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# AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW

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DAVID S. GARLAND AND LUCIUS P. MCGEHEE  
UNDER THE SUPERVISION OF  
JAMES COCKCROFT

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**STRAY.** (See also the titles **ANIMALS**, vol. 2, p. 378; **FENCES**, vol. 12, p. 1035; **IMPOUNDING**, vol. 16, p. 4.)—"Stray," in its common-law sense, denotes a wandering beast whose owner is unknown.<sup>1</sup>

**STREAM.** (See also the titles **RIPARIAN RIGHTS**, vol. 24, p. 978; **WATERS AND WATERCOURSES**.)—A stream is, first, "a course of running water, a river, rivulet, or brook; second, a steady current in a river or in the sea, especially the middle or most rapid part of a current or tide, as the Gulf Stream; third, a flow, a flowing, that which flows; fourth, anything issuing from a source, and moving or flowing continuously; fifth, a continued course or current."<sup>2</sup>

1. **Stray.**—*Roberts v. Barne*, 27 Wis. 425. See also *Walters v. Glats*, 29 Iowa 437.

A **stray** beast is one that has left an inclosure and wanders at large without its owner and beyond his control. *Sturges v. Raymond*, 27 Conn. 474.

**Stray and Estray.**—In *Woods v. Davis*, 12 Kan. 577, in construing a statute providing for the taking up of **strays**, the court said: "He insists that only cattle whose owner is unknown can be taken up under the **stray** law. We are inclined to doubt this construction, and to think that the word **stray** is used in the statute in the sense of wandering—roving—as defined by Webster, and as ordinarily understood, and not in the sense of the old common-law term 'estrays.'"

**Hogs Left in a Stockyard** by some person unknown are not **strays**. *Millcreek Tp. v. Brighton Stock Yard Co.*, 27 Ohio St. 435.

2. **Stream.**—*Illinois Cent. R. Co. v. Chicago*, 173 Ill. 484, *quoting* Cent. Dict.

"A **stream** means a river, brook, or rivulet, anything in fact that is liquid and flows in a line or course." *French v. Carhart*, 1 N. Y. 107.

A watercourse is a **stream** of water usually flowing in a particular direction with well-defined channels and banks, although the channel may sometimes be dry. *Simmons v. Winters*, 21 Oregon 41.

**Continuous Current.**—**Stream** implies a continuous current in one direction. *Murdock v. Stickney*, 8 Cush. (Mass.) 117.

In *M'Nab v. Robertson*, (1897) A. C. 134, Lord Watson said: "The word **stream**, in its primary and natural sense, denotes a body of water, having, as such body, a continuous flow in one direction. \* \* \* I see no reason to doubt that a subterraneous flow of water may in some circumstances possess the

very same characteristics as a body of water running on the surface; but in my opinion water, whether falling from the sky or escaping from a spring, which does not flow onward with any continuity of parts, but becomes dissipated in the earth's strata and simply percolates through or along those strata until it issues from them at a lower level, through dislocation of the strata or otherwise, cannot with any propriety be described as a **stream**."

In *Schlichter v. Phillipy*, 67 Ind. 201, the trial court instructed the jury that "to establish the existence of a **stream** of water, it is not necessary to prove that it flowed continuously, \* \* \* but it must have a substantial existence." The defendant asked an additional instruction, in substance that the **stream** must be well defined, flowing in a certain direction, and by a regular channel, and not the mere outburst of a freshet, flowing in no particular direction. It was held that the instruction asked should have been given.

**Percolations.**—Water percolating through the ground in no defined or visible channel is not a **stream**. *Taylor v. St. Helens*, 6 Ch. D. 273; *M'Nab v. Robertson*, (1897) A. C. 134; *Miller v. Black Rock Springs Imp. Co.*, 99 Va. 747.

**Surface Water.**—"For the use of **stream** in the sense of a general flow of surface water on a gradual slope of land, see *Crewson v. Grand Trunk R. Co.*, 27 U. C. Q. B. 68.

**Stream and Pond or Lake Distinguished.**—See the title **LAKES AND PONDS**, vol. 18, p. 130, and see *Gouverneur v. National Ice Co.*, 57 Hun (N. Y.) 475.

**For Streams as Boundaries**, see the title **BOUNDARIES**, vol. 4, p. 818 *et seq.*

**Natural Stream.**—See **NATURE—NATURAL**, vol. 21, p. 422.

**Stream and Ravine.**—See **RAVINE**, vol. 23, p. 890,

**STREET CAR.** — See CAR, vol. 5, p. 145; OMNIBUS, vol. 21, p. 916; and the title STREET RAILWAYS, *post*.

**STREET IMPROVEMENT.** (See also IMPROVE — IMPROVEMENT, vol. 16, p. 57, and the title SPECIAL OR LOCAL ASSESSMENTS, vol. 25, p. 1166.) — See note 1.

**STREET LAMP.** — See LAMP, vol. 18, p. 140.

**STREET PURPOSES.** — See note 2.

**Public Highway.** — “A *stream* is a public highway wherever it is suitable in its natural condition for general use in travel or in the transportation of property.” Griffith *v.* Holman, 23 Wash. 351, quoting Gould on Waters, § 107. See also the titles HIGHWAYS, vol. 15, p. 350; NAVIGABLE WATERS, vol. 21, p. 439 *et seq.*

**Navigable Stream.** — See the title NAVIGABLE WATERS, vol. 21, p. 424.

**“Stream” and “River” Synonymous.** — See RIVER, vol. 24, p. 985, note.

**Spring Distinguished from Stream.** — See M’Nab *v.* Robertson, (1897) A. C. 141, and see STRING, vol. 26, p. 152.

**Water.** — A statute provided that a county judge might cause the erection of a bridge over any *stream* in the county. It was held that under this statute a bridge might be constructed over a ravine on a public road though no *stream* of water passed through it. The court said: “A construction should not be placed upon this statute which would deprive a county of the power of bridging such ‘sloughs’ if it is reasonably susceptible of a different construction. One of the definitions of a *stream* is simply ‘water.’ See Webster’s Dictionary, *verbum stream*. Taken in this acceptance the statute authorizes the county judge to build a bridge over ‘water’ in his county. This we believe to be its reasonable

and proper construction.” Long *v.* Boone County, 36 Iowa 64.

In Stein *v.* Burden, 29 Ala. 133, it was said: “Every owner has a property in the *stream* that flows through his land, while he has no property in the water of which it is composed, save for the gratification of his natural or ordinary wants.”

**1. Street Improvements.** — In Leuly *v.* West Hoboken, 54 N. J. L. 508, it was said: “The phrase ‘*street*, sewer, and drainage *improvements*,’ as used in the act approved March 23, 1883 (Rev. Sup., p. 548, pl. 263), has been construed not to include the laying out and opening of streets, but only work upon streets.”

*Street improvements* have been held not to include sewers. See Hoboken *v.* Harrison, 30 N. J. L. 74. See also Clay *v.* Grand Rapids, 60 Mich. 456.

**Bridge.** — A bridge erected on one of the streets of a city across a river has been held to be a *street improvement*. Berlin Iron-Bridge Co. *v.* San Antonio, (Tex. Civ. App. 1899) 50 S. W. Rep. 408.

**2. Street Purposes.** — Where land is granted for “*street purposes* only,” it cannot be appropriated for the purpose of maintaining waterworks. See O’Neal *v.* Sherman, 77 Tex. 182, (Tex. Civ. App. 1894) 25 S. W. Rep. 57. See also Lyon *v.* McDonald, 78 Tex. 77; Dubuque *v.* Benson, 23 Iowa 250.

# STREET RAILWAYS.

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## CROSS-REFERENCES.

For matters of PLEADING AND PRACTICE, see the title STREET RAILWAYS, in the *ENCYCLOPEDIA OF PLEADING AND PRACTICE*, vol. 20, p. 830.

For other matters of SUBSTANTIVE LAW and EVIDENCE, see in this work the following titles: *ABUTTING OWNERS*, vol. 1, p. 224; *CONTRIBUTORY NEGLIGENCE*, vol. 7, p. 386; *CORPORATIONS (PRIVATE)*, vol. 7, p. 620, and references there given; *MUNICIPAL CORPORATIONS*, vol. 20, p. 1123; *NEGLIGENCE*, vol. 21, p. 455; *ORDINANCES*, vol. 21, p. 943; *RAILROADS*, vol. 23, p. 667, and references given; *STREETS AND SIDEWALKS*, *post*; *TAXATION*, *post*.

**I. DEFINITION.** — The term "street railway" is applied to a railway laid upon the surface of the streets of cities or villages, or other highways, and used primarily for the transportation of passengers, the elevation of the track conforming to the grade of the street or highway.<sup>1</sup> The distinctive and essential features of a street railway as distinguished from other railroads are the location of the road upon the surface of streets and highways, its mode of operation, and its use for the carriage of passengers.<sup>2</sup> The motive power by which the

1. *Definition.* — South, etc., *Alabama R. Co. v. Highland Ave., etc., R. Co.*, 119 Ala. 105; *Montgomery v. Santa Ana Westminster R. Co.*, 104 Cal. 186, 43 Am. St. Rep. 89; *Louisville, etc., R. Co. v. Louisville City R. Co.*, 2 Duv. (Ky.) 175; *Hannah v. Metropolitan St. R. Co.*, 81 Mo. App. 78; *State v. Dayton Traction Co.*, 10 Ohio Cir. Dec. 212; *Philadelphia v. McManes*, 175 Pa. St. 28.

If the top of the rails generally conforms to the surface of the highway, the fact that in some few places there are cuts and fills does

not prevent the road from being a street railway. *Dietz v. Cincinnati, etc., Traction Co.*, 6 Ohio Dec. 513.

The fact that some freight and express matter is carried on an extension between two neighboring towns does not take a road out of the class of street railways. *Cedar Rapids, etc., R. Co. v. Cedar Rapids*, 106 Iowa 476.

2. *Williams v. City Electric St. R. Co.*, 41 Fed. Rep. 556.

"The track of the steam road in a street is generally so laid as to exclude vehicles from

cars are operated is immaterial as affecting its character as a street railway.<sup>1</sup> Thus, the power may be either animal or mechanical, such as electricity,<sup>2</sup> cable,<sup>3</sup> or even steam.<sup>4</sup> So the character of the road as a street railway is not affected by the character of the rails used for the tracks<sup>5</sup> or by the fact that it is operated from a point within the limits of a city to points without the limits,<sup>6</sup> even, it has been held, though the road is not throughout its whole route confined to streets and highways.<sup>7</sup> Still, a railroad operated through rural country without confining its location to highways, and discharging passengers at regular stations, may not be a street railway though its motive power is electricity and only passengers are carried.<sup>8</sup> In *New York* it has been held that a railway for passengers built exclusively underneath the surface of streets would still be a street railway,<sup>9</sup> and in *Pennsylvania* one constructed overhead has been held to be a street railway.<sup>10</sup>

**Whether Included in Term "Railroad" or "Railway."** — Statutes have frequently been enacted regulating "railroads" or "railways," and the question has arisen whether such statutes apply to street railways. These terms may be used in their broad sense so as to include street railways or in their technical or popular sense so as to exclude street railways,<sup>11</sup> the sense in which the particular term is used depending on the intention of the legislature in the enactment of the statute.<sup>12</sup> Thus, it has been held, in view of the legislative intent, that street railways were included within the general terms "railroads" or "railways" as used in particular enactments,<sup>13</sup> such as statutes prohibiting "railroad" corporations from issuing for less than par stock which shall be paid for in cash,<sup>14</sup> or authorizing the consolidation of "railroad companies,"<sup>15</sup> or prohibiting the obstruction of "railroad" tracks,<sup>16</sup> or subjecting to taxation the real estate of "any railroad company,"<sup>17</sup> or excepting "railroad corpora-

passing along it and from crossing except at places specially provided, and in its operation the running of the trains drives traffic from the streets and tends to destroy the use for which the street was acquired, while a street railway is so constructed and operated as not to destroy, but to facilitate, the use of the street." *State v. Dayton Traction Co.*, 10 Ohio Cir. Dec. 212.

1. **Motive Power.** — *Williams v. City Electric St. R. Co.*, 41 Fed. Rep. 556; *Massachusetts L. & T. Co. v. Hamilton*, (C. C. A.) 88 Fed. Rep. 588; *Lamb v. St. Louis Cable, etc., R. Co.*, 33 Mo. App. 489; *Halsey v. Rapid Transit St. R. Co.*, 47 N. J. Eq. 380; *Potts v. Quaker City El. R. Co.*, 12 Pa. Co. Ct. 593.

2. *Hill v. Rome St. R. Co.*, 101 Ga. 66; *Nieman v. Detroit Suburban St. R. Co.*, 103 Mich. 256.

3. *Funk v. St. Paul City R. Co.*, 61 Minn. 435, 52 Am. St. Rep. 608; *Front St. Cable R. Co. v. Johnson*, 2 Wash. 112.

4. *Williams v. City Electric St. R. Co.*, 41 Fed. Rep. 556; *Nichols v. Ann Arbor, etc., St. R. Co.*, 87 Mich. 361; *Newell v. Minneapolis, etc., R. Co.*, 35 Minn. 112, 59 Am. Rep. 303. See also *Briggs v. Lewiston, etc., Horse R. Co.*, 79 Me. 363, 1 Am. St. Rep. 316. Compare *Stanley v. Davenport*, 54 Iowa 463, 37 Am. Rep. 216; *East End St. R. Co. v. Doyle*, 88 Tenn. 747, 17 Am. St. Rep. 933.

5. **Rails.** — *Nieman v. Detroit Suburban St. R. Co.*, 103 Mich. 256 (use of T rail).

6. *Newell v. Minneapolis, etc., R. Co.*, 35 Minn. 112, 59 Am. Rep. 303.

7. *Cincinnati, etc., Electric St. R. Co. v. Cincinnati, etc., R. Co.*, 12 Ohio Cir. Dec. 113.

8. *Hannah v. Metropolitan St. R. Co.*, 81 Mo. App. 78 (railway fence law).

**Railway in Public Park Not Street Railway.** — *Philadelphia v. McManes*, 175 Pa. St. 28. This case is stated more fully under PARKS AND PUBLIC SQUARES, vol. 21, p. 1073.

9. *Matter of New York Dist. R. Co.*, 107 N. Y. 42 (constitutional provision requiring consent of abutting owners to construction of street railway).

10. *Com. v. Northeastern El. R. Co.*, 3 Pa. Dist. 104; *Potts v. Quaker City El. R. Co.*, 12 Pa. Co. Ct. 593. See also *Doane v. Lake St. El. R. Co.*, 165 Ill. 510, 56 Am. St. Rep. 265; *Bond v. Pennsylvania Co.*, 171 Ill. 508. And see generally the title ELEVATED RAILROADS, vol. 10, p. 896.

11. *Massachusetts L. & T. Co. v. Hamilton*, (C. C. A.) 88 Fed. Rep. 588.

12. *Massachusetts L. & T. Co. v. Hamilton*, (C. C. A.) 88 Fed. Rep. 588; *Fidelity L. & T. Co. v. Douglas*, 104 Iowa 532.

13. *Birmingham Mineral R. Co. v. Jacobs*, 92 Ala. 200; *Chicago v. Evans*, 24 Ill. 52; *Clinton v. Clinton, etc., Horse R. Co.*, 37 Iowa 61; *Lax v. Forty-second St., etc., Ferry R. Co.*, 46 N. Y. Super. Ct. 448; *Katzenberger v. Lawo*, 90 Tenn. 235, 25 Am. St. Rep. 681.

14. *Cheetham v. McCormick*, 178 Pa. St. 186.

15. *Matter of Washington St., etc., R. Co.*, 52 Hun (N. Y.) 311, affirmed 115 N. Y. 442; *Hestonville, etc., Pass. R. Co. v. Philadelphia*, 89 Pa. St. 210.

16. *Compare Gyger v. Philadelphia*, 136 Pa. St. 96.

17. *Price v. State R. Co. v. Pittsburgh*, 104 Pa. St. 522. See also *Knopf v. Lake St. El. R. Co.*, Volume XXVII.

tions" from the right to institute proceedings in insolvency.<sup>1</sup> On the other hand, the courts have refused to construe such terms as including street railways in statutes making particular judgments against "any railway corporation" superior liens to prior mortgages,<sup>2</sup> giving an exclusive franchise to operate a "railroad" between certain points,<sup>3</sup> authorizing the condemnation of land for a right of way,<sup>4</sup> giving a lien on a "railroad" to laborers and materialmen,<sup>5</sup> imposing a penalty for the exaction of excessive fares by "railroad" companies,<sup>6</sup> making "railroad" corporations liable for injuries to employees caused by the negligence of co-employees,<sup>7</sup> or liable for injuries to passengers,<sup>8</sup> or limiting the time for actions against railroad corporations.<sup>9</sup>

**II. LEGAL STATUS AND NATURE.**— Since a street railway, like an ordinary commercial railroad, is of a *quasi*-public nature,<sup>10</sup> the right of eminent domain may be exercised when necessary to secure for it a right of way,<sup>11</sup> though the exercise of such power is seldom necessary, as street railways are almost exclusively constructed over streets and highways; and, of course, to authorize a street-railway company to institute condemnation proceedings, the power must have been conferred by the legislature.<sup>12</sup> Similarly, street-railway companies owe a duty to the public to continue the operation of established street railways, and this duty may be compelled by mandamus;<sup>13</sup> and contracts limiting their power to perform their duties to the public have been held to be invalid as against public policy.<sup>14</sup> Street railways are regarded as common carriers of passengers,<sup>15</sup> but they are not carriers of goods except under special circumstances.<sup>16</sup> The construction and operation of street railways have been considered to be works of "internal improvement" within the meaning of a

197 Ill. 212. Compare Cedar Rapids, etc., R. Co. v. Cedar Rapids, 106 Iowa 476; State v. Duluth Gas, etc., Co., 76 Minn. 96.

1. Central Nat. Bank v. Worcester Horse R. Co., 13 Allen (Mass.) 105.

2. Massachusetts L. & T. Co. v. Hamilton, (C. C. A.) 88 Fed. Rep. 588; Fidelity L. & T. Co. v. Douglas, 104 Iowa 532.

3. Louisville, etc., R. Co. v. Louisville City R. Co., 2 Duv. (Ky.) 175.

4. Thomson-Houston Electric Co. v. Simon, 20 Oregon 60, 23 Am. St. Rep. 86. See also Murray Hill Land Co. v. Milwaukee Light, etc., Co., 110 Wis. 555.

5. Massillon Bridge Co. v. Cambria Iron Co., 59 Ohio St. 179. And see the title MECHANICS' LIENS, vol. 20, p. 290. See also Christ v. Schuylkill Electric R. Co., 9 Pa. Dist. 268. Compare New England Engineering Co. v. Oakwood St. R. Co., 75 Fed. Rep. 162 (construing the Ohio statute); Montgomery v. Allen, 107 Ky. 298; Koken Iron Works v. Robertson Ave. R. Co., 141 Mo. 228; St. Louis Bolt, etc., Co. v. Donahoe, 3 Mo. App. 559.

As to Liens on Street Railways Generally, see Frick Co. v. Norfolk, etc., R. Co., (C. C. A.) 86 Fed. Rep. 725; Cambria Iron Co. v. Union Trust Co., 154 Ind. 291; Oberholtzer v. Norristown Pass. R. Co., 16 Pa. Co. Ct. 13. And see the title MECHANICS' LIENS, vol. 20, p. 255.

6. Moneypenny v. Sixth Ave. R. Co., (N. Y. Super. Ct. Spec. T.) 4 Abb. Pr. N. S. (N. Y.) 357.

7. Funk v. St. Paul City R. Co., 61 Minn. 435, 52 Am. St. Rep. 608. Compare Johnson v. Louisville City R. Co., 10 Bush (Ky.) 231.

8. Lincoln St. R. Co. v. McClellan, 54 Neb. 672.

9. North Hudson County R. Co. v. Flanagan, 57 N. J. L. 696, 236.

10. Chicago Gen. R. Co. v. Chicago City R. Co., 62 Ill. App. 502.

11. See the title EMINENT DOMAIN, vol. 10, p. 1079.

12. Thomson-Houston Electric Co. v. Simon, 20 Oregon 60, 23 Am. St. Rep. 86.

13. Mandamus.—Potwin Place v. Topeka R. Co., 51 Kan. 609, 37 Am. St. Rep. 312; Bridgeton v. Bridgeton, etc., Traction Co., 62 N. J. L. 592; Loader v. Brooklyn Heights R. Co., (Supm. Ct. Spec. T.) 14 Misc. (N. Y.) 208; Martin v. Second etc., St. Pass. R. Co., 3 Phila. (Pa.) 316, 15 Leg. Int. (Pa.) 405; State v. Spokane St. R. Co., 19 Wash. 518, 67 Am. St. Rep. 739. And see generally the title MANDAMUS, vol. 19, p. 872 et seq. Compare State v. Helena Power, etc., Co., 22 Mont. 391. See, however, State v. San Antonio St. R. Co., 10 Tex. Civ. App. 12; San Antonio St. R. Co. v. State, 90 Tex. 520, 59 Am. St. Rep. 834.

Where a street-car company, because of its inability to get employees to accept its terms, has stopped part of its cars, to the detriment of the public, mandamus lies to compel it to resume full operation of its lines. Loader v. Brooklyn Heights R. Co., (Supm. Ct. Spec. T.) 14 Misc. (N. Y.) 208.

14. Wilmington City R. Co. v. Wilmington, etc., R. Co., (Del. Ch. 1900) 46 Atl. Rep. 12; Doane v. Chicago City R. Co., 51 Ill. App. 353, affirmed 160 Ill. 22; South Chicago City R. Co. v. Calumet Electric St. R. Co., 171 Ill. 391, affirming 70 Ill. App. 254.

15. State v. Spokane St. R. Co., 19 Wash. 518, 67 Am. St. Rep. 739. And see the title CARRIERS OF PASSENGERS, vol. 5, p. 481.

16. Thomson-Houston Electric Co. v. Simon, 20 Oregon 60, 23 Am. St. Rep. 86, 47 Am. & Eng. R. Cas. 51. And see the title COMMON CARRIERS, vol. 6, p. 256.

constitutional provision prohibiting the state from being interested in any work of internal improvement.<sup>1</sup>

### III. ACQUISITION OF FRANCHISE — 1. Necessity for Legislative Authorization.

— The right to construct and operate a street railway over streets and other highways belongs to that class of rights known as franchises,<sup>2</sup> and in the *United States* requires authorization from the legislature, directly or indirectly.<sup>3</sup> The unauthorized construction and operation of a street railway, like other obstructions of streets and highways,<sup>4</sup> constitute a nuisance, which may be prevented by injunction at the suit of the public.<sup>5</sup> So quo warranto may be instituted to prevent the further usurpation of the franchise,<sup>6</sup> and it seems that the nuisance may be summarily abated by the public authorities.<sup>7</sup> Where a street railway is constructed without authority, the public authorities may maintain a suit to recover for the damages to the street or highway.<sup>8</sup> A private individual cannot, it seems, as a general rule, question the right to operate a street railway over streets,<sup>9</sup> though an abutting owner or other person who suffers special injury by the unauthorized operation of such a railway may

1. Atty.-Gen. v. Pingree, 120 Mich. 550.

2. State v. East Fifth St. R. Co., 140 Mo. 539, 62 Am. St. Rep. 742; People v. O'Brien, 111 N. Y. 1, 7 Am. St. Rep. 684. See also FRANCHISES, vol. 14, p. 9, note.

3. Connecticut. — Stamford Horse R. Co., 56 Conn. 381, 36 Am. & Eng. R. Cas. 140.

Illinois. — Metropolitan City R. Co. v. Chicago, 96 Ill. 620.

Indiana. — Eichels v. Evansville St. R. Co., 78 Ind. 261, 41 Am. Rep. 561.

New York. — Hilton v. Thirty-fourth St. R. Co., (Supm. Ct.) 1 How. Pr. N. S. (N. Y.) 453; Fanning v. Osborne, 102 N. Y. 441.

Ohio. — Citizens' Electric R. Co. v. County Com'rs, 56 Ohio St. 1.

Pennsylvania. — Atty.-Gen. v. Lombard, etc., St. Pass. R. Co., 10 Phila. (Pa.) 352, 32 Leg. Int. (Pa.) 238; Com. v. Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471; Potts v. Quaker City El. R. Co., 161 Pa. St. 396.

Texas. — Ft. Worth St. R. Co. v. Rosedale St. R. Co., 68 Tex. 169.

Virginia. — Norfolk R., etc., Co. v. Consolidated Turnpike Co., 100 Va. 243.

Street Railway on Turnpike. — Matter of Rochester Electric R. Co., 57 Hun (N. Y.) 56.

4. See the titles HIGHWAYS, vol. 15, p. 491 et seq.; STREETS AND SIDEWALKS.

5. Injunction Against Unauthorized Street Railway. — United States. — Detroit v. Detroit City R. Co., 56 Fed. Rep. 867.

Connecticut. — Stamford v. Stamford Horse R. Co., 56 Conn. 381.

Illinois. — Hunt v. Chicago Horse, etc., R. Co., 121 Ill. 638; Metropolitan City R. Co. v. Chicago, 96 Ill. 620.

Missouri. — Springfield v. Robberson Ave. R. Co., 69 Mo. App. 514.

New Jersey. — Grey v. New York, etc., Traction Co., 56 N. J. Eq. 463.

New York. — Eastchester v. New York, etc., Traction Co., (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 571.

Pennsylvania. — Atty.-Gen. v. Lombard, etc., St. Pass. R. Co., 10 Phila. (Pa.) 352, 32 Leg. Int. (Pa.) 238.

The fact that an indictment will lie for the unlawful obstruction of the street does not show the existence of such an adequate remedy.

law as to require the denial of an injunction. Grey v. New York, etc., Traction Co., 56 N. J. Eq. 463.

Similarly, the fact that the municipality may forcibly abate the nuisance does not require the denial of the injunction. Stamford v. Stamford Horse R. Co., 56 Conn. 381.

Borough. — In Stamford v. Stamford Horse R. Co., 56 Conn. 381, 36 Am. & Eng. R. Cas. 140, it was held that where it was the duty of a borough to keep its streets in proper repair, and it was liable for failing to do so, the borough was the proper party to apply for an injunction to restrain the laying of tracks on streets not authorized.

City May Maintain Suit for Injunction. — Metropolitan City R. Co. v. Chicago, 96 Ill. 620, 2 Am. & Eng. R. Cas. 291.

The Attorney-General has the right to file an information in chancery to enjoin a horse and dummy railroad company from constructing and using a track in and along a public street of a city, where it has not legally obtained permission so to do. Hunt v. Chicago Horse, etc., R. Co., 121 Ill. 638, affirming 20 Ill. App. 282.

6. Quo Warranto. — Lehigh Coal, etc., Co. v. Inter-County St. R. Co., 15 Pa. Co. Ct. 293. See also State v. Pittsburgh, etc., R. Co., 53 Ohio St. 189. And for fuller collection of cases (some of which are contra) see the title Quo Warranto, vol. 23, p. 643.

7. Summary Abatement. — Stamford v. Stamford Horse R. Co., 56 Conn. 381; Spokane St. R. Co. v. Spokane Falls, 6 Wash. 521. Compare Cleveland City R. Co. v. Cleveland, 6 Ohio Dec. 33; Mill Creek Valley St. R. Co. v. Carthage, 9 Ohio Cir. Dec. 833, 18 Ohio Cir. Ct. 216. See generally the title ABATEMENT OF NUISANCES, vol. 1, p. 87 et seq.

8. Citizens' Electric R. Co. v. County Com'rs, 56 Ohio St. 1.

9. Individual May Not Question Rightfulness of Street Railroad. — Alabama. — Birmingham Traction Co. v. Southern Bell Telephone, etc., Co., 119 Ala. 144.

California. — Market St. R. Co. v. Central R. Co., 51 Cal. 583.

Illinois. — Doane v. Lake St. El. R. Co., 165 Ill. 510, 56 Am. St. Rep. 265.

New York. — Davis v. New York, 14 N. Y. 186; Brooklyn City, etc., R.

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maintain a suit for an injunction,<sup>1</sup> and it has been held that one street-railway company having a franchise to construct a street railway over certain streets may, in the construction of its road, remove other tracks upon the street laid without authority.<sup>2</sup>

**2. Power of Government to Grant** — *a.* IN GENERAL. — The dominant control of highways and streets is vested in the legislature, which may, in the absence of constitutional restrictions, grant franchises to operate street railways,<sup>3</sup> even without the consent of the municipalities over whose streets the railways are to be constructed<sup>4</sup> or without the consent of the abutting owners.<sup>5</sup> While the taking of private property for the use of a street

*Co. v. Coney Island, etc., R. Co.*, 35 Barb. (N. Y.) 364; *New York Cable R. Co. v. Forty-second St., etc., R. Co.*, 13 Daly (N. Y.) 118.

*Ohio*. — *Simmons v. Toledo*, 3 Ohio Cir. Dec. 64, 5 Ohio Cir. Ct. 124; *Sommers v. Cincinnati*, 6 Ohio Dec. (Reprint) 887, 8 Am. L. Rec. 612; *Harrison v. Mt. Auburn Cable R. Co.*, 9 Ohio Dec. (Reprint) 805, 17 Cinc. L. Bul. 265.

*Pennsylvania*. — *Larimer, etc., St. R. Co. v. Larimer St. R. Co.*, 137 Pa. St. 533; *Coatesville, etc., St. R. Co. v. Uwchlan St. R. Co.*, 18 Pa. Super. Ct. 521; *Lehigh Coal, etc., Co. v. Inter-County St. R. Co.*, 15 Pa. Co. Ct. 295. See also *Junction Pass. R. Co. v. Williamsport Pass. R. Co.*, 154 Pa. St. 116.

**Right of Rival Company.** — One street-car company cannot enjoin another company from running cars on the same street on the ground that the defendant company has no franchise or license, as that is a matter that can be raised only on behalf of the public. *Market St. R. Co. v. Central R. Co.*, 51 Cal. 583. See also *New England R. Co. v. Central R., etc., Co.*, 69 Conn. 47; *Central Crosstown R. Co. v. Metropolitan St. R. Co.*, 16 N. Y. App. Div. 229; *Larimer, etc., St. R. Co. v. Larimer St. R. Co.*, 137 Pa. St. 533; *Tamaqua, etc., St. R. Co. v. Inter-County St. R. Co.*, 167 Pa. St. 91. Compare *Germantown Pass. R. Co. v. Citizens Pass. R. Co.*, 151 Pa. St. 138.

1. See *infra*, this title, *Abutting Owners — Right to Prevent Unauthorized Construction or Operation*.

2. *Omnibus R. Co. v. Baldwin*, 57 Cal. 160, 1 Am. & Eng. R. Cas. 316.

3. **Control of Streets** — *United States*. — *People's Pass. R. Co. v. Memphis City R. Co.*, 10 Wall. (U. S.) 38.

*Florida*. — *State v. Jacksonville St. R. Co.*, 29 Fla. 590, 50 Am. & Eng. R. Cas. 179.

*Georgia*. — *Savannah, etc., R. Co. v. Savannah*, 45 Ga. 602, 3 Am. R. Rep. 36; *Floyd County v. Rome St. R. Co.*, 77 Ga. 614; *Dieter v. Estill*, 95 Ga. 370.

*Illinois*. — *Chicago v. Illinois Steel Co.*, 66 Ill. App. 561.

*Indiana*. — *Eichels v. Evansville St. R. Co.*, 78 Ind. 261, 41 Am. Rep. 561.

*Iowa*. — *Chicago, etc., R. Co. v. Newton*, 36 Iowa 299.

*Kansas*. — *Atchison St. R. Co. v. Missouri Pac. R. Co.*, 31 Kan. 660.

*Louisiana*. — *Hill v. Chicago, etc., R. Co.*, 38 La. Ann. 599. See also *Hepting v. New Orleans Pac. R. Co.*, 36 La. Ann. 898.

*Maryland*. — *Hiss v. Baltimore, etc., Pass. R. Co.*, 52 Md. 242, 36 Am. Rep. 371.

*New Jersey*. — *Jersey City v. Jersey City, etc., R. Co.*, 20 N. J. Eq. 360; *Paterson, etc.,*

*Horse R. Co. v. Paterson*, 24 N. J. Eq. 158; *State v. Hoboken*, 35 N. J. L. 208; *Domestic Tel., etc., Co. v. Newark*, 49 N. J. L. 344.

*New York*. — *People v. Kerr*, 27 N. Y. 188; *Adamson v. Nassau Electric R. Co.*, 89 Hun (N. Y.) 261; *People v. O'Brien*, 111 N. Y. 1; *Brooklyn City, etc., R. Co. v. Coney Island, etc., R. Co.*, 35 Barb. (N. Y.) 364; *Potter v. Collis*, 19 N. Y. App. Div. 392.

*Ohio*. — *Dietz v. Cincinnati, etc., Traction Co.*, 6 Ohio Dec. 513, 4 Ohio N. P. 399.

*Pennsylvania*. — *Harrisburg v. Harrisburg Pass. R. Co.*, 1 Pearson (Pa.) 298; *Conshohocken R. Co. v. Pennsylvania R. Co.*, 15 Pa. Co. Ct. 445; *Philadelphia v. Empire Pass. R. Co.*, 3 Brews. (Pa.) 547; *City v. Empire Pass. R. Co.*, 7 Phila. (Pa.) 321; *Com. v. Erie, etc., R. Co.*, 27 Pa. St. 339, 67 Am. Dec. 471.

*Wisconsin*. — *State v. Hilbert*, 72 Wis. 184, 36 Am. & Eng. R. Cas. 118.

4. *Florida*. — *State v. Jacksonville St. R. Co.*, 29 Fla. 590.

*Georgia*. — *Savannah, etc., R. Co. v. Savannah*, 45 Ga. 602; *Floyd County v. Rome St. R. Co.*, 77 Ga. 614.

*Illinois*. — *Chicago v. Illinois Steel Co.*, 66 Ill. App. 561.

*Iowa*. — *Chicago, etc., R. Co. v. Newton*, 36 Iowa 299.

*New Hampshire*. — *Boston, etc., R. Co. v. Portsmouth*, 71 N. H. 21.

*New Jersey*. — *Jersey City v. Jersey City, etc., R. Co.*, 20 N. J. Eq. 360; *Paterson, etc., Horse R. Co. v. Paterson*, 24 N. J. Eq. 158.

*New York*. — *Brooklyn City, etc., R. Co. v. Coney Island, etc., R. Co.*, 35 Barb. (N. Y.) 364; *People v. Kerr*, 27 N. Y. 188; *New York, etc., R. Co. v. Forty-second St., etc., R. Co.*, 50 Barb. (N. Y.) 309.

*Pennsylvania*. — *Harrisburg City Pass. R. Co. v. Harrisburg*, 149 Pa. St. 465.

*Wisconsin*. — *Milwaukee v. Milwaukee, etc., R. Co.*, 7 Wis. 85.

5. *Florida*. — *State v. Jacksonville St. R. Co.*, 29 Fla. 590.

*Illinois*. — *Wiggins Ferry Co. v. East St. Louis Union R. Co.*, 107 Ill. 450.

*Maryland*. — *Hodges v. Baltimore Union Pass. R. Co.*, 58 Md. 603.

*New Jersey*. — *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75, 86 Am. Dec. 252; *Paterson, etc., Horse R. Co. v. Paterson*, 24 N. J. Eq. 158.

*New York*. — *Brooklyn City, etc., R. Co. v. Coney Island, etc., R. Co.*, 35 Barb. (N. Y.) 364.

*Ohio*. — *State v. Bell*, 34 Ohio St. 194.

See also *infra*, this title, *Abutting Owners*.

In *Smith v. East End St. R. Co.*, 87 Tenn.

railway is a taking for a public use and may be authorized under the power of eminent domain,<sup>1</sup> the right to take it can, of course, be acquired only by voluntary grant from the owner or by condemnation proceedings.<sup>2</sup> Thus the legislature cannot authorize the construction of street railways over the roads of turnpike or plank-road companies without the consent of such companies or the condemnation of the necessary right of way under the power of eminent domain.<sup>3</sup> It has been held, however, that the use of a tollbridge as part of a public highway in the operation of a street railway was reasonable and consistent with the purpose for which the bridge was erected; that such use could be authorized by the legislature, and that it did not constitute a taking of private property in the exercise of the power of eminent domain.<sup>4</sup> Still, a bridge company is entitled to tolls from a street-car company that runs its cars across the bridge.<sup>5</sup> The franchise to use a street for street-railway purposes is, like other property, subject to condemnation for public use, and the legislature may therefore authorize one company to use the tracks of another company, on making compensation therefor, whenever in its judgment the public good so requires.<sup>6</sup> The legislative grant of street franchises may be made, in the absence of constitutional restriction, by special acts.<sup>7</sup> A grant of authority to maintain a street railway upon the public streets may be conferred by the legislature in direct words or by necessary implication,<sup>8</sup> but if the grant rests upon implication it must flow necessarily out of the law from which it is derived.<sup>9</sup> The grant of a street-railway franchise is not void for indefiniteness because it fails to designate the number of tracks to be laid or their exact location upon the street.<sup>10</sup> It has been held that when parks, squares, or grounds are dedicated to the public for purposes of beauty, adornment, health, or recreation, neither the legislature nor the municipality can authorize their occupation by street railways;<sup>11</sup> but it seems to be otherwise when the property is vested in the municipality without restrictions as to its use.<sup>12</sup>

*b. CONSTITUTIONAL RESTRICTIONS — (1) In General.* — In many jurisdictions constitutional provisions restrict the power of the legislature to grant franchises for street railways;<sup>13</sup> but a constitutional provision restricting the

626, 38 Am. & Eng. R. Cas. 470, the charter of the street-railway company provided that no street should be occupied until the consent of the city expressed by ordinance should be obtained; and there was a statutory provision (M. & V. Code Tenn., § 1925, Annot. Code 1896, § 2399) that the powers granted were "in no manner to interfere with the rights of private citizens or private property." It was held that this did not require the consent of owners of abutting property; that the section construed was merely a saving of all rights of action for any unlawful use or obstruction of the public highways, or other wrongs or abuses.

1. See the title *EMINENT DOMAIN*, vol. 10, p. 1079; and see *Suburban R. Co. v. Metropolitan West Side El. R. Co.*, 193 Ill. 217; *Adee v. Nassau Electric R. Co.*, 72 N. Y. App. Div. 404.

2. *Harvey v. Aurora, etc.*, R. Co., 186 Ill. 283.

3. *Detroit, etc., Plank Road Co. v. Detroit Suburban R. Co.*, 103 Mich. 585.

4. *Pittsburg, etc., Pass. R. Co. v. Point Bridge Co.*, 165 Pa. St. 37. Compare *Pennsylvania Canal Co. v. Lewisburg, etc., R. Co.*, 10 Pa. Super. Ct. 413.

**Right to Exclude Street Railway from Bridge Lost by Long Acquiescence in Such Use.** — *Covington, etc., Bridge Co. v. South Covington, etc., St. R. Co.*, 93 Ky. 136, 50 Am. & Eng. R. Cas. 395.

5. *Monongahela Bridge Co. v. Pittsburgh, etc., R. Co.*, 114 Pa. St. 478.

**Toll for Use of Tollbridge.** — Two cents per passenger has been held not to be an unreasonable toll. *Covington, etc., Bridge Co. v. South Covington, etc., St. R. Co.*, 93 Ky. 136, 50 Am. & Eng. R. Cas. 395.

A law fixing the rate of tolls over a bridge "for every carriage, wagon, buggy, or other wheeled vehicle of whatever description" has been held not to include street cars. *Monongahela Bridge Co. v. Pittsburgh, etc., R. Co.*, 114 Pa. St. 478.

6. See *infra*, this title, *Joint Use of Tracks*.

7. *Dieter v. Estill*, 95 Ga. 370; *Millvale v. Evergreen R. Co.*, 131 Pa. St. 1.

8. *Eichels v. Evansville St. R. Co.*, 78 Ind. 261, 41 Am. Rep. 561.

9. *State v. Hoboken*, 35 N. J. L. 205.

10. *Baker v. Selma St., etc., R. Co.*, 130 Ala. 474. See also *Central R., etc., Co. v. New York, etc., R. Co.*, 72 Conn. 33.

11. *Jacksonville v. Jacksonville R. Co.*, 67 Ill. 540; *New Orleans, etc., R. Co. v. New Orleans, 26 La. Ann.* 478. See also the title *PARKS AND PUBLIC SQUARES*, vol. 21, p. 1072.

12. *People v. Park, etc., R. Co.*, 76 Cal. 156. See also the title *Reference in the last note supra*.

13. See *Pittsburg, etc., Pass. R. Co. v. Memphis City (U. S.)* 38; *Jersey City v. R. Co.*, 10 N. J. L. 205.

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power of the legislature to grant street-railway franchises does not affect its power to authorize a change in the motive power of street railways.<sup>1</sup> A constitutional restriction on the power of the legislature to authorize the operation of a street railway on any street has been held to restrict its power to permit one railway company to operate its cars over the tracks of another company<sup>2</sup> or to permit the laying of additional tracks in a street.<sup>3</sup>

(2) *Consent of Corporate Authorities.* — A very common constitutional provision is one which prohibits the legislature from granting a street-railway franchise without the consent of the corporate authorities over whose streets or highways the railway is to be operated.<sup>4</sup> Such a provision does not prevent a legislative grant of corporate powers to a street-railway company prior to the consent of the municipality, but merely prohibits the construction of the railway until such consent has been obtained.<sup>5</sup>

(3) *Consent of Abutting Owners.* — In *New York* the constitution provides that no law shall authorize the construction of street railways on any street or highway without the consent of a certain proportion of the abutting property owners,<sup>6</sup> or, where the consent of such abutting owners cannot be had, the

*Jersey City, etc., R. Co.,* 20 N. J. Eq. 360; *Paterson, etc., Horse R. Co. v. Paterson,* 24 N. J. Eq. 158.

**Provisions Not Retroactive.** — The provision of Const. N. Y., art. 3, § 18, prohibiting legislation authorizing the construction or operation of a street railroad except in the cases specified, is prospective in its operation, and has no reference to or effect upon previously existing laws. *People v. Brooklyn, etc., R. Co.,* 89 N. Y. 75, *affirming* 24 Hun (N. Y.) 529. See also *Williamsport Pass. R. Co. v. Williamsport,* 120 Pa. St. 1.

1. **Change in Motive Power.** — *Hudson River Telephone Co. v. Watervliet Turnpike, etc., Co.,* 135 N. Y. 393, 31 Am. St. Rep. 838, 56 Am. & Eng. R. Cas. 469, *reversing* 61 Hun (N. Y.) 140; *Matter of Third Ave. R. Co.,* 121 N. Y. 536, *reversing* (Supm. Ct. Spec. T.) 9 N. Y. Supp. 686; *Matter of New York El. R. Co.,* 70 N. Y. 327. Compare *Matter of Third Ave. R. Co.,* 56 Hun (N. Y.) 537, *affirming* 9 N. Y. Supp. 686.

2. *Colonial City Traction Co. v. Kingston City R. Co.,* 153 N. Y. 540, *affirming* 15 N. Y. App. Div. 195. See also *Sanflet v. Toledo,* 8 Ohio Cir. Dec. 711, 10 Ohio Cir. Ct. 460, and see generally *infra*, this title, *Joint Use of Tracks.* See, however, *Ingersoll v. Nassau Electric R. Co.,* 89 Hun (N. Y.) 213. Compare *Kunz v. Brooklyn Heights R. Co.,* (Supm. Ct. Spec. T.), 25 Misc. (N. Y.) 334.

3. *Auchincloss v. Metropolitan El. R. Co.,* 69 N. Y. App. Div. 63. See also *Harner v. Columbus St. R. Co.,* 11 Ohio Dec. (Reprint) 807, 29 Cinc. L. Bul. 387, and see generally *infra*, this title, *Nature and Extent of Franchise — Exclusiveness of Franchise.*

4. **Consent of Corporate Authorities — Alabama.** — *Baker v. Selma St., etc., R. Co.,* 130 Ala. 474.

*Georgia.* — *Dieter v. Estill,* 95 Ga. 370; *Almond v. Atlanta Consol. St. R. Co.,* 108 Ga. 417; *Brown v. Atlanta R., etc., Co.,* 113 Ga. 462.

*Illinois.* — *Metropolitan City R. Co. v. Chicago,* 96 Ill. 620.

*New York.* — *Matter of Rochester Electric R. Co.,* 57 Hun (N. Y.) 56; *Beekman v. Third Ave. R. Co.,* 13 N. Y. App. Div. 279.

*Ohio.* — *Morrow County Illuminating Co. v. Mt. Gilead,* 10 Ohio Dec. 235.

*Pennsylvania.* — *Harrisburg, etc., Electric R. Co. v. Harrisburg, etc., Turnpike Co.,* 15 Pa. Co. Ct. 389; *Middletown, etc., St. R. Co. v. Railroad Co.,* 2 Dauphin Co. Rep. (Pa.) 319; *Reading Co. v. Schuylkill Valley Traction Co.,* 14 Montg. Co. Rep. (Pa.) 10; *Larimer, etc., St. R. Co. v. Larimer St. R. Co.,* 137 Pa. St. 533.

*Texas.* — *Gulf City R. Co. v. Gulf City, etc., R. Co.,* 63 Tex. 529, 26 Am. & Eng. R. Cas. 114; *Ft. Worth St. R. Co. v. Rosedale St. R. Co.,* 68 Tex. 169, 32 Am. & Eng. R. Cas. 283; *Taylor v. Dunn,* 80 Tex. 652.

**Underground Railway.** — *Matter of New York Dist. R. Co.,* 107 N. Y. 42, *affirming* 42 Hun (N. Y.) 621.

**Construction of Railway on Turnpike.** — *Electric R. Co. v. Turnpike Co.,* 4 Pa. Dist. 17; *Johnstown, etc., Turnpike Co. v. Johnstown Pass. R. Co.,* 4 Pa. Dist. 594.

5. *Brown v. Atlanta R., etc., Co.* 113 Ga. 462.

Before the consent of the local authorities is secured, however, one railway company cannot acquire any rights in a street or highway so as to prevent another company with the consent of the proper authorities from being authorized to construct a street railway. *Com. v. Lance,* 3 Dauphin Co. Rep. (Pa.) 181, 3 Del. Co. Rep. (Pa.) 9.

6. **New York — Consent of Abutting Owners.** — Const. N. Y., art. 3, § 18; *Sea Beach R. Co. v. Coney Island, etc., Electric R. Co.,* 22 N. Y. App. Div. 477; *Geneva, etc., R. Co. v. New York Cent., etc., R. Co.,* 24 N. Y. App. Div. 335; *Black v. Brooklyn Heights R. Co.,* 32 N. Y. App. Div. 468; *New York Cable R. Co. v. Forty-second St., etc., R. Co.,* 13 Daly (N. Y.) 118; *Benedict v. Seventh Ward R. Co.,* 51 Hun (N. Y.) 111; *Matter of Kings County El. R. Co.,* 82 N. Y. 95; *Matter of Saratoga Electric R. Co.,* 58 Hun (N. Y.) 287; *Matter of Thirty-fourth St. R. Co.,* 102 N. Y. 343; *Matter of People's R. Co.,* 112 N. Y. 578; *Matter of Lockport, etc., R. Co.,* 77 N. Y. 557; *Matter of New York Cable R. Co.,* 40 Hun (N. Y.) 1; *Matter of Rochester Electric R. Co.,* 123 N. Y. 351; *Matter of Cortland, etc., Horse R. Co.,* 31 Hun (N. Y.) 72; *Matter of New York Dist. R. Co.,* 107 N. Y. 42.

It is necessary to have the consent of the

consent of three commissioners appointed by the Supreme Court, the report of such commission to be confirmed by the court.<sup>1</sup>

(4) *Special Legislation.* — Constitutional provisions prohibiting special legislation may restrict the power of the legislature to grant street-railway franchises.<sup>2</sup> Thus, provisions that all laws of a general nature shall have a uniform operation will prevent the grant by a special law of a street-railway franchise where a general law upon the subject has been enacted;<sup>3</sup> but where no provision has been made by a general law for the acquisition of street-railway franchises, a constitutional provision prohibiting special laws for any case where provisions have been made by general law, or requiring general laws to have a uniform operation, does not prohibit the grant of street-railway franchises by a special law.<sup>4</sup>

(5) *Entitling Act — Plurality of Subjects.* — In granting street-railway franchises the legislature must, of course, observe any existing constitutional provisions prohibiting statutes from containing a plurality of subjects,<sup>5</sup> and provisions relating to entitling acts.<sup>6</sup>

c. IMPOSING CONDITIONS. — In granting a franchise to construct a street railway the legislature may impose such conditions upon the grant as it may see fit,<sup>7</sup> and provisions in the constitution prescribing conditions upon which

owners of one-half in value of the property bounded on each street or portion of a street upon which it is proposed to construct such street railway. *Hilton v. Thirty-fourth St. R. Co.*, (Supm. Ct.) 1 How. Pr. N. S. (N. Y.) 453.

*Consent Need Not Be under Seal.* — *Matter of Cortland, etc., Horse R. Co.*, 31 Hun (N. Y.) 72, *affirmed* 98 N. Y. 336.

*Lot Owner at Corner Where Road Curves.* — In estimating whether the necessary consents have been obtained, the consent of the owner of a lot situated opposite a corner around which the railway is to run is to be included. *Sea Beach R. Co. v. Coney Island, etc., Electric R. Co.*, 22 N. Y. App. Div. 477.

1. *Hilton v. Thirty-fourth St. R. Co.*, (Supm. Ct.) 1 How. Pr. N. S. (N. Y.) 453; *Matter of Broadway Surface R. Co.*, 34 Hun (N. Y.) 414; *Matter of People's R. Co.*, 112 N. Y. 578, *affirming* 48 Hun (N. Y.) 617; *Matter of Buffalo Traction Co.*, 25 N. Y. App. Div. 447; *Matter of Nassau Electric R. Co.*, 167 N. Y. 37; *Matter of Kingsbridge R. Co.*, 66 N. Y. App. Div. 497; *People v. Railroad Com'rs*, 42 N. Y. App. Div. 366; *Matter of East River Bridge Co.*, 75 Hun (N. Y.) 119.

*Necessity for Nonconsent of Property Owners.* — To entitle a railway company to have commissioners appointed it must be shown that the consent of the property owners could not be obtained. *Matter of New York Cable R. Co.*, 36 Hun (N. Y.) 355; *Matter of Cross Town St. R. Co.*, 68 Hun (N. Y.) 236.

The commissioners have no jurisdiction where the refusal of the consent of abutting owners is based upon a submission to them of improper plans. *Matter of New York Cable R. Co.*, 109 N. Y. 32, *affirming* 45 Hun (N. Y.) 153.

*The Duty to Appoint Commissioners Is Mandatory.* — *Matter of Thirty-fourth St. R. Co.*, 102 N. Y. 343. See also *Forty-second St., etc., Ferry R. Co. v. Thirty-fourth St. R. Co.*, 102 N. Y. 691. But it is discretionary with the court to refuse to confirm the commissioners' report. *Matter of Kings County El. R. Co.*, 82 N. Y. 95, *dismissing appeal* from 20 Hun (N. Y.) 217.

*Commissioners May Be Appointed* without first

obtaining the consent of the municipal authorities. *Matter of Broadway Surface R. Co.*, 34 Hun (N. Y.) 414; *Matter of Auburn City R. Co.*, 88 Hun (N. Y.) 603.

*Successive Applications for Appointment of Commissioners.* — *Matter of People's R. Co.*, 112 N. Y. 578.

*Conduct of Commissioners' Hearing.* — The commissioners do not constitute a judicial tribunal bound to proceed according to technical rules in hearing the parties, but they are a tribunal like a legislative committee, not bound to regard the rules of evidence strictly. *Matter of Nassau Cable Co.*, 36 Hun (N. Y.) 272.

*Power of Court to Set Aside Unfavorable Report.* — *Matter of Nassau Electric R. Co.*, 167 N. Y. 37, *reversing* 6 N. Y. App. Div. 141; *Matter of Nassau Cable Co.*, 36 Hun (N. Y.) 272.

*Considerations Requiring Refusal to Confirm Right.* — *Matter of Port Chester St. R. Co.*, 43 N. Y. App. Div. 536.

*Report of Commissioners Need Not Be Unanimous.* — *Matter of Port Chester St. R. Co.*, 43 N. Y. App. Div. 536.

2. *Prohibition of Special Legislation.* — *Smith v. Indianapolis St. R. Co.*, 158 Ind. 425; *Stange v. Dubuque*, 62 Iowa 303; *Weinman v. Wilkinsburg, etc., R. Co.*, 118 Pa. St. 192; *Watkins v. West Philadelphia Pass. R. Co.*, 1 Pa. Dist. 463; *Gulf City R. Co. v. Gulf City, etc., R. Co.*, 63 Tex. 529.

3. *Omnibus R. Co. v. Baldwin*, 57 Cal. 160.

4. *Dieter v. Estill*, 95 Ga. 370; *Hodges v. Baltimore Union Pass. R. Co.*, 58 Md. 603, 10 Am. & Eng. R. Cas. 270.

5. *Plurality of Subject.* — *Jackson, etc., Traction Co. v. Railroads Com'r*, 128 Mich. 164.

6. *Titles of Acts.* — *Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 386; *Paterson R. Co. v. Grundy*, 51 N. J. Eq. 213, 56 Am. & Eng. R. Cas. 486; *Grey v. Newark Plank Road Co.*, 65 N. J. L. 51; *Union Pass. R. Co.'s Appeal*, 81\* Pa. St. 91; *Millvale v. Evergreen R. Co.*, 131 Pa. St. 1, 46 Am. & Eng. R. Cas. 219. See generally the title STATUTES, vol. 26, p. 520.

7. *Conditions Imposed.* — *Central R., etc., Co.'s Appeal*, 67 Conn. 199; *Boston, etc., R. Co. v.*

street railways may be constructed do not exclude the legislature from imposing conditions other than those so prescribed.<sup>1</sup> Thus, the legislature may impose conditions requiring the consent of the corporate authorities in the place where the street railway is to be constructed<sup>2</sup> or of the abutting prop-

Portsmouth, 71 N. H. 21; Taggart v. Newport St. R. Co., 16 R. I. 668, 43 Am. & Eng. R. Cas. 208.

1. Matter of Thirty-fourth St. R. Co., 102 N. Y. 343, reversing 37 Hun (N. Y.) 442.

2. Consent of Municipal Authorities Required — *California*. — *Eisenhuth v. Ackerson*, 105 Cal. 87.

*Georgia*. — *West End, etc., St. R. Co. v. Atlanta St. R. Co.*, 49 Ga. 151.

*Illinois*. — *Chicago City R. Co. v. People*, 73 Ill. 541.

*Indiana*. — *City R. Co. v. Citizens' St. R. Co.*, (Ind. 1898) 52 N. E. Rep. 157.

*Maine*. — *Veazie v. Mayo*, 45 Me. 560; *Cherryfield, etc., Electric R. Co., Appellants*, 95 Me. 361.

*New Jersey*. — *Paterson, etc., Horse R. Co. v. Paterson*, 24 N. J. Eq. 158; *West Jersey Traction Co. v. Camden Horse R. Co.*, 53 N. J. Eq. 163; *Stockton v. Atlantic Highlands, etc., Electric R. Co.*, 53 N. J. Eq. 418.

*New York*. — *Matter of Rochester Electric R. Co.*, 123 N. Y. 351; *Shaper v. Brooklyn, etc., Cable R. Co.*, 42 Hun (N. Y.) 657, 4 N. Y. St. Rep. 860, affirmed 124 N. Y. 630; *People v. Newton*, 48 Hun (N. Y.) 477, reversing 14 N. Y. St. Rep. 906; *Geneva, etc., R. Co. v. New York Cent., etc., R. Co.*, 24 N. Y. App. Div. 335; *Matter of Syracuse, etc., R. Co.*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 510; *Matter of People's Rapid Transit R. Co.*, 57 Hun (N. Y.) 587; *Delaware, etc., R. Co. v. Syracuse, etc., R. Co.*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 456.

*Ohio*. — *Citizens' Electric R. Co. v. County Com'rs*, 56 Ohio St. 1.

*Pennsylvania*. — *Philadelphia v. Citizen's Pass. R. Co.*, 48 Leg. Int. (Pa.) 220; *Philadelphia v. Lombard, etc., St. R. Co.*, 3 Grant Cas. (Pa.) 403; *Pittsburgh, etc., Pass. R. Co.'s Appeal*, 1 Penny. (Pa.) 449; *Scranton, etc., Traction Co. v. Delaware, etc., Canal Co.*, 1 Pa. Super. Ct. 409; *Easton Transit Co.*, 2 Pa. Dist. 649; *Faust v. Second, etc., St. Pass. R. Co.*, 3 Phila. (Pa.) 164, 15 Leg. Int. (Pa.) 221; *Hestonville, etc., R. Co. v. Schuylkill River Pass. R. Co.*, 6 Phila. (Pa.) 141, 23 Leg. Int. (Pa.) 213; *Philadelphia v. Philadelphia, etc., R. Co.*, 7 P. Co. Ct. 390; *Com. v. Central Pass. R. Co.*, 52 Pa. St. 506; *Larimer, etc., St. R. Co. v. Larimer St. R. Co.*, 137 Pa. St. 533.

*Tennessee*. — *People's Pass. R. Co. v. Memphis*, (Tenn. 1875) 16 S. W. Rep. 973.

Such a provision is not an unlawful delegation of power to municipal officers. *Philadelphia v. Lombard, etc., St. Pass. R. Co.*, 4 Brews. (Pa.) 1.

After the authorities have refused consent they cannot subsequently reconsider their action, but the legislature must be again applied to. *Musser v. Fairmount, etc., R. Co.*, 5 Pa. L. J. Rep. 466, 7 Am. L. Reg. 284.

Where a Street Railway Is Chartered to Run Through Several Municipalities it must have the consent of the authorities of all of such municipi-

palities before it can construct any part of its road. *Lehigh Coal, etc., Co. v. Inter County St. R. Co.*, 167 Pa. St. 75; *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.*, 167 Pa. St. 62, 46 Am. St. Rep. 659; *Rahn Tp. v. Tamaqua, etc., St. R. Co.*, 167 Pa. St. 84; *Wheeler v. Pennsylvania R. Co.*, 194 Pa. St. 539.

**Supplement to Charter Authorising Extension.** — When a charter requires the consent of the city council for any extension of the railway lines, and a supplement authorizes the extension of the road without consent, a second supplement which is silent as to consent is to be taken subject to the requirement of the charter that consent shall be obtained. *Philadelphia v. Citizen's Pass. R. Co.*, 151 Pa. St. 128. See also *Philadelphia v. Lombard, etc., St. Pass. R. Co.*, 4 Brews. (Pa.) 14; *Pittsburgh, etc., Pass. R. Co.'s Appeal*, 1 Penny. (Pa.) 449.

**Construction of Street Railway on Turnpike.** — *Stockton v. Atlantic Highlands, etc., Electric R. Co.*, 53 N. J. Eq. 418.

In *Cincinnati, etc., St. R. Co. v. Cummins-ville*, 14 Ohio St. 523, it was held that the *Ohio Act of April 10, 1861*, prohibiting the construction of any street railway upon any road, etc., outside the limits of cities and villages, without the consent of the public authorities having charge of such road, did not require the consent of the authorities of a road district to the construction of a street railway over a turnpike running through such district.

And in *Cincinnati v. Columbia, etc., St. R. Co.*, 9 Ohio Dec. (Reprint) 782, 17 Cinc. L. Bul. 192, it was held that where a village was incorporated twenty-one years after the consent to the construction and operation of a street railway was obtained from a turnpike company, the consent of the municipality was not necessary.

**Whether Consent of Turnpike Company Sufficient.** — In *District Atty. v. Lynn, etc., R. Co.*, 16 Gray (Mass.) 242, such consent was held sufficient under the act of incorporation of the railroad company. But compare *Matter of Rochester Electric R. Co.*, 123 N. Y. 351, 46 Am. & Eng. R. Cas. 157. See also *Steelton v. East Harrisburg Pass. R. Co.*, 11 Pa. Co. Ct. 161, 2 Dauphin Co. Rep. (Pa.) 313; *Harrisburg, etc., Electric R. Co. v. Harrisburg, etc., Turnpike Co.*, 15 Pa. Co. Ct. 389.

**Who Are Authorities Whose Consent Is Necessary.** — *Logansport R. Co. v. Logansport*, 114 Fed. Rep. 688; *Trotter v. St. Louis, etc., R. Co.*, 180 Ill. 471; *Lysander v. Syracuse, etc., R. Co.*, 51 N. Y. App. Div. 617, affirming 31 Misc. (N. Y.) 330 (bridge); *Wheatfield v. Tonawanda St. R. Co.*, 92 Hun (N. Y.) 460 (bridge); *Gaedeke v. Staten Island Midland R. Co.*, 43 N. Y. App. Div. 514; *Gaedeke v. Staten Island Midland R. Co.*, 46 N. Y. App. Div. 219; *Bohmer v. Haffen*, 35 N. Y. App. Div. 381, affirming 22 Misc. (N. Y.) 565; *Venango County v. Oil City St. R. Co.*, 3 Pa. Dist. 546; *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.*, 14 Pa. Co. Ct. 88; *Delaware County, etc., Electric R. Co. v. Philadelphia*, 164 Pa. St. 457 (bridge constructed by

erty owners,<sup>1</sup> or of a majority of the electors of the municipality,<sup>2</sup> or of the owners of another street railway previously constructed in the streets or highways covered by the franchise;<sup>3</sup> or limiting the time within which the road shall be constructed;<sup>4</sup> or providing that the company to whom the franchise is granted shall purchase the omnibuses, horses, etc., of an omnibus line operated upon the streets covered by the franchise or upon parallel streets,<sup>5</sup> or that there shall be a finding by a special tribunal or court that public convenience requires the construction of the proposed street railway.<sup>6</sup> Where the statutes require the consent of a majority of the property owners along the proposed route and of the city before the construction of the railway, the consent of the property owners is not a condition precedent to the consent of the city. The consents are independent, and it is immaterial which is obtained first.<sup>7</sup>

**3. Delegation of Power to Subordinate Bodies** — *a. IN GENERAL.* — The legislature may expressly delegate to municipalities or other subordinate bodies

city and county); *Hain v. Lebanon, etc.*, St. R. Co., 1 Pa. Dist. 452; *Berks County v. Reading City Pass. R. Co.*, 167 Pa. St. 102 (bridge).

Where by statute the consent "of the local authorities having control of that portion of a street or highway upon which it is proposed to construct and operate such railroad" was required, and the proposed railway was to run upon a highway in a town, the "local authorities" were held to be the officers whose duties and powers concerned the supervision, maintenance, and care of the highway — that is, the highway commissioners of the town. *Matter of Rochester Electric R. Co.*, 123 N. Y. 351, affirming 57 Hun (N. Y.) 56.

**Effect of Acquiescence by Municipality.** — *State v. Spokane St. R. Co.*, 19 Wash. 518, 67 Am. St. Rep. 729.

**1. Consent of Abutting Owners.** — *Hunt v. Chicago Horse, etc.*, R. Co., 121 Ill. 638, reversing 20 Ill. App. 282; *Stockton v. Atlantic Highlands, etc.*, Electric R. Co., 53 N. J. Eq. 418; *Paterson, etc., Horse R. Co. v. Paterson*, 24 N. J. Eq. 158; *Brooklyn City, etc., R. Co. v. Coney Island, etc.*, R. Co., 35 Barb. (N. Y.) 364; *Matter of Saratoga Electric R. Co.*, 58 Hun (N. Y.) 287; *Rapp v. Cincinnati, etc.*, R. Co., 9 Ohio Dec. (Reprint) 302, 12 Cinc. L. Bul. 119; *State v. Bell*, 34 Ohio St. 194 (consent enures under statute to lowest bidder, though not given to him in terms).

**Conditions to Consent.** — See *People v. Chicago West Div. R. Co.*, 118 Ill. 113.

**Legality of Contract to Pay for Consent of Abutting Property Owner.** — *Doane v. Chicago City R. Co.*, 51 Ill. App. 353.

**Burden of Proving Consent of Property Owners.** — *Dusenberry v. New York, etc., Traction Co.*, 46 N. Y. App. Div. 267.

**Acquiescence of Abutting — Evidence of Consent.** — *Paterson, etc., Horse R. Co. v. Paterson*, 24 N. J. Eq. 158 (standing by while road is being constructed and operated).

After the lapse of ten years, and the acquiescence of property holders and the destruction of all written evidence by fire, very slight evidence will suffice to establish the fact that consent was obtained as required by statute. *Chicago City R. Co. v. People*, 73 Ill. 541.

So if a street railway is constructed without the consent of the property owners, it is within the discretion of the court to deny an injunction to restrain its operation as a nuisance

to give the railway company a reasonable time to acquire such consent. *Black v. Brooklyn Heights R. Co.*, 32 N. Y. App. Div. 468.

**Consent of Holder of Record Title.** — *Sea Beach R. Co. v. Coney Island, etc., Electric R. Co.*, 22 N. Y. App. Div. 477.

**Consent to Lay Track Opposite Public Property.** — *Paterson, etc., Horse R. Co. v. Paterson*, 24 N. J. Eq. 158 (city corporation may consent). See also *Case v. Cayuga County*, 88 Hun (N. Y.) 59 (consent of county officers as to county property situated on street).

**Assigning Consents Valid.** — *Geneva, etc., R. Co. v. New York Cent., etc.*, R. Co., 163 N. Y. 228, reversing 24 N. Y. App. Div. 335. See, however, *Case v. Cayuga County*, 88 Hun (N. Y.) 59 (consent of public officers as to public property).

**2. Granting Consent by Popular Vote.** — *State v. Bechel*, 22 Neb. 158.

**3. Consent of Owners of Street Railway.** — *Matter of Thirty-fourth St. R. Co.*, 102 N. Y. 343, reversing 37 Hun (N. Y.) 442. See also *New York Cable R. Co. v. Chambers St., etc.*, R. Co., 40 Hun (N. Y.) 29; *Matter of Atlantic Ave. El. R. Co.*, 136 N. Y. 292.

In a statute prohibiting any company from laying a track in that portion of the street in which another company has laid a track, without the consent of such other company, the words "portion of" a street must be construed to mean the whole width of the street. *Forty-second St., etc., Ferry R. Co. v. Thirty-fourth St. R. Co.*, 52 N. Y. Super. Ct. 252. See also *New York, etc., R. Co. v. Forty-second St., etc.*, R. Co., 50 Barb. (N. Y.) 399.

**4. Plymouth Tp. v. Chestnut Hill, etc., R. Co., 15 Pa. Co. Ct. 442.**

**5. Cooper v. Second, etc., St. Pass. R. Co., 3 Phila. (Pa.) 252, 15 Leg. Int. (Pa.) 357; *Green, etc., St. Pass. R. Co. v. Moore*, 64 Pa. St. 79.**

**6. Finding that Public Convenience Requires Road.** — *In re Shelton St. R. Co.*, 69 Conn. 626; *Portland R. Extension Co.*, 94 Me. 565; *Cherryfield, etc., Electric R. Co.*, Appellants, 95 Me. 361; *Milbridge, etc., Electric R. Co.*, Appellants, 96 Me. 110; *Keene Electric R. Co.'s Petition*, 68 N. H. 434; *Nashua St. R. Co.'s Petition*, 69 N. H. 275. See also *People v. Railroad Com'rs*, 42 N. Y. App. Div. 366; *Seccomb v. Wurster*, 83 Fed. Rep. 856; *Paterson, etc., Horse R. Co. v. Paterson*, 24 N. J. Eq. 158.

the power to grant franchises to street-railway companies or to license the construction of street railways over their streets,<sup>1</sup> and may by curative act ratify the unauthorized action of a municipality in granting a street-railway franchise,<sup>2</sup> except, of course, where the power of the legislature in this respect is restricted by the constitution.<sup>3</sup> A general constitutional provision prohibiting the legislature from granting "special privileges" or "franchises" does not prohibit it from empowering municipalities to license the construction of street railways,<sup>4</sup> nor is such prohibition implied in a provision that corporations shall be formed under general laws, as such authority to a municipal corporation relates merely to the grant of street franchises, and not to the creation of corporations.<sup>5</sup> Territorial legislatures may enact general laws empowering municipalities to grant franchises or licenses for the construction of street railways over their streets.<sup>6</sup> The power of a municipality to consent to the use of its streets for street-railway purposes may be conferred by the charter of a street-railway company as well as by the charter of the municipality.<sup>7</sup> The grant, when made by a municipality or other subordinate body, under legislative sanction, is still a franchise emanating from the state.<sup>8</sup>

**1. Delegation of Power to Grant Franchises —**  
*United States.* — *Knoxville v. Africa*, (C. C. A.) 77 Fed. Rep. 501; *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557.

*California.* — *Oakland R. Co. v. Oakland, etc.*, R. Co., 45 Cal. 365, 13 Am. Rep. 181.

*Florida.* — *State v. Jacksonville St. R. Co.*, 29 Fla. 590.

*Indiana.* — *Smith v. Indianapolis St. R. Co.*, 158 Ind. 425.

*Kansas.* — *Atchison St. R. Co. v. Missouri Pac. R. Co.*, 31 Kan. 660.

*Kentucky.* — *Covington St. R. Co. v. Covington*, 9 Bush (Ky.) 127.

*Louisiana.* — *Canal, etc., St. R. Co. v. Crescent City R. Co.*, 41 La. Ann. 561.

*Maryland.* — *Offutt v. Montgomery County*, 94 Md. 115.

*Massachusetts.* — *South Boston R. Co. v. Middlesex R. Co.*, 121 Mass. 485; *Daniels v. Commonwealth Ave. St. R. Co.*, 175 Mass. 518; *New Bedford, etc., St. R. Co. v. Acushnet St. R. Co.*, 143 Mass. 200.

*Michigan.* — *People v. Ft. Wayne, etc., R. Co.*, 92 Mich. 522; *Taylor v. Bay City St. R. Co.*, 80 Mich. 77.

*New Jersey.* — *Paterson R. Co. v. Grundy*, 51 N. J. Eq. 213.

*New York.* — *Irvine v. Atlantic Ave. R. Co.*, 10 N. Y. App. Div. 560.

*Ohio.* — *Richland County v. Citizens' Electric R., etc., Co.*, 1 Ohio Dec. 290, 31 Cinc. L. Bul. 103; *Hamilton v. Cincinnati, etc., Electric St. R. Co.*, 8 Ohio Dec. 174, 5 Ohio N. P. 457; *Verera v. Akron, etc., R. Co.*, 11 Ohio Cir. Dec. 664, 21 Ohio Cir. Ct. 347; *Cincinnati, etc., St. R. Co. v. Cummins, etc., Co.*, 14 Ohio St. 523; *Sims v. Brooklyn St. R. Co.*, 37 Ohio St. 567.

*Pennsylvania.* — *Hannum v. Railroad Co.*, 8 Del. Co. Rep. (Pa.) 91.

*Texas.* — *Houston v. Houston City St. R. Co.*, 83 Tex. 548, 29 Am. St. Rep. 679.

*Washington.* — *Wood v. Seattle*, 23 Wash. 1.

*West Virginia.* — *Watson v. Fairmont, etc., R. Co.*, 49 W. Va. 528.

See also *Burlington v. Burlington Traction Co.*, 70 Vt. 491.

The delegation of power to a municipality to grant street-railway franchises to particular per-

sons excludes power to grant such franchises to others. *Allen v. Clausen*, 114 Wis. 244.

A municipality authorized to grant a right of way over its streets has no right to grant authority to a street-railway company to construct railways on streets other than those authorized by its charter. *Citizens' St. R. Co. v. Africa*, 100 Tenn. 26.

**A General Law** authorizing municipalities to consent to the construction of street railways over their streets confers such power upon a municipality incorporated under a special law. *Eichels v. Evansville St. R. Co.*, 78 Ind. 261, 41 Am. Rep. 561.

**Extension of Franchise.** — *Linden Land Co. v. Milwaukee Electric R., etc., Co.*, 107 Wis. 493.

**Renewal of Franchise.** — *Cincinnati v. Cincinnati St. R. Co.*, 1 Ohio Dec. 591, 31 Cinc. L. Bul. 308; *State v. East Cleveland R. Co.*, 3 Ohio Cir. Dec. 471, 6 Ohio Cir. Ct. 318.

**2.** *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557; *People v. Los Angeles Electric R. Co.*, 91 Cal. 338; *McCartney v. Chicago, etc., R. Co.*, 112 Ill. 611; *Nash v. Lowry*, 37 Minn. 261; *People v. Law*, 34 Barb. (N. Y.) 494, 22 How. Pr. (N. Y.) 109. See also *Denver Tramway Co. v. Londoner*, 20 Colo. 150.

**3. Legislature Having No Power to Pass, Cannot Ratify.** — *Stange v. Dubuque*, 62 Iowa 303. See also *Stange v. Hill, etc., St. R. Co.*, 54 Iowa 669; *Knorr v. Miller*, 3 Ohio Cir. Dec. 297, 5 Ohio Cir. Ct. 609.

**4.** *Chicago City R. Co. v. People*, 73 Ill. 541.

**5.** *Smith v. Indianapolis St. R. Co.*, 158 Ind. 425.

**6.** *Henderson v. Ogden City R. Co.*, 7 Utah 199, 46 Am. & Eng. R. Cas. 95, holding that a prohibition against special laws authorizing the laying of a railroad track does not affect the validity of general laws authorizing the same.

**7.** *Almand v. Atlanta Consol. St. R. Co.*, 108 Ga. 417.

**8.** *City R. Co. v. Citizen's St. R. Co.*, 166 U. S. 557; *Detroit v. Detroit City R. Co.*, 56 Fed. Rep. 867; *Chicago City R. Co. v. People*, 73 Ill. 541; *State v. Dayton Traction Co.*, 10 Ohio Cir. Dec. 212; *State v. Madison St. R. Co.*, 72 Wis. 612. See also *Lincoln St. R. Co. v. Lincoln*, 61 Neb. 109.

*b. EXTENT OF DELEGATED POWER — (1) In General.* — Municipal corporations and other subordinate or *quasi*-municipal bodies have no inherent power to grant street-railway franchises over their streets and highways,<sup>1</sup> and where such power is delegated by statute to a subordinate body, its extent, of course, depends entirely upon the terms of the statute.<sup>2</sup> Though in a few cases it has been held that the general powers vested in municipalities to control and regulate the manner in which their streets should be used empowered such municipalities to grant franchises to construct street railways over their streets,<sup>3</sup> the great weight of authority is to the effect that the power to license the construction of street railways is an extraordinary one, and cannot be implied from a charter of a municipal corporation which confers only the usual powers ordinarily conferred upon such corporations.<sup>4</sup> In *Texas* it is held that the constitutional provision that no law should be passed by the legislature granting the right to construct and operate a street railway within any city, etc., without the consent of the local authorities impliedly confers on municipalities the power to permit the construction of street railways on their streets.<sup>5</sup> In

1. *Power of Municipality to Grant Franchises.* — *Detroit Citizens St. R. Co. v. Detroit R. Co.*, 171 U. S. 48; *People's Pass. R. Co. v. Memphis City R. Co.*, 10 Wall. (U. S.) 38; *Stanley v. Davenport*, 54 Iowa 463, 37 Am. Rep. 216; *Central Crosstown R. Co. v. Metropolitan St. R. Co.*, 16 N. Y. App. Div. 229.

*Power of Board of Electrical Subways to Authorize Erection of Trolley System.* — *Presbyterian Church v. State Board*, 55 N. J. L. 436.

2. See generally the cases cited *supra*, in the next preceding subdivision of this subsection.

3. *Held Included in General Powers of Municipality* — *United States*. — *Detroit Citizens' St. R. Co. v. Detroit*, (C. C. A.) 64 Fed. Rep. 628. See also *Beenson v. Chicago*, 75 Fed. Rep. 880.

*Florida*. — *State v. Jacksonville St. R. Co.*, 29 Fla. 590.

*Kansas*. — *Atchison St. R. Co. v. Missouri Pac. R. Co.*, 31 Kan. 660.

*Louisiana*. — *Brown v. Duplessis*, 14 La. Ann. 854.

*Missouri*. — *State v. Corrigan Consol. St. R. Co.*, 85 Mo. 274, 55 Am. Rep. 361.

See also *Wilmington City R. Co. v. People's R. Co.* (Del. Ch. 1900) 47 Atl. Rep. 245; *Atkinson v. Asheville St. R. Co.*, 113 N. Car. 581.

4. *Power Not to Be Implied from Ordinary Grant of Powers* — *England*. — *Reg. v. Train*, 2 B. & S. 640, 110 E. C. L. 640; *Reg. v. Charlesworth*, 16 Q. B. 1012, 71 E. C. L. 1012; *Reg. v. Longton Gas Co.*, 2 El. & El. 651, 105 E. C. L. 651.

*United States*. — *People's Pass. R. Co. v. Memphis City R. Co.*, 10 Wall. (U. S.) 38; *Logansport R. Co. v. Logansport*, 114 Fed. Rep. 688; *Detroit v. Detroit City R. Co.*, 56 Fed. Rep. 867.

*Alabama*. — *Birmingham, etc., St. R. Co. v. Birmingham St. R. Co.*, 79 Ala. 465, 58 Am. Rep. 615; *Louisville, etc., R. Co. v. Mobile, etc., R. Co.*, 124 Ala. 162.

*Colorado*. — *Denver, etc., R. Co. v. Denver City R. Co.*, 2 Colo. 673.

*Illinois*. — *Chicago v. Rumpff*, 45 Ill. 90, 92 Am. Dec. 196; *Chicago City R. Co. v. People*, 73 Ill. 546.

*Indiana*. — *Eichels v. Evansville St.*

78 Ind. 263, 41 Am. Rep. 561.

*Iowa*. — *Logan v. Pyne*, 43 Iowa 524.

*Reg. 261; Stange v. Hill, etc., St. R.*

*Iowa 669; Stanley v. Davenport*, 54 Iowa 463, 37 Am. Rep. 216; *Stange v. Dubuque*, 62 Iowa 303; *Des Moines St. R. Co. v. Des Moines Broad-Gauge St. R. Co.*, 73 Iowa 513.

*Kentucky*. — *Covington St. R. Co. v. Covington*, 9 Bush (Ky.) 127.

*Nebraska*. — *Lincoln St. R. Co. v. Lincoln*, 61 Neb. 109.

*New Jersey*. — *Trenton St. R. Co. v. United New Jersey R., etc., Co.*, 60 N. J. Eq. 500.

*New York*. — *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186; *Coleman v. Second Ave. R. Co.*, 38 N. Y. 201; *Beekman v. Saratoga, etc., R. Co.*, 3 Paige (N. Y.) 75; *Fanning v. Osborne*, 102 N. Y. 441; *People v. Kerr*, 27 N. Y. 188; *Milbau v. Sharp*, 27 N. Y. 619; *People v. O'Brien*, 111 N. Y. 1, 7 Am. St. Rep. 684; *Beekman v. Third Ave. R. Co.*, 13 N. Y. App. Div. 279, *affirmed* 153 N. Y. 279; *McClean v. Westchester Electric R. Co.*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 383; *People v. Third Ave. R. Co.*, 45 Barb. (N. Y.) 63.

*North Carolina*. — *Asheville St. R. Co. v. West Asheville, etc., R. Co.*, 114 N. Car. 725.

*Ohio*. — *Cincinnati Inclined Plane R. Co. v. Cincinnati*, 52 Ohio St. 609; *Verera v. Akron, etc., R. Co.*, 11 Ohio Cir. Dec. 664.

*Pennsylvania*. — *Atty.-Gen. v. Lombard, etc., St. Pass. R. Co.*, 10 Phila. (Pa.) 352, 32 Leg. Int. (Pa.) 238; *Homestead St. R. Co. v. Pittsburgh, etc., Electric St. R. Co.*, 166 Pa. St. 162.

*Tennessee*. — *Memphis City R. Co. v. Memphis, etc., Pass. R. Co.*, 4 Coldw. (Tenn.) 406.

*Wisconsin*. — *Allen v. Clausen*, 114 Wis. 244.

See also *San Antonio v. Rische*, (Tex. Civ. App. 1896) 38 S. W. Rep. 388; *Norfolk R., etc., Co. v. Consolidated Turnpike Co.*, 100 Va. 897.

*Extensions.* — In *People v. Third Ave. R. Co.*, 45 Barb. (N. Y.) 63, it was held that under the *New York Act of 1860*, which made it unlawful to lay, construct, or operate any railway in or upon the streets of the city of New York, except under the authority of the legislature, the common council of the city could not authorize an extension of a street railway, unless perhaps where such extension was a necessary incident to the enjoyment of the prior grant.

5. *Houston v. Houston City St. R. Co.*, 83 Tex. 548, 29 Am. St. Rep. 679. See also *Texas, etc., R. Co. v. Rosedale St. R. Co.*, 64 Tex. 80, 53 Am. Rep. 739.

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some cases the view is taken that while a municipality cannot, under its general powers, grant an irrevocable right to operate a street railway upon its streets, it may confer a license to do so revocable at will.<sup>1</sup> Where the constitution requires the consent of the municipality or such consent is made by the legislature a condition to the right to construct the railway, the municipality has, as a general rule, discretion to withhold or give its consent,<sup>2</sup> or to fix the number of tracks to be laid in the street<sup>3</sup> or the duration of the franchise or license;<sup>4</sup> but the grant of a right to use a street or other highway which would result in the practical exclusion of the public therefrom has been considered to be an abuse of discretion and unauthorized.<sup>5</sup> So where a municipality granted without consideration a street-railway franchise to one company when another company had offered a fair consideration therefor, its action was considered illegal as a malfeasance.<sup>6</sup>

(2) *What Motive Power May Be Authorized.* — Where a municipality is authorized generally to grant street-railway franchises it may authorize the use of any motive power it may see fit, such as electricity<sup>7</sup> or steam,<sup>8</sup> and may authorize the use of a newly discovered motive power or one not known at the time when the authority was given to the municipality.<sup>9</sup> Of course a municipality cannot authorize a street-railway company to use a motive power expressly prohibited by the latter's charter.<sup>10</sup>

(3) *Grant of Exclusive Franchise.* — In view of the fact that the policy of the law is always to discourage monopolies, authority to grant exclusive privileges to any street-railway company as to the occupation of a street does not exist in a municipal corporation unless it has been conferred by the legislature in direct and express terms. It can never exist by mere implication or construction.<sup>11</sup> The legislature may, however, unless restricted by constitutional

1. *Detroit v. Detroit City R. Co.*, 56 Fed. Rep. 867, 56 Am. & Eng. R. Cas. 337; *Texarkana, etc., St. R. Co. v. Texas, etc., R. Co.*, 28 Tex. Civ. App. 551.

2. *People v. Barnard*, 110 N. Y. 548, 36 Am. & Eng. R. Cas. 70, reversing 48 Hun (N. Y.) 57; *Sims v. Brooklyn St. R. Co.*, 37 Ohio St. 556; *Providence v. Union R. Co.*, 12 R. I. 473.

3. *Kennelly v. Jersey City*, 57 N. J. L. 293.

4. *Houston v. Houston City St. R. Co.*, 83 Tex. 548, 29 Am. St. Rep. 679, 50 Am. & Eng. R. Cas. 380.

5. *Watson v. Robberson Ave. R. Co.*, 69 Mo. App. 548; *Elmer v. Chosen Freeholders*, 57 N. J. L. 366. See also *Detroit City R. Co. v. Mills*, 85 Mich. 634, 46 Am. & Eng. R. Cas. 608; *Lewis v. Chosen Freeholders*, 56 N. J. L. 416; *Berks County v. Reading City Pass. R. Co.*, 167 Pa. St. 102; *Woonsocket St. R. Co. v. Woonsocket*, 22 R. I. 64.

6. *Adamson v. Union R. Co.*, 74 Hun (N. Y.) 3; *Milbau v. Sharp*, 15 Barb. (N. Y.) 193.

But the mere neglect of a supervisor to secure the most desirable conditions for permission to a street-railway company to construct its tracks on highways is not sufficient to annul the permission. *Rahn Tp. v. Tamaqua, etc., St. R. Co.*, 4 Pa. Dist. 29.

7. *Motive Power — United States.* — *Williams v. City Electric St. R. Co.*, 41 Fed. Rep. 556, 43 Am. & Eng. R. Cas. 215; *Buckner v. Hart*, 52 Fed. Rep. 835, affirmed (C. C. A.) 54 Fed. Rep. 925. *Indiana.* — *Williams v. Citizens' R. Co.*, 130 Ind. 71, 30 Am. St. Rep. 201.

*Iowa.* — *Teachout v. Des Moines Broad-Gauge St. R. Co.*, 75 Iowa 722.

*Kentucky.* — *Louisville, etc., R. Co. v. Bowling Green R. Co.*, (Ky. 1901) 63 S. W. Rep. 4.

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*Maryland.* — *North Baltimore Pass. R. Co. v. North Ave. R. Co.*, 75 Md. 233.

*Michigan.* — *Detroit City R. Co. v. Mills*, 85 Mich. 634.

*New Jersey.* — *Paterson R. Co. v. Grundy*, 51 N. J. Eq. 213; *Halsey v. Rapid Transit St. R. Co.*, 47 N. J. Eq. 380. Compare *State v. Trenton*, 54 N. J. L. 92.

*New York.* — *People v. Newton*, 112 N. Y. 396; *Hudson River Telephone Co. v. Watervliet Turnpike, etc., Co.*, 135 N. Y. 393, 31 Am. St. Rep. 838, reversing 61 Hun (N. Y.) 140.

*Pennsylvania.* — *Watkin v. West Philadelphia Pass. R. Co.*, 1 Pa. Dist. 463.

The power to authorize the use of electricity as a motive power is embraced within the terms "by any other power than by locomotive." *Lockhart v. Craig St. R. Co.*, 139 Pa. St. 419.

Power to authorize electricity as motive power includes power to authorize the erection of poles for a trolley system. *Taggart v. Newport St. R. Co.*, 16 R. I. 668.

For further cases, see under HORSE RAILWAYS, vol. 15, p. 749, and the title ELECTRIC RAILROADS, vol. 10, p. 881.

8. *Williams v. City Electric St. R. Co.*, 41 Fed. Rep. 556.

9. *Buckner v. Hart*, 52 Fed. Rep. 835; *North Baltimore Pass. R. Co. v. North Ave. R. Co.*, 75 Md. 233; *Detroit City R. Co. v. Mills*, 85 Mich. 634, 46 Am. & Eng. R. Cas. 608.

10. *Farrell v. Winchester Ave. R. Co.*, 61 Conn. 127.

11. *Exclusive Franchise — United States.* — *Detroit Citizens' St. R. Co. v. Detroit R. Co.*, 171 U. S. 48, affirming 110 Mich. 384, 64 Am. St. Rep. 350; *New Orleans City R. Co. v. Crescent City R. Co.*, 12 Fed. Rep. 308; *Jack-*

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provision, expressly empower municipalities to grant exclusive street-railway franchises.<sup>1</sup> By some authorities the right of a city to grant exclusive privileges is regarded as depending on the length of time through which such privilege is to extend, so that if the length of time is not unreasonable the privilege may be granted.<sup>2</sup> In order that a street-railway franchise shall be deemed exclusive it must be plainly conferred by express words or necessary implication.<sup>3</sup>

By Contract with Private Parties a company may of course acquire an exclusive right over private property, and such right will be recognized even though afterwards a highway be laid out over the land occupied.<sup>4</sup>

c. EXECUTION OF DELEGATED POWER—(1) *In General*.—The legislature has power, of course, to prescribe the manner in and the conditions on which the consent of or license by the municipality shall be given. This power is not affected by a constitutional provision requiring the consent of municipalities to the grant of street-railway franchises,<sup>5</sup> and municipalities, in giving their consents or granting licenses to street-railway companies, must of course comply with the requirements of the statute conferring upon them the power to do so.<sup>6</sup> Thus, requirements as to the publication of notice of the applica-

son County Horse R. Co. *v.* Interstate Rapid Transit R. Co., 24 Fed. Rep. 306; Logansport R. Co. *v.* Logansport, 114 Fed. Rep. 688. *Compare* Fidelity Trust, etc., Co. *v.* Mobile St. R. Co., 53 Fed. Rep. 687.

*Indiana*.—Indianapolis Cable St. R. Co. *v.* Citizens' St. R. Co., 127 Ind. 369.

*Louisiana*.—Canal, etc., St. R. Co. *v.* Crescent City R. Co., 41 La. Ann. 561, 40 Am. & Eng. R. Cas. 329; New Orleans, etc., R. Co. *v.* New Orleans, 44 La. Ann. 729.

*Michigan*.—Detroit Citizens' St. R. Co. *v.* Detroit, 110 Mich. 384, 64 Am. St. Rep. 350.

*New York*.—Milbau *v.* Sharp, 17 Barb. (N. Y.) 435, *affirmed* 27 N. Y. 611; Davis *v.* New York, 14 N. Y. 506, 67 Am. Dec. 186; New York *v.* Eighth Ave. R. Co., 118 N. Y. 389, *affirmed* Potter *v.* Collis, 19 N. Y. App. Div. 392.

*Ohio*.—Cincinnati St. R. Co. *v.* Smith, 29 Ohio St. 291; Toledo Consol. St. R. Co. *v.* Toledo Electric St. R. Co., 3 Ohio Cir. Dec. 493, 6 Ohio Cir. Ct. 362.

*Oregon*.—Parkhurst *v.* Capital City R. Co., 23 Oregon 471, 56 Am. & Eng. R. Cas. 455.

*Tennessee*.—People's Pass. R. Co. *v.* Memphis, (Tenn. 1875) 16 S. W. Rep. 973.

*Utah*.—Henderson *v.* Ogden City R. Co., 7 Utah 199, 46 Am. & Eng. R. Cas. 95.

See also Ft. Worth St. R. Co. *v.* Rosedale St. R. Co., 68 Tex. 169, and see generally the title MONOPOLIES AND CORPORATE TRUSTS, vol. 20, p. 866 *et seq.* *Compare* Des Moines St. R. Co. *v.* Des Moines Broad-Gauge St. R. Co., 73 Iowa 513, 32 Am. & Eng. R. Cas. 209; Burlington, etc., Ferry Co. *v.* Davis, 48 Iowa 133, 30 Am. Rep. 390.

A municipality authorized to grant railway franchises "under such regulations and upon such terms and conditions as said authorities may from time to time prescribe" is not authorized to grant exclusive street-railway rights over its streets. Detroit Citizens' St. R. Co. *v.* Detroit R. Co., 171 U. S. 48, 110 Mich. 384, 64 Am. St. Rep. 350.

1. *Exclusive Franchise Authorized*.—Indianapolis Cable St. R. Co. *v.* Citizens' St. R. Co.,

127 Ind. 369, 43 Am. & Eng. R. Cas. 234; Des Moines St. R. Co. *v.* Des Moines Broad-Gauge St. R. Co., 73 Iowa 513, 32 Am. & Eng. R. Cas. 209. See also State *v.* New Orleans, 32 La. Ann. 268.

Where power to grant the exclusive privilege of using its streets and alleys for street-railway purposes is given to a municipality, it cannot grant a street-railway franchise over one street and bind itself not to authorize the construction of street railways over other streets. The effect of such a contract is not to give the exclusive privilege of using the streets for railway purposes, but to give to the grantee the exclusive privilege of preventing their use for such purposes. Citizens' St. R. Co. *v.* Jones, 34 Fed. Rep. 579.

2. *Exclusive Privilege for Limited Time*.—Des Moines St. R. Co. *v.* Des Moines Broad-Gauge St. R. Co., 73 Iowa 513, 32 Am. & Eng. R. Cas. 209 (grant for thirty years upheld). See also City R. Co. *v.* Citizens' St. R. Co., 166 U. S. 557.

3. See *infra*, this title, *Nature and Extent of Franchise—Exclusiveness of Franchise*.

4. Ft. Worth St. R. Co. *v.* Queens City R. Co., 71 Tex. 165.

5. Beekman *v.* Third Ave. R. Co., 13 N. Y. App. Div. 279, *affirmed* 153 N. Y. 144.

6. *Municipal Grants Must Conform to Statute Conferring Power—United States*.—Louisville Trust Co. *v.* Cincinnati, (C. C. A.) 76 Fed. Rep. 296.

*California*.—Omnibus R. Co. *v.* Baldwin, 57 Cal. 160, 1 Am. & Eng. R. Cas. 316.

*Illinois*.—General Electric R. Co. *v.* Chicago City R. Co., 66 Ill. App. 362.

*Indiana*.—City R. Co. *v.* Citizen's St. R. Co., (Ind. 1898) 52 N. E. Rep. 157.

*Missouri*.—Ruckert *v.* Grand Ave. R. Co., 163 Mo. 260.

*New Jersey*.—State *v.* Newark, 54 N. J. L. 102.

*New York*.—Abraham *v.* Myers, (Supm. Ct. Spec. T.) 29 Abb. N. Cas. (N. Y.) 384; Matter of Buffalo Traction Co., 25 N. Y. App. Div. 447; Beekman *v.* Third Ave. R. Co., 13 N. Y. App. Div. 279, *affirmed* 153 N. Y. 144.

tion or petition for the consent or license must be complied with.<sup>1</sup> So when the manner of selling the franchise is prescribed by the statute, the sale must be in the manner specified;<sup>2</sup> and the consent of the abutting property owners must be given when required by the statute.<sup>3</sup> The municipality cannot delegate to any officer or board its statutory authority to permit the construction

*Ohio.* — *Nearing v. Toledo Electric St. R. Co.*, 6 Ohio Cir. Dec. 664, 9 Ohio Cir. Ct. 596; *Aydelott v. Cincinnati*, 4 Ohio Cir. Dec. 486, 11 Ohio Cir. Ct. 11; *Mill Creek Valley St. R. Co. v. Carthage*, 9 Ohio Cir. Dec. 833, 18 Ohio Cir. Ct. 216; *Cincinnati St. R. Co. v. Smith*, 29 Ohio St. 291; *State v. Henderson*, 38 Ohio St. 644; *State v. Bell*, 34 Ohio St. 194, 21 Am. R. Rep. 84; *Cincinnati Inclined Plane R. Co. v. Cincinnati*, 52 Ohio St. 609.

*Pennsylvania.* — *Condon v. Railroad Co.*, 30 Pittsb. Leg. J. N. S. (Pa.) 289; *Larimer, etc., St. R. Co. v. Larimer St. R. Co.*, 137 Pa. St. 533.

**Necessity to Define Location of Tracks on Street.** — *West Jersey Traction Co. v. Camden Horse R. Co.*, 53 N. J. Eq. 163; *Theberath v. Newark*, 57 N. J. L. 309; *Kennelly v. Jersey City*, 57 N. J. L. 293; *Trenton v. Trenton Horse R. Co.*, (N. J. 1890) 19 Atl. Rep. 263; *Bergen Traction Co. v. Township Committee*, (N. J. 1895) 32 Atl. Rep. 754.

**Time When Consent May Be Applied For.** — *McWilliams v. Jewett*, (Supm. Ct. Spec. T.) 14 Misc. (N. Y.) 491.

**Consent to Corporation Before It Has Been Incorporated.** — *Homestead St. R. Co. v. Pittsburgh, etc., Electric St. R. Co.*, 166 Pa. St. 162.

**Giving Consent by "Resolution."** — *West Jersey Traction Co. v. Board of Public Works*, 56 N. J. L. 436; *West Jersey Traction Co. v. Shivers*, 58 N. J. L. 124. *Compare Babcock v. Scranton Traction Co.*, 1 Lack. Leg. N. (Pa.) 223.

**Manner of Passing Ordinance.** — *Hutchinson v. Belmar*, 61 N. J. L. 443.

**Application for Franchise.** — *Sanfleet v. Toledo*, 8 Ohio Cir. Dec. 711, 10 Ohio Cir. Ct. 460.

**Application by Company Before Incorporation.** — *Sloane v. People's Electric R. Co.*, 3 Ohio Cir. Dec. 674, 7 Ohio Cir. Ct. 84.

**Requirement for Provision for Compulsory Arbitration of Disputes with Employees.** — *Wood v. Seattle*, 23 Wash. 1.

**Franchise Acquired by Considerations Given to Public Officers Held to Be Invalid.** — *Keogh v. Railroad Co.*, 5 Lack. Leg. N. (Pa.) 242.

**License to Corporation of Which Public Officer Is Stockholder.** — *West Jersey Traction Co. v. Board of Public Works*, 56 N. J. L. 431; *Hough v. Smith*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 363.

1. *Illinois.* — *Metropolitan City R. Co. v. Chicago*, 96 Ill. 620; *Harvey v. Aurora, etc., R. Co.*, 186 Ill. 283.

*New Jersey.* — *Camden Horse R. Co. v. West Jersey Traction Co.*, 58 N. J. L. 102; *Avon-by-the-Sea Land, etc., Co. v. Neptune City*, 57 N. J. L. 701, 362.

*New York.* — *People v. Grant*, 138 N. Y. 653; *Hough v. Smith*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 363. See also *Geneva, etc., R. Co. v. New York Cent., etc., R. Co.*, 24 N. Y. App. Div. 335.

*Ohio.* — *Hamilton v. Cincinnati, etc., Electric*

*St. R. Co.*, 8 Ohio Dec. 174, 5 Ohio N. P. 457; *Smith v. Columbus, etc., R. Co.*, 8 Ohio N. P. 1; *State v. Cincinnati, etc., Electric St. R. Co.*, 10 Ohio Cir. Dec. 418; *State v. East Cleveland R. Co.*, 3 Ohio Cir. Dec. 471, 6 Ohio Cir. Ct. 318.

*Washington.* — *Wood v. Seattle*, 23 Wash. 1.

**Necessity for New Notice Where Membership of City Council Is Changed.** — *Seccomb v. Wurster*, 83 Fed. Rep. 856.

**Time of Publishing Notice.** — *Aydelott v. Cincinnati*, 4 Ohio Cir. Dec. 486, 11 Ohio Cir. Ct. 11.

2. *Louisiana.* — *Johnson v. New Orleans*, 105 La. 149; *New Orleans City, etc., R. Co. v. Watkins*, 48 La. Ann. 1550. See also *Board of Liquidation v. New Orleans*, 32 La. Ann. 915.

*Missouri.* — *State v. West Side St. R. Co.*, 146 Mo. 155.

*New York.* — *Beekman v. Third Ave. R. Co.*, 153 N. Y. 144; *People v. Barnard*, 48 Hun (N. Y.) 57, 36 Am. & Eng. R. Cas. 70 (no right to require bond with conditions not authorized by statute).

*Ohio.* — *Sloane v. People's Electric R. Co.*, 3 Ohio Cir. Dec. 674, 7 Ohio Cir. Ct. 84; *Knorr v. Miller*, 3 Ohio Cir. Dec. 297, 5 Ohio Cir. Ct. 609; *Simmons v. Toledo*, 3 Ohio Cir. Dec. 64, 5 Ohio Cir. Ct. 124; *Cincinnati St. R. Co. v. Smith*, 29 Ohio St. 291.

A statute requiring the municipality to sell a street-railway franchise to the "highest bidder" requires a sale to the highest bidder for money, and a sale to the highest bidder in yards of pavement is unauthorized. *Buckner v. Hart*, 52 Fed. Rep. 835, *affirmed* (C. C. A.) 54 Fed. Rep. 925.

**Sale Together of Two Disconnected Extensions.** — *Beekman v. Third Ave. R. Co.*, 13 N. Y. App. Div. 279, *affirmed* 153 N. Y. 144.

**Change of Route After Sale.** — *Buckner v. Hart*, 52 Fed. Rep. 835.

**Fake Bids.** — *Southern Boulevard R. Co. v. People's Traction Co.*, 5 N. Y. App. Div. 330.

**Advertisement for Bids.** — *Sloane v. People's Electric R. Co.*, 3 Ohio Cir. Dec. 674, 7 Ohio Cir. Ct. 84.

**Rights of Bidder.** — *People v. Barnard*, 110 N. Y. 548, *reversing* 48 Hun (N. Y.) 57.

**Power to Reject Bid.** — *Gallagher v. Johnson*, 11 Ohio Dec. (Reprint) 840, 30 Cinc. L. Bul. 139.

3. *United States.* — *Beeson v. Chicago*, 75 Fed. Rep. 880.

*Illinois.* — *Hunt v. Chicago Horse, etc., R. Co.*, 121 Ill. 638; *Doane v. Lake St. El. R. Co.*, 165 Ill. 510, 56 Am. Rep. 265; *Stewart v. Chicago Gen. St. R. Co.*, 58 Ill. App. 446.

*New Jersey.* — *Currie v. Atlantic City*, 66 N. J. L. 671.

*New York.* — *Schaper v. Brooklyn, etc., Cable R. Co.*, (Supm. Ct. Gen. T.) 4 N. Y. St. Rep. 860, *affirmed* 124 N. Y. 630.

*Ohio.* — *Neare v. Mt. Auburn Cable R. Co.*, 11 Ohio Dec. (Reprint) 782, 29 Cinc. L. Bul. 17; *Sloane v. People's Electric R. Co.*, 3 Ohio Cir. Dec. 674, 7 Ohio Cir. Ct. 84.

of street railways.<sup>1</sup> Where the power to license such railways or to consent to their construction is given to a municipal board or body, the consent or

**Consent to Single Track Does Not Authorize Double Track.**—*Roberts v. Easton*, 19 Ohio St. 78.

**Conclusiveness of Question of Consent.**—Where the consent of the property owners is a prerequisite to the power of the council to grant permission to construct a street railway, the action of the council in granting the permission is not conclusive evidence against the property owners on the street of consent by the requisite majority. *Roberts v. Easton*, 19 Ohio St. 78. See also *Beeson v. Chicago*, 75 Fed. Rep. 880; *Sommers v. Cincinnati*, 6 Ohio Dec. (Reprint) 887, 8 Am. L. Rec. 612; *Bullock v. West Chicago Rapid Transit Co.*, 23 Chicago Leg. N. 149; *Corry v. Gaynor*, 22 Ohio St. 584; *Hays v. Jones*, 27 Ohio St. 218; *Hamilton v. Cincinnati*, etc., *Electric St. R. Co.*, 8 Ohio Dec. 174, 5 Ohio N. P. 457; *Simmons v. Toledo*, 4 Ohio Cir. Dec. 69, 8 Ohio Cir. Ct. 535.

But it will not be presumed that the municipal authorities acted without such consent when their proceedings purport to be predicated upon it. *Cincinnati College v. Nesmith*, 2 Cinc. Super. Ct. 24.

**Consent as Regards Entirety of Route.**—Consents to a proposed line have been considered as consents to its construction as an entirety only. *Beeson v. Chicago*, 75 Fed. Rep. 880.

In *Ohio* it has been held that while the common council may not evade the statute requiring the consent of adjoining owners, by substituting one route for another, it may allow the application as to a part only of the route covered by the application and petition. *Simmons v. Toledo*, 3 Ohio Cir. Dec. 64, 5 Ohio Cir. Ct. 124.

In *New Jersey* it has been held that if permission is asked to construct a street railroad upon a route partly outside of the jurisdiction of the municipality, it will be sufficient to support a grant for the part of the route within such jurisdiction that consents of the owners of the requisite proportion of frontage upon that part be obtained and filed. *Hutchinson v. Belmar*, 61 N. J. L. 443, affirmed 62 N. J. L. 450.

**Conditional Consents.**—*People v. Chicago West Div. R. Co.*, 118 Ill. 113; *Moore v. Hadfield*, 62 N. J. L. 386.

Conditions attached to the consent of a property owner do not render his consent invalid. *Hutchinson v. Belmar*, 61 N. J. L. 443, affirmed 62 N. J. L. 450.

**Consents Required of Majority of Property Owners on Each Street over Which Railway Runs.**—*Neare v. Mt. Auburn Cable R. Co.*, 4 Ohio Dec. 475; *Mt. Auburn Cable R. Co. v. Neare*, 54 Ohio St. 153. See also *Sanfleet v. Toledo*, 8 Ohio Cir. Dec. 711, 10 Ohio Cir. Ct. 460.

**Consent through Agent.**—*North Chicago St. R. Co. v. Cheetham*, 58 Ill. App. 318.

**Consent of One Tenant in Common.**—*Orton v. Metuchen*, 66 N. J. L. 572; *Ronnebaum v. Mt. Auburn R. Co.*, 6 Ohio Dec. 24; *Simmons v. Toledo*, 4 Ohio Cir. Dec. 69, 8 Ohio Cir. Ct. 535.

**Consent by Trustees.**—*Hutchinson v. Belmar*, 61 N. J. L. 443, affirmed 62 N. J. L. 450.

**Consent of Executor.**—*Orton v. Metuchen*, 66 N. J. L. 572.

**Consent of Husband.**—*Simmons v. Toledo*, 4 Ohio Cir. Dec. 69, 8 Ohio Cir. Ct. 535.

**Consent of Owner of Remainder in Fee.**—*Simmons v. Toledo*, 4 Ohio Cir. Dec. 69, 8 Ohio Cir. Ct. 535.

**Consent of Board of Education as to School Lands.**—*Currie v. Atlantic City*, 66 N. J. L. 140.

**Effect of Subsequent Conveyances by Consenting Owner.**—*Currie v. Atlantic City*, 66 N. J. L. 140; *Adee v. Nassau Electric R. Co.*, 65 N. Y. App. Div. 529.

**Acknowledgment of Consents.**—*Orton v. Metuchen*, 66 N. J. L. 572.

**Recording Consents.**—*Adee v. Nassau Electric R. Co.*, 65 N. Y. App. Div. 529.

**Necessity for Entry of Consents on Records of City Council.**—*Sanfleet v. Toledo*, 8 Ohio Cir. Dec. 711, 10 Ohio Cir. Ct. 460.

**Location of Property as Regards Validity of or Necessity for Consent.**—*Currie v. Atlantic City*, 66 N. J. L. 140; *Tiedmann v. Staten Island Midland R. Co.*, 18 N. Y. App. Div. 368; *Merriman v. Utica Belt Line St. R. Co.*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 269.

**Corner Property.**—*Merriman v. Utica Belt Line St. R. Co.*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 269.

**Revocation of Consents.**—It has been held that property owners are entitled to revoke their consents before action is taken by the municipality. *Bullock v. West Chicago Rapid Transit Co.*, 23 Chicago Leg. N. 149; *Simmons v. Toledo*, 4 Ohio Cir. Dec. 69, 8 Ohio Cir. Ct. 535; *Hays v. Jones*, 27 Ohio St. 218. But the contrary has also been held. *Currie v. Atlantic City*, 66 N. J. L. 140; *Adee v. Nassau Electric R. Co.*, 65 N. Y. App. Div. 529. And to render a revocation effectual, notice of such revocation must be given before action is taken by the municipality. *Hutchinson v. Belmar*, 61 N. J. L. 443, affirmed 62 N. J. L. 450.

**Burden of Proving Invalidity of Consent.**—*Adee v. Nassau Electric R. Co.*, 65 N. Y. App. Div. 529.

**For Whose Benefit Consents Inure.**—*Adee v. Nassau Electric R. Co.*, 65 N. Y. App. Div. 529.

**Legality of Contract in Consideration of Consent.**—It has been held that an agreement between a street-railway company and a landowner made in consideration of consent to the construction of the railway is not illegal on the ground that such consent by an individual affects not only his own property, but the property of others and the interests of the public at large. *Montclair Military Academy v. North Jersey St. R. Co.*, 65 N. J. L. 339.

1. *Board of Liquidation v. New Orleans*, 32 La. Ann. 915; *State v. Bell*, 34 Ohio St. 194, 21 Am. R. Rep. 84.

Where the power of determining when and on what streets the public convenience requires street railroads is devolved by law upon the city council, it may not delegate the power to any other officers, nor to the street-railway company, which would be influenced by its own interest rather than by that of the public. *Citizens' St. R. Co. v. Jones*, 34 Fed. Rep. 579.

license can be given only where the board or body is assembled in corporate meeting.<sup>1</sup>

(2) *Imposing Conditions.* — When the consent of the municipality or *quasi* municipality in which the railway is to be constructed is required as a condition precedent to the right to construct the railway, its authorities may affix to the consent given lawful and reasonable conditions beneficial to the public,<sup>2</sup> such as conditions that the railway shall be constructed and put in operation within a certain time;<sup>3</sup> limiting the time for which the franchise may be enjoyed;<sup>4</sup> requiring the grantee to remove its tracks when ordered by the municipality;<sup>5</sup> limiting the rate of speed at which the cars may be operated;<sup>6</sup> restricting the right of the grantee to the carriage of passengers only and prohibiting the carriage of freight;<sup>7</sup> requiring the consent of the abutting property owners to the construction of the railway;<sup>8</sup> regulating the location of tracks upon the street;<sup>9</sup> providing that the character of the railway construction shall be subject to the approval of the municipality;<sup>10</sup> fixing the fare to be charged for carrying passengers;<sup>11</sup> requiring the running of a certain

**Optional Routes and Tracks.** — The city may leave to the discretion of the street-railway company the use of any one of several streets. *Girard College Pass. R. Co. v. Thirteenth, etc., St., etc., R. Co., 7 Phila. (Pa.) 620.* Or it may give to the company the right to use a single or a double track, and construction and operation of the line in either form does not preclude it from afterwards changing to the other form as the demands of business require. *Ransom v. Citizens' R. Co., 104 Mo. 375.*

1. *West Jersey Traction Co. v. Camden Horse R. Co., 53 N. J. Eq. 163; Pennsylvania R. Co. v. Montgomery County Pass. R. Co., 167 Pa. St. 62, 46 Am. St. Rep. 659.*

**Meeting of Township's Supervisors Held in Attorney's Office.** — *Meixwell v. Railroad Co., 7 Northam. Co. Rep. (Pa.) 274.*

**Approval of Report of Committee of Aldermen Sufficient Action by Board of Aldermen.** — *Abraham v. Meyers, 29 Abb. N. Cas. (N. Y.) 384.*

2. **Imposing Conditions.** — *Illinois.* — *People v. Suburban R. Co., 178 Ill. 594; Citizens' Horse R. Co. v. Belleville, 47 Ill. App. 388.* See also *Harvey v. Aurora, etc., R. Co., 186 Ill. 283.*

*Kansas.* — *Eureka Light, etc., Co. v. Eureka, 5 Kan. App. 669.*

*Michigan.* — *Detroit v. Ft. Wayne, etc., R. Co., 95 Mich. 456, 35 Am. St. Rep. 580; Grosse Pointe Tp. v. Detroit, etc., R. Co., (Mich. 1902) 90 N. W. Rep. 42.*

*New Jersey.* — *Grey v. New York, etc., Traction Co., 56 N. J. Eq. 463.*

*New York.* — *New York v. Eighth Ave. R. Co., 118 N. Y. 389; New York, etc., R. Co. v. New York, 1 Hilt. (N. Y.) 562; Abraham v. Meyers, (Supm. Ct. Spec. T.) 29 Abb. N. Cas. (N. Y.) 384; People v. Barnard, 110 N. Y. 548, reversing 48 Hun (N. Y.) 57.* See also *Matter of Atlantic Ave. El. R. Co., 136 N. Y. 292.*

*Ohio.* — *Cincinnati v. Cincinnati St. R. Co., 1 Ohio Dec. 591, 31 Cinc. L. Bul. 308.*

*Pennsylvania.* — *Allegheny v. Millville, etc., St. R. Co., 159 Pa. St. 411; Philadelphia v. Ridge Ave. Pass. R. Co., 143 Pa. St. 444.*

3. *Citizens' Horse R. Co. v. Belleville, 47 Ill. App. 388; Grey v. New York, etc., Traction Co., 56 N. J. Eq. 463; Abraham v. Meyers, (Supm. Ct. Spec. T.) 29 Abb. N. Cas. (N. Y.) 384; Plymouth Tp. v. Chestnut Hill, etc., R. Co., 168*

*Pa. St. 181; Ft. Worth St. R. Co. v. Rosedale St. R. Co., 68 Tex. 169.*

4. *Louisville Trust Co. v. Cincinnati, (C. C. A.) 76 Fed. Rep. 296; City R. Co. v. Citizens' St. R. Co., (Ind. 1898) 52 N. E. Rep. 157; Houston v. Houston City St. R. Co., 83 Tex. 548, 29 Am. St. Rep. 679.* See also *City R. Co. v. Citizens' St. R. Co., 166 U. S. 557.*

5. *Rapid R. Co. v. Mt. Clemens, 118 Mich. 133.*

6. *Chouquette v. Southern Electric R. Co., 152 Mo. 257.* See also *Ruschenberg v. Southern Electric R. Co., 161 Mo. 70.*

7. *St. Louis, etc., R. Co. v. Kirkwood, 159 Mo. 239. Compare State v. Dayton Traction Co., 10 Ohio Cir. Dec. 212.*

8. *Chicago City R. Co. v. People, 73 Ill. 541,* holding further that slight evidence is sufficient to prove consent of property owners after a lapse of a long period.

9. *Nieman v. Detroit Suburban St. R. Co., 103 Mich. 256; Gloversville v. Johnstown, etc., Horse R. Co., 66 Hun (N. Y.) 627; Philadelphia v. Continental Pass. R. Co., 11 Phila. (Pa.) 315, 33 Leg. Int. (Pa.) 43.*

10. *Detroit v. Detroit City R. Co., 37 Mich. 558; Grand Rapids Electric R. Co. v. Grand Rapids, 84 Mich. 257.*

11. *Detroit v. Detroit Citizens St. R. Co., 184 U. S. 368; Cleveland City R. Co. v. Cleveland, 94 Fed. Rep. 385; People v. Suburban R. Co., 178 Ill. 595; City R. Co. v. Citizens' St. R. Co., (Ind. 1898) 52 N. E. Rep. 157; Robira v. New Orleans, etc., R. Co., 45 La. Ann. 1368; Detroit v. Ft. Wayne, etc., R. Co., 95 Mich. 456, 35 Am. St. Rep. 580; Gaedeke v. Staten Island Midland R. Co., 43 N. Y. App. Div. 514; People v. Barnard, 110 N. Y. 548, reversing 48 Hun (N. Y.) 57; Beekman v. Third Ave. R. Co., 153 N. Y. 144; Allegheny v. Millville, etc., St. R. Co., 159 Pa. St. 411.*

In *Connecticut* it was held that a municipality authorized to approve the plans for the construction of a street railway had no power to impose as conditions to its approval provisions relating to the fare to be charged by the railway company on another of its lines. *Fair Haven, etc., R. Co. v. New Haven, 74 Conn. 102.* See, however, *Gaedeke v. Staten Island Midland R. Co., 43 N. Y. App. Div. 514.*

number of cars;<sup>1</sup> prohibiting the abandonment of other lines;<sup>2</sup> or requiring indemnity from the street-railway company against liabilities arising from the construction and operation of the railway.<sup>3</sup> Other examples of conditions that may be lawfully affixed are that the railway company shall observe and be subject to present and future ordinances regulating the operation of the railway;<sup>4</sup> that the company shall keep in repair the streets upon which its tracks are constructed;<sup>5</sup> that it shall water the streets;<sup>6</sup> that it shall pay for the use of the streets a yearly sum<sup>7</sup> or a proportion of the earnings of the railway;<sup>8</sup> or that it shall pay the expense of passing the ordinance conferring the license and a reasonable attorney's fee.<sup>9</sup>

**Conditions Which Are in Conflict with General Laws**, such as that the company to which the license or grant is made will not exercise one of its corporate powers,<sup>10</sup> cannot, of course, be imposed;<sup>11</sup> and an attempt to impose unauthorized conditions is void and does not affect the validity of the municipality's license or consent.<sup>12</sup>

**Waiving Conditions.** — A municipality may, of course, waive the performance of conditions imposed by it in giving its consent to the construction of street railways.<sup>13</sup>

**4. Who May Acquire Franchise** — *a. IN GENERAL.* — Though, as a matter of fact, street railways are almost universally operated by private or quasi-public corporations, the franchise to own and operate such a railway may belong to an individual,<sup>14</sup> and in the absence of constitutional restriction the legislature may authorize municipalities to construct and operate street railways over their streets.<sup>15</sup> In *Michigan*, however, it has been held that the constitutional provision prohibiting the state from being interested in any work of internal improvement prohibited the legislature from authorizing a city, which is to be considered as an agency of the state, to construct and

1. *Central R., etc., Co.'s Appeal*, 67 Conn. 199; *Potwin Place v. Topeka R. Co.*, 51 Kan. 609, 37 Am. St. Rep. 312.

2. *Central R., etc., Co.'s Appeal*, 67 Conn. 199.

3. *Taylor v. Dunn*, 80 Tex. 652.

4. *Faust v. Second, etc., St. Pass. R. Co.*, 3 Phila. (Pa.) 164, 15 Leg. Int. (Pa.) 221; *Philadelphia v. Ridge Ave. Pass. R. Co.*, 143 Pa. St. 444; *Providence v. Union R. Co.*, 12 R. I. 473.

5. *Citizens' Horse R. Co. v. Belleville*, 47 Ill. App. 388; *City R. Co. v. Citizens' St. R. Co.*, (Ind. 1898) 52 N. E. Rep. 157; *Pittsburgh, etc., R. Co. v. Birmingham*, 51 Pa. St. 41; *Lawrence County v. New Castle Electric St. R. Co.*, 8 Pa. Super. Ct. 313 (strengthening bridge). See also *infra*, this title, *Improvement, Paving, and Repair of Streets*.

6. *Newcomb v. Norfolk Western St. R. Co.*, 179 Mass. 449.

7. *Central R., etc., Co.'s Appeal*, 67 Conn. 199; *Chicago Gen. R. Co. v. Chicago*, 176 Ill. 253, 68 Am. St. Rep. 188; *City R. Co. v. Citizens' St. R. Co.*, (Ind. 1898) 52 N. E. Rep. 157; *Covington St. R. Co. v. Covington*, 9 Bush (Ky.) 127; *New York v. Eighth Ave. R. Co.*, 118 N. Y. 389; *Lawrence County v. New Castle Electric St. R. Co.*, 8 Pa. Super. Ct. 313; *Providence v. Union R. Co.*, 12 R. I. 473.

8. *Carlisle v. Cumberland Valley Electric Pass. R. Co.*, 22 Pa. Co. Ct. 221; *Allegheny v. Millville, etc., St. R. Co.*, 159 Pa. St. 411.

9. *Hutchinson v. Belmar*, 61 N. J. L. 443, affirmed 62 N. J. L. 450.

10. **Conditions in Conflict with General Laws.** — *State v. Dayton Traction Co.*, 10 Ohio Cir. Dec. 212, 18 Ohio Cir. Ct. 490.

11. *People v. Sutter St. R. Co.*, 117 Cal. 604; *Central R., etc., Co.'s Appeal*, 67 Conn. 199 (conditions as to fenders on cars); *Grand Rapids Electric R. Co. v. Grand Rapids*, 84 Mich. 257; *Beekman v. Third Ave. R. Co.*, 153 N. Y. 144; *Matter of Kings County El. R. Co.*, 105 N. Y. 97; *Harrisburg City Pass. R. Co. v. Harrisburg*, 149 Pa. St. 465.

12. *Fair Haven, etc., R. Co. v. New Haven*, 74 Conn. 102; *Powell v. Macon, etc., R. Co.*, 92 Ga. 209.

The plea of *ultra vires* cannot be advanced by the road where it has accepted the advantages and benefits predicated upon the ordinance. *People v. Suburban R. Co.*, 178 Ill. 594.

13. *Chicago City R. Co. v. People*, 73 Ill. 541 (conditions limiting time for construction of railway).

14. **In Whom Franchise Vested.** — *Detroit v. Detroit City R. Co.*, 56 Fed. Rep. 867; *Brown v. Duplessis*, 14 La. Ann. 854; *McKee v. Grand Rapids, etc., St. R. Co.*, 41 Mich. 274; *Nash v. Lowry*, 37 Minn. 261; *New York, etc., R. Co. v. Forty-second St., etc., R. Co.*, 50 Barb. (N. Y.) 309; *Henderson v. Ogden City R. Co.*, 7 Utah 199, 46 Am. & Eng. R. Cas. 95; *Watson v. Fairmont, etc., R. Co.*, 49 W. Va. 528. See also *Atkinson v. Asheville St. R. Co.*, 113 N. Car. 581; *Budd v. Multnomah St. R. Co.*, 15 Oregon 404; *Middlebury Bank v. Edgerton*, 30 Vt. 182.

15. **Franchise in Municipality.** — *Matter of Rapid Transit R. Com'rs*, 26 N. Y. App. Div.

operate a street railway.<sup>1</sup> Where the franchise is claimed by a corporation under municipal grant or license, it must, of course, have power to operate the street railway,<sup>2</sup> but a corporation empowered to operate a street railway may take a street franchise extending beyond the term of its own franchise to exist as a corporation, the street franchise being assignable;<sup>3</sup> and similarly, such a corporation may accept a street franchise running for a shorter period than its corporate existence.<sup>4</sup>

**b. ORGANIZATION AND INCORPORATION OF STREET-RAILWAY CORPORATIONS.** — The statutes in the several jurisdictions provide by general laws for the organization and incorporation of street-railway corporations,<sup>5</sup> and the same general principles of law applicable to the organization and incorporation of other corporations under general laws<sup>6</sup> apply, of course, to the corporations here under consideration.<sup>7</sup> In the absence of constitutional restriction, the legislature may validate the prior invalid incorporation of street-railway corporations.<sup>8</sup> In many states constitutional provisions exist which forbid the creation or formation of any corporation except under general laws.<sup>9</sup>

**5. Acceptance of Franchise.** — While the grant of a street-railway franchise must be accepted by the grantee before it can become binding,<sup>10</sup> such acceptance may be implied from the circumstances,<sup>11</sup> such as the previous application

608; *Matter of Rapid Transit R. Com'rs*, 5 N. Y. App. Div. 290.

1. *Atty.-Gen. v. Pingree*, 120 Mich. 550.

2. *Corporation under Municipal Grant.* — *Knoxville v. Africa*, (C. C. A.) 77 Fed. Rep. 501, reversing 70 Fed. Rep. 729; *Watkins v. West Philadelphia Pass. R. Co.*, 1 Pa. Dist. 463; *Com. v. Northeastern El. R. Co.*, 161 Pa. St. 409; *Citizens' St. R. Co. v. Africa*, 100 Tenn. 26.

Where a corporation, by virtue of a legislative grant, has authority to construct and operate its road in certain streets, an ordinance giving to it authority to extend its tracks to other streets does not contravene a constitutional provision against ordinances conferring corporate powers. *Sims v. Brooklyn St. R. Co.*, 37 Ohio St. 556.

**Ordinary Commercial Steam Railway.** — *Com. v. Northeastern El. R. Co.*, 161 Pa. St. 409; *Pennsylvania R. Co. v. Bridgeport R. Co.*, 11 Montg. Co. Rep. (Pa.) 73; *Cincinnati v. Cincinnati Inclined Plane R. Co.*, 11 Ohio Dec. (Reprint) 892, 30 Cinc. L. Bul. 321.

3. *Detroit v. Detroit Citizens' St. R. Co.*, 184 U. S. 368; *Detroit Citizens' St. R. Co. v. Detroit*, (C. C. A.) 64 Fed. Rep. 628; *People v. O'Brien*, 111 N. Y. 1, 7 Am. St. Rep. 684. *Compare* *Detroit v. Detroit City R. Co.*, 56 Fed. Rep. 867; *Detroit v. Detroit City R. Co.*, 60 Fed. Rep. 161.

4. *Louisville Trust Co. v. Cincinnati*, (C. C. A.) 76 Fed. Rep. 296. See also *Gaw v. Bristol*, etc., R. Co., 22 Pa. Co. Ct. 332.

5. See the local statutes.

6. See the title CORPORATIONS (PRIVATE), vol. 7, p. 639 *et seq.*

7. **General Statutes Applicable to Street-railway Companies** — *Delaware.* — *Wilmington City R. Co. v. People's R. Co.*, (Del. Ch. 1900) 47 Atl. Rep. 245.

*Kansas.* — *Atchison St. R. Co. v. Missouri Pac. R. Co.*, 31 Kan. 660.

*Maryland.* — *Oler v. Baltimore*, etc., R. Co., 41 Md. 583, 7 Am. R. Rep. 495; *Koch v. North Ave. R. Co.*, 75 Md. 222, 50 Am. & Eng. R. Cas. 401.

*New Hampshire.* — *Keene Electric R. Co.'s Petition*, 68 N. H. 434.

*New York.* — *Bohmer v. Haffen*, 35 N. Y. App. Div. 381.

*Pennsylvania.* — *Central Pennsylvania Telephone Co. v. Wilkes Barre*, etc., R. Co., 1 Pa. Dist. 628; *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.*, 14 Pa. Co. Ct. 88; *Com. v. Northeastern El. R. Co.*, 3 Pa. Dist. 104; *Hannum v. Railway Co.*, 8 Del. Co. Rep. (Pa.) 91; *In re Easton Transit Co.*, 2 Pa. Dist. 649; *Junction Pass. R. Co. v. Williamsport Pass. R. Co.*, 154 Pa. St. 116; *Berks County v. Reading City Pass. R. Co.*, 167 Pa. St. 102.

*Texas.* — *Aycock v. San Antonio Brewing Assoc.*, 26 Tex. Civ. App. 341.

**Designation of Route.** — *Africa v. Knoxville*, 70 Fed. Rep. 729 (M. & V. Code Tenn., § 1920, Annot. Code Tenn. 1896, § 2392).

**Map and Profile of Route.** — *Delaware*, etc., R. Co. v. *Syracuse*, etc., R. Co., (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 456.

**Right of Purchasers of Street Franchise to Organize Corporation.** — *Birmingham R.*, etc., Co. v. *Birmingham Traction Co.*, 128 Ala. 110 (Civ. Code Ala. 1896, § 1199).

**Presumption of Incorporation under General Laws.** — *Smith v. Indianapolis St. R. Co.*, 158 Ind. 425.

8. *Brown v. Atlanta R.*, etc., Co., 113 Ga. 462.

9. *Denver*, etc., R. Co. v. *Denver City R. Co.*, 2 Colo. 673; *Gulf City R. Co. v. Gulf City*, etc., R. Co., 63 Tex. 529.

The grant of additional powers to a corporation already existing, as, for example, authority to construct its road on such streets as the city council shall prescribe, does not violate such a constitutional provision. *Hodges v. Baltimore Union Pass. R. Co.*, 58 Md. 603, 10 Am. & Eng. R. Cas. 270.

10. **Acceptance of Franchise Necessary.** — *Logansport R. Co. v. Logansport*, 114 Fed. Rep. 688; *Trenton St. R. Co. v. Pennsylvania R. Co.*, 63 N. J. Eq. 276; *Williams Valley R. Co. v. Lykens*, etc., St. R. Co., 1 Dauphin Co. Rep. (Pa.) 225.

11. *Atty.-Gen. v. Metropolitan R. Co.*, 125 Mass. 515, 28 Am. Rep. 264.

by the grantee therefor, or even, it seems, from the fact that the grant is beneficial.<sup>1</sup>

**IV. CROSSING OTHER RAILROADS — 1. In General.** — A franchise for the operation of a street railway on a public street does not confer any right of exclusive occupancy of the street nor clothe the owner thereof with power to prevent the crossing of its tracks by another company having a franchise to operate a railway on an intersecting street;<sup>2</sup> and the same is true with regard to the right of a street railway to cross the tracks of an ordinary railroad,<sup>3</sup> or of an ordinary railroad to cross the tracks of a street railway.<sup>4</sup> In the case of a crossing of an ordinary railroad by an electric railway operated by the trolley system, the trolley wire may be suspended over the tracks of the railroad company provided that sufficient space is left for the passage of trains without danger to the employees.<sup>5</sup> Where a street railway has rightfully constructed a crossing over another railroad, it has the right, when repairs thereto become necessary, to replace it with a crossing of a safer and better pattern.<sup>6</sup> A railway company whose tracks are to be crossed cannot prevent such crossing on the ground that the company attempting to construct the crossing is usurping a street-railway franchise.<sup>7</sup>

**2. Compensation.** — A railroad or street-railway company whose tracks on a public street are crossed by another street-railway company is not entitled to compensation for the resulting injuries arising out of the impairment of its easement in the street<sup>8</sup> nor for the interruption of its business rendered neces-

1. *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557.

2. **Crossing of Tracks by Other Companies.** — *Highland Ave., etc., R. Co. v. Birmingham Union R. Co.*, 93 Ala. 505; *Consolidated Traction Co. v. South Orange, etc., Traction Co.*, 56 N. J. Eq. 569; *Morris, etc., R. Co. v. Newark Pass. R. Co.*, 51 N. J. Eq. 379; *Metropolitan St. R. Co. v. Toledo Electric St. R. Co.*, 6 Ohio Cir. Dec. 733, 9 Ohio Cir. Ct. 664. *Compare Highland Ave., etc., R. Co. v. Birmingham R., etc., Co.*, 113 Ala. 239.

3. **Street Railway Crossing Railroad** — *Connecticut*. — *New York, etc., R. Co. v. Bridgeport Traction Co.*, 65 Conn. 410.

*Delaware*. — *Philadelphia, etc., R. Co. v. Wilmington City R. Co.*, (Del. Ch. 1897) 38 Atl. Rep. 1067.

*Georgia*. — *Southern R. Co. v. Atlanta R., etc., Co.*, 111 Ga. 679.

*Illinois*. — *Chicago, etc., R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255.

*Indiana*. — *Chicago, etc., R. Co. v. Whiting, etc., St. R. Co.*, 139 Ind. 297, 47 Am. St. Rep. 264; *Chicago, etc., R. Co. v. Hammond, etc., R. Co.*, 151 Ind. 577.

*Kentucky*. — *Elizabethtown, etc., R. Co. v. Ashland St. R. Co.*, 96 Ky. 347; *Louisville, etc., R. Co. v. Bowling Green R. Co.*, (Ky. 1901) 63 S. W. Rep. 4.

*Missouri*. — *Kansas City, etc., R. Co. v. St. Joseph Terminal R. Co.*, 97 Mo. 457.

*New Jersey*. — *West Jersey R. Co. v. Camden, etc., R. Co.*, 52 N. J. Eq. 31.

*Ohio*. — *Cincinnati, etc., Electric St. R. Co. v. Cincinnati, etc., R. Co.*, 12 Ohio Cir. Dec. 113.

*Pennsylvania*. — *Scranton, etc., Traction Co. v. Delaware, etc., Canal Co.*, 1 Pa. Super. Ct. 409; *Pennsylvania R. Co. v. Suburban Rapid Transit Co.*, 1 Pa. Dist. 636; *Du Bois Traction Pass. R. Co. v. Buffalo, etc., R. Co.*, 149 Pa. St. 1; *Williams Valley R. Co. v. Lykens, etc., Val-*

*ley St. R. Co.*, 192 Pa. St. 552, 1 Dauphin Co. Ct. Rep. (Pa.) 225.

*Texas*. — *Texas, etc., R. Co. v. Rosedale St. R. Co.*, 64 Tex. 80, 53 Am. Rep. 739.

*Compare Port Richmond, etc., Electric R. Co. v. Staten Island Rapid Transit R. Co.*, 144 N. Y. 445 (interference with gate system).

4. *Lynn, etc., R. Co. v. Boston, etc., R. Corp.*, 114 Mass. 88.

5. *Philadelphia, etc., R. Co. v. Wilmington City R. Co.*, (Del. Ch. 1897) 38 Atl. Rep. 1067; *Erslew v. New Orleans, etc., R. Co.*, 49 La. Ann. 86.

6. *Chicago, etc., R. Co. v. Hammond-Whiting, etc., Electric R. Co.*, 151 Ind. 577.

7. *Philadelphia, etc., R. Co. v. Wilmington City R. Co.*, (Del. Ch. 1897) 38 Atl. Rep. 1067; *Consolidated Traction Co. v. South Orange, etc., Traction Co.*, 56 N. J. Eq. 569. See also *Du Bois Traction Pass. R. Co. v. Buffalo, etc., R. Co.*, 149 Pa. St. 1; *Pennsylvania R. Co. v. Greensburg, etc., R. Co.*, 176 Pa. St. 559. *Compare Chicago, etc., R. Co. v. General Electric R. Co.*, 79 Ill. App. 569; *Geneva, etc., R. Co. v. New York Cent., etc., R. Co.*, 24 N. Y. App. Div. 335; *Kingston v. Colonial City Traction Co.*, 17 N. Y. App. Div. 274.

8. **No Compensation** — *United States*. — *Omaha Horse R. Co. v. Cable Tram-Way Co.*, 32 Fed. Rep. 727.

*Alabama*. — *Highland Ave., etc., R. Co. v. Birmingham Union R. Co.*, 93 Ala. 505.

*California*. — *Market St. R. Co. v. Central R. Co.*, 51 Cal. 583.

*Delaware*. — *Philadelphia, etc., R. Co. v. Wilmington City R. Co.*, (Del. Ch. 1897) 38 Atl. Rep. 1067.

*Georgia*. — *Southern R. Co. v. Atlanta R., etc., Co.*, 111 Ga. 679.

*Illinois*. — *Chicago, etc., R. Co. v. West Chicago St. R. Co.*, 156 Ill. 255; *Pittsburg, etc., R. Co. v. West Co.*, 156 Ill. App. 273.



sary in the construction of the crossing,<sup>1</sup> though it has been held that the owner of the tracks crossed would be entitled to damages for any injury to its tracks.<sup>2</sup>

**3. Expense of Making and Maintaining Crossing.**—It seems that a street-railway company which crosses the pre-existing tracks of another street railway or ordinary railroad is bound to construct the crossing at its own expense and to maintain the crossing in a proper condition of repair; but it is not required to pay any portion of the expense of maintaining at such crossing gates which the railroad company is required under an exercise of the police power to maintain for the protection of the public.<sup>3</sup>

**4. Statutory Regulations.**—In some jurisdictions the statutes regulate the construction of the tracks of ordinary railroads and of street railways across each other,<sup>4</sup> and have intrusted to commissioners<sup>5</sup> or to courts<sup>6</sup> the power to regulate the manner of constructing such crossings. Where general power to regulate the construction of crossings by street railways over the tracks of ordinary railroads is given to commissioners or courts, they may, in a proper exercise of their discretion, deny to a street-railway company the right to construct a grade crossing and compel it to construct an overhead crossing.<sup>7</sup> So some statutes direct that the tribunals to which is intrusted the duty of determining the manner of crossing shall avoid grade crossings whenever practicable.<sup>8</sup>

*Indiana.*—Chicago, etc., R. Co. v. Whiting, etc., R. Co., 139 Ind. 297, 47 Am. St. Rep. 264.

*Massachusetts.*—Lynn, etc., R. Co. v. Boston, etc., R. Corp., 114 Mass. 88.

*New Jersey.*—Morris, etc., R. Co. v. Newark Pass. R. Co., 51 N. J. Eq. 379, 52 N. J. Eq. 340; Consolidated Traction Co. v. South Orange, etc., Traction Co., 56 N. J. Eq. 569.

*New York.*—New York, etc., R. Co. v. Forty-second St., etc., R. Co., 50 Barb. (N. Y.) 309; Brooklyn Cent., etc., R. Co. v. Brooklyn City R. Co., 33 Barb. (N. Y.) 420. *Compare* People's R. Co. v. Syracuse, etc., R. Co., (Supm. Ct. Spec. T.) 22 Abb. N. Cas. (N. Y.) 427.

*Ohio.*—Cincinnati, etc., Electric St. R. Co. v. Cincinnati, etc., R. Co., 12 Ohio Cir. Dec. 113.

*Pennsylvania.*—Market St. Pass. R. Co. v. Union Pass. R. Co., 10 Phila. (Pa.) 43, 30 Leg. Int. (Pa.) 154; Delaware, etc., R. Co. v. Wilkes-Barre, etc., R. Co., 1 Pa. Dist. 627; Lockhart v. Craig St. R. Co., 139 Pa. St. 419; Du Bois Traction Pass. R. Co. v. Buffalo, etc., R. Co., 149 Pa. St. 1.

*Compare* Central R. Co. v. Philadelphia, etc., R. Co., 95 Md. 428.

A street-railway company has no right to cross the right of way of another railway company at a point not upon a highway without the consent of the latter, or without acquiring the right to cross by the exercise of the power of eminent domain. Northern Cent. R. Co. v. Harrisburg, etc., Electric R. Co., 177 Pa. St. 142. See also Cincinnati Southern R. Co. v. Chattanooga Electric St. R. Co., 44 Fed. Rep. 470, and the title CROSSINGS, vol. 8, pp. 340, 351.

1. Consolidated Traction Co. v. South Orange, etc., Traction Co., 56 N. J. Eq. 569.

2. Central Pass. R. Co. v. Philadelphia, etc., R. Co., 95 Md. 428. See, however, Consolidated Traction Co. v. South Orange, etc., Traction Co., 56 N. J. Eq. 569.

3. Central Pass. R. Co. v. Philadelphia, etc., R. Co., 95 Md. 428.

**4. Statutes Regulating Construction of Crossings.**—Geneva, etc., R. Co. v. New York Cent., etc., R. Co., 163 N. Y. 228; Cincinnati, etc., Electric St. R. Co. v. Cincinnati, etc., R. Co., 12 Ohio Cir. Dec. 113; Baltimore, etc., R. Co. v. Hanover, etc., St. R. Co., 13 Pa. Co. Ct. 291.

**Constitutionality of Act as Affected by Title**—Jackson, etc., Traction Co. v. Railroads Com'r, 128 Mich. 164 (Act Mich. 1893, No. 171).

5. Jackson, etc., Traction Co. v. Railroads Com'r, 128 Mich. 164; Port Richmond, etc., Electric R. Co. v. Staten Island Rapid Transit R. Co., 71 Hun (N. Y.) 179; Buffalo, etc., R. Co. v. New York, etc., R. Co., 72 Hun (N. Y.) 583.

**Application for Appointment of Commissioners.**—Matter of Saratoga Electric R. Co., 58 Hun (N. Y.) 287.

6. New York, etc., R. Co. v. Atlantic Highlands, etc., Electric R. Co., 55 N. J. Eq. 522; Consolidated Traction Co. v. South Orange, etc., Traction Co., 56 N. J. Eq. 569; Matter of Trenton St. R. Co., 58 N. J. Eq. 533; Matter of West Jersey Traction Co., 59 N. J. Eq. 63; Trenton St. R. Co. v. United New Jersey R., etc., Co., 60 N. J. Eq. 500; Delaware, etc., Canal Co. v. Lackawanna Valley Traction Co., 2 Lack. Leg. N. (Pa.) 295; Delaware, etc., R. Co. v. Wilkes-Barre, etc., R. Co., 1 Pa. Dist. 627; Baltimore, etc., R. Co. v. Hanover, etc., St. R. Co., 2 Pa. Dist. 774; Pennsylvania R. Co. v. Braddock Electric R. Co., 152 Pa. St. 116.

**When Crossing Reasonable and Feasible—Number of Trains as Affecting Question.**—Louisville, etc., R. Co. v. Bowling Green R. Co., (Ky. 1901) 63 S. W. Rep. 4.

7. Jackson, etc., Traction Co. v. Railroads Com'r, 128 Mich. 164.

8. Jackson, etc., Traction Co. v. Railroads Com'r, 128 Mich. 164; *In re* Saddle River Traction Co., (N. J. 1898) 41 Atl. Rep. 107; Matter of West Jersey Traction Co., 59 N. J. Eq. 63; Williams Valley R. Co. v. Lykens, etc., St. R.

**V. JOINT USE OF TRACKS.** — The tracks of a street-railway company lawfully laid in a public street do not become a part of the street so as to authorize other railway companies as a matter of right to operate cars over them,<sup>1</sup> nor has a municipality any implied power to authorize one street-railway company to use the tracks of another company.<sup>2</sup> Two street-railway companies may, by agreement, authorize the one to use the tracks of the other;<sup>3</sup> but where street-railway tracks are owned by cotenants, one cannot, without the consent of the other, confer on a third the right to use such tracks.<sup>4</sup>

**Compulsory Acquisition of Right.** — A street-railway company has no inherent or implied right to acquire by condemnation proceedings under the power of eminent domain the right to use the tracks of another company;<sup>5</sup> but such right may be expressly conferred by the legislature.<sup>6</sup> So the legislature, under its reserved power to alter, amend, or repeal the charter of street-railway companies, may authorize one company to acquire the right to use the tracks of another company<sup>7</sup> and may delegate to municipalities the right

Co., 1 Dauphin Co. Rep. (Pa.) 225; Pennsylvania R. Co. v. Suburban Rapid Transit Co., 1 Pa. Dist. 636; Baltimore, etc., R. Co. v. Hanover, etc., St. R. Co., 2 Pa. Dist. 774; Scranton, etc., Traction Co. v. Delaware, etc., Canal Co., 180 Pa. St. 636.

**The Economy** with which a grade crossing may be avoided is to be considered in determining whether such avoidance is reasonably practicable. Matter of West Jersey Traction Co., 59 N. J. Eq. 63.

**But the Financial Ability** of the street railway seeking to make the crossing is not material. Chester Traction Co. v. Philadelphia, etc., R. Co., 188 Pa. St. 105.

**Construction of Undergrade Crossing Held Not to Be Reasonably Practicable under Circumstances of Case.** — *In re Saddle River Traction Co.*, (N. J. 1898) 41 Atl. Rep. 107; New York, etc., R. Co. v. Atlantic Highlands, etc., Electric R. Co., 55 N. J. Eq. 522.

**Construction of Undergrade Crossing Held to Be Reasonably Practicable under Circumstances.** — Matter of West Jersey Traction Co., 59 N. J. Eq. 63.

**Construction of Overhead Crossing Held to Be Reasonably Practicable.** — Scranton, etc., Traction Co. v. Delaware, etc., Canal Co., 180 Pa. St. 636; Pennsylvania R. Co. v. Warren St. R. Co., 188 Pa. St. 74; New York Cent., etc., R. Co. v. Warren St. R. Co., 188 Pa. St. 85; Chester Traction Co. v. Philadelphia, etc., R. Co., 188 Pa. St. 105; Williams Valley R. Co. v. Lykens Valley St. R. Co., 192 Pa. St. 552; Delaware, etc., Canal Co. v. Lackawanna Valley Traction Co., 2 Lack. Leg. N. (Pa.) 295; Pennsylvania R. Co. v. Conshohocken R. Co., 4 Pa. Dist. 12.

**1. Joint Use of Tracks.** — Louisville City R. Co. v. Central Pass. R. Co., 87 Ky. 223; Canal, etc., R. Co. v. St. Charles St. R. Co., 44 La. Ann. 1069; Crescent City R. Co. v. New Orleans, etc., R. Co., 48 La. Ann. 856; Metropolitan R. Co. v. Quincy R. Co., 12 Allen (Mass.) 262; Jersey City, etc., R. Co. v. Jersey City, etc., Horse R. Co., 20 N. J. Eq. 61; Brooklyn Cent. R. Co. v. Brooklyn City R. Co., 32 Barb. (N. Y.) 358. See also Com. v. Temple, 14 Gray (Mass.) 74; Com. v. Smedley, 17 Phila. (Pa.) 18, 41 Leg. Dist. 12.

**2. Mercantile Trust, etc., Co. v. Collins** Park, etc., R. Co., 101 Fed. Rep. 347; Brooklyn R. Co. v. Brooklyn City R. Co., 32 Barb. (N. Y.) 358.

Y.) 358; Texarkana, etc., R. Co. v. Texas, etc., R. Co., 28 Tex. Civ. App. 551.

**3. Georgia.** — Trust Co. v. State, 109 Ga. 736. *Illinois.* — Chicago v. Evans, 24 Ill. 52.

*Louisiana.* — Canal, etc., R. Co. v. Orleans R. Co., 44 La. Ann. 54.

*New York.* — People v. O'Brien, 111 N. Y. 1, 7 Am. St. Rep. 684; Roddy v. Brooklyn Heights R. Co., (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 373; Brooklyn El. R. Co. v. Brooklyn, etc., R. Co., 23 N. Y. App. Div. 29; Gallagher v. Keating, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 131; Ingersoll v. Nassau Electric R. Co., 157 N. Y. 453; Chapman v. Syracuse Rapid Transit R. Co., (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 626.

*Ohio.* — Toledo, etc., R. Co. v. Toledo Traction Co., 8 Ohio Dec. 191, 5 Ohio N. P. 443; Toledo Electric St. R. Co. v. Toledo, etc., R. Co., 1 Ohio Dec. 33, 7 Ohio N. P. 211.

**Construction of Agreements.** — Atlanta R., etc., Co. v. Atlanta Rapid Transit Co., 113 Ga. 481; Coney Island, etc., R. Co. v. Coney Island, etc., R. Co., 38 N. Y. App. Div. 494; Toledo, etc., R. Co. v. Toledo Traction Co., 8 Ohio Cir. Dec. 204, 15 Ohio Cir. Ct. 190, 9 Ohio Cir. Dec. 828, 17 Ohio Cir. Ct. 22.

**4. Chapman v. Syracuse Rapid Transit R. Co.**, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 626.

**5. Acquisition by Condemnation.** — Central City Horse R. Co. v. Ft. Clark Horse R. Co., 81 Ill. 523; Crescent City R. Co. v. New Orleans, etc., R. Co., 48 La. Ann. 856.

**6. Louisville City R. Co. v. Central Pass. R. Co.**, 87 Ky. 223; Covington St. R. Co. v. Covington, etc., St. R. Co., 19 Am. L. Reg. N. S. 765; Canal, etc., R. Co. v. Orleans R. Co., 44 La. Ann. 54, 50 Am. & Eng. R. Cas. 369; Metropolitan R. Co. v. Quincy R. Co., 12 Allen (Mass.) 262; St. Louis R. Co. v. Southern R. Co., 105 Mo. 581; Sixth Ave. R. Co. v. Kerr, 72 N. Y. 330; Metropolitan St. R. Co. v. Toledo Electric St. R. Co., 6 Ohio Cir. Dec. 733, 9 Ohio Cir. Ct. 664; Union Pass. R. Co. v. Continental R. Co., 11 Phila. (Pa.) 321, 33 Leg. Int. (Pa.) 43. See also Central City Horse R. Co. v. Ft. Clark Horse R. Co., 81 Ill. 523.

**The Use of Mechanical Motive Power and Fixtures,** as well as track, may be appropriated in the exercise of the right of eminent domain. Metropolitan City R. Co. v. Chicago West Div. R. Co., 83 Ill. 324.

**7. Metropolitan R. Co. v. Highland St. R. Co.**, Volume XXVII.

to authorize one company to use the tracks of another.<sup>1</sup> Likewise, a municipality, in granting to one company its consent to the use of streets for street-railway purposes, may impose conditions giving to other street-railway companies the right to use the tracks of the prior grantee,<sup>2</sup> or may reserve the right subsequently to allow such use.<sup>3</sup> The right acquired by one company to use the tracks of another company does not invest the former with any ownership of or title to the tracks which it is authorized to use;<sup>4</sup> and a court of equity has the power to provide protection to each against the invasion of its rights by the other.<sup>5</sup>

Compensation must be made to the company whose tracks are used or condemned.<sup>6</sup> If the franchise of the company the right to use whose tracks is taken is not exclusive, compensation need be made only for the use and wear of the tracks,<sup>7</sup> and need not include loss of profits from competition.<sup>8</sup> The statutes conferring on one company the right to use the tracks of another frequently provide the manner in which the amount of compensation for such use shall be determined.<sup>9</sup>

**VI. ABUTTING OWNERS — 1. Right to Compensation.** — The general rule is now well settled that the use of streets in cities or villages<sup>10</sup> or of rural high-

118 Mass. 290; New Bedford, etc., St. R. Co. v. Acushnet St. R. Co., 143 Mass. 200.

**1. Power to Authorize Company to Use Another's Tracks Delegated.** — Pacific R. Co. v. Wade, 91 Cal. 449, 25 Am. St. Rep. 201; Hook v. Los Angeles R. Co., 129 Cal. 180; Canal, etc., R. Co. v. Crescent City R. Co., 44 La. Ann. 485; New Orleans, etc., R. Co. v. Canal, etc., R. Co., 47 La. Ann. 1476; Union Depot R. Co. v. Southern R. Co., 105 Mo. 562; St. Louis R. Co. v. Southern R. Co., 105 Mo. 577; Union R. Co. v. Southern R. Co., 105 Mo. 602; Toledo Consol. St. R. Co. v. Toledo Electric St. R. Co., 3 Ohio Cir. Dec. 493, 6 Ohio Cir. Ct. 362; State v. Cincinnati, etc., Electric St. R. Co., 10 Ohio Cir. Dec. 418, 19 Ohio Cir. Ct. 79. See also Omnibus R. Co. v. Baldwin, 57 Cal. 160.

**2.** Jersey City, etc., Horse R. Co. v. Jersey City, etc., R. Co., 21 N. J. Eq. 550; Staten Island Midland R. Co. v. Staten Island Electric R. Co., 34 N. Y. App. Div. 181; Kinsman St. R. Co. v. Broadway, etc., St. R. Co., 36 Ohio St. 239; Hannum v. Railroad Co., 8 Del. Co. Rep. (Pa.) 91.

**3.** Mercantile Trust, etc., Co. v. Collins Park, etc., R. Co., 101 Fed. Rep. 347; North Baltimore Pass. R. Co. v. North Ave. R. Co., 75 Md. 233.

**Construction of Reservation.** — Mercantile Trust, etc., Co. v. Collins Park, etc., R. Co., 101 Fed. Rep. 347.

**Unreasonable Exercise of Reserved Power.** — Mercantile Trust, etc., Co. v. Collins Park, etc., R. Co., 101 Fed. Rep. 347.

**4.** Toledo Electric St. R. Co. v. Toledo, etc., R. Co., 3 Ohio Dec. 376. See, however, Toledo Electric St. R. Co. v. Toledo, etc., R. Co., 1 Ohio Dec. 33, 7 Ohio N. P. 211.

**5.** Toledo Consol. St. R. Co. v. Toledo Electric St. R. Co., 3 Ohio Cir. Dec. 493, 6 Ohio Cir. Ct. 362.

**6. Compensation.** — Louisville City R. Co. v. Central Pass. R. Co., 87 Ky. 223; Canal, etc., R. Co. v. Orleans R. Co., 44 La. Ann. 54; Canal, etc., R. Co. v. Crescent City R. Co., 44 La. Ann. 485; North Baltimore Pass. R. Co. v. North Ave. R. Co., 75 Md. 233; Metropolitan R. Co. v. Quincy R. Co., 12 Allen (Mass.) 262; Jersey

City, etc., Horse R. Co. v. Jersey City, etc., R. Co., 21 N. J. Eq. 550; Toledo Consol. St. R. Co. v. Toledo Electric St. R. Co., 3 Ohio Cir. Dec. 493, 6 Ohio Cir. Ct. 362; Union Pass. R. Co. v. Continental R. Co., 11 Phila. (Pa.) 321, 33 Leg. Int. (Pa.) 43; Providence v. Union R. Co., 12 R. I. 473.

**7.** Louisville City R. Co. v. Central Pass. R. Co., 87 Ky. 223.

**8.** Louisville City R. Co. v. Central Pass. R. Co., 87 Ky. 233; Metropolitan R. Co. v. Highland St. R. Co., 118 Mass. 290; Grand Ave. R. Co. v. Citizens' R. Co., 148 Mo. 665.

**9. Statutes as to Compensation.** — Pacific R. Co. v. Wade, 91 Cal. 449, 25 Am. St. Rep. 201; Hook v. Los Angeles R. Co., 129 Cal. 180; Metropolitan R. Co. v. Highland St. R. Co., 118 Mass. 290; Union Depot R. Co. v. Southern R. Co., 105 Mo. 562, 602; St. Louis R. Co. v. Southern R. Co., 105 Mo. 577; People's R. Co. v. Grand Ave. R. Co., 149 Mo. 245; Grand Ave. R. Co. v. People's R. Co., 132 Mo. 34; Grand Ave. R. Co. v. Citizens' R. Co., 148 Mo. 665.

In *Massachusetts* the compensation to be paid is to be determined by the board of railroad commissioners, and it is within the discretion of such board to establish rules apportioning the expenses and regulating the mode of estimating compensation. No exception lies to its exercise of this discretion when no question of law arises. Cambridge R. Co. v. Charles River St. R. Co., 139 Mass. 454.

Formerly the compensation was determined by commissioners appointed by the court. Metropolitan R. Co. v. Broadway R. Co., 99 Mass. 238; Metropolitan R. Co. v. Quincy R. Co., 12 Allen (Mass.) 262; Boston, etc., R. Corp. v. Western R. Corp., 14 Gray (Mass.) 253.

**10. Right to Compensation of Abutting Owners — United States.** — Van Bokelen v. Brooklyn City R. Co., 5 Blatchf. (U. S.) 379; Lorie v. North Chicago City R. Co., 32 Fed. Rep. 270; Williams v. City Electric St. R. Co., 41 Fed. Rep. 556; Ranken v. St. Louis, etc., Suburban R. Co., 98 Fed. Rep. 479.

*Alabama.* — Baker v. Selma St., etc., R. Co., 130 Ala. 474.

*California.* — Carson v. Central R. Co., 35

ways<sup>1</sup> for a street railway is one of the ordinary purposes for which such streets and highways may be used, and does not impose an additional burden or servitude so as to entitle the abutting property owner, as a matter of right, to compensation before such use can be made; and abutting property owners cannot complain of the temporary interference with their right of access which necessarily results from the tearing up of a street for the construction of a street railway in it.<sup>2</sup> The rule that a street railway is not an additional burden is generally recognized irrespective of the question whether, in the original laying out of the street, a mere easement was taken, leaving the fee simple in the abutting property.<sup>3</sup> So in the application of the rule no distinction is

Cal. 325; *Finch v. Riverside, etc.*, R. Co., 87 Cal. 597.

*Connecticut*. — *Elliott v. Fair Haven, etc.*, R. Co., 32 Conn. 579.

*Florida*. — *Randall v. Jacksonville St. R. Co.*, 19 Fla. 409; *State v. Jacksonville St. R. Co.*, 29 Fla. 590.

*Georgia*. — *Savannah, etc.*, R. Co. *v. Savannah*, 45 Ga. 602; *Campbell v. Metropolitan St. R. Co.*, 82 Ga. 320.

*Illinois*. — *Stetson v. Chicago, etc.*, R. Co., 75 Ill. 74; *Chicago, etc.*, R. Co. *v. West Chicago*, St. R. Co., 156 Ill. 255; *Doane v. Lake St. El. R. Co.*, 165 Ill. 510, 56 Am. St. Rep. 265; *Chicago, etc.*, R. Co. *v. General Electric R. Co.*, 79 Ill. App. 569.

*Indiana*. — *Eichels v. Evansville St. R. Co.*, 78 Ind. 261, 41 Am. Rep. 561.

*Iowa*. — *Sears v. Marshalltown St. R. Co.*, 65 Iowa 742.

*Kentucky*. — *Louisville City R. Co. v. Central Pass. R. Co.*, 87 Ky. 227; *Covington St. R. Co. v. Covington, etc.*, St. R. Co., 19 Am. L. Reg. N. S. 765. See also *Louisville Southern R. Co. v. Hooe*, (Ky. 1896) 35 S. W. Rep. 266.

*Louisiana*. — *Brown v. Duplessis*, 14 La. Ann. 854; *Tilton v. New Orleans City R. Co.*, 35 La. Ann. 1062.

*Maine*. — *Briggs v. Lewiston, etc.*, Horse R. Co., 79 Me. 363, 1 Am. St. Rep. 316; *Milbridge, etc.*, Electric R. Co., Appellants, 96 Me. 110.

*Maryland*. — *Hiss v. Baltimore, etc.*, Pass. R. Co., 52 Md. 242, 36 Am. Rep. 371; *Hodges v. Baltimore Union Pass. R. Co.*, 58 Md. 603.

*Massachusetts*. — *Atty.-Gen. v. Metropolitan R. Co.*, 125 Mass. 515, 28 Am. Rep. 264.

*Michigan*. — *Grand Rapids, etc.*, R. Co. *v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306; *Detroit City R. Co. v. Mills*, 85 Mich. 634; *Nichols v. Ann Arbor, etc.*, St. R. Co., 87 Mich. 361.

*Minnesota*. — *Newell v. Minneapolis, etc.*, R. Co., 35 Minn. 112, 59 Am. Rep. 303.

*Missouri*. — *Hovelman v. Kansas City Horse R. Co.*, 79 Mo. 632; *Ransom v. Citizens' R. Co.*, 104 Mo. 375.

*New Jersey*. — *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75, 86 Am. Dec. 252; *Hogencamp v. Paterson Horse R. Co.*, 17 N. J. Eq. 83; *Paterson, etc.*, Horse R. Co. *v. Paterson*, 24 N. J. Eq. 158; *Citizens' Coach Co. v. Camden Horse R. Co.*, 33 N. J. Eq. 267, 36 Am. Rep. 542; *West Jersey R. Co. v. Cape May, etc.*, R. Co., 34 N. J. Eq. 164; *Van Horne v. Newark Pass. R. Co.*, 48 N. J. Eq. 332; *Paterson R. Co. v. Grundy*, 51 N. J. Eq. 213.

*North Carolina*. — *Merrick v. Intramontaine R. Co.*, 118 N. Car. 1081.

*Ohio*. — *Cincinnati College v. Nesmith*, Cinc. Super. Ct. 24; *Simmons v. Toledo*, Ohio 28

Cir. Dec. 69, 8 Ohio Cir. Ct. 535; *Cincinnati, etc.*, St. R. Co. *v. Cummins*, 14 Ohio St. 523.

*Oregon*. — *McQuaid v. Portland, etc.*, R. Co., 18 Oregon 237.

*Pennsylvania*. — *Faust v. Second, etc.*, St. Pass. R. Co., 3 Phila. (Pa.) 164, 15 Leg. Int. (Pa.) 221; *Clark v. Second, etc.*, St. Pass. R. Co., 3 Phila. (Pa.) 259, 15 Leg. Int. (Pa.) 357; *Hannum v. Railroad Co.*, 8 Del. Co. Rep. (Pa.) 91; *Guffey v. Pittsburg, etc.*, R. Co., 27 Pittsb. Leg. J. N. S. (Pa.) 141; *Hain v. Lebanon, etc.*, St. R. Co., 1 Pa. Dist. 452; *Rafferty v. Central Traction Co.*, 147 Pa. St. 579, 30 Am. St. Rep. 763.

*Rhode Island*. — *Vose v. Newport St. R. Co.*, 17 R. I. 134.

*Tennessee*. — *Smith v. East End St. R. Co.*, 87 Tenn. 626; *Cumberland Tel., etc.*, Co. *v. United Electric R. Co.*, 93 Tenn. 492.

*Texas*. — *Texas, etc.*, R. Co. *v. Rosedale St. R. Co.*, 64 Tex. 80, 53 Am. Rep. 739; *San Antonio Rapid Transit St. R. Co. v. Lumberger*, 88 Tex. 79, 53 Am. St. Rep. 730; *Gray v. Dallas Terminal R., etc.*, Co., 13 Tex. Civ. App. 158; *Aycock v. San Antonio Brewing Assoc.*, 26 Tex. Civ. App. 341.

*Utah*. — *Dooley Block v. Salt Lake Rapid Transit Co.*, 9 Utah 31.

*Wisconsin*. — *Hobart v. Milwaukee City R. Co.*, 27 Wis. 194.

See also *Theobald v. Louisville, etc.*, R. Co., 66 Miss. 279, 14 Am. St. Rep. 564.

**Passage of Street Cars over Bridge Built by Railroad, Additional Servitude.** — *Carolina Cent. R. Co. v. Wilmington St. R. Co.*, 120 N. Car. 520.

1. *Ranken v. St. Louis, etc., Suburban R. Co.*, 98 Fed. Rep. 479; *Kennelly v. Jersey City*, 57 N. J. L. 293; *Cincinnati, etc.*, St. R. Co. *v. Cummins*, 14 Ohio St. 523. Compare *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.*, 167 Pa. St. 62, 46 Am. St. Rep. 659.

2. *Glidden v. Cincinnati*, 4 Ohio Dec. 423.

3. **Whether Mere Easement or Fee in Street Taken.** — *Williams v. City Electric St. R. Co.*, 41 Fed. Rep. 556; *Ranken v. St. Louis, etc., Suburban R. Co.*, 98 Fed. Rep. 479; *Birmingham Traction Co. v. Birmingham R., etc.*, Co., 119 Ala. 137; *Finch v. Riverside, etc.*, R. Co., 87 Cal. 597; *Elliott v. Fair Haven, etc.*, R. Co., 32 Conn. 579; *Randall v. Jacksonville St. R. Co.*, 19 Fla. 409; *Eichels v. Evansville St. R. Co.*, 78 Ind. 261, 41 Am. Rep. 561; *Briggs v. Lewiston, etc.*, Horse R. Co., 79 Me. 363, 1 Am. St. Rep. 316; *Hodges v. Baltimore Union Pass. R. Co.*, 58 Md. 603; *Detroit City R. Co. v. Mills*, 85 Mich. 634; *Hinchman v. Paterson*, 79 Mo. 632; *N. J. Eq. 75*, 86 Am. Dec. 252; *Horse R. Co.*

to be made on account of the motive power used for the operation of the railway.<sup>1</sup> Thus, the rule has been held to apply not only where the railway was to be operated by animal power,<sup>2</sup> but also where it was to be operated by cable power, necessitating considerable substructure in the street,<sup>3</sup> or by electric power,<sup>4</sup> under either the underground system<sup>5</sup> or the trolley system, the latter necessitating the erection of poles in the street and the stringing of overhead wires,<sup>6</sup> and even where steam was the motive power, dummy engines being used.<sup>7</sup> In the case of ordinary steam railroads the rule is different. They constitute an additional burden on the land, and may not be constructed or operated in the street unless compensation has been made to the owners of abutting property.<sup>8</sup> The distinction between the rule governing ordinary railroads and that applied to street railways is to be found not in the motive power employed, but in the character of the use. A street railway is directly ancillary to the uses of the street; it is a mode of travel closely allied to those in common use on the highway, and, as a matter of fact and common knowledge, is very much less of an obstruction than an ordinary railroad.<sup>9</sup>

Van Horne v. Newark Pass. R. Co., 48 N. J. Eq. 332; Kennelly v. Jersey City, 57 N. J. L. 293; Merrick v. Intramontaine R. Co., 118 N. Car. 1081; Cincinnati, etc., St. R. Co. v. Cummins-ville, 14 Ohio St. 546; Gray v. Dallas Terminal R., etc., Co., 13 Tex. Civ. App. 158. Compare Stetson v. Chicago, etc., R. Co., 75 Ill. 74.

1. **Motive Power.**—Lorie v. North Chicago City R. Co., 32 Fed. Rep. 270; Briggs v. Lewiston, etc., Horse R. Co., 79 Me. 363, 1 Am. St. Rep. 316; Detroit City R. Co. v. Mills, 85 Mich. 634; Halsey v. Rapid Transit St. R. Co., 47 N. J. Eq. 380; Rafferty v. Central Traction Co., 147 Pa. St. 579, 30 Am. St. Rep. 763; Taggart v. Newport St. R. Co., 16 R. I. 668; Cumberland Tel., etc., Co. v. United Electric R. Co., 93 Tenn. 492.

2. See the title ABUTTING OWNERS, vol. 1, p. 227, and see Sears v. Marshalltown St. R. Co., 65 Iowa 742; Hodges v. Baltimore Union Pass. R. Co., 58 Md. 603.

3. Lorie v. North Chicago City R. Co., 32 Fed. Rep. 270; Tuebner v. California St. R. Co., 66 Cal. 171; Harrison v. Mt. Auburn Cable R. Co., 9 Ohio Dec. (Reprint) 805, 17 Cinc. L. Bul. 265; Clement v. Cincinnati, 9 Ohio Dec. (Reprint) 688, 16 Cinc. L. Bul. 355.

4. Ranken v. St. Louis, etc., Suburban R. Co., 98 Fed. Rep. 479; Central Pennsylvania Telephone Co. v. Wilkes-Barre, etc., R. Co., 1 Pa. Dist. 628. And see the titles ABUTTING OWNERS, vol. 1, p. 227; ELECTRIC RAILWAYS, vol. 10, p. 883.

5. St. Michael's Protestant Episcopal Church v. Forty-second St. R. Co., (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 601.

6. **Trolleys**—United States.—Williams v. City Electric St. R. Co., 41 Fed. Rep. 556.

Alabama.—Baker v. Selma St., etc., R. Co., 130 Ala. 474; Birmingham Traction Co. v. Birmingham R., etc., Co., 119 Ala. 137.

Illinois.—Chicago, etc., R. Co. v. West Chicago St. R. Co., 156 Ill. 255.

Maryland.—Koch v. North Ave. R. Co., 75 Md. 222, 50 Am. & Eng. R. Cas. 401.

Michigan.—Potter v. Saginaw Union St. R. Co., 83 Mich. 295; Detroit City R. Co. v. Mills, 85 Mich. 634.

New Jersey.—Halsey v. Rapid Transit St. R. Co., 47 N. J. Eq. 380; Paterson R. Co. v.

Grundy, 51 N. J. Eq. 213; Kennelly v. Jersey City, 57 N. J. L. 293; Roebbling v. Trenton Pass. R. Co., 58 N. J. L. 666; Budd v. Camden Horse R. Co., 61 N. J. Eq. 543.

New York.—Tracy v. Troy, etc., R. Co., 54 Hun (N. Y.) 550.

Ohio.—Simmons v. Toledo, 4 Ohio Cir. Dec. 69, 8 Ohio Cir. Ct. 535; Mt. Adams, etc., R. Co. v. Winslow, 2 Ohio Cir. Dec. 240, 3 Ohio Cir. Ct. 425; Pelton v. East Cleveland R. Co., 10 Ohio Dec. (Reprint) 545, 22 Cinc. L. Bul. 67.

Pennsylvania.—Com. v. West Chester, 9 Pa. Co. Ct. 546; Lockhart v. Craig St. R. Co., 139 Pa. St. 419.

Rhode Island.—Taggart v. Newport St. R. Co., 16 R. I. 668.

Tennessee.—Cumberland Tel., etc., Co. v. United Electric R. Co., 93 Tenn. 492.

Texas.—San Antonio Rapid Transit Co. v. Lumburger, 88 Tex. 79, 53 Am. St. Rep. 730.

Utah.—Ogden City R. Co. v. Ogden City, 7 Utah 207.

See also Gulf Coast Ice, etc., Co. v. Bowers, 80 Miss. 570.

But the use of the wires and poles for the distribution of electric light and power to private consumers imposes an additional burden on the street. Schaaf v. Cleveland, etc., R. Co., 66 Ohio St. 215.

7. Williams v. City Electric St. R. Co., 41 Fed. Rep. 556; Briggs v. Lewiston, etc., Horse R. Co., 79 Me. 363, 1 Am. St. Rep. 316; Nichols v. Ann Arbor, etc., St. R. Co., 87 Mich. 361; Fobes v. Rome, etc., R. Co., 121 N. Y. 505. See also the title ABUTTING OWNERS, vol. 1, p. 228. Compare Stange v. Hill, etc., St. R. Co., 54 Iowa 669; Stanley v. Davenport, 54 Iowa 463, 37 Am. Rep. 216; Stange v. Dubuque, 62 Iowa 303; East End St. R. Co. v. Doyle, 88 Tenn. 747, 17 Am. St. Rep. 933.

8. See the titles ABUTTING OWNERS, vol. 1, pp. 227, 241; RAILROADS, vol. 23, p. 707; STREETS AND SIDEWALKS; and see Western R. Co. v. Alabama Grand Trunk R. Co., 96 Ala. 272; Denver v. Bayer, 7 Colo. 113. Compare Louisville Southern R. Co. v. Hooe, (Ky. 1896) 35 S. W. Rep. 266.

9. Briggs v. Lewiston, etc., Horse R. Co., 79 Me. 363, 1 Am. St. Rep. 316, 32 Am. & Eng. R. Cas. 167.

**New York Rule.** — In New York, though the general rule is recognized where the fee in the street is in the municipality or state,<sup>1</sup> where the fee is in the abutting owner it is held that compensation must be made to him to authorize the use of the street for railway purposes;<sup>2</sup> but a municipality which owns the fee in its streets is not entitled to demand compensation for the use of such streets for street-railway purposes under legislative authority.<sup>3</sup>

**Qualifications.** — Where an abutting property owner can show that by the construction of the street railway he will suffer some special and material damage from the impairment of his easement of access, he is entitled to compensation,<sup>4</sup> and if a street-railway company abuses its rights and so operates its road that it becomes a nuisance, the abutting landowners have an appropriate remedy by injunction or by an action for damages.<sup>5</sup> So a street-railway company operating its road by mechanical power is liable for damages to property owners adjoining its power houses who may be injured by the manner in which the power houses are run.<sup>6</sup>

**Statutory Provisions.** — In some jurisdictions statutory provisions have been enacted requiring compensation to be made to abutting owners.<sup>7</sup>

**2. Right to Prevent Unauthorized Construction or Operation.** — It is generally

**1. New York.** — *Brooklyn City, etc., R. Co. v. Coney Island, etc., R. Co.*, 35 Barb. (N. Y.) 364; *Trelford v. Coney Island, etc., R. Co.*, 5 N. Y. App. Div. 464; *Kellinger v. Forty-second St., etc., Ferry R. Co.*, 50 N. Y. 206; *Mahady v. Bushwick R. Co.*, 91 N. Y. 148, 43 Am. Rep. 661; *Clark v. Rochester City, etc., R. Co.*, 50 Hun (N. Y.) 600, 2 N. Y. Supp. 563; *People v. Kerr*, 27 N. Y. 188; *Story v. New York El. R. Co.*, 90 N. Y. 122, 43 Am. Rep. 146; *Fobes v. Rome, etc., R. Co.*, 121 N. Y. 505.

**2. McCruden v. Rochester R. Co.**, (Supm. Ct.) 5 Misc. (N. Y.) 59; *Thayer v. Rochester City, etc., R. Co.*, (Supm. Ct. Spec. T.) 15 Abb. N. Cas. (N. Y.) 52; *Adee v. Nassau Electric R. Co.*, 65 N. Y. App. Div. 529; *Peck v. Schenectady R. Co.*, 170 N. Y. 298; *Craig v. Rochester City, etc., R. Co.*, 39 N. Y. 404. *Compare Clark v. Rochester City, etc., R. Co.*, 50 Hun (N. Y.) 600, 2 N. Y. Supp. 563; *Benedict v. Seventh Ward R. Co.*, 51 Hun (N. Y.) 111; *Wetmore v. Story*, (Supm. Ct. Gen. T.) 3 Abb. Pr. (N. Y.) 262.

**3. People v. Kerr**, 27 N. Y. 188, affirming 37 Barb. (N. Y.) 357.

**4. Special Injury — California.** — *Bancroft v. San Diego*, 120 Cal. 432 (tracks not conforming to grade of street).

*Georgia.* — *Campbell v. Metropolitan St. R. Co.*, 82 Ga. 320.

*Illinois.* — *Stetson v. Chicago, etc., R. Co.*, 75 Ill. 74.

*Iowa.* — *Sritesky v. Cedar Rapids*, 98 Iowa 373 (tracks not conforming to grade).

*Michigan.* — *Nichols v. Ann Arbor, etc., St. R. Co.*, 87 Mich. 361 (tracks not conforming to grade of street). See also *Grand Rapids St. R. Co. v. West Side St. R. Co.*, 48 Mich. 433.

*Missouri.* — *Sheehy v. Kansas City Cable R. Co.*, 94 Mo. 574, 4 Am. St. Rep. 396 (change in grade of street); *Brady v. Kansas City Cable R. Co.*, 111 Mo. 329 (change in grade of street); *Taylor v. Kansas City Cable R. Co.*, 38 Mo. App. 668 (raising grade of street); *Fred v. Kansas City Cable R. Co.*, 65 Mo. App. 121, 2 Mo. App. Rep. 1173 (change in grade of street).

*New York.* — *Waldmuller v. Brooklyn El. R. Co.*, 40 N. Y. App. Div. 242; *Mahady v. Bush-*

*wick R. Co.*, 91 N. Y. 148, 43 Am. Rep. 661 (unreasonable use of street for storage and switching of cars).

*Ohio.* — *Schaaf v. Cleveland, etc., R. Co.*, 66 Ohio St. 215; *McMaken v. Cincinnati, etc., Electric St. R. Co.*, 5 Ohio Dec. 358, 5 Ohio N. P. 367; *Cincinnati, etc., St. R. Co. v. Cummins-ville*, 14 Ohio St. 523 (construction of railway adjoining curb line so as to prevent wagons stopping in front of property).

*Utah.* — *Dooly Block v. Salt Lake Rapid Transit Co.*, 9 Utah 31.

*Washington.* — *Seattle Transfer Co. v. Seattle*, 27 Wash. 520.

*Wisconsin.* — *Hobart v. Milwaukee City R. Co.*, 27 Wis. 200.

See also *Baltimore Belt R. Co. v. McColgan*, 83 Md. 650, 35 Atl. Rep. 59 (tracks not conforming to street grade). *Compare Inter-State Consol. Rapid Transit R. Co. v. Early*, 46 Kan. 197 (cut in street to bring track to established grade).

**In Case of Special Injury the Remedy is by an action at law for special damage, and not by application for an injunction.** *Lorie v. North Chicago City R. Co.*, 32 Fed. Rep. 270. See also *Campbell v. Metropolitan St. R. Co.*, 82 Ga. 320.

**5. Baltimore, etc., R. Co. v. Fifth Baptist Church**, 108 U. S. 317; *Williams v. City Electric St. R. Co.*, 41 Fed. Rep. 556; *Roebbling v. Trenton Pass. R. Co.*, 58 N. J. L. 666; *Hussner v. Brooklyn City R. Co.*, 114 N. Y. 433, 11 Am. St. Rep. 679; *Waldmuller v. Brooklyn El. R. Co.*, 40 N. Y. App. Div. 242 (washing cars in street); *Smith v. East End St. R. Co.*, 87 Tenn. 626; *East End St. R. Co. v. Doyle*, 88 Tenn. 747, 17 Am. St. Rep. 933.

**6. Tuebner v. California St. R. Co.**, 66 Cal. 171; *Rogers v. Philadelphia Traction Co.*, 182 Pa. St. 473, 61 Am. St. Rep. 716.

**7. General Electric R. Co. v. Chicago City R. Co.**, 66 Ill. App. 362; *Sears v. Marshalltown St. R. Co.*, 65 Iowa 742; *Onset St. R. Co. v. Plymouth County*, 154 Mass. 395; *Taylor v. Bay City St. R. Co.*, 80 Mich. 77; *Ruckert v. Grand Ave. R. Co.*, 163 Mo. 260; *Vose v. Newport St. R. Co.*, 1. 134. See also *McDermott v. Warren, etc., St. R. Co.*, 172 Mass. 197.

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recognized that an abutting property owner, especially where he owns the fee in the street or highway, may, where an action for damages would be inadequate as a remedy, enjoin the unauthorized construction and operation of a street railway.<sup>1</sup> If, however, the abutting owner receives no special injury from the construction and operation of the street railway, he has no standing to demand an injunction;<sup>2</sup> and it has been held that he cannot as a matter of right institute as relator a *quo warranto* proceeding to prevent the use of a street for street-railway purposes.<sup>3</sup> Where the abutting owner was the owner of the fee in the street, he has been permitted to maintain ejectment to oust one unlawfully constructing a street railway in such street.<sup>4</sup> An abutting property owner may sue to compel the proper location of the tracks of a street railway.<sup>5</sup>

**3. Right to Stand Vehicles on Curb Line for Loading and Unloading.** — The owner of property abutting on the street has the right to have vehicles stand in front of his property for such reasonable time as is necessary for loading and unloading them, even though in the exercise of such right the passage of street cars is impeded.<sup>6</sup>

**VII. NATURE AND EXTENT OF FRANCHISE — 1. In General.** — The right to operate a street railway over streets and public highways is a franchise, the owner of which acquires thereby no estate or interest in the soil.<sup>7</sup> While a street-railway company has no exclusive right to the use of its tracks and the ground covered by it, but is only entitled to use them in common with others traveling on the highway,<sup>8</sup> it has from the necessity of the case a paramount

**1. Preventing Unauthorized Construction or Operation** — *United States*. — *Hart v. Buckner*, (C. C. A.) 54 Fed. Rep. 925, affirming 52 Fed. Rep. 835; *General Electric R. Co. v. Chicago*, etc., R. Co., (C. C. A.) 98 Fed. Rep. 907; *Beeson v. Chicago*, 75 Fed. Rep. 880. See also *Seccomb v. Wurster*, 83 Fed. Rep. 856.

*Alabama*. — *Louisville, etc., R. Co. v. Mobile*, etc., R. Co., 124 Ala. 162.

*Kansas*. — *Mikesell v. Durkee*, 34 Kan. 509, 36 Kan. 97; *Atchison St. R. Co. v. Nave*, 38 Kan. 744, 5 Am. St. Rep. 800.

*Missouri*. — *Charles H. Heer Dry-Goods Co. v. Citizens' R. Co.*, 41 Mo. App. 63.

*New York*. — *Hussner v. Brooklyn City R. Co.*, 114 N. Y. 433, 11 Am. St. Rep. 679, affirming 41 Hun (N. Y.) 643; *Fanning v. Osborne*, 102 N. Y. 441; *McClellan v. Westchester Electric R. Co.*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 383; *Craig v. Rochester City, etc., R. Co.*, 39 N. Y. 404; *Beekman v. Third Ave. R. Co.*, 13 N. Y. App. Div. 279; *Peck v. Schenectady R. Co.*, 170 N. Y. 298.

*Ohio*. — *Glidden v. Cincinnati*, 4 Ohio Dec. 423; *Cincinnati, etc., St. R. Co. v. Cumminsville*, 14 Ohio St. 523; *Roberts v. Easton*, 19 Ohio St. 78.

*Pennsylvania*. — *Faust v. Second, etc., St. Pass. R. Co.*, 3 Phila. (Pa.) 164, 15 Leg. Int. (Pa.) 221; *Philadelphia v. Thirteenth, etc., St. Pass. R. Co.*, 8 Phila. (Pa.) 648; *Taylor v. Erie City Pass. R. Co.*, 186 Pa. St. 120; *Mory v. Pley Valley R. Co.*, 199 Pa. St. 152; *Hannum v. Medina, etc., Electric R. Co.*, 200 Pa. St. 44. Compare *Pennsylvania Canal Co. v. Lewisburg, etc., Pass. R. Co.*, 20 Pa. Co. Ct. 550; *Minnich v. Lancaster, etc., R. Co.*, 24 Pa. Co. Ct. 312.

*Utah*. — *Dooly Block v. Salt Lake Rapid Transit Co.* 9 Utah 31.

*Wisconsin*. — *Linden Land Co. v. Milwaukee Electric R., etc., Co.*, 107 Wis. 493.

**2.** *Lorie v. North Chicago City R. Co.*, 32 Fed. Rep. 270; *Doane v. Lake St. El. R. Co.*, 165 Ill. 510, 56 Am. St. Rep. 265; *Stewart v. Chicago General St. R. Co.*, 166 Ill. 61; *Tibbetts v. West, etc., Towns St. R. Co.*, 153 Ill. 147, affirming 54 Ill. App. 180; *Hoyle v. New Orleans City R. Co.*, 23 La. Ann. 535; *Fogg v. Nevada-California-Oregon R. Co.*, 20 Nev. 429; *Randolph v. Chosen Freeholders*, 63 N. J. L. 155; *Gray v. Dallas Terminal R., etc., Co.*, 13 Tex. Civ. App. 158; *Watson v. Fairmont, etc., R. Co.*, 49 W. Va. 528. See also *Fouche v. Rome St. R. Co.*, 84 Ga. 233.

**3.** *People v. North Chicago R. Co.*, 88 Ill. 537.

**4.** *Finch v. Riverside, etc., R. Co.*, 87 Cal. 597.

**5.** *Kennedy v. Detroit R. Co.*, 108 Mich. 390. In *Zabriskie v. Jersey City, etc., R. Co.*, 13 N. J. Eq. 314, it was held that the location of a railroad through a public street in a line not warranted by law would not be enjoined at the instance of the owner of an unimproved building lot, suffering no present detriment.

**6.** *Rafferty v. Central Traction Co.*, 147 Pa. St. 579, 30 Am. St. Rep. 763. Compare *Hobart v. Milwaukee City R. Co.*, 27 Wis. 194, 9 Am. Rep. 461, 2 Am. R. Rep. 35.

**7. No Right in Soil of Street.** — *State v. King*, 104 La. 735; *Hinchman v. Paterson Horse R. Co.*, 17 N. J. Eq. 75, 86 Am. Dec. 252.

**8. No Exclusive Right to Use of Tracks and Roadbed.** — *Market St. R. Co. v. Central R. Co.*, 51 Cal. 583; *Adolph v. Central Park, etc., R. Co.*, 76 N. Y. 530; *Fleckenstein v. Dry Dock, etc., R. Co.*, 105 N. Y. 655.

This question chiefly arises when the liability of the street-railway company for injuries from negligence is in question. The fact that a street railway often occupies a large

right to have its tracks unobstructed for the passage of its cars.<sup>1</sup> The cars have the right of way upon their tracks as against both those whom they meet and those who go in the same direction,<sup>2</sup> and wagons moving at a slow rate of speed, and occupying the tracks or a portion thereof in front of a car, are required, when they can do so, to withdraw from the tracks to allow the passage of the car.<sup>3</sup> So the owner of a street-railway franchise has such an interest in its tracks that another person has no right, from the fact that the tracks are laid in the street, to run cars or other vehicles particularly adapted for the purpose over them.<sup>4</sup>

**Making Repairs.** — The right to operate a street railway impliedly confers the right to use upon the street the ordinary and necessary appliances for the repair of the railway system.<sup>5</sup>

**Route as Entirety.** — A franchise for a street railway over a particular route confers merely the right to construct the railway over such route as an entirety.<sup>6</sup>

**Distribution of Electricity.** — A franchise to operate a street railway by the trolley electric system does not empower the railway company to use it for the distribution of electrical power or light to private consumers.<sup>7</sup>

**2. Construction of Grant.** — The grant of a street-railway franchise is considered as an encroachment upon the public or common rights in the streets or highways, and it is well established that such a grant is to be construed most strongly against the grantee.<sup>8</sup> Where the grant is unambiguous, it is not to be construed according to the conduct of the parties and the rule of practical construction.<sup>9</sup>

portion of crowded streets, and that it is constructed and operated on the theory that it is not an additional burden upon the highway, but is merely an additional use contemplated when the street was laid out, necessitates a liberal construction in favor of the rights of the public, and the law is averse to conceding any exclusive right to that portion of the street to the railway company except where the necessities of the case demand. See *infra*, this section, *Construction of Grant*; *infra*, this title, *Liability for Injuries from Negligence*.

1. **Has Paramount Right.** — *Com. v. Temple*, 14 Gray (Mass.) 69.

2. *Jersey City, etc., R. Co. v. Jersey City, etc., Horse R. Co.*, 20 N. J. Eq. 61.

3. *Com. v. Temple*, 14 Gray (Mass.) 69 (indictment for obstructing track); *Adolph v. Central Park, etc., R. Co.*, 76 N. Y. 530.

4. *Metropolitan R. Co. v. Quincy R. Co.*, 12 Allen (Mass.) 269; *Jersey City, etc., R. Co. v. Jersey City, etc., Horse R. Co.*, 20 N. J. Eq. 61.

Thus, in *Camden Horse R. Co. v. Citizens' Coach Co.*, 31 N. J. Eq. 525, *affirmed* 33 N. J. Eq. 267, 36 Am. Rep. 542, 1 Am. & Eng. R. Cas. 190, an injunction was granted on the application of a street-railway company to restrain a rival coach company from regularly using its tracks with coaches adapted to them, thus competing with the car line and interfering with its proper operation by constant stopping to take on or let off passengers.

5. **Right to Repair.** — *Potter v. Scranton Traction Co.*, 176 Pa. St. 271.

6. *Canastota Knife Co. v. Newington Tramway Co.*, 69 Conn. 146.

7. *Chicago Gen. St. R. Co. v. Ellicott*, 88 Fed. Rep. 941.

8. **Construction of Grant.** — *United States v. Burns v. Multnomah R. Co.*, 15 Fed. Rep. 177;

*Citizens' St. R. Co. v. Jones*, 34 Fed. Rep. 579.

*Connecticut.* — *Farrell v. Winchester Ave. R. Co.*, 61 Conn. 127.

*Delaware.* — *Wilmington City R. Co. v. Wilmington, etc., R. Co.*, (Del. 1900) 46 Atl. Rep. 12.

*Indiana.* — *Eichels v. Evansville St. R. Co.*, 78 Ind. 261, 5 Am. & Eng. R. Cas. 274.

*Kansas.* — *Wyandotte v. Corrigan*, 35 Kan. 21.

*Missouri.* — *Ransom v. Citizens' R. Co.*, 104 Mo. 375.

*New Jersey.* — *State v. Hoboken*, 35 N. J. L. 205.

*New York.* — *People v. Newton*, 112 N. Y. 396; *People v. Broadway R. Co.*, 126 N. Y. 29.

*Ohio.* — *Hamilton, etc., Electric Transit R. Co. v. Hamilton*, 4 Ohio Dec. 10, 1 Ohio N. P. 366.

*Pennsylvania.* — *Philadelphia v. Citizens' Pass. R. Co.*, 151 Pa. St. 128; *Com. v. Central Pass. R. Co.*, 52 Pa. St. 506.

In the case of a legislative grant of a franchise to a private corporation, nothing is to be taken by implication against the public except what necessarily flows from the nature and terms of the grant; and the application of this doctrine will prevent a street-railway company, chartered by a special act, from occupying with its railway a street the use of which was granted to another company by the municipality under a general statute twenty-eight years later, where the grant to the latter company is definite as to location and that to the former company is very indefinite. *Junction Pass. R. Co. v. Williamsport Pass. R. Co.*, 154 Pa. St. 116, 56 Am. & Eng. R. Cas. 462. See also the title CORPORATIONS (PRIVATE), vol. 7, p. 708 *et seq.*

9. *Cincinnati v. Cincinnati St. R. Co.*, 9 Ohio Dec. 235, 6 Ohio N. P. 140.

Volume XXVII.



**3. Motive Power.** — As heretofore stated, the nature of the motive power used does not affect the character of the railway as a street railway.<sup>1</sup> An exception in the grant of the franchise of the use of a particular power is equivalent to a positive prohibition of such use;<sup>2</sup> but the question what motive power the owner of a street-railway franchise is entitled to use depends upon the construction of the grant of the franchise.<sup>3</sup> A grant in general terms, without expressly designating the power to be used, will authorize the use of any power ordinarily in use for street railways,<sup>4</sup> and under general terms descriptive of the motive power a subsequently discovered power may be authorized;<sup>5</sup> but where the grant expressly designates the motive power, no other power may be used.<sup>6</sup> The adoption of one form of motive power does not necessarily preclude a subsequent change,<sup>7</sup> and in many jurisdictions

1. See *supra*, this title, *Definition*.

2. *Farrell v. Winchester Ave. R. Co.*, 61 Conn. 127.

3. **Motive Power** — *United States*. — *Citizens' St. R. Co. v. Jones*, 34 Fed. Rep. 579.

*Alabama*. — *Birmingham, etc., St. R. Co. v. Birmingham St. R. Co.*, 79 Ala. 465, 58 Am. Rep. 615.

*Colorado*. — *Denver, etc., R. Co. v. Denver City R. Co.*, 2 Colo. 681.

*Connecticut*. — *Farrell v. Winchester Ave. R. Co.*, 61 Conn. 127.

*Illinois*. — *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788.

*Louisiana*. — *Tilton v. New Orleans City R. Co.*, 35 La. Ann. 1062.

*New Jersey*. — *Paterson R. Co. v. Grundy*, 51 N. J. Eq. 213; *State v. Trenton*, 54 N. J. L. 92.

*New York*. — *People v. Newton*, 112 N. Y. 396.

*Pennsylvania*. — *Lockhart v. Craig St. R. Co.*, 8 Pa. Co. Ct. 470; *Com. v. West Chester*, 9 Pa. Co. Ct. 542; *Allegheny v. Ohio, etc., R. Co.*, 26 Pa. St. 355; *Heilman v. Lebanon, etc., R. Co.*, 145 Pa. St. 23; *Reeves v. Philadelphia Traction Co.*, 152 Pa. St. 153.

**"Noiseless Steam Motors" Not Required to Be in Fact Noiseless.** — *Farnum v. Concord Horse R. Co.*, 66 N. H. 569.

**"Locomotive Steam Power."** — A prohibition against the use of "locomotive steam power" does not prohibit the use of a "kinetic motor" which is operated by a storage steam system. *People v. Railroad Com'rs*, 32 N. Y. App. Div. 179, *affirmed* (N. Y. 1899) 53 N. E. Rep. 1129.

**"Horse, Cable, or Electrical Power" Authorizes Trolley.** — *Fox v. Catherine St., etc., R. Co.*, 12 Pa. Co. Ct. 180, 1 Pa. Dist. 507.

**Whether Steam Constitutes an Obstruction of a Street**, where the franchise allows the use of "electricity or such other power as will not necessarily obstruct the use of" the streets, is a question for the jury. *Houston v. Houston Belt, etc., St. R. Co.*, 84 Tex. 581.

**Many Cases as to Authorisation of Electricity** are collected in the title **ELECTRIC RAILWAYS**, vol. 10, p. 879 *et seq.*

4. *Hooper v. Baltimore City Pass. R. Co.*, 85 Md. 509. See also *Wilmington City R. Co. v. Wilmington, etc., R. Co.*, (Del. 1900) 46 Atl. Rep. 12, and title **ELECTRIC RAILWAYS**, vol. 10, p. 879.

**"Any Motive Power or System of Traction"** authorizes the use of electricity. *Green v.*

*City, etc., R. Co.*, 78 Md. 294, 44 Am. St. Rep. 288.

**"Mechanical Power" Other than Steam.** — In *Hudson River Telephone Co. v. Watervliet Turnpike, etc., Co.*, 135 N. Y. 393, 31 Am. St. Rep. 838, *reversing* 61 Hun (N. Y.) 140, it was held that under Laws N. Y. 1862, c. 233, authorizing a certain railway company to construct a street railway and operate it by any mechanical or other power except steam, the company was authorized to adopt electricity as a motive power.

5. *Hudson River Telephone Co. v. Watervliet Turnpike, etc., Co.*, 56 Hun (N. Y.) 67, *appeal dismissed* 121 N. Y. 397. See also title **ELECTRIC RAILWAYS**, vol. 10, p. 880, note 1.

6. **Motive Power Expressly Designated.** — *Wilmington City R. Co. v. Wilmington, etc., R. Co.*, (Del. 1900) 46 Atl. Rep. 12; *Indianapolis Cable St. R. Co. v. Citizens' St. R. Co.*, 127 Ind. 369; *Watkins v. West Philadelphia Pass. R. Co.*, 1 Pa. Dist. 463. See also *Omaha Horse R. Co. v. Cable Tramway Co.*, 30 Fed. Rep. 324.

But a franchise to lay a "horse-railroad tracks or track" has been held not to restrict the motive power to horse power, but merely to designate the nature of the track. *Paterson R. Co. v. Grundy*, 51 N. J. Eq. 213.

**Remedy for Unauthorized Motive Power.** — *Spokane St. R. Co. v. Spokane Falls*, 6 Wash. 521, when the remedy was held to be not by abatement as a nuisance but by compelling use of proper power.

**The Title of the Act Granting the Franchise** may show what motive power was to be used. *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788.

7. **Change in Motive Power.** — *Hudson River Telephone Co. v. Watervliet Turnpike, etc., Co.*, 135 N. Y. 393, 31 Am. St. Rep. 838, *reversing* 61 Hun (N. Y.) 140.

**Option as to Motive Power Is a Continuing Option.** — *McCartney v. Chicago, etc., R. Co.*, 112 Ill. 611, 29 Am. & Eng. R. Cas. 326.

**Change to Cable Power Held to Be Unauthorized.** — In *People v. Newton*, 112 N. Y. 396, the grant of a street-railway franchise before the underground cable system as motive power was in use, conferring on the grantee the right to place a track on the surface of the road and to make temporary openings for its necessary foundation, was held not to authorize the grantee subsequently to convert its road into an underground cable system, necessitating the opening of the streets and the construction of

the legislature has conferred upon municipalities<sup>1</sup> or upon some special tribunal such as railroad commissioners,<sup>2</sup> abutting property owners,<sup>3</sup> or commissioners appointed by a court where the property owners refuse to consent to a change in motive power,<sup>4</sup> the power to authorize a change. A general authority conferred on a municipality to permit the use of any power does not authorize it to permit the owner of a street-railway franchise to use a power expressly prohibited in the grant of the franchise.<sup>5</sup> In an action to recover for injuries received through the operation of a street railway, a private individual cannot raise the question of the right of the railway company to operate its cars by other than the power specified in its charter;<sup>6</sup> and it has also been held that an abutting property owner could not raise such question.<sup>7</sup>

**4. What Streets May Be Occupied.** — The determination of the question what streets may be occupied depends upon the terms of the grant of the street-railway franchise.<sup>8</sup> Where the grant expressly designated the streets through and over which the road might be laid, and contained a further general provision that the road might be laid "over and across" any street or highway within its termini, it was held that such latter provision was intended merely

considerable underground works. See also title *ELECTRIC RAILWAYS*, vol. 10, p. 881.

1. *McCartney v. Chicago*, etc., R. Co., 112 Ill. 611; *Hudson River Telephone Co. v. Water-vliet*, etc., Turnpike Co., 135 N. Y. 393, 31 Am. St. Rep. 838 (stated in title *ELECTRIC RAILWAYS*, vol. 10, p. 880); *Weinman v. Wilkinsburg*, etc., R. Co., 118 Pa. St. 192; *Taggart v. Newport St. R. Co.*, 16 R. I. 668.

**Acquiescence of Municipality in Change of Power.** — Where without legislative authorization a municipality consented to the use of electric power by a street railway, but subsequently authority was given to it to permit the use of electricity, it was held to be estopped by acquiescence in the change of motive power to electricity to deny the right of the company to use such power. *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557.

2. *People v. Railroad Com'rs*, 32 N. Y. App. Div. 179; *People v. Railroad Com'rs*, 30 N. Y. App. Div. 69, *affirmed* 156 N. Y. 693; *Potter v. Collis*, 19 N. Y. App. Div. 392.

**Review of Decision by Commissioners.** — *People v. Railroad Com'rs*, 32 N. Y. App. Div. 179.

3. *St. Michael's Protestant Episcopal Church v. Forty-second St.*, etc., R. Co., (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 601.

4. *Matter of Rochester*, etc., R. Co., 51 N. Y. App. Div. 65.

5. *Farrell v. Winchester Ave. R. Co.*, 61 Conn. 127. *Compare Fritz v. Erie City Pass. R. Co.*, 155 Pa. St. 472.

6. **Whether Individual May Raise Question of Authorization of Power.** — *Chicago Gen. R. Co. v. Chicago City R. Co.*, 87 Ill. App. 17, *affirmed* 186 Ill. 219; *Hine v. Bay Cities Consol. R. Co.*, 115 Mich. 204. See also *Potter v. Scranton Traction Co.*, 176 Pa. St. 271. *Compare Indianapolis Cable St. R. Co. v. Citizens' St. R. Co.*, 127 Ind. 369; *Farnum v. Concord Horse R. Co.*, 66 N. H. 569.

7. *Detroit City R. Co. v. Mills*, 85 Mich. 634.

8. **Streets to Be Occupied** — *Georgia*. — *Brown v. Atlanta R.*, etc., Co., 113 Ga. 462; *Thomas v. Milledgeville R. Co.*, 99 Ga. 714.

*Illinois*. — *McCartney v. Chicago*, etc., R. Co., 112 Ill. 611,

*New Jersey*. — *McFarland v. Orange*, etc., Horse Car R. Co., 13 N. J. Eq. 17; *Paterson R. Co. v. Grundy*, 51 N. J. Eq. 213; *West Jersey Traction Co. v. Camden Horse R. Co.*, 53 N. J. Eq. 163.

*New York*. — *Central Crosstown R. Co. v. Metropolitan St. R. Co.*, 16 N. Y. App. Div. 229.

*Pennsylvania*. — *Philadelphia v. Citizens' Pass. R. Co.*, 10 Pa. Co. Ct. 16, *affirmed* 151 Pa. St. 128; *Pennsylvania R. Co. v. Montgomery County Pass. R. Co.*, 14 Pa. Co. Ct. 88; *Conshohocken R. Co. v. Pennsylvania R. Co.*, 15 Pa. Co. Ct. 445; *Rafferty v. Central Traction Co.*, 147 Pa. St. 579, 30 Am. St. Rep. 763; *Junction Pass. R. Co. v. Williamsport Pass. R. Co.*, 154 Pa. St. 116; *Com. v. Union Pass. R. Co.*, 163 Pa. St. 22; *Citizens' Pass. R. Co. v. East Harrisburg Pass. R. Co.*, 164 Pa. St. 274; *Com. v. Union Pass. R. Co.*, 163 Pa. St. 22; *Pennsylvania R. Co. v. Greensburg*, etc., R. Co., 176 Pa. St. 559.

*Texas*. — *Ft. Worth St. R. Co. v. Rosedale St. R. Co.*, 68 Tex. 169.

*Virginia*. — *Norfolk R.*, etc., Co. *v. Consolidated Turnpike Co.*, 100 Va. 243.

Where a street railway was to terminate at N., which was the name of both a township and a village therein, the word N. was held to refer to the village. *Mason v. Brooklyn City*, etc., R. Co., 35 Barb. (N. Y.) 373.

**Route by Designated Street Requiring Turn at Acute Angle.** — *Wilmington City R. Co. v. Wilmington*, etc., R. Co., (Del. 1900) 46 Atl. Rep. 12.

**"Adjacent Street" Construed from Necessity to Include Neighboring Parallel Street.** — *Brooklyn Heights R. Co. v. Brooklyn*, (Brooklyn City Ct. Gen. T.) 18 N. Y. Supp. 870, *affirmed* 152 N. Y. 244. See also *ADJACENT*, vol. 1, p. 635, note.

**An Ambiguity in the Charter as to the Route must be resolved against the company and in favor of the public.** *Burns v. Multnomah R. Co.*, 15 Fed. Rep. 177, 10 Am. & Eng. R. Cas. 289.

**Tracks Allowed to Cross Street Excluded from Grant.** — *Stare v. Newport St. R. Co.*, 16 R. I. 533.

for the crossing of the latter streets, and not to allow the laying of the road lengthwise along such streets.<sup>1</sup> Where the grant authorizes the construction of the road to the river at the foot of a street through which the road runs, and subsequently the space between the river and the foot of the street as existing at the time of the grant is filled in, the road may be laid to the river.<sup>2</sup> Where the grant authorizes several routes collectively, the construction of the road over one route does not preclude the grantee from subsequently occupying another of the authorized routes.<sup>3</sup> Where the grant designates the termini of the route and authorizes the construction of the railway on any street between such termini, the railway should be allowed to follow such streets as are the principal channels of travel and on which it will best promote the public convenience;<sup>4</sup> and if merely the termini of the route are fixed, and the road is constructed along a particular route, the grantee is concluded by such location.<sup>5</sup>

**"At."** — Where the terminus of the route was designated "at" a certain village, the construction of the road to a convenient point "within" the village was held to be authorized.<sup>6</sup>

**"From."** — So the term "from" as used in a grant of the right to construct a street railway from a city to a village has been construed to authorize the construction of the road from a point within the city.<sup>7</sup>

**"Between."** — A franchise to construct a street railway on certain streets "between" two designated streets does not authorize the construction of the road along either of the latter streets.<sup>8</sup>

**Bridges.** — A franchise authorizing the construction of the road along a particular street or highway has been held to authorize its construction across a bridge forming a part of such street or highway.<sup>9</sup>

**Private Property.** — When the charter designates specified streets as the route of the road, such route cannot be abandoned and the road constructed through private property,<sup>10</sup> though to avoid dangerous crossings slight divergence from the designated streets and highways has been held to be permissible.<sup>11</sup>

**5. What Tracks May Be Laid.** — The question what tracks may be laid depends, of course, upon the terms of the grant.<sup>12</sup> General authority to construct a street railway without limitation as to the number of tracks has been held to authorize the construction of a double-track railway;<sup>13</sup> and the fact that the railway is originally constructed as a single-track railway does not

1. *Stamford v. Stamford Horse R. Co.*, 56 Conn. 381, 36 Am. & Eng. R. Cas. 140.

2. *Central Crosstown R. Co. v. Metropolitan St. R. Co.*, 16 N. Y. App. Div. 229.

3. *Thomas v. Milledgeville R. Co.*, 99 Ga. 714.

4. *West Jersey Traction Co. v. Camden Horse R. Co.*, 52 N. J. Eq. 452.

5. *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. (N. Y.) 358.

6. *Mason v. Brooklyn City, etc., R. Co.*, 35 Barb. (N. Y.) 373. See also *At.*, vol. 3, p. 167.

7. *McCartney v. Chicago, etc., R. Co.*, 112 Ill. 611, 29 Am. & Eng. R. Cas. 326. And see *From.*, vol. 14, p. 555, note.

8. *Philadelphia v. Citizens' Pass. R. Co.*, 151 Pa. St. 128, 56 Am. & Eng. R. Cas. 503, fully stated under *BETWEEN*, vol. 4, p. 8.

9. *Over Bridge.* — *Pittsburg, etc., Pass. R. Co. v. Point Bridge Co.*, 165 Pa. St. 37; *Berks County v. Reading City Pass. R. Co.*, 167 Pa. St. 102. Compare *Venango County v. Oil City St. R. Co.*, 3 Pa. Dist. 546.

**Where a Bridge over Which Street Car Tracks Are Laid, Having Been Burnt, Is Rebuilt by the county, the tracks may be relaid without com-**

pensation; the use of the bridge by the street railway is not an additional burden. *Floyd County v. Rome St. R. Co.*, 77 Ga. 614. See also titles *BRIDGES*, vol. 4, p. 920; *EMINENT DOMAIN*, vol. 10, pp. 1093, 1130, 1135.

10. **Construction over Private Property.** — *Matter of South Beach R. Co.*, 119 N. Y. 141, affirming 53 Hun (N. Y.) 131; *Rahn Tp. v. Tamaqua, etc., St. R. Co.*, 167 Pa. St. 84. See also *Heath v. Des Moines, etc., R. Co.*, 61 Iowa 11, 10 Am. & Eng. R. Cas. 313.

11. *Keogh v. Railroad Co.*, 5 Lack. Leg. N. (Pa.) 242.

12. *Rapid R. Co. v. Mt. Clemens*, 118 Mich. 133; *Eldert v. Long Island Electric R. Co.*, 165 N. Y. 651, affirming 28 N. Y. App. Div. 451.

**Right to Construct Third Track.** — *Auchincloss v. Metropolitan El. R. Co.*, 69 N. Y. App. Div. 63, reversing 29 Misc. (N. Y.) 151.

13. *Brown v. Atlanta R., etc., Co.*, 113 Ga. 462, wherein it was said that there is no merit in the contention that a double-track railroad is two railroads and that a single track is one railroad. See also *West Jersey Traction Co. v. Camden Horse R. Co.*, 53 N. J. Eq. 163.

deprive the grantee from subsequently constructing an additional track,<sup>1</sup> especially where the authority is to construct a single-track railway with the privilege of transforming the single into a double track.<sup>2</sup> Where the authority was to build a road with the necessary turnouts and switches, provided the road was located to the south of the centre of the highway, it was held that only a single-track railway was authorized.<sup>3</sup> General power to construct a street railway impliedly includes the right to construct in connection therewith the necessary turnouts and switches,<sup>4</sup> and it has been held that the necessary switches for moving the cars to and from the car barns could be laid on a street intersecting that over which the franchise was granted.<sup>5</sup> If the grant of the franchise expressly designates what turnouts and switches may be laid, then, of course, only the turnouts and switches so designated are authorized;<sup>6</sup> and authority to construct necessary turnouts and switches, expressly given in the grant of a franchise for a single-track street railway, has been held to be a continuing authority to construct such additional turnouts and switches as the increase in travel rendered necessary, even though the grant of the franchise contained a limitation as to the time for the construction of the railway.<sup>7</sup> Under authority to construct necessary turnouts, sidings, etc., an extension of the road cannot be constructed.<sup>8</sup> So under the guise of constructing switches, the double tracking of the railway will not be permitted.<sup>9</sup>

**Location of Tracks.** — The grant of the franchise generally provides with regard to the location of the tracks in the street or highway,<sup>10</sup> and it has been said that if the location of tracks is not designated the owner of the franchise may place them wherever in the street it is for his best interest to go.<sup>11</sup> Though a statute requiring the tracks to be placed "as nearly as possible" in the centre of the street does not require under all circumstances that the tracks be placed in the centre of the street, they should be so placed when it is practicable to do so.<sup>12</sup>

**Gauge of Track.** — It seems to be within the discretion of the owner of the franchise to determine the gauge of the tracks where there is no specification

1. *Noblesville v. Lake Erie, etc., R. Co.*, 130 Ind. 1.

2. *Ransom v. Citizens' R. Co.*, 104 Mo. 375.

3. *Willis v. Erie City Pass. R. Co.*, 188 Pa. St. 56.

4. **Implied Powers to Construct Turnouts, etc.** — *Romer v. St. Paul City R. Co.*, 75 Minn. 211, 74 Am. St. Rep. 455; *Wyoming v. Wilkes Barre, etc., R. Co.*, 8 Kulp (Pa.) 113; *Wilkesbarre v. Coalville Pass. R. Co.*, 8 Kulp (Pa.) 298. See also *Concord v. Concord Horse R. Co.*, 65 N. H. 30; *Kunz v. Brooklyn Heights R. Co.*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 334. Compare *Cape May, etc., R. Co. v. Cape May* 58 N. J. L. 565.

The right of the city to be consulted about the situation and construction of the side-tracks is of equal dignity with the right of the railway company to construct them; and until it is shown that the city has waived its privilege, or declined to act, the railway company is not entitled to a writ of injunction to control the action of the city in that respect. *Houston v. Houston Belt, etc., R. Co.*, 84 Tex. 581.

8. *Romer v. St. Paul City R. Co.*, 75 Minn. 211, 74 Am. St. Rep. 455.

6. *Cape May, etc., R. Co. v. Cape May*, 58 N. J. L. 565.

**Necessity for Laying Out by Officers of Municipality.** — *Concord v. Concord Horse R. Co.*, 65 N. H. 30, 38 Am. & Eng. R. Cas. 425.

7. *Detroit Citizens' St. R. Co. v. Board of*

Public Works, 126 Mich. 554. See also *Akron, etc., R. Co. v. Bedford*, 8 Ohio Dec. 142. Compare *Harner v. Columbus St. R. Co.*, 11 Ohio Dec. (Reprint) 807, 29 Cinc. L. Bul. 387.

8. *Central Crosstown R. Co. v. Metropolitan St. R. Co.*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 716.

9. *Willis v. Erie City Pass. R. Co.*, 188 Pa. St. 56.

10. **Location of Tracks.** — *Hoyle v. New Orleans City R. Co.*, 23 La. Ann. 535; *Browne v. Turner*, 174 Mass. 150; *Erin Tp. v. Detroit, etc., Plank Road Co.*, 115 Mich. 465; *People v. Detroit, etc., R. Co.*, (Mich. 1899) 81 N. W. Rep. 336; *Curvin v. Rochester, etc., R. Co.*, 78 Hun (N. Y.) 555; *Murray Hill Land Co. v. Milwaukee Light, etc., Co.*, 110 Wis. 555.

**Centre of Street — Widened Space Caused by Converging Streets.** — *Kennedy v. Detroit R. Co.*, 108 Mich. 390.

**Acquiescence by Municipality in Location of Tracks.** — *Collins v. Carbondale Traction Co.*, 5 Pa. Dist. 18.

**Laying of Track as Practical Location — No Right to Change.** — *McCruden v. Rochester R. Co.*, (Supm. Ct.) 5 Misc. (N. Y.) 59, *affirmed* 77 Hun (N. Y.) 609. See also *Shamokin v. Electric R. Co.*, 196 Pa. St. 166.

11. *Campbell v. Metropolitan St. R. Co.*, 82 Ga. 320.

12. *Finch v. Riverside, etc., R. Co.*, 87 Cal.

thereof in the grant of the franchise.<sup>1</sup>

**6. Right to Transport Freight.** — It has been suggested that where the franchise is merely to operate a street railway the grantee has no right to operate cars thereon for freight transportation, as the object of a street railway is the transportation of passengers;<sup>2</sup> but of course the grantee may be expressly authorized by the legislature to carry property as well as passengers,<sup>3</sup> and when it is so authorized, it may operate cars intended exclusively for the transportation of property.<sup>4</sup>

**7. Power of Eminent Domain.** — While the condemnation of property for a street railway is a public use and may be authorized by statute,<sup>5</sup> of course the existence of the power of street-railway companies to institute proceedings for such condemnation is dependent upon the terms of the statute under which the proceedings are authorized.<sup>6</sup>

**8. Exclusiveness of Franchise.** — A street-railway franchise will not be deemed exclusive so as to preclude the operation of other railways unless an exclusive franchise is plainly conferred by express words or necessary implication.<sup>7</sup> Therefore, the legislature may grant a second franchise to operate a street railway upon the same street without infringing upon the rights of the first grantee or giving to it a right of action arising from competition and the consequent reduction in earnings,<sup>8</sup> though it has been held that where the

1. *Denver, etc., R. Co. v. Barsaloux*, 15 Colo. 290; *Com. v. Central Pass. R. Co.*, 52 Pa. St. 506.

2. **Transporting Freight.**—*South, etc., Alabama R. Co. v. Highland Ave., etc., R. Co.*, 119 Ala. 105. See also *Brown v. Atlanta R., etc., Co.*, 113 Ga. 462, and see *supra*, this title, *Definition*.

In *St. Louis, etc., R. Co. v. Kirkwood*, 159 Mo. 239, a grant of a street-railway franchise "for the transportation of passengers" was held not to authorize the transportation of freight over the road.

"**Heavy Freight.**"—For the construction of a restriction in the grant of a right of way by a turnpike company against the carriage of "heavy freight," see *Baltimore, etc., Turnpike Road v. United R., etc., Co.*, 93 Md. 138.

3. *Matter of Washington St. Asylum, etc., R. Co.*, 115 N. Y. 442; *Matter of People's Rapid Transit Co.*, 125 N. Y. 93; *De Grauw v. Long Island Electric R. Co.*, 163 N. Y. 597; *State v. Dayton Traction Co.*, 64 Ohio St. 272, *affirming* 10 Ohio Cir. Dec. 212; *Millvale v. Evergreen R. Co.*, 131 Pa. St. 1, 46 Am. & Eng. R. Cas. 219.

4. *De Grauw v. Long Island Electric R. Co.*, 163 N. Y. 597, *affirming* 43 N. Y. App. Div. 502.

5. See the title **EMINENT DOMAIN**, vol. 10, p. 1079, and see *supra*, this title, *Acquisition of Franchise—Power of Government to Grant—In General*.

6. *Matter of South Beach R. Co.*, 119 N. Y. 141, *affirming* 53 Hun (N. Y.) 131; *Matter of Rochester Electric R. Co.*, 123 N. Y. 351, *affirming* 57 Hun (N. Y.) 56; *Toledo Consol. St. R. Co. v. Toledo Electric St. R. Co.*, 3 Ohio Cir. Dec. 493, 6 Ohio Cir. Ct. 362; *Thomson-Houston Electric Co. v. Simon*, 20 Oregon 60, 23 Am. St. Rep. 86; *Ogden City R. Co. v. Ogden City*, 7 Utah 207, 46 Am. & Eng. R. Cas. 101.

7. **Exclusiveness of Franchise—United States.**—*Citizens' St. R. Co. v. Jones*, 34 Fed. Rep. 579.

*California.*—*Oakland R. Co. v. Oakland, etc., R. Co.*, 45 Cal. 365, 13 Am. Rep. 181.

*Connecticut.*—*New England R. Co. v. Central R., etc., Co.*, 69 Conn. 47.

*Georgia.*—*West End, etc., St. R. Co. v. Atlanta St. R. Co.*, 49 Ga. 151.

*Indiana.*—*City R. Co. v. Citizens' St. R. Co.*, (Ind. 1898) 52 N. E. Rep. 157; *Indianapolis Cable St. R. Co. v. Citizens' St. R. Co.*, 127 Ind. 369.

*Kentucky.*—*Louisville, etc., R. Co. v. Louisville City R. Co.*, 2 Duv. (Ky.) 175; *Louisville City R. Co. v. Central Pass. R. Co.*, 87 Ky. 223.

*New Jersey.*—*Jersey City, etc., R. Co. v. Jersey City, etc., Horse R. Co.*, 20 N. J. Eq. 61, 21 N. J. Eq. 550; *Paterson R. Co. v. Grundy*, 51 N. J. Eq. 213.

*New York.*—*New York Cable R. Co. v. Chambers St., etc., R. Co.*, 40 Hun (N. Y.) 29; *Brooklyn City, etc., R. Co. v. Coney Island, etc., R. Co.*, 35 Barb. (N. Y.) 364; *New York, etc., R. Co. v. Forty-second St., etc., R. Co.*, 50 Barb. (N. Y.) 285; *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. (N. Y.) 358, 33 Barb. (N. Y.) 420.

*Ohio.*—*Kinsman St. R. Co. v. Broadway, etc., St. R. Co.*, 36 Ohio St. 239.

*Texas.*—*Gulf City St. R. Co. v. Galveston City R. Co.*, 65 Tex. 502; *Ft. Worth St. R. Co. v. Rosedale St. R. Co.*, 68 Tex. 169; *Houston v. Houston City St. R. Co.*, 83 Tex. 548, 29 Am. St. Rep. 679, 50 Am. & Eng. R. Cas. 380.

See also *Pennsylvania R. Co. v. Conshohocken R. Co.*, 4 Pa. Dist. 12.

8. **United States.**—*Omaha Horse R. Co. v. Cable Tramway Co.*, 30 Fed. Rep. 324. *Compare Fidelity Trust, etc., Co. v. Mobile St. R. Co.*, 53 Fed. Rep. 687.

*Maryland.*—*Koch v. North Ave. R. Co.*, 75 Md. 222. See also *North Baltimore Pass. R. Co. v. Baltimore*, 75 Md. 247.

*New York.*—*New York Cable R. Co. v. Chambers St., etc., R. Co.*, 40 Hun (N. Y.) 29; *Brooklyn City, etc., R. Co. v. Coney Island, etc., R. Co.*, 35 Barb. (N. Y.) 364.

*Pennsylvania.*—*Thirteenth, etc., St. Pass. R. Co. v. Southern Pass. R. Co.*, 3 Pa. Dist. 337.

new track intervenes between the curb and the track of the prior grantee, the latter is entitled to recover damages resulting from interference with freedom of access to its cars and the loss of earnings therefrom,<sup>1</sup> and if the second grantee is authorized to use the tracks of the former grantee, compensation must be made for such use.<sup>2</sup> The legislature may, of course, grant franchises giving an exclusive right to operate street railways upon certain streets and highways,<sup>3</sup> and in some instances statutes have been enacted restricting the acquisition of franchises to construct street railways paralleling and competing with existing lines.<sup>4</sup> An exclusive franchise is to be strictly construed,<sup>5</sup> and though it has been held that exclusive permission to operate a street railway within a city would exclude the operation of another street railway by a later-discovered motive power,<sup>6</sup> yet there is authority to the effect that an exclusive grant to operate a horse railway in a city does not exclude the subsequent grant of a franchise to operate therein street railways by some other or newly discovered motive power.<sup>7</sup> So a provision in the charter of a commercial steam railroad that no other railroad should be constructed between certain points in a city was held not to preclude the construction of a street railway between such points.<sup>8</sup> An exclusive franchise to operate a street railway is regarded as property which may be taken, so far as its exclusiveness is concerned, under the power of eminent domain, so as to authorize the grant of a franchise to operate another railway.<sup>9</sup> It has been announced as a general rule that where there are conflicting grants of street-railway franchises, the first to undertake in good faith the construction of its road has the better right.<sup>10</sup>

See also *Com. v. Lance*, 8 Del. Co. Rep. (Pa.) 9. Compare *Pennsylvania R. Co. v. Philadelphia Belt Line R. Co.*, 10 Pa. Co. Ct. 625.

*Texas*. — *Ft. Worth St. R. Co. v. Rosedale St. R. Co.*, 68 Tex. 169, 32 Am. & Eng. R. Cas. 283; *Houston v. Houston City St. R. Co.*, 83 Tex. 548, 29 Am. St. Rep. 679.

*Utah*. — *Henderson v. Ogden City R. Co.*, 7 Utah 199, 46 Am. & Eng. R. Cas. 95.

*Washington*. — *Wood v. Seattle*, 23 Wash. 1.

See also *Oakland R. Co. v. Oakland, etc., R. Co.*, 45 Cal. 365, 13 Am. Rep. 181, 5 Am. R. Rep. 148; *Wilmington City R. Co. v. People's R. Co.*, (Del. 1900) 47 Atl. Rep. 245; *Chicago Gen. R. Co. v. Chicago City R. Co.*, 62 Ill. App. 502; *General Electric R. Co. v. Chicago City R. Co.*, 66 Ill. App. 362; *Grand Rapids St. R. Co. v. West Side St. R. Co.*, 48 Mich. 433, 7 Am. & Eng. R. Cas. 95; *St. Louis Transfer R. Co. v. St. Louis Merchants Bridge Terminal R. Co.*, 111 Mo. 666; *Murray Hill Land Co. v. Milwaukee Light, etc., Co.*, 110 Wis. 555.

1. *Omaha Horse R. Co. v. Cable Tram Way Co.*, 32 Fed. Rep. 727.

2. See *supra*, this title, *Joint Use of Tracks*.

3. *Wilmington City R. Co. v. Wilmington, etc., R. Co.*, (Del. 1900) 46 Atl. Rep. 12.

4. *New England R. Co. v. Central R., etc., Co.*, 69 Conn. 47; *St. Louis R. Co. v. Northwestern St. Louis R. Co.*, 69 Mo. 65, reversing 2 Mo. App. 69; *St. Louis R. Co. v. South St. Louis R. Co.*, 72 Mo. 67; *Forty-second St., etc., Ferry R. Co. v. Thirty-fourth St. R. Co.*, 52 N. Y. Super. Ct. 252, holding that Laws N. Y. 1884, c. 252, § 14, prohibiting a horse-railroad company from laying its tracks on "that portion of any street" occupied by another company, was not restricted to that part of the street actually occupied by the track, but extended to the space on each side of the track to the whole width of

the street; *Hestonville, etc., Pass. R. Co. v. Forty-second St., etc., R. Co.*, 4 Pa. Dist. 343.

**Parallel Street Railways — What Are Within Prohibition.** — *St. Louis R. Co. v. Northwestern St. Louis R. Co.*, 69 Mo. 65.

5. **Construction of Exclusive Grants.** — *Wilmington City R. Co. v. Wilmington, etc., R. Co.*, (Del. 1900) 46 Atl. Rep. 12; *Des Moines St. R. Co. v. Des Moines Broad-Gauge St. R. Co.*, 73 Iowa 513, 32 Am. & Eng. R. Cas. 209; *Philadelphia, etc., Pass. R. Co.'s Appeal*, 102 Pa. St. 123.

6. *Wilmington City R. Co. v. Wilmington, etc., R. Co.*, (Del. 1900) 46 Atl. Rep. 12.

7. After such a grant, there has been permitted operation by cable, *Omaha Horse R. Co. v. Cable Tramway Co.*, 30 Fed. Rep. 324, 32 Fed. Rep. 727 (stated under HORSE RAILWAYS, vol. 15, p. 749); by electric power, *Teachout v. Des Moines Broad-Gauge St. R. Co.*, 75 Iowa 722, 36 Am. & Eng. R. Cas. 108; and by steam, *Denver, etc., R. Co. v. Denver City R. Co.*, 2 Colo. 673.

8. *Louisville, etc., R. Co. v. Louisville City R. Co.*, 2 Duv. (Ky.) 175.

9. *Metropolitan City R. Co. v. Chicago West Div. R. Co.*, 87 Ill. 317; *Philadelphia, etc., Pass. R. Co.'s Appeal*, 102 Pa. St. 123. And see the title EMINENT DOMAIN, vol. 10, pp. 1001, 1100, 1117.

10. **Conflicting Grants.** — *Indianapolis Cable St. R. Co. v. Citizens' St. R. Co.*, 127 Ind. 360; *City R. Co. v. Citizens' St. R. Co.*, (Ind. 1898) 52 N. E. Rep. 157. See also *People's Pass. R. Co. v. Marshall St. R. Co.*, 20 Phila. (Pa.) 203, 47 Leg. Int. (Pa.) 26; *Ft. Worth St. R. Co. v. Rosedale St. R. Co.*, 68 Tex. 169; *Denison Land, etc., Co., v. Denison, etc., Co.*, 11 Tex. Civ. App. 157.

Volume XXVII.

**9. Protection of Franchise as Contract Obligation.** — The legislative grant of a street-railway franchise is in the nature of a contract obligation, the impairment of which is prohibited by the provision of the Federal Constitution denying to the states the power to enact laws impairing the obligation of contracts.<sup>1</sup> But the power to alter or revoke may be reserved.<sup>2</sup>

**VIII. IMPROVEMENT, PAVING, AND REPAIR OF STREETS — 1. In General.** — It is a well-recognized general rule that the grant of a street-railway franchise imposes upon the grantee the duty to construct and maintain its roadbed, with reference to the surface of the street, in such condition that its tracks shall not render the street unsafe for ordinary travel;<sup>3</sup> but in the absence of

**1. Legislative Franchise Contract Obligation** — *United States*. — *City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557; *Citizens' St. R. Co. v. Memphis*, 53 Fed. Rep. 715; *Citizens' St. R. Co. v. City R. Co.*, 56 Fed. Rep. 746; *Africa v. Knoxville*, 70 Fed. Rep. 729.

*Colorado*. — *Denver v. Denver City Cable R. Co.*, 22 Colo. 565.

*Illinois*. — *Belleville v. Citizens' Horse R. Co.*, 152 Ill. 171; *People v. Chicago West. Div. R. Co.*, 118 Ill. 113, *affirming* 18 Ill. App. 125; *People v. Suburban R. Co.*, 178 Ill. 594; *Harvey v. Aurora, etc., R. Co.*, 186 Ill. 283; *Citizens' Horse R. Co. v. Belleville*, 47 Ill. App. 388; *Chicago Gen. R. Co. v. Chicago City R. Co.*, 62 Ill. App. 502.

*Iowa*. — *Ingram v. Chicago, etc., R. Co.*, 38 Iowa 669; *Burlington v. Burlington St. R. Co.*, 49 Iowa 144, 31 Am. Rep. 145.

*Kansas*. — *Wyandotte v. Corrigan*, 35 Kan. 21.

*Kentucky*. — *Johnson v. Owensboro, etc., R. Co.*, (Ky. 1896) 36 S. W. Rep. 8.

*Michigan*. — *Hamtramck Tp. v. Rapid R. Co.*, 122 Mich. 472.

*Minnesota*. — *Nash v. Lowry*, 37 Minn. 261.

*Missouri*. — *Springfield R. Co. v. Springfield*, 85 Mo. 674; *Hovelman v. Kansas City Horse R. Co.*, 79 Mo. 632.

*New York*. — *Coney Island, etc., R. Co. v. Kennedy*, 15 N. Y. App. Div. 588; *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. (N. Y.) 358; *People v. O'Brien*, 111 N. Y. 1, *reversing* 45 Hun (N. Y.) 519; *De Grauw v. Long Island Electric R. Co.*, 43 N. Y. App. Div. 502; *Herzog v. New York El. R. Co.*, (N. Y. Super. Ct. Spec. T.) 14 N. Y. Supp. 296.

*North Carolina*. — *Asheville St. R. Co. v. Asheville*, 109 N. Car. 688.

*Pennsylvania*. — *Hays v. Com.*, 82 Pa. St. 518; *Norristown v. Norristown Pass. R. Co.*, 148 Pa. St. 87. *Compare Philadelphia, etc., Pass. R. Co.'s Appeal*, 102 Pa. St. 123, 20 Am. & Eng. R. Cas. 1.

*Texas*. — *Houston v. Houston City St. R. Co.*, 83 Tex. 548, 29 Am. St. Rep. 679, 50 Am. & Eng. R. Cas. 380. See also *Ft. Worth St. R. Co. v. Rosendale St. R. Co.*, 68 Tex. 169, 32 Am. & Eng. R. Cas. 283. *Compare Gulf City R. Co. v. Gulf City, etc., R. Co.*, 63 Tex. 529, 26 Am. & Eng. R. Cas. 114.

See also *Grand Rapids Electric R. Co. v. Grand Rapids*, 84 Mich. 257; *Newark, etc., Traction Co. v. North Arlington*, 67 N. J. L. 161. *Compare Lake Roland El. R. Co. v. Baltimore*, 77 Md. 352, 54 Am. & Eng. R. Cas. 11.

See generally the titles CORPORATIONS (PRIVATE), vol. 7, p. 669; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1049.

**2. Reservation of Power to Alter** — *United States*. — *Henderson v. Central Pass. R. Co.*, 21 Fed. Rep. 358, 20 Am. & Eng. R. Cas. 542; *Omaha Horse R. Co. v. Cable Tramway Co.*, 30 Fed. Rep. 324.

*Delaware*. — *Wilmington City R. Co. v. Wilmington, etc., R. Co.*, (Del. 1900) 46 Atl. Rep. 12; *Wilmington City R. Co. v. People's R. Co.*, (Del. Ch. 1900) 47 Atl. Rep. 245.

*Massachusetts*. — *Medford, etc., R. Co. v. Somerville*, 111 Mass. 232.

*New Jersey*. — *Douglass v. State*, 34 N. J. L. 485; *West Jersey Traction Co. v. Camden Horse R. Co.*, 53 N. J. Eq. 163.

*New York*. — *People v. Railroad Com'rs*, 32 N. Y. App. Div. 179; *New York v. Twenty-third St. R. Co.*, 113 N. Y. 311, 41 Am. & Eng. R. Cas. 640.

*Wisconsin*. — *State v. Hilbert*, 72 Wis. 184, 36 Am. & Eng. R. Cas. 118.

See also *Detroit v. Detroit City R. Co.*, 76 Mich. 421. *Compare Williamsport Pass. R. Co. v. Williamsport*, 120 Pa. St. 1, 36 Am. & Eng. R. Cas. 125.

**3. Construction and Maintenance of Roadbed** — *Connecticut*. — *Jacques v. Bridgeport Horse R. Co.*, 41 Conn. 61, 19 Am. Rep. 483.

*Indiana*. — *Western Paving, etc., Co. v. Citizens' St. R. Co.*, 128 Ind. 525, 25 Am. St. Rep. 462.

*Iowa*. — *Bergert v. Davenport City R. Co.*, 34 Iowa 571; *Sioux City St. R. Co. v. Sioux City*, 78 Iowa 742.

*Kentucky*. — *Louisville City R. Co. v. Louisville*, 8 Bush (Ky.) 415.

*Louisiana*. — *Dominguez v. Orleans R. Co.*, 35 La. Ann. 751; *Cline v. Crescent City R. Co.*, 41 La. Ann. 1031.

*Massachusetts*. — *Gillett v. Western R. Corp.*, 8 Allen (Mass.) 560.

*Missouri*. — *Keitel v. St. Louis Cable, etc., R. Co.*, 28 Mo. App. 657; *Griveaud v. St. Louis Cable, etc., R. Co.*, 33 Mo. App. 458.

*New York*. — *Fash v. Third Ave. R. Co.*, 1 Daly (N. Y.) 148; *Worster v. Forty-second St., etc., Ferry R. Co.*, 50 N. Y. 203; *Wooley v. Grant St., etc., R. Co.*, 83 N. Y. 121; *Conroy v. Twenty-third St. R. Co.*, (C. Pl. Gen. T.) 52 How. Pr. (N. Y.) 49; *Albany v. Water-vliet Turnpike, etc., Co.*, 108 N. Y. 14. See also *Mazetti v. New York, etc., R. Co.*, 3 E. D. Smith (N. Y.) 100; *Cook v. New York Floating Dry Dock Co.*, 1 Hilt. (N. Y.) 436; *Lowrey v. Brooklyn City, etc., R. Co.*, (Brooklyn City Ct. Gen. T.) 4 Abb. N. Cas. (N. Y.) 32.

any duty imposed by its charter or by general laws or ordinances, it is under no obligation to keep in repair, pave, or improve generally the streets over which it operates its cars, or to maintain the part between its tracks in the same condition as the remainder of the street is kept by the municipality;<sup>1</sup> nor, where its tracks are laid in a street already paved, is it liable for any portion of the cost of such paving.<sup>2</sup> In many instances, however, the duty is expressly imposed upon street-railway companies in the grant of their franchises to pave, repave, or improve the whole or a portion of the streets over which their tracks are laid,<sup>3</sup> or to keep in repair the whole or a certain portion of the street.<sup>4</sup> Where the charter of a street-railway company or the grant of its franchise expressly fixes its liability with regard to the paving or repaving of streets, the municipality cannot by ordinance impose on the company an additional burden in this respect, as such additional imposition would be an impairment of the contract rights of the company;<sup>5</sup> nor can municipalities

*Pennsylvania.*—Harrisburg *v.* Harrisburg Pass. R. Co., 1 Pearson (Pa.) 298; Reading *v.* United Traction Co., 202 Pa. St. 571.

*Tennessee.*—Memphis, etc., R. Co. *v.* State, 87 Tenn. 746.

*Texas.*—Houston City St. R. Co. *v.* Delesdernier, 84 Tex. 82; Laredo Electric, etc., Co. *v.* Hamilton, 23 Tex. Civ. App. 480. See also Galveston City R. Co. *v.* Nolan, 53 Tex. 139.

*Virginia.*—Virginia Cent. R. Co. *v.* Sanger, 15 Gratt. (Va.) 230, 80 Am. Dec. 702.

*Wisconsin.*—Fitts *v.* Cream City R. Co., 59 Wis. 323.

1. *United States.*—Chicago *v.* Sheldon, 9 Wall. (U. S.) 50.

*Indiana.*—Western Paving, etc., Co. *v.* Citizens' St. R. Co., 128 Ind. 525, 25 Am. St. Rep. 462.

*Iowa.*—Lacey *v.* Marshalltown, 99 Iowa 367; Ft. Dodge Electric Light, etc., Co. *v.* Ft. Dodge, 115 Iowa 568.

*Massachusetts.*—Boston *v.* Union Freight R. Co., 181 Mass. 205; Springfield *v.* Springfield St. R. Co., 182 Mass. 41.

*Missouri.*—State *v.* Corrigan Consol. St. R. Co., 85 Mo. 263, 55 Am. Rep. 361; Kansas *v.* Corrigan, 86 Mo. 67.

*New York.*—Gilmore *v.* Utica, 121 N. Y. 561; New York *v.* Eighth Ave. R. Co., 7 N. Y. App. Div. 86; New York *v.* New York, etc., R. Co., (Supm. Ct. Gen. T.) 19 N. Y. Supp. 67.

*Pennsylvania.*—Philadelphia *v.* Empire Pass. R. Co., 3 Brews. (Pa.) 570.

**Voluntary Paving Does Not Create Obligation to Repave or Repair.**—Leake *v.* Philadelphia, 150 Pa. St. 643.

2. *Atlanta Consol. St. R. Co. v. Atlanta*, 111 Ga. 255; *Gulf City St. R., etc., Co. v. Galveston*, 69 Tex. 660; *Dallas v. Dallas Consol. Traction R. Co.*, (Tex. Civ. App. 1895) 33 S. W. Rep. 757.

A provision that a street-railway company shall be liable for the expense of certain street improvements is prospective. *Gulf City St. R. etc., Co. v. Galveston*, 69 Tex. 660.

3. **Duty to Pave, etc., Imposed Specially**—*California.*—Schmidt *v.* Market St., etc., R. Co., 90 Cal. 37.

*Connecticut.*—Bowditch *v.* New Haven, 40 Conn. 503.

*District of Columbia.*—District of Columbia *v.* Washington, etc., R. Co., 1 Mackey (D. C.) 361.

*Florida.*—State *v.* Jacksonville St. R. Co., 29 Fla. 590.

*Georgia.*—Atlanta *v.* Gate City St. R. Co., 80 Ga. 276.

*Illinois.*—Parmelee *v.* Chicago, 60 Ill. 267; Chicago *v.* Cummings, 144 Ill. 446.

*Michigan.*—Detroit *v.* Detroit City R. Co., 37 Mich. 558.

*New York.*—Davidge *v.* Binghamton, 62 N. Y. App. Div. 525; Wood *v.* Binghamton, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 208; Conway *v.* Rochester, 157 N. Y. 33.

*Ohio.*—Columbus *v.* Columbus St. R. Co., 45 Ohio St. 98.

*Pennsylvania.*—Philadelphia *v.* Empire Pass. R. Co., 7 Phila. (Pa.) 321, 3 Brews. (Pa.) 570; Frankford, etc., R. Co. *v.* Philadelphia, (Pa. 1886) 4 Atl. Rep. 550; Philadelphia *v.* Ridge Ave. Pass. R. Co., 143 Pa. St. 444.

**Obligation of Lessee.**—The lessee of a railway company assumes an obligation to pave and repair imposed on the lessor. *Mullen v. Philadelphia Traction Co.*, 20 W. N. C. (Pa.) 203.

**Expressly Imposed Liability for Cost of Paving.**—*Council Bluffs v. Omaha, etc., St. R., etc., Co.*, 114 Iowa 141 ("property owners abutting").

4. *State v. Jacksonville St. R. Co.*, 29 Fla. 590, 50 Am. & Eng. R. Cas. 179; *State v. New Orleans City, etc., R. Co.*, 42 La. Ann. 550; *Philadelphia, etc., R. Co. v. Philadelphia*, 11 Phila. (Pa.) 358, 33 Leg. Int. (Pa.) 264; *Thirteenth, etc., St. Pass. R. Co. v. Philadelphia*, 13 W. N. C. (Pa.) 487; *Pittsburgh, etc., Pass. R. Co. v. Birmingham*, 51 Pa. St. 41; *Ridge Ave. Pass. R. Co. v. Philadelphia*, 124 Pa. St. 219; *Philadelphia v. Ridge Ave. Pass. R. Co.*, 143 Pa. St. 444.

A city ordinance requiring a street-railroad company to repair the street between the rails and on the sides of its railway is not invalid as being a surrender by the city of its corporate power over its streets. *State v. Corrigan Consol. St. R. Co.*, 85 Mo. 263, 55 Am. Rep. 361.

5. **Imposing Duties Additional to Franchise Requirements.**—*Coast-Line R. Co. v. Savannah*, 30 Fed. Rep. 646; *Western Paving, etc., Co. v. Citizens' St. R. Co.*, 128 Ind. 525, 25 Am. St. Rep. 462; *Oskaloosa St. R., etc., Co. v. Oskaloosa*, 99 Iowa 496; *Shreveport v. Shreveport Belt R. Co.*, 104 La. 260; *State v. Corrigan Consol. St. R. Co.*, 85 Mo. 263, 55 Am. Rep. 361; *Kansas v. Corrigan*, 86 Mo. 67; *Phila-*



impose on such companies additional burdens to pave between or about their tracks.<sup>1</sup> In the grant of the franchise the legislature may reserve the power to impose additional burdens as to the paving and improvement of the streets,<sup>2</sup> but a provision in the charter of a street-railway company that the grantee shall be subject to city ordinances regulating the running of passenger railway cars does not enable the city to impose on it the duty to pave any portion of the street,<sup>3</sup> and the same has been held true of a provision that the company should be subject to such regulations as might be made by the municipality "in regard to paving, repaving," etc.<sup>4</sup> The right to levy special assessments against railways for the improvement of the streets over which their tracks are laid is fully discussed in another title.<sup>5</sup>

**2. Extent of Obligation or Duty.** — The extent of the obligation or duty of a street-railway company to pave, repair, and otherwise improve the streets depends upon the provisions of its charter or franchise, and in construing such provisions the usual rules of interpretation are, of course, applied.<sup>6</sup>

"Good Order" and "Repair." — It has been held that an obligation to keep the entire street in "good order" and "good repair" requires the removal of dirt and filth necessarily accumulating thereon.<sup>7</sup>

**Paving and Repaving.** — The duty is frequently expressly imposed upon street-railway companies to pave or repave the streets or portions thereof,<sup>8</sup> and under the duty to keep a certain portion of the street "well paved" the company may be required to construct a pavement where one did not exist;<sup>9</sup> but an obligation to "pave" has been held not to include excavating with reference to grading preliminary to paving.<sup>10</sup>

"Repair" as Including Paving. — The duty imposed upon a street-railway company by its charter or the grant of its franchise to keep in "repair" the street or a particular portion thereof does not impose upon it any duty to pave a

delphia v. Philadelphia City Pass. R. Co., 177 Pa. St. 379.

1. State v. Corrigan Consol. St. R. Co., 85 Mo. 282, 55 Am. Rep. 361; St. Louis v. Missouri R. Co., 13 Mo. App. 524; Philadelphia v. Empire Pass. R. Co., 3 Brews. (Pa.) 570; Frayser v. State, 16 Lea (Tenn.) 671. Compare Fielders v. North Jersey St. R. Co., 67 N. J. L. 76.

2. Sioux City St. R. Co. v. Sioux City, 78 Iowa 367, 742; Lincoln St. R. Co. v. Lincoln, 61 Neb. 109; Wood v. Binghamton, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 208.

3. Philadelphia v. Empire Pass. R. Co., 18 Pa. Co. Ct. 81, 5 Pa. Dist. 53, affirmed 177 Pa. St. 382.

4. Philadelphia v. Hestonville, etc., Pass. R. Co., 177 Pa. St. 371.

5. See the title SPECIAL OR LOCAL ASSESSMENTS, vol. 25, pp. 1187-1189, and see the following additional cases: Mobile v. Royal St. R. Co., 45 Ala. 322; Mobile v. Dargan, 45 Ala. 310; Ft. Dodge Electric Light, etc., Co. v. Ft. Dodge, 115 Iowa 568; Sioux City St. R. Co. v. Sioux City, 78 Iowa 367; State v. Dist. Ct., 32 Minn. 181; Lincoln St. R. Co. v. Lincoln, 61 Neb. 109; Montreal v. Montreal St. R. Co., 3 Montreal Super. Ct. 320; Toronto v. Toronto St. R. Co., 23 Can. Sup. Ct. 198.

6. Charter Construed as to Obligation to Pave, Etc. — State v. Jacksonville St. R. Co., 29 Fla. 590; Philadelphia v. Thirteenth, etc., St. Pass. R. Co., 169 Pa. St. 269; Galveston City R. Co. v. Nolan, 53 Tex. 139; Galveston v. Galveston City R. Co., 46 Tex. 435; Montreal v. Montreal St. R. Co., 3 Montreal Super. Ct. 320. See gen-

erally the title STATUTES, vol. 26, p. 596 *et seq.*, and see PAVE, etc., vol. 22, p. 507.

Under an ordinance requiring a street-railway company to "keep the surface of the streets inside the rails, and for two feet four inches outside thereof, in good order and repair," "provided, however, that upon the paved portion of said streets the materials for repaving shall be supplied at the expense of the city," where the city directed the company to "raise and repair" that portion of the pavement which was within the rails, it was held that the city was bound to bear the expense of the materials, as such repairs amounted to repaving within the meaning of the proviso. Ft. Wayne, etc., R. Co. v. Detroit, 34 Mich. 78. See also Ft. Wayne, etc., St. R. Co. v. Detroit, 39 Mich. 543.

7. Keeping "in Good Order" and "Good Repair." — Pittsburgh, etc., Pass. R. Co. v. Birmingham, 51 Pa. St. 41; Pittsburgh, etc., Pass. R. Co. v. Pittsburgh, 80 Pa. St. 72.

8. Paving and Repaving. — Cambria Iron Co. v. Union Trust Co., 154 Ind. 292, rehearing denied 154 Ind. 308; Lansing v. Lansing City Electric R. Co., 109 Mich. 123; West Chester v. West Chester St. R. Co., 203 Pa. St. 201.

Macadamizing Not Paving. — Leake v. Philadelphia, 150 Pa. St. 643. But see MACADAMIZE, vol. 10, p. 603; PAVE, etc., vol. 22, p. 507.

9. District of Columbia v. Washington, etc., R. Co., 4 Mackey (D. C.) 214. See also Philadelphia v. Spring Garden Farmers' Market Co., 161 Pa. St. 522.

10. Ft. Street, etc., R. Co. v. Schneider, 15 Mich. 74. See PAVE, etc., vol. 22, p. 507.

street which at the time was unpaved,<sup>1</sup> though it seems to be the better rule that the duty to keep a portion of the street in good repair will require the company, where such portion has been paved, to replace such paving with an improved pavement to correspond with a change made in the paving of the balance of the street by the municipality,<sup>2</sup> and *a fortiori* such duty will require the company to restore any pavement which may be put down by the municipality.<sup>3</sup>

"Condition" as Applied to Paving. — The duty to keep a certain portion of the street in "as good condition" as the municipality keeps the balance of the street requires the company in the first instance to pave such portion of the street, where the balance is paved by the municipality.<sup>4</sup>

"Reconstruct" as Applied to Paving. — The duty to "reconstruct" streets upon which tracks are laid does not impose upon the street-railway company the duty, after constructing the street, to repave it in case the character of the paving is subsequently changed by the city.<sup>5</sup>

Character of and Necessity for Paving. — Where the street-railway company is under obligation to pave and repave the street when necessary, the municipality is to be the judge of the necessity for paving and repaving<sup>6</sup> and also of the character of paving to be laid.<sup>7</sup> An obligation to repave extends to a repaving with a different or improved paving,<sup>8</sup> and the fact that only a particular character of paving was in use at the time of the grant of a franchise which imposed upon the street-railway company the duty to pave and repave the street does not limit its liability to paving and repaving with that

1. *Repair*—United States. — Chicago v. Sheldon, 9 Wall. (U. S.) 50.

Connecticut. — Farmers' L. & T. Co. v. Ansonia, 61 Conn. 76, 19 Am. Rep. 485.

District of Columbia. — District of Columbia v. Washington, etc., R. Co., 1 Mackey (D. C.) 361, 4 Am. & Eng. R. Cas. 174.

Florida. — State v. Jacksonville St. R. Co., 29 Fla. 590.

Indiana. — Western Paving, etc., Co. v. Citizens' St. R. Co., 128 Ind. 525, 25 Am. St. Rep. 462.

Maryland. — Baltimore v. Scharf, 54 Md. 499.

Missouri. — Farrar v. St. Louis, 80 Mo. 379; State v. Corrigan Consol. St. R. Co., 85 Mo. 263, 55 Am. Rep. 361; Kansas v. Corrigan, 86 Mo. 67.

New Jersey. — Dean v. Paterson, 67 N. J. L. 199.

New York. — Binghamton v. Binghamton, etc., R. Co., 61 Hun (N. Y.) 479; Matter of Fulton St., (Supm. Ct.) 29 How. Pr. (N. Y.) 429.

Pennsylvania. — Philadelphia v. Evans, 27 W. N. C. (Pa.) 240; Norristown v. Norristown Pass. R. Co., 148 Pa. St. 87; Leake v. Philadelphia, 150 Pa. St. 643; Shamokin v. Shamokin St. R. Co., 178 Pa. St. 128.

Texas. — Galveston v. Galveston City R. Co., 46 Tex. 435.

Compare Middlesex R. Co. v. Wakefield, 103 Mass. 261; People v. Ft. Street, etc., R. Co., 41 Mich. 413. See generally REPAIR, vol. 24, p. 470.

2. Conway v. Rochester, 157 N. Y. 33, reversing 24 N. Y. App. Div. 489 (to "have and keep in permanent repair"); People v. Utica, 45 N. Y. App. Div. 356; Doyle v. New York, 58 N. Y. App. Div. 588; Philadelphia v. Thirteenth, etc., St. Pass. R. Co., 169 Pa. St. 269; Reading v. United Traction Co., 202 Pa. St. 571.

Mechanicville v. Stillwater, etc., St. R. Co., 67 Pa. St. 269.

N. Y. App. Div. 628; Reading v. Union Traction Co., 24 Pa. Co. Ct. 629; McKeesport v. McKeesport Pass. R. Co., 158 Pa. St. 447. But see Baltimore v. Scharf, 54 Md. 499; Dean v. Paterson, 67 N. J. L. 199; Philadelphia v. Hesstonville, etc., Pass. R. Co., 177 Pa. St. 371.

Repaving Where Paving Is Torn Up for Municipal Improvements. — Reading v. Reading, etc., St. R. Co., 19 Pa. Super. Ct. 202.

3. State v. Jacksonville St. R. Co., 29 Fla. 590; Reading v. United Traction Co., 202 Pa. St. 571.

4. State v. Jacksonville, etc., R. Co., 29 Fla. 590 (stated under REPAIR, vol. 24, p. 472, note 2).

5. Norristown v. Norristown Pass. R. Co., 9 Pa. Co. Ct. 98, 148 Pa. St. 87, stated under RECONSTRUCT — RECONSTRUCTION, vol. 24, p. 71. See also Gilmore v. Utica, 121 N. Y. 561, where the company's obligation to "restore the street or highway \* \* \* to such state as not unnecessarily to have impaired its usefulness" was held not to bind it to conform its repairs to the absolute directions and requirements of the municipality whenever the municipality should resolve to pave or repave a street.

6. Character and Necessity of Paving. — Philadelphia v. Ridge Ave. Pass. R. Co., 143 Pa. St. 444. See also Detroit v. Ft. Wayne, etc., R. Co., 90 Mich. 646.

7. District of Columbia v. Washington, etc., R. Co., 4 Mackey (D. C.) 214; Mechanicville v. Stillwater, etc., St. R. Co., 67 N. Y. App. Div. 628, affirming 35 Misc. (N. Y.) 513; Columbus v. Columbus St. R. Co., 45 Ohio St. 98; Philadelphia v. Ridge Ave. Pass. R. Co., 143 Pa. St. 444. See also McKeesport v. McKeesport Pass. R. Co., 158 Pa. St. 447. Compare Atlanta v. Gate City St. R. Co., 80 Ga. 276; Binghamton v. Binghamton, etc., R. Co., 61 Hun (N. Y.) 479.

8. Philadelphia v. Thirteenth, etc., St. Pass. R. Co., 169 Pa. St. 269.

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character of paving, but it may be required to pave with an improved kind.<sup>1</sup>

**Streets and Portions Thereof to Be Paved, Etc.** — The question what streets and portions thereof the company is required to pave, etc., depends upon the construction of the statutes or ordinances imposing the duty.<sup>2</sup> Where the duty is to repair, pave, or otherwise improve the street, the company is bound to keep in repair, pave, etc., the whole street from curb to curb.<sup>3</sup> Where the provision was to "keep the surface of the streets inside the rails and for two feet four inches outside thereof" in repair, it was held that the company was required to keep in repair two feet four inches outside of each outer rail.<sup>4</sup>

**The Duty to Repair or Pave "In and About the Rails"** has been held to include the portion of the surface of the street disturbed in the construction of the track,<sup>5</sup> and in applying this rule, to include the space between double tracks<sup>6</sup> and one foot outside of each outer rail.<sup>7</sup>

**The Term "Roadbed,"** as used in a requirement that a street railway shall pave its roadbed, includes the foundation on which its tracks rest.<sup>8</sup>

**Change of Street Grade.** — Where the grant of a street-railway franchise requires that the tracks shall conform to the grade of the street, the company is required, at its own expense, to relay its tracks to conform with a change of the grade.<sup>9</sup>

**3. Release and Discharge of Liability.** — Where the duty to repair, pave, repave, or otherwise improve streets is imposed upon a street-railway company by ordinances of a municipality granting its consent to the use of the streets for street-railway purposes, the municipality may, by agreement with

1. *Philadelphia v. Ridge Ave. Pass. R. Co.*, 143 Pa. St. 444.

2. **Streets to Be Paved.** — *State v. New Orleans Traction Co.*, 48 La. Ann. 567; *State v. Canal, etc.*, St. R. Co., 44 La. Ann. 526; *Merrimack River Locks, etc., v. Lowell Horse R. Corp.*, 109 Mass. 221; *Dearborn v. Detroit, etc., R. Co.*, (Mich. 1902) 90 N. W. Rep. 688; *Duluth v. Duluth St. R. Co.*, 60 Minn. 178; *St. Louis v. Missouri R. Co.*, 87 Mo. 151, *affirming* 13 Mo. App. 524; *Kent v. Binghamton*, 72 N. Y. App. Div. 623.

Under a contract by a city with a company, giving a right of way, that the company shall keep in good order and condition, from curb to curb, the streets, intersections, bridges, etc., though which its tracks pass, it cannot be claimed that the company is under obligation to keep in such condition streets on which its tracks do not pass, and which extend alongside and border on middle or neutral grounds, dividing them, comprised between curbs or external lines, and which do not form part of thoroughfares on which vehicles usually move. The obligation exists only as to streets and spots on which the tracks actually pass. *State v. New Orleans City, etc., R. Co.*, 42 La. Ann. 550.

**Proportionate Liability of Two Companies for Paving Where Roads Cross.** — *Philadelphia v. Second, etc., St. Pass. R. Co.*, 13 Pa. Co. Ct. 580.

3. *Thirteenth, etc., St. Pass. R. Co. v. Philadelphia*, 16 Phila. (Pa.) 164, 40 Leg. Int. (Pa.) 271, 13 W. N. C. (Pa.) 487; *Philadelphia, etc., R. Co. v. Philadelphia*, 2 W. N. C. (Pa.) 639; *Pittsburgh, etc., Pass. R. Co. v. Birmingham*, 51 Pa. St. 41; *Pittsburg, etc., Pass. R. Co. v. Pittsburg*, 80 Pa. St. 72; *Ridge Ave. Pass. R. Co. v. Philadelphia*, 124 Pa. St. 219; *Campbell v. Frankford, etc., R. Co.*, 139 Pa. St. 522; *Philadelphia v. Ridge Ave. Pass. R. Co.*, 143 Pa. St.

444; *Philadelphia v. Thirteenth, etc., St. Pass. R. Co.*, 169 Pa. St. 269.

**Duty to Repair Bridges Crossed.** — See *State v. Canal, etc., St. R. Co.*, 44 La. Ann. 526.

Where a franchise to construct a railway over certain streets, highways, and bridges required the company to pave and keep in repair a certain portion of the "streets," "highways," and "avenues," it was held that the company was under no obligation to relay a floor of oak planks on any portion of a bridge over which its tracks were laid. *Cedar Rapids v. Cedar Rapids, etc., R. Co.*, 108 Iowa 406.

4. *People v. Ft. Street, etc., R. Co.*, 41 Mich. 413.

5. **"In and About the Rails."** — *New York v. Second Ave. R. Co.*, 102 N. Y. 572, 55 Am. Rep. 839; *McMahon v. Second Ave. R. Co.*, 75 N. Y. 231, *affirming* 11 Hun (N. Y.) 347.

6. **Space Between Double Tracks.** — *New York v. Second Ave. R. Co.*, 102 N. Y. 572, 55 Am. Rep. 839, *affirming* 31 Hun (N. Y.) 241. See also *St. Louis v. St. Louis R. Co.*, 50 Mo. 94. But compare *Robbins v. Omnibus R. Co.*, 32 Cal. 472.

7. *McMahon v. Second Ave. R. Co.*, 75 N. Y. 231.

8. *Shreveport v. Shreveport Belt R. Co.*, 107 La. 785. And see generally ROADBED — ROADWAY, vol. 24, p. 988.

9. **Change of Grade.** — *Little Rock v. Citizens' St. R. Co.*, 56 Ark. 28; *District of Columbia v. Washington, etc., R. Co.*, 1 Mackey (D. C.) 361, 4 Mackey (D. C.) 214; *Karst v. St. Paul, etc., R. Co.*, 22 Minn. 118; *Ashland St. R. Co. v. Ashland*, 78 Wis. 271. See also *McHale v. Easton, etc., Transit Co.*, 169 Pa. St. 416; *McKeesport v. McKeesport Pass. R. Co.*, 158 Pa. St. 447. Compare *Galveston City R. Co. v. Nolan*, 53 Tex. 139; *Galveston v. Galveston City R. Co.*, 46 Tex. 435.

the company, modify or change the liabilities of the latter in this respect.<sup>1</sup> If, however, a mandatory duty in this regard is imposed by statute, a municipality has no power to release the company from the performance of the duty.<sup>2</sup> Sometimes it is left optional with the municipality whether to require the street-railway company to pave or improve the streets.<sup>3</sup>

#### 4. Enforcement of Liability — Improvement at Expense of Street-railway Company. —

Where a street-railway company refuses to perform its obligation to repair, pave, repave, or improve the street, the municipality may make the necessary repairs, etc., and recover the cost from the company,<sup>4</sup> provided such cost is reasonable;<sup>5</sup> and the sum expended has been held to be *prima facie* that recoverable, where no fraud is shown and no facts appear to impeach the reasonableness of the account.<sup>6</sup>

**Indemnifying Municipality for Recovery on Default.** — Where a street-railway company defaults in its obligation to the municipality to keep the street in proper repair, and an individual injured by reason of such nonrepair recovers against the municipality, the company is liable over to the municipality for the amount of the recovery.<sup>7</sup>

**Mandamus.** — Mandamus will lie to compel a street-railway company to perform its duty in regard to the repair, paving, and improvement of streets;<sup>8</sup>

1. **Liability to Pave, etc., Modified or Released.** — West Chicago St. R. Co. v. Chicago, 178 Ill. 339; Leake v. Philadelphia, 10 Pa. Co. Ct. 263; Philadelphia v. Evans, 139 Pa. St. 483. See also State v. St. Charles St. R. Co., 44 La. Ann. 562.

**Release of Duty to Repair No Release of Duty to Pave.** — West Chester v. West Chester St. R. Co., 203 Pa. St. 201.

**Consideration for Release from Liability.** — Western Paving, etc., Co. v. Citizens' St. R. Co., 128 Ind. 525, 25 Am. St. Rep. 462.

2. **Shreveport v. Shreveport Belt R. Co.**, 104 La. 260; Wood v. Binghamton, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 208. See also Conway v. Rochester, 157 N. Y. 33.

3. **Gilmore v. Utica**, 121 N. Y. 561, reversing 55 Hun (N. Y.) 514. See also Davidge v. Binghamton, 62 N. Y. App. Div. 525.

4. **Enforcing Liability — United States.** — Washington, etc., R. Co. v. District of Columbia, 108 U. S. 522.

**Connecticut.** — New Haven v. Fair Haven, etc., R. Co., 38 Conn. 422, 9 Am. Rep. 399.

**District of Columbia.** — District of Columbia v. Washington, etc., R. Co., 1 Mackey (D. C.) 361, 4 Mackey (D. C.) 214.

**Indiana.** — Indianapolis, etc., R. Co. v. Lawrenceburg, 34 Ind. 304.

**Nebraska.** — Lincoln St. R. Co. v. Lincoln, 61 Neb. 109.

**New York.** — Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475, 7 Am. Rep. 469; New York v. Second Ave. R. Co., 102 N. Y. 572, 55 Am. Rep. 839; Mechanicville v. Stillwater, etc., St. R. Co., 67 N. Y. App. Div. 628, affirming 35 Misc. (N. Y.) 513. See also Gilmore v. Utica, 121 N. Y. 561.

**Ohio.** — Columbus v. Columbus St. R. Co., 45 Ohio St. 98.

**Pennsylvania.** — Philadelphia, etc., Pass. R. Co. v. Philadelphia, 11 Phila. (Pa.) 358, 33 Leg. Int. (Pa.) 264; Philadelphia v. Thirteenth, etc., St. R. Co., 3 Pa. Dist. 468, affirmed 169 Pa. St. 269; Philadelphia v. Ridge Ave. Pass. R. Co., 143 Pa. St. 444; McKeesport v. Mc-

Keesport Pass. R. Co., 158 Pa. St. 447; Reading v. United Traction Co., 202 Pa. St. 571.

**Texas.** — Houston City St. R. Co. v. Storrie, (Tex. Civ. App. 1898) 44 S. W. Rep. 693.

**Wisconsin.** — Ashland St. R. Co. v. Ashland, 78 Wis. 271.

See also State v. St. Charles St. R. Co., 44 La. Ann. 562.

**That Another Company Occupies the Same Street Makes No Difference;** the city may elect to sue one company for all and drive it to an action against the other for contribution, or it may sue each for one-half. Philadelphia v. Second, etc., St. Pass. R. Co., 2 Pa. Dist. 705.

**Demand on Company to Do Work.** — Philadelphia v. Hestonville, etc., Pass. R. Co., 203 Pa. St. 38.

**Company Estopped as to Defects in Notice by Standing By.** — Columbus v. Columbus St. R. Co., 45 Ohio St. 98. But see Western Paving, etc., Co. v. Citizens' St. R. Co., 128 Ind. 525, 25 Am. St. Rep. 462, holding that there is no estoppel as to a duty not assumed.

**Lien for Reimbursement.** — Provisional Municipality v. Northrup, (C. C. A.) 66 Fed. Rep. 689; Philadelphia v. Philadelphia, etc., R. Co., 2 Phila. (Pa.) 37, 13 Leg. Int. (Pa.) 20.

**Materials to Be Furnished by City — No Recovery Where None Furnished.** — Norristown v. Norristown Pass. R. Co., 148 Pa. St. 87.

5. **New York v. Second Ave. R. Co.**, 102 N. Y. 572, 55 Am. Rep. 839.

6. **New York v. Second Ave. R. Co.**, 102 N. Y. 572, 55 Am. Rep. 839; Reading v. United Traction Co., 202 Pa. St. 571.

7. **Indemnifying Municipality.** — Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475, 7 Am. Rep. 469; Carty v. London, 18 Ont. 122.

**A Provision for Forfeiture of the Franchise for failure to keep a street in repair does not affect this liability of the company to indemnify the city.** Troy v. Troy, etc., R. Co., 3 Lans. (N. Y.) 270, affirmed 49 N. Y. 657.

8. **Mandamus.** — See the title MANDAMUS, vol. 10, p. 87, and see Rex v. Severn, etc., R. Co., 2 B. & Ald. 646; Detroit v. Ft. Wayne, etc.,

but this writ should not issue when it appears that the company, by reason of its financial straits, has no power to comply therewith.<sup>1</sup>

**Injunction.** — Where a street-railway company refuses to perform its duty in regard to the repair, paving, or improvement of the street, an injunction restraining the operation of the railway until such duty is performed may issue.<sup>2</sup>

**Indictment.** — It has been held that an indictment will lie against a street-railway company which fails to perform its duty with regard to the repair of streets.<sup>3</sup>

**IX. SALES, LEASES, AND CONSOLIDATION — 1. General Principles.** — It has been announced as a general rule that as the operation of a street railway is a matter of public interest, a street-railway company cannot make a valid transfer, by way of either absolute conveyance, mortgage, or lease, of its street-railway franchise or of its railway or property necessary for the performance of its public duties.<sup>4</sup> In other cases, however, the grant of a street-railway franchise, entitling the grantee to enter upon and occupy streets with the railway structure, is considered to be a typical easement in property, and as such to be a contract right capable in the absence of express restrictions of being sold, conveyed, assigned, or mortgaged.<sup>5</sup>

**2. Sales.** — It seems that in the absence of statutory authority one street-railway company has no power to purchase the franchise of another company,<sup>6</sup> and in at least one jurisdiction street-railway companies are expressly prohibited by statute from selling their roads.<sup>7</sup> In some cases, however, a street-railway franchise has been regarded as property which may be transferred in the absence of statutory restrictions like other property.<sup>8</sup> Of course the legislature may confer this power<sup>9</sup> or may ratify previous unauthorized transfers.<sup>10</sup> And power to purchase street-railway franchises may be con-

R. Co., 90 Mich. 646; *State v. Paterson, etc.*, R. Co., 43 N. J. L. 505; *Oshkosh v. Milwaukee, etc.*, R. Co., 74 Wis. 534, 17 Am. St. Rep. 175.

In *Louisiana* it was formerly held that mandamus would not lie to compel a corporation to repair, etc., the defects and bad condition of a street, which obligation it had assumed by accepting its franchise. *State v. New Orleans, etc.*, R. Co., 37 La. Ann. 589. But by Act La. No. 133 of 1888 mandamus was provided as a special statutory remedy applicable to the enforcement of such obligations as arise from a contract between the city and a street-railway corporation. *State v. Canal, etc.*, St. R. Co., 44 La. Ann. 526; *State New Orleans City, etc.*, R. Co., 42 La. Ann. 550; *State v. New Orleans, etc.*, R. Co., 44 La. Ann. 1026.

1. *Benton Harbor v. St. Joseph, etc.*, St. R. Co., 102 Mich. 386, 47 Am. St. Rep. 553.

2. *Atty.-Gen. v. Toronto St. R. Co.*, 15 Grant Ch. (U. C.) 187, 14 Grant Ch. (U. C.) 673. See also *Atty.-Gen. v. Keily*, 22 Grant Ch. (U. C.) 458, holding that after compliance with a decree in an injunction suit, a new information must be filed for relief against subsequent neglect to repair. *Compare Loyalsock Tp. v. Montoursville Pass. R. Co.*, 7 Pa. Dist. 291.

3. **Indictable as Nuisance.** — *Memphis, etc.*, R. Co. v. *State*, 87 Tenn. 746.

**Under Ordinance Making Default Misdemeanor.** — *St. Louis v. Missouri R. Co.*, 87 Mo. 151.

4. *Braslin v. Somerville Horse R. Co.*, 145 Mass. 64; *Richardson v. Sibley*, 11 Allen

(Mass.) 65, 87 Am. Dec. 700. See also the title **CORPORATIONS (PRIVATE)**, vol. 7, p. 750.

5. *Louisville Trust Co. v. Cincinnati, (C. C. A.)* 76 Fed. Rep. 296; *Knoxville v. Africa, (C. C. A.)* 77 Fed. Rep. 501. See also *Detroit Citizens' St. R. Co. v. Detroit (C. C. A.)* 64 Fed. Rep. 628.

6. *Braslin v. Somerville Horse R. Co.*, 145 Mass. 64. See the title **CORPORATIONS (PRIVATE)**, vol. 7, p. 751.

7. *Clemens Electrical Mfg. Co. v. Walton*, 173 Mass. 286 (Pub. Stat. Mass. 1882, c. 113, § 56, Rev. Laws Mass. 1902, c. 112, § 85).

8. See the cases cited in note 5, *supra*, and see *Watson v. Fairmont, etc.*, R. Co., 49 W. Va. 528.

**Corporation May Purchase Franchise.** — *People v. Stanford*, 77 Cal. 360. See also the title **CORPORATIONS (PRIVATE)**, vol. 7, p. 729.

**The Power of a Street-railway Company to Assign a Part of Its Franchise** is one which concerns the public alone. *Oakland R. Co. v. Oakland, etc.*, R. Co., 45 Cal. 365, 13 Am. Rep. 181.

9. *Potwin Place v. Topeka R. Co.*, 51 Kan. 609, 37 Am. St. Rep. 312; *Grosse Pointe Tp. v. Detroit, etc.*, R. Co., (Mich. 1902) 90 N. W. Rep. 42; *Bridgeton v. Bridgeton, etc.*, Traction Co., 62 N. J. L. 592; *Brinkerhoff v. Newark, etc.*, Traction Co., 66 N. J. L. 478; *Wright v. Milwaukee Electric R., etc.*, Co., 95 Wis. 29, 60 Am. St. Rep. 74. See also *Western Paving, etc.*, Co. v. *Citizens' St. R. Co.*, 128 Ind. 525, 25 Am. St. Rep. 462.

10. *Louisville Trust Co. v. Cincinnati, (C. C. A.)* 76 Fed. Rep. 296.

ferred by the legislature, subject to such conditions and limitations as it may see fit to impose.<sup>1</sup>

**Mortgages.** — It has been held that in the absence of express statutory authority a street-railway company has no authority to mortgage its railway and franchise,<sup>2</sup> though in other cases the grant of a street-railway franchise was held to be property which could be mortgaged and which would pass to a purchaser under a foreclosure of the mortgage.<sup>3</sup> The power to mortgage the street railway and franchise may be, of course, and generally is, conferred by the legislature.<sup>4</sup>

**Rights and Liabilities of Purchasers.** — The purchaser of a street-railway franchise takes it burdened with all the conditions of the grant of the original franchise,<sup>5</sup>

1. *Louisville Trust Co. v. Cincinnati*, 73 Fed. Rep. 716.

2. **Mortgages.** — *Richardson v. Sibley*, 11 Allen (Mass.) 65, 87 Am. Dec. 700. And see generally the title RAILROAD SECURITIES, vol. 23, p. 797.

3. *New Orleans, etc., R. Co. v. Delamore*, 114 U. S. 501; *Louisville Trust Co. v. Cincinnati*, (C. C. A.) 76 Fed. Rep. 296; *Knoxville v. Africa*, (C. C. A.) 77 Fed. Rep. 501.

4. *United States*. — *Manhattan Trust Co. v. Sioux City Cable R. Co.*, 76 Fed. Rep. 658; *Louisville Trust Co. v. Cincinnati Inclined Plane R. Co.*, 78 Fed. Rep. 307; *Old Colony Trust Co. v. Dubuque Light, etc., Co.*, 89 Fed. Rep. 794.

*Illinois*. — *Wells v. Northern Trust Co.*, 195 Ill. 288, affirming 90 Ill. App. 460.

*Iowa*. — *Fidelity L. & T. Co. v. Douglas*, 104 Iowa 532.

*Nebraska*. — *Lincoln St. R. Co. v. Lincoln*, 61 Neb. 109.

*New York*. — *People v. O'Brien*, 111 N. Y. 1, 7 Am. St. Rep. 684.

See also the title RAILROAD SECURITIES, vol. 23, p. 797.

**Foreclosure of Mortgage.** — *New York Security, etc., Co. v. Lincoln St. R. Co.*, 77 Fed. Rep. 525.

**Powers of Receivers in Operating Railway.** — *Morley v. Saginaw Circuit Judge*, 117 Mich. 246.

**Priorities.** — *Illinois Trust, etc., Bank v. Doud*, (C. C. A.) 105 Fed. Rep. 123; *Maryland Steel Co. v. Gettysburg Electric R. Co.*, 99 Fed. Rep. 150 (indebtedness for rebuilding power house destroyed by fire); *Guaranty Trust Co. v. Galveston City R. Co.*, (C. C. A.) 107 Fed. Rep. 311; *Cambria Iron Co. v. Union Trust Co.*, 154 Ind. 291; *McCornack v. Salem Consol. St. R. Co.*, 34 Oregon 543; *Houston City St. R. Co. v. Storrie*, (Tex. Civ. App. 1898) 44 S. W. Rep. 693. And see generally the titles MORTGAGES, vol. 20, p. 1047 *et seq.*; RAILROAD SECURITIES, vol. 23, p. 809 *et seq.*

**Priority Between Mortgage Indebtedness and Special Assessments.** — *Lincoln St. R. Co. v. Lincoln*, 61 Neb. 109 (Comp. Stat. Neb. 1887, c. 13a, § 77; Comp. Stat. Neb. 1899, § 1244).

**An Indebtedness for Motive Power Pending Receivership** has priority over a mortgage indebtedness. *Manhattan Trust Co. v. Sioux City Cable R. Co.*, 76 Fed. Rep. 658.

**An Indebtedness for Operating Expenses** incurred prior to receivership has been held to be entitled to preference over a mortgage. *Guaranty Trust Co. v. Galveston City R. Co.*,

(C. C. A.) 107 Fed. Rep. 311. Compare *Mercantile Trust Co. v. Kings County El. R. Co.*, 40 N. Y. App. Div. 141.

In *Central Trust Co. v. Clark*, (C. C. A.) 81 Fed. Rep. 269, preference over a mortgage was given to a claim for machinery furnished for motive power within six months of the appointment of the receiver. See also *New York Guaranty, etc., Co. v. Tacoma R., etc., Co.*, (C. C. A.) 83 Fed. Rep. 365.

A claim for money loaned prior to a receivership to pay interest on mortgage bonds has no priority over the mortgage; but a claim for money loaned to enable the railway to be operated and avoid a forfeiture of the franchise should have priority. *Illinois Trust, etc., Bank Co. v. Ottumwa Electric R. Co.*, 89 Fed. Rep. 235.

**A Claim for Damages** arising out of the operation of the road prior to the appointment of the receiver has no priority over the mortgage. *Front St. Cable R. Co. v. Drake*, 84 Fed. Rep. 247; *Fidelity L. & T. Co. v. Douglass*, 104 Iowa 532 (*construing* Code Iowa 1873, § 1309, Annot. Code Iowa 1897, § 2075).

**Property Covered by Mortgage.** — See *California Title Ins., etc., Co. v. Pauly*, 111 Cal. 122 ("property \* \* \* for use or adapted to use" on or about the railway); *Hinchman v. Point Defiance R. Co.*, 14 Wash. 349 (rolling stock purchased by lessee).

**Machinery** for generating power, subsequently placed in the power house, is covered by a mortgage on the road and plant. *Phoenix Iron-Works Co. v. New York Security Trust, etc., Co.*, (C. C. A.) 83 Fed. Rep. 757. See also *Guaranty Trust Co. v. Galveston City R. Co.*, 107 Fed. Rep. 311.

**An Extension** subsequently constructed is also covered by the mortgage. *Front St. Cable R. Co. v. Drake*, 84 Fed. Rep. 257. See also *Hinchman v. Point Defiance R. Co.*, 14 Wash. 349.

**Purchaser Takes Cum Onere** — *United States*. — *Louisville Trust Co. v. Cincinnati*, (C. C. A.) 76 Fed. Rep. 296. See also *Cress v. Lebanon*, 98 Fed. Rep. 549.

*Kansas*. — *Potwin Place v. Topeka R. Co.*, 51 Kan. 609, 37 Am. St. Rep. 312.

*Michigan*. — *Grosse Pointe Tp. v. Detroit, etc., R. Co.*, (Mich. 1902) 90 N. W. Rep. 42.

*New Jersey*. — *Bridgeton v. Bridgeton, etc., Traction Co.*, 62 N. J. L. 592.

*Ohio*. — *Mill Creek Valley St. R. Co. v. Carthage*, 9 Ohio Cir. Dec. 833, 18 Ohio Cir. Ct. 216; *Cincinnati Inclined Plane R. Co. v. Cincinnati, Cincinnati St. R. Co. v. Cincinnati Inq.* 52 Ohio St. 609; *Cincinnati v. Cincinnati Inq.*

such as conditions requiring the payment of a license fee for each car operated,<sup>1</sup> a stated car service for the accommodation of the public,<sup>2</sup> or the lighting of streets,<sup>3</sup> or provisions limiting the duration of the franchise.<sup>4</sup> Personal obligations on the part of the street-railway company conveying its railway and franchise are not necessarily binding upon its grantee, though the latter may in its purchase assume such obligations so as to render them enforceable against it.<sup>5</sup> The purchaser of a street railway and franchise acquires all the rights of its grantor, such as a right to extend the railway.<sup>6</sup>

**3. Leases.** — Authority to make or take leases is frequently conferred upon street-railway companies, either by charter or by general laws; and leases entered into without express authority have received legislative ratification.<sup>7</sup> Power given to one street railway to lease the road of another company impliedly confers on the latter power to make the lease.<sup>8</sup>

**Rights and Liabilities of Lessee.** — The lessee of a street railway and franchise is under the same obligations with regard to the operation of the railway as were imposed upon its lessor in the grant of the franchise.<sup>9</sup> On the other hand, the lessee acquires all the rights of the lessor.<sup>10</sup>

**Liability of Lessor.** — In *Massachusetts* it has been held that where the grantee of a street-railway franchise leases its railway under statutory authority, the lessor still remains, in the absence of statutory exemption, liable for injuries arising to third persons through the operation of the railway by the lessee.<sup>11</sup> In *Pennsylvania*, however, it has been held that the lessor is not liable for injuries caused by the negligence of the lessee in the operation of the railway, since the statutory authority to lease must be construed as a grant with all the ordinary attributes of such authority between lessor and lessee, unless the statute makes a reservation of continuing liability in the lessor.<sup>12</sup> The grantee of a street-railway franchise cannot, by a lease of its railway, escape liabilities imposed upon it in the grant of the franchise.<sup>13</sup>

**4. Consolidation.** — The subject of the consolidation of corporations has been fully discussed under another title in this work.<sup>14</sup>

*Inclined Plane R. Co.*, 11 Ohio Dec. (Reprint) 892, 30 Cinc. L. Bul. 321.

*Compare Bonham v. Citizens' St. R. Co.*, 158 Ind. 106 (limitation as to speed); *Stafford v. Chippewa Valley Electric R. Co.*, 110 Wis. 331.

1. *Louisville Trust Co. v. Cincinnati*, 73 Fed. Rep. 716.

2. *Potwin Place v. Topeka R. Co.*, 51 Kan. 609, 37 Am. St. Rep. 312; *Grosse Pointe Tp. v. Detroit, etc.*, R. Co., (Mich. 1902) 90 N. W. Rep. 42.

3. *Grosse Pointe Tp. v. Detroit, etc.*, R. Co., (Mich. 1902) 90 N. W. Rep. 42.

4. *Louisville Trust Co. v. Cincinnati Inclined Plane R. Co.*, 78 Fed. Rep. 307.

5. *Wallace v. Ann Arbor, etc.*, Electric R. Co., 121 Mich. 588.

6. *Brinkerhoff v. Newark, etc.*, Traction Co., 66 N. J. L. 478.

7. **Leases.** — *Dickinson v. Consolidated Traction Co.*, 114 Fed. Rep. 232; *Hunting v. Hartford St. R. Co.*, 73 Conn. 179; *Chicago v. Evans*, 24 Ill. 52; *Braslin v. Somerville Horse R. Co.*, 145 Mass. 64; *Quested v. Newburyport, etc.*, Horse R. Co., 127 Mass. 204; *Philadelphia, etc.*, Turnpike Co. v. Philadelphia, etc., R. Co., 5 Pa. Dist. 305; *O'Neill v. Hestonville, etc.*, Pass. R. Co., 9 Pa. Dist. 2.

**Necessity for Consent of Stockholder.** — *Dickinson v. Consolidated Traction Co.*, 114 Fed. Rep. 232; *Wormser v. Metropolitan St. R. Co.*, 73 N. Y. App. Div. 626, affirming 37 Misc. (N. Y.) 618.

**Construction of Lease.** — *Atlantic Ave. R. Co. v. Johnson*, 134 N. Y. 375, affirming 57 Hun (N. Y.) 591.

8. *Hunting v. Hartford St. R. Co.*, 73 Conn. 179; *Pinkerton v. Pennsylvania Traction Co.*, 193 Pa. St. 229.

9. **Lessee's Rights and Liabilities.** — *Chicago v. Evans*, 24 Ill. 52; *Bridgeton v. Bridgeton, etc.*, Traction Co., 62 N. J. L. 592.

In *New Jersey* it has been held, however, that where an ordinance giving the consent of the municipality to the use of its street for street-railway purposes requires the grantee of the privilege to pay an annual fee for each car operated, a lessee of the railway is under no obligation to pay such fee. *Cape May v. Cape May Transp. Co.*, 64 N. J. L. 80.

10. *Wilkesbarre v. Coalville Pass. R. Co.*, 8 Kulp (Pa.) 298 (right to construct switches and turnouts); *Reeves v. Philadelphia Traction Co.*, 152 Pa. St. 153; *Rafferty v. Central Traction Co.*, 29 W. N. C. (Pa.) 542.

11. **Lessor Still Liable.** — *Quested v. Newburyport, etc.*, Horse R. Co., 127 Mass. 204; *Braslin v. Somerville Horse R. Co.*, 145 Mass. 64 (injury to passenger carried by lessee).

12. **Contra.** — *Pinkerton v. Pennsylvania Traction Co.*, 193 Pa. St. 229.

13. *Ft. Worth St. R. Co. v. Allen*, (Tex. Civ. App. 1897) 39 S. W. Rep. 125 (liability to repair street).

14. **Consolidation.** — See the title CONSOLIDATION OF CORPORATIONS, vol. 6, p. 800. See also

**X. REGULATION AND CONTROL — 1. In General.** — It is a well-recognized rule that municipalities, under their general police power or inherent control over the manner in which the public streets shall be used, may regulate the operation of street railways within their limits,<sup>1</sup> whether the franchise is owned by an individual or by a corporation.<sup>2</sup> And a municipality cannot by contract abrogate or restrict this right.<sup>3</sup> The right to regulate the operation of street railways is subject to the limitation that the regulation must not be so unreasonable as to destroy the property or franchise of the street-railway company,<sup>4</sup> and if a grant of special powers and privileges accompanies the grant of the street-railway franchise, coupled with limitations upon the right of municipal interference, the municipality cannot, by any regulation of its own, abridge the privilege thus conferred or infringe upon the limitations thus prescribed.<sup>5</sup>

**2. Precautions in Operation of Cars — a. IN GENERAL.** — Municipalities have the right, in the exercise of their police power, to impose, for the protection of the public, reasonable regulations with regard to the operation of street cars,<sup>6</sup> such as regulations requiring the stoppage of cars upon the

the following cases involving particularly the consolidation of street railways.

**Power to Consolidate.** — *Market St. R. Co. v. Hellman*, 109 Cal. 571; *Trust Co. v. State*, 109 Ga. 736; *In re Trenton St. R. Co.*, (N. J. 1900) 47 Atl. Rep. 819; *Bohmer v. Haffen*, 161 N. Y. 390, *affirming* 35 N. Y. App. Div. 381; *Matter of Washington St., etc.*, R. Co., 52 Hun (N. Y.) 311, *affirmed* 115 N. Y. 442; *Hestonville, etc.*, Pass. R. Co. v. Philadelphia, 89 Pa. St. 210; *Gyger v. Philadelphia City Pass. R. Co.*, 136 Pa. St. 96; *Philadelphia v. Thirteenth, etc.*, St. Pass. R. Co., 169 Pa. St. 269.

Street railways are not within the provisions of Const. Pa., art. 17, § 4, prohibiting the consolidation of parallel or competing railroads, since they are not competing within the sense of the prohibition. *Gyger v. Philadelphia City Pass. R. Co.*, 136 Pa. St. 96.

**Right of Corporation Formed by Consolidation.** — *Africa v. Knoxville*, 70 Fed. Rep. 729; *Wilbur v. Trenton Pass. R. Co.*, 57 N. J. L. 212; *Consolidated Traction Co. v. Elizabeth*, 58 N. J. L. 619; *In re Trenton St. R. Co.*, (N. J. 1900) 47 Atl. Rep. 819; *Bohmer v. Haffen*, 161 N. Y. 390, *affirming* 35 N. Y. App. Div. 381; *Adee v. Nassau Electric R. Co.*, 65 N. Y. App. Div. 529.

**Liability for Obligations of Constituent Companies.** — *Capital Traction Co. v. Offutt*, 17 App. Cas. (D. C.) 292; *Lincoln St. R. Co. v. Lincoln*, 61 Neb. 109; *Kent v. Binghamton*, 61 N. Y. App. Div. 323; *Philadelphia v. Ridge Ave. Pass. R. Co.*, 143 Pa. St. 444 (obligation to repair street).

**1. Control — United States.** — *Allerton v. Chicago*, 9 Biss. (U. S.) 552; *Baltimore v. Baltimore Trust, etc.*, Co., 166 U. S. 673.

**California.** — *San José v. San José, etc.*, R. Co., 53 Cal. 475.

**Iowa.** — *Clinton v. Clinton, etc.*, Horse R. Co., 37 Iowa 61.

**Kansas.** — *Wyandotte v. Corrigan*, 35 Kan. 21.

**Michigan.** — *Detroit v. Ft. Wayne, etc.*, R. Co., 90 Mich. 646.

**Missouri.** — *Springfield R. Co. v. Springfield*, 85 Mo. 674; *St. Louis, etc.*, R. Co. v. *Kirkwood*, 159 Mo. 239.

**New Jersey.** — *North Hudson County R. Co. v. Hoboken*, 41 N. J. L. 71; *Trenton Horse R. Co. v. Trenton*, 53 N. J. L. 132; *Consolidated*

*Traction Co. v. Elizabeth*, 58 N. J. L. 619; *Consolidated Traction Co. v. East Orange Tp.*, 63 N. J. L. 669, *affirming* 61 N. J. L. 202.

**New York.** — *Broadway, etc.*, R. Co. v. *New York*, 49 Hun (N. Y.) 126.

**Ohio.** — *Toledo Consol. St. R. Co. v. Toledo Electric St. R. Co.*, 3 Ohio Cir. Dec. 493, 6 Ohio Cir. Ct. 362.

**Pennsylvania.** — *West Philadelphia Pass. R. Co. v. Philadelphia*, 10 Phila. (Pa.) 70, 30 Leg. Int. (Pa.) 256; *Frankford, etc.*, R. Co. v. *Philadelphia*, 58 Pa. St. 119, 98 Am. Dec. 242.

**Texas.** — *Gulf City St. R. Co. v. Galveston City R. Co.*, 65 Tex. 502.

**Virginia.** — *Norfolk R., etc.*, Co. v. *Corletto*, 100 Va. 355.

**2. Trenton Horse R. Co. v. Trenton**, 53 N. J. L. 132; *Frankford, etc.*, R. Co. v. *Philadelphia*, 58 Pa. St. 119, 98 Am. Dec. 242.

**3. Macon Consol. St. R. Co. v. Macon**, 112 Ga. 782; *Brooklyn v. Nassau Electric R. Co.*, 20 N. Y. App. Div. 31.

**4. Citizens' St. R. Co. v. Memphis**, 53 Fed. Rep. 715; *Springfield R. Co. v. Springfield*, 85 Mo. 674; *Trenton Horse R. Co. v. Trenton*, 53 N. J. L. 132; *New York v. Dry Dock, etc.*, R. Co., 133 N. Y. 104, *reversing* (C. Pl. Gen. T.) 15 N. Y. Supp. 297; *West Philadelphia Pass. R. Co. v. Philadelphia*, 10 Phila. (Pa.) 70, 30 Leg. Int. (Pa.) 256. *Compare* *Lake Roland El. R. Co. v. Baltimore*, 77 Md. 352, 54 Am. & Eng. R. Cas. 11.

**Smoking in Cars.** — A municipal ordinance prohibiting smoking in street cars has been sustained as a valid police regulation. *State v. Heidenhain*, 42 La. Ann. 483, 43 Am. & Eng. R. Cas. 287.

**Compelling Free Transportation of Policemen** cannot be sustained as a valid exercise of the police power, but is invalid in that it deprives the railway companies of their property without due process of law and without compensation. *Wilson v. United Traction Co.*, 72 N. Y. App. Div. 233.

**5. Trenton Horse R. Co. v. Trenton**, 53 N. J. L. 132; *Brooklyn City R. Co. v. Furey*, (Supm. Ct. Spec. T.) 4 Abb. Pr. N. S. (N. Y.) 364.

**6. Regulating Operation of Cars.** — *Lamb v. St. Louis Cable, etc.*, R. Co., 33 Mo. App. 489; *Cape May, etc.*, R. Co. v. *Cape May*, 59 N. J. L. 404.



appearance of danger to persons on the street,<sup>1</sup> before crossing the tracks of steam railroads<sup>2</sup> and before crossing intersecting streets,<sup>3</sup> the ringing of bells at street crossings,<sup>4</sup> and the carrying of lights at night;<sup>5</sup> regulations prescribing the side of intersecting streets upon which the cars shall stop to take on and let off passengers;<sup>6</sup> and regulations prescribing the minimum distance within which cars going in the same direction may approach each other.<sup>7</sup>

*b.* FENDERS ON CARS. — A municipal ordinance requiring fenders on street cars for the protection of the ordinary traveler on the street has been held to be a valid and proper police regulation.<sup>8</sup>

*c.* SCREENS OR VESTIBULES ON CARS. — Statutes requiring street-railway companies to construct screens upon the front of their cars to protect the motorman, gripman, or engineer from the inclemency of the weather during the winter months, have been sustained as valid police regulations.<sup>9</sup>

*d.* NUMBER OF OPERATORS ON CARS. — Municipal ordinances requiring two employees or operators on each car have been sustained as valid police regulations,<sup>10</sup> but in the absence of such a requirement, a street railway is not necessarily required to have both a conductor and a driver on its cars,<sup>11</sup> and in some cases the power of municipalities to require both a conductor and a driver on horse cars has been denied.<sup>12</sup>

*e.* RATE OF SPEED. — Regulations prohibiting the running of street cars faster than a certain speed have universally been sustained as valid under the police power,<sup>13</sup> and *a fortiori* a street-railway company is bound by provisions in the grant or consent of the municipality to the use of its streets limiting

1. *Murphy v. Lindell R. Co.*, 153 Mo. 252; *J. F. Conrad Grocer Co. v. St. Louis, etc., R. Co.*, 89 Mo. App. 391; *Fath v. Tower Grove, etc., R. Co.*, 105 Mo. 537. See also *McCarthy v. Cass Ave., etc., R. Co.*, 92 Mo. 536; *Liddy v. St. Louis R. Co.*, 40 Mo. 506; *Lamb v. St. Louis Cable, etc., R. Co.*, 33 Mo. App. 489.

**Regulation Applicable to Horse Cars Only, Not to Cable Cars.** — *Glenville v. St. Louis R. Co.*, 51 Mo. App. 629. See, however, *Lamb v. St. Louis Cable, etc., R. Co.*, 33 Mo. App. 489.

2. *Toledo Consol. St. R. Co. v. Fuller*, 9 Ohio Cir. Dec. 123; *Cincinnati St. R. Co. v. Murray*, 53 Ohio St. 570. See also *Philadelphia, etc., R. Co. v. Boyer*, 97 Pa. St. 91, 2 Am. & Eng. R. Cas. 172.

3. *Cape May, etc., R. Co. v. Cape May*, 59 N. J. L. 404.

4. *Schneider v. Market St. R. Co.*, 134 Cal. 482; *North Hudson County R. Co. v. Hoboken*, 41 N. J. L. 71; *Bass v. Norfolk R., etc., Co.*, 100 Va. 1.

5. *Johnson v. Hudson River R. Co.*, 20 N. Y. 65, 75 Am. Dec. 375, *affirming* 6 Duer (N. Y.) 633; *Memphis City R. Co. v. Logue*, 13 Lea (Tenn.) 32.

6. *North Birmingham St. R. Co. v. Calderwood*, 89 Ala. 247, 18 Am. St. Rep. 105.

7. *Bishop v. Union R. Co.*, 14 R. I. 315.

8. *Cape May, etc., R. Co. v. Cape May*, 59 N. J. L. 396.

9. **Vestibules Required.** — *State v. Smith*, 58 Minn. 35; *State v. Whitaker*, 160 Mo. 59; *State v. Nelson*, 52 Ohio St. 88.

**The Constitutionality and Validity of such regulations are affirmed in the first two cases above, but in *New York* a like requirement was held not authorized by the police power and consequently invalid. *Yonkers v. Yonkers R. Co.*, 51 N. Y. App. Div. 271.**

10. **Two Operators on Each Car.** — *South Covington, etc., St. R. Co. v. Berry*, 93 Ky. 43, 40 Am.

St. Rep. 161; *Trenton Horse R. Co. v. Trenton*, 53 N. J. L. 132 (horse-car driver and conductor); *State v. Sloan*, 48 S. Car. 21.

11. *Dunn v. Cass Ave., etc., R. Co.*, 21 Mo. App. 188; *Thornhill v. Cincinnati*, 2 Ohio Cir. Dec. 592, 4 Ohio Cir. Ct. 354.

12. *Brooklyn Crosstown R. Co. v. Brooklyn*, 37 Hun (N. Y.) 413; *Toronto v. Toronto St. R. Co.*, 15 Ont. App. 30, 36 Am. & Eng. R. Cas. 44.

13. **Regulating Rate of Speed** — *Connecticut*. — *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475.

*Indiana*. — *Whitson v. Franklin*, 34 Ind. 392; *Bonham v. Citizens St. R. Co.*, 158 Ind. 106.

*Massachusetts*. — *Com. v. Temple*, 14 Gray (Mass.) 69; *Hanlon v. South Boston Horse R. Co.*, 129 Mass. 310.

*Mississippi*. — *Donnaher v. State*, 8 Smed. & M. (Miss.) 649.

*Missouri*. — *Weber v. Kansas City Cable R. Co.*, 100 Mo. 200, 18 Am. St. Rep. 541; *Ruschenberg v. Southern Electric R. Co.*, 161 Mo. 70. See also *Robertson v. Wabash, etc., R. Co.*, 84 Mo. 119.

*New Jersey*. — *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605; *Cape May, etc., R. Co. v. Cape May*, 59 N. J. L. 393.

*Virginia*. — *Norfolk, etc., R. Co. v. Corletto*, 100 Va. 355.

An ordinance adopted before the introduction of cable power has been held not to apply to street railways subsequently operated by the cable system. *Glenville v. St. Louis R. Co.*, 51 Mo. App. 629. But *compare* *Bly v. Nashua Street R. Co.*, 67 N. H. 474, 68 Am. St. Rep. 681; *Lewis v. Cincinnati Street R. Co.*, 10 Ohio Dec. 53.

A rate of speed fixed by an ordinance may be altered and reduced by a subsequent ordinance. *Brooklyn v. Nassau Electric R. Co.*, 20 N. Y. App. Div. 31.

the rate of speed of the cars,<sup>1</sup> though in some few instances ordinances limiting the speed of street-railway cars have been held to be invalid as being unreasonable.<sup>2</sup> In the absence of limitations on speed a street-railway company has a right to drive its horse cars at the rate of speed used for other vehicles drawn by horses for the carriage of passengers;<sup>3</sup> but street cars cannot be operated at a speed incompatible with the use of the street or highway by others with reasonable safety.<sup>4</sup>

*f. MOTIVE POWER.* — It has been held that under its general police power a municipality may prohibit the use of a particular motive power in the operation of a street railway where the safety of the public requires such prohibition,<sup>5</sup> even though the grant of the street-railway franchise may have impliedly authorized the use of such power.<sup>6</sup>

**3. Use of Salt or Sand on Tracks.** — Municipal regulations restricting the use by street-railway companies of salt or sand on their tracks have been sustained as valid police regulations.<sup>7</sup>

**4. Removal of Snow and Ice from Tracks.** — Ordinances regulating the removal of snow and ice from the tracks have also been sustained as valid police regulations.<sup>8</sup> In removing snow from the tracks the street-railway company is required to do the work in a manner which will not interfere unnecessarily with the use of the street,<sup>9</sup> and while in the absence of restrictions it may have a right to place the snow removed upon other portions of the street in a reasonable manner, it has no right to place it so as to interfere with the flow of water in the street.<sup>10</sup>

**5. Repair of Streets.** — Municipal ordinances requiring street-railway companies whose cars are operated by horse power to keep in repair that part of the street between their tracks have been sustained as valid police regulations.<sup>11</sup> In *Colorado*, where the grant of the franchise for a cable street railway required the railway company to construct siphons at street intersections to carry the surface water beneath the tracks, a subsequent ordinance requiring the com-

1. See *supra*, this title, *Acquisition of Franchise—Delegation of Power to Subordinate Bodies—Imposing Conditions*.

2. *Zumault v. Kansas City, etc., Air Line*, 71 Mo. App. 670; *United Traction Co. v. Water-vliet*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 392.

3. *Com. v. Temple*, 14 Gray (Mass.) 69.

4. *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605.

5. **Motive Power.** — *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788 (prohibition against use of steam power); *Donnaher v. State*, 8 Smed. & M. (Miss.) 649. See also *Richmond, etc., R. Co. v. Richmond*, 96 U. S. 521; *Buffalo, etc., R. Co. v. Buffalo*, 5 Hill (N. Y.) 209.

6. *North Chicago City R. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788.

7. *Consolidated Traction Co. v. Elizabeth*, 58 N. J. L. 619 (use of salt for removal of ice and snow from track); *Dry Dock, etc., R. Co. v. New York*, 47 Hun (N. Y.) 221 (use of sand on worn and slippery pavement prohibited).

8. **Regulating Removal of Snow and Ice.** — *McDonald v. Toledo Consol. St. R. Co., (C. C. A.)* 74 Fed. Rep. 104 (requiring snow removed from tracks to be leveled over street); *Union R. Co. v. Cambridge*, 11 Allen (Mass.) 287. See also *Ovington v. Lowell, etc., R. Co.*, 163 Mass. 440.

**Construction of Ordinance for Removal of Snow.**

— *Ovington v. Lowell, etc., R. Co.*, 163 Mass. 440.

**Prohibition Against Throwing Snow from Track on Street Valid.** — *Broadway, etc., R. Co. v. New York*, 49 Hun (N. Y.) 126. Compare *Montreal v. Montreal St. R. Co.*, 19 Quebec Super. Ct. 504.

**Even an Absolute Prohibition Against the Removal of the Snow from street-railway tracks has been sustained as a valid police regulation though its enforcement would suspend the running of street cars.** *Union R. Co. v. Cambridge*, 11 Allen (Mass.) 287, decided under Acts Mass. 1864, c. 229, § 16.

9. *Bowen v. Detroit City R. Co.*, 54 Mich. 496, 52 Am. Rep. 822. See also *Prime v. Twenty-third St. R. Co., (N. Y. Super. Ct. Spec. T.)* 1 Abb. N. Cas. (N. Y.) 63 (injunction against company at suit of abutting owner).

**A Street-railway Company Is Liable in Damages for an injury occasioned by the neglectful making and leaving, by its servants, of a pile of snow in the street.** *Lee v. Union R. Co.*, 12 R. I. 383, 34 Am. Rep. 668.

10. *Short v. Baltimore City Pass. R. Co.*, 50 Md. 73, 33 Am. Rep. 298.

11. **Repair of Streets.** — *State v. Jacksonville St. R. Co.*, 29 Fla. 590, 50 Am. & Eng. R. Cas. 179.

**As to Franchise or Charter Requirements of repair, see *supra*, this title, *Improvement, Paving, and Repair of Streets*.**

pany to keep street siphons free from sediment was held to be invalid as placing an additional and unauthorized burden on the company.<sup>1</sup>

**6. Watering Tracks.** — An ordinance requiring street-railway companies to water their tracks so as to lay the dust may be sustained as a valid police regulation.<sup>2</sup> By reason of peculiar provisions, however, certain ordinances requiring the sprinkling of streets have been held to be unreasonable and invalid.<sup>3</sup>

**7. Interference with Railway in Making Street Improvements.** — Street-railway companies, like all others using the streets and highways, must submit to temporary inconveniences for the sake of permanent public advantage, and municipalities may, therefore, in making street improvements, temporarily obstruct or remove the tracks of such companies though a serious interruption in the operation of the railway may follow;<sup>4</sup> but in making such improvements unnecessary interference with existing street-car lines is not authorized.<sup>5</sup>

**8. Plan of Construction.** — Regulations of the plan and manner of construction of street railways have been sustained under the general police power.<sup>6</sup> Thus, it is competent to prescribe that only a single track shall be laid through narrow portions of a street,<sup>7</sup> that guard wires shall be provided in the construction of an electric trolley system, where several electric wires cross each other,<sup>8</sup> or that a particular character of rails shall be used.<sup>9</sup> Similarly, after a street railway has been constructed, requirements as to a change in the plan of construction have been sustained as valid police regulations,<sup>10</sup> such as changes in the location of tracks<sup>11</sup> or in the construction of the track, to enable

1. *Denver v. Denver City Cable R. Co.*, 22 Colo. 565.

2. *Watering Tracks to Lay Dust.* — *City, etc., R. Co. v. Savannah*, 77 Ga. 731, 4 Am. St. Rep. 106.

3. *State v. New Orleans City, etc., R. Co.*, 49 La. Ann. 1571 (on ground of indefiniteness); *Chester v. Chester Traction Co.*, 4 Pa. Super. Ct. 575, reversing 5 Pa. Dist. 609 (unreasonable and invalid as requiring sprinkling all of the year without regard to necessity).

4. *Obstruction to Railway in Making Municipal Improvements* — *Maryland.* — *Kirby v. Citizens' R. Co.*, 48 Md. 168, 30 Am. Rep. 455 (construction of sewer).

*Massachusetts.* — *Middlesex R. Co. v. Wakefield*, 103 Mass. 262 (widening draw in bridge).

*New York.* — *Kolzem v. Broadway, etc., R. Co.*, (C. Pl. Gen. T.) 1 Misc. (N. Y.) 148; *Dry Dock, etc., R. Co. v. New York*, 55 Barb. (N. Y.) 298 (construction of sewer).

*Pennsylvania.* — *Ridge Ave. Pass. R. Co. v. Philadelphia*, 181 Pa. St. 592 (change of street grade); *Philadelphia, etc., Pass. R. Co. v. Philadelphia*, 11 Phila. (Pa.) 358, 33 Leg. Int. (Pa.) 264 (repairing street surface). See also *Owens v. People Pass. R. Co.*, 155 Pa. St. 334.

*Washington.* — *Spokane St. R. Co. v. Spokane*, 5 Wash. 634 (construction of sewer).

See also *Clapp v. Spokane*, 53 Fed. Rep. 515; *Detroit v. Ft. Wayne, etc., R. Co.*, 90 Mich. 645.

In the construction of a sewer in a street occupied by an elevated railway, the elevated-railway company must stand any expense necessary for the protection of its track. *Brooklyn El. R. Co. v. Brooklyn*, 2 N. Y. App. Div. 98. See also *Louisville City R. Co. v. Louisville*, 8 Bush (Ky.) 415.

**Mistake of Judgment Causing Increased Inter-**

**ference. — *Ridge Ave. Pass. R. Co. v. Philadelphia*, 181 Pa. St. 592.**

5. The power of a city to locate sewers and provide for their construction exists only by virtue of the general grant from the state of power to control streets and provide for the health and welfare of its people; and when it has granted a street-railroad franchise and the road has been constructed, it cannot, by the unreasonable location of a sewer in a particular position in a street traversed by the road, cause unnecessary damage thereto without liability to be called to account in the courts. *Clapp v. Spokane*, 53 Fed. Rep. 515.

**Unnecessary Interference by Contractors in Repairing the Street** will be enjoined. *Milwaukee St. R. Co. v. Adlam*, 85 Wis. 142.

6. **Method of Construction.** — *Veazie v. Mayo*, 45 Me. 560; *Medford, etc., R. Co. v. Somerville*, 111 Mass. 232; *Kennelly v. Jersey City*, 57 N. J. L. 293. See also *Moore v. Street Com'rs*, 61 N. J. L. 470.

7. *Baltimore v. Baltimore Trust, etc., Co.*, 166 U. S. 673, reversing 64 Fed. Rep. 153. See also *Burlington v. Burlington St. R. Co.*, 49 Iowa 144, 31 Am. Rep. 145. Compare *Brooklyn City R. Co. v. Furey*, (Supm. Ct. Spec. T.) 4 Abb. Pr. N. S. (N. Y.) 364.

8. *State v. Janesville St. R. Co.*, 87 Wis. 72, 41 Am. St. Rep. 23.

9. *Passenger R. Co. v. Easton*, 7 Pa. Co. Ct. 577. Compare *Waterloo v. Waterloo St. R. Co.*, 71 Iowa 193.

10. **Change in Construction.** — *Detroit v. Ft. Wayne, etc., R. Co.*, 90 Mich. 646, 50 Am. & Eng. R. Cas. 447. Compare *Des Moines St. R. Co. v. Des Moines Broad Gauge St. R. Co.*, 74 Iowa 585, 36 Am. & Eng. R. Cas. 132 (change of gauge).

11. *Macon Consol. St. R. Co. v. Macon*, 112 Ga. 782 (removal of track to centre of street);

the proper paving of the street<sup>1</sup> or to make the tracks conform to the street so as to enable vehicles to pass over the tracks without inconvenience or danger,<sup>2</sup> even though such change was made necessary on account of a change in the grade of the street.<sup>3</sup>

**9. Accommodation of Public — Number of Cars.** — A municipal regulation requiring the running of cars at minimum intervals for the accommodation of the public, if reasonable, is a valid exercise of the police control.<sup>4</sup> In the passage of such an ordinance the city council is presumed to act in the exercise of a judgment upon the facts, and this judgment must control in the absence of a showing that it has been improperly and unreasonably exercised.<sup>5</sup>

**Overcrowding Cars.** — In *Missouri* a municipal ordinance limiting the number of passengers to be carried on a car has been sustained as a valid police regulation.<sup>6</sup>

**10. Tickets and Fares.** — The regulation of fares chargeable by street-railway companies and the issuance of tickets and transfers will be treated elsewhere in this work.<sup>7</sup>

**11. License Fees.** — The general rule that municipal corporations have no inherent power to impose license fees upon the transactions of a business<sup>8</sup> applies with full force to the imposition of license fees for the operation of street railways;<sup>9</sup> but of course this power may be conferred upon municipalities by the legislature,<sup>10</sup> and has been held to be conferred under a power to license "hackmen, draymen, omnibus drivers, cabmen, expressmen, and all others pursuing like occupations,"<sup>11</sup> or to license every kind of business carried on in the municipality.<sup>12</sup> Grants of street-railway franchises in which

West Philadelphia Pass. R. Co. v. Philadelphia, 10 Phila. (Pa.) 70, 30 Leg. Int. (Pa.) 256.

1. Louisville City R. Co. v. Louisville, 8 Bush (Ky.) 415 (character of rail); Kalamazoo v. Michigan Traction Co., 126 Mich. 525 (character of rail); Detroit v. Ft. Wayne, etc., R. Co., 90 Mich. 646; Springfield R. Co. v. Springfield, 85 Mo. 674; Schuylkill Traction Co. v. Shenandoah, 9 Pa. Dist. 77 (character of ties). Compare Easton, etc., Pass. R. Co. v. Easton, 25 W. N. C. (Pa.) 493; Washington, etc., R. Co. v. Alexandria, 98 Va. 344 (character of rail).

2. North Chicago City R. Co. v. Lake View, 105 Ill. 183, 11 Am. & Eng. R. Cas. 42; North Hudson County R. Co. v. Hoboken, 41 N. J. L. 71; Albany v. Watervliet Turnpike, etc., Co., 108 N. Y. 14.

Such a Requirement Has Been Held Unreasonable in so far as it rendered the officers of the company personally liable for its violation. Oxanna v. Allen, 90 Ala. 468.

3. Reading v. United Traction Co., 202 Pa. St. 571. See also Ashland St. R. Co. v. Ashland, 78 Wis. 271.

4. Cars to Be Run at Minimum Intervals. — People v. Detroit Citizens' St. R. Co., 116 Mich. 132; New York v. Dry Dock, etc., R. Co., 133 N. Y. 104, 28 Am. St. Rep. 609; New York v. New York, etc., R. Co., (C. Pl. Gen. T.) 10 Misc. (N. Y.) 417; New York v. Union R. Co., (Supm. Ct. App. T.) 31 Misc. (N. Y.) 451.

As to Conditions in the Grant of the Franchise requiring a stated car service, see *supra*, this title, *Acquisition of Franchise — Delegation of Power to Subordinate Bodies — Imposing Conditions*.

5. People v. Detroit Citizens' St. R. Co., 116 Mich. 132; New York v. Dry Dock, etc., R. Co., 133 N. Y. 104, 28 Am. St. Rep. 609.

**Evidence to Show Unreasonableness of Regulation.** — New York v. Dry Dock, etc., R. Co., 133 N. Y. 104, 28 Am. St. Rep. 609.

6. **Overcrowding Cars.** — St. Louis v. St. Louis R. Co., 89 Mo. 44, 58 Am. Rep. 82, affirming 14 Mo. App. 221, wherein an ordinance imposing a fine for carrying on an average more than eighteen passengers per trip to a car was sustained.

7. See the title TICKETS AND FARES.

8. See the title OCCUPATION, BUSINESS, AND PRIVILEGE TAXES, vol. 21, pp. 782, 783.

9. **Municipality Imposing License Fees.** — State v. Hoboken, 30 N. J. L. 225; North Hudson County R. Co. v. Hoboken, 41 N. J. L. 71; Pavonia Horse R. Co. v. Jersey City, 45 N. J. L. 297; Kansas City v. Corrigan, 18 Mo. App. 206.

10. Wyandotte v. Corrigan, 35 Kan. 21; Harrisburg City v. Citizens' Pass. R. Co., 4 Pa. Dist. 687; Frankford, etc., R. Co. v. Philadelphia, 58 Pa. St. 119, 98 Am. Dec. 242; Johnson v. Philadelphia, 60 Pa. St. 445; Newport News, etc., R., etc., Co. v. Newport News, 100 Va. 157, 4 Va. Sup. Ct. 31; State v. Hilbert, 72 Wis. 184. See also *supra*, this title, *Acquisition of Franchise — Delegation of Power to Subordinate Bodies*.

11. Allerton v. Chicago, 9 Biss. (U. S.) 552; Frankford, etc., R. Co. v. Philadelphia, 58 Pa. St. 119, 98 Am. Dec. 242 ("omnibuses or vehicles in the nature thereof"). See also State v. Herod, 29 Iowa 123; North Braddock v. Second Ave. Traction Co., 28 Pittsb. Leg. J. N. S. (Pa.) 278. Compare State v. Hoboken, 30 N. J. L. 225.

12. San José v. San José, etc., R. Co., 53 Cal. 475 (holding it to be immaterial that the railway is operated to a point without the city limits); Newport News, etc., R., etc., Co. v.

the right to impose license fees is not reserved do not preclude the subsequent imposition of license fees,<sup>1</sup> and a provision in the grant of a franchise that a certain fee shall be paid for each car operated does not prevent the municipality from thereafter requiring the payment of an increased license fee.<sup>2</sup> Where a municipality has authority to consent or withhold its consent to the use of its streets for street-railway purposes, it may impose as a condition to the giving of its consent the payment of a fee for each car operated<sup>3</sup> or an annual fee for each mile of track operated.<sup>4</sup>

**Amount of License Fee.** — While it is recognized that a municipality cannot, under its police power to license and regulate the operation of street railways, impose a license fee for the purpose of revenue,<sup>5</sup> under a general power to "license and regulate" the operation of street railways the courts have, in view of the intention of the legislature as shown in other legislation, included power to raise revenue for general municipal purposes by the imposition of license fees.<sup>6</sup> The courts are adverse to the denial of the validity of an imposition of a license under the police power on the ground that the purpose of the imposition is for revenue,<sup>7</sup> and license fees of five dollars,<sup>8</sup> twenty-five dollars,<sup>9</sup> and as high as fifty dollars per annum for each car operated have been sustained as valid under the police power.<sup>10</sup> When the amount of the license fees depends upon the construction, the same rule of construction which applies to ordinances imposing license fees in general is to be applied.<sup>11</sup>

**XL TERMINATION OF STREET FRANCHISE — 1. Revocation.** — As heretofore shown, the grant of a street-railway franchise is a contract obligation within the protection of the Federal Constitution prohibiting the several states from

Newport News, 100 Va. 157. See also *New Orleans v. New Orleans City, etc.*, R. Co., 40 La. Ann. 587.

1. *State v. Herod*, 29 Iowa 123; *Wyandotte v. Corrigan*, 35 Kan. 21; *New Orleans v. New Orleans City, etc.*, R. Co., 40 La. Ann. 587; *Kansas City v. Corrigan*, 18 Mo. App. 206; *McKeesport v. McKeesport, etc.*, Pass. R. Co., 2 Pa. Super. Ct. 242; *Johnson v. Philadelphia*, 60 Pa. St. 445; *Newport News, etc.*, R., etc., Co. v. *Newport News*, 100 Va. 157.

2. *State v. Hilbert*, 72 Wis. 184.

In the act incorporating a street company a provision that the "company shall also pay such license fee for each car run by said company as is now paid by other passenger-railway companies" in the city does not import a contract that the company shall never be required to pay a license fee greater than that required of such companies at the date when the company was incorporated. *Union Pass. R. Co. v. Philadelphia*, 101 U. S. 528, *affirming* 83 Pa. St. 429.

3. *Byrne v. Chicago Gen. R. Co.*, 169 Ill. 75, *affirming* 63 Ill. App. 438; *Louisville City R. Co. v. Louisville*, 4 Bush (Ky.) 478; *Newport v. South Covington, etc.*, St. R. Co., 89 Ky. 29; *Baltimore Union Pass. R. Co. v. Baltimore*, 71 Md. 405; *New York v. Broadway, etc.*, R. Co., 17 Hun (N. Y.) 242; *New York v. Dry Dock, etc.*, R. Co., 47 Hun (N. Y.) 199; *New York v. Manhattan R. Co.*, 72 Hun (N. Y.) 637, 25 N. Y. Supp. 860; *New York v. Broadway, etc.*, R. Co., 97 N. Y. 275; *New York v. Third Ave. R. Co.*, 117 N. Y. 406; *New York v. Eighth Ave. R. Co.*, 118 N. Y. 389; *New York v. Forty-second, etc.*, St. R. Co., (Supm. Ct. Spec. T.) 52 How. Pr. (N. Y.) 106; *Cincinnati Inclined Plane R. Co. v. Cincinnati*, 52 Ohio St. 609; *Cincinnati v. Mt. Auburn Cable R. Co.*, 11

Ohio Dec. (Reprint) 667, 28 Cinc. L. Bul. 276; *Cincinnati St. R. Co. v. Cincinnati*, 11 Ohio Dec. 15; *Union Pass. R. Co. v. Philadelphia*, 83 Pa. St. 429.

4. *Chicago Gen. R. Co. v. Chicago*, 176 Ill. 253, 68 Am. St. Rep. 188.

5. *Allerton v. Chicago*, 9 Biss. (U. S.) 552; *Denver City R. Co. v. Denver*, 2 Colo. App. 34; *Kansas City v. Corrigan*, 18 Mo. App. 206; *North Hudson County R. Co. v. Hoboken*, 41 N. J. L. 71; *New York v. Third Ave. R. Co.*, 33 N. Y. 42; *New York v. Second Ave. R. Co.*, 32 N. Y. 261. See also the title *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*, vol. 21, p. 788.

6. *San José v. San José, etc.*, R. Co., 53 Cal. 475.

7. *Allerton v. Chicago*, 9 Biss. (U. S.) 552; *Denver City R. Co. v. Denver*, 2 Colo. App. 34; *North Braddock v. Second Ave. Traction Co.*, 8 Pa. Super. Ct. 233.

8. *State v. Herod*, 29 Iowa 123.

9. *Denver City R. Co. v. Denver*, 2 Colo. App. 34. Compare *North Hudson County R. Co. v. Hoboken*, 41 N. J. L. 71.

10. *Union Pass. R. Co. v. Philadelphia*, 101 U. S. 532; *Allerton v. Chicago*, 9 Biss. (U. S.) 552, 6 Fed. Rep. 555; *Frankford, etc.*, R. Co. v. *Philadelphia*, 58 Pa. St. 119, 98 Am. Dec. 242; *Johnson v. Philadelphia*, 60 Pa. St. 445; *Railway Co. v. Philadelphia*, 6 Phila. (Pa.) 238, 24 Leg. Int. (Pa.) 252. See, however, *New York v. Second Ave. R. Co.*, 32 N. Y. 261.

11. *New York v. Twenty-third St. R. Co.*, 62 Hun (N. Y.) 545; *New York v. Third Ave. R. Co.*, (Supm. Ct.) 3 N. Y. St. Rep. 181, *affirmed* 117 N. Y. 404; *Harrisburg v. Citizens' Pass. R. Co.*, 4 Pa. Dist. 687. And see generally the title *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*, vol. 21, p. 809 *et seq.*

enacting laws impairing the obligation of contracts.<sup>1</sup> The legislature may, of course, in granting street-railway franchises, reserve a power of revocation,<sup>2</sup> or such power may be reserved by a municipality in granting its consent, under legislative authority, to the use of its streets for street-railway purposes.<sup>3</sup> The intention of the legislature to exercise a power of revocation reserved by it must clearly appear in order to establish such revocation.<sup>4</sup>

**2. Expiration by Lapse of Time.** — The duration of a street-railway franchise depends, of course, on the language of the grant,<sup>5</sup> and such franchise, like any other, terminates, of course, upon the expiration of the time for which it was granted;<sup>6</sup> nor will the breach by the municipality of a contract to purchase the railway, rolling stock, etc., at the expiration of the period for which the franchise is granted operate to prolong its existence.<sup>7</sup> Where circumstances render the further operation of the street railway impossible, the franchise terminates through the inherent limitation of the grant itself.<sup>8</sup> A street-railway corporation may take a grant of a franchise for a longer period than its corporate life, the franchise being assignable, and when assigned the franchise does not terminate with the corporate life of the grantee.<sup>9</sup>

**3. Surrender.** — While a franchise to construct a street railway may be lost by surrender,<sup>10</sup> the intent to surrender such right should be plain and unequivocal.<sup>11</sup>

**Abandonment.** — The surrender of the right to construct a street railway under a franchise grant may be presumed from the failure by the grantee for many years to construct the railway,<sup>12</sup> and surrender by abandonment of grants of this character may be the more readily presumed, the grant being of a public easement, and for the purpose of providing for and promoting the public good.<sup>13</sup> Still, an abandonment of a street-railway franchise is not to be presumed from slight and equivocal circumstances.<sup>14</sup>

**4. Taking under Power of Eminent Domain.** — The franchise to operate a street railway is a species of property which may be taken under the power of eminent domain.<sup>15</sup>

1. See *supra*, this title, *Nature and Extent of Franchise — Protection of Franchise as Contract Obligation*, and the title *DISSOLUTION OF CORPORATIONS*, vol. 9, p. 548.

2. See *supra*, this title, VII. 9, and the title *DISSOLUTION OF CORPORATIONS*, vol. 9, p. 549.

3. Getchell, etc., *Lumber, etc., Co. v. Des Moines Union R. Co.*, 115 Iowa 734.

4. *Citizens' St. R. Co. v. City R. Co.*, 64 Fed. Rep. 647; *City R. Co. v. Citizens' St. R. Co.*, (Ind. 1898) 52 N. E. Rep. 157.

5. **Life of Franchise Depends on Construction of Grant.** — *Detroit Citizens' St. R. Co. v. Detroit*, (C. C. A.) 64 Fed. Rep. 628; *Africa v. Knoxville*, 70 Fed. Rep. 729; *Louisville Trust Co. v. Cincinnati*, (C. C. A.) 76 Fed. Rep. 296.

6. *Detroit v. Detroit City R. Co.*, 56 Fed. Rep. 867; *Louisville Trust Co. v. Cincinnati*, 73 Fed. Rep. 716; *Augusta, etc., R. Co. v. Augusta*, 100 Ga. 701. See the title *DISSOLUTION OF CORPORATIONS*, vol. 9, p. 569.

7. *Canal, etc., St. R. Co. v. New Orleans*, 39 La. Ann. 709.

8. *Southern R. Co. v. Memphis*, (C. C. A.) 99 Fed. Rep. 170.

9. *Detroit Citizens' St. R. Co. v. Detroit*, (C. C. A.) 64 Fed. Rep. 628. See also *supra*, this title, *Sales, Leases, and Consolidation*.

10. **Franchise Lost by Surrender.** — *West Philadelphia Pass. R. Co. v. Philadelphia, etc., Turnpike Road Co.*, 6 Pa. Dist. 160; *Wood v. Seattle*, 23 Wash. 1. See also the title *DISSOLUTION OF CORPORATIONS*, vol. 9, p. 560.

**Necessity for Consent of State to Surrender.** — *Wright v. Milwaukee Electric R., etc., Co.*, 95 Wis. 29, 60 Am. St. Rep. 74.

**Power of Municipality to Accept Surrender of Street-railway Franchise.** — *Wood v. Seattle*, 23 Wash. 1.

11. *McNeil v. Chicago City R. Co.*, 61 Ill. 150, 12 Am. R. Rep. 457.

12. *Henderson v. Central Pass. R. Co.*, 21 Fed. Rep. 358; *Louisville Trust Co. v. Cincinnati*, (C. C. A.) 76 Fed. Rep. 296. See also *East St. Louis Connecting R. Co. v. East St. Louis*, 182 Ill. 433, *affirming* 81 Ill. App. 109; *Junction Pass. R. Co. v. Williamsport Pass. R. Co.*, 154 Pa. St. 116, 56 Am. & Eng. R. Cas. 462; *Combs v. Keyes*, 89 Wis. 297, 46 Am. St. Rep. 839. And see generally the titles *EASEMENTS*, vol. 10, p. 434 *et seq.*; *RAILROADS*, vol. 23, pp. 705, 706.

In *Henderson v. Central Pass. R. Co.*, 21 Fed. Rep. 358, 20 Am. & Eng. R. Cas. 542, a non-user of the right of way for more than ten years was held to be sufficient evidence of abandonment.

13. *Louisville Trust Co. v. Cincinnati*, (C. C. A.) 76 Fed. Rep. 296.

14. *Citizens' St. R. Co. v. Memphis*, 53 Fed. Rep. 715; *McNeil v. Chicago City R. Co.*, 61 Ill. 150; *Wright v. Milwaukee Electric R., etc., Co.*, 95 Wis. 29, 60 Am. St. Rep. 74. See also *Louisville, etc., R. Co. v. Bowling Green R. Co.*, (Ky. 1901) 63 S. W. Rep. 4.

15. See *supra*, this title, *Joint Use of Tracks*;

**5. Nonuser.** — A street-railway franchise, being of a public nature, may be forfeited for nonuser,<sup>1</sup> and a municipality has no power by contract to prevent such forfeiture.<sup>2</sup> Where a street-railway company has the right to lay a single or a double track at its option, it does not, by constructing and operating its road as a single-track road for many years, forfeit its right to construct a double track when the public convenience demands it.<sup>3</sup>

*Quo Warranto* proceedings will lie to enforce the forfeiture of a street-railway franchise for nonuser.<sup>4</sup>

**6. Forfeiture for Breach of Conditions Prescribed in Grant of Franchise —**

*a. IN GENERAL.* — A violation of the conditions upon which a street-railway franchise was granted is cause for a forfeiture of the franchise.<sup>5</sup>

*Conditions Limiting Time of Construction.* — One of the most frequent causes for forfeiture of street-railway franchises is breach of conditions limiting the time for the construction of the railway.<sup>6</sup>

*No Excuse for a Breach* of the conditions is afforded by the mere fact that performance would put the company to great inconvenience and cause a large outlay of money,<sup>7</sup> or that by reason of insolvency it is unable to perform.<sup>8</sup>

*b. WAIVER OF FORFEITURE.* — The state may waive performance of the conditions imposed by it in the grant of street-railway franchises, and thereby

*Nature and Extent of Franchise — Exclusiveness of Franchise;* and the title *EMINENT DOMAIN*, vol. 10, pp. 1091, 1100, 1117.

**1. Forfeiture for Nonuser.** — *State v. East Fifth St. R. Co.*, 140 Mo. 539, 62 Am. St. Rep. 742 (failure to run cars for three years). See also *People v. Atlantic Ave. R. Co.*, 125 N. Y. 513; *People v. Broadway R. Co.*, 126 N. Y. 29, reversing 56 Hun (N. Y.) 45. And see the title *DISSOLUTION OF CORPORATIONS*, vol. 9, p. 574.

Evidence that the street-railway company ran only one car a day over its tracks, doing this not for the accommodation of the public, but merely as a pretense for holding the franchise, shows a sufficient nonuser to warrant a judgment of forfeiture. *People v. Sutter St. R. Co.*, 117 Cal. 604.

**2. State v. East Fifth St. R. Co.**, 140 Mo. 539, 62 Am. St. Rep. 742.

**3. Hestonville, etc., Pass. R. Co. v. Philadelphia**, 89 Pa. St. 210; *People's Pass. R. Co. v. Baldwin*, 14 Phila. (Pa.) 231, 37 Leg. Int. (Pa.) 424. See also *supra*, this title, *Nature and Extent of Franchise — What Tracks May Be Laid*.

**4. State v. East Fifth St. R. Co.**, 140 Mo. 539, 62 Am. St. Rep. 742. See also the title *QUO WARRANTO*, vol. 23, p. 639.

**5. Breach of Condition of Franchise.** — *Tower v. Tower, etc.*, St. R. Co., 68 Minn. 500, 64 Am. St. Rep. 493 (stated under *FORFEIT — FORFEITURE*, vol. 13, p. 1078); *Springfield v. Roberson Ave. R. Co.*, 69 Mo. App. 514; *Plymouth v. Chestnut Hill, etc.*, R. Co., 168 Pa. St. 181.

**6. Time of Construction Limited — California.** — *People v. Sutter St. R. Co.*, 117 Cal. 604; *People v. Los Angeles Electric R. Co.*, 91 Cal. 338; *Omnibus R. Co. v. Baldwin*, 57 Cal. 160, 1 Am. & Eng. R. Cas. 316; *Oakland R. Co. v. Oakland, etc.*, R. Co., 45 Cal. 365, 13 Am. Rep. 181; *Santa Rosa City R. Co. v. Central St. R. Co.*, (Cal. 1895) 38 Pac. Rep. 986.

*Delaware.* — *Wilmington City R. Co. v. Wilmington, etc.*, R. Co., (Del. 1900) 46 Atl. Rep. 12; *Williamson v. Gordan Heights R. Co.*, (Del. 1898) 40 Atl. Rep. 933.

*Illinois.* — *McNeil v. Chicago City R. Co.*, 61 Ill. 150, 12 Am. R. Rep. 457; *Chicago v. Chicago, etc.*, R. Co., 105 Ill. 73; *Belleville v. Citizens' Horse R. Co.*, 152 Ill. 171.

*Kansas.* — *Atchison St. R. Co. v. Nave*, 38 Kan. 744, 5 Am. St. Rep. 800, 36 Am. & Eng. R. Cas. 29.

*Louisiana.* — *Young v. Magazine St. R. Co.*, 24 La. Ann. 53.

*Maryland.* — *Hodges v. Baltimore Union Pass. R. Co.*, 58 Md. 603; *United R., etc., Co. v. Hayes*, 92 Md. 490.

*Michigan.* — *Hamtramck Tp. v. Rapid R. Co.*, 122 Mich. 472.

*Missouri.* — *Hovelman v. Kansas City Horse R. Co.*, 79 Mo. 632.

*New York.* — *People v. Broadway R. Co.*, 126 N. Y. 29, reversing 56 Hun (N. Y.) 45; *Matter of Kings County El. R. Co.*, 105 N. Y. 97; *Matter of Brooklyn El. R. Co.*, 125 N. Y. 434; *Matter of New York Cable R. Co.*, 40 Hun (N. Y.) 1; *New York Cable Co. v. New York*, 104 N. Y. 1; *Bohmer v. Haffen*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 565; *Auchincloss v. Metropolitan El. R. Co.*, 69 N. Y. App. Div. 63; *Matter of Metropolitan El. R. Co.*, (Supm. Ct. Spec. T.) 12 N. Y. Supp. 506; *Dusenberry v. New York, etc., Traction Co.*, 46 N. Y. App. Div. 267.

*Pennsylvania.* — *Plymouth v. Chestnut Hill, etc.*, R. Co., 168 Pa. St. 181; *Com. v. Middletown Electric R. Co.*, 2 Dauphin Co. Rep. (Pa.) 316.

*Texas.* — *Ft. Worth St. R. Co. v. Rosedale St. R. Co.*, 68 Tex. 163.

See also *West Springfield, etc.*, St. R. Co. v. Bodurtha, 181 Mass. 583.

Under the phraseology of a particular franchise the forfeiture has been held to extend only to the portion unfinished within the time prescribed. *Houston v. Houston, etc.*, R. Co., 84 Tex. 581.

**7. St. Joseph County v. South Bend, etc.**, R. Co., 118 Ind. 68; *People v. Broadway R. Co.*, 126 N. Y. 29.

**8. Union St. R. Co. v. Saginaw Circuit Judge**, 113 Mich. 694 (paving between tracks).

avoid the forfeiture of the franchise for breach of such conditions.<sup>1</sup> So municipalities may waive conditions imposed in giving their consent to the use of streets for street-railway purposes,<sup>2</sup> but they cannot waive performance of conditions imposed by the state.<sup>3</sup>

c. **NECESSITY FOR JUDICIAL DETERMINATION OF FORFEITURE.** — In some special instances provisions for forfeiture of street-railway franchises for breach of conditions in the grant have been considered to be self-executing, so that upon breach of the conditions the existence of the franchise *ipso facto* ceased without a judicial or legislative declaration of forfeiture;<sup>4</sup> but unless the grant clearly so provides, the breach of its conditions does not *ipso facto* terminate its existence; there must be a judicial or at least a legislative determination to that effect.<sup>5</sup> Where the franchise under which a street railway operates provides that the municipality may declare a forfeiture upon a breach of certain stipulations, the municipality may declare the forfeiture at its option upon a conceded breach of the stipulations, without resort to the courts.<sup>6</sup>

d. **WHO MAY ENFORCE FORFEITURE.** — As a general rule a private individual cannot, in a collateral proceeding, assert a forfeiture of a street-railway franchise for breach of the conditions contained in the grant.<sup>7</sup> The state

1. **Forfeiture Waived.** — *People v. Los Angeles Electric R. Co.*, 91 Cal. 338; *Santa Rosa City R. Co. v. Central St. R. Co.*, (Cal. 1895) 38 Pac. Rep. 986; *Bohmer v. Haffen*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 565; *Matt v. of New York El. R. Co.*, 70 N. Y. 327; *Dern v. Salt Lake City R. Co.*, 19 Utah 46. See also the title **DISSOLUTION OF CORPORATIONS**, vol. 9, p. 596.

**Waiver by Acquiescence and Grant of Additional Franchises.** — *Dern v. Salt Lake City R. Co.*, 19 Utah 46. See also *Bohmer v. Haffen*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 565.

2. *Chicago City R. Co. v. People*, 73 Ill. 541; *New Orleans, etc., R. Co. v. New Orleans*, 44 La. Ann. 748; *Hodges v. Baltimore Union Pass. R. Co.*, 58 Md. 603.

3. *People v. Sutter St. R. Co.*, 117 Cal. 604; *Chicago City R. Co. v. People*, 73 Ill. 541; *State v. East Fifth St. R. Co.*, 140 Mo. 539, 62 Am. St. Rep. 742.

4. **Provision for Forfeiture Self-executing.** — *Oakland R. Co. v. Oakland, etc., R. Co.*, 45 Cal. 365, 13 Am. Rep. 181 (provision that the franchise "shall utterly cease and be forfeited"); *Wilmington City R. Co. v. Wilmington, etc., R. Co.*, (Del. 1900) 46 Atl. Rep. 12 ("shall wholly cease and determine"); *Matter of Brooklyn, etc., R. Co.*, 72 N. Y. 245; *Brooklyn Steam Transit Co. v. Brooklyn*, 78 N. Y. 525; *Houston v. Houston Belt, etc., R. Co.*, 84 Tex. 581. See also *Atchison St. R. Co. v. Nave*, 38 Kan. 744, 5 Am. St. Rep. 800. See also the title **DISSOLUTION OF CORPORATIONS**, vol. 9, p. 553 *et seq.*, where several of the cases above are stated and considered at length.

5. **Judicial Determination Generally Necessary** — *California.* — *People v. Los Angeles Electric R. Co.*, 91 Cal. 338; *Santa Rosa City R. Co. v. Central St. R. Co.*, (Cal. 1895) 38 Pac. Rep. 986 ("works a forfeiture"). Compare *Arcata v. Arcata, etc., R. Co.*, 92 Cal. 639.

*Maryland.* — *Hodges v. Baltimore Union Pass. R. Co.*, 58 Md. 603.

*New York.* — *Brooklyn Cent. R. Co. v.*

*Brooklyn City R. Co.*, 32 Barb. (N. Y.) 358; *Matter of Brooklyn El. R. Co.*, 125 N. Y. 434; *Coney Island, etc., R. Co. v. Kennedy*, 15 N. Y. App. Div. 588; *Dusenberry v. New York, etc., Traction Co.*, 46 N. Y. App. Div. 267.

*Ohio.* — *Akron, etc., R. Co. v. Bedford*, 8 Ohio Dec. 142, 6 Ohio N. P. 276.

*Pennsylvania.* — *Scranton R. Co. v. Scranton*, 5 Lack. Leg. N. (Pa.) 250; *Plymouth v. Chestnut Hill, etc., R. Co.*, 15 Pa. Co. Ct. 442; *Archbald v. Carbondale Traction Co.*, 3 Pa. Dist. 751.

See also the title **DISSOLUTION OF CORPORATIONS**, vol. 9, p. 569 *et seq.*, and see **FORFEIT — FORFEITURE**, vol. 13, pp. 1077, 1078.

**Temporary Injunction Pending Proceedings to Determine Forfeiture.** — *Dusenberry v. New York, etc., Traction Co.*, 46 N. Y. App. Div. 267.

6. *Union St. R. Co. v. Saginaw Circuit Judge*, 113 Mich. 694. See also *Stewart v. Ashtabula*, 98 Fed. Rep. 516, *reversed* in part 107 Fed. Rep. 857.

7. **Private Individual Cannot Enforce Forfeiture.** — *Africa v. Knoxville*, 70 Fed. Rep. 729; *Hodges v. Baltimore Union Pass. R. Co.*, 58 Md. 603; *Kitchell v. Manchester Road Electric R. Co.*, 79 Mo. App. 340; *Hovelman v. Kansas City Horse R. Co.*, 79 Mo. 632; *Plymouth v. Chestnut Hill, etc., R. Co.*, 15 Pa. Co. Ct. 442; *Dern v. Salt Lake City, R. Co.*, 19 Utah 46. See also *City R. Co. v. Citizens' St. R. Co.* (Ind. 1898) 52 N. E. Rep. 157. Compare *Atchison St. R. Co. v. Nave*, 38 Kan. 744, 5 Am. St. Rep. 800. See generally the title **DISSOLUTION OF CORPORATIONS**, vol. 9, p. 594.

**Railway Company Claiming Rival Franchise.** — *Santa Rosa City R. Co. v. Central St. R. Co.*, (Cal. 1895) 38 Pac. Rep. 986; *New Orleans, etc., R. Co. v. New Orleans*, 44 La. Ann. 748. See also *Hamilton St. R. Electric Co. v. Hamilton, etc., Electric Transit Co.*, 3 Ohio Cir. Dec. 158, 5 Ohio Cir. Ct. 319. Compare *Wilmington City R. Co. v. Wilmington, etc., R. Co.*, (Del. 1900) 46 Atl. Rep. 12.



may institute proceedings to enforce the forfeiture,<sup>1</sup> and where the franchise is granted by a municipality under legislative authority, it may sue to enforce a forfeiture thereof for breach of the conditions imposed by it,<sup>2</sup> but it seems that a municipality cannot assert a forfeiture for breach of conditions imposed by the legislature in granting the franchise.<sup>3</sup>

2. **EQUITABLE RELIEF FROM FORFEITURE.** — In *New Jersey* a court of equity, under the general equitable power to relieve from forfeitures, has asserted the right to relieve a street-railway company from the effect of a forfeiture of its street franchise incurred through a failure to complete the railway within the time stipulated by a municipality in giving its consent to the use of its streets.<sup>4</sup>

7. **Effect of Termination of Franchise.** — Upon the termination of the franchise to operate a street railway, the right to maintain the tracks in the street also terminates, as such right is merely accessory to the right to operate the railway, and cannot subsist when the principal right is gone.<sup>5</sup> Upon the termination of the franchise, the company has, as a general rule, the right to remove the structure of its railway.<sup>6</sup> Sometimes, however, grants of street-railway franchises by municipalities expressly provide that upon the termination of the franchise the railway shall revert to the municipality.<sup>7</sup>

## **XII. LIABILITY FOR INJURIES FROM NEGLIGENCE — 1. Operation of Cars —**

a. **GENERAL RIGHTS AND DUTIES** — (1) *Right of Way.* — A company operating a street railway has not an exclusive or paramount right to the use of the part of the street occupied by its tracks, either as against other vehicles<sup>8</sup>

1. **State.** — *People v. Sutter St. R. Co.*, 117 Cal. 604.

2. **Municipality.** — *Tower v. Tower, etc.*, St. R. Co., 68 Minn. 500, 64 Am. St. Rep. 493; *Springfield v. Roberson Ave. R. Co.*, 69 Mo. App. 514; *Plymouth v. Chestnut Hill, etc.*, R. Co., 168 Pa. St. 181. Compare *Brooklyn Cent. R. Co. v. Brooklyn City R. Co.*, 32 Barb. (N. Y.) 358.

3. *Milwaukee Electric R., etc., Co. v. Milwaukee*, 95 Wis. 39, 60 Am. St. Rep. 81. See also *Elmira v. Maple Ave. R. Co.*, (Supm. Ct. Gen. T.) 21 N. Y. St. Rep. 544.

4. *North Jersey St. R. Co. v. South Orange Tp.* 58 N. J. Eq. 83.

5. *Southern R. Co. v. Memphis*, (C. C. A.) 97 Fed. Rep. 819.

6. *Young v. Magazine St. R. Co.*, 24 La. Ann. 53. See also *Union St. R. Co. v. Saginaw Circuit Judge*, 113 Mich. 694.

7. See for example *Tower v. Tower, etc.*, St. R. Co., 68 Minn. 500, 64 Am. St. Rep. 493.

8. **No Exclusive Right of Way** — *United States*. — *Cincinnati St. R. Co. v. Whitcomb*, (C. C. A.) 66 Fed. Rep. 915.

*Arkansas*. — *Little Rock Traction, etc., Co. v. Morrison*, 69 Ark. 289.

*California*. — *Shea v. Potrero, etc.*, R. Co., 44 Cal. 414.

*Connecticut*. — *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475.

*Illinois*. — *Chicago West Div. R. Co. v. Ingraham*, 131 Ill. 659; *North Chicago St. R. Co. v. Smadraff*, 189 Ill. 155; *West Chicago St. R. Co. v. Maday*, 88 Ill. App. 49, affirmed 183 Ill. 308; *Joliet R. Co. v. Barty*, 96 Ill. App. 351. Compare *West Chicago St. R. Co. v. Dougherty*, 89 Ill. App. 362.

*Indiana*. — *Muncie St. R. Co. v. Maynard*, 5 Ind. App. 372.

*Kansas*. — *Edgerton v. O'Neil*, 4 Kan. App. 73.

*Louisiana*. — *Brown v. Duplessis*, 14 La. Ann. 854; *Cline v. Crescent City R. Co.*, 43 La. Ann. 327.

*Maryland*. — *Lake Roland El. R. Co. v. McKewen*, 80 Md. 593.

*Michigan*. — *Rascher v. East Detroit, etc.*, R. Co., 90 Mich. 413, 30 Am. St. Rep. 447; *Mertz v. Detroit Electric R. Co.*, 125 Mich. 11. Compare *Kornetzski v. Detroit*, 94 Mich. 341.

*Minnesota*. — *Armstead v. Mendenhall*, 83 Minn. 136; *Wilson v. Minneapolis St. R. Co.*, 74 Minn. 436.

*Nebraska*. — *Omaha St. R. Co. v. Duvall*, 40 Neb. 29.

*New Jersey*. — *Camden Horse R. Co. v. Citizens' Coach Co.*, 28 N. J. Eq. 145; *Citizens' Coach Co. v. Camden Horse R. Co.*, 33 N. J. Eq. 267, affirming 31 N. J. Eq. 525; *Buttelli v. Jersey City, etc.*, Electric R. Co., 59 N. J. L. 302; *Woodland v. North Jersey St. R. Co.*, 66 N. J. L. 455.

*New York*. — *Adolph v. Central Park, etc.*, R. Co., 65 N. Y. 554; *Fleckenstein v. Dry Dock, etc.*, R. Co., 105 N. Y. 655, 8 N. Y. St. Rep. 32; *Bresky v. Third Ave. R. Co.*, 16 N. Y. App. Div. 83; *Wilbrand v. Eighth Ave. R. Co.*, 3 Bosw. (N. Y.) 314; *Buy v. Third Ave. R. Co.*, 45 N. Y. App. Div. 11; *Hennessy v. Brooklyn City R. Co.*, 73 Hun (N. Y.) 569; *Fettritch v. Dickenson*, (C. Pl. Gen. T.) 22 How. Pr. (N. Y.) 248. Compare *Hewlett v. Brooklyn Heights R. Co.*, 63 N. Y. App. Div. 423.

*Pennsylvania*. — *Patterson v. Pittston*, 8 Kulp (Pa.) 530; *Second, etc.*, St. R. Co. v. Morris, 8 Phila. (Pa.) 304. Compare *McCracken v. Consolidated Traction Co.*, 201 Pa. St. 378.

*Texas*. — *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 60 Am. Rep. 32; *San Antonio St. R. Co. v. Renken*, 15 Tex. Civ. App. 229.

or as against pedestrians.<sup>1</sup> As a matter of necessity, however, from the fact that street cars can travel only upon the tracks, they have in a qualified sense a paramount right of way in that vehicles traversing the street upon which the tracks are laid must give way to cars which they meet or by which they are overtaken;<sup>2</sup> and the same is true as regards pedestrians.<sup>3</sup> For the purpose of crossing a street upon which a street railway is operated, other vehicles have an equal right with the street cars to the use of the street,<sup>4</sup> especially where streets intersect;<sup>5</sup> and a driver of a vehicle approaching the line of a street-railway company has the right of way if, proceeding at a rate of speed which under the circumstances is reasonable, he can reach the point of crossing in time to go safely on the tracks in advance of an approaching car, the latter being sufficiently distant to be checked and if need be stopped before it reaches him.<sup>6</sup> At street crossings pedestrians have also equal rights with

*Washington.*—*Spurrier v. Front St. Cable R. Co.*, 3 Wash. 659; *Traver v. Spokane St. R. Co.*, 25 Wash. 225. *Compare Tesch v. Milwaukee Electric R., etc., Co.*, 108 Wis. 593.

1. *Chicago West Div. R. Co. v. Ingraham*, 33 Ill. App. 351, *affirmed* 131 Ill. 659; *Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1; *Buttelli v. Jersey City, etc., Electric R. Co.*, 59 N. J. L. 302; *Gilmore v. Federal St., etc., Pass. R. Co.*, 153 Pa. St. 31, 34 Am. St. Rep. 682; *Gibbons v. Wilkes-Barre, etc., St. R. Co.*, 155 Pa. St. 279.

2. *Duty to Give Way to Passage of Street Cars.*—*United States.*—*Cincinnati St. R. Co. v. Whitcomb*, 31 U. S. App. 374.

*California.*—*Bailey v. Market St. Cable R. Co.*, 110 Cal. 320.

*Delaware.*—*Brown v. Wilmington City R. Co.*, 1 Penn. (Del.) 332; *Adams v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 512; *Farley v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 581.

*Illinois.*—*Chicago West Div. R. Co. v. Bert*, 69 Ill. 388; *North Chicago St. R. Co. v. Smadraff*, 189 Ill. 155; *North Chicago Electric R. Co. v. Peuser*, 190 Ill. 67.

*Maine.*—*Flewelling v. Lewiston, etc., Horse R. Co.*, 89 Me. 585.

*Missouri.*—*Moore v. Kansas City, etc., Rapid Transit R. Co.*, 126 Mo. 265.

*New Jersey.*—*Orange, etc., Horse R. Co. v. Ward*, 47 N. J. L. 560; *North Hudson County R. Co. v. Isley*, 49 N. J. L. 468; *Jersey City, etc., R. Co. v. Jersey City Horse R. Co.*, 20 N. J. Eq. 61, *reversed on other grounds* 21 N. J. Eq. 550; *Buttelli v. Jersey City, etc., Electric R. Co.*, 59 N. J. L. 302.

*New York.*—*Hegan v. Eighth Ave. R. Co.*, 15 N. Y. 380; *Adolph v. Central Park, etc., R. Co.*, 76 N. Y. 530; *Buhrens v. Dry Dock, etc., R. Co.*, 125 N. Y. 702; *O'Neil v. Dry Dock, etc., R. Co.*, 129 N. Y. 125, 26 Am. St. Rep. 512; *Bernhard v. Rochester R. Co.*, 68 Hun (N. Y.) 369; *Hennessy v. Brooklyn City R. Co.*, 73 Hun (N. Y.) 569; *Cambeis v. Third Ave. R. Co.*, (C. Pl. Gen. T.) 1 Misc. (N. Y.) 158; *Rosenblatt v. Brooklyn Heights R. Co.*, 26 N. Y. App. Div. 600; *Dillon v. Nassau Electric R. Co.*, 59 N. Y. App. Div. 614; *Wilbrand v. Eighth Ave. R. Co.*, 3 Bosw. (N. Y.) 314; *Barker v. Hudson River R. Co.*, 4 Daly (N. Y.) 274; *O'Neill v. Third Ave. R. Co.*, (C. Pl. Gen. T.) 3 Misc. (N. Y.) 521; *Kennedy v. Metropolitan St. R. Co.*, (C. Pl. Gen. T.) 11 Misc. (N. Y.) 320; *Quinn v. Atlantic Ave. R. Co.*,

(*Brooklyn City Ct. Gen. T.*) 12 N. Y. Supp. 223. *Ohio.*—*Siek v. Toledo Consol. St. R. Co.*, 9 Ohio Cir. Dec. 51.

*Pennsylvania.*—*Ehrisman v. East Harrisburg City Pass. R. Co.*, 150 Pa. St. 180.

3. *Hot Springs St. R. Co. v. Johnson*, 64 Ark. 420; *Fenton v. Second Ave. R. Co.*, 126 N. Y. 625, *reversing* 56 Hun (N. Y.) 99; *Warner v. People's St. R. Co.*, 141 Pa. St. 615. See also *Fonda v. St. Paul City R. Co.*, 77 Minn. 336.

4. *Clark v. Bennett*, 123 Cal. 275; *McClain v. Brooklyn City R. Co.*, 116 N. Y. 459, *affirming* 42 Hun (N. Y.) 657; *Kennedy v. Third Ave. R. Co.*, 31 N. Y. App. Div. 30. *Compare De Lon v. Kokomo City St. R. Co.*, 22 Ind. App. 377.

5. *Street Intersections.*—*Delaware.*—*Price v. Charles Warner Co.*, 1 Penn. (Del.) 462.

*District of Columbia.*—*Eckington, etc., R. Co. v. Hunter*, 6 App. Cas. (D. C.) 287.

*Illinois.*—*Chicago City R. Co. v. Martensen*, 100 Ill. App. 306, *affirmed* 198 Ill. 511.

*Nebraska.*—*Omaha St. R. Co. v. Cameron*, 43 Neb. 297.

*New Jersey.*—*New Jersey Electric R. Co. v. Miller*, 59 N. J. L. 423; *Shelly v. Brunswick Traction Co.*, 65 N. J. L. 639.

*New York.*—*Buhrens v. Dry Dock, etc., R. Co.*, 53 Hun (N. Y.) 571, *affirmed* 125 N. Y. 702; *O'Neil v. Dry Dock, etc., R. Co.*, 129 N. Y. 125, *affirming* 59 N. Y. Super. Ct. 123; *Bernhard v. Rochester R. Co.*, 68 Hun (N. Y.) 369; *Zimmerman v. Union R. Co.*, 3 N. Y. App. Div. 219; *Huber v. Nassau Electric R. Co.*, 22 N. Y. App. Div. 426; *Brozek v. Steinway R. Co.*, 23 N. Y. App. Div. 623; *Hergert v. Union R. Co.*, 25 N. Y. App. Div. 218; *Reilly v. Brooklyn Heights R. Co.*, 65 N. Y. App. Div. 453; *Witzel v. Third Ave. R. Co.*, (N. Y. City Ct. Gen. T.) 3 Misc. (N. Y.) 561; *Chapman v. Atlantic Ave. R. Co.*, (*Brooklyn City Ct. Gen. T.*) 14 Misc. (N. Y.) 384; *Degnan v. Brooklyn City R. Co.*, (*Brooklyn City Ct. Gen. T.*) 14 Misc. (N. Y.) 388; *Dise v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 97; *O'Rourke v. Yonkers R. Co.*, 32 N. Y. App. Div. 8.

*Tennessee.*—*Nashville, etc., R. Co. v. Norman*, 108 Tenn. 324.

*Compare Helber v. Spokane St. R. Co.*, 22 Wash. 319; *Stafford v. Chippewa Valley Electric R. Co.*, 110 Wis. 331.

6. *New Jersey Electric R. Co. v. Miller*, 59 N. J. L. 423; *Earle v. Consolidated Traction Co.*, 64 N. J. L. 573; *Buhrens v. Dry Dock, etc.*,

the street cars in the use of the streets for crossing.<sup>1</sup> Where street railways intersect at street crossings, irrespective of motive power neither has a superior right of way, but it is the duty of the one last arriving at the intersection to give way to the other.<sup>2</sup> In *Michigan*, by statute, where street cars on intersecting lines arrive at the intersection at substantially the same time, precedence is given to the car on the track first laid.<sup>3</sup> Where the track of the street railway is laid in part over private land over which it has secured the right of way, it has, of course, a right to the exclusive use of such part of its tracks.<sup>4</sup>

(2) *General Degree of Care Required.* — It is the duty of persons operating street cars to use reasonable or ordinary care, or the care which an ordinarily or reasonably prudent man would use, to avoid injury to other persons using the street.<sup>5</sup> The standard of ordinary care is not, however, absolute, but varies according to the circumstances and according to the possible or probable danger which may arise.<sup>6</sup> Thus, greater care is required in the operation of heavy cars traveling at high rates of speed than would be required in the operation of lighter cars traveling at slower rates of speed and more quickly stopped.<sup>7</sup> So a higher degree of care is required in the operation of

R. Co., 53 Hun (N. Y.) 571, *affirmed* 125 N. Y. 702; Toledo Electric St. R. Co. v. Westenhuber, 12 Ohio Cir. Dec. 22.

1. *Towner v. Brooklyn Heights R. Co.*, 44 N. Y. App. Div. 628; *Schulman v. Houston, etc., R. Co.*, (N. Y. Super. Ct. Gen. T.) 15 Misc. (N. Y.) 30. *Compare* *Citizens' St. R. Co. v. Howard*, 102 Tenn. 474.

2. *Crossing of Two Street Railways.* — See *infra*, this subsection, *Collision Between Street-railway Cars.*

3. *Becker v. Detroit Citizens' St. R. Co.*, 121 Mich. 580.

4. *Private Right of Way.* — *Floyd v. Paducah R., etc., Co.*, (Ky. 1901) 64 S. W. Rep. 653. *Compare* *Lickens v. Staten Island Midland R. Co.*, 64 N. Y. App. Div. 327.

5. *Reasonable or Ordinary Care.* — *United States.* — *Cincinnati St. R. Co. v. Whitcomb*, 31 U. S. App. 374; *Stelk v. McNulta*, (C. C. A.) 99 Fed. Rep. 138.

*Arkansas.* — *Citizens' St. R. Co. v. Steen*, 42 Ark. 321.

*California.* — *Driscoll v. Market St. Cable R. Co.*, 97 Cal. 553, 33 Am. St. Rep. 203; *Shea v. Potrero, etc., R. Co.*, 44 Cal. 414.

*Delaware.* — *Brown v. Wilmington City R. Co.*, 1 Penn. (Del.) 332.

*Illinois.* — *North Chicago St. R. Co. v. Zeiger*, 78 Ill. App. 463; *North Chicago St. R. Co. v. Allen*, 82 Ill. App. 128; *West Chicago St. R. Co. v. Wizemann*, 83 Ill. App. 402; *McGary v. West Chicago St. R. Co.*, 85 Ill. App. 610; *Chicago City R. Co. v. Anderson*, 93 Ill. App. 419, *affirmed* 193 Ill. 9; *South Chicago City R. Co. v. Kinnare*, 96 Ill. App. 210; *Chicago West Div. R. Co. v. Ingraham*, 131 Ill. 659.

*Kansas.* — *Topeka City R. Co. v. Higgs*, 38 Kan. 375.

*Louisiana.* — *Barnes v. Shreveport City R. Co.*, 47 La. Ann. 1218.

*Massachusetts.* — *O'Leary v. Brockton St. R. Co.*, 177 Mass. 187.

*Missouri.* — *Pope v. Kansas City Cable R. Co.*, 99 Mo. 400; *Stanley v. Union Depot R. Co.*, 114 Mo. 606; *Bindbeutel v. Street R. Co.*, 43 Mo. App. 463.

*Montana.* — *Wall v. Helena St. R. Co.*, 12 Mont. 44.

*New York.* — *Weiler v. Manhattan R. Co.*, 53 Hun (N. Y.) 372; *McClain v. Brooklyn City R. Co.*, 116 N. Y. 459; *Moroney v. Brooklyn City R. Co.*, (Brooklyn City Ct. Gen. T.) 30 N. Y. St. Rep. 911; *Seagriff v. Brooklyn Heights R. Co.*, 31 N. Y. App. Div. 595; *Harvey v. Nassau Electric R. Co.*, 35 N. Y. App. Div. 307.

*Ohio.* — *Pendleton St. R. Co. v. Shires*, 18 Ohio St. 255; *Pendleton St. R. Co. v. Stallman*, 22 Ohio St. 1.

*Pennsylvania.* — *Jones v. Greensburg, etc., R. Co.*, 9 Pa. Super. Ct. 65.

*Tennessee.* — *Memphis City R. Co. v. Logue*, 13 Lea (Tenn.) 32; *Citizens' St. R. Co. v. Dan*, 102 Tenn. 320.

*Texas.* — *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 60 Am. Rep. 32; *San Antonio St. R. Co. v. Mechler*, (Tex. Civ. App. 1894) 29 S. W. Rep. 202, 87 Tex. 628. *Compare* *Dallas City R. Co. v. Beeman*, 74 Tex. 291; *San Antonio St. R. Co. v. Cailloutte*, 79 Tex. 341.

*Virginia.* — *Norfolk R., etc., Co. v. Corletto*, 100 Va. 355.

*Washington.* — *Traver v. Spokane St. R. Co.*, 25 Wash. 225.

*Wisconsin.* — *Stafford v. Chippewa Valley Electric R. Co.*, 110 Wis. 331; *Thoresen v. La Crosse City R. Co.*, 87 Wis. 597, 41 Am. St. Rep. 64.

See also the title NEGLIGENCE, vol. 21, p. 463 *et seq.*

6. *Cincinnati St. R. Co. v. Whitcomb*, 31 U. S. App. 374; *Citizens' St. R. Co. v. Steen*, 42 Ark. 321; *Maxwell v. Wilmington City R. Co.*, 1 Marv. (Del.) 199; *Adams v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 512; *Farley v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 581; *Metropolitan R. Co. v. Hammett*, 13 App. Cas. (D. C.) 370; *Kestner v. Pittsburgh, etc., Traction Co.*, 158 Pa. St. 422.

7. *Cincinnati St. R. Co. v. Whitcomb*, 31 U. S. App. 374; *Winters v. Kansas City Cable R. Co.*, 99 Mo. 509, 17 Am. St. Rep. 591; *Dallas Rapid Transit R. Co. v. Dunlap*, 7 Tex. Civ. App. 471; *Cogswell v. West St., etc., Electric R. Co.*, 5 Wash. 46.

cars in the more thronged streets of a city than in the less frequented streets, or in the open or suburban parts;<sup>1</sup> greater care is required at street crossings where pedestrians and vehicles may be expected than at other points;<sup>2</sup> and greater care is to be used to avoid injuries to children in the street than the law demands for the protection of adults.<sup>3</sup> Where a street railway is constructed partly in a street and partly over a private road, the only care required toward persons on the private road is that required toward licensees.<sup>4</sup>

Instructions have frequently been held to be erroneous as imposing too great a burden on the company;<sup>5</sup> for example, an instruction importing that the street-railway company was required to use extraordinary precautions<sup>6</sup> or such a degree of care as would prevent accident.<sup>7</sup>

A Rule of the Street-railway Company for the direction of its servants in the operation of cars which imposes upon them a higher degree of care than is imposed by law cannot be considered as determining the degree of care required.<sup>8</sup>

(3) *Employment of Servants.* — A street-railway company is required to employ competent servants to operate its cars, and is liable for injuries caused through the incompetency of such servants;<sup>9</sup> but where, at the time of an accident, no negligence on the part of the servants in charge of the car is shown, the company cannot be held liable on mere proof of facts affecting the general character of such servants for skill or proficiency in the discharge of their duties.<sup>10</sup> A street-railway company is also required to provide enough

1. *Brown v. Wilmington City R. Co.*, 1 Penn. (Del.) 332; *Liddy v. St. Louis R. Co.*, 40 Mo. 506.

2. *Where Vehicles and Pedestrians May Be Expected* — *Alabama*. — *Highland Ave.*, etc., R. Co. v. Sampson, 112 Ala. 425.

*Illinois*. — *West Chicago St. R. Co. v. Petters*, 196 Ill. 298; *Wallen v. North Chicago St. R. Co.*, 82 Ill. App. 103.

*Kentucky*. — *Owensboro City R. Co. v. Hill*, (Ky. 1900) 56 S. W. Rep. 21.

*Minnesota*. — *Strutzel v. St. Paul City R. Co.*, 47 Minn. 543; *Watson v. Minneapolis St. R. Co.*, 53 Minn. 551.

*Missouri*. — *Winters v. Kansas City Cable R. Co.*, 99 Mo. 509, 17 Am. St. Rep. 591.

*New York*. — *McClain v. Brooklyn City R. Co.*, 116 N. Y. 459; *Hoyt v. Metropolitan St. R. Co.*, 73 N. Y. App. Div. 249; *Duncan v. Union R. Co.*, 39 N. Y. App. Div. 497.

*Virginia*. — *Bass v. Norfolk R.*, etc., Co., 100 Va. 1.

*Wisconsin*. — *Heucke v. Milwaukee City R. Co.*, 69 Wis. 401; *Stafford v. Chippewa Valley Electric R. Co.*, 110 Wis. 331.

6. *West Chicago St. R. Co. v. Schwartz*, 93 Ill. App. 387.

4. *Hooper v. Staten Island Midland R. Co.*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 721.

5. *Instructions*. — *Moroney v. Brooklyn City R. Co.*, (Brooklyn City Ct. Gen. T.) 9 N. Y. Supp. 546; *Memphis St. R. Co. v. Wilson*, 108 Tenn. 618.

6. *Eckington, etc., R. Co. v. Hunter*, 6 App. Cas. (D. C.) 287.

7. *West Chicago St. R. Co. v. Wizemann*, 83 Ill. App. 402. See also *O'Leary v. Brockton St. R. Co.*, 177 Mass. 187.

8. *Isackson v. Duluth St. R. Co.*, 75 Minn. 27. Compare *Hart v. Cedar Rapids, etc., R. Co.*, 109 Iowa 631.

9. *Employment of Competent Servants* — *Arkan-*

*sas*. — *Little Rock Traction, etc., Co. v. Morrison*, 69 Ark. 289.

*California*. — *Swain v. Fourteenth St. R. Co.*, 93 Cal. 179.

*Delaware*. — *Brown v. Wilmington City R. Co.*, 1 Penn. (Del.) 332.

*Kentucky*. — *South Covington, etc., St. R. Co. v. Herrklotz*, 104 Ky. 400.

*Louisiana*. — *Rice v. Crescent City R. Co.*, 51 La. Ann. 108.

*Michigan*. — *Holman v. Union St. R. Co.*, 114 Mich. 208.

*Montana*. — *Wall v. Helena St. R. Co.*, 12 Mont. 44.

*New Hampshire*. — *Warren v. Manchester St. R. Co.*, 70 N. H. 352.

*New York*. — *Pyne v. Broadway, etc., R. Co.*, (C. Pl. Gen. T.) 19 N. Y. Supp. 217. Compare *Bittner v. Crosstown St. R. Co.*, 153 N. Y. 76, 60 Am. St. Rep. 588.

*Pennsylvania*. — *Todd v. Second Ave. Traction Co.*, 192 Pa. St. 587.

In *Wall v. Helena St. R. Co.*, 12 Mont. 44, it appeared that at the time of the injury a boy fifteen years old was the driver, and that had there been a competent driver in charge the injury could have been prevented. The company was held liable.

*Motorman with Defective Eyesight*. — *Rice v. Crescent City R. Co.*, 51 La. Ann. 108.

*Drunken Driver*. — *Pyne v. Broadway, etc., St. R. Co.*, (C. Pl. Gen. T.) 19 N. Y. Supp. 217.

10. *Cunningham v. Los Angeles R. Co.*, 115 Cal. 561; *Snider v. New Orleans, etc., R. Co.*, 48 La. Ann. 1.

And in *Philadelphia City R. Co. v. Henrice*, 92 Pa. St. 431, 37 Am. Rep. 699, it was held that a witness could not be asked how many hours the drivers and conductors were employed each day for the purpose of showing that the driver was physically unable to discharge his duty.

men on its cars to control them properly;<sup>1</sup> but it has been held that a company operating cars by horse power was not, as a matter of law, required to keep a conductor on each of its cars in addition to a driver,<sup>2</sup> and in the absence of evidence that a conductor was necessary for the safe running of an electric car it has been held to be error to admit evidence that there was no conductor on the car at the time of the accident.<sup>3</sup>

**Flagmen at Crossings.** — The rule requiring ordinary railroad companies to station flagmen at much-traveled street crossings<sup>4</sup> does not apply to street railways.<sup>5</sup>

(4) **Character and Condition of Cars.** — A street-railway company is under a duty to use reasonable care to see that its cars are in proper condition, so that they may be operated without undue damage to the public,<sup>6</sup> and to equip its cars with such safety appliances as men of average prudence would use under the circumstances.<sup>7</sup> But it is not required to equip its cars with the best appliances to avoid accidents which human skill has devised; it is only required to use appliances which are in general use and which have been found to be usually adequate and safe, and to avail itself of new inventions and improvements known to it.<sup>8</sup> And it is not required to adopt a device the practical utility of which has not been demonstrated.<sup>9</sup> The failure to furnish a car with proper equipment does not render the company liable for injuries which result from other causes than such failure.<sup>10</sup>

(5) **Speed and Control of Cars.** — It is negligence on the part of a street-railway company to operate its cars at so great a speed that they cannot be controlled to avoid injury to pedestrians and vehicles rightfully on the track.<sup>11</sup>

1. **Duty to Employ Sufficient Servants.** — *Flournoy v. Shreveport Belt R. Co.*, 50 La. Ann. 635. As to the regulation of this matter by ordinance, see *supra*, this title, *Regulation and Control — Precautions in Operation of Cars — Number of Operators on Cars*.

2. *Dunn v. Cass Ave., etc.*, R. Co., 21 Mo. App. 188.

3. *Christensen v. Union Trunk Line R. Co.*, 6 Wash. 75.

4. **Flagmen.** — See the title *CROSSINGS*, vol. 8, p. 396 *et seq.*

5. *Eckington, etc.*, R. Co. *v. Hunter*, 6 App. Cas. (D. C.) 287.

6. **Character and Condition of Cars — Arkansas.** — *Little Rock Traction, etc., Co. v. Morrison*, 69 Ark. 289.

*Illinois.* — *Chicago City R. Co. v. Mager*, 185 Ill. 336; *South Chicago City R. Co. v. Purvis*, 193 Ill. 454.

*New York.* — *Dintruff v. Rochester City, etc., R. Co.*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 402.

*Pennsylvania.* — *Musser v. Lancaster City St. R. Co.*, 176 Pa. St. 621.

*Utah.* — *Thompson v. Salt Lake Rapid Transit Co.*, 16 Utah 281.

*Washington.* — *Roberts v. Spokane St. R. Co.*, 23 Wash. 325; *Mitchell v. Tacoma R., etc., Co.*, 9 Wash. 120.

See also *Gargan v. West End St. R. Co.*, 176 Mass. 106; *Mt. Adams, etc., R. Co. v. Cavagna*, 3 Ohio Cir. Dec. 608, 6 Ohio Cir. Ct. 606.

**Car of Another Company.** — If a person on the street is injured through a defect in a street car, the company using it cannot avoid liability by showing that it belonged to another company. *Jetter v. New York, etc., R. Co.*, 2 Abb. App. Dec. (N. Y.) 458.

**Land for Track.** — *Jones v. Greensburg, etc., R. Co.*, 43 W. N. C. (Pa.) 298.

7. *Warren v. Manchester St. R. Co.*, 70 N. H. 352; *Weitzman v. Nassau Electric R. Co.*, 33 N. Y. App. Div. 585.

**Ordinances Prescribing Use of Fenders.** — See *supra*, this title, *Regulation and Control — Precautions in Operation of Cars — Fenders on Cars*.

8. **Duty to Adopt New Inventions.** — *Atlantic Ave. R. Co. v. Van Dyke*, (C. C. A.) 72 Fed. Rep. 458; *Unger v. Forty-second St., etc., R. Co.*, 51 N. Y. 497; *Richmond R., etc., Co. v. Garthright*, 92 Va. 627, 53 Am. St. Rep. 839. See also *Morrow v. Westchester Electric R. Co.*, (Supm. Ct. Tr. T.) 30 Misc. (N. Y.) 694; *Buente v. Pittsburg, etc., Traction Co.*, 2 Pa. Super. Ct. 185.

**Prompt Action After an Ordinance Requiring the Adoption of Fenders on Street Cars** is all that is required, and the diligence of the company in complying with such requirement is for the jury. *Platt v. Albany R. Co.*, 170 N. Y. 115, reversing 55 N. Y. App. Div. 636.

9. *Lorimer v. St. Paul City R. Co.*, 48 Minn. 391.

10. *Snider v. New Orleans, etc., R. Co.*, 48 La. Ann. 1. See also *Webster v. New Orleans City, etc., R. Co.*, 51 La. Ann. 299. And see generally the title *NEGLIGENCE*, vol. 21, p. 483 *et seq.*

11. **Speed of Cars — United States.** — *Tacoma R., etc., Co. v. Hays*, (C. C. A.) 110 Fed. Rep. 496.

*Alabama.* — *Birmingham R., etc., Co. v. City Stable Co.*, 119 Ala. 615.

*California.* — *Schierhold v. North Beach, etc., R. Co.*, 40 Cal. 447.

*Connecticut.* — *Lawler v. Hartford St. R. Co.*, 72 Conn. 74.

*Delaware.* — *Adams v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 512; *Farley v.*

What Constitutes an Improper Rate of Speed depends upon the circumstances.<sup>1</sup> The company has the right to run the car at any rate of speed not dangerous to the public,<sup>2</sup> and is not required to regulate the speed at such a rate as may be necessary to avoid injury to persons crossing the tracks in an unreasonable and improper manner,<sup>3</sup> the test of negligence in the rate of speed being the speed at which an ordinarily prudent man would have run the car under the particular circumstances.<sup>4</sup>

Where the Statutes or Valid Municipal Ordinances Impose Speed Restrictions, their violation has been considered to constitute negligence *per se*,<sup>5</sup> while in other cases it has been held that exceeding such speed, while evidence of negligence, was not conclusive.<sup>6</sup> If the grant of the street-railway franchise expressly restricts

Wilmington, etc., Electric R. Co., 3 Penn. (Del.) 581.

Georgia.—Metropolitan St. R. Co. v. Johnson, 90 Ga. 500.

Illinois.—Chicago City R. Co. v. Robinson, 127 Ill. 9, 11 Am. St. Rep. 87; Central R. Co. v. Allmon, 147 Ill. 471; West Chicago St. R. Co. v. Musa, 180 Ill. 130; Chicago City R. Co. v. Tuohy, 196 Ill. 410; Chicago City R. Co. v. Roach, 76 Ill. App. 496; East St. Louis Electric St. R. Co. v. Burns, 77 Ill. App. 529; Chicago City R. Co. v. Wall, 93 Ill. App. 411; Chicago City R. Co. v. Robinson, 127 Ill. 9, 11 Am. St. Rep. 87, affirming 27 Ill. App. 26.

Iowa.—Patterson v. Townsend, 91 Iowa 725.

Kentucky.—Louisville R. Co. v. Will, (Ky. 1902) 66 S. W. Rep. 628.

Maryland.—Baltimore Consol. R. Co. v. Rifcowitz, 89 Md. 338.

Massachusetts.—Carlson v. Lynn, etc., R. Co., 172 Mass. 388.

Michigan.—Rascher v. East Detroit, etc., R. Co., 90 Mich. 413, 30 Am. St. Rep. 447.

Minnesota.—Walker v. St. Paul City R. Co., 81 Minn. 404; Boyer v. St. Paul City R. Co., 54 Minn. 127; Watson v. Minneapolis St. R. Co., 53 Minn. 551.

Missouri.—Pope v. Kansas City Cable R. Co., 99 Mo. 400; Winters v. Kansas City Cable R. Co., 99 Mo. 509, 17 Am. St. Rep. 591; Humbird v. Union St. R. Co., 110 Mo. 76. See also Hogan v. Citizens' R. Co., 150 Mo. 36.

New Jersey.—Newark Pass. R. Co. v. Block, 55 N. J. L. 605; Consolidated Traction Co. v. Glynn, 59 N. J. L. 432.

New York.—Johnson v. Hudson River R. Co., 20 N. Y. 65, 75 Am. Dec. 375; Cosgrove v. Metropolitan St. R. Co., 74 N. Y. App. Div. 166; Fullerton v. Metropolitan St. R. Co., 37 N. Y. App. Div. 386; Brown v. Twenty-third St. R. Co., 121 N. Y. 667; Harvey v. Nassau Electric R. Co., 35 N. Y. App. Div. 307; Schoener v. Metropolitan St. R. Co., 72 N. Y. App. Div. 23; Lang v. Houston, etc., R. Co., 75 Hun (N. Y.) 151; Hennessy v. Brooklyn City R. Co., 73 Hun (N. Y.) 569; Silberstein v. Houston, etc., R. Co., 117 N. Y. 293.

Pennsylvania.—Harper v. Philadelphia Traction Co., 175 Pa. St. 129; Breary v. Philadelphia Traction Co., 5 Pa. Dist. 95; Ferrier v. Wilkes Barre, etc., Traction Co., 202 Pa. St. 365; Henderson v. United Traction Co., 202 Pa. St. 527; Greeley v. Federal St., etc., Pass. R. Co., 153 Pa. St. 218; Walbridge v. Schuylkill Electric R. Co., 190 Pa. St. 274.

Tennessee.—Wilson v. Citizens' St. R. Co., 105 Tenn. 74.

Texas.—Dallas Consol. Traction R. Co. v. Hurley, 10 Tex. Civ. App. 246.

Utah.—Hall v. Ogden City St. R. Co., 13 Utah 243, 57 Am. St. Rep. 726.

Virginia.—Richmond R., etc., Co. v. Garthright, 92 Va. 627, 53 Am. St. Rep. 839; Bass v. Norfolk R., etc., Co., 100 Va. 1.

Wisconsin.—Little v. Superior Rapid Transit R. Co., 88 Wis. 402.

Canada.—Toronto R. Co. v. Gosnell, 24 Can. Sup. Ct. 582.

1. What Is Improper Speed—Delaware.—Maxwell v. Wilmington City R. Co., 1 Marv. (Del.) 199.

Illinois.—Rack v. Chicago City R. Co., 69 Ill. App. 556 (twelve miles an hour in city); Chicago City R. Co. v. Roach, 76 Ill. App. 496 (six miles an hour in crowded street).

New Jersey.—Consolidated Traction Co. v. Glynn, 59 N. J. L. 432.

Ohio.—Cincinnati St. R. Co. v. Lewis, 23 Ohio Cir. Ct. 127.

Pennsylvania.—Gilmore v. Federal St., etc., Pass. R. Co., 153 Pa. St. 31, 34 Am. St. Rep. 682; Dunseath v. Pittsburg, etc., Traction Co., 161 Pa. St. 124; Thatcher v. Central Traction Co., 166 Pa. St. 66, 45 Am. St. Rep. 645; Kline v. Electric Traction Co., 181 Pa. St. 276; Gaughan v. Second Ave. Traction Co., 189 Pa. St. 408.

Wisconsin.—Stafford v. Chippewa Valley Electric R. Co., 110 Wis. 331.

In the absence of a special ordinance, the reasonable speed for a street car operated by horse power has been held to be the average rate for carriages used to convey passengers by horse power. Com. v. Temple, 14 Gray (Mass.) 69; Adolph v. Central Park, etc., R. Co., 76 N. Y. 530.

2. Citizens' St. R. Co. v. Steen, 42 Ark. 321.

3. Meyer v. Lindell R. Co., 6 Mo. App. 27.

4. Stafford v. Chippewa Valley Electric R. Co., 110 Wis. 331.

5. Violation of Speed Ordinance as Negligence.—Highland Ave., etc., R. Co. v. Sampson, 112 Ala. 425; Clark v. Bennett, 123 Cal. 275; Baltimore City Pass. R. Co. v. McDonnell, 43 Md. 534; Liddy v. St. Louis R. Co., 40 Mo. 506; Omaha St. R. Co. v. Duvall, 40 Neb. 29; Becker v. Cincinnati St. R. Co., 2 Ohio Dec. 137. See also *supra*, this title, *Regulation and Control—Precautions in Operation of Cars—Rate of Speed*. See also the title NEGLIGENCE, vol. 21, p. 478.

6. Hanlon v. South Boston Horse R. Co., 129 Mass. 310; Davidson v. Schuylkill Traction Co., 4 Pa. Super. Ct. 86.

the maximum speed, the running of a car in excess of such speed is evidence of negligence.<sup>1</sup>

**Proximate Cause.** — It has frequently been held that the mere fact that the car was operated at a prohibited or excessive rate of speed will not render the company liable if it is not also shown that this was the cause of the injury and that such injury could have been avoided if the speed had been within the permitted rate.<sup>2</sup>

**Control of Car.** — While a car is in motion, the driver, motorman, or gripman must remain in place so as to control it if necessary,<sup>3</sup> and where the danger of a collision becomes apparent, he must use a reasonable diligence to slacken the speed or stop the car if necessary to avoid the collision.<sup>4</sup>

**Proof of Speed.** — The general rules of evidence apply with regard to the proof of the rate of speed at which a car was operated.<sup>5</sup> Witnesses may express their opinion as to the rate of speed;<sup>6</sup> and the fact that the car ran an unusual distance after a collision, or before it could be stopped, is evidence to show that the speed was excessive.<sup>7</sup>

(6) **Lookout.** — Drivers, gripmen, and motormen are required to keep a reasonably careful lookout ahead to discover pedestrians and vehicles on or approaching the tracks, so as to be able to take the proper precautions to avoid injuries;<sup>8</sup> and the fact that such servants were prevented from keeping

1. Cogswell v. West St., etc., Electric R. Co., 5 Wash. 46.

2. Molyneux v. Southwest Missouri Electric R. Co., 81 Mo. App. 25; Hoffman v. Syracuse Rapid Transit R. Co., 50 N. Y. App. Div. 83; Holdridge v. Mendenhall, 108 Wis. 1. See also McCann v. Sixth Ave. R. Co., 117 N. Y. 505, 15 Am. St. Rep. 539. And see generally the title NEGLIGENCE, vol. 21, p. 483 et seq.

3. Control of Car. — City Electric R. Co. v. Jones, 61 Ill. App. 183 (motorman leaving post to collect fares); Brooks v. Lincoln St. R. Co., 22 Neb. 816.

Driver Inside of Car — Negligence. — Brooks v. Lincoln St. R. Co., 22 Neb. 816.

4. Pope v. Kansas City Cable R. Co., 99 Mo. 400; Watson v. Broadway, etc., St. R. Co., 43 Hun (N. Y.) 636, 6 N. Y. St. Rep. 538; McClain v. Brooklyn City R. Co., 116 N. Y. 459; Fenton v. Second Ave. R. Co., 56 Hun (N. Y.) 100; Mentz v. Second Ave. R. Co., 2 Robt. (N. Y.) 356, affirmed 3 Abb. App. Dec. (N. Y.) 274.

5. Admissibility. — Cook v. Los Angeles, etc., Electric R. Co., 134 Cal. 279; City R. Co. v. Wiggins, (Tex. Civ. App. 1899) 52 S. W. Rep. 577.

Condition of Wagon After Collision. — Strauss v. Newburgh Electric R. Co., 6 N. Y. App. Div. 264.

Speed of Other Cars. — Hewlett v. Brooklyn Heights R. Co., 63 N. Y. App. Div. 423; Christensen v. Union Trunk Line R. Co., 6 Wash. 75.

Sufficiency of Evidence. — Schneider v. Market St. R. Co., 134 Cal. 482; Baltimore City Pass. R. Co. v. McDonnell, 43 Md. 534.

6. Opinion Evidence. — See the title EXPERT AND OPINION EVIDENCE, vol. 12, p. 472 et seq.

Testimony of a witness that a car was traveling at "a terrible speed" is inadmissible. Chicago City R. Co. v. Wall, 93 Ill. App. 411.

7. West Chicago St. R. Co. v. Musa, 180 Ill. 130; Chicago City R. Co. v. Tuohy, 196 Ill. 410,

affirming 95 Ill. App. 314; McDonald v. Brooklyn Heights R. Co., 51 N. Y. App. Div. 186.

8. Lookout Ahead — United States. — Robinson v. Louisville R. Co., (C. C. A.) 112 Fed. Rep. 484.

California. — Swain v. Fourteenth St. R. Co., 93 Cal. 179.

Georgia. — Duncan v. Rome St. R. Co., 99 Ga. 98.

Illinois. — West Chicago St. R. Co. v. Williams, 87 Ill. App. 548.

Kentucky. — South Covington, etc., St. R. Co. v. Herrklotz, 104 Ky. 400; Montgomery v. Johnson, (Ky. 1900) 58 S. W. Rep. 476.

Louisiana. — Barnes v. Shreveport City R. Co., 47 La. Ann. 1218.

Maryland. — Baltimore City Pass. R. Co. v. McDonnell, 43 Md. 553; Baltimore Traction Co. v. Wallace, 77 Md. 435.

Massachusetts. — Com. v. Metropolitan R. Co., 107 Mass. 236 (driver's attention distracted by fire); Collins v. South Boston R. Co., 142 Mass. 301, 56 Am. Rep. 675; Carlson v. Lynn, etc., R. Co., 172 Mass. 388.

Minnesota. — Strutzel v. St. Paul City R. Co., 47 Minn. 543; Watson v. Minneapolis St. R. Co., 53 Minn. 551; Anderson v. Minneapolis St. R. Co., 42 Minn. 490.

Missouri. — Winters v. Kansas City Cable R. Co., 99 Mo. 509, 17 Am. St. Rep. 591; Pope v. Kansas City Cable R. Co., 99 Mo. 400; Senn v. Southern R. Co., 108 Mo. 142; Schmidt v. St. Louis R. Co., 163 Mo. 645; Cooney v. Southern Electric R. Co., 80 Mo. App. 226; Humbird v. Union St. R. Co., 110 Mo. 76; Levin v. Metropolitan St. R. Co., 140 Mo. 624.

Nebraska. — Omaha St. R. Co. v. Duvall, 40 Neb. 29.

New Jersey. — North Hudson County R. Co. v. Isley, 49 N. J. L. 468.

New York. — Block v. Harlem Bridge, etc., R. Co., (Supm. Ct. Gen. T.) 9 N. Y. Supp. 164; Wells v. Brooklyn City R. Co., 58 Hun (N. Y.) 389; Colabel v. Metropolitan St. R. Co., 74 N. Y. App. Div. 505; Sciurba v. Met-

this lookout by reason of other duties in the operation of the car, imposed upon them by the company and demanding their attention,<sup>1</sup> such as the collection of fares,<sup>2</sup> does not relieve the company from liability for injuries which might have been avoided had a proper lookout been kept. It has been held that the duty with regard to keeping a lookout is limited to a lookout ahead, and negligence cannot be attributed to a failure to observe vehicles or pedestrians approaching the track from the side or rear;<sup>3</sup> and the failure to keep a lookout ahead at a place where the track is laid over the private right of way of the street-railway company, and where persons are not to be expected to be on the track, is not negligence.<sup>4</sup> Where a proper lookout was in fact kept at the time of the accident, the fact that the railway company required its servants to perform other duties which might have prevented them from keeping a proper lookout is not evidence of negligence.<sup>5</sup>

(7) *Signals and Warnings* — (a) *Lights*. — It has frequently been held as a general rule that lights must be carried at night so as to enable persons on the street to see approaching cars,<sup>6</sup> but it does not seem to be the duty of street-railway companies to furnish such lights on their cars as will enable those operating the cars to see objects ahead on the track in time to avoid accidents.<sup>7</sup>

(b) *Sounding Gong or Bell* — Where pedestrians or vehicles are seen by those

ropolitan St. R. Co., 73 N. Y. App. Div. 170; *Bello v. Metropolitan St. R. Co.*, 2 N. Y. App. Div. 313; *Coghlan v. Third Ave. R. Co.*, 7 N. Y. App. Div. 124; *Geary v. Metropolitan St. R. Co.*, 73 N. Y. App. Div. 441; *Fullerton v. Metropolitan St. R. Co.*, 63 N. Y. App. Div. 1; *Geipel v. Steinway R. Co.*, 14 N. Y. App. Div. 551; *Mitchell v. Third Ave. R. Co.*, 62 N. Y. App. Div. 371; *Killen v. Brooklyn Heights R. Co.*, 48 N. Y. App. Div. 557; *Goldstein v. Dry Dock, etc., R. Co.*, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 200; *DeLoia v. Metropolitan St. R. Co.*, 165 N. Y. 664; *Wells v. Brooklyn City R. Co.*, 58 Hun (N. Y.) 389; *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455, 98 Am. Dec. 66; *Finkelstein v. Brooklyn Heights R. Co.*, 51 N. Y. App. Div. 287. *Compare* *Stone v. Dry Dock, etc., R. Co.*, 46 Hun (N. Y.) 184; *Wright v. Third Ave. R. Co.*, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 707; *Scott v. Third Ave. R. Co.*, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 350.

*Pennsylvania*. — *Karahuta v. Schuylkill Traction Co.*, 6 Pa. Super. Ct. 319; *Smith v. Philadelphia Traction Co.*, 40 W. N. C. (Pa.) 501; *Henne v. People's St. R. Co.*, 38 W. N. C. (Pa.) 275; *Thomas v. Citizens' Pass. R. Co.*, 132 Pa. St. 504; *Ehrisman v. East Harrisburg City Pass. R. Co.*, 150 Pa. St. 180; *Harkins v. Pittsburg, etc., Traction Co. Corp.*, 173 Pa. St. 149.

*Texas*. — *Hays v. Gainesville St. R. Co.*, 70 Tex. 602, 8 Am. St. Rep. 624; *San Antonio St. R. Co. v. Cailloutte*, 79 Tex. 341; *Dallas Rapid Transit R. Co. v. Elliott*, 7 Tex. Civ. App. 216; *Dallas Consol. Traction R. Co. v. Hurley*, 10 Tex. Civ. App. 246; *Thoresen v. LaCrosse City R. Co.*, 87 Wis. 597, 41 Am. St. Rep. 64.

*Rounding Curve*. — It is not, as a matter of law, sufficient care on the part of a gripman, when approaching a curve in the street, to ring the bell, and, having seen that the way is clear in front, to go ahead without looking to the right or left. *Winters v. Kansas City Cable R. Co.*, 99 Mo. 509, 17 Am. St. Rep. 591.

1. *Montgomery v. Johnson*, (Ky. 1900) 58 S.

W. Rep. 476 (motorman turning seats in car); *Barnes v. Shreveport City R. Co.*, 47 La. Ann. 1218 (motorman making change for passenger); *Dahl v. Milwaukee City R. Co.*, 65 Wis. 371.

2. *Anderson v. Minneapolis St. R. Co.*, 42 Minn. 490; *Saare v. Union R. Co.*, 20 Mo. App. 211, wherein the driver's leaving his team and going inside the car to collect fares was characterized as the "grossest sort of negligence and carelessness;" *Hyland v. Yonkers R. Co.*, 51 Hun (N. Y.) 643, 4 N. Y. Supp. 305.

3. *Lawrence v. Pendleton St. R. Co.*, 1 Cinc. Super. Ct. 180.

4. *Camden, etc., R. Co. v. Young*, 60 N. J. L. 193.

5. *Skeets v. Connolly St. R. Co.*, 54 N. J. L. 518. *Compare* *McCoy v. Milwaukee St. R. Co.*, 88 Wis. 56.

6. *Lights on Cars*. — *North Chicago St. R. Co. v. Nelson*, 79 Ill. App. 229; *Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1; *Rascher v. East Detroit, etc., R. Co.*, 90 Mich. 413, 30 Am. St. Rep. 447; *Johnson v. Hudson River R. Co.*, 20 N. Y. 65, 75 Am. Dec. 375, *affirming* 6 Duer (N. Y.) 633; *Welsh v. United Traction Co.*, 202 Pa. St. 530; *Tompkins v. Scranton Traction Co.*, 3 Pa. Super. Ct. 577; *Dallas Consol. Traction R. Co. v. Hurley*, 10 Tex. Civ. App. 246. See also *Shea v. Potrero, etc., R. Co.*, 44 Cal. 414; *Carlson v. Lynn, etc., R. Co.*, 172 Mass. 388; *Memphis City R. Co. v. Logue*, 13 Lea (Tenn.) 32.

7. *Memphis City R. Co. v. Logue*, 13 Lea (Tenn.) 32. *Compare* *Calumet Electric St. R. Co. v. Lynholm*, 70 Ill. App. 371.

*Headlight in Addition to Signal Lights*. — Where a city ordinance required that cars should be provided after sunset with colored signal lights in front and rear, it was held not to be negligence *per se* to fail to have a headlight in addition to such colored signal lights. *McGee v. Consolidated St. R. Co.*, 102 Mich. 107, 47 Am. St. Rep. 507.

*Duty Prescribed by Ordinance*. — See *supra*, this title, *Regulation and Control* — *Precautions in Operation of Cars* — *In General*.



operating a street car upon or approaching the tracks, warning of the approach of the car should be given by sounding the gong or bell, or otherwise, and the failure to give such warning may constitute such negligence as to render the street-railway company liable for injuries resulting therefrom.<sup>1</sup> So if a street car is rapidly approaching a point, as for example a street crossing,<sup>2</sup> where it is apparent that the danger of injury to the public will be materially lessened by giving warning of the car's approach, it is the duty of those operating the car to give such warning.<sup>3</sup> And it has been held that where the operator of a car cannot see the track far enough ahead to give due warning of the car's approach to persons on the tracks, he should continually sound the gong in anticipation of their being on the tracks.<sup>4</sup>

**Municipal Ordinances** frequently require that on approaching any street crossing the bell or gong shall be sounded at a certain distance from the crossing.<sup>5</sup>

**Proximate Cause.**—Negligence cannot be predicated on a failure to sound the gong or bell, so as to render the street railway liable, where the person injured by the car had, in fact, knowledge of its approach.<sup>6</sup>

(8) **Violation of Ordinances.**—It has been held that a municipality cannot, in the exercise of its police power, impose on street-railway companies duties in the operation of their cars the violation of which will create a civil liability to persons injured from a neglect thereof,<sup>7</sup> and that the violation of ordinances

1. **Sounding Gong or Bell**—*Illinois*.—East St. Louis Electric St. R. Co. v. Burns, 77 Ill. App. 529; East St. Louis Electric R. Co. v. Snow, 88 Ill. App. 660; Chicago Gen. R. Co. v. Kriz, 94 Ill. App. 277.

*Indiana*.—Citizens' St. R. Co. v. Abright, 14 Ind. App. 433.

*Iowa*.—Eddy v. Cedar Rapids, etc., R. Co., 98 Iowa 626.

*Maryland*.—Central R. Co. v. Coleman, 80 Md. 328.

*Missouri*.—Schmidt v. St. Louis R. Co., 163 Mo. 645.

*New Jersey*.—Consolidated Traction Co. v. Chenoweth, (N. J. 1896) 35 Atl. Rep. 1067.

*New York*.—Sesselmann v. Metropolitan St. R. Co., 65 N. Y. App. Div. 484; O'Connor v. Union R. Co., 67 N. Y. App. Div. 99; Pelle-treau v. Metropolitan St. R. Co., 74 N. Y. App. Div. 192; Kleiner v. Third Ave. R. Co., 162 N. Y. 193; Hernandez v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 36 Misc. (N. Y.) 793.

*Pennsylvania*.—Raulston v. Philadelphia Traction Co., 13 Pa. Super. Ct. 412; Shaughnessy v. Consolidated Traction Co., 17 Pa. Super. Ct. 588; Breary v. Philadelphia Traction Co., 5 Pa. Dist. 95; Owens v. People's Pass. R. Co., 155 Pa. St. 334; Welsh v. United Traction Co., 202 Pa. St. 530.

*Texas*.—Citizens' R. Co. v. Holmes, 19 Tex. Civ. App. 266.

*Washington*.—Burian v. Seattle Electric Co., 26 Wash. 606.

**Backing Car Without Giving Signals.**—Ford v. Metropolitan R. Co., 4 Ont. L. Rep. 29.

**Weight of Positive and Negative Evidence of Sounding Bell.**—Sanders v. Southern Electric R. Co., 147 Mo. 411; Hogan v. Citizens' R. Co., 150 Mo. 36; Hernandez v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 36 Misc. (N. Y.) 793, reversing (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 853; Ryan v. La Crosse City R. Co., 108 Wis. 122.

2. *Adams v. Wilmington, etc., Electric R. Co., 3 Penn. (Del.) 512; Farley v. Wilmington, etc.,*

*Electric R. Co., 3 Penn. (Del.) 581; West Chicago St. R. Co. v. Nilson, 70 Ill. App. 171; Canfield v. North Chicago St. R. Co., 98 Ill. App. 1; Potter v. O'Donnell, 101 Ill. App. 546; Owensboro City R. Co. v. Hill, (Ky. 1900) 56 S. W. Rep. 21; Dennis v. North Jersey St. R. Co., 64 N. J. L. 439; Hennessy v. Brooklyn City R. Co., 73 Hun (N. Y.) 569; Schwarzb-  
baum v. Third Ave. R. Co., 54 N. Y. App. Div. 164; Cosgrove v. Metropolitan St. R. Co., 74 N. Y. App. Div. 166; Tupper v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 36 Misc. (N. Y.) 819; Bass v. Norfolk R., etc., Co., 100 Va. 1. See, however, Stafford v. Chippewa Valley Electric R. Co., 110 Wis. 331.*

3. *Murphy v. Derby St. R. Co., 73 Conn. 249* (car approaching ice wagon standing by track). See also *Wahlgren v. Market St. R. Co., 132 Cal. 656* (car passing from car barn across sidewalk). Compare *Perry v. Macon Consol. St. R. Co., 101 Ga. 400* (car approaching lumber piled by track).

4. *J. F. Conrad Grocer Co. v. St. Louis, etc., R. Co., 89 Mo. App. 391.*

5. *Driscoll v. Market St. Cable R. Co., 97 Cal. 553, 33 Am. St. Rep. 203; San Antonio St. R. Co. v. Mechler, (Tex. Civ. App. 1894) 29 S. W. Rep. 202.* And see *supra*, this title, *Regulation and Control—Precautions in Operation of Cars—In General.*

6. *Jager v. Coney Island, etc., R. Co., 84 Hun (N. Y.) 307; Williamson v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 29 Misc. (N. Y.) 324; Anderson v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 30 Misc. (N. Y.) 104.* See also *Johnson v. Third Ave. R. Co., 69 N. Y. App. Div. 247.*

7. **Violation of Ordinances.**—*Rockford City R. Co. v. Blake, 173 Ill. 354, 64 Am. St. Rep. 122* (requiring stopping of car); *Holwerson v. St. Louis, etc., R. Co., 157 Mo. 216; Sanders v. Southern Electric R. Co., 147 Mo. 411.* See also *Sheehan v. Citizens' R. Co., 72 Mo. App. 524; Day v. Citizens R. Co., 81 Mo. App. 471. Compare Kelly v. Union R., etc., Co., 95 Mo. 279.*

regulating the operation of street railways should be considered as evidence of negligence,<sup>1</sup> but in other jurisdictions it has been held to constitute negligence *per se*.<sup>2</sup>

(9) *Contributory Negligence* — (a) *In General*. — Contributory negligence on the part of the person injured through the operation of a street railway will, of course, as in other cases, preclude a recovery;<sup>3</sup> and it will have this effect even though there was a violation by the company of an ordinance regulating the operation of the cars.<sup>4</sup> Since street cars are more easily controlled than the trains of an ordinary railroad, and do not travel at the high rate of speed of those trains, the danger from injuries in the operation of street cars is materially less than in the case of railroad trains, and persons are not required to exercise the same degree of watchfulness and attention to keep themselves out of the way of the former as out of the way of the latter.<sup>5</sup> Still, the courts have, in view of the apparent danger to persons using streets upon which street cars are operated, established certain requirements which they are bound to observe to avoid injury.<sup>6</sup> The doctrine of imputable contributory negligence, whereby it is sought to impute to children the contributory negligence of their parents or custodians, or to passengers the contributory negligence of their carrier, has received thorough treatment in another title.<sup>7</sup> Where a pedestrian is injured by a collision between a street car and a vehicle,

1. *Atlanta Consol. St. R. Co. v. Foster*, 108 Ga. 223 (speed of cars); *Hanlon v. South Boston Horse R. Co.*, 129 Mass. 310 (speed of car); *Mahan v. Union Depot, etc., Co.*, 34 Minn. 29 (speed of car); *San Antonio St. R. Co. v. Mechler*, (Tex. Civ. App. 1894) 29 S. W. Rep. 202; *Riley v. Salt Lake Rapid Transit Co.*, 10 Utah 428; *Norfolk R., etc., Co. v. Corletto*, 100 Va. 355; *Mueller v. Milwaukee St. R. Co.*, 86 Wis. 340. See generally the title NEGLIGENCE, vol. 21, p. 478 *et seq.*

*Effect of Contributory Negligence Where Ordinance Violated*. — See *infra*, this subsection, *Contributory Negligence — In General*.

In *Massachusetts* such violation is held to be merely *prima facie* and not conclusive evidence of negligence. *Hanlon v. South Boston Horse R. Co.*, 129 Mass. 310.

2. *San Antonio St. R. Co. v. Watzlavzick*, (Tex. Civ. App. 1904) 28 S. W. Rep. 115; *City R. Co. v. Wiggins*, (Tex. Civ. App. 1899) 52 S. W. Rep. 577; *Riley v. Salt Lake Rapid Transit Co.*, 10 Utah 428.

3. *Contributory Negligence — Illinois*. — *Thorsell v. Chicago City R. Co.*, 82 Ill. App. 375.

*Louisiana*. — *Mercier v. New Orleans, etc., R. Co.*, 23 La. Ann. 264; *Schwartz v. Crescent City R. Co.*, 30 La. Ann. 15.

*Minnesota*. — *Fonda v. St. Paul City R. Co.*, 71 Minn. 438.

*Missouri*. — *Meyer v. Lindell R. Co.*, 6 Mo. App. 27.

*New York*. — *Harnett v. Bleecker St., etc., R. Co.*, 49 N. Y. Super. Ct. 185.

*Pennsylvania*. — *Carson v. Federal St., etc., R. Co.*, 147 Pa. St. 219, 30 Am. St. Rep. 727; *Winter v. Federal St., etc., R. Co.*, 153 Pa. St. 26; *Rose v. West Philadelphia R. Co.*, (Pa. 1888) 12 Atl. Rep. 78.

See generally the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368.

*Burden to Show Contributory Negligence*. — *Washington, etc., R. Co. v. Gladmon*, 15 Wall. (U. S.) 401.

4. *Murphy v. Lindell R. Co.*, 153 Mo. 252.

5. *Care Required to Keep Out of Cars' Way — United States*. — *Tacoma R., etc., Co. v. Hays*, (C. C. A.) 110 Fed. Rep. 496.

*District of Columbia*. — *Capital Traction Co. v. Luby*, 12 App. Cas. (D. C.) 295.

*Indiana*. — *Muncie St. R. Co. v. Maynard*, 5 Ind. App. 372; *Citizens' St. R. Co. v. Abright*, 14 Ind. App. 433; *Marchal v. Indianapolis St. R. Co.*, 28 Ind. App. 133. See, however, *Young v. Citizens' St. R. Co.*, 148 Ind. 54.

*Maine*. — *Warren v. Bangor, etc., R. Co.*, 95 Me. 115.

*Maryland*. — *North Baltimore Pass. R. Co. v. Arnreich*, 78 Md. 589.

*Massachusetts*. — *Lynam v. Union R. Co.*, 114 Mass. 83; *Robbins v. Springfield St. R. Co.*, 165 Mass. 30.

*Minnesota*. — *Shea v. St. Paul City R. Co.*, 50 Minn. 395; *Holmgren v. Twin City Rapid Transit Co.*, 61 Minn. 85.

*New Jersey*. — *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605.

*New York*. — *Brown v. Twenty-Third St. R. Co.*, 56 N. Y. Super. Ct. 356, *affirmed* 121 N. Y. 667; *Read v. Brooklyn Heights R. Co.*, 32 N. Y. App. Div. 503.

*Pennsylvania*. — *Trout v. Altoona, etc., Electric R. Co.*, 13 Pa. Super. Ct. 17.

*Utah*. — *Hall v. Ogden City St. R. Co.*, 13 Utah 243, 57 Am. St. Rep. 726.

See, however, *Hoelzel v. Crescent City R. Co.*, 49 La. Ann. 1302.

6. See *infra*, this section, *Collision with Vehicles and Horses; Injuries to Pedestrians; Injuries to Children; Injuries to Bicyclists*.

7. See the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 445 *et seq.*

*Imputing Negligence of Parent to Infant*. — See *infra*, this subsection, *Injuries to Children*.

*Imputing Negligence of Driver of Wagon to Passenger*. — *Birmingham R., etc., Co. v. Baker*, 126 Ala. 135; *Johnson v. St. Paul City R. Co.*, 67 Minn. 260; *Wosika v. St. Paul City R. Co.*, 80 Minn. 364; *Hoffman v. Syracuse Rapid Transit R. Co.*, 50 N. Y. App. Div. 83; *Ulrich*

the vehicle being pushed by the force of the collision against the pedestrian, negligence on the part of the driver of the vehicle does not affect the liability of the street-car company if it was also negligent.<sup>1</sup> The question whether a person has been guilty of contributory negligence is generally a question for the jury.<sup>2</sup>

(b) *Injuries Avoidable Notwithstanding Contributory Negligence.* — Although one injured by a collision with a street car may have been guilty of negligence, still, if the operator in charge of the car, after discovery of such person's negligence, could by the exercise of ordinary care have avoided the injuries, such person's negligence will not relieve the street-railway company from liability.<sup>3</sup>

(10) *Proof of Negligence — Burden of Proof.* — As in other cases of injuries from negligence,<sup>4</sup> the plaintiff in an action against a street-railway company for injuries received in a collision with a street car has the burden of proving negligence on the part of the defendant.<sup>5</sup>

v. Toledo Consol. St. R. Co., 5 Ohio Cir. Dec. 111.

*Imputing Negligence of Driver to Owner of Wagon.* — Carson v. Federal St., etc., R. Co., 147 Pa. St. 219, 30 Am. St. Rep. 727.

1. Knoll v. Third Ave. R. Co. (N. Y. 1901) 60 N. E. Rep. 1113, affirming 46 N. Y. App. Div. 527.

2. Wallen v. North Chicago St. R. Co., 82 Ill. App. 103; West Chicago St. R. Co. v. Levy, 82 Ill. App. 202; West Chicago St. R. Co. v. Liderman, 87 Ill. App. 638; McNulta v. Norgren, 90 Ill. App. 491; Howland v. Union St. R. Co., 150 Mass. 86; Little v. Grand Rapids St. R. Co., 78 Mich. 205; McClain v. Brooklyn City R. Co., 116 N. Y. 459; Cowan v. Third-Ave. R. Co., (Supm. Ct. Gen. T.) 9 N. Y. Supp. 610; Seletskey v. Third Ave. R. Co., 69 N. Y. App. Div. 27. And see the title CONTRIBUTORY NEGLIGENCE, vol. 7, pp. 456, 457.

3. *Injuries Avoidable Notwithstanding Contributory Negligence.* — Arkansas. — Citizens' St. R. Co. v. Steen, 42 Ark. 321; Little Rock Traction, etc., Co. v. Morrison, 69 Ark. 289; Johnson v. Stewart, 62 Ark. 164.

California. — Schneider v. Market St. R. Co., 134 Cal. 482; Lee v. Market St. R. Co., 135 Cal. 293.

Colorado. — Oliver v. Denver Tramway Co., 13 Colo. App. 543.

Indiana. — Citizens' St. R. Co. v. Hamer, 29 Ind. App. 426.

Iowa. — Orr v. Cedar Rapids, etc., R. Co., 94 Iowa 423.

Kentucky. — Flynn v. Louisville R. Co., (Ky. 1901) 62 S. W. Rep. 490; Floyd v. Paducah R., etc., Co., (Ky. 1901) 64 S. W. Rep. 653.

Maryland. — Baltimore Traction Co. v. Wallace, 77 Md. 435; Baltimore Traction Co. v. Appel, 80 Md. 603; Baltimore Consol. R. Co. v. Rifeowitz, 89 Md. 338.

Missouri. — Ennis v. Union Depot R. Co., 155 Mo. 20; Davies v. People's R. Co., 67 Mo. App. 598; Cooney v. Southern Electric R. Co., 80 Mo. App. 226; McAndrews v. St. Louis, etc., R. Co., 83 Mo. App. 233, 88 Mo. App. 97; Hutchinson v. St. Louis, etc., R. Co., 88 Mo. App. 376. Compare Hicks v. Citizens' R. Co., 124 Mo. 115.

New Hampshire. — Parkinson v. Concord St. R. Co., 71 N. H. 28.

New York. — McClain v. Brooklyn City R. Co., 116 N. Y. 459, affirming 42 Hun (N. Y.) 657; Green v. Metropolitan St. R. Co., 65 N. Y. App. Div. 54. Compare Scott v. Third Ave. R. Co., 59 Hun (N. Y.) 456. See, however, Goodman v. Metropolitan St. R. Co., 63 N. Y. App. Div. 84.

Ohio. — Griffin v. Toledo, etc., R. Co., 11 Ohio Cir. Dec. 749.

Texas. — Hays v. Gainesville St. R. Co., 70 Tex. 602, 8 Am. St. Rep. 624.

Washington. — Roberts v. Spokane St. R. Co., 23 Wash. 323.

See also the title CONTRIBUTORY NEGLIGENCE, vol. 7, pp. 385, 386. Compare Johnson v. Superior Rapid Transit R. Co., 91 Wis. 233. See, however, Watermolen v. Fox River Electric R., etc., Co., 110 Wis. 153.

*Injury Avoidable if Motorman Had Been Competent.* — Little Rock Traction, etc., Co. v. Morrison, 69 Ark. 289.

4. See the title NEGLIGENCE, vol. 21, p. 514.

5. *Burden of Proving Negligence.* — Delaware. — Farley v. Wilmington, etc., Electric R. Co., 3 Penn. (Del.) 581.

Indiana. — Indianapolis St. R. Co. v. Robinson, 157 Ind. 414.

Maryland. — Siacik v. Northern Cent. R. Co., 92 Md. 213.

Massachusetts. — Spargo v. West End St. R. Co., 175 Mass. 174.

Missouri. — J. F. Conrad Grocer Co. v. St. Louis, etc., R. Co., 89 Mo. App. 534.

New Jersey. — Graham v. Consolidated Traction Co., 64 N. J. L. 10.

New York. — Boetgen v. New York, etc., R. Co., (Supm. Ct. Tr. T.) 50 N. Y. Supp. 331; Lhove v. Third Ave. R. Co., (C. Pl. Gen. T.) 14 Misc. (N. Y.) 612; Van Wagner v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 26 Misc. (N. Y.) 796; White v. Albany R. Co., 35 N. Y. App. Div. 23; Mehrle v. Brooklyn, etc., R. Co., 59 N. Y. App. Div. 617; McCloskey v. Metropolitan St. R. Co., 67 N. Y. App. Div. 617; O'Keefe v. Third Ave. R. Co., (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 418.

Pennsylvania. — Thilow v. Philadelphia Traction Co., 4 Pa. Dist. 83.

Texas. — North Side St. R. Co. v. Want, 4 Tex. App. Civ. Cas., § 167.

**Admissibility of Evidence.** — The general rules of evidence as to admissibility are applicable to actions against street-railway companies for injuries from negligence.<sup>1</sup>

**Question for Jury.** — The general rule that the question of negligence is a question of fact for the determination of the jury<sup>2</sup> applies with regard to the existence of negligence on the part of street-railway companies in the operation of their cars;<sup>3</sup> but where there is no proof of negligence, or where the evidence is such that the court would be required to set aside a verdict finding negligence on the part of the company, the court is justified in taking the case from the jury.<sup>4</sup>

**b. COLLISION WITH VEHICLES AND HORSES** — (1) *In General.* — The rights of persons using vehicles and horses on the streets and of street-railway companies operating cars on the same streets are mutual and co-ordinate, and such companies are required to use ordinary care to avoid collision with the vehicles and horses.<sup>5</sup> On the other hand, if there has been no negligence on

**1. Admissibility of Evidence.** — *Chicago City R. Co. v. Taylor*, 170 Ill. 49; *Palmer v. Cedar Rapids, etc., R. Co.*, 113 Iowa 442; *Floyd v. Paducah R., etc., Co.*, (Ky. 1901) 64 S. W. Rep. 653; *Baltimore City Pass. R. Co. v. Cooney*, 87 Md. 261; *Stiasny v. Metropolitan St. R. Co.*, 58 N. Y. App. Div. 172; *Hays v. Gainesville St. R. Co.*, 70 Tex. 602, 8 Am. St. Rep. 624.

**Declarations of Motorman or Conductor Res Gestæ.** — *Floyd v. Paducah R., etc., Co.*, (Ky. 1901) 64 S. W. Rep. 653.

**Acts of Conductor After Accident.** — *Wilcox v. Wilmington City R. Co.*, 2 Penn. (Del.) 157.

**Conduct of Motorman Prior to Accident.** — *Culbertson v. Metropolitan St. R. Co.*, 140 Mo. 35; *Bennett v. Brooklyn Heights R. Co.*, 1 N. Y. App. Div. 205; *Pyne v. Broadway, etc., R. Co.*, (C. Pl. Gen. T.) 46 N. Y. St. Rep. 662, affirmed 138 N. Y. 627.

**Evidence of Usual Practice of Street-railway Company.** — *Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1.

**Evidence of Rules of Street-railway Company.** — *Fitzpatrick v. Bloomington City R. Co.*, 73 Ill. App. 516; *O'Keefe v. Eighth Ave. R. Co.*, 33 N. Y. App. Div. 324; *Cincinnati St. R. Co. v. Altemeier*, 60 Ohio St. 10.

**Evidence of Distance in Which Car Could Be Stopped.** — *Hogan v. Citizens' R. Co.*, 150 Mo. 30; *Cass v. Third Ave. R. Co.*, 20 N. Y. App. Div. 591; *Frohle v. Brooklyn Heights R. Co.*, 41 N. Y. App. Div. 344.

**Arrest of Driver of Car.** — *Seipp v. Dry Dock, etc., R. Co.*, 45 N. Y. App. Div. 489.

**Proof of Discharge of Motorman.** — *Christensen v. Union Trunk Line R. Co.*, 6 Wash. 75.

**Sufficiency of Identification of Accident to Admit Evidence Thereof.** — *Cunningham v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 123.

**Presumption from Failure to Produce Evidence.** — *Hope v. West Chicago St. R. Co.*, 82 Ill. App. 311.

**Pleading and Proof.** — *Quincy Horse R., etc., Co. v. Gnuse*, 38 Ill. App. 212; *Kankakee Electric R. Co. v. Lade*, 56 Ill. App. 454; *Citizens' St. R. Co. v. Abright*, 14 Ind. App. 433; *Oldfield v. New York, etc., R. Co.*, 14 N. Y. 310; *Coyle v. Third Ave. R. Co.*, (N. Y. City Ct. Gen. T.) 17 Misc. (N. Y.) 282, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 9; *Walsh v. Atlantic Ave. R. Co.*, 23 N. Y. App. Div. 19; *Brook-*

*lyn St. R. Co. v. Kelley*, 3 Ohio Cir. Dec. 393, 6 Ohio Cir. Ct. 155; *Cleveland, etc., R. Co. v. Nixon*, 12 Ohio Cir. Dec. 79; *McClellan v. Chippewa Valley Electric R. Co.*, 110 Wis. 326.

**2. Question for Jury.** — See the titles NEGLIGENCE, vol. 21, p. 498 *et seq.*; QUESTIONS OF LAW AND FACT, vol. 23, p. 543.

**3. Cook v. Los Angeles, etc., Electric R. Co.**, 134 Cal. 279; *North Chicago St. R. Co. v. Zeiger*, 18 Ill. 9, 74 Am. St. Rep. 157; *Marchal v. Indianapolis St. R. Co.*, 28 Ind. App. 133; *Siatick v. Northern Cent. R. Co.*, 92 Md. 213; *Kerrigan v. West End St. R. Co.*, 158 Mass. 305; *Omaha St. R. Co. v. Duvall*, 40 Neb. 29; *Simpson v. Brooklyn Heights R. Co.*, (Brooklyn City Ct. Gen. T.) 14 Misc. (N. Y.) 645; *Walker v. Atlantic Ave. R. Co.*, (Brooklyn City Ct. Gen. T.) 11 N. Y. Supp. 742; *Cambeis v. Third Ave. R. Co.*, (C. Pl. Gen. T.) 1 Misc. (N. Y.) 158; *Berke v. Twenty-third St. R. Co.*, 52 Hun (N. Y.) 611, 4 N. Y. Supp. 905; *Rauscher v. Philadelphia Traction Co.*, 176 Pa. St. 349.

**4. Cowden v. Shreveport Belt R. Co.**, 106 La. 236; *New York Small Stock Co. v. Third Ave. R. Co.*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 276; *Goldschmidt v. Metropolitan Crosstown R. Co.*, 1 N. Y. App. Div. 309; *Smith v. Holmesburg, etc., Electric R. Co.*, 187 Pa. St. 451; *Cawley v. La Crosse City R. Co.*, 106 Wis. 239.

**5. Collision with Vehicles or Horses.** — *Swain v. Fourteenth St. R. Co.*, 93 Cal. 179; *McKenna v. Metropolitan R. Co.*, 112 Mass. 55; *Warren v. Mendenhall*, 77 Minn. 145; *Omaha St. R. Co. v. Duvall*, 40 Neb. 29; *Moore v. Charlotte Electric St. R. Co.*, 128 N. Car. 455; *Davidson v. Schuylkill Traction Co.*, 4 Pa. Super. Ct. 86; *Nashville St. R. Co. v. O'Brien*, 104 Tenn. 28.

**Vehicles Crossing Tracks — Alabama.** — *Birmingham R., etc., Co. v. Baker*, 132 Ala. 507.

**Illinois.** — *West Chicago St. R. Co. v. McCallum*, 169 Ill. 240; *Chicago City R. Co. v. Anderson*, 193 Ill. 9, affirming 93 Ill. App. 419; *Rend v. Chicago West Div. R. Co.*, 8 Ill. App. 517; *Central R. Co. v. Allmon*, 45 Ill. App. 389.

**Iowa.** — *Hart v. Cedar Rapids, etc., R. Co.*, 109 Iowa 631.

**Massachusetts.** — *Driscoll v. West End St. R. Co.*, 159 Mass. 142.

the part of the street railway in the operation of its cars, it cannot be held liable for injuries caused by collision with vehicles.<sup>1</sup> As a general rule, the question whether due care was exercised by the street-railway company to avoid a collision is for the determination of the jury.<sup>2</sup> Where the danger of a collision between vehicles or horses and street cars is imminent, it is the duty of the person operating the car to use diligence to avoid the collision, and, if necessary, to stop the car;<sup>3</sup> but it has been held that where the person in charge of a street car sees a vehicle approaching the track, he has the right to presume that the driver will not attempt to cross so as to incur danger of

*Minnesota*.—Shea v. St. Paul City R. Co., 50 Minn. 395.

*Missouri*.—Lamb v. St. Louis Cable, etc., R. Co., 33 Mo. App. 489.

*New Hampshire*.—Gallagher v. Manchester St. R. Co., 70 N. H. 212.

*New Jersey*.—Sickler v. North Jersey St. R. Co., (N. J. 1900) 46 Atl. Rep. 779.

*New York*.—Fay v. Brooklyn Heights R. Co., 69 N. Y. App. Div. 563; Bruss v. Metropolitan St. R. Co., 66 N. Y. App. Div. 554; Smith v. Metropolitan St. R. Co., 66 N. Y. App. Div. 600; Bernhard v. Rochester R. Co., 68 Hun (N. Y.) 369; Gallagher v. Coney Island, etc., R. Co., (Brooklyn City Ct. Gen. T.) 4 N. Y. Supp. 870; Lawson v. Metropolitan St. R. Co., 40 N. Y. App. Div. 307; Tait v. Buffalo R. Co., 55 N. Y. App. Div. 507; Reilly v. Brooklyn Heights R. Co., 65 N. Y. App. Div. 453; Morris v. Metropolitan St. R. Co., 63 N. Y. App. Div. 78, affirmed 170 N. Y. 592; Johnson v. Rochester R. Co., 61 N. Y. App. Div. 12; Brennan v. Metropolitan St. R. Co., 60 N. Y. App. Div. 264; Stines v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 34 Misc. (N. Y.) 789; Piercy v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 30 Misc. (N. Y.) 612; Knoll v. Third Ave. R. Co., 46 N. Y. App. Div. 527.

*Ohio*.—Toledo Electric St. R. Co. v. Westenhuber, 12 Ohio Cir. Dec. 22, 22 Ohio Cir. Ct. 67.

*Pennsylvania*.—Harmon v. Pennsylvania Traction Co., 200 Pa. St. 311.

*Texas*.—City R. Co. v. Thompson, 20 Tex. Civ. App. 16.

**Sudden Stoppage of Car in Middle of Street Intersection.**—Harrison v. Sutter St. R. Co., 116 Cal. 156.

**Starting Car While Vehicle Is Crossing Track.**—Piper v. Pueblo City R. Co., 4 Colo. App. 424; Riegelman v. Third Ave. R. Co., (C. Pl. Gen. T.) 9 Misc. (N. Y.) 51.

1. Jones v. Third Ave. R. Co., (Supm. Ct. App. T.) 34 Misc. (N. Y.) 201; Berke v. Twenty-Third St. R. Co., (Supm. Ct. Gen. T.) 4 N. Y. Supp. 905; Coughtry v. Willamette St. R. Co., 21 Oregon 245; Philadelphia Traction Co. v. Bernheimer, 125 Pa. St. 615; North Side St. R. Co. v. Want, 4 Tex. App. Civ. Cas., § 167.

**Vehicles Crossing Tracks**—*Illinois*.—Jacksonville R. Co. v. Lamb, 86 Ill. App. 487.

*Indiana*.—Kessler v. Citizens' St. R. Co., 20 Ind. App. 427.

*Kentucky*.—Kelly v. Louisville R. Co., (Ky. 1898) 46 S. W. Rep. 688; Louisville R. Co. v. Stammers, (Ky. 1898) 47 S. W. Rep. 341.

*Missouri*.—Hanselman v. St. Louis, etc., R. Co., 88 Mo. App. 123.

*New York*.—Devine v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 29 Misc. (N. Y.) 301, reversing (N. Y. City Ct. Gen. T.) 58 N. Y.

Supp. 1139; McFarland v. Third Ave. R. Co., (Supm. Ct. App. T.) 29 Misc. (N. Y.) 121.

*Pennsylvania*.—Conyngham v. Erie Electric Motor Co., 15 Pa. Super. Ct. 573; Phillips v. People's Pass. R. Co., 190 Pa. St. 222; Lee v. Schuylkill Valley Traction Co., 13 Montg. Co. Rep. (Pa.) 91; McManigal v. South Side Pass. R. Co., 181 Pa. St. 358; Kane v. People's Pass. R. Co., 181 Pa. St. 53; Thomas v. Citizens' Pass. R. Co., 132 Pa. St. 504.

*Wisconsin*.—Cawley v. La Crosse City R. Co., 101 Wis. 145; Eastwood v. La Crosse City R. Co., 94 Wis. 163.

**2. Question for Jury**—*Illinois*.—Chicago City R. Co. v. Brady, 35 Ill. App. 460.

*Massachusetts*.—Driscoll v. West End St. R. Co., 159 Mass. 142; Kerrigan v. West End St. R. Co., 158 Mass. 305.

*New York*.—Schron v. Staten Island Electric R. Co., 16 N. Y. App. Div. 111; Hurley v. New York, etc., Brewing Co., 13 N. Y. App. Div. 167; Degnan v. Brooklyn City R. Co., (Brooklyn City Ct. Gen. T.) 14 Misc. (N. Y.) 388; Zimmerman v. Union R. Co., 3 N. Y. App. Div. 219; Ludecke v. Metropolitan St. R. Co., (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 635; Witzel v. Third Ave. R. Co., (N. Y. City Ct. Gen. T.) 3 Misc. (N. Y.) 561; Gallagher v. Coney Island, etc., R. Co., (Brooklyn City Ct. Gen. T.) 24 N. Y. St. Rep. 746; Knoll v. Third Ave. R. Co., (N. Y. 1901) 60 N. E. Rep. 1113, affirming 46 N. Y. App. Div. 527.

*Pennsylvania*.—Fenner v. Wilkes-Barre Traction Co., 202 Pa. St. 365; Lenkner v. Citizens' Traction Co., 179 Pa. St. 486.

**3. Danger of Collision Imminent**—*Delaware*.—Higgins v. Wilmington City R. Co., 1 Marv. (Del.) 352.

*Illinois*.—South Chicago City R. Co. v. Kinnare, 96 Ill. App. 210.

*Indiana*.—Citizens' St. R. Co. v. Damm, 25 Ind. App. 511; Muncie St. R. Co. v. Maynard, 5 Ind. App. 372; Citizens' St. R. Co. v. Lowe, 12 Ind. App. 47.

*Iowa*.—Orr v. Cedar Rapids, etc., R. Co., 94 Iowa 423.

*Maine*.—Flewelling v. Lewiston, etc., Horse R. Co., 89 Me. 585.

*Maryland*.—Baltimore Traction Co. v. Appel, 80 Md. 603.

*Massachusetts*.—White v. Worcester Consol. St. R. Co., 167 Mass. 43.

*Michigan*.—Mertz v. Detroit Electric R. Co., 125 Mich. 11; Edwards v. Foote, 129 Mich. 121; Boettcher v. Detroit Citizens' St. R. Co., (Mich. 1902) 91 N. W. Rep. 125.

*Missouri*.—Zurfluh v. People's St. R. Co., 46 Mo. App. 636; Sheehan v. Citizens' R. Co., 72 Mo. App. 524.

*New York*.—Strauss v. Newburgh Electric

a collision.<sup>1</sup> In case of a collision between a street car and a vehicle, there is no presumption that it was caused by the negligence of either the driver of the vehicle<sup>2</sup> or the person operating the car,<sup>3</sup> but the question of negligence is a matter of proof.

(2) *Vehicles Moving Along Track.* — While it is the duty of vehicles moving along street-railway tracks to leave the tracks on the approach of cars, so as not to obstruct their passage,<sup>4</sup> still, those in charge of cars must use reasonable diligence to prevent collisions, and the company is liable for injuries resulting from their failure to do so.<sup>5</sup> Thus, where a vehicle is seen moving on the tracks ahead of a car the motorman, gripman, or driver should bring his car under control if possible, so as to avoid a collision if the driver of the vehicle fails to leave the track;<sup>6</sup> but he is not required to bring the car to a stop unless the vehicle is sufficiently near to be reasonably considered in a

R. Co., 6 N. Y. App. Div. 264; *Smith v. Metropolitan St. R. Co.*, 7 N. Y. App. Div. 253; *Reilly v. Third Ave. R. Co.*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 11; *Snediker v. Nassau Electric R. Co.*, 41 N. Y. App. Div. 628.

*Ohio.* — *Lawrence v. Pendleton St. R. Co.*, 1 Cinc. Super. Ct. 180.

*Pennsylvania.* — *Byrne v. Montgomery, etc., Electric R. Co.*, 19 Pa. Super. Ct. 531; *Waechter v. Second Ave. Traction Co.*, 198 Pa. St. 129.

*Tennessee.* — *Citizens' St. R. Co. v. Shepherd*, 107 Tenn. 444.

*Wisconsin.* — *Lockwood v. Belle City St. R. Co.*, 92 Wis. 97.

1. *Smith v. Citizens' R. Co.*, 52 Mo. App. 36.

2. *O'Neil v. Dry Dock, etc., R. Co.*, 59 N. Y. Super. Ct. 123; *Spurrier v. Front St. Cable R. Co.*, 3 Wash. 659.

3. *Jones v. Greensburg, etc., R. Co.*, 9 Pa. Super. Ct. 65; *North Side St. R. Co. v. Want*, 4 Tex. App. Civ. Cas., § 167.

4. *Vehicles on Track.* — *Adolph v. Central Park, etc., R. Co.*, 76 N. Y. 530. See also *supra*, this section, *General Rights and Duties — Right of Way.*

5. *United States.* — *Robinson v. Louisville R. Co.*, (C. C. A.) 112 Fed. Rep. 484.

*Alabama.* — *Birmingham R., etc., Co. v. Smith*, 121 Ala. 352; *Birmingham R., etc., Co. v. Pinckard*, 124 Ala. 372.

*California.* — *Swain v. Fourteenth St. R. Co.*, 93 Cal. 179; *Horgan v. Jones*, 131 Cal. 521; *Abrahams v. Los Angeles Traction Co.*, 124 Cal. 411.

*Illinois.* — *North Chicago St. R. Co. v. Zeiger*, 78 Ill. App. 463.

*Kentucky.* — *Louisville R. Co. v. Stammers*, (Ky. 1898) 47 S. W. Rep. 341.

*Maryland.* — *United R., etc., Co. v. Seymour*, 92 Md. 425.

*Massachusetts.* — *Glazebrook v. West End St. R. Co.*, 160 Mass. 239.

*Michigan.* — *Bush v. St. Joseph, etc., St. R. Co.*, 113 Mich. 513 (failure to leave track in time caused by wheels slipping on rail).

*Minnesota.* — *Peterson v. St. Paul City R. Co.*, 54 Minn. 152; *Flannagan v. St. Paul City R. Co.*, 68 Minn. 300.

*Mississippi.* — *White v. Vicksburg R. Power, etc., Co.*, (Miss. 1902) 31 So. Rep. 709.

*Missouri.* — *Hicks v. Citizens' R. Co.*, 124 Mo. 115.

*New Jersey.* — *Hughes v. Camden, etc., R. Co.*, 65 N. J. L. 203.

*New York.* — *Countryman v. Fonda, etc., R. Co.*, 166 N. Y. 201, *reversing* (Supm. Ct. App. Div.) 54 N. Y. Supp. 1098; *Bossert v. Nassau Electric R. Co.*, 40 N. Y. App. Div. 144; *Schilling v. Metropolitan St. R. Co.*, 47 N. Y. App. Div. 500; *Seletskey v. Third Ave. R. Co.*, 69 N. Y. App. Div. 27; *Quinn v. Atlantic Ave. R. Co.*, (Brooklyn City Ct. Gen. T.) 12 N. Y. Supp. 223; *Witte v. Brooklyn City R. Co.*, (Brooklyn City Ct. Gen. T.) 4 Misc. (N. Y.) 286, *affirmed* 143 N. Y. 667; *Ward v. New York, etc., R. Co.*, 79 Hun (N. Y.) 390.

*Pennsylvania.* — *Gress v. Braddock, etc., St. R. Co.*, 14 Pa. Super. Ct. 87; *Greeley v. Federal St., etc., Pass. R. Co.*, 153 Pa. St. 218.

*Running Street Car on Wrong Track.* — Where a street car was proceeding on the left-hand instead of the right-hand track, and came in collision with the plaintiff's team, which was prevented by a heap of snow from avoiding the collision, a refusal to charge the jury that the car had a right to travel on the left-hand track was held to be error for which the judgment should be reversed, as the mere fact that the car was running on the left-hand track was not itself a fault on the part of the defendant which would subject it to damages. *Altreuter v. Hudson River R. Co.*, 2 E. D. Smith (N. Y.) 151.

*Backing Car Against Vehicles Following in Rear.* — *Rome St. R. Co. v. McGinnis*, 94 Ga. 229; *Central R. Co. v. Knowles*, 191 Ill. 241, *affirming* 93 Ill. App. 581; *Kissock v. Consolidated Traction Co.*, 15 Pa. Super. Ct. 103; *Campbell v. Consolidated Traction Co.*, 201 Pa. St. 167.

In *Cook v. Metropolitan R. Co.*, 98 Mass. 361, it appeared that the horses attached to a car, after pulling it part way up a ferry drop, refused or were unable to pull it further, whereupon the driver applied the brake, but was unable to hold the car stationary, and it ran back, injuring the horses of C., who was driving a wagon, following the car at a distance of about ten feet behind it, another team following him. The defendants usually had an extra horse to pull the car up the drop, but on this occasion there was none. It was held that there was evidence of negligence on the part of the railway company sufficient to go to the jury.

6. *Flannagan v. St. Paul City R. Co.*, 68 Minn. 300; *Consolidated Traction Co. v. Haight*, 59 N. J. L. 577; *Toledo Consol. St. R. Co. v. Rohner*, 6 Ohio Cir. Dec. 706, 9 Ohio Cir. Ct. 702.

position of danger.<sup>1</sup> It has been held that where a street car approaching from the rear runs down a wagon driving along the track, this is of itself sufficient evidence of negligence on the part of the street-railway company in the absence of special circumstances excusing such act to carry the question to the jury.<sup>2</sup> Where a street car is approaching from the rear a vehicle moving along the track, the person operating the car has not the right to proceed without regard to the presence of the vehicle, in anticipation that the vehicle will leave the track in time to give free passage to the car.<sup>3</sup> But it has been held that where a vehicle is moving along street-railway tracks in the direction of an approaching car, the person operating the car has a right to assume, until the contrary is evidenced from the actions of the driver,<sup>4</sup> that he will turn from the tracks in time to give free passage to the car. The person operating a street car has no right to run down a vehicle the person in charge of which refuses to leave the track so as to allow the car to pass,<sup>5</sup> even though a municipal ordinance makes such refusal to turn out a misdemeanor.<sup>6</sup> If the street-railway company is not guilty of negligence in the operation of the car it cannot be held liable for injuries resulting from a collision between the car and a vehicle moving along the track.<sup>7</sup>

(3) *Vehicles Moving Beside Track.* — Where a vehicle is moving on a street beside a street-railway track, at a safe distance from the track, the person in charge of a street car is justified in operating the car on the presumption that the vehicle will be kept at a safe distance from the track, and the street-railway company cannot be held liable for a collision caused by a sudden veering of the vehicle;<sup>8</sup> but if the driver of such a vehicle is not aware of the car's approach, warnings and signals of its approach should be given,<sup>9</sup> and if the vehicle is in such close proximity to the track that the danger of a collision is imminent, reasonable care in having the car under control is required of the person in charge of the car.<sup>10</sup>

(4) *Vehicles Standing on Street.* — If a vehicle is standing on the side of a street at a safe distance from the track, the motorman of an approaching car has a right to presume that the vehicle will remain where it is, and if the horses become frightened at the car and back the vehicle into the car, the company is not liable.<sup>11</sup> But where a vehicle is standing on the track, or in such close proximity thereto as to prevent the free passage of the car, the company will be held liable for a collision if the person in charge of the car,

1. *Sonnenfeld Millinery Co. v. People's R. Co.*, 59 Mo. App. 668.

2. *Vincent v. Norton, etc.*, St. R. Co., 180 Mass. 104; *O'Malley v. Metropolitan St. R. Co.*, 3 N. Y. App. Div. 259; *Schilling v. Metropolitan St. R. Co.*, 47 N. Y. App. Div. 500; *Seifter v. Brooklyn Heights R. Co.*, 55 N. Y. App. Div. 10; *McCann v. New York, etc., R. Co.*, 56 N. Y. App. Div. 419; *Witte v. Brooklyn City R. Co.*, (Brooklyn City Ct. Gen. T.) 4 Misc. (N. Y.) 286; *Toledo Electric St. R. Co. v. Cooper*, 8 Ohio Cir. Dec. 496.

3. *Mertz v. Detroit Electric R. Co.*, 125 Mich. 11. See also *White v. Worcester Consolidated St. R. Co.*, 167 Mass. 43 (vehicle driving around obstacle and so crossing track and back again).

4. *Glazebrook v. West End St. R. Co.*, 160 Mass. 239, explained in *White v. Worcester Consol. St. R. Co.*, 167 Mass. 45. Compare *Will v. West Side R. Co.*, 84 Wis. 42.

5. *Camden, etc., R. Co. v. Preston*, 59 N. J. L. 264.

6. *Laethem v. Ft. Wayne, etc., R. Co.*, 100 Mich. 297.

7. *Elwood v. Chicago City R. Co.*, 90 Ill. App. 397.

8. *Vehicles Moving Beside Track.* — *Birmingham R., etc., Co. v. Franscomb*, 124 Ala. 621; *South Chicago City R. Co. v. Kinnare*, 96 Ill. App. 210; *Rombach v. Crescent City R. Co.*, 50 La. Ann. 473; *Suydam v. Grand St., etc., R. Co.*, 41 Barb. (N. Y.) 375; *Christensen v. Union Trunk Line R. Co.*, 6 Wash. 75.

9. *Wilkins v. Omaha, etc., R., etc., Co.*, 96 Iowa 668; *Tashjian v. Worcester Consol. St. R. Co.*, 177 Mass. 75; *Le Blanc v. Lowell, etc., St. R. Co.*, 170 Mass. 564.

10. *Joliet R. Co. v. Barty*, 96 Ill. App. 351; *Geist v. Detroit City R. Co.*, 91 Mich. 446; *Blakeslee v. Consolidated St. R. Co.*, 112 Mich. 63; *Koch v. St. Paul City R. Co.*, 45 Minn. 407; *Warren v. Union R. Co.*, 46 N. Y. App. Div. 517; *Reilly v. Troy City R. Co.*, 32 N. Y. App. Div. 131.

11. *Vehicles Standing on Street.* — *Higgins v. Wilmington City R. Co.*, 1 Marv. (Del.) 352.

*Duty to Slow Down Car.* — *Hoffman v. Syracuse Rapid Transit R. Co.*, 50 N. Y. App. Div. 83.

operating it in a prudent manner, could have avoided the collision;<sup>1</sup> and the improper obstruction of a street-railway track by allowing a vehicle to stand thereon, or in too close proximity thereto, will not prevent a recovery for injuries caused by a collision if the accident could have been avoided by the exercise of due care on the part of the person operating the car.<sup>2</sup>

**An Error of Judgment** on the part of the person operating a street car as to the existence of sufficient space between the tracks and a vehicle standing upon the street to allow the car to pass is not necessarily negligence.<sup>3</sup>

(5) **Contributory Negligence** — (a) **In General.** — Persons driving vehicles on streets upon which street cars are operated must of course use reasonable care, or the care which a reasonably prudent man would exercise, to avoid collisions with cars,<sup>4</sup> and persons riding in vehicles as passengers must themselves use due care to avoid being injured by a collision.<sup>5</sup> When the street car has come to a full stop after collision with a vehicle attributable in the first instance to the negligence of the driver of the latter, an injury which is due to the car starting before the driver of the vehicle has extricated himself from the consequences of the collision cannot be attributed to the driver's original negligence.<sup>6</sup> The question as to the existence of contributory negligence is generally one for the jury.<sup>7</sup>

(b) **Driving on Street on Which Street Cars Are Operated.** — A driver of a vehicle is not guilty of contributory negligence in selecting for his route a street on which street cars are operated when he might have taken another route,<sup>8</sup> nor

1. *Birmingham R., etc., Co. v. City Stable Co.*, 119 Ala. 615; *Higgins v. Wilmington City R. Co.*, 1 Marv. (Del.) 352; *Atwood v. Bangor, etc., R. Co.*, 91 Me. 399; *Laethem v. Ft. Wayne, etc., R. Co.*, 100 Mich. 297; *Koch v. St. Paul City R. Co.*, 45 Minn. 407; *Saffer v. Westchester Electric R. Co.*, (N. Y. City Ct. Gen. T.) 22 Misc. (N. Y.) 555; *Mullen v. Central Park, etc., R. Co.*, (N. Y. City Ct. Gen. T.) 1 Misc. (N. Y.) 216; *Holzman v. Metropolitan St. R. Co.*, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 644; *McCambley v. Staten Island Midland R. Co.*, 32 N. Y. App. Div. 346; *Albert v. Bleker St., etc., R. Co.*, 2 Daly (N. Y.) 389; *Ward v. Lakeside R. Co.*, 20 Pa. Co. Ct. 494; *Kestner v. Pittsburgh, etc., Traction Co.*, 158 Pa. St. 422.

2. *Consolidated Traction Co. v. Haight*, 59 N. J. L. 577.

3. *O'Leary v. Brockton St. R. Co.*, 177 Mass. 187; *Spaulding v. Jarvis*, 32 Hun (N. Y.) 621; *Patton v. Philadelphia Traction Co.*, 132 Pa. St. 76. See also *Gumb v. Twenty-Third St. R. Co.*, 58 N. Y. Super. Ct. 1.

4. **Contributory Negligence** — *Arkansas*. — *Hot Springs St. R. Co. v. Johnson*, 64 Ark. 420.

*Kentucky*. — *Central Pass. R. Co. v. Chatterson*, (Ky. 1895) 29 S. W. Rep. 18.

*Massachusetts*. — *Scannell v. Boston El. R. Co.*, 176 Mass. 170.

*New York*. — *Luedecke v. Metropolitan St. R. Co.*, (N. Y. City Ct. Gen. T.) 60 N. Y. Supp. 999; *O'Neill v. Third Ave. R. Co.*, (C. Pl. Gen. T.) 3 Misc. (N. Y.) 521.

*Tennessee*. — *Memphis St. R. Co. v. Wilson*, 108 Tenn. 618; *Saunders v. City, etc., R. Co.*, 99 Tenn. 130.

*Texas*. — *Austin Dam, etc., R. Co. v. Goldstein*, 18 Tex. Civ. App. 704.

*Washington*. — *Spurrier v. Front St. Cable R. Co.*, 3 Wash. 659.

**Driving on Left Side of Street.** — *Mooney v. Trow Directory, etc., Co.*, (C. Pl. Gen. T.) 2

Misc. (N. Y.) 238; *Spurrier v. Front St. Cable R. Co.*, 3 Wash. 659.

**Firemen Responding to Fire Alarm.** — *Birmingham R., etc., Co. v. Baker*, 126 Ala. 135.

**Salvage Wagon Responding to Fire Alarm.** — *Flynn v. Louisville R. Co.*, (Ky. 1901) 62 S. W. Rep. 490.

**Driving Fast in Violation of Ordinance.** — *McGrath v. City, etc., R. Co.*, 93 Ga. 312. See also *Wosika v. St. Paul City R. Co.*, 80 Minn. 364.

**Slowing Up.** — *Sheehan v. Citizens' R. Co.*, 72 Mo. App. 524.

**Where Injury Might Have Been Lessened by Exercise of Unusual Prudence in Face of Danger.** — *Gibbons v. Wilkes-Barre, etc., St. Co.*, 155 Pa. St. 279.

**Jumping from Wagon Before Collision.** — *Bush v. St. Joseph, etc., St. R. Co.*, 113 Mich. 513; *Edwards v. Foote*, 129 Mich. 121; *Geary v. Metropolitan St. R. Co.*, 73 N. Y. App. Div. 441; *Anderson v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 104.

5. *Farley v. Wilmington, etc., Electric R. Co.*, 3 Penn. (Del.) 581; *Ulrich v. Toledo Consol. St. R. Co.*, 5 Ohio Cir. Dec. 111.

6. *McDivitt v. Des Moines St. R. Co.*, 99 Iowa 141.

7. **Contributory Negligence for Jury.** — *Muncie St. R. Co. v. Maynard*, 5 Ind. App. 372; *Rascher v. East Detroit, etc., R. Co.*, 90 Mich. 413, 30 Am. St. Rep. 447; *Blakeslee v. Consolidated St. R. Co.*, 112 Mich. 63; *Fay v. Brooklyn Heights R. Co.*, 69 N. Y. App. Div. 563; *Davidson v. Schuylkill Traction Co.*, 4 Pa. Super. Ct. 86.

**Firemen Responding to Fire Alarm Not Expected to Use Care of Ordinary Individuals.** — *McGee v. West End St. R. Co.*, 151 Mass. 240.

8. **Driving on Street on Which Cars Are Operated.** — *Muncie St. R. Co. v. Maynard*, 5 Ind. App. 372; *Robbins v. Springfield St. R. Co.*, 165 Mass. 30 (man seventy-nine years old,



is it negligence to drive on such a street a wagon so constructed that the driver cannot see to the rear over the bed of the vehicle;<sup>1</sup> and in driving along a street it is not necessarily negligent to approach so near to the track as to render a collision with a street car possible.<sup>2</sup>

(c) **Standing Vehicles On or Near Track.** — In case of collisions between street cars and vehicles standing in the street on or near the track, the question has frequently arisen whether the driver was guilty of contributory negligence.<sup>3</sup> To leave a horse and vehicle in the street unhitched and unattended has been held to constitute contributory negligence.<sup>4</sup> So it has been held to be negligence to stop a wagon on the track of a street-railway company, in front of an approaching car, though the driver thought that the wagon was clear of the track.<sup>5</sup> But it is not necessarily negligence to stand a vehicle next to the curb line for business purposes.<sup>6</sup>

(d) **Driving on Track.** — It is not negligence *per se* to drive a vehicle along a street-railway track in the direction in which cars travel upon the track,<sup>7</sup> even,

blind in one eye, and of defective hearing); *Oates v. Metropolitan St. R. Co.*, 168 Mo. 535; *Gibbons v. Wilkes-Barre, etc., St. R. Co.*, 155 Pa. St. 279.

**Testing Horse.** — A person who drives a young horse alongside of an electric railway, with full knowledge of the situation and danger, for the express purpose of testing the horse, is guilty of such contributory negligence as bars a recovery for injuries sustained in consequence of his horse taking fright at an approaching car. *Cornell v. Detroit Electric R. Co.*, 82 Mich. 405. Compare *Oates v. Metropolitan St. R. Co.*, 168 Mo. 535.

1. *Vincent v. Norton, etc., St. R. Co.*, 180 Mass. 104.

2. *Rouse v. Detroit Electric R. Co.*, 128 Mich. 149; *Tunison v. Weadock*, (Mich. 1902) 89 N. W. Rep. 703; *Manor v. Bay Cities Consol. R. Co.*, 118 Mich. 1; *Brooks v. Lincoln St. R. Co.*, 22 Neb. 816; *Quinn v. Brooklyn City R. Co.*, 40 N. Y. App. Div. 608; *Gibbons v. Wilkes-Barre, etc., St. R. Co.*, 155 Pa. St. 279; *Morrow v. Delaware County, etc., Electric R. Co.*, 199 Pa. St. 156. See also *infra*, this subsection, *Driving on Track*.

3. **Standing Vehicles On or Near Track.** — *Atwood v. Bangor, etc., R. Co.*, 91 Me. 399; *Oddie v. Mendenhall*, 84 Minn. 58; *Gray v. Second Ave. R. Co.*, 65 N. Y. 561, 34 N. Y. Super. Ct. 519; *Black v. Staten Island Electric R. Co.*, 40 N. Y. App. Div. 238; *Gumb v. Twenty Third St. R. Co.*, 58 N. Y. Super. Ct. 1.

4. **Leaving Horse Unhitched.** — *Higgins v. Wilmington City R. Co.*, 1 Marv. (Del.) 352; *Hoffman v. Syracuse Rapid Transit R. Co.*, 50 N. Y. App. Div. 83; *New York Condensed Milk Co. v. Nassau Electric R. Co.*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 127; *Gilmore v. Federal St., etc., Pass. R. Co.*, 153 Pa. St. 31, 34 Am. St. Rep. 682. See also *Johnson v. Stewart*, 62 Ark. 164. See however, *Albert v. Bleecker St., etc., R. Co.*, 2 Daly (N. Y.) 389.

5. *Spaulding v. Jarvis*, 32 Hun (N. Y.) 621. Compare *Redford v. Spokane St. R. Co.*, 15 Wash. 419.

6. *Tarler v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 684 (physician's buggy); *Fenner v. Wilkes-Barre, etc., Traction Co.*, 202 Pa. St. 365, holding that a driver who has heavy packages to deliver at a store, and

who is compelled by reason of obstructions in the street to back his wagon to the curb so that his horses stand on the track of a street-railway company, is not necessarily guilty of negligence.

But a driver who, in unloading a safe, unnecessarily places his horses squarely across the track of an electric railway on a dark night, at a point where there is a descending grade, is guilty of contributory negligence, and if his horses are injured by a passing car he cannot recover from the railway company. *Winter v. Federal St., etc., Pass. R. Co.*, 153 Pa. St. 26.

7. **Driving on Track — California.** — *Mahoney v. San Francisco, etc., R. Co.*, 110 Cal. 471.

**Illinois.** — *North Chicago St. R. Co. v. Zeiger*, 182 Ill. 9, 74 Am. St. Rep. 157, affirming 78 Ill. App. 463; *West Chicago St. R. Co. v. O'Connor*, 85 Ill. App. 278.

**Indiana.** — *Citizens' St. R. Co. v. Lowe*, 12 Ind. App. 47.

**Maryland.** — *United R., etc., Co. v. Seymour*, 92 Md. 425.

**Massachusetts.** — *Vincent v. Norton, etc., St. R. Co.*, 180 Mass. 104.

**Michigan.** — *Rascher v. East Detroit, etc., R. Co.*, 90 Mich. 413, 30 Am. St. Rep. 447; *Mertz v. Detroit Electric R. Co.*, 125 Mich. 11.

**Missouri.** — *Bindbeutel v. Street R. Co.*, 43 Mo. App. 463.

**Nebraska.** — *Brooks v. Lincoln St. R. Co.*, 22 Neb. 816.

**New Jersey.** — *Consolidated Traction Co. v. Reeves*, 58 N. J. L. 573.

**New York.** — *Fishbach v. Steinway R. Co.*, 11 N. Y. App. Div. 152; *Quinn v. Atlantic Ave. R. Co.*, (Brooklyn City Ct. Gen. T.) 34 N. Y. St. Rep. 801, affirmed 134 N. Y. 611; *Brachfeld v. Third Ave. R. Co.*, (N. Y. City Ct. Gen. T.) 29 Misc. (N. Y.) 586; *Seifter v. Brooklyn Heights R. Co.*, 55 N. Y. App. Div. 10; *Mapes v. Union R. Co.*, 56 N. Y. App. Div. 508; *Saffer v. Westchester Electric R. Co.*, (N. Y. City Ct. Gen. T.) 22 Misc. (N. Y.) 555; *Cambeis v. Third Ave. R. Co.*, (C. Pl. Gen. T.) 1 Misc. (N. Y.) 158; *Arnesen v. Brooklyn City R. Co.*, (Brooklyn City Ct. Gen. T.) 9 Misc. (N. Y.) 270; *Lahey v. Central Park, etc., R. Co.*, (N. Y. Super. Ct. Gen. T.) 2 Misc. (N. Y.) 537; *Cohen v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 186.

It has been held, though the wagon is so constructed or loaded that a watch to the rear cannot be kept.<sup>1</sup> So it is not necessarily contributory negligence to drive a vehicle along a track immediately in the rear of a car.<sup>2</sup> Nor is it necessarily negligent to drive a vehicle along a track in the direction from which cars will approach,<sup>3</sup> but when so driving the driver should keep a lookout for cars approaching in the opposite direction, so as to be able to turn out of their way,<sup>4</sup> and he should use reasonable diligence to ascertain the approach of cars from the rear, so as to be able to turn out in time to avoid obstructing the passage of such cars;<sup>5</sup> but he is not, as a matter of law, required to keep a constant watch to the rear to discover approaching cars,<sup>6</sup> and in turning from the track he is not, as a matter of law, required to look behind for approaching cars.<sup>7</sup> Where a driver of a vehicle has actual knowledge of the approach of a car from the rear, he should use reasonable diligence to leave the track so as not to obstruct the free passage of the car.<sup>8</sup>

(e) **Crossing Track** — *aa. IN GENERAL.* — It is not negligence for a person to drive across street-railway tracks whenever he may have occasion to do so;<sup>9</sup> but in crossing such tracks the driver of a vehicle must exercise reasonable or ordinary care,<sup>10</sup> though it has been held that he is not required to take the same precautions as a pedestrian.<sup>11</sup> The question of negligence in such a case depends upon the proximity or remoteness of the car, its speed, and other circumstances;<sup>12</sup> and the driver is not bound to take notice of the fact that an

*Ohio.* — *Lewis v. Cincinnati St. R. Co.*, 10 Ohio Dec. 53.

*Pennsylvania.* — *Jones v. Greensburg, etc., St. R. Co.*, 43 W. N. C. (Pa.) 298; *Kacchale v. United Traction Co.*, 15 Pa. Super. Ct. 73; *Gaughan v. Second Ave. Traction Co.*, 189 Pa. St. 408.

*Wisconsin.* — *McClellan v. Chippewa Valley Electric R. Co.*, 110 Wis. 326.

1. *Vincent v. Norton, etc., St. R. Co.*, 180 Mass. 104.

2. *Cook v. Metropolitan R. Co.*, 98 Mass. 261; *Campbell v. Consolidated Traction Co.*, 201 Pa. St. 167.

3. *Swain v. Fourteenth St. R. Co.*, 93 Cal. 179; *Rascher v. East Detroit, etc., R. Co.*, 90 Mich. 413, 30 Am. St. Rep. 447; *Hughes v. Camden, etc., R. Co.*, 65 N. J. L. 203; *Delaney v. Yonkers R. Co.*, 13 N. Y. App. Div. 114; *Cannon v. Pittsburg, etc., Traction Co.*, 194 Pa. St. 159.

4. *Chicago West Div. R. Co. v. Bert*, 69 Ill. 388; *Jackson v. United Traction Co.*, 18 Pa. Super. Ct. 211.

**Vehicle in Procession.** — *Jatho v. Green, etc., St. Pass. R. Co.*, 4 Phila. (Pa.) 24, 17 Leg. Int. (Pa.) 52.

5. *Adolph v. Central Park, etc., R. Co.*, 76 N. Y. 530; *Devine v. Brooklyn Heights R. Co.*, 34 N. Y. App. Div. 248; *Bryant v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 532; *Johnson v. Brooklyn Heights R. Co.*, 34 N. Y. App. Div. 271; *Winter v. Crosstown St. R. Co.*, (Buffalo Super. Ct. Gen. T.) 8 Misc. (N. Y.) 362.

6. *Tunison v. Weadock*, (Mich. 1902) 89 N. W. Rep. 703; *J. F. Conrad Grocer Co. v. St. Louis, etc., R. Co.*, 89 Mo. App. 391; *Bossert v. Nassau Electric R. Co.*, 40 N. Y. App. Div. 144; *Mapes v. Union R. Co.*, 56 N. Y. App. Div. 508. *Compare Hill v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 440; *Winter v. Crosstown St. R. Co.*, (Buffalo Super. Ct. Gen. T.) 8 Misc. (N. Y.) 362; *Adolph v. Central*

*Park, etc., R. Co.*, 76 N. Y. 530, *affirming* 43 N. Y. Super. Ct. 199.

7. *Cohen v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 186. *Compare Pechesky v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 432.

8. *Morrissey v. Bridgeport Traction Co.*, 68 Conn. 215; *Wood v. Detroit City St. R. Co.*, 52 Mich. 402, 50 Am. Rep. 259; *North Hudson County R. Co. v. Isley*, 49 N. J. L. 468; *McCann v. New York, etc., R. Co.*, 56 N. Y. App. Div. 419.

9. **Driving Across Tracks.** — *Birmingham R., etc., Co. v. City Stable Co.*, 119 Ala. 615.

10. *Davidson v. Denver Tramway Co.*, 4 Colo. App. 283; *Culbertson v. Metropolitan St. R. Co.*, 140 Mo. 35.

**Vehicle of Fire Company.** — *Birmingham R., etc., Co. v. Baker*, 126 Ala. 135.

11. *Consolidated Traction Co. v. Behr*, 59 N. J. L. 477.

12. **Negligence Depends on Circumstances** — *California.* — *Clark v. Bennett*, 123 Cal. 275.

*Connecticut.* — *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475; *Lawler v. Hartford St. R. Co.*, 72 Conn. 74.

*Illinois.* — *Chicago Gen. R. Co. v. Carroll*, 91 Ill. App. 356, *affirmed* 189 Ill. 273; *Chicago City R. Co. v. Martensen*, 100 Ill. App. 306, *affirmed* 198 Ill. 511.

*Kansas.* — *Metropolitan St. R. Co. v. Slayman*, 64 Kan. 722.

*Massachusetts.* — *Lahti v. Fitchburg, etc., St. R. Co.*, 172 Mass. 147; *Creavin v. Newton St. R. Co.*, 176 Mass. 529.

*Michigan.* — *Geist v. Detroit City R. Co.*, 91 Mich. 446; *Ryan v. Detroit Citizens' St. R. Co.*, 123 Mich. 597.

*Minnesota.* — *Watson v. Minneapolis St. R. Co.*, 53 Minn. 551; *Flannagan v. St. Paul City R. Co.*, 68 Minn. 300; *Armstead v. Mendenhall*, 83 Minn. 136.

*New Jersey.* — *Consolidated Traction Co. v. Lambertson*, 59 N. J. L. 297; *Consolidated Trac-*

approaching car is traveling at an excessive rate of speed, but is justified in acting on the presumption that a proper rate of speed is being maintained.<sup>1</sup> In many instances the courts have held, as a matter of law, that persons attempting to drive across street-railway tracks where a car was approaching in very close proximity were guilty of negligence.<sup>2</sup> But in other cases, in view of the remoteness of the car, the courts have refused to adjudge that they were guilty of contributory negligence.<sup>3</sup>

*tion Co. v. Knoth*, 59 N. J. L. 582; *North Jersey St. R. Co. v. Schwartz*, 66 N. J. L. 437; *Woodland v. North Jersey St. R. Co.*, 66 N. J. L. 455.

*New York*.—*Buhrens v. Dry Dock, etc., R. Co.*, 53 Hun (N. Y.) 571; *Johnson v. Rochester R. Co.*, 61 N. Y. App. Div. 12; *Mowbray v. Brooklyn Heights R. Co.*, 59 N. Y. App. Div. 239; *Vitelli v. Nassau Electric R. Co.*, 53 N. Y. App. Div. 659; *Geoghegan v. Third Ave. R. Co.*, 51 N. Y. App. Div. 369; *Meyer v. Brooklyn, etc., R. Co.*, 47 N. Y. App. Div. 286; *Blate v. Third Ave. R. Co.*, 44 N. Y. App. Div. 163; *Lawson v. Metropolitan St. R. Co.*, 40 N. Y. App. Div. 307; *Walsh v. Atlantic Ave. R. Co.*, 23 N. Y. App. Div. 19; *McGrane v. Flushing, etc., Electric R. Co.*, 13 N. Y. App. Div. 177; *Brozek v. Steinway R. Co.*, 10 N. Y. App. Div. 360; *Stines v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 789; *Hicks v. Nassau Electric R. Co.*, 47 N. Y. App. Div. 479; *Nolan v. New York Cent., etc., R. Co.*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 619; *Curry v. Union Electric R. Co.*, 86 Hun (N. Y.) 559.

*North Carolina*.—*Moore v. Charlotte Electric St. R. Co.*, 128 N. Car. 455.

*Ohio*.—*Toledo Electric St. R. Co. v. Westenhuber*, 12 Ohio Cir. Dec. 22.

*Pennsylvania*.—*Raulston v. Philadelphia Traction Co.*, 13 Pa. Super. Ct. 412; *Haney v. Pittsburgh, etc., Traction Co.*, 159 Pa. St. 395.

*Tennessee*.—*Citizens' Rapid Transit Co. v. Seigrist*, 96 Tenn. 119; *Saunders v. City, etc., R. Co.*, 99 Tenn. 130.

*Texas*.—*Citizens R. Co. v. Washington*, 24 Tex. Civ. App. 422.

*Utah*.—*Dederichs v. Salt Lake City R. Co.*, 13 Utah 34.

*Wisconsin*.—*Tesch v. Milwaukee Electric R., etc., Co.*, 108 Wis. 593.

*Canada*.—*Toronto R. Co. v. Gosnell*, 24 Can. Sup. Ct. 582.

**Fire Truck Responding to Fire Alarm.**—*Garity v. Detroit Citizens St. R. Co.*, 112 Mich. 369; *Warren v. Mendenhall*, 77 Minn. 145; *Consolidated Traction Co. v. Chenowith*, (N. J. 1896) 35 Atl. Rep. 1067.

1. *Lauffer v. Bridgeport Traction Co.*, 68 Conn. 475; *Metropolitan St. R. Co. v. Slayman*, 64 Kan. 722.

**2. Crossing Track under Circumstances Held Negligence.**—*Illinois*.—*West Chicago St. R. Co. v. Boeker*, 70 Ill. App. 67; *Goodman v. West Chicago St. R. Co.*, 101 Ill. App. 474 (car one block distant and traveling at a high rate of speed).

*Indiana*.—*Citizens' St. R. Co. v. Helvie*, 22 Ind. App. 515; *De Lon v. Kokomo City St. R. Co.*, 22 Ind. App. 377.

*Kentucky*.—*South Covington, etc., St. R. Co. v. Enslin*, (Ky. 1897) 38 S. W. Rep. 850.

*Michigan*.—*Guilloz v. Ft. Wayne, etc., R. Co.*,

108 Mich. 41; *Graff v. Detroit Citizens' St. R. Co.*, 109 Mich. 77; *Hilts v. Foote*, 125 Mich. 241.

*Minnesota*.—*O'Connell v. St. Paul City R. Co.*, 64 Minn. 466.

*New Jersey*.—*Hannon v. North Jersey St. R. Co.*, 65 N. J. L. 547.

*New York*.—*Rider v. Syracuse Rapid Transit R. Co.*, 171 N. Y. 139, reversing 72 N. Y. Supp. 1125; *Meyer v. Brooklyn Heights R. Co.*, 9 N. Y. App. Div. 79 (crossing between street crossings where car, travelling rapidly, was one hundred and fifty feet distant); *Reed v. Metropolitan St. R. Co.*, 58 N. Y. App. Div. 87; *Hamilton v. Third Ave. R. Co.*, (C. Pl. Gen. T.) 6 Misc. (N. Y.) 382; *Rohe v. Third Ave. R. Co.*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 740; *Boston, etc., Dispatch Express Co. v. Metropolitan St. R. Co.*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 25; *Baumann v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 658; *Petri v. Third Ave. R. Co.*, (Supm. Ct. Tr. T.) 30 Misc. (N. Y.) 254; *Manhattan Pie Baking Co. v. Metropolitan St. R. Co.*, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 855; *Vogts v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 799; *Seggerman v. Metropolitan St. R. Co.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 374 (car thirty feet distant traveling twenty miles an hour); *Lang v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 754; *Lefkowitz v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 787; *Clancy v. Troy, etc., R. Co.*, 88 Hun (N. Y.) 496.

*Pennsylvania*.—*Smith v. Electric Traction Co.*, 6 Pa. Dist. 471; *Trout v. Altoona, etc., Electric R. Co.*, 13 Pa. Super. Ct. 17; *Thomas v. Citizens Pass. R. Co.*, 132 Pa. St. 504; *Bornscheuer v. Consolidated Traction Co.*, 198 Pa. St. 332; *Tyson v. Union Traction Co.*, 199 Pa. St. 264; *Smith v. Electric Traction Co.*, 42 W. N. C. (Pa.) 351.

*Washington*.—*Christensen v. Union Trunk Line R. Co.*, 6 Wash. 75.

*Wisconsin*.—*Stafford v. Chippewa Valley Electric R. Co.*, 110 Wis. 331.

**3. Not Negligence per se.**—*California*.—*Clark v. Bennett*, 123 Cal. 275 (car fifty yards distant, traveling eight miles an hour).

*Connecticut*.—*Lawler v. Hartford St. R. Co.*, 72 Conn. 74 (car seventy feet distant).

*Kansas*.—*Metropolitan St. R. Co. v. Slayman*, 64 Kan. 722.

*Louisiana*.—*Hemmingway v. New Orleans City, etc., R. Co.*, 50 La. Ann. 1087.

*Massachusetts*.—*Creavin v. Newton St. R. Co.*, 176 Mass. 539.

*New York*.—*Lawson v. Metropolitan St. R. Co.*, 40 N. Y. App. Div. 307, affirmed 166 N. Y. 589 (car fifty feet distant); *Buhrens v. Dry Dock, etc., R. Co.*, 53 Hun (N. Y.) 571 (car seventy feet distant); *Schoener v. Metropolitan*

*bb. DUTY TO STOP, LOOK, AND LISTEN.* — The rule requiring drivers of vehicles to stop, look, and listen before crossing the tracks of an ordinary railroad<sup>1</sup> does not apply so as to render one who fails to stop before crossing the tracks of a street railway guilty as a matter of law of contributory negligence;<sup>2</sup> but in approaching street-railway tracks at a street crossing, the driver of a vehicle should have his horses under control, so that the vehicle can be stopped if necessary to avoid a collision with a street car.<sup>3</sup>

*Duty to Look.* — Drivers of vehicles should, before crossing street-railway tracks, look for approaching cars.<sup>4</sup> In many cases, however, it has been held

St. R. Co., 72 N. Y. App. Div. 23 (car seventy-five feet distant); *O'Callaghan v. Metropolitan St. R. Co.*, 69 N. Y. App. Div. 574; *Bertsch v. Metropolitan St. R. Co.*, 68 N. Y. App. Div. 228; *Smith v. Metropolitan St. R. Co.*, 66 N. Y. App. Div. 600 (car half-block distant); *Bruss v. Metropolitan St. R. Co.*, 66 N. Y. App. Div. 554; *Decker v. Brooklyn Heights R. Co.*, 64 N. Y. App. Div. 430 (patrol wagon); *Brozek v. Steinway R. Co.*, 10 N. Y. App. Div. 360 (car fifty feet distant, traveling eight miles an hour); *Lowy v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 774; *Piercy v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 612; *Mason v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 108; *Reilly v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 110; *Williamson v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 324; *Reiss v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 198; *Weidinger v. Third Ave. R. Co.*, 40 N. Y. App. Div. 197; *Reilly v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 814; *Hunter v. Third Ave. R. Co.*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 1, *affirming* (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 432; *McDonald v. Third Ave. R. Co.*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 52; *Reilly v. Third Ave. R. Co.*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 11; *Shanley v. Union R. Co.*, (N. Y. City Ct. Gen. T.) 14 Misc. (N. Y.) 442; *Kelly v. Brooklyn Heights R. Co.*, (Brooklyn City Ct. Gen. T.) 12 Misc. (N. Y.) 568; *Kerr v. Atlantic Ave. R. Co.*, (Brooklyn City Ct. Gen. T.) 10 Misc. (N. Y.) 264; *Witzel v. Third Ave. R. Co.*, (N. Y. City Ct. Gen. T.) 3 Misc. (N. Y.) 561.

*North Carolina.* — *Moore v. Charlotte Electric St. R. Co.*, 128 N. Car. 455.

*Pennsylvania.* — *Raulston v. Philadelphia Traction Co.*, 13 Pa. Super. Ct. 412; *Downey v. Pittsburgh, etc., Traction Co.*, 161 Pa. St. 131; *Hamilton v. Consolidated Traction Co.*, 201 Pa. St. 351.

*Tennessee.* — *Citizens' Rapid Transit Co. v. Seigrist*, 96 Tenn. 119; *Nashville, etc., R. Co. v. Norman*, 108 Tenn. 324.

*Wisconsin.* — *Watermolen v. Fox River Electric R., etc., Co.*, 110 Wis. 153.

1. See the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 429 *et seq.*

2. *Failure to Stop Not Negligence per se.* — *Cincinnati St. R. Co. v. Whitcomb* (C. C. A.) 66 Fed. Rep. 915; *McCoy v. Kokomo R., etc., Co.*, 158 Ind. 658; *Marchal v. Indianapolis St. R. Co.*, 28 Ind. App. 133; *Cooke v. Baltimore Traction Co.*, 80 Md. 551; *Kelly v. Wakefield, etc., St. R. Co.*, 179 Mass. 542;

*Jones v. Greensburg, etc., St. R. Co.*, 43 W. N. C. (Pa.) 298; *Haas v. Chester St. R. Co.*, 202 Pa. St. 145.

3. *Garrity v. Detroit Citizens' St. R. Co.*, 112 Mich. 369; *Hilts v. Toote*, 125 Mich. 241. See, however, *Consolidated Traction Co. v. Chenowith*, (N. J. 1896) 35 Atl. Rep. 1067 (driver of fire truck).

4. *Duty to Look* — *Alabama.* — *Highland Ave., etc., R. Co. v. Maddox*, 100 Ala. 618; *Highland Ave., etc., R. Co. v. Sampson*, 112 Ala. 425.

*Louisiana.* — *Cowden v. Shreveport Belt R. Co.*, 106 La. 236.

*Maine.* — *Fairbanks v. Bangor, etc., R. Co.*, 95 Me. 78; *Warren v. Bangor, etc., R. Co.*, 95 Me. 115.

*Massachusetts.* — *Kelly v. Wakefield, etc., St. R. Co.*, 175 Mass. 331; *Hurley v. West End St. R. Co.*, 180 Mass. 370. *Compare Robbins v. Springfield St. R. Co.*, 165 Mass. 30.

*Michigan.* — *Fritz v. Detroit Citizens' St. R. Co.*, 105 Mich. 50; *Blakeslee v. Consolidated St. R. Co.*, 105 Mich. 462; *Doherty v. Detroit Citizens' St. R. Co.*, 118 Mich. 213, *reaffirming* 118 Mich. 209; *Borschall v. Detroit R. Co.*, 115 Mich. 473; *Hilts v. Foote*, 125 Mich. 241.

*Missouri.* — *J. F. Conrad Grocer Co. v. St. Louis, etc., R. Co.*, 89 Mo. App. 534; *Hickman v. Union Depot R. Co.*, 47 Mo. App. 65; *Smith v. Citizens' R. Co.*, 52 Mo. App. 36; *Sonnenfeld Millinery Co. v. People's R. Co.*, 59 Mo. App. 668.

*New York.* — *Ward v. Rochester Electric R. Co.*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 427.

*Ohio.* — *Schausten v. Toledo Consol. St. R. Co.*, 7 Ohio Cir. Dec. 389, 18 Ohio Cir. Ct. 691; *Cincinnati St. R. Co. v. Jenkins*, 11 Ohio Cir. Dec. 130, 20 Ohio Cir. Ct. 256. See also *Lewis v. Cincinnati St. R. Co.*, 10 Ohio Dec. 53.

*Pennsylvania.* — *McCauley v. Philadelphia Traction Co.*, 13 Pa. Super. Ct. 354; *Trout v. Altoona, etc., Electric R. Co.*, 13 Pa. Super. Ct. 17; *Potter v. Scranton R. Co.*, 19 Pa. Super. Ct. 444; *Carson v. Federal St., etc., Pass. R. Co.*, 29 W. N. C. (Pa.) 402; *Wheeler v. Philadelphia Traction Co.*, 150 Pa. St. 187; *Ehrisman v. East Harrisburg City Pass. R. Co.*, 150 Pa. St. 180; *Omslaer v. Pittsburgh, etc., Traction Co.*, 168 Pa. St. 519, 47 Am. St. Rep. 901; *Boehmer v. Pittsburgh, etc., Traction Co.*, 194 Pa. St. 313; *Kern v. Second Ave. Traction Co.*, 194 Pa. St. 75; *Burke v. Union Traction Co.*, 198 Pa. St. 497; *Pieper v. Union Traction Co.*, 202 Pa. St. 100; *Keenan v. Union Traction Co.*, 202 Pa. St. 107; *Haas v. Chester St. R. Co.*, 202 Pa. St. 145; *Carson v. Federal St., etc., R. Co.*, 147 Pa. St. 219,

that the failure of the driver of a vehicle to look for approaching cars before crossing street-railway tracks was not, as a matter of law, contributory negligence.<sup>1</sup> The failure of a person to look for approaching cars before crossing street-railway tracks does not place him in any worse position than if he had looked and seen the car; and therefore if, at the time when he started to drive across the tracks, the car was at such a distance that an attempt to cross after seeing it would not have been contributory negligence, his failure to look for the car will not preclude his recovery.<sup>2</sup>

**Time to Look.** — The driver of a vehicle should look for approaching cars at the time of crossing and when in close proximity to the track; his duty is not performed by looking when a considerable distance from the track, or a considerable time before he attempts to cross.<sup>3</sup>

**c. INJURIES TO PEDESTRIANS — (1) In General.** — The operation of street cars is necessarily attended with considerable danger to pedestrians, and while the owners of street railways are held to due care in the management of their

30 Am. St. Rep. 727; *Darwood v. Union Traction Co.*, 189 Pa. St. 592.

*Tennessee.* — *Nashville, etc., R. Co. v. Norman*, 108 Tenn. 324.

*Wisconsin.* — *Cawley v. La Crosse City R. Co.*, 106 Wis. 239; *Dummer v. Milwaukee Electric R., etc., Co.*, 108 Wis. 589; *Stafford v. Chippewa Valley Electric R. Co.*, 110 Wis. 331; *Boerth v. West Side R. Co.*, 87 Wis. 288; *Thoresen v. La Crosse City R. Co.*, 94 Wis. 129.

*Canada.* — *O'Hearn v. Port Arthur*, 4 Ont. L. Rep. 209.

See also *Davidson v. Denver Tramway Co.*, 4 Colo. App. 283. See, however, *Wilson v. Citizens' St. R. Co.*, 105 Tenn. 74.

**Person Driving Alongside Tracks Attempting to Cross to Other Side of Street.** — *McHugh v. North Jersey St. R. Co.*, (N. J. 1900) 46 Atl. Rep. 782; *O'Hearn v. Port Arthur*, 4 Ont. L. Rep. 209; *Follet v. Toronto St. R. Co.*, 15 Ont. App. 346.

**Person Driving on One Track Attempting to Cross Parallel Track.** — *Fritz v. Detroit Citizens' St. R. Co.*, 105 Mich. 50; *Schlitz v. Nassau Electric R. Co.*, 44 N. Y. App. Div. 542.

**1. Failure to Look Not Negligence per se.** — *United States.* — *Tacoma R. Co. v. Hays*, (C. C. A.) 110 Fed. Rep. 496.

*Illinois.* — *Springfield City R. Co. v. Clark*, 51 Ill. App. 626; *Tri-city R. Co. v. Banker*, 100 Ill. App. 6.

*Indiana.* — *Citizen's St. R. Co. v. Abright*, 14 Ind. App. 433.

*Minnesota.* — *Shea v. St. Paul City R. Co.*, 50 Minn. 395; *Riley v. Minneapolis St. R. Co.*, 80 Minn. 424; *Armstead v. Mendenhall*, 83 Minn. 136.

*New Jersey.* — *Dennis v. North Jersey St. R. Co.*, 64 N. J. L. 439; *Consolidated Traction Co. v. Chenoweth*, (N. J. 1896) 35 Atl. Rep. 1067. See, however, *McHugh v. North Jersey St. R. Co.*, (N. J. 1900) 46 Atl. Rep. 782.

*New York.* — *Morris v. Metropolitan St. R. Co.*, 170 N. Y. 592; *R. F. Stevens Co. v. Brooklyn Heights R. Co.*, 59 N. Y. App. Div. 23; *Dipaolo v. Third Ave. R. Co.*, 55 N. Y. App. Div. 566; *Pyne v. Broadway, etc., R. Co.*, (C. Pl. Gen. T.) 19 N. Y. Supp. 217. See, however, *Schlitz v. Nassau Electric R. Co.*, 44

N. Y. App. Div. 542; *Vonelling v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 301; *Roth v. Metropolitan St. R. Co.*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 213; *Winch v. Third Ave. R. Co.*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 403; *Ward v. Rochester Electric R. Co.*, 63 Hun (N. Y.) 624, 17 N. Y. Supp. 427.

*Washington.* — *Traver v. Spokane St. R. Co.*, 25 Wash. 225. See, however, *Christensen v. Union Trunk Line*, 6 Wash. 75; *Helber v. Spokane St. R. Co.*, 22 Wash. 319.

**Suburban Part of City.** — In *Wosika v. St. Paul City R. Co.*, 80 Minn. 364, where the driver of a vehicle drove upon the street-railway track in the suburban and thinly settled district of a city where the cars were operated at a high rate of speed, without looking for approaching cars, he was held to be guilty of negligence.

**2. Lawler v. Hartford St. R. Co.**, 72 Conn. 74; *Toronto R. Co. v. Gosnell*, 24 Can. Sup. Ct. 582. Compare *Dummer v. Milwaukee Electric R., etc., Co.*, 108 Wis. 589.

**3. Time to Look.** — *Highland Ave., etc., R. Co. v. Maddox*, 100 Ala. 618; *Kelly v. Wakefield, etc., St. R. Co.*, 175 Mass. 331; *Haas v. Chester St. R. Co.*, 202 Pa. St. 145; *Keenan v. Union Traction Co.*, 202 Pa. St. 107; *McPhillips v. Union Traction Co.*, 19 Pa. Super. Ct. 223; *Cupps v. Consolidated Traction Co.*, 13 Pa. Super. Ct. 630; *Brown v. Pittsburg, etc., Traction Co.*, 14 Pa. Super. Ct. 594; *Kern v. Second Ave. Traction Co.*, 194 Pa. St. 75; *Burke v. Union Traction Co.*, 198 Pa. St. 497; *Pieper v. Union Traction Co.*, 202 Pa. St. 100; *Bornscheuer v. Traction Co.*, 30 Pittsb. Leg. J. N. S. (Pa.) 344. Compare *Kelly v. Wakefield, etc., St. R. Co.*, 179 Mass. 542; *Manayunk Boarding, etc., Stable v. Union Traction Co.*, 42 W. N. C. (Pa.) 45; *Tacoma R., etc., Co. v. Hays*, (C. C. A.) 110 Fed. Rep. 496, affirming 106 Fed. Rep. 48; *Merritt v. Foote*, 128 Mich. 367; *Moran v. Detroit, etc., R. Co.*, 124 Mich. 582; *Armstead v. Mendenhall*, 83 Minn. 136; *Schilling v. Metropolitan St. R. Co.*, 47 N. Y. App. Div. 500; *Citizens' Rapid Transit Co. v. Siegrist*, 96 Tenn. 119. See also *South Covington, etc., St. R. Co. v. Enslen*, (Ky. 1897) 38 S. W. Rep. 850.

**Crossing Tracks in Suburbs.** — *Keenan v. Union Traction Co.*, 202 Pa. St. 107.

lines to prevent injury to persons walking on the streets,<sup>1</sup> they are not, when exercising such care, responsible in damages to pedestrians who in a careless, reckless, or absent-minded manner walk suddenly upon the track in front of a moving car and are injured before there is time to stop the car,<sup>2</sup> or who in crossing in front of moving cars are injured solely through accidentally falling on the track.<sup>3</sup> The person in charge of a car with a clear track before him has a right to assume that people will not suddenly undertake to cross in front of it,<sup>4</sup> and if a pedestrian is seen upon the track who is apparently capable of taking care of himself, the person operating the car may assume

1. **Reasonable Care to Avoid Injury Required.** — West Chicago St. R. Co. v. Annis, 165 Ill. 475; Chicago City R. Co. v. Roach, 180 Ill. 174; Wall v. Helena St. R. Co., 12 Mont. 44; Gildea v. Metropolitan St. R. Co., 58 N. Y. App. Div. 528; Reilly v. Brooklyn Heights R. Co., 65 N. Y. App. Div. 453; O'Callaghan v. Metropolitan St. R. Co., 69 N. Y. App. Div. 574; McGuire v. Third Ave. R. Co., 9 N. Y. App. Div. 529; Halliday v. Brooklyn Heights R. Co., 59 N. Y. App. Div. 57; Legare v. Union R. Co., 61 N. Y. App. Div. 202; O'Toole v. Central Park, etc., R. Co., 58 Hun (N. Y.) 609, 12 N. Y. Supp. 347; Heffran v. Brooklyn Heights R. Co., (Brooklyn City Ct. Gen. T.) 8 Misc. (N. Y.) 41; Manahan v. Steinway, etc., R. Co., 55 Hun (N. Y.) 610, 8 N. Y. Supp. 935.

**Starting Standing Car While Pedestrian Is Crossing Track.** — West Chicago St. R. Co. v. Ranstead, 70 Ill. App. 111.

**Increasing Speed of Car While Pedestrian Is Crossing in Front of Car.** — Legare v. Union R. Co., 61 N. Y. App. Div. 202; Fandel v. Third Ave. R. Co., 16 N. Y. App. Div. 426.

**Passing Other Car Discharging or Receiving Passengers.** — Capital Traction Co. v. Lusby, 12 App. Cas. (D. C.) 295; Chicago City R. Co. v. Robinson, 27 Ill. App. 26, affirmed 127 Ill. 1; West Chicago St. R. Co. v. Shiplett, 85 Ill. App. 683; Miller v. St. Paul City R. Co., 42 Minn. 454; Consolidated Traction Co. v. Scott, 58 N. J. L. 682; Doherty v. Troy City R. Co., 91 Hun (N. Y.) 28; Johnson v. Third Ave. R. Co., 69 N. Y. App. Div. 247; Pelletreau v. Metropolitan St. R. Co., 74 N. Y. App. Div. 192.

**Injuries to Men Working in Street.** — Third Ave. R. Co. v. Krausz, (C. C. A.) 112 Fed. Rep. 379; Eddy v. Cedar Rapids, etc., R. Co., 98 Iowa 626; United R., etc., Co. v. Fletcher, 95 Md. 533; Lyons v. Bay Cities Consolidated R. Co., 115 Mich. 114; Laschinger v. St. Paul City R. Co., 84 Minn. 333; Burns v. Second Ave. R. Co., 21 N. Y. App. Div. 521; Lewis v. Binghamton R. Co., 35 N. Y. App. Div. 12; Morrissey v. Westchester Electric R. Co., 18 N. Y. App. Div. 67; Floetl v. Third Ave. R. Co., 10 N. Y. App. Div. 308; Lahey v. Central Park, etc., R. Co., (N. Y. Super. Ct. Gen. T.) 2 Misc. (N. Y.) 537; McKelvey v. Twenty-third St. R. Co., (N. Y. Super. Ct. Tr. T.) 5 Misc. (N. Y.) 424; Schmidt v. Steinway, etc., R. Co., 55 Hun (N. Y.) 496; Owens v. People's Pass. R. Co., 155 Pa. St. 334; Houston City St. R. Co. v. Woodlock, (Tex. Civ. App. 1895) 29 S. W. Rep. 817.

**Flagman at Railroad and Street-railway Crossing.** — D'Or v. Atlantic Ave. R. Co., (Brooklyn City Ct. Gen. T.) 13 N. Y. Supp. 789.

**Municipal Employee.** — O'Connor v. Union R. Co., 67 N. Y. App. Div. 99.

**Backing Car While Pedestrian Is Crossing in Rear.** — Lundy v. Second Ave. R. Co., (C. Pl. Gen. T.) 1 Misc. (N. Y.) 100.

2. **Liability Dependent on Negligence** — California. — Driscoll v. Market St. Cable R. Co., 97 Cal. 553, 33 Am. St. Rep. 203.

Georgia. — Perry v. Macon Consol. St. R. Co., 101 Ga. 400.

Illinois. — Pfeiffer v. Chicago City R. Co., 96 Ill. App. 10.

Kentucky. — Gordon v. Louisville R. Co., (Ky. 1898) 44 S. W. Rep. 972.

Louisiana. — Knoker v. Canal, etc., R. Co., 52 La. Ann. 806.

Massachusetts. — Widmer v. West End St. R. Co., 158 Mass. 49.

Minnesota. — Lydecker v. St. Paul City R. Co., 61 Minn. 414.

New Jersey. — Bageard v. Consolidated Traction Co., 64 N. J. L. 316.

New York. — Mulligan v. Third Ave. R. Co., 61 N. Y. App. Div. 214; Mathison v. Staten Island Midland R. Co., 66 N. Y. App. Div. 610; Kuhn v. Union R. Co., 10 N. Y. App. Div. 195; Ewing v. Atlantic Ave. R. Co., (Brooklyn City Ct. Gen. T.) 11 N. Y. Supp. 626.

Ohio. — Bethel v. Cincinnati St. R. Co., 8 Ohio Cir. Dec. 310, 15 Ohio Cir. Ct. 381.

Pennsylvania. — Sauers v. Union Traction Co., 193 Pa. St. 602.

Texas. — Houston City St. R. Co. v. Farrell, (Tex. Civ. App. 1894) 27 S. W. Rep. 942.

Virginia. — Richmond Traction Co. v. Hildebrand, 98 Va. 22; Trowbridge v. Danville St. Car. Co., (Va. 1894) 19 S. E. Rep. 780.

Wisconsin. — Ryan v. La Crosse City R. Co., 108 Wis. 122.

**Distinction Between Passengers and Pedestrians.** — The distinction between the duty owing to passengers and that owing to ordinary pedestrians is plain. In the one case the relation of carrier and passenger exists, with all the high and special duties which attend that relation; in the other case only the ordinary duty arising from one user of the highway to another exists. Pendleton St. R. Co. v. Shires, 18 Ohio St. 255.

3. **Person Falling on Track.** — Baltimore City Pass. R. Co. v. Cooney, 87 Md. 261; Silberstein v. Houston, etc., R. Co., 117 N. Y. 293; Dorman v. Broadway R. Co., 117 N. Y. 655, 27 N. Y. St. Rep. 841; Fenton v. Second Ave. R. Co., 4 Silv. App. (N. Y.) 380; McCoy v. Milwaukee St. R. Co., 82 Wis. 215.

4. **Person in Charge of Car May Presume that Pedestrians Will Act with Reasonable Care.** — Driscoll v. Market St. Cable R. Co., 97 Cal. 553, 33 Am. St. Rep. 203; Knoker v. Canal, etc., R. Co., 52 La. Ann. 806 (person standing near

that he will leave the track before the car reaches him, and this presumption may be indulged so long as the danger of injuring him does not become imminent.<sup>1</sup> So where a pedestrian is seen approaching the track, the person in charge of a street car has the right to presume that he will stop rather than attempt to cross the track directly in front of the car.<sup>2</sup> Where the danger of injury to a pedestrian from collision with a street car has become imminent, as where a person crossing the tracks in front of a moving car accidentally falls,<sup>3</sup> or where a person is lying unconscious on the track,<sup>4</sup> it is the duty of the driver, motorman, or gripman to use ordinary care to avoid injury to him, as by stopping the car, even though his dangerous predicament has been caused by his contributory negligence; and a failure to use such care will render the company liable.<sup>5</sup> But a mere error of judgment on the part of the operator of the car at a critical moment as to the best means of stopping the car is not such a failure to use reasonable care as will render the street-railway company liable,<sup>6</sup> and in determining whether reasonable care was used to avoid the accident, the danger to passengers which would have resulted from an earlier

track); *Scott v. Third Ave. R. Co.*, 61 Hun (N. Y.) 627, 16 N. Y. Supp. 350 (person standing near track talking); *Sauers v. Union Traction Co.*, 193 Pa. St. 602; *Gunn v. Union R. Co.*, 22 R. I. 321, rehearing denied 22 R. I. 579. See also *Bailey v. Market St. Cable R. Co.*, 110 Cal. 320.

1. *Perry v. Macon Consol. St. R. Co.*, 101 Ga. 400; *Doyle v. West End St. R. Co.*, 161 Mass. 533; *Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 60 Am. Rep. 32. See also *Webb v. Chicago City R. Co.*, 83 Ill. App. 565; *Doyle v. West End St. R. Co.*, 161 Mass. 533.

2. *West Chicago St. R. Co. v. Schwartz*, 93 Ill. App. 387; *Schulte v. New Orleans City, etc.*, R. Co., 44 La. Ann. 509; *Farrar v. New Orleans, etc.*, R. Co., 52 La. Ann. 417; *Bunyan v. Citizens' R. Co.*, 127 Mo. 12; *Hickman v. Nassau Electric R. Co.*, 36 N. Y. App. Div. 376. See also *Handy v. Metropolitan St. R. Co.*, 70 N. Y. App. Div. 26.

3. *Giraldo v. Coney Island, etc.*, R. Co., (Supm. Ct. Gen. T.) 16 N. Y. St. Rep. 774; *Kitay v. Brooklyn, etc.*, R. Co., 23 N. Y. App. Div. 228; *Totarella v. New York, etc.*, R. Co., 53 N. Y. App. Div. 413; *Fenton v. Second Ave. R. Co.*, 56 Hun (N. Y.) 99.

4. *Mentz v. Second Ave. R. Co.*, 3 Abb. App. Dec. (N. Y.) 274.

**Running over Drunken Man on Track.**—In *Werner v. Citizens' R. Co.*, 81 Mo. 368, affirming 11 Mo. App. 601, a street-railway company was held to be liable for the act of a driver in driving upon a man who was lying drunk upon the track, and killing him, where it appeared that the driver saw him, but, supposing the object to be a bundle of grain, made no effort to stop, though he could easily have done so.

Of course, if the person operating the car was not negligent in discovering the presence of such person on the track until too late to stop the car, there can be no recovery. *Stelk v. McNulta*, (C. C. A.) 99 Fed. Rep. 138. See also *Murray v. Forty-second St., etc.*, R. Co., 9 N. Y. App. Div. 610.

5. **Duty When Danger Becomes Imminent.**—*Illinois.*—*Rockford City R. Co. v. Blake*, 74 Ill. App. 175.

*Kentucky.*—*Louisville R. Co. v. Will*, (Ky. 1902) 66 S. W. Rep. 628; *Owensboro City R.*

*Co. v. Hill*, (Ky. 1900) 56 S. W. Rep. 21; *Louisville R. Co. v. Blaydes*, (Ky. 1899) 51 S. W. Rep. 820.

*Maryland.*—*Baltimore Consol. R. Co. v. Rifeowitz*, 89 Md. 338; *Baltimore City Pass. R. Co. v. Cooney*, 87 Md. 261.

*Massachusetts.*—*Doyle v. West End St. R. Co.*, 161 Mass. 533.

*Michigan.*—*Montgomery v. Lansing City Electric R. Co.*, 103 Mich. 46; *McClellan v. Ft. Wayne, etc.*, R. Co., 105 Mich. 101.

*Missouri.*—*Pope v. Kansas City Cable R. Co.*, 99 Mo. 400; *O'Keefe v. St. Louis, etc.*, R. Co., 81 Mo. App. 387; *Bunyan v. Citizens' R. Co.*, 127 Mo. 12; *Levin v. Metropolitan St. R. Co.*, 140 Mo. 624. See also *Zurfluh v. People's R. Co.*, 46 Mo. App. 636.

*New Jersey.*—*Buttelli v. Jersey City, etc.*, Electric R. Co., 59 N. J. L. 302.

*New York.*—*Curtin v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 83.

*Pennsylvania.*—*Coll v. Easton Transit Co.*, 180 Pa. St. 618.

*Tennessee.*—*Bamberger v. Citizens' St. R. Co.*, 95 Tenn. 18, 49 Am. St. Rep. 909.

*Texas.*—*Houston City St. R. Co. v. Woodlock*, (Tex. Civ. App. 1895) 29 S. W. Rep. 817.

*Washington.*—*Burian v. Seattle Electric Co.*, 26 Wash. 606.

*Wisconsin.*—*McCoy v. Milwaukee St. R. Co.*, 88 Wis. 56; *Tesch v. Milwaukee Electric R., etc.*, Co., 108 Wis. 593.

See also *Bailey v. Market St. Cable R. Co.*, 110 Cal. 320.

**The Gathering of a Large Crowd in the Immediate Vicinity of the Tracks** and overflowing them imposes upon the street-railway company's employees the duty of greater care and caution in the running of cars, but does not require the stopping of cars altogether. *Washington, etc.*, R. Co. v. *Wright*, 7 App. Cas. (D. C.) 295.

**Member of Parading Band Walking Close to Track.**—*Montgomery v. Lansing City Electric R. Co.*, 103 Mich. 46.

**Failure to Stop Car After Collision.**—*Weitzman v. Nassau Electric R. Co.*, 33 N. Y. App. Div. 585; *Green v. Metropolitan St. R. Co.*, 42 N. Y. App. Div. 160.

6. *Stabenau v. Atlantic Ave. R. Co.*, 15 N. Y. App. Div. 408 (using brake instead of reversing electric current).

stoppage of the car is to be considered.<sup>1</sup>

(2) *Contributory Negligence* — (a) *Crossing Track*. — A pedestrian crossing the track of a street railway is not bound to use more than ordinary care, or that degree of care which people of ordinarily prudent habits could reasonably be expected to exercise under the circumstances of the case.<sup>2</sup> He is, however, bound to exercise ordinary care and vigilance in avoiding danger,<sup>3</sup> the exact precautions to be taken to avoid injury depending on the particular circumstances.<sup>4</sup> The question as to the existence of contributory negligence is generally one for the jury.<sup>5</sup> It is not contributory negligence for a pedestrian to attempt to cross street-railway tracks in front of a moving car at such a distance that the person in control of the car can, if operating it in a careful and prudent manner, avoid injury to him.<sup>6</sup> On the other hand, if the car is

1. *Burian v. Seattle Electric Co.*, 26 Wash. 606.

2. *Contributory Negligence — Crossing Tracks*. — *Driscoll v. Market St. Cable R. Co.*, 97 Cal. 553, 33 Am. St. Rep. 203; *West Chicago St. R. Co. v. Dougherty*, 89 Ill. App. 362; *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605; *O'Toole v. Central Park, etc., R. Co.*, 58 Hun (N. Y.) 609, 12 N. Y. Supp. 347; *Fenton v. Second Ave. R. Co.*, 56 Hun (N. Y.) 99; *Roberts v. Spokane St. R. Co.*, 23 Wash. 325.

*Sudden Unexpected Peril*. — *Hock v. New York, etc., R. Co.*, 74 N. Y. App. Div. 52.

*Error of Judgment*. — *McClain v. Brooklyn City R. Co.*, 116 N. Y. 459.

*Intoxication*. — The fact that a person injured by the negligence of the driver of a horse car was intoxicated at the time of the accident will not prevent his maintaining an action for damages, unless his intoxication contributed to the injury. *Maguire v. Middlesex R. Co.*, 115 Mass. 239. See also *Bradley v. Second Ave. R. Co.*, 8 Daly (N. Y.) 289.

*Attempt of Mother to Rescue Child*. — *West Chicago St. R. Co. v. Liderman*, 87 Ill. App. 638, *affirmed* 187 Ill. 463.

*Crippled Person*. — *Baltimore Traction Co. v. Wallace*, 77 Md. 435.

3. *Macon, etc., St. R. Co. v. Holmes*, 103 Ga. 655; *North Chicago St. R. Co. v. Martin*, 51 Ill. App. 247; *Ponsano v. St. Charles St. R. Co.*, 52 La. Ann. 245; *McQuade v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 154; *Harvey v. Nassau Electric R. Co.*, 35 N. Y. App. Div. 307; *Brown v. Broadway, etc., R. Co.*, 50 N. Y. Super. Ct. 106; *Lumis v. Philadelphia Traction Co.*, 181 Pa. St. 268; *Burgess v. Salt Lake City R. Co.*, 17 Utah 406; *Redford v. Spokane St. R. Co.*, 9 Wash. 55.

*Person Marching in Procession*. — *Brown v. Broadway, etc., R. Co.*, 50 N. Y. Super. Ct. 106.

4. *Brown v. Wilmington City R. Co.*, 1 Penn. (Del.) 332.

5. *Question for Jury*. — *Driscoll v. Market St. Cable R. Co.*, 97 Cal. 553, 33 Am. St. Rep. 203; *Schneider v. Market St. R. Co.*, 134 Cal. 482; *Wahlgren v. Market St. R. Co.*, 132 Cal. 661, *affirmed on rehearing* 132 Cal. 659; *Chicago City R. Co. v. Wall*, 93 Ill. App. 411; *Canfield v. North Chicago St. R. Co.*, 98 Ill. App. 1; *Connolly v. Trenton Pass. R. Co.*, 56 N. J. L. 700; *Consolidated Traction Co. v. Isley*, 59 N. J. L. 224; *Halliday v. Brooklyn Heights R. Co.*, 59 N. Y. App. Div. 57; *Traver v. Spokane St. R. Co.*, 25 Wash. 225.

6. *Crossing in Front of Moving Cars* — *Calif-*

*ornia*. — *Schneider v. Market St. R. Co.*, 134 Cal. 482.

*Illinois*. — *West Chicago St. R. Co. v. Dedloff*, 92 Ill. App. 547; *West Chicago St. R. Co. v. Foster*, 74 Ill. App. 414.

*Maryland*. — *Baltimore Traction Co. v. Wallace*, 77 Md. 435.

*Massachusetts*. — *Scannell v. Boston El. R. Co.*, 176 Mass. 170; *Coleman v. Lowell, etc., St. R. Co.*, 181 Mass. 591.

*Minnesota*. — *Walker v. St. Paul City R. Co.*, 81 Minn. 404; *Kostuch v. St. Paul City R. Co.*, 78 Minn. 459.

*New Jersey*. — *Consolidated Traction Co. v. Glynn*, 59 N. J. L. 432.

*New York*. — *Mills v. Brooklyn City R. Co.*, (Brooklyn City Ct. Gen. T.) 10 Misc. (N. Y.) 1; *Faurot v. Brooklyn Heights R. Co.*, (Brooklyn City Ct. Gen. T.) 14 Misc. (N. Y.) 398; *Lhowe v. Third Ave. R. Co.*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 612; *Walls v. Rochester R. Co.*, 92 Hun (N. Y.) 581; *Read v. Brooklyn Heights R. Co.*, 32 N. Y. App. Div. 503; *Killen v. Brooklyn Heights R. Co.*, (Supm. Ct. Tr. T.) 31 Misc. (N. Y.) 290; *Aaron v. Second Ave. R. Co.*, 2 Daly (N. Y.) 127; *Baxter v. Second Ave. R. Co.*, 3 Robt. (N. Y.) 510; *Gildea v. Metropolitan St. R. Co.*, 58 N. Y. App. Div. 528; *Lang v. Houston, etc., R. Co.*, 75 Hun (N. Y.) 151; *Wells v. Brooklyn City R. Co.*, 58 Hun (N. Y.) 389; *Cowan v. Third Ave. R. Co.*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 610; *Friedman v. Dry-Dock, etc., R. Co.*, (C. Pl. Gen. T.) 11 N. Y. Supp. 429; *Mackie v. Brooklyn City R. Co.*, (Brooklyn City Ct. Gen. T.) 10 Misc. (N. Y.) 4; *Hoyt v. Metropolitan St. R. Co.*, 73 N. Y. App. Div. 249; *Buckley v. New York, etc., R. Co.*, 73 N. Y. App. Div. 587; *Handy v. Metropolitan St. R. Co.*, 70 N. Y. App. Div. 26; *Dorsch v. Brooklyn Heights R. Co.*, 68 N. Y. App. Div. 222; *Copeland v. Metropolitan St. R. Co.*, 67 N. Y. App. Div. 483; *Cohen v. Metropolitan St. R. Co.*, 63 N. Y. App. Div. 165; *Mitchell v. Third Ave. R. Co.*, 62 N. Y. App. Div. 371; *Schwarzbaum v. Third Ave. R. Co.*, 60 N. Y. App. Div. 274; *Frank v. Metropolitan St. R. Co.*, 58 N. Y. App. Div. 100; *Fandel v. Third Ave. R. Co.*, 162 N. Y. 598, *affirming* 15 N. Y. App. Div. 426; *Sesselmann v. Metropolitan St. R. Co.*, 65 N. Y. App. Div. 484; *Legare v. Union R. Co.*, 61 N. Y. App. Div. 202.

*Pennsylvania*. — *Cleary v. Pittsburgh, etc., Traction Co.*, 179 Pa. St. 526; *Callahan v. Philadelphia Traction Co.*, 184 Pa. St. 425; *McGovern v. Union Traction Co.*, 192 Pa. St. 344; *Henderson v. United Traction Co.*, 202 Pa. St. 527.



in such proximity that it cannot be controlled in time to avoid injury to the pedestrian he is guilty of contributory negligence.<sup>1</sup>

**Duty to Stop, Look, and Listen.** — In *Louisiana* it has been held that the general rule requiring pedestrians crossing the tracks of ordinary railroads to stop, look, and listen for approaching trains<sup>2</sup> applies equally to crossing the tracks of street railways operated by electricity.<sup>3</sup> In most jurisdictions, however, this rule is not recognized to the extent of requiring pedestrians to stop, and in some cases it has been held that even the failure to look and listen before crossing was not as a matter of law contributory negligence.<sup>4</sup> But the general rule undoubtedly is that it is the duty of pedestrians to look and listen for approaching cars before crossing street-railway tracks;<sup>5</sup> and this rule has

*Rhode Island.* — *Swanson v. Union R. Co.*, 22 R. I. 122.

*Washington.* — *Chisholm v. Seattle Electric R. Co.*, 27 Wash. 237.

*Wisconsin.* — *Tesch v. Milwaukee Electric R., etc.*, Co., 108 Wis. 593.

1. *Colorado.* — *Griffith v. Denver Consol. Tramway Co.*, 14 Colo. App. 504.

*District of Columbia.* — *Hurdle v. Washington, etc.*, R. Co., 8 App. Cas. (D. C.) 120.

*Louisiana.* — *Dieck v. New Orleans, etc.*, R. Co., 51 La. Ann. 262.

*Massachusetts.* — *Mathes v. Lowell, etc.*, St. R. Co., 177 Mass. 416.

*Minnesota.* — *Hickey v. St. Paul City R. Co.*, 60 Minn. 119.

*Missouri.* — *Watson v. Mound City St. R. Co.*, 133 Mo. 246.

*New Jersey.* — *Schwanewede v. North Hudson County R. Co.*, 67 N. J. L. 449; *Gilliland v. Middlesex, etc.*, Traction Co., 67 N. J. L. 542.

*New York.* — *Loricko v. Brooklyn Heights R. Co.*, 44 N. Y. App. Div. 628; *Madigan v. Third Ave. R. Co.*, 68 N. Y. App. Div. 123; *Thal v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 794; *Newcomb v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 787; *Lawson v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 824; *May v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 748; *Harvey v. Nassau Electric R. Co.*, 35 N. Y. App. Div. 307; *McQuade v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 154.

*Pennsylvania.* — *Sweeney v. Scranton Traction Co.*, 5 Lack. Leg. N. (Pa.) 86; *McCauley v. Philadelphia Traction Co.*, 13 Pa. Super. Ct. 354; *Blaney v. Electric Traction Co.*, 184 Pa. St. 524; *Walsh v. Hestonville, etc.*, Pass. R. Co., 194 Pa. St. 570; *Watkins v. Union Traction Co.*, 194 Pa. St. 564; *Sullivan v. Consolidated Traction Co.*, 198 Pa. St. 187; *Meyer v. Pittsburg, etc.*, Traction Co., 189 Pa. St. 414.

*Virginia.* — *Richmond Traction Co. v. Hildebrand*, 98 Va. 22.

*Wisconsin.* — *Tesch v. Milwaukee Electric R., etc.*, Co., 108 Wis. 593.

2. **Duty to Stop, Look, and Listen.** — See the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 429 et seq.

3. **Louisiana Rule.** — *Hoelzel v. Crescent City R. Co.*, 49 La. Ann. 1302.

4. *City Electric R. Co. v. Jones*, 61 Ill. App. 183 (attention of pedestrian diverted by run-away); *Chicago City R. Co. v. Robinson*, 127 Ill. o. 11 Am. St. Rep. 87; *Roberts v. Spokane St. R. Co.*, 23 Wash. 325; *Burian v. Seattle*

*Electric Co.*, 26 Wash. 606; *Chisholm v. Seattle Electric R. Co.*, 27 Wash. 237. See also *Robbins v. Springfield St. R. Co.*, 165 Mass. 30. See, however, *Hall v. West End St. R. Co.*, 168 Mass. 461 (person very deaf).

5. **Duty to Look and Listen.** — *California.* — *Bailey v. Market St. Cable R. Co.*, 110 Cal. 320.

*Delaware.* — *Farley v. Wilmington, etc.*, Electric R. Co., 3 Penn. (Del.) 581; *Adams v. Wilmington, etc.*, Electric R. Co., 3 Penn. (Del.) 512.

*Georgia.* — *Cain v. Macon Consol. St. R. Co.*, 97 Ga. 298. See also *Metropolitan St. R. Co. v. Johnson*, 90 Ga. 500.

*Indiana.* — *Young v. Citizens' St. R. Co.*, 148 Ind. 54. See also *Evansville St. R. Co. v. Gentry*, 147 Ind. 408, 62 Am. St. Rep. 421.

*Iowa.* — *Beem v. Tama, etc.*, Electric R., etc., Co., 104 Iowa 563.

*Louisiana.* — *Schulte v. New Orleans City, etc.*, R. Co., 44 La. Ann. 509; *Hoelzel v. Crescent City R. Co.*, 49 La. Ann. 1302; *Canedo v. New Orleans, etc.*, R. Co., 52 La. Ann. 2149; *Dieck v. New Orleans, etc.*, R. Co., 51 La. Ann. 262; *Webster v. New Orleans City, etc.*, R. Co., 51 La. Ann. 299.

*Michigan.* — *McGee v. Consolidated St. R. Co.*, 102 Mich. 107, 47 Am. St. Rep. 507.

*Minnesota.* — *Russell v. Minneapolis St. R. Co.*, 83 Minn. 304; *Terien v. St. Paul City R. Co.*, 70 Minn. 532; *Greengard v. St. Paul City St. R. Co.*, 72 Minn. 181; *Downs v. St. Paul City R. Co.*, 75 Minn. 41 (tracks across sidewalk into car barn). See also *Shea v. St. Paul City R. Co.*, 50 Minn. 395. See, however, *Holmgren v. Twin City Rapid Transit Co.*, 61 Minn. 85.

*Missouri.* — *Lynch v. Metropolitan St. R. Co.*, 112 Mo. 420; *Hickman v. Union Depot R. Co.*, 47 Mo. App. 65.

*New Jersey.* — *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605; *Sheets v. Connolly St. R. Co.*, 54 N. J. L. 518; *Jewett v. Paterson R. Co.*, 62 N. J. L. 424; *McGrath v. North Jersey St. R. Co.*, 66 N. J. L. 312. See, however, *Consolidated Traction Co. v. Haight*, 59 N. J. L. 577.

*New York.* — *Doyle v. Albany R. Co.*, 5 N. Y. App. Div. 601; *Cowan v. Third Ave. R. Co.*, (Supm. Ct. Gen. T.) 16 N. Y. St. Rep. 916; *Healey v. Brooklyn Heights R. Co.*, (Supm. Ct. App. Div.) 45 N. Y. Supp. 393; *Martin v. Third Ave. R. Co.*, 27 N. Y. App. Div. 52; *Hickman v. Nassau Electric R. Co.*, 36 N. Y. App. Div. 376. *Compare Schwarzbaum v. Third Ave. R. Co.*, 60 N. Y. App. Div. 274; *Dollner v. Union R. Co.*, 7 N. Y. App. Div. 283; *Balla v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 27 Misc.

been applied where a person alighting from a car on one track crossed an adjoining track without looking,<sup>1</sup> or alighted from a car upon the parallel track,<sup>2</sup> or where a pedestrian, after waiting for the passage of a car on one track, crossed behind such car and across another track without looking, and was struck by a car on the latter track,<sup>3</sup> or where a person walking behind a wagon moving along one track crossed the other track without looking for an approaching car,<sup>4</sup> or where a person standing between parallel tracks stepped backward upon one track without looking.<sup>5</sup> Where it would not have been contributory negligence to attempt to cross in front of an approaching car if the pedestrian had looked and seen it, his failure to look will not constitute contributory negligence.<sup>6</sup>

Ignorance of the Existence of Tracks may prevent the failure of a pedestrian to look for approaching cars from constituting contributory negligence,<sup>7</sup> but cannot have such effect if he was negligent in not discovering the existence of the tracks.<sup>8</sup>

**Time to Look.** — A pedestrian about to cross street-railway tracks should look for cars when in close proximity to the track.<sup>9</sup> The fact that he looked and saw no car when a considerable distance from the track, for example, before leaving the sidewalk,<sup>10</sup> does not relieve him from the duty of again looking when near the track.<sup>11</sup>

(N. Y.) 775; *Reynolds v. Third Ave. R. Co.*, (C. Pl. Gen. T.) 8 Misc. (N. Y.) 313; *Pyne v. Broadway, etc., R. Co.*, (C. Pl. Gen. T.) 46 N. Y. St. Rep. 662, *affirmed* 138 N. Y. 627; *Mitchell v. Third Ave. R. Co.*, 62 N. Y. App. Div. 371; *D'Oro v. Atlantic Ave. R. Co.*, 129 N. Y. 632.

**Ohio.** — *Lutterbeck v. Toledo Consol. St. R. Co.*, 5 Ohio Cir. Dec. 141, 11 Ohio Cir. Ct. 279; *Bethel v. Cincinnati St. R. Co.*, 8 Ohio Cir. Dec. 310, 15 Ohio Cir. Ct. 381. *Compare Weiser v. Broadway, etc., St. R. Co.*, 6 Ohio Cir. Dec. 215, 10 Ohio Cir. Ct. 14.

**Oregon.** — *Smith v. City R. Co.*, 29 Oregon 539.

**Pennsylvania.** — *Potter v. Scranton R. Co.*, 19 Pa. Super. Ct. 444; *Smith v. Electric Traction Co.*, 6 Pa. Dist. 471; *Carson v. Federal St., etc., R. Co.*, 147 Pa. St. 219, 30 Am. St. Rep. 727; *Nugent v. Philadelphia Traction Co.*, 181 Pa. St. 160; *Watkins v. Union Traction Co.*, 194 Pa. St. 564.

**Texas.** — *Citizens' R. Co. v. Holmes*, 19 Tex. Civ. App. 266; *Citizens R. Co. v. Ford*, 25 Tex. Civ. App. 328. *Compare Dallas Rapid Transit R. Co. v. Elliott*, 7 Tex. Civ. App. 216.

**Wisconsin.** — *Tesch v. Milwaukee Electric R., etc., Co.*, 108 Wis. 593.

See also *Nashville, etc., R. Co.*, 108 Tenn. 324; *Richmond Traction Co. v. Hildebrand*, 98 Va. 22. *Compare Baltimore Consol. R. Co. v. Rifcowitz*, 89 Md. 338.

**Looking Only in One Direction.** — *McGee v. Consolidated St. R. Co.*, 102 Mich. 107, 47 Am. St. Rep. 507.

**Rule of Company Requiring Cars to Stop Does Not Excuse Failure to Look.** — *Doyle v. Albany R. Co.*, 5 N. Y. App. Div. 601.

1. *Creamer v. West End St. R. Co.*, 156 Mass. 320, 32 Am. St. Rep. 456; *Doty v. Detroit Citizens' St. R. Co.*, 129 Mich. 464; *Greengard v. St. Paul City R. Co.*, 72 Minn. 181; *Johnson v. Third Ave. R. Co.*, 69 N. Y. App. Div. 247; *Lutterbeck v. Toledo Consol. St. R. Co.*, 5 Ohio Cir. Dec. 141. *Compare Capital Traction Co. v. Lusby*, 12 App. Cas. (D. C.) 295; *Cohen v.*

*Metropolitan St. R. Co.*, 63 N. Y. App. Div. 165; *Pelletreau v. Metropolitan St. R. Co.*, 74 N. Y. App. Div. 192; *Doherty v. Troy City R. Co.*, 91 Hun (N. Y.) 28; *Bass v. Norfolk R., etc., Co.*, 100 Va. 1.

2. *Creamer v. West End St. R. Co.*, 156 Mass. 320, 32 Am. St. Rep. 456.

3. *McCarthy v. Detroit Citizens' St. R. Co.*, 120 Mich. 400; *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605; *Scott v. Third Ave. R. Co.*, 61 Hun (N. Y.) 627, 16 N. Y. Supp. 350; *Blaney v. Electric Traction Co.*, 184 Pa. St. 524; *Burgess v. Salt Lake City R. Co.*, 17 Utah 406. See also *West Chicago St. R. Co. v. Nilson*, 70 Ill. App. 171; *McNulta v. Norgren*, 90 Ill. App. 491; *Conley v. Albany R. Co.*, 22 N. Y. App. Div. 321; *Schwarzbaum v. Third Ave. R. Co.*, 54 N. Y. App. Div. 164; *Burian v. Seattle Electric Co.*, 26 Wash. 606.

4. *Bethel v. Cincinnati St. R. Co.*, 8 Ohio Cir. Dec. 310.

5. *Bailey v. Market St. Cable R. Co.*, 110 Cal. 320.

6. *Kitay v. Brooklyn, etc., R. Co.*, 23 N. Y. App. Div. 228; *Mentz v. Second Ave. R. Co.*, 3 Abb. App. Dec. (N. Y.) 274, *affirming* 2 Robt. (N. Y.) 356.

7. **Ignorance of Track.** — *Boyer v. St. Paul City R. Co.*, 54 Minn. 127.

8. *Russell v. Minneapolis St. R. Co.*, 83 Minn. 304.

9. **Time to Look.** — *Potter v. Scranton R. Co.*, 19 Pa. Super. Ct. 444; *Blaney v. Electric Traction Co.*, 184 Pa. St. 524.

10. *McGrath v. North Jersey St. R. Co.*, 66 N. J. L. 312; *Hickman v. Nassau Electric R. Co.*, 36 N. Y. App. Div. 326; *Conley v. Albany R. Co.*, 22 N. Y. App. Div. 321. *Compare Curtin v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 22 Misc. (N. Y.) 83, *affirming* (N. Y. City Ct. Gen. T.) 21 Misc. (N. Y.) 788; *McClain v. Brooklyn City R. Co.*, 116 N. Y. 459.

11. *McGee v. Consolidated St. R. Co.*, 102 Mich. 107; *Jewett v. Paterson R. Co.*, 62

**Obstructions to Vision.** — If obstacles temporarily intervene to prevent observation, the pedestrian should delay crossing the track until proper observation can be made,<sup>1</sup> and where there is a permanent obstruction to his vision in his approach to the track, he should look after passing such obstruction.<sup>2</sup>

**Extent of Observation.** — A pedestrian crossing street-railway tracks is required to extend his observation for approaching cars only to the distance within which cars proceeding at the customary and reasonably safe speed would threaten his safety, and is not required to extend his observation to every approaching car, however far distant.<sup>3</sup>

(b) **Walking on Track.** — A person walking on or near the track of a street-railway company and using reasonable care and prudence to avoid injuries is not necessarily guilty of contributory negligence;<sup>4</sup> but one walking on or near street-railway tracks must use reasonable care to discover the approach of cars,<sup>5</sup> and is guilty of contributory negligence if he is injured through his failure to leave the track when he sees a car approaching.<sup>6</sup> In *Pennsylvania* the mere fact that a pedestrian was walking on the track of a street railway has been held to show contributory negligence,<sup>7</sup> and the same rule seems to apply in *Louisiana*.<sup>8</sup>

(c) **Standing On or Near Track.** — While the mere fact that a person when injured was standing on or in close proximity to the track of a street railway does not render him necessarily guilty of contributory negligence,<sup>9</sup> still, when he is in such a position he must use reasonable care to discover the approach of cars and avoid injury from them.<sup>10</sup> This question as to contributory negligence has frequently arisen where men working in streets on or adjacent to street-railway tracks have been injured by passing cars.<sup>11</sup>

N. J. L. 424; *Healey v. Brooklyn Heights R. Co.*, (Supm. Ct. App. Div.) 45 N. Y. Supp. 393. See also *Doherty v. Troy City R. Co.*, 91 Hun (N. Y.) 28.

1. *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605. Compare *McGuire v. Third Ave. R. Co.*, 9 N. Y. App. Div. 529; *Tupper v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 819.

2. *Terien v. St. Paul City R. Co.*, 70 Minn. 532.

3. *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605.

4. **Walking On or Near Track.** — *Shea v. Potrero, etc.*, R. Co., 44 Cal. 414; *Howland v. Union St. R. Co.*, 150 Mass. 86; *Quirk v. Rapid R. Co.*, (Mich. 1902) 90 N. W. Rep. 673; *Buttelli v. Jersey City, etc., Electric R. Co.*, 59 N. J. L. 302; *Ford v. Metropolitan R. Co.*, 4 Ont. L. Rep. 29. Compare *Camden, etc., R. Co. v. Young*, 60 N. J. L. 193.

In *Shea v. Potrero, etc.*, R. Co., 44 Cal. 414, it was said that it was not necessarily contributory negligence for a person "to walk on the track instead of the space by the side of the track. Such person is authorized to walk on the track, he using reasonable care and prudence to avoid injuries, but he is not required to abandon the track in order to avoid possible injuries which may result from the carelessness of the company."

5. *Young v. Citizens' St. R. Co.*, 148 Ind. 54; *Smith v. Crescent City R. Co.*, 47 La. Ann. 833.

6. *Jager v. Coney Island, etc., R. Co.*, 84 Hun (N. Y.) 307.

7. *Penman v. McKeesport, etc., R. Co.*, 201 Pa. St. 247, 31 Pittsb. Leg. J. N. S. (Pa.) 264; *Gilmartin v. Lackawanna Valley Rapid Transit*

*Co.*, 186 Pa. St. 193 (walking on track and frequently looking behind for expected car). See also *Dix v. Ridge Ave. Pass. R. Co.*, 15 Pa. Super. Ct. 350; *Warner v. People's St. R. Co.*, 141 Pa. St. 615 (walking along cleared track to avoid deep snow in the rest of the street).

8. In *Johnson v. Canal, etc., R. Co.*, 27 La. Ann. 53, it was held that to walk on street-railway tracks when there was a convenient and safe sidewalk near was itself negligence. See also *Childs v. New Orleans City R. Co.*, 33 La. Ann. 154.

9. **Standing On or Near Track.** — *G'Sell v. Metropolitan St. R. Co.*, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 387.

**Standing on Track Because of Blockade of Street by Wagons.** — *Hernandez v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 793, reversing (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 853.

**Track Crossing Sidewalk.** — *O'Toole v. Central Park, etc., R. Co.*, 58 Hun (N. Y.) 609, 12 N. Y. Supp. 347.

10. *Miller v. St. Paul City R. Co.*, 42 Minn. 454, holding that there is contributory negligence where one waiting for a car stands between the parallel tracks of a cable railway which are so near together that his danger is apparent on the slightest reflection, and fails to watch for approaching cars on one track.

**Member of Crowd Reading Election Returns.** — *Washington, etc., R. Co. v. Wright*, 7 App. Cas. (D. C.) 295.

11. **Workmen in Streets** — *United States*. — *Third Ave. R. Co. v. Krausz*, (C. C. A.) 112 Fed. Rep. 379.

*Indiana*. — *Young v. Citizens' St. R. Co.*, 148 Ind. 54.

d. INJURIES TO CHILDREN — (1) *Children On or Near Track.* — Street-railway companies are required to exercise due care to avoid injury to children on or near their tracks, and will be liable for injuries resulting from their failure to do so.<sup>1</sup> Thus, the company is liable for injuries where a child goes upon the tracks of a street railway a sufficient distance in advance of an approaching car to enable those in charge thereof, by the exercise of ordinary care, to stop the car before striking him,<sup>2</sup> or where the person in charge of the car fails to keep a proper lookout ahead<sup>3</sup> or runs the car at an excessive rate of

*Iowa.* — Eddy v. Cedar Rapids, etc., R. Co., 93 Iowa 626.

*Michigan.* — Little v. Grand Rapids St. R. Co., 78 Mich. 205; Daly v. Detroit Citizens' St. R. Co., 105 Mich. 193; Lyons v. Bay Cities Consol. R. Co., 115 Mich. 114.

*Minnesota.* — Hafner v. St. Paul City R. Co., 73 Minn. 252.

*Missouri.* — Davies v. People's R. Co., 159 Mo. 1, 67 Mo. App. 598.

*New York.* — Crowley v. Metropolitan St. R. Co., 24 N. Y. App. Div. 101; Bengivenga v. Brooklyn Heights R. Co., 48 N. Y. App. Div. 515; Dipaolo v. Third Ave. R. Co., 55 N. Y. App. Div. 566; Weingarten v. Metropolitan St. R. Co., 52 N. Y. App. Div. 364; O'Connor v. Union R. Co., 67 N. Y. App. Div. 99; Wells v. Brooklyn Heights R. Co., 67 N. Y. App. Div. 212, affirming (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 44; Lewis v. Binghamton R. Co., 35 N. Y. App. Div. 12; Burns v. Second Ave. R. Co., 21 N. Y. App. Div. 521; Stastney v. Second Ave. R. Co., 61 N. Y. Super. Ct. 104; Lahey v. Central Park, etc., R. Co., (N. Y. Super. Ct. Gen. T.) 2 Misc. (N. Y.) 537.

*Pennsylvania.* — Ferguson v. Philadelphia Traction Co., 9 Pa. Co. Ct. 147; Owens v. People's Pass. R. Co., 155 Pa. St. 334.

*Texas.* — Houston City St. R. Co. v. Woodlock, (Tex. Civ. App. 1895) 29 S. W. Rep. 817.

*Municipal Employees.* — Dipaolo v. Third Ave. R. Co., 55 N. Y. App. Div. 566; O'Connor v. Union R. Co., 67 N. Y. App. Div. 99.

*Flagman at Railroad and Street-railway Crossing.* — D'Oro v. Atlantic Ave. R. Co., (Brooklyn City Ct. Gen. T.) 13 N. Y. Supp. 789.

1. *Injuries to Children — Connecticut.* — Budd v. Meriden Electric R. Co., 69 Conn. 272; Murphy v. Derby St. R. Co., 73 Conn. 249.

*Louisiana.* — Barksdull v. New Orleans, etc., R. Co., 23 La. Ann. 180.

*Maryland.* — Baltimore City Pass. R. Co. v. Cooney, 87 Md. 261.

*Massachusetts.* — Rosenberg v. West End St. R. Co., 168 Mass. 561.

*Missouri.* — Burnstein v. Cass Ave., etc., R. Co., 56 Mo. App. 45; Levin v. Metropolitan St. R. Co., 140 Mo. 624.

*New York.* — Gumby v. Metropolitan St. R. Co., 171 N. Y. 635; Wihnyk v. Second Ave. R. Co., 14 N. Y. App. Div. 515; Corcoran v. New York El. R. Co., 19 Hun (N. Y.) 368.

*Pennsylvania.* — Beard v. Reading City R. Co., 39 W. N. C. (Pa.) 356; Citizens' Pass. R. Co. v. Foxley, 107 Pa. St. 537.

*Texas.* — Austin Rapid-Transit R. Co. v. Cullen, (Tex. Civ. App. 1895) 30 S. W. Rep. 578; Gutierrez v. Laredo Electric, etc., Co., (Tex. Civ. App. 1898) 45 S. W. Rep. 310.

*Wisconsin.* — Wills v. Ashland Light, etc., Co., 108 Wis. 255 (child nearly fourteen years

old); Ryan v. La Crosse City R. Co., 108 Wis. 122; Dahl v. Milwaukee City R. Co., 62 Wis. 652.

2. *California.* — Fox v. Oakland Consol. St. R. Co., 118 Cal. 55, 62 Am. St. Rep. 216.

*Illinois.* — Chicago City R. Co. v. Tuohy, 196 Ill. 410, affirming 95 Ill. App. 314.

*Indiana.* — Elwood Electric St. R. Co. v. Ross, 26 Ind. App. 258; Citizens St. R. Co. v. Hamer, 29 Ind. App. 426.

*Kansas.* — Consolidated City, etc., R. Co. v. Carlson, 58 Kan. 62.

*Missouri.* — Czezewzka v. Benton-Bellefontaine R. Co., 121 Mo. 201.

*New York.* — Fullerton v. Metropolitan St. R. Co., 170 N. Y. 592, affirming 63 N. Y. App. Div. 1; Griffiths v. Metropolitan St. R. Co., 63 N. Y. App. Div. 86, reversing (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 289; Huerzeler v. Central, etc., R. Co., (C. Pl.) 1 Misc. (N. Y.) 136; Mallard v. Ninth Ave. R. Co., 15 Daly (N. Y.) 376; Block v. Harlem Bridge, etc., R. Co., 55 Hun (N. Y.) 607, 9 N. Y. Supp. 164; Tholen v. Brooklyn City R. Co., (Brooklyn City Ct. Gen. T.) 10 Misc. (N. Y.) 283; Timony v. Brooklyn City, etc., R. Co., (Brooklyn City Ct. Gen. T.) 10 Misc. (N. Y.) 261. Compare Griffith v. Metropolitan St. R. Co., (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 289 (child eight years old).

*Pennsylvania.* — Jones v. United Traction Co., 201 Pa. St. 344; Nolder v. McKeesport, etc., R. Co., 201 Pa. St. 169.

*Texas.* — San Antonio St. R. Co. v. Mechler, 87 Tex. 628, affirming (Tex. Civ. App. 1894) 29 S. W. Rep. 202.

*West Virginia.* — Sample v. Consolidated Light, etc., Co., 50 W. Va. 472.

A motorman of an electric car approaching places where he has reason to expect children are at play must use a high degree of watchfulness. Sample v. Consolidated Light, etc., Co., 50 W. Va. 472. See also Berger County Traction Co. v. Heitman, 61 N. J. L. 682.

*Children Coasting Across Track.* — The duty of watchfulness rests upon the driver of a street car approaching a street crossing where he has reason to suppose that young children may be engaged in coasting or sliding down a neighboring hill and across the car track, even though such conduct on the part of the children is unlawful. Strutzel v. St. Paul City R. Co., 47 Minn. 543.

3. *Failure to Keep Proper Lookouts — District of Columbia.* — Reiners v. Washington, etc., R. Co., 9 App. Cas. (D. C.) 19.

*Kansas.* — Consolidated City, etc., R. Co. v. Carlson, 58 Kan. 62.

*Massachusetts.* — Collins v. South Boston R. Co., 142 Mass. 301, 56 Am. Rep. 675.

*Minnesota.* — Strutzel v. St. Paul City R.

speed,<sup>1</sup> or where the appliances for stopping the car are defective.<sup>2</sup> Where children too young to appreciate the danger are seen by the person in charge of a car on or approaching the track, such person is not justified in presuming that they will leave the track if thereon, or will not go in front of the car if approaching the track, but he should bring the car under control so as to avoid injury to them in either case.<sup>3</sup> On the other hand, a street-railway company cannot be held liable for injuries to children occurring without any negligence on its part,<sup>4</sup> as where a child suddenly runs upon the track

Co., 47 Minn. 543; *Weissner v. St. Paul City R. Co.*, 47 Minn. 468.

*Missouri*.—*Rosenkranz v. Lindell R. Co.*, 108 Mo. 9, 32 Am. St. Rep. 588; *Senn v. Southern R. Co.*, 108 Mo. 152. *Compare Boland v. Missouri R. Co.*, 36 Mo. 484.

*New Jersey*.—*Bergen County Traction Co. v. Heitman*, 61 N. J. L. 682.

*New York*.—*Bahrenburgh v. Brooklyn City, etc., R. Co.*, 56 N. Y. 652; *Nugent v. Metropolitan St. R. Co.*, 17 N. Y. App. Div. 582; *Adams v. Metropolitan St. R. Co.*, 60 N. Y. App. Div. 188; *Agnew v. Brooklyn City R. Co.*, (Brooklyn City Ct. Gen. T.) 24 N. Y. St. Rep. 744; *Levy v. Dry-Dock, etc., R. Co.*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 485; *Ehrman v. Brooklyn City R. Co.*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 336; *Hyland v. Yonkers R. Co.*, 51 Hun (N. Y.) 643, 4 N. Y. Supp. 305, *affirmed* 119 N. Y. 612; *Mason v. Atlantic Ave. R. Co.*, (Brooklyn City Ct. Gen. T.) 4 Misc. (N. Y.) 291; *Keenan v. Brooklyn City R. Co.*, (Brooklyn City Ct. Gen. T.) 8 Misc. (N. Y.) 601; *Jones v. Brooklyn Heights R. Co.*, (Brooklyn City Ct. Gen. T.) 10 Misc. (N. Y.) 543; *Giraldo v. Coney Island, etc., R. Co.*, 62 Hun (N. Y.) 620, 16 N. Y. Supp. 774.

*Pennsylvania*.—*Schnur v. Citizens' Traction Co.*, 153 Pa. St. 29, 34 Am. St. Rep. 680; *Johnson v. Reading City Pass. R. Co.*, 160 Pa. St. 647, 40 Am. St. Rep. 752; *Evers v. Philadelphia Traction Co.*, 176 Pa. St. 376, 53 Am. St. Rep. 674; *Reilley v. Philadelphia Traction Co.*, 176 Pa. St. 335; *Kroesen v. New Castle Electric St. R. Co.*, 198 Pa. St. 26; *Jones v. United Traction Co.*, 201 Pa. St. 344; *Nolder v. McKeesport, etc., R. Co.*, 201 Pa. St. 169.

*Texas*.—*San Antonio St. R. Co. v. Cail-loutte*, 79 Tex. 341.

*Washington*.—*Mitchell v. Tacoma R., etc., Co.*, 9 Wash. 120.

*Wisconsin*.—*Slensby v. Milwaukee St. R. Co.*, 95 Wis. 179.

1. *Excessive Speed*.—*Quincy Horse R., etc., Co. v. Gnuse*, 38 Ill. App. 212; *Barksdull v. New Orleans, etc., R. Co.*, 23 La. Ann. 180; *Reed v. Minneapolis St. R. Co.*, 34 Minn. 557; *Murray v. Paterson R. Co.*, 61 N. J. L. 301; *Adams v. Nassau Electric R. Co.*, 51 N. Y. App. Div. 241; *Pendril v. Second Ave. R. Co.*, (N. Y. Super. Ct. Gen. T.) 43 How. Pr. (N. Y.) 399; *Ehrman v. Brooklyn City R. Co.*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 336; *Wallace v. Suburban R. Co.*, 26 Oregon 174; *Hedin v. Suburban R. Co.*, 26 Oregon 155; *Buente v. Pittsburg, etc., Traction Co.*, 2 Pa. Super. Ct. 185; *Hooper v. United Traction Co.*, 17 Pa. Super. Ct. 638; *Nolder v. McKeesport, etc., R. Co.*, 201 Pa. St. 169.

2. *Dintruff v. Rochester City, etc., R. Co.*, 57 Hun (N. Y.) 585, 10 N. Y. Supp. 402.

3. *Children Too Young to Appreciate Danger*.—*Illinois*.—*South Chicago City R. Co. v. Kin-nare*, 96 Ill. App. 210.

*Indiana*.—*Citizens St. R. Co. v. Hamer*, 29 Ind. App. 426.

*Louisiana*.—*Nelson v. Crescent City R. Co.*, 49 La. Ann. 491.

*Missouri*.—*Winters v. Kansas City Cable R. Co.*, 99 Mo. 509, 17 Am. St. Rep. 591.

*New York*.—*Muller v. Brooklyn Heights R. Co.*, 18 N. Y. App. Div. 177; *Howell v. Rochester R. Co.*, 24 N. Y. App. Div. 502 (child five years old). *Compare Griffith v. Metropolitan St. R. Co.*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 289 (child eight years old).

*Ohio*.—*Colter v. Cincinnati St. R. Co.*, 9 Ohio Cir. Dec. 865, 18 Ohio Cir. Ct. 382 (child three and a half years old).

*Pennsylvania*.—*Thompson v. United Traction Co.*, 193 Pa. St. 555 (child ten years old); *Kroesen v. New Castle Electric St. R. Co.*, 198 Pa. St. 26 (child four years old); *Jones v. United Traction Co.*, 201 Pa. St. 344 (child two years old); *Woekner v. Erie Electric Motor Co.*, 176 Pa. St. 451 (child nearly four years old); *Oster v. Schuylkill Traction Co.*, 195 Pa. St. 320. *Compare Fleishman v. Never-sink Mountain R. Co.*, 174 Pa. St. 510 (child six years old standing near track); *Flanagan v. People's Pass. R. Co.*, 163 Pa. St. 102 (child seven and a half years old); *Philadelphia City Pass. R. Co. v. Henrice*, 92 Pa. St. 431, 37 Am. Rep. 699.

*Tennessee*.—*Bamberger v. Citizens' St. R. Co.*, 95 Tenn. 18, 49 Am. St. Rep. 909.

*Texas*.—*Galveston City R. Co. v. Hewitt*, 67 Tex. 473, 60 Am. Rep. 32 (child nineteen months old); *San Antonio St. R. Co. v. Mech-ler*, 87 Tex. 628, *affirming* (Tex. Civ. App. 1894) 29 S. W. Rep. 202.

*Washington*.—*Mitchell v. Tacoma R., etc., Co.*, 9 Wash. 120.

See also *Mason v. Minneapolis St. R. Co.*, 54 Minn. 216.

4. *Schlenks v. Central Pass. R. Co.*, (Ky. 1893) 23 S. W. Rep. 589; *Klein v. Crescent City R. Co.*, 23 La. Ann. 729; *O'Connor v. Boston, etc., R. Corp.*, 135 Mass. 352; *Mes-senger v. Dennie*, 137 Mass. 197, 50 Am. Rep. 295; *Aiken v. Holyoke St. R. Co.*, 180 Mass. 8; *Boland v. Missouri R. Co.*, 36 Mo. 484; *Maschek v. St. Louis R. Co.*, 71 Mo. 276; *Graham v. Consolidated Traction Co.*, 64 N. J. L. 10; *Wolf v. Houston, etc., R. Co.*, 50 Hun (N. Y.) 603, 2 N. Y. Supp. 787, *affirmed* 130 N. Y. 638; *Jaquinto v. Broadwav, etc., R. Co.*, (N. Y. Super. Ct. Gen. T.) 2 Misc. (N. Y.) 174; *Foy v. Toledo Consol. St. R. Co.*, 6 Ohio Cir. Dec. 396, 10 Ohio Cir. Ct. 151; *Pitcher v. People's St. R. Co.*, 154 Pa. St. 560; *Dallas City R. Co. v. Beeman*, 74 Tex. 291.

immediately in front of an approaching car, and his presence could not have been discovered in time to have avoided striking him.<sup>1</sup>

(2) *Children on Cars.*—The question of the liability of a street-railway company for injuries to children riding on its cars but not in the relation of passengers has frequently arisen. It is a fundamental principle that a street-railway company is not liable for injuries to children upon its cars unless it has been guilty of a breach of duty;<sup>2</sup> and such a company is under no obligation to guard its cars while in operation to prevent children from boarding them and jumping from them.<sup>3</sup> So cars left temporarily standing in the street are not regarded as dangerous machines, attractive to children, within the intent of the turntable doctrine,<sup>4</sup> and the company is under no obligation

See also *Smith v. Kansas City El. R. Co.*, 61 Kan. 862, 60 Pac. Rep. 1059; *Roller v. Sutter St. R. Co.*, 66 Cal. 230.

1. *Georgia.*—*Perry v. Macon Consol. St. R. Co.*, 101 Ga. 400.

*Illinois.*—*Chicago West Div. R. Co. v. Ryan*, 131 Ill. 474; *Rack v. Chicago City R. Co.*, 173 Ill. 289, *affirming* 69 Ill. App. 656; *West Chicago St. R. Co. v. Camp*, 46 Ill. App. 503; *Finley v. West Chicago St. R. Co.*, 90 Ill. App. 368.

*Indiana.*—*Bonham v. Citizens St. R. Co.*, 158 Ind. 106; *Citizens St. R. Co. v. Carey*, 56 Ind. 396.

*Louisiana.*—*Hearn v. St. Charles St. R. Co.*, 34 La. Ann. 160; *Gallaher v. Crescent City R. Co.*, 37 La. Ann. 288; *Gannon v. New Orleans City, etc., R. Co.*, 48 La. Ann. 1002; *Culbertson v. Crescent City R. Co.*, 48 La. Ann. 1376; *McLaughlin v. New Orleans, etc., R. Co.*, 48 La. Ann. 23; *Sciortino v. Crescent City R. Co.*, 49 La. Ann. 7; *Campbell v. New Orleans City R. Co.*, 104 La. 183; *Palmisano v. New Orleans City R. Co.*, 108 La. 243; *O'Rourke v. New Orleans City, etc., R. Co.*, 51 La. Ann. 755.

*Missouri.*—*Maschek v. St. Louis R. Co.*, 71 Mo. 276; *Winters v. Kansas City Cable R. Co.*, 99 Mo. 509, 17 Am. St. Rep. 591; *Kennedy v. St. Louis R. Co.*, 43 Mo. App. 1.

*New Jersey.*—*Graham v. Consolidated Traction Co.*, 64 N. J. L. 10; *Baier v. Camden, etc., R. Co.*, 68 N. J. L. 42.

*New York.*—*Dorman v. Broadway R. Co.*, 117 N. Y. 655, 27 N. Y. St. Rep. 841; *Fenton v. Second Ave. R. Co.*, 126 N. Y. 625; *Manahan v. Steinway, etc., R. Co.*, 125 N. Y. 760, 35 N. Y. St. Rep. 813; *Flynn v. Metropolitan St. R. Co.*, 10 N. Y. App. Div. 258; *Weitzman v. Nassau Electric R. Co.*, 40 N. Y. App. Div. 615; *Adams v. Nassau Electric R. Co.*, 41 N. Y. App. Div. 334; *Hirschman v. Dry Dock, etc., R. Co.*, 46 N. Y. App. Div. 621; *Baker v. Eighth Ave. R. Co.*, 62 Hun (N. Y.) 39; *Jaquinto v. Broadway, etc., R. Co.*, (N. Y. Super. Ct. Gen. T.) 2 Misc. (N. Y.) 174; *Ogier v. Albany R. Co.*, 88 Hun (N. Y.) 486; *Bello v. Metropolitan St. R. Co.*, (N. Y. Super. Ct. Tr. T.) 14 Misc. (N. Y.) 279; *Greenberg v. Third Ave. R. Co.*, 35 N. Y. App. Div. 619; *Gordon v. Second Ave. R. Co.*, (Supm. Ct. App. Div.) 57 N. Y. Supp. 298.

*Ohio.*—*Foy v. Toledo Consol. St. R. Co.*, 3 Ohio Dec. 22.

*Pennsylvania.*—*Chilton v. Central Traction Co.*, 152 Pa. St. 425; *Funk v. Electric Traction Co.*, 175 Pa. St. 559; *Moss v. Philadelphia Traction Co.*, 180 Pa. St. 389; *Kline v. Electric Traction Co.*, 181 Pa. St. 276; *Kierzenkowski*

*v. Philadelphia Traction Co.*, 184 Pa. St. 459; *Mulcahy v. Electric Traction Co.*, 185 Pa. St. 427; *Callary v. Easton Transit Co.*, 185 Pa. St. 176; *Fletcher v. Scranton Traction Co.*, 185 Pa. St. 147; *Hunter v. Consolidated Traction Co.*, 193 Pa. St. 557; *Miller v. Union Traction Co.*, 198 Pa. St. 639.

*Virginia.*—*Trumbo v. City St. Car Co.*, 89 Va. 780.

*Wisconsin.*—*Holdridge v. Mendenhall*, 108 Wis. 1; *Tishacek v. Milwaukee Electric R., etc., Co.*, 110 Wis. 417.

In *Bulger v. Albany R. Co.*, 42 N. Y. 459, the evidence tended to show that the driver of a street car was on the lookout and kept a very close watch on the track and all obstructions; but a child approached the car diagonally from the rear and fell under it, and the hind wheel passed over her, killing her instantly. The driver stood on the front platform and could not see the position of the child. It was held that a nonsuit was properly allowed.

*Child Falling on Track.*—*Lavin v. Second Ave. R. Co.*, 12 N. Y. App. Div. 381; *Stabenau v. Atlantic Ave. R. Co.*, 155 N. Y. 511, *reversing* (Supm. Ct. Gen. T.) 34 N. Y. Supp. 1149; *De Ioia v. Metropolitan St. R. Co.*, 37 N. Y. App. Div. 455.

*Child Suddenly Stopping in Crossing Track.*—*Frank v. Metropolitan St. R. Co.*, 44 N. Y. App. Div. 243.

3. *Children on Cars but Not Passengers.*—*North Chicago St. R. Co. v. Thurston*, 43 Ill. App. 587 (car running off track); *Taylor v. South Covington, etc., St. R. Co.*, (Ky. 1892) 20 S. W. Rep. 275; *Lott v. New Orleans City, etc., R. Co.*, 37 La. Ann. 337; *Palmisano v. New Orleans City R. Co.*, 108 La. 243 (catching and lecturing trespassing child); *Siack v. Northern Cent. R. Co.*, 92 Md. 213; *Omaha St. R. Co. v. Baker*, 44 Neb. 511.

3. *Jefferson v. Birmingham R., etc., Co.*, 116 Ala. 294; *Hagestrom v. West Chicago St. R. Co.*, 78 Ill. App. 574; *Nussebaum v. Louisville R. Co.*, (Ky. 1900) 57 S. W. Rep. 249; *Bishop v. Union R. Co.*, 14 R. I. 314, 51 Am. Rep. 386.

In *Chicago West Div. R. Co. v. Hair*, 57 Ill. App. 587, *Waterman, J.*, said: "Unquestionably passenger cars as well as teams of all kinds do afford an enticement to children to jump on, 'hitch on,' make use of the vehicle in play, but we are aware of no rule making it the duty of those in charge of cars or carriages to be all the while so stationed that boys cannot jump or hitch thereon in mere sport."

4. *Kaumeier v. City Electric R. Co.*, 116 Mich. 306, 72 Am. St. Rep. 525. See also the title

to prevent children from playing on them.<sup>1</sup> Persons in charge of street cars may be guilty of negligence rendering the company liable where they permit children to get on and off the cars while in motion, without any effort to restrain them from such acts.<sup>2</sup> So where children are riding on a street car, the persons in charge of the car must use reasonable diligence to avoid injury to them though they are trespassers, and for injuries resulting from their failure to do so the company will be liable;<sup>3</sup> and where a child of tender years is in a dangerous position upon a street car, though without permission, the failure of those in charge of the car to remove the child from such position may constitute negligence rendering the company liable.<sup>4</sup> These principles have been rigidly applied where the person in charge of a car compelled a child to get off while the car was in motion,<sup>5</sup> and where, by motions indicating an intention to administer corporal punishment, he frightened the child so that it jumped or fell from the car.<sup>6</sup> On the other hand, the company is not liable where a child stealing a ride on a street car is injured without any fault on the part of those in charge thereof,<sup>7</sup> as where he rides voluntarily, and unnecessarily jumps from the car while in motion.<sup>8</sup>

(3) *Contributory Negligence* — (a) *of Child*. — The general rules as to contributory negligence of children, which have been fully stated in another title,<sup>9</sup> are applicable in case of injuries by street cars. Thus, contributory negligence of children *sui juris* will prevent recovery for injuries,<sup>10</sup> but children of tender years have been held to be as a matter of law incapable of contributory negligence,<sup>11</sup> and the same degree of care on their part is not

**TURNABLES.** And see generally the title NEGLIGENCE, vol. 21, pp. 473-475.

1. *George v. Los Angeles R. Co.*, 126 Cal. 357, 77 Am. St. Rep. 184; *Gay v. Essex Electric St. R. Co.*, 159 Mass. 238, 38 Am. St. Rep. 415; *Kaumeier v. City Electric R. Co.*, 116 Mich. 306, 72 Am. St. Rep. 529. See also *Taylor v. South Covington, etc., St. R. Co.*, (Ky. 1892) 20 S. W. Rep. 275; *Siack v. Northern Cent. R. Co.*, 92 Md. 213.

2. *Pueblo Electric St. R. Co. v. Sherman*, 25 Colo. 114; *Wynn v. City, etc., R. Co.*, 91 Ga. 344.

3. *Blackmore v. Toronto St. R. Co.*, 38 U. C. Q. B. 172. See also *Muelhausen v. St. Louis R. Co.*, 91 Mo. 332; *Buck v. People's St. R., etc., Light, etc., Co.*, 108 Mo. 179.

4. *Pittsburg, etc., Pass. R. Co. v. Caldwell*, 74 Pa. St. 421; *Levin v. Second Ave. Traction Co.*, 201 Pa. St. 58, *reaffirming* 194 Pa. St. 156 (child five years old riding on platform of car).

5. *Compelling Child to Alight While Car in Motion*. — *North Chicago City R. Co. v. Gastka*, 128 Ill. 613; *Jackson v. St. Louis South Western R. Co.*, 52 La. Ann. 1706; *McCahill v. Detroit City R. Co.*, 96 Mich. 156; *Barre v. Reading City Pass. R. Co.*, 155 Pa. St. 170; *Hestonville, etc., R. Co. v. Biddle*, (Pa. 1889) 16 Atl. Rep. 488; *Washington, etc., Electric R. Co. v. Quayle*, 95 Va. 741; *Hart v. West Side R. Co.*, 86 Wis. 483. See also *Day v. Brooklyn City R. Co.*, 12 Hun (N. Y.) 435.

A child riding on the platform of a railroad car without payment of fare is a trespasser; but this fact will not exempt the company from payment of damages if its driver ejects him in a manner which endangers life and limb, as by compelling him to jump backward from the platform while the car is in motion. *Biddle v. Hestonville, etc., Pass. R. Co.*, 112 Pa. St. 551.

6. *Hagerstrom v. West Chicago St. R. Co.*,

67 Ill. App. 63 (spitting and striking at child); *McCann v. Sixth Ave. R. Co.*, 117 N. Y. 505, 15 Am. St. Rep. 539; *Ansteth v. Buffalo R. Co.*, (Buffalo Super. Ct. Gen. T.) 9 Misc. (N. Y.) 419, *affirmed* 145 N. Y. 210, 45 Am. St. Rep. 607; *Hogan v. Central Park, etc., R. Co.*, 58 N. Y. Super. Ct. 322; *Mt. Adams, etc., R. Co. v. Doherty*, 6 Ohio Cir. Dec. 810, 8 Ohio Cir. Ct. 349.

7. *Chave v. New York, etc., R. Co.*, 48 Hun (N. Y.) 620, 1 N. Y. Supp. 262 (child falling from car); *Finley v. Hudson Electric R. Co.*, 64 Hun (N. Y.) 373; *Marks v. Rochester R. Co.*, 41 N. Y. App. Div. 66; *Pope v. United Traction Co.*, 30 Pittsb. Leg. J. N. S. (Pa.) 62.

8. *Hogan v. Central Park, etc., R. Co.*, 124 N. Y. 647, *reversing* 58 N. Y. Super. Ct. 322; *Hestonville, etc., Pass. R. Co. v. Kelley*, 102 Pa. St. 115; *Wrasse v. Citizens Traction Co.*, 146 Pa. St. 417; *Bishop v. Union R. Co.*, 14 R. I. 314, 51 Am. Rep. 386.

9. *Contributory Negligence*. — See the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 405 *et seq.*

10. *George v. Los Angeles R. Co.*, 126 Cal. 357, 77 Am. St. Rep. 184; *Consolidated City, etc., R. Co. v. Wyatt*, 59 Kan. 772, 52 Pac. Rep. 98 (child eleven years old); *Taylor v. South Covington, etc., St. R. Co.*, (Ky. 1892) 20 S. W. Rep. 275; *Mullen v. Springfield St. R. Co.*, 164 Mass. 450; *North Hudson County R. Co. v. Flanagan*, 57 N. J. L. 696 (boy nine years old); *Fitzhenry v. Consolidated Traction Co.*, 64 N. J. L. 674; *Muller v. Brooklyn Heights R. Co.*, 18 N. Y. App. Div. 177; *Griffith v. Metropolitan St. R. Co.*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 289 (child eight years old). Compare *Pearson v. Union R. Co.*, 14 Mo. App. 579.

11. *Chicago West Div. R. Co. v. Ryan*, 131 Ill. 474 (child seventeen months old); *Elwood Electric St. R. Co. v. Ross*, 26 Ind. App. 258 (child four years of age).

required as is required of adults, but only such care is to be demanded of them as may usually be expected of children of similar age and discretion.<sup>1</sup>

**Particular Applications of Doctrine.** — A child of immature years is not necessarily negligent in crossing the tracks of a street railway without looking for approaching cars,<sup>2</sup> or in passing in front of a moving car of which it is aware,<sup>3</sup> or in walking on a street-railway track,<sup>4</sup> or in standing on or near tracks,<sup>5</sup> or in playing in the street.<sup>6</sup>

(b) **Of Parents.** — As heretofore shown in another title in this work, the decisions are conflicting on the question whether, in case of injuries to chil-

1. *Colorado.* — Pueblo Electric St. R. Co. v. Sherman, 25 Colo. 114.

*Illinois.* — Quincy Horse R., etc., Co. v. Gnuse, 38 Ill. App. 212; Chicago City R. Co. v. Tuohy, 196 Ill. 410, *affirming* 95 Ill. App. 314; West Chicago St. R. Co. v. Stoltenberg, 62 Ill. App. 420 (child nine years old); East St. Louis Electric St. R. Co. v. Burns, 77 Ill. App. 529 (child between eight and nine years old).

*Indiana.* — Citizens' St. R. Co. v. Hamer, 29 Ind. App. 426 (child seven years old).

*Kentucky.* — Louisville R. Co. v. Phillips, (Ky. 1900) 58 S. W. Rep. 995.

*New York.* — McCann v. Sixth Ave. R. Co., 117 N. Y. 505, 15 Am. St. Rep. 539; Shea v. Sixth Ave. R. Co., 62 N. Y. 180, 20 Am. Rep. 480; Block v. Harlem Bridge, etc., R. Co., (Supm. Ct. Gen. T.) 9 N. Y. Supp. 164 (child seven years old); Goldstein v. Dry Dock, etc., R. Co., (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 200.

*Oregon.* — Wallace v. Suburban R. Co., 26 Oregon 174.

*Washington.* — Roberts v. Spokane St. R. Co., 23 Wash. 325 (child ten years old riding on bicycle).

*Wisconsin.* — Wills v. Ashland Light, etc., R. Co., 108 Wis. 255.

2. **Child Crossing Track Without Looking for Cars** — *Connecticut.* — Murphy v. Derby St. R. Co., 73 Conn. 249 (child six years old).

*District of Columbia.* — Reiners v. Washington, etc., R. Co., 9 App. Cas. (D. C.) 19 (child three and a half years old).

*Illinois.* — Chicago City R. Co. v. Wilcox, 138 Ill. 370 (child six years old); Quincy Horse R., etc., Co. v. Gnuse, 38 Ill. App. 212, *reversed* on another point 137 Ill. 264 (child nearly seven years old).

*Indiana.* — Citizens' St. R. Co. v. Hamer, 29 Ind. App. 426 (child seven years old).

*Kansas.* — Consolidated City, etc., R. Co. v. Carlson, 58 Kan. 62 (child ten years old); Consolidated City, etc., R. Co. v. Wyatt, 59 Kan. 772, 52 Pac. Rep. 98 (girl eleven years old).

*Kentucky.* — Louisville R. Co. v. Phillips, (Ky. 1900) 58 S. W. Rep. 995 (child twelve years old).

*Massachusetts.* — Howland v. Union St. R. Co., 150 Mass. 86 (child twelve and a half years old); Rosenberg v. West End St. R. Co., 168 Mass. 561 (child nine years old). *Compare* Morev v. Gloucester St. R. Co., 171 Mass. 164 (child eight years old).

*Missouri.* — Ruschenberg v. Southern Electric R. Co., 161 Mo. 70.

*New Jersey.* — Consolidated Traction Co. v. Scott, 58 N. J. L. 682, 55 Am. St. Rep. 620 (child between seven and eight years old). *Compare* Sheets v. Connolly St. R. Co., 54 N.

J. L. 518 (child ten years old); Brady v. Consolidated Traction Co., 64 N. J. L. 373 (child nine and a half years old).

*New York.* — Pinder v. Brooklyn Heights R. Co., 65 N. Y. App. Div. 521 (boy fourteen years old). *Compare* Thompson v. Buffalo R. Co., 145 N. Y. 196 (child fourteen years old); Weiss v. Metropolitan St. R. Co., 33 N. Y. App. Div. 221 (child between eight and nine years old); Biederman v. Dry Dock, etc., R. Co., 54 N. Y. App. Div. 291 (child thirteen years old).

*Washington.* — Mitchell v. Tacoma R., etc., Co., 13 Wash. 560.

*Compare* Kaiser v. New Orleans, etc., R. Co., 107 La. 539 (boy thirteen years old); Henderson v. Detroit Citizens St. R. Co., 116 Mich. 368; Ryan v. La Crosse City R. Co., 108 Wis. 122 (child between eight and nine years old); Wills v. Ashland Light, etc., R. Co., 108 Wis. 255.

3. **Passing in Front of Moving Car.** — Levy v. Dry-Dock, etc., R. Co., 58 Hun (N. Y.) 610, 12 N. Y. Supp. 485 (child four years old); Ellick v. Metropolitan St. R. Co., 15 N. Y. App. Div. 556 (child nine years old); Howell v. Rochester R. Co., 24 N. Y. App. Div. 502 (child five years old); Hicks v. Nassau Electric R. Co., 47 N. Y. App. Div. 479 (child nine years old); Huerzeler v. Central, etc., R. Co., (C. Pl.) 1 Misc. (N. Y.) 136; Keenan v. Brooklyn City R. Co., (Brooklyn City Ct. Gen. T.) 8 Misc. (N. Y.) 601 (child under six years old); Costello v. Third Ave. R. Co., 161 N. Y. 317, *reversing* 26 N. Y. App. Div. 48 (child eight years old); Finkelstein v. Brooklyn Heights R. Co., 51 N. Y. App. Div. 287 (child between seven and eight years old); Young v. Atlantic Ave. R. Co., (Brooklyn City Ct. Gen. T.) 10 Misc. (N. Y.) 541 (child seven and a half years old). *Compare* Mullen v. Springfield St. R. Co., 164 Mass. 450 (child between nine and ten years old); Brady v. Consolidated Traction Co., 63 N. J. L. 25 (child nine and a half years old); Ledman v. Dry Dock, etc., R. Co., 28 N. Y. App. Div. 197 (child eleven years old); Weiss v. Metropolitan St. R. Co., 33 N. Y. App. Div. 221 (child between eight and nine years old).

4. **Walking on Track.** — Markey v. Consolidated Traction Co., 65 N. J. L. 82 (child four years old); Markey v. Consolidated Traction Co., 65 N. J. L. 82, *affirmed* 65 N. J. L. 682 (walking backwards on track towards car).

5. **Standing on Tracks.** — Griffiths v. Metropolitan St. R. Co., 63 N. Y. App. Div. 86 (boy between seven and eight years old); Iaquina v. Citizens' Traction Co., 166 Pa. St. 63 (boy twelve years old); Riley v. Salt Lake Rapid Transit Co., 10 Utah 428 (boy seven years old).

6. *Rudd v. Meriden Electric R. Co.*, 69 Conn. 272; *Mitchell v. Tacoma R., etc., Co.*, 9 Wash. 120.



dren of tender years, the negligence of the parents or custodians of the child in permitting the exposure to the danger is to be imputed to the child,<sup>1</sup> and of course the general rules recognized in the several jurisdictions apply fully to injuries received by a child from the negligent operation of a street railway.<sup>2</sup> Parents are themselves chargeable with the exercise of ordinary care in the protection of their minor children, and the want of such care will prevent a recovery by the parent for injury to or the death of his child.<sup>3</sup> The question whether the parents or custodians were negligent in failing to keep a more careful watch over the child is generally for the jury.<sup>4</sup>

c. INJURIES TO BICYCLISTS. — In recent years a number of cases have arisen involving the liability of street-railway companies for injuries resulting from collisions with bicyclists. The general subject of the right of bicyclists to use streets and highways has been discussed elsewhere in this work.<sup>5</sup> A street-railway company is required to exercise due care to avoid injury to persons riding bicycles on the street,<sup>6</sup> but of course the company is not responsible for injuries resulting from a collision caused by the inability of the rider to manage his bicycle.<sup>7</sup> It is not negligence for a bicyclist to ride upon a street on which street cars are operated,<sup>8</sup> nor is it necessarily negligence for him to ride along the tracks of a street railway;<sup>9</sup> but a person riding a bicycle in a public street occupied by a street railway is bound to exercise ordinary care for his own safety,<sup>10</sup> and when riding on the tracks should give reasonable attention to the approach of cars from the rear so as to enable him

1. See the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 448 *et seq.*

2. *Hogan v. Citizens R. Co.*, 150 Mo. 36; *Juskowitz v. Dry Dock, etc., R. Co.*, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 64; *Kitchell v. Brooklyn Heights R. Co.*, 6 N. Y. App. Div. 99; *Schwartz v. United Traction Co.*, 30 Pittsb. Leg. J. N. S. (Pa.) 153.

3. *Negligence as Affecting Parent's Right of Action.* — *Cauley v. East St. Louis Electric St. R. Co.*, 58 Ill. App. 151; *Senn v. Southern R. Co.*, 124 Mo. 621; *Albert v. Albany R. Co.*, 5 N. Y. App. Div. 544; *Lawrence v. Scranton Traction Co.*, 3 Lack. Leg. N. (Pa.) 101; *Dan v. Citizens' St. R. Co.*, 99 Tenn. 88.

4. *Question for Jury — California.* — *Fox v. Oakland Consol. St. R. Co.*, 118 Cal. 55, 62 Am. St. Rep. 216.

*Illinois.* — *Cauley v. East St. Louis Electric St. R. Co.*, 58 Ill. App. 151.

*Indiana.* — *Elwood Electric St. R. Co. v. Ross*, 26 Ind. App. 258.

*Missouri.* — *Senn v. Southern R. Co.*, 124 Mo. 621; *Levin v. Metropolitan St. R. Co.*, 140 Mo. 624.

*New York.* — *Juskowitz v. Dry Dock, etc., R. Co.*, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 64; *Kitchell v. Brooklyn Heights R. Co.*, 6 N. Y. App. Div. 99; *Coghlan v. Third Ave. R. Co.*, 7 N. Y. App. Div. 124; *Lhowe v. Third Ave. R. Co.*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 612; *Ehrman v. Brooklyn City R. Co.*, 60 Hun (N. Y.) 580, 14 N. Y. Supp. 336, *affirmed* 131 N. Y. 576.

*Oregon.* — *Hedin v. Suburban R. Co.*, 26 Oregon 155.

*Pennsylvania.* — *Henne v. People's St. R. Co.*, 1 Pa. Super. Ct. 311; *Harkins v. Pittsburgh, etc., Traction Co. Corp.*, 173 Pa. St. 146; *Evers v. Philadelphia Traction Co.*, 176 Pa. St. 376, 53 Am. St. Rep. 674.

*Texas.* — *San Antonio St. R. Co. v. Cail-*

*loutte*, 79 Tex. 341; *Houston City St. R. Co. v. Dillon*, 3 Tex. Civ. App. 302.

*Wisconsin.* — *Dahl v. Milwaukee City R. Co.*, 62 Wis. 652.

5. See the title BICYCLES, vol. 4, p. 15.

6. *Injuries to Bicyclists.* — *Louisville R. Co. v. Blaydes*, (Ky. 1899) 51 S. W. Rep. 820, 52 S. W. Rep. 960; *Cardonner v. Metropolitan St. R. Co.*, 26 N. Y. App. Div. 8; *Gould v. Union Traction Co.*, 190 Pa. St. 198; *Roberts v. Spokane St. R. Co.*, 23 Wash. 325.

*Where a Bicyclist Is Riding Along the Tracks in Front of a Moving Car*, the person in charge of the car should give timely warning by sounding the gong to enable the rider to apprehend the approach of the car and leave the tracks. *Rooks v. Houston, etc., R. Co.*, 10 N. Y. App. Div. 98.

But such person is justified in presuming that the rider will, on the sounding of the gong, leave his position of danger. *Nein v. La Crosse City R. Co.*, (C. C. A.) 92 Fed. Rep. 85; *Everett v. Los Angeles Consol. Electric R. Co.*, 115 Cal. 105; *Gagne v. Minneapolis St. R. Co.*, 77 Minn. 171.

*And Where a Bicyclist Is Riding Parallel to the Track*, the person in charge of the car is justified in presuming that he will not suddenly attempt to cross the track in front of the car or swerve too near to the track. *South Chicago City R. Co. v. Kinnare*, 96 Ill. App. 210.

7. *Inability of Rider to Manage Bicycle.* — *South Chicago City R. Co. v. Kinnare*, 96 Ill. App. 210.

8. *Louisville R. Co. v. Blaydes*, (Ky. 1899) 51 S. W. Rep. 820, 52 S. W. Rep. 960.

9. *Rooks v. Houston, etc., R. Co.*, 10 N. Y. App. Div. 98. *Compare Gagne v. Minneapolis St. R. Co.*, 77 Minn. 171.

10. *Bicyclist Must Use Due Care.* — *South Chicago City R. Co. v. Kinnare*, 96 Ill. App. 210.

to leave the track in time,<sup>1</sup> though he is not, it seems, required to look behind him.<sup>2</sup> It is negligence to attempt to cross street-railway tracks in front of a rapidly approaching car which cannot be stopped in time to avoid a collision,<sup>3</sup> or to attempt to cross without first looking for approaching cars.<sup>4</sup>

*f. INJURIES TO DOGS.* — The decisions on the question whether an action may be maintained for the negligent killing of a dog are conflicting, but in the *United States* the weight of authority is that such an action lies,<sup>5</sup> and in a number of cases recovery has been allowed against street-railway companies for dogs killed through the negligent operation of the cars. Thus, where a dog is seen on the track in front of a street car, the person in charge of the car is not authorized to run it without regard to the safety of the dog, and trust solely to the alertness of the dog to avoid injury.<sup>6</sup>

*g. COLLISION BETWEEN STREET-RAILWAY CARS.* — Where the tracks of two street railways intersect, the law presumes, in the absence of proof that either railway company has by usage or otherwise any right of precedence at the crossing, that they stand on a footing of equality, each lawfully using a public street and each owing to the other the duty of exercising reasonable care while so doing,<sup>7</sup> and that the one which arrives at the crossing first is entitled to pass over before the other can enter upon it.<sup>8</sup> Hence, where a person on the car of one company is injured through a collision at a crossing, caused by the negligence of those in charge of a car of another company,

1. *Nein v. La Crosse City R. Co.*, (C. C. A.) 92 Fed. Rep. 85; *Everett v. Los Angeles Consol. Electric R. Co.*, 115 Cal. 105; *Gagne v. Minneapolis St. R. Co.*, 77 Minn. 171; *Beacon v. Traction Co.*, 30 Pittsb. Leg. J. N. S. (Pa.) 431.

2. *No Duty to Look Behind.* — *Rooks v. Houston, etc., R. Co.*, 10 N. Y. App. Div. 98.

3. *Crossing in Front of Cars.* — *Chicago North Shore St. R. Co. v. McCarthy*, 66 Ill. App. 667 (car seventy-five feet distant, traveling twenty miles an hour); *Lurie v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 81; *Cleveland, etc., R. Co. v. Nixon*, 12 Ohio Cir. Dec. 79, 21 Ohio Cir. Ct. 736; *McCracken v. Consolidated Traction Co.*, 201 Pa. St. 378.

4. *Bennett v. Detroit Citizens St. R. Co.*, 123 Mich. 692; *Gagne v. Minneapolis St. R. Co.*, 77 Minn. 171; *McCracken v. Consolidated Traction Co.*, 201 Pa. St. 378. See also *Sewell v. New York, etc., R. Co.*, 171 Mass. 302.

Thus it is negligent for a bicyclist following on the track in the rear of a car to cross to the parallel track to pass the car, and he cannot recover where he is immediately struck by a car approaching on such track. *Medca'f v. St. Paul City R. Co.*, 82 Minn. 18; *Cardonner v. Metropolitan St. R. Co.*, 38 N. Y. App. Div. 597.

5. *Right of Action for Killing Dog.* — *Parker v. Mize*, 27 Ala. 480; *White v. Brantley*, 37 Ala. 430; *Brent v. Kimball*, 60 Ill. 211, 14 Am. Rep. 35; *Lowell v. Gathright*, 97 Ind. 313; *Barret v. Utley*, 12 Bush (Ky.) 399; *Gibbons v. Van Alstyne*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 156; *Dodson v. Mock*, 4 Dev. & B. (20 N. Car.) 146, 32 Am. Dec. 677; *Findlay v. Bear*, 8 S. & R. (Pa.) 571; *Wheatley v. Harris*, 4 Sneed. (Tenn.) 468, 70 Am. Dec. 258; *Heiligmann v. Rose*, 81 Tex. 222, 26 Am. St. Rep. 804. See generally the title *ANIMALS*, vol. 2, pp. 347, 348. Compare *Wilson v.*

*Wilmington, etc., R. Co.*, 10 Rich. L. (S. Car.) 52.

In *Georgia* it has been held that a dog is not property, except in a qualified sense, either at common law or under the statutes of that state. The owner may maintain an action of trespass *vi et armis* for the wanton and malicious killing of his dog, but he cannot maintain case for its unintentional, though negligent, destruction. *Jemison v. Southwestern R. Co.*, 75 Ga. 444.

In *Illinois* an action was held to lie for the killing of a dog in good faith mistaken for a wolf. *Ranson v. Kitner*, 31 Ill. App. 241.

In *Vermont* a recovery was allowed for the killing of a dog in shooting at a fox which the dog had chased to cover. *Wright v. Clark*, 50 Vt. 130, 28 Am. Rep. 496.

6. *West Chicago St. R. Co. v. Klecka*, 94 Ill. App. 346; *Meisch v. Rochester Electric R. Co.*, 72 Hun (N. Y.) 604; *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317, 66 Am. St. Rep. 754.

But where a dog was run over by an electric car, and no one saw him until he was under the car, the mere fact that the car was running faster than usual does not show that the running down of the dog was a negligent act. *Dettmers v. Brooklyn Heights R. Co.*, 22 N. Y. App. Div. 488.

7. *Rights and Duties at Intersection of Tracks.* — *Metropolitan St. R. Co. v. Kennedy*, (C. C. A.) 82 Fed. Rep. 158.

8. *Metropolitan R. Co. v. Hammett*, 13 App. Cas. (D. C.) 370; *Chicago City R. Co. v. McLaughlin*, 40 Ill. App. 496.

Where a car on one track reaches a crossing from one to two hundred feet in advance of a car on the other track, the two cars cannot be considered as approaching the crossing at the same time, within the meaning of a statute giving to the older company precedence in crossing. *Becker v. Detroit Citizens' St. R. Co.*, 121 Mich. 580.

the latter is liable,<sup>1</sup> and one railway company may recover from another for injuries to its car caused by the negligence of the other.<sup>2</sup> It has been held that where at the crossing of tracks of two street railways the rights of each are equal, the fact that the rear end of a car on one track is struck by the front end of a car on the other track is sufficient to show negligence in the operation of the latter car. The rule of *res ipsa loquitur* applies in such case.<sup>3</sup>

Where One Car Is Following Another on the Same Track, those in charge of the rear car should maintain such a distance and speed as to enable the car to be stopped in time to avoid a collision when the front car is stopped to discharge or take on passengers; and where the two cars belong to different companies, and the rear car is negligently operated, resulting in a collision, the company guilty of such negligence is liable for injuries caused thereby to persons on the front car.<sup>4</sup>

*h.* COLLISION BETWEEN STREET CARS AND RAILROAD TRAINS. — Where a street-car line crosses an ordinary railroad, the relative duties of the street-railway company and the railroad company to avoid collisions at the crossing are the same as in the case of ordinary travelers over the crossing.<sup>5</sup>

*i.* FRIGHTENING HORSES. — The right of a company to construct and operate a railway along the streets carries with it the right to do whatever is necessary for the successful operation of such railway; so that the company is not, as a general rule, liable for injuries caused by horses which become frightened by its cars or by the usual and necessary noise incident to their operation.<sup>6</sup>

1. *Persons Injured by Collision.* — Metropolitan St. R. Co. v. Kennedy, (C. C. A.) 82 Fed. Rep. 158; Howland v. Oakland Consol. St. R. Co., 110 Cal. 513 (passenger on car); Metropolitan R. Co. v. Hammett, 13 App. Cas. (D. C.) 370 (driver of car); Chicago City R. Co. v. McLaughlin, 40 Ill. App. 496 (driver of car); Becker v. Detroit Citizens' St. R. Co., 121 Mich. 580 (motorman); Taylor v. Grand Ave. R. Co., 137 Mo. 363 (passenger on car); Loudoun v. Eighth Ave. R. Co., 162 N. Y. 380 (passenger on car); Wetzel v. Philadelphia Traction Co., 184 Pa. St. 407; Connor v. Electric Traction Co., 173 Pa. St. 602 (driver on car).

2. *Cars Injured by Collision.* — Chicago Gen. R. Co. v. Chicago City R. Co., 87 Ill. App. 17, affirmed 186 Ill. 219.

3. Chicago City R. Co. v. McLaughlin, 40 Ill. App. 496. See also Loudoun v. Eighth Ave. R. Co., 162 N. Y. 380, 16 N. Y. App. Div. 152.

4. *Rear-end Collisions.* — Wynne v. Atlantic Ave. R. Co., (Brooklyn City Ct. Gen. T.) 14 Misc. (N. Y.) 294, affirmed 156 N. Y. 702.

5. New York, etc., R. Co. v. New Jersey Electric R. Co., 60 N. J. L. 52.

What those duties are has been heretofore fully discussed. See the title CROSSINGS, vol. 8, p. 335, particularly pp. 342, 355, 358, notes. See also the following cases pertaining especially to street railways: Baltimore, etc., R. Co. v. Friel, (C. C. A.) 77 Fed. Rep. 136; Washington, etc., R. Co. v. Hickey, 5 App. Cas. (D. C.) 436; Savannah, etc., R. Co. v. Beasley, 94 Ga. 142; Mantel v. Chicago, etc., R. Co., 23 Minn. 62; Coddington v. Brooklyn Crosstown R. Co., 102 N. Y. 66; Cincinnati St. R. Co. v. Murray, 53 Ohio St. 570; Downey v. Philadelphia Traction Co., 161 Pa. St. 588; Gulf, etc., R. Co. v. Pendry, 87 Tex. 553, 47 Am. St. Rep. 125.

6. *Frightening Horses* — United States. —

McDonald v. Toledo Consol. St. R. Co., (C. C. A.) 74 Fed. Rep. 104.

Illinois. — Kankakee Electric R. Co. v. Lade, 56 Ill. App. 454; Galesburg Electric Motor, etc., Co. v. Manville, 61 Ill. App. 490; East St. Louis, etc., Electric St. R. Co. v. Wachtel, 63 Ill. App. 181; Wachtel v. East St. Louis, etc., Electric R. Co., 77 Ill. App. 465.

Indiana. — Marion City R. Co. v. Buboils, 23 Ind. App. 342; Terre Haute Electric R. Co. v. Yant, 21 Ind. App. 486.

Massachusetts. — Howard v. Union Freight R. Co., 156 Mass. 159; Henderson v. Greenfield, etc., St. R. Co., 172 Mass. 542.

Michigan. — Cornell v. Detroit Electric R. Co., 82 Mich. 495.

Missouri. — Molyneux v. Southwest Missouri Electric R. Co., 81 Mo. App. 25.

Nebraska. — Omaha St. R. Co. v. Duvall, 40 Neb. 29.

North Carolina. — Doster v. Charlotte St. R. Co., 117 N. Car. 651.

Ohio. — Chapman v. Zanesville St. R. Co., 11 Ohio Dec. (Reprint) 449, 27 Cinc. L. Bul. 70.

Oregon. — Coughtry v. Willamette St. R. Co., 21 Oregon 245.

Pennsylvania. — McKinney v. United Traction Co., 19 Pa. Super. Ct. 362; Davison v. Wilkes-Barre, etc., Traction Co., 10 Pa. Super. Ct. 442; Pittsburgh Southern R. Co. v. Taylor, 104 Pa. St. 306, 49 Am. Rep. 580; Piolet v. Simmers, 106 Pa. St. 95, 51 Am. Rep. 496; Philadelphia Traction Co. v. Bernheimer, 125 Pa. St. 615; Hazel v. People's Pass. R. Co., 132 Pa. St. 96; Steiner v. Philadelphia Traction Co., 134 Pa. St. 199; Yingst v. Lebanon, etc., St. R. Co., 167 Pa. St. 438.

Texas. — Hargis v. St. Louis, etc., R. Co., 75 Tex. 23; North Side St. R. Co. v. Tippens, 4 Tex. App. Civ. Cas., § 160; Klatt v. Houston Electric St. R. Co., (Tex. Civ. App. 1900) 57 S. W. Rep. 1112. Compare San Antonio Edison Co. v. Beyer, 24 Tex. Civ. App. 145.

such as the sounding of the gong<sup>1</sup> or the escape of steam from a dummy steam engine standing still.<sup>2</sup> If, however, horses on the street have shown indications of fright, and an accident is imminent, and this has been seen by the operators of the street car, they are bound to use reasonable care to avoid the accident,<sup>3</sup> and it may be their duty to stop the car if in motion,<sup>4</sup> or to delay starting the car if it has stopped,<sup>5</sup> or to desist from sounding the gong,<sup>6</sup> and a failure to do so may constitute negligence rendering the street-railway company liable for injuries resulting from such failure. Still, the question what steps should be taken in the exercise of reasonable care to avoid the accident is for the jury, and it cannot be said as a matter of law that a failure to stop the car constitutes negligence.<sup>7</sup>

**The Use of a Car Which in Running Produces Great, Unusual, and Unnecessary Noises,** calculated to frighten horses, may constitute such negligence as to render the company liable for resulting injuries.<sup>8</sup>

*Wisconsin.* — *Bishop v. Belle City St. R. Co.*, 92 Wis. 139.

*Canada.* — *Myers v. Brantford St. R. Co.*, 27 Ont. App. 513.

In *Hazel v. People's Pass. R. Co.*, 132 Pa. St. 96, it appeared that the car had run off the track and was being put back in the usual manner, and with the usual noises, and that a horse standing on the street twenty or thirty feet from the car became frightened, reared up and fell, and was killed. It was held that, in the absence of other evidence of negligence, a recovery could not be allowed.

1. *North Chicago St. R. Co. v. Harms*, 59 Ill. App. 374; *Galesburg Electric Motor, etc., Co. v. Manville*, 61 Ill. App. 490; *Henderson v. Greenfield, etc., St. R. Co.*, 172 Mass. 542; *Steiner v. Philadelphia Traction Co.*, 134 Pa. St. 199; *Philadelphia Traction Co. v. Bernheimer*, 125 Pa. St. 615; *North Side St. R. Co. v. Tappens*, 4 Tex. App. Civ. Cas., § 160.

2. *Howard v. Union Freight R. Co.*, 156 Mass. 159.

3. **Duty to Avoid Imminent Danger** — *Illinois.* — *East St. Louis, etc., Electric St. R. Co. v. Wachtel*, 63 Ill. App. 181; *Richter v. Cicero, etc., St. R. Co.*, 70 Ill. App. 196; *Wachtel v. East St. Louis, etc., Electric R. Co.*, 77 Ill. App. 465; *Springfield Consol. R. Co. v. Ankrom*, 93 Ill. App. 655; *Joliet R. Co. v. Eich*, 96 Ill. App. 240. See also *Sunderland v. Pioneer Fire Proof Constr. Co.*, 78 Ill. App. 102.

*Indiana.* — *Muncie St. R. Co. v. Maynard*, 5 Ind. App. 372.

*Kansas.* — *Ft. Scott Rapid-transit R. Co. v. Page*, 10 Kan. App. 362.

*Kentucky.* — *Owensboro City R. Co. v. Lyddane*, (Ky. 1897) 41 S. W. Rep. 578.

*Missouri.* — *Oates v. Metropolitan St. R. Co.*, 168 Mo. 535.

*Nebraska.* — *Lincoln Rapid Transit Co. v. Nichols*, 37 Neb. 332.

*Pennsylvania.* — *Kelly v. Pittsburg, etc., Traction Co.*, 10 Pa. Super. Ct. 644; *Obold v. United Traction Co.*, 19 Pa. Super. Ct. 326; *Gibbons v. Wilkes-Barre, etc., St. R. Co.*, 155 Pa. St. 279.

*Texas.* — *Citizens' R. Co. v. Hair*, (Tex. Civ. App. 1895) 32 S. W. Rep. 1050.

*Canada.* — *Myers v. Brantford St. R. Co.*, 31 Ont. 309.

See also *Flewelling v. Lewiston, etc., Horse R. Co.*, 89 Me. 585.

4. *Richter v. Cicero, etc., St. R. Co.*, 70 Ill.

App. 196; *Ft. Scott Rapid-transit R. Co. v. Page*, 10 Kan. App. 362; *Owensboro City R. Co. v. Lyddane*, (Ky. 1897) 41 S. W. Rep. 578; *Gibbons v. Wilkes-Barre, etc., R. Co.*, 155 Pa. St. 279. Compare *Chapman v. Zanesville St. R. Co.*, 11 Ohio Dec. (Reprint) 449, 27 Cinc. L. Bul. 70.

5. *Philadelphia Traction Co. v. Lightcap*, 17 U. S. App. 605; *Richter v. Cicero, etc., St. R. Co.*, 70 Ill. App. 196.

6. *Oates v. Metropolitan St. R. Co.*, 168 Mo. 535; *Citizens' R. Co. v. Hair*, (Tex. Civ. App. 1895) 32 S. W. Rep. 1050.

7. *Kankakee Electric R. Co. v. Lade*, 56 Ill. App. 454; *Terre Haute Electric R. Co. v. Yant*, 21 Ind. App. 486; *Chapman v. Zanesville St. R. Co.*, 11 Ohio Dec. (Reprint) 449, 27 Cinc. L. Bul. 70.

8. **Use of Car Making Unusual Noise.** — *Hill v. Rome St. R. Co.*, 101 Ga. 66; *Ayars v. Camden, etc., R. Co.*, 63 N. J. L. 416; *Richmond R., etc., Co. v. Hudgins*, 100 Va. 409.

In *Ayars v. Camden, etc., R. Co.*, 63 N. J. L. 416, it appeared that an electric car, moving at the ordinary rate of speed, ran without lessening its speed through a pool of water on the tracks, thereby throwing the water and causing a roaring and hissing noise, by reason of which a horse driven by the plaintiff became frightened and ran away, injuring the plaintiff. It was held that there was sufficient evidence to go to the jury on the question whether the railway company had exercised reasonable care.

In *Richmond R., etc., Co. v. Hudgins*, 100 Va. 409, it was held that there was no error in an instruction that "if the jury believe from the evidence that the horse of plaintiff was frightened by the noise and smoke arising from the machinery of the car of defendant, and that said noise and smoke was not incident to the ordinary operation of their cars, they are instructed that this raises the presumption that such noise and smoke would not have been caused if those who had the providing, maintaining, and care of defendant's machinery had used proper care in regard thereto, and, in the absence of an explanation on the part of the defendant showing due care on its part, they may infer that the defendant was guilty of negligence; and if they further believe that such negligence caused the accident as set forth in the declaration, and that the plaintiff was free from fault, they must find for the plaintiff."

**Contributory Negligence.** — It has been held that one who deliberately drives onto a street upon which an electric railway is operated, for the purpose of ascertaining whether the horse he is driving will take fright at the cars, is guilty of contributory negligence, precluding a recovery for injuries received in consequence thereof.<sup>1</sup> So a city hackman has been held to be guilty of contributory negligence in allowing his horses to stand on the street without having hold of the reins.<sup>2</sup>

**2. Injuries from Defects in Tracks or Obstructions in Street.** — In constructing its railway a street-railway company is required to use reasonable care to avoid injury to persons using the street, whether on foot or in vehicles,<sup>3</sup> and to abutting property owners;<sup>4</sup> and after the railway is constructed, the company is required to maintain it in a safe condition so as to avoid injury to such persons,<sup>5</sup> and must not leave dangerous obstructions in the street.<sup>6</sup> Where the grant of the franchise imposes on the company duties with regard to the maintenance and repair of the street in addition to its common-law obligations, persons using the street who are injured by reason of the company's neglect or omission to perform such duties may recover from the

**1. Using Horse Liable to Take Fright.** — *Cornell v. Detroit Electric R. Co.*, 82 Mich. 495. Compare *Flewelling v. Lewiston, etc.*, *Horse R. Co.*, 89 Me. 585; *Van Wie v. Mt. Vernon*, 26 N. Y. App. Div. 330.

**2. Allowing Horse to Stand Unattended.** — *Gray v. Second Ave. R. Co.*, 65 N. Y. 562.

**3. Defects and Obstructions — Arkansas.** — *Little Rock Traction, etc., Co. v. Dunlap*, 68 Ark. 291.

*Indiana.* — *Delzell v. Indianapolis, etc., R. Co.*, 32 Ind. 45.

*Massachusetts.* — *Cook v. Union R. Co.*, 125 Mass. 57; *Osgood v. Lynn, etc., R. Co.*, 130 Mass. 492; *Mahoney v. Natick, etc., St. R. Co.*, 173 Mass. 587; *Kane v. West End St. R. Co.*, 169 Mass. 64.

*Missouri.* — *Grivelaud v. St. Louis Cable, etc., R. Co.*, 33 Mo. App. 458.

*New York.* — *Hooper v. Johnstown, etc., R. Co.*, 59 Hun (N. Y.) 618, *affirmed* 128 N. Y. 613; *Wood v. Third Ave. R. Co.*, 91 Hun (N. Y.) 276, *reversing* 13 Misc. (N. Y.) 308 (hole in manhole cover); *Schild v. Central Park, etc., R. Co.*, 133 N. Y. 446, 28 Am. St. Rep. 658; *Carpenter v. Central Park, etc., R. Co.*, (C. Pl. Gen. T.) 11 Abb. Pr. N. S. (N. Y.) 416.

*Pennsylvania.* — *Wagner v. Pittsburgh, etc., Pass. R. Co.*, 158 Pa. St. 419.

*Texas.* — *Houston City St. R. Co. v. Delesdernier*, 84 Tex. 82; *Houston City St. R. Co. v. Richart*, (Tex. Civ. App. 1894) 27 S. W. Rep. 918. Compare *Galveston City R. Co. v. Nolan*, 53 Tex. 139.

**Electric Pole Maintained in Dangerous Manner.** — *Cleveland v. Bangor St. R. Co.*, 86 Me. 232.

**4.** *Alton, etc., Horse R., etc., Co. v. Deitz*, 50 Ill. 210, 99 Am. Dec. 509; *Lion v. Baltimore City Pass. R. Co.*, 90 Md. 266.

**Changing Flow of Water to Abutting Property.** — *Alton, etc., Horse R., etc., Co. v. Deitz*, 50 Ill. 210, 99 Am. Dec. 509 (insufficient culvert). See also *Damour v. Lyons City*, 44 Iowa 276.

**5. Maintaining Road in Safe Condition — Alabama.** — *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133.

*Indiana.* — *Citizens St. R. Co. v. Ballard*, 22 Ind. App. 151; *Indianapolis St. R. Co. v. Walton*, 29 Ind. App. 368.

*Louisiana.* — *Dominguez v. Orleans R. Co.*, 35 La. Ann. 751; *Cline v. Crescent City R. Co.*, 41 La. Ann. 1031; *Nivette v. New Orleans, etc., R. Co.*, 42 La. Ann. 1153; *Cline v. Crescent City R. Co.*, 43 La. Ann. 327.

*Massachusetts.* — *Uggle v. West End St. R. Co.*, 160 Mass. 351, 39 Am. St. Rep. 481.

*Minnesota.* — *Lowe v. Minneapolis St. R. Co.*, 37 Minn. 283.

*New York.* — *Worster v. Forty-second St., etc., R. Co.*, 50 N. Y. 203; *Wooley v. Grand St., etc., R. Co.*, 83 N. Y. 121; *Schild v. New York, etc., R. Co.*, 133 N. Y. 446, 28 Am. St. Rep. 658; *Fash v. Third Ave. R. Co.*, 1 Daly (N. Y.) 148; *Rockwell v. Third Ave. R. Co.*, 64 Barb. (N. Y.) 438, *affirmed* 53 N. Y. 625; *Schnell v. Metropolitan St. R. Co.*, 50 N. Y. App. Div. 616; *Casper v. Dry Dock, etc., R. Co.*, 23 N. Y. App. Div. 451; *Wiley v. Smith*, 25 N. Y. App. Div. 351.

*Pennsylvania.* — *Campbell v. Frankford, etc., R. Co.*, 139 Pa. St. 522; *Bradwell v. Pittsburgh, etc., Pass. R. Co.*, 153 Pa. St. 105; *Gilton v. Hestonville, etc., Pass. R. Co.*, 166 Pa. St. 460; *Rahenkamp v. United Traction Co.*, 14 Pa. Super. Ct. 635; *Musser v. Lancaster City St. R. Co.*, 176 Pa. St. 621.

*Texas.* — *Houston City St. R. Co. v. Delesdernier*, 84 Tex. 82; *Houston City St. R. Co. v. Medlenka*, 17 Tex. Civ. App. 621; *Ft. Worth St. R. Co. v. Allen*, (Tex. Civ. App. 1897) 39 S. W. Rep. 125; *Laredo Electric, etc., Co. v. Hamilton*, 23 Tex. Civ. App. 480.

*Canada.* — *Conlon v. City R. Co.*, 8 Nova Scotia 209.

**Leaving Spikes or Splinters Projecting from Rail.** — A company which neglects to keep its road and tracks in good condition is liable to a person injured by falling on a loose rail and a protruding spike. *Cline v. Crescent City R. Co.*, 43 La. Ann. 327.

**6.** *Slayton v. West End St. R. Co.*, 174 Mass. 55 (rails temporarily left in street); *Thomas v. Consolidated Traction Co.*, 62 N. J. L. 36 (rails left in street); *Morhart v. North Jersey St. R. Co.*, 64 N. J. L. 236; *Parkes v. Metropolitan St. R. Co.*, (N. Y. City Ct. Gen. T.) 37 Misc. (N. Y.) 844; *Higgins v. Brooklyn, etc., R. Co.*, 54 N. Y. App. Div. 69.

company therefor.<sup>1</sup> The company is not, however, required at its peril to construct and maintain the railway in such condition that no injury can possibly happen to persons using the street; it is only required to use reasonable care in the construction and maintenance of its line.<sup>2</sup>

**Particular Defects.** — Street-railway companies have frequently been held liable for injuries caused by their failure to keep their tracks on a level with the surface of the street, so as to avoid creating an obstruction to the general use of the street,<sup>3</sup> and where such a company is required so to keep its tracks, the fact that elevation of the rails above the street is caused by the wearing down of the street by traffic does not relieve the company of the duty to remedy such defect.<sup>4</sup> The company may also be held liable for injuries arising from excavations or holes allowed to remain between the tracks,<sup>5</sup> or, in case of a street railway operated by the cable system, for injuries caused by the excessive and improper width of the grip slot.<sup>6</sup>

**Removal of Snow from Tracks.** — In the removal of snow from the tracks, the company is required to use reasonable care not to render the street unsafe for the general public, and on failure to perform such duty is liable for consequent

**1. Statutory Duty to Repair Street.** — *Alabama.* — Birmingham Union R. Co. v. Alexander, 93 Ala. 133.

*Connecticut.* — Fields v. Hartford, etc., Horse R. Co., 54 Conn. 9; Shalley v. Danbury, etc., Horse R. Co., 64 Conn. 381.

*Illinois.* — Rockford City R. Co. v. Matthews, 50 Ill. App. 267.

*Louisiana.* — Ober v. Crescent City R. Co., 44 La. Ann. 1059.

*Massachusetts.* — Kearns v. South Middlesex St. R. Co., 181 Mass. 587.

*Minnesota.* — Baumgartner v. Mankato, 60 Minn. 244.

*New Hampshire.* — Call v. Portsmouth, etc., St. R. Co., 69 N. H. 562.

*New Jersey.* — Fielders v. North Jersey St. R. Co., 67 N. J. L. 76.

*New York.* — McMahon v. Second Ave. R. Co., 11 Hun (N. Y.) 347, affirming 75 N. Y. 231; Rockwell v. Third Ave. R. Co., 64 Barb. (N. Y.) 438; Worster v. Forty-second St., etc., R. Co., 50 N. Y. 203; Sullivan v. Staten Island Electric R. Co., 50 N. Y. App. Div. 558; Doyle v. New York, 58 N. Y. App. Div. 588; Simon v. Metropolitan St. R. Co., (Supm. Ct. App. T.) 29 Misc. (N. Y.) 126.

*Pennsylvania.* — Mayberry v. Passenger R. Co., 9 W. N. C. (Pa.) 404; Philadelphia v. Weller, 4 Brews. (Pa.) 24; Wagner v. Pittsburgh, etc., Pass. R. Co., 158 Pa. St. 419; McLaughlin v. Philadelphia Traction Co., 175 Pa. St. 565.

*Texas.* — Houston City R. Co. v. Dawson, 2 Tex. Unrep. Cas. 223.

*Canada.* — Conlon v. City R. Co., 8 Nova Scotia 209; Joyce v. Halifax St. R. Co., 24 Nova Scotia 113; Halifax St. R. Co. v. Joyce, 22 Can. Sup. Ct. 258.

**2. Extent of Duty.** — Cowan v. Muskegon R. Co., 84 Mich. 583; Wood v. Third Ave. R. Co., (Supm. Ct.) 13 Misc. (N. Y.) 308; Casper v. Dry Dock, etc., R. Co., 23 N. Y. App. Div. 451, 56 N. Y. App. Div. 372; Sanford v. Union Pass. R. Co., 16 Pa. Super. Ct. 393.

**3. Keeping Tracks Level with Surface of Street.** — *Alabama.* — Birmingham Union R. Co. v. Alexander, 93 Ala. 133.

*Connecticut.* — Cunningham v. Fair Haven, etc., R. Co., 72 Conn. 244.

*Illinois.* — Stratton v. Central City Horse R. Co., 95 Ill. 25.

*Kentucky.* — Groves v. Louisville R. Co., (Ky. 1900) 58 S. W. Rep. 508.

*Maine.* — Bangs v. Lewiston, etc., Horse R. Co., 89 Me. 194.

*Maryland.* — Central R. Co. v. State, 82 Md. 647.

*Minnesota.* — McKillop v. Duluth St. R. Co., 53 Minn. 532; Baumgartner v. Mankato, 60 Minn. 244.

*New York.* — Wooley v. Grand St., etc., R. Co., 83 N. Y. 121; Schild v. Central Park, etc., R. Co., 62 Hun (N. Y.) 620, 16 N. Y. Supp. 701, affirmed 133 N. Y. 446, 28 Am. St. Rep. 658.

*Texas.* — Houston City St. R. Co. v. Delesdernier, 84 Tex. 82. See also Citizens' R. Co. v. Gossett, (Tex. Civ. App. 1902) 68 S. W. Rep. 706.

*Washington.* — Gray v. Washington Water Power Co., 27 Wash. 713.

*Canada.* — Joyce v. Halifax St. R. Co., 24 Nova Scotia 113; Halifax St. R. Co. v. Joyce, 22 Can. Sup. Ct. 258.

**4. Wearing Down of Surface of Street.** — Groves v. Louisville R. Co., (Ky. 1900) 58 S. W. Rep. 508; Schild v. Central Park, etc., R. Co., 133 N. Y. 446, 28 Am. St. Rep. 658; Houston City St. R. Co. v. Medlenka, 17 Tex. Civ. App. 621; Joyce v. Halifax St. R. Co., 24 Nova Scotia 113. See also Fash v. Third Ave. R. Co., 1 Daly (N. Y.) 148. See, however, Eddy v. Ottawa City Pass. R. Co., 31 U. C. Q. B. 569.

**5. Holes Between Tracks.** — Fox v. Wharton, 64 N. J. L. 453; Worster v. Forty-second St., etc., R. Co., 50 N. Y. 203; Wolf v. Third Ave. R. Co., 67 N. Y. App. Div. 605.

**6. Cable Slot of Improper Width.** — Keitel v. St. Louis Cable, etc., R. Co., 28 Mo. App. 657 (wheel of buggy catching in slot); Griveaud v. St. Louis Cable, etc., R. Co., 33 Mo. App. 458; Minster v. Citizens' R. Co., 53 Mo. App. 276; Brown v. Metropolitan St. R. Co., 60 N. Y. App. Div. 184 (wheel of bicycle going through cable slot); Humbert v. Brooklyn Cable R. Co.,

injuries to persons using the street.<sup>1</sup> So if the snow is deposited negligently on the street in such a manner as to obstruct the natural flow of water from the street, the company will be liable for injuries caused thereby.<sup>2</sup> The liability of the company for such injuries is dependent on its negligence in the removal of the snow.<sup>3</sup>

**An Abutting Property Owner** may enjoin a street-railway company from throwing snow from its tracks and leaving it on the street for an unreasonable time, so as to cut off the use of the street for access to his property.<sup>4</sup>

**Defective Electric Wires.** — In a number of instances actions have been brought against street-railway companies to recover for injuries caused by the breaking or sagging of electric trolley wires, and recoveries have been allowed where the company was negligent in maintaining such wires in an unsafe condition.<sup>5</sup> So there may be a recovery for injuries received from the escape of electricity through the defective bonding of the rails,<sup>6</sup> or from electricity escaping through the slot of an underground trolley street railway.<sup>7</sup> But in the absence of negligence on the part of the company, it cannot be held liable for injuries from such causes.<sup>8</sup>

**Municipal Supervision and Direction of Repairs.** — The fact that authority is given to the municipality or to particular officers to supervise and direct the repairs to be made upon a street railway does not release the company from liability

(Brooklyn City Ct. Gen. T.) 12 N. Y. St. Rep. 172 (horse catching calk of shoe in slot).

1. **Removal of snow from Tracks** — *United States*. — McDonald v. Toledo Consol. St. R. Co., (C. C. A.) 74 Fed. Rep. 104.

*Massachusetts*. — Mahoney v. Metropolitan R. Co., 104 Mass. 73.

*Michigan*. — Laughlin v. Grand Rapids St. R. Co., 62 Mich. 220. See also Wallace v. Detroit City R. Co., 58 Mich. 231.

*New Hampshire*. — Smith v. Nashua St. R. Co., 69 N. H. 504.

*New York*. — Broadway, etc., R. Co. v. New York, 49 Hun (N. Y.) 126; Somerville v. City R. Co., 63 Hun (N. Y.) 628, 17 N. Y. Supp. 719; Mowrey v. Central City R. Co., 66 Barb. (N. Y.) 43, affirmed 51 N. Y. 666; Dixon v. Brooklyn City, etc., R. Co., 180 N. Y. 170; Somerville v. City R. Co., (Supm. Ct. Gen. T.) 43 N. Y. St. Rep. 425.

*Virginia*. — Newport News, etc., R., etc., Co. v. Bradford, 99 Va. 117, 100 Va. 231.

*Wisconsin*. — Gerrard v. La Crosse City R. Co., 113 Wis. 258 (declivities on side of tracks caused in removal of snow).

Where a street is so narrow as not to admit of the passage of teams on either side of the car track, it is negligence for the company to throw snow from its track with a snow plow, forming a ridge on either side of the track so high when packed down by travel as to upset a sleigh necessarily going thereon in turning out to allow a team to pass. *Somerville v. City R. Co.*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 719.

**Stied Upset by Striking Pile of Snow.** — McDonald v. Toledo Consol. St. R. Co., (C. C. A.) 74 Fed. Rep. 104.

2. *Short v. Baltimore City Pass. R. Co.*, 50 Md. 73, 33 Am. Rep. 298.

3. *Ovington v. Lowell, etc., St. R. Co.*, 163 Mass. 440; *Connor v. Metropolitan St. R. Co.*, 48 N. Y. App. Div. 580. See also *Newport News, etc., R., etc., Co. v. Bradford*, 99 Va. 117.

4. **Injunction by Abutting Owner.** — *Prime v. Twenty-third St. R. Co.*, (N. Y. Super. Ct. Spec.

T.) 1 Abb. N. Cas. (N. Y.) 63, holding that the fact that there was no other place to which the snow could be carried without ruinous expense to the company did not justify the latter in leaving it upon the street for an unnecessary length of time; neither did the fact that the snowfall was so great that even if the company threw none from its track access to the sidewalk would have been cut off justify such interference with the street.

5. **Defective Electric Wires.** — *Kankakee Electric R. Co. v. Whittemore*, 45 Ill. App. 484; *Gross v. South Chicago City R. Co.*, 73 Ill. App. 217; *O'Flaherty v. Nassau Electric R. Co.*, 343 N. Y. App. Div. 74; *United Electric R. Co. v. Shelton*, 89 Tenn. 423, 24 Am. St. Rep. 614; *Chattanooga Electric R. Co. v. Mingle*, 103 Tenn. 667, 76 Am. St. Rep. 703. Compare *Freeman v. Brooklyn Heights R. Co.*, 54 N. Y. App. Div. 596. See also the title *ELECTRIC RAILROADS*, vol. 10, p. 889 *et seq.*

**Failure of a Person Driving on the Street** to see broken wires is not necessarily contributory negligence. *Kankakee Electric R. Co. v. Whittemore*, 45 Ill. App. 484.

6. *Trenton Pass. R. Co. v. Cooper*, 60 N. J. L. 219, 64 Am. St. Rep. 592; *Braham v. Nassau Electric R. Co.*, 72 N. Y. App. Div. 456.

**Res Ipsa Loquitur.** — The escape of electricity through its tracks is *prima facie* evidence of negligence on the part of the street-railway company. *Trenton Pass. R. Co. v. Cooper*, 60 N. J. L. 219, 64 Am. St. Rep. 592. See also *Ludwig v. Metropolitan St. R. Co.*, 71 N. Y. App. Div. 210.

7. *Ludwig v. Metropolitan St. R. Co.*, 71 N. Y. App. Div. 210.

8. *Read v. City, etc., R. Co.*, 115 Ga. 366; *Ludwig v. Metropolitan St. R. Co.*, 71 N. Y. App. Div. 210; *Albany v. Watervliet Turnpike, etc., Co.*, (Supm. Ct. Gen. T.) 57 N. Y. St. Rep. 453; *Citizens R. Co. v. Gifford*, 19 Tex. Civ. App. 631.

**Notice to Conductor or Motorman of Defective Wire as Notice to Company.** — *Read v. City, etc., R. Co.*, 115 Ga. 366.

for injuries arising from its failure to keep its railway in repair, though the condition in which it was kept was sanctioned by the municipality or by its particular officers.<sup>1</sup> Where a street-railway company which is required to keep in repair the pavement between its tracks has no authority to change the construction of the pavement as laid by the municipality, it cannot be held liable for injuries caused by a depression in the pavement left by the municipality for drainage purposes.<sup>2</sup>

**Notice of Defects.** — Where the defects in the street or railway which it is the duty of the railway to remedy are patent, it cannot escape liability for injuries resulting therefrom if it had no actual knowledge of such defects, as an omission to know that such a defect exists is itself negligence.<sup>3</sup>

**Defects Caused by Acts of Third Persons.** — Where the duty is imposed upon a street-railway company to keep in repair certain portions of the street, it may become liable for defects therein though such defects were caused by the acts of third persons.<sup>4</sup>

**Proof of Defects.** — The general rules of evidence apply with regard to the admissibility of evidence to prove defects in the street and tracks.<sup>5</sup>

**Indemnifying Municipality.** — The municipality is not released from liability for injuries caused by defects in its streets by reason of the fact that a street-

1. **Municipal Supervision of Repairs.** — *Delzell v. Indianapolis, etc., R. Co.*, 32 Ind. 45; *Cleveland v. Bangor St. R. Co.*, 86 Me. 232; *Osgood v. Lynn, etc., R. Co.*, 130 Mass. 492; *Houston City St. R. Co. v. Delesdernier*, 84 Tex. 82; *Houston City St. R. Co. v. Richart*, (Tex. Civ. App. 1894) 27 S. W. Rep. 920; *Conlon v. City R. Co.*, 8 Nova Scotia 209; *Joyce v. Halifax St. R. Co.*, 24 Nova Scotia 113, *affirming* 21 Nova Scotia 531. See also *Alton, etc., Horse R., etc., Co. v. Deitz*, 50 Ill. 210, 99 Am. Dec. 509. Compare *Miller v. Lebanon, etc., St. R. Co.*, 186 Pa. St. 190.

In *New York*, under a statute requiring street-railway companies to keep in repair the portion of the street adjacent to their tracks, "under the supervision of the proper local authorities" and "whenever required by them to do so," the fact that the authorities have not requested the making of repairs will not relieve the company from liability for injuries caused by the want of repairs. *Doyle v. New York, 58 N. Y. App. Div. 588*; *Simon v. Metropolitan St. R. Co.*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 126.

2. *Snell v. Rochester R. Co.*, 64 Hun (N. Y.) 476; *Campbell v. Frankford, etc., R. Co.*, 139 Pa. St. 522.

3. **Notice of Defects.** — *Keitel v. St. Louis Cable, etc., R. Co.*, 28 Mo. App. 657; *Griveaud v. St. Louis Cable, etc., R. Co.*, 33 Mo. App. 458; *Worster v. Forty-second St., etc., R. Co.*, 50 N. Y. 203.

A street-car company is not entitled to notice of a defect in its track in order to hold it liable for a resulting injury where the defect is patent. If it appears that such a defect existed and that an injury was caused thereby, the presumption of negligence is complete. If the defect is of such short duration as to destroy the presumption of knowledge on the part of the company, that is a matter of defense. *Worster v. Forty-second St., etc., R. Co.*, 50 N. Y. 203; *Schild v. Central Park, etc., R. Co.*, 133 N. Y. 446, 28 Am. St. Rep. 658; *Rockwell v. Third Ave. R. Co.*, 64 Barb. (N. Y.) 438, *affirmed* 53 N. Y. 625. See also *Central R. Co.*

*v. State*, 82 Md. 647; *Gilton v. Hestonville, etc., Pass. R. Co.*, 166 Pa. St. 460.

4. **Defects Caused by Acts of Third Persons.** — *McMahon v. Second Ave. R. Co.*, 75 N. Y. 231. See, however, *Citizens Pass. R. Co. v. Ketcham*, 122 Pa. St. 228.

In *Massachusetts* it was held that Pub. Stat. Mass. (1882), c. 113, § 32, requiring a street-railway company to keep in repair the paving and upper planking or other surface material of the portions of streets occupied by its tracks, and in case of unpaved streets an additional space of eighteen inches each side of its track, did not impose upon the company the duty of filling in an excavation made by another, but it was only when such excavation had been filled by the municipality, or other person responsible, to the plane where surface material was required that the duty of the street-railway company began; and that, therefore, where a trench was dug in an unpaved street within eighteen inches of a track of a street-railway company by a person acting under a permit from the city for the construction of a sewer, the railway company was not charged with the duty of keeping in repair any portion of the street within the lines of the trench until it had been filled to a point where a surface was required. *Leary v. Boston El. R. Co.*, 180 Mass. 203. But see *Rev. Laws Mass. (1902)*, c. 112, § 44.

5. See generally the title EVIDENCE, vol. 11, p. 484, and the cross-references there given.

**Evidence of Similar Accidents.** — *Morrow v. Westchester Electric R. Co.*, 54 N. Y. App. Div. 592.

**Opinion of Witness as to Safety of Crossing.** — *Laughlin v. Grand Rapids St. R. Co.*, 62 Mich. 220.

**Photograph of Place of Accident.** — *Cunningham v. Fair Haven, etc., R. Co.*, 72 Conn. 244.

**Condition of Track at Places Other than Place of Accident.** — *Cunningham v. Fair Haven, etc., R. Co.*, 72 Conn. 244.

**Evidence of Condition of Track Prior to Injury.** — *Cunningham v. Fair Haven, etc., R. Co.*, 72 Conn. 244.



railway company has become bound to remedy such defects.<sup>1</sup> Still, if a recovery is had against the municipality, it may recover of the street-railway company the amount of the judgment recovered against it by the injured person,<sup>2</sup> together with the costs and expenses reasonably incurred in defending the suit in which the judgment was recovered.<sup>3</sup>

**Contributory Negligence.** — Negligence on the part of a person using the street, contributing to injuries sustained by him from defects in the street or tracks which the street-railway company was required to remedy, will, of course, prevent his recovery for such injuries from the company.<sup>4</sup> But a person using the street has a right to act on the presumption that the street-railway company has performed its duty in keeping its tracks in a safe condition,<sup>5</sup> and the mere fact that he has knowledge that the street is in a dangerous condition through the negligence of the company does not render his use of the street necessarily negligent.<sup>6</sup> The question whether the injured person was guilty of contributory negligence is usually for the jury.<sup>7</sup>

**Notice of Injury as Condition to Action.** — In *Connecticut* it has been held, under a statute providing that no action for an injury from a defective highway shall be maintained against any town, city, corporation, or borough unless written notice of such injury and of its nature and of the place of its occurrence is

**Evidence as to Condition Some Time After Injury Sued For.** — *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133.

**Evidence of Same Use by Other Persons Held Admissible to Show Absence of Defect.** — *Birmingham Union R. Co. v. Alexander*, 93 Ala. 133.

1. *Adams v. Halifax*, 13 Nova Scotia 344.

2. *Waterbury v. Waterbury Traction Co.*, 74 Conn. 153; *St. Joseph v. Union R. Co.*, 116 Mo. 636, 38 Am. St. Rep. 626; *Brooklyn v. Brooklyn City R. Co.*, 47 N. Y. 475, 7 Am. Rep. 469; *Ft. Worth St. R. Co. v. Allen* (Tex. Civ. App. 1897) 39 S. W. Rep. 125; *Carty v. London*, 18 Ont. 122. See also the titles *HIGHWAYS*, vol. 15, p. 489; *STREETS AND SIDEWALKS*, *post*.

Where a street-railway company accepts a license from the municipality to lay and operate its tracks in the streets, the terms and conditions of the license form a contract between the parties; and a reservation by the municipal corporation of the right to revoke the license in case the railroad company fails to comply with its terms does not alter the liability of the railroad company while operating its road under the license. Where, therefore, a judgment is recovered against the municipal corporation for injuries received by a citizen, by reason of the failure of the railroad company to comply with the conditions of the license, the record of the judgment is competent evidence in an action by the municipal corporation against the railroad company, and is conclusive as to the defendant's liability, and as to the amount the plaintiff is entitled to recover, if the defendant had notice of the action against the plaintiff and an opportunity to defend it. *Troy v. Troy*, etc., R. Co., 49 N. Y. 657.

**Notice to Defend.** — *Waterbury v. Waterbury Traction Co.*, 74 Conn. 152.

3. *Waterbury v. Waterbury Traction Co.*, 74 Conn. 152.

4. *Slayton v. West End St. R. Co.*, 174 Mass. 55; *Zanger v. Detroit City R. Co.*, 87 Mich. 646; *Watson v. Brooklyn City R. Co.*, (Brooklyn City Ct. Gen. T.) 14 Misc. (N. Y.) 405.

5. *Wiley v. Smith*, 25 N. Y. App. Div. 351.

A person driving along a track is not, as a matter of law, guilty of negligence in sitting in the centre of a low cart, immediately behind his horse, so that he is unable to observe the upturned end of a rail forming part of the track; but if the rail is plainly visible for a distance of one hundred and fifty feet and should have been observed by him in the exercise of ordinary care, he is guilty of such negligence as will preclude his recovery. *Bradwell v. Pittsburg*, etc., Pass. R. Co., 153 Pa. St. 105.

**6. Using Street with Knowledge of Condition.** — *Mahoney v. Metropolitan R. Co.*, 104 Mass. 73; *Laughlin v. Grand Rapids St. R. Co.*, 62 Mich. 220; *Newport News*, etc., R. etc., Co. v. *Bradford*, 100 Va. 231. See also *Farmer v. Findlay St. R. Co.*, 60 Ohio St. 36. Compare *Watson v. Brooklyn City R. Co.*, (Brooklyn City Ct. Gen. T.) 14 Misc. (N. Y.) 405.

In *Mahoney v. Metropolitan R. Co.*, 104 Mass. 73, the plaintiff sought to recover for injuries to himself and horse, caused by the alleged negligence of the defendant in piling snow on each side of the track. It appeared that he was driving a sled heavily loaded with lumber and drawn by two horses, and, seeing the danger in crossing the defendant's tracks, approached them in a cautious manner, using all the care possible; but when partly across, the front runners of his sled being much lower than the rear ones, owing to the bank of hard snow, the load became disengaged and fell forward on the plaintiff and his horses. The court held that the fact of his seeing the obstruction and knowing its dangerous character was not conclusive evidence of negligence on his part, and that it was for the jury to determine whether he was justified in attempting to cross the tracks, and whether he used due care in doing so.

7. *Laughlin v. Grand Rapids St. R. Co.*, 62 Mich. 220; *Wooley v. Grand St.*, etc., R. Co., 83 N. Y. 121; *Gerrard v. La Crosse City R. Co.*, 113 Wis. 258.

given within sixty days, that notice to a street-railway company of injuries caused by defects in its tracks or in the street which it is required to remedy is a condition precedent to the right of action therefor;<sup>1</sup> and the same has been held true in *Massachusetts* under a similar statute.<sup>2</sup>

'3. **Injuries to Passengers.**— In the carriage of passengers street railways are common carriers, and their duties and liabilities in this regard have been heretofore fully discussed.<sup>3</sup>

1. *Fields v. Hartford, etc., Horse R. Co.*, 54 Conn. 9; *Shalley v. Danbury, etc., Horse R. Co.*, 64 Conn. 381, in which latter case it was held that such a requirement is not unconstitutional as a denial or unreasonable abridgement of the plaintiff's right to sue, and further that there

was no waiver of notice in the particular case.

2. *Dobbins v. West End St. R. Co.*, 168 Mass. 556; *Mahoney v. Natick, etc., St. R. Co.*, 173 Mass. 587.

3. See the titles CARRIERS OF PASSENGERS, vol. 5, p. 474; COMMON CARRIERS, vol. 6, p. 236.

# STREETS AND SIDEWALKS.

BY BRISCOE BALDWIN CLARK.

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## CROSS-REFERENCES.

For matters of *PLEADING AND PRACTICE*, see the title *STREETS AND HIGHWAYS* in the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 20, p. 885.  
 For other matters of *SUBSTANTIVE LAW AND EVIDENCE* related to this subject, see in this work the titles *HIGHWAYS*, vol. 15, p. 343, and cross-references; *MUNICIPAL CORPORATIONS*, vol. 20, p. 1123, and cross-references; *STREET RAILWAYS*, ante, p. 3.

**I. WHAT CONSTITUTES STREET OR SIDEWALK.**—A street is a public way or road in a city or village, as distinguished from public ways or roads in a township or county.<sup>1</sup> The term "street" does not include private ways,<sup>2</sup> nor roads or ways owned by private corporations, such as toll roads;<sup>3</sup> nor does the term include a waterway;<sup>4</sup> but a bridge over a stream crossing a street has been considered a part of the street.<sup>5</sup> A street is a public highway,<sup>6</sup> and as such *per se* a public place;<sup>7</sup> but not all highways are streets,<sup>8</sup> and this has been

1. *Definition—Florida*.—Duval County v. Jacksonville, 36 Fla. 196.

*Indiana*.—Pittsburgh, etc., R. Co. v. Hays, 17 Ind. App. 261; Debolt v. Carter, 31 Ind. 367; State v. Moriarity, 74 Ind. 103.

*Iowa*.—Sachs v. Sioux City, 109 Iowa 224.

*Kansas*.—Ottawa v. McCreery, 10 Kan. App. 443.

*Maine*.—State v. Beeman, 35 Me. 242; Dorman v. Lewiston, 81 Me. 411.

*Maryland*.—Horner v. State, 49 Md. 278.

*Minnesota*.—Carli v. Stillwater St. R., etc., Co., 28 Minn. 373, 41 Am. Rep. 290.

*Mississippi*.—Mobile, etc., R. Co. v. State, 51 Miss. 140.

*Missouri*.—California v. Howard, 78 Mo. 90.

*New Jersey*.—Read v. Camden, 54 N. J. L. 347.

*New York*.—Parfitt v. Ferguson, 3 N. Y. App. Div. 181; Brace v. New York Cent. R. Co., 27 N. Y. 269.

*Oregon*.—Heiple v. East Portland, 13 Oregon 97.

*Pennsylvania*.—Stormfeltz v. Manor Turnpike Co., 13 Pa. St. 560; Southwark R. Co. v. Philadelphia, 47 Pa. St. 314; Reed v. Erie, 79 Pa. St. 352. See also Robinson v. Local Board, 8 App. Cas. 798.

*Street and Levee Distinguished*.—St. Paul v. Chicago, etc., R. Co., 63 Minn. 330.

2. *Private Ways*.—Coverdale v. Charlton, 4 Q. B. D. 121; Com. v. Boston, etc., R. Co., 135 Mass. 550. See also Denver v. Clements, 3 Colo. 484. Compare St. Mary v. Barrett, L. R.

9 Q. B. 278, 43 L. J. M. C. 85; Midland R. Co. v. Walton, 17 Q. B. D. 30, 55 L. J. M. C. 99.

3. *Toll Roads*.—Quinn v. Paterson, 27 N. J. L. 35; Wilson v. Allegheny City, 79 Pa. St. 272.

4. *Waterway*.—Reed v. Erie, 79 Pa. St. 346.

5. *Bridges*.—Chicago v. Powers, 42 Ill. 169, 89 Am. Dec. 418; Sachs v. Sioux City, 109 Iowa 224. See also Challiss v. Parker, 11 Kan. 391; Read v. Camden, 54 N. J. L. 347, 53 N. J. L. 322 (bridge over railroad tracks), and the title *BRIDGES*, vol. 4, p. 920. Compare Hestonville, etc., Pass. R. Co. v. Forty-second St., etc., R. Co., 4 Pa. Dist. 343.

6. *Public Highway—Alabama*.—Government St. R. Co. v. Hanlon, 53 Ala. 81.

*Colorado*.—Denver v. Clements, 3 Colo. 484; Ward v. Farwell, 6 Colo. 72.

*Connecticut*.—Hamlin v. Norwich, 40 Conn. 25.

*Illinois*.—Chicago Union Traction Co. v. Stanford, 104 Ill. App. 99.

*Indiana*.—Brinkmeyer v. Evansville, 29 Ind. 104; Cox v. Louisville, etc., R. Co., 48 Ind. 178.

*Iowa*.—Sachs v. Sioux City, 109 Iowa 224.

*Mississippi*.—Theobald v. Louisville, etc., R. Co., 66 Miss. 285, 14 Am. St. Rep. 564.

*Pennsylvania*.—Southwark R. Co. v. Philadelphia, 47 Pa. St. 314.

See also the title *HIGHWAYS*, vol. 15, p. 352.

7. *Carwile v. State*, 35 Ala. 302; *State v. Waggoner*, 52 Ind. 481; *State v. Moriarty*, 74 Ind. 104.

8. *Sachs v. Sioux City*, 109 Iowa 224.

held true though the highway was located within the limits of a city.<sup>1</sup> The term "road"<sup>2</sup> or "highway"<sup>3</sup> in its broad sense includes streets, but in its more narrow sense the term "highway" does not include streets,<sup>4</sup> and the same is true with regard to the term "road."<sup>5</sup>

**Street and Sidewalk Distinguished.**—While the term "street" in its broad sense includes both the roadway for vehicles and the sidewalk for pedestrians,<sup>6</sup> still when used in its narrow sense it has been held to include only the roadway for vehicles, thereby excluding from the term the sidewalk for pedestrians.<sup>7</sup> The term "sidewalk," when used to designate a part of a street, means that part of the street intended only for pedestrians, and is thus distinguished from that part of the street set apart especially for vehicles and horsemen.<sup>8</sup> To constitute a walk a sidewalk it is not essential that it be laid directly upon the ground.<sup>9</sup> It is immaterial of what kind of material the walk is constructed.<sup>10</sup> The sidewalk is equally with the balance of the street a public highway,<sup>11</sup> and a walk for pedestrians beside a private road is not a sidewalk.<sup>12</sup> A *cul-de-sac* or way open at one end only may be a street.<sup>13</sup>

**II. ESTABLISHMENT OF STREETS**—1. **Dedication.**—One of the most frequent means by which streets are established is through dedication; this subject has been fully discussed in another title.<sup>14</sup>

2. **Prescription.**—The principles applying to the creation of streets by prescription have been fully discussed elsewhere.<sup>15</sup>

1. *Heiple v. East Portland*, 13 Oregon 97.

2. **Road.**—*Brace v. New York Cent. R. Co.*, 27 N. Y. 269 (statute requiring cattle guards at road crossings); *Sharet's Road*, 8 Pa. St. 92.

3. **Highway.**—*Hall v. St. Paul*, 56 Minn. 428; *Northwestern Telephone Exch. Co. v. Minneapolis*, 81 Minn. 140; *Southern Kansas R. Co. v. Oklahoma City*, (Okla. 1902) 69 Pac. Rep. 1050.

4. *Indianapolis v. Croas*, 7 Ind. 9; *Mobile, etc., R. Co. v. State*, 51 Miss. 140.

5. *Clark v. Com.*, 14 Bush (Ky.) 166 (obstruction of "public road").

6. **Street as including Sidewalk**—*Arkansas*.—*Little Rock v. Fitzgerald*, 59 Ark. 499.

*Colorado*.—*Board of Public Works v. Hayden*, 13 Colo. App. 36.

*Connecticut*.—*Ely v. Parsons*, 2 Conn. 384; *Manchester v. Hartford*, 30 Conn. 118; *Beardsley v. Hartford*, 50 Conn. 538.

*Idaho*.—*Giffen v. Lewiston*, 6 Idaho 231; *McLean v. Lewiston*, (Idaho 1902) 69 Pac. Rep. 479.

*Illinois*.—*Bloomington v. Bay*, 42 Ill. 503.

*Indiana*.—*Evansville v. Pfisterer*, 34 Ind. 45, 7 Am. Rep. 214; *Higert v. Greencastle*, 43 Ind. 591; *State v. Berdette*, 73 Ind. 185, 38 Am. Rep. 117; *Chamberlain v. Evansville*, 77 Ind. 546; *Kokomo v. Mahan*, 100 Ind. 242; *Taber v. Grafmiller*, 109 Ind. 206; *Dooley v. Sullivan*, 112 Ind. 451, 2 Am. St. Rep. 209; *Wiles v. Hoss*, 114 Ind. 371.

*Iowa*.—*Warren v. Henly*, 31 Iowa 31.

*Massachusetts*.—*Dickinson v. Worcester*, 138 Mass. 555.

*Michigan*.—*Brevoort v. Detroit*, 24 Mich. 325.

*Missouri*.—*Knapp v. St. Louis Transfer R. Co.*, 126 Mo. 26.

*New Hampshire*.—*Hall v. Manchester*, 40 N. H. 410.

*New York*.—*Matter of Burmeister*, 76 N. Y. 174; *Pomfrey v. Saratoga Springs*, 104 N. Y. 459.

*Pennsylvania*.—*Provost v. New Chester Water Co.*, 162 Pa. St. 279.

*Virginia*.—*Sands v. Richmond*, 31 Gratt. (Va.) 571, 31 Am. Rep. 742.

Thus, the word "street" as used in a statute requiring municipalities to compensate for damages resulting from a change in the grade of a street includes sidewalks. *Kokomo v. Mahan*, 100 Ind. 242.

So, also, a municipality, under statutory authority to improve its streets, may improve sidewalks. *Taber v. Grafmiller*, 109 Ind. 206.

7. *Himmelmänn v. Satterlee*, 50 Cal. 69; *Dyer v. Chase*, 52 Cal. 440; *Philadelphia v. Lea*, 9 Phila. (Pa.) 106, 30 Leg. Int. (Pa.) 52.

8. **Sidewalk.**—*Little Rock v. Fitzgerald*, 59 Ark. 499; *Ottawa v. Spencer*, 40 Ill. 217; *Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640; *Enos v. Springfield*, 113 Ill. 65; *Challiss v. Parker*, 11 Kan. 384; *Graham v. Albert Lea*, 48 Minn. 201; *Oliver v. Kansas City*, 69 Mo. 83; *Ord v. Nash*, 50 Neb. 335. See also *Porter v. Waring*, (Ct. App.) 2 Abb. N. Cas. (N. Y.) 230.

**Sidewalk and Crosswalk Distinguished.**—*O'Neil v. Detroit*, 50 Mich. 135, stated and quoted under **CROSSWALK**, vol. 8, p. 434.

9. Thus, in *Challiss v. Parker*, 11 Kan. 384, a board walk elevated on posts was held to be a sidewalk, though in one place there was a stream of running water beneath it.

10. *Graham v. Albert Lea*, 48 Minn. 201.

11. *Ottawa v. Spencer*, 40 Ill. 217; *Chicago v. O'Brien*, 111 Ill. 532, 53 Am. Rep. 640.

12. *People v. Meyer*, (County Ct.) 26 Misc. (N. Y.) 117.

13. *Bartlett v. Bangor*, 67 Me. 460. See also **CUL-DE-SAC**, vol. 8, p. 458. *Compare Holdane v. Cold Spring*, 23 Barb. (N. Y.) 103.

14. **Dedication.**—See the title **DEDICATION**, vol. 9, p. 20.

15. **Prescription.**—See the title **PRESCRIPTION**, vol. 22, p. 1180.

**3. Incorporation or Annexation of Territory to Municipality.** — The general rule is that when a municipal corporation is created it becomes vested with jurisdiction over the territory embraced within its corporate limits, including the parts of established roads of the county,<sup>1</sup> and the same has been held true where territory is annexed to an existing municipality.<sup>2</sup> It has also been held that the part of a turnpike road taken into a city by an extension of its boundary and accepted by the city becomes a street thereof.<sup>3</sup> The fact that the county has made a valuable improvement on one of the streets does not oust the municipality of its jurisdiction over such street when brought within its corporate limits.<sup>4</sup>

**4. Statutory Proceedings for Establishment of Streets** — *a. IN GENERAL.* — In the absence of statutory authority municipalities have no power to acquire by compulsory proceedings property for the establishment of streets,<sup>5</sup> and power merely to regulate and improve streets does not include the power to open and establish new streets and condemn property therefor.<sup>6</sup> The taking of land for the opening of streets is a taking for a public use and may be authorized by the legislature in the exercise of the power of eminent domain,<sup>7</sup> and the condemnation of the absolute fee title to land for the purpose of a street may be authorized as well as the condemnation of a mere easement.<sup>8</sup> The question whether a municipality or particular board has power to establish streets and condemn land for such purposes depends upon the terms of the statute conferring the power,<sup>9</sup> and power conferred upon a municipality to

**1. Incorporation of Municipality.** — *Almand v. Atlanta Consol. St. R. Co.*, 108 Ga. 417; *Deering v. Cumberland County*, 87 Me. 151. See also *State v. Lythgoe*, 6 Rich. L. (S. Car.) 112.

**2. Extension of Corporate Limits.** — *Brown v. Hines*, 16 Ind. App. 1; *McGrew v. Stewart*, 51 Kan. 185; *Danville v. Fiscal Ct.*, (Ky. 1899) 49 S. W. Rep. 458; *Louisville v. Brewer*, 72 S. W. Rep. 9, 24 Ky. L. Rep. 1671; *Cascade County v. Great Falls*, 18 Mont. 537; *Thale v. Cincinnati*, 3 Ohio Dec. 131; *Corry v. Cincinnati*, 10 Ohio Dec. (Reprint) 601; *Wabash R. Co. v. Defiance*, 8 Ohio Cir. Dec. 703, 10 Ohio Cir. Ct. 27, affirmed 52 Ohio St. 262. See also *Doe v. Jones*, 11 Ala. 63. Compare *Denver v. Mullen*, 7 Colo. 345.

Under Act Ky. March 17, 1896, providing for the acquisition by counties of tollpikes and their conversion into free highways, and providing that all turnpikes and gravel roads thus acquired shall become public roads and be maintained and kept in repair by the county, where a turnpike is thus acquired, the part thereof included within the limits of a municipality becomes a street of the municipality to be controlled and maintained by it. *Danville v. Fiscal Ct.*, 106 Ky. 608.

Where a city procures the annexation of territory traversed by a county road, such road becomes a street of the municipality without formal recognition of such fact by the municipal council. *Louisville v. Brewer*, (Ky. 1903) 72 S. W. Rep. 9.

**Bridge.** — Where the limits of a city are extended to the opposite bank of a river, so as to embrace a bridge then owned by the county, the bridge becomes part of the city street by which it is approached and thereby ceases to be within any road district as established by the county, or under the control of the county officers, but falls within the jurisdiction of city officers, by whom it is to be kept in repair.

*Cascade County v. Great Falls*, 18 Mont. 537. See also *Wabash R. Co. v. Defiance*, 52 Ohio St. 262.

**3. Mackin v. Wilson**, (Ky. 1898) 45 S. W. Rep. 663. See also *Versailles, etc., Turnpike Co. v. Versailles*, (Ky. 1889) 10 S. W. Rep. 280.

**4. Almand v. Atlanta Consol. St. R. Co.**, 108 Ga. 417.

**5. Condemnation — Statutory Authority Necessary.** — *MacKellar v. Seeds*, 10 Pa. Super. Ct. 167, 44 W. N. C. (Pa.) 182.

**6. Knowles v. Muscatine**, 20 Iowa 248.

In *Tacoma v. State*, 4 Wash. 64, it was held that power conferred upon the city of Tacoma to lay out, establish, etc., streets did not include an implied power to condemn lands therefor, as there was nothing in the grant which might not be accomplished by a purchase of the necessary lands.

**7. Statutory Power.** — *Brimmer v. Boston*, 102 Mass. 19. See the title EMINENT DOMAIN; vol. 10, p. 1043.

**8. Fairchild v. St. Paul**, 46 Minn. 540.

**9. Statute Determines Existence of Power — California.** — *Byrne v. Drain*, 127 Cal. 663; *Cohen v. Alameda*, 124 Cal. 504.

*Illinois.* — *Curry v. Mt. Sterling*, 15 Ill. 320; *People v. Kirk*, 162 Ill. 138, 53 Am. St. Rep. 277.

*Louisiana.* — *New Orleans v. Steinhardt*, 52 La. Ann. 1043.

*Maine.* — *Preble v. Portland*, 45 Me. 241.

*Maryland.* — *Baltimore v. Smith, etc.*, Brick Co., 80 Md. 458.

*Missouri.* — *In re Independence Ave. Boulevard*, 128 Mo. 272.

*New Jersey.* — *Cherry v. Keyport*, 52 N. J. L. 544.

*New York.* — *Matter of Board of Public Works*, 144 N. Y. 440; *Matter of Board of St. Opening*, 91 Hun (N. Y.) 477; *Matter of Board of St. Opening*, (Supm. Ct.) 12 Misc. (N. Y.) 526; *Matter of Board of St. Opening*, 82 Hun



"open" streets has been held to empower it to lay out and establish new streets.<sup>1</sup> Power conferred upon a municipality to establish a street is to be exercised for the public good as circumstances may require, and it cannot by contract abridge such power.<sup>2</sup>

**b. EXERCISE OF POWER**—(1) *In General*.—The power to establish streets is to be exercised in the manner provided by the statutes conferring the power.<sup>3</sup> In many instances the statutes have provided for the institution of proceedings for the opening of streets before particular tribunals, such as a particular court, or commissioners, or the city council.<sup>4</sup> The authority of the special tribunal over such matters is of a judicial nature,<sup>5</sup> and in order that jurisdiction may be acquired there must be a strict compliance with every prerequisite of the statute, otherwise the proceedings are invalid,<sup>6</sup> and a statutory provision that in all actions concerning the opening of streets, all proceedings had for that purpose shall be presumed to have been regular and legally taken until the contrary is shown applies only to proceedings had after jurisdiction has been acquired.<sup>7</sup>

(2) *Necessity for Street*.—While, to authorize the establishment of a street and the condemnation of land therefor, it must be shown to be of public convenience and utility,<sup>8</sup> still where a special tribunal is made the tribunal to

(N. Y.) 580; *Robert v. Kings County*, (N. Y. 1899) 52 N. E. Rep. 1126.

*Pennsylvania*.—*Verona v. Allegheny Valley R. Co.*, 187 Pa. St. 358.

*Washington*.—See *Seattle, etc.*, R. Co. v. State, 7 Wash. 150, 38 Am. St. Rep. 866; *Ilwaco v. Ilwaco R., etc., Co.*, 17 Wash. 652.

*Canada*.—*Gooderham v. Toronto*, 25 Can. Sup. Ct. 246.

**Power to "Extend."**—The fact that the street sought to be established as an "extension" of another street is not a direct continuation of the latter, but makes an offset before starting, does not prevent it from being an "extension." *Locust St.*, 153 Pa. St. 276. See also **EXTEND**, vol. 12, p. 573.

1. *Hannibal v. Hannibal, etc.*, R. Co., 49 Mo. 480.

2. *Matter of Opening First St.*, 66 Mich. 42; *New York, etc.*, R. Co. v. *New Rochelle*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 195.

3. **Exercise of Power—Following Statutory Requirements**—*Illinois*.—*Kidder v. Peoria*, 29 Ill. 77.

*Indiana*.—*Elkhart v. Simonton*, 71 Ind. 7; *Logansport v. Shirk*, 129 Ind. 352.

*Maine*.—*Biddeford v. York County*, 78 Me. 105.

*Maryland*.—*Baltimore v. Grand Lodge, etc.*, 44 Md. 436; *Friedenwald v. Shipley*, 74 Md. 220.

*Massachusetts*.—*Barnes v. Springfield*, 4 Allen (Mass.) 488; *Dwight v. Springfield*, 4 Gray (Mass.) 107; *Lowell v. Hadley*, 8 Met. (Mass.) 180; *Taber v. New Bedford*, 135 Mass. 162.

*Minnesota*.—*St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 359.

*New Jersey*.—*State v. Clarke*, 25 N. J. L. 54; *Wilson v. Trenton*, 55 N. J. L. 220; *State v. Union*, 32 N. J. L. 343; *State v. Belgen*, 33 N. J. L. 39; *State v. Hudson*, 34 N. J. L. 531; *Onderdonk v. Plainfield*, 42 N. J. L. 480.

*New York*.—*Matter of Central Park Com'rs.* 51 Barb. (N. Y.) 277; *Matter of Beekman St.*, 20 Johns. (N. Y.) 269; *Havermans v. Troy*.

(Supm. Ct. Spec. T.) 50 How. Pr. (N. Y.) 510; *Matter of Kingsbridge Road*, 4 Hun (N. Y.) 599; *People v. Supervisor*, 89 Hun (N. Y.) 241; *Matter of Newland Ave.*, (Supm. Ct. Gen. T.) 38 N. Y. St. Rep. 796; *People v. Haverstraw*, 137 N. Y. 88.

*Oregon*.—*Ladd v. East Portland*, 18 Oregon 87.

*Pennsylvania*.—*Walnut St.*, 7 Kulp (Pa.) 562; *Du Bois Opera House Co. v. Du Bois*, 16 Pa. Co. Ct. 210; *Opening of Sheridan Ave.*, 138 Pa. St. 264; *Locust St.*, 153 Pa. St. 276; *West Chester Alley*, 160 Pa. St. 89.

*Rhode Island*.—*Tingley v. Providence*, 9 R. I. 388; *Billings v. Providence*, (R. I. 1895) 32 Atl. Rep. 855.

*Texas*.—*Norwood v. Gonzales County*, 79 Tex. 218.

4. *Dorman v. Lewiston*, 81 Me. 411. See the local statutes generally.

**The Common Council of a City**, in laying out streets, act, not as agents or officers of the city, but as public officers, vested with quasi-judicial functions, and deriving their power from the sovereign authority. The laying out and establishing the way is the act of the state, in the exercise of the power of eminent domain, and this power cannot be destroyed or abridged by the acts of any individual or the city. *Brimmer v. Boston*, 102 Mass. 19.

5. *Matter of Canal St.*, 11 Wend. (N. Y.) 154.

6. **Prerequisites Must Be Complied With.**—*Keifer v. Bridgeport*, 68 Conn. 401; *People v. Hyde Park*, 117 Ill. 462; *Busenbark v. Clements*, 22 Ind. App. 557; *State v. Judge*, 51 La. Ann. 1768; *State v. Jersey City*, 25 N. J. L. 309; *People v. Supervisor*, 89 Hun (N. Y.) 241; *Northern Pac. Terminal Co. v. Portland*, 14 Oregon 24; *Hogsett's Appeal*, 2 Pa. Super. Ct. 265; *Rubland v. Hazel Green*, 55 Wis. 664.

7. *Northern Pac. Terminal Co. v. Portland*, 14 Oregon 24; *Van Sant v. Portland*, 6 Oregon 395.

8. **Necessity for Street.**—In *Michigan*, under the constitutional provision requiring the jury

determine the necessity for the establishment of a street, its decision, in the absence of fraud or evil practice, will not as a general rule be disturbed,<sup>1</sup> and where a mere power is conferred upon a municipality to open streets and condemn land therefor, it is discretionary with the municipality to refuse to exercise the power with regard to a particular proposed street.<sup>2</sup>

(3) *Petition or Consent of Property Owners.* — Statutory provisions requiring a petition or consent on the part of property owners abutting upon the street to be opened must of course be complied with.<sup>3</sup>

(4) *Where Street May Be Located.* — Where the statute authorizing the opening of a street expressly fixes the location of the street, this location is, of course, controlling.<sup>4</sup>

**Public Property.** — A municipality, under general power to open streets and condemn land therefor, has no power to condemn or take land belonging to the state for such purpose.<sup>5</sup>

**Tide Lands and Land of Navigable Waters.** — The construction of streets over tide lands, which are public property, may be authorized by the legislature,<sup>6</sup> and in *Illinois* it has been held that the legislature may authorize the extension of a

to determine the necessity for taking land for public use, in determining whether the taking of land for opening a street is necessary, the jury should consider the benefits to the public and the cost of the improvement. *Detroit v. Beecher*, 75 Mich. 454. See also *Seifert v. Brooks*, 34 Wis. 443.

1. *California.* — *Symons v. San Francisco*, 115 Cal. 555.

*Illinois.* — *Curry v. Mt. Sterling*, 15 Ill. 320; *Chicago v. Wright*, 69 Ill. 318.

*Indiana.* — *Holden v. Crawfordsville*, 143 Ind. 558.

*Louisiana.* — *New Orleans v. Steinhardt*, 52 La. Ann. 1043.

*Missouri.* — *Saxton v. St. Joseph*, 60 Mo. 153; *State v. Engelmann*, 106 Mo. 628; *In re Independence Ave. Boulevard*, 128 Mo. 272; *Cape Girardeau v. Houck*, 129 Mo. 607.

*New Jersey.* — *Matthiessen, etc., Sugar Refining Co. v. Jersey City*, 26 N. J. Eq. 247; *North Baptist Church v. Orange*, 54 N. J. L. 111.

*New York.* — *People v. Delaware, etc., R. Co.*, 159 N. Y. 545, 11 N. Y. App. Div. 280, *affirmed* Matter of *Folts St.*, 18 N. Y. App. Div. 568.

*Pennsylvania.* — *Forty-ninth St.*, 20 Pa. Co. Ct. 462, 7 Pa. Dist. 73.

*Rhode Island.* — *Hunter v. Newport*, 5 R. I. 325.

2. *Collins v. Savannah*, 77 Ga. 745. See also *Worcester v. Worcester County*, 167 Mass. 565.

3. *Petition or Consent of Property Owners — United States.* — *Liebman v. San Francisco*, 24 Fed. Rep. 705 (*construing California statute*). *California.* — *In re Grove St.*, 61 Cal. 438.

*Illinois.* — *Taylor v. Bloomington*, 186 Ill. 497.

*Louisiana.* — *Opening of Royal St.*, 16 La. Ann. 393.

*Maine.* — *Cassidy v. Bangor*, 61 Me. 434; *Dorman v. Lewiston*, 81 Me. 411.

*Michigan.* — *Detroit v. Judge*, 40 Mich. 64.

*Minnesota.* — *Fohl v. Chicago, etc., R. Co.*, 84 Minn. 314.

*New Jersey.* — *New Jersey Junction R. Co. v. Jersey City*, 68 N. J. L. 108; *State v. Elizabeth*, 30 N. J. L. 176; *State v. Orange*, 32 N. J. L.

49; *State v. Union*, 32 N. J. L. 343; *Wirth v. Jersey City*, 56 N. J. L. 216.

*New York.* — *People v. Whitney's Point*, 32 Hun (N. Y.) 508; *Elwood v. Rochester*, 43 Hun (N. Y.) 102; *Havermans v. Troy*, (Supm. Ct. Spec. T.) 50 How. Pr. (N. Y.) 510; *Brooklyn v. Patchen*, 8 Wend. (N. Y.) 47; *People v. Port Jervis*, 100 N. Y. 283.

*Pennsylvania.* — *Union Alley*, 9 Pa. Dist. 209; *Speer v. Pittsburg*, 166 Pa. St. 86; *Dorrance v. Dorranceton*, 181 Pa. St. 164.

**Sufficiency of Petition.** — A *California Act* (Stat. Cal., 1871-72, p. 911, § 5) requires that the petition to the mayor shall be signed by the "owners of a majority in frontage of the property described in section four of this act, as said names are or shall be named in the last preceding annual assessment roll for the state, city, and county taxes." It was held that the court could not disregard such requirement as to qualification of petitioners, and no signatures of persons whose names do not there appear should be included. It was also held that signatures by executors, administrators, and agents must be excluded, as also must the signatures by the president and secretary of a corporation owning abutting property without competent authority from the corporation. It was further held that the determination of the County Court that a majority of owners had signed the petition was not conclusive, and also that the determination of the mayor that the petition was so signed was not conclusive. *Kahn v. San Francisco*, 79 Cal. 388.

**Verification.** — Where the statute required a verification by the city attorney, it was held sufficient for him to swear that the petition was true to the best of his knowledge and belief. *Detroit v. Beecher*, 75 Mich. 454, 27 Am. & Eng. Corp. Cas. 43.

4. *Where Street May Be Located.* — *Matter of Brooklyn*, 73 N. Y. 179.

5. **Public Property.** — *Atlanta v. Central R., etc., Co.*, 53 Ga. 120.

6. *Bowker v. Wright*, 54 N. J. L. 130; *Columbia, etc., R. Co. v. Seattle*, 6 Wash. 332; *Seattle, etc., R. Co. v. State*, 7 Wash. 150, 38 Am. St. Rep. 866; *State v. Forrest*, 12 Wash. 483.

street over the waters of Lake Michigan, so long as the same does not interfere with navigation, commerce, or the right of fishing.<sup>1</sup>

**Railroad Property.** — Under a general power to establish streets and condemn property for such purpose, streets may be established across the tracks of an ordinary railroad,<sup>2</sup> but under a general power to open streets it has been held that streets cannot be located longitudinally over the right of way of a railroad company,<sup>3</sup> nor under such power can a street be opened through the depot grounds of a railroad company, in such a manner as to destroy or essentially impair the company's enjoyment of the property for railroad purposes.<sup>4</sup> The legislature may expressly authorize the location of streets through the freight yards of a railroad.<sup>5</sup>

**Across Other Streets and Alleys.** — Streets may be opened across other streets or public alleys without condemning the land occupied by the streets or alleys so crossed.<sup>6</sup>

**Over Existing Highways.** — Streets may be established over existing highways such as county roads, within the corporate limits of a municipality, and such a change in use does not impose an additional servitude nor constitute a taking which demands additional compensation.<sup>7</sup>

**Turnpike or Toll Road.** — Though a turnpike or toll road is a public highway, and the use is of the same nature as the use of streets, still streets may be laid out over such ways.<sup>8</sup>

**Property Acquired from Municipality.** — As the taking of land for the opening of streets is in the exercise of the power of eminent domain, and as the sovereign power of eminent domain cannot be abridged by the acts of any municipality, the legislature may authorize the taking of land for such purpose, though the land is held under a warranty deed from the municipality.<sup>9</sup>

**Land Occupied by Buildings.** — Under a general power to establish streets and condemn land therefor, the fact that a building is constructed upon the land sought to be condemned is immaterial,<sup>10</sup> and it has been held that a general provision in an act relating to the establishment of "roads," prohibiting the taking of land occupied by a dwelling house for the establishment of a road, did not restrict the general power conferred on a municipality to take land for a street.<sup>11</sup>

**Cemeteries.** — In some instances statutes providing for the establishment of streets expressly prohibit the opening of streets through cemeteries or burial grounds.<sup>12</sup>

**Over Vacated Streets.** — Where a street has been vacated it is then as if no street had been located, and subsequently a new street may be established over the line of the old street.<sup>13</sup>

1. *People v. Kirk*, 162 Ill. 138, 53 Am. St. Rep. 277. See also *Hogsett's Appeal*, 2 Pa. Super. Ct. 265.

2. **Railroad Property.** — *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 227; *Chicago, etc., R. Co. v. Chicago*, 151 Ill. 348; *Chicago, etc., R. Co. v. Cicero*, 154 Ill. 656; *Pittsburg, etc., R. Co. v. Chicago*, 159 Ill. 369; *St. Paul, etc., R. Co. v. Minneapolis*, 35 Minn. 141; *Hannibal v. Hannibal, etc., R. Co.*, 49 Mo. 480; *People v. Delaware, etc., R. Co.*, 11 N. Y. App. Div. 280, *affirmed* 159 N. Y. 545; *Matter of North Third Ave.*, 32 N. Y. App. Div. 394; *Washington St.*, 12 Pa. Co. Ct. 288.

3. *New Jersey Southern R. Co. v. Long Branch Com'rs*, 39 N. J. L. 28; *Prospect Park, etc., R. Co. v. Williamson*, 91 N. Y. 552.

4. *Milwaukee, etc., R. Co. v. Faribault*, 23 Minn. 167.

5. *Terre Haute v. Evansville, etc., R. Co.*, 149

Ind. 174; *Matter of Folts St.*, 18 N. Y. App. Div. 568.

6. **Crossing Other Streets.** — *Scotten v. Detroit*, 106 Mich. 564.

7. **Over Existing Highways.** — *Huddleston v. Eugene*, 34 Oregon 343.

8. **Toll Roads.** — *Backus v. Lebanon*, 11 N. H. 25.

9. *Brimmer v. Boston*, 102 Mass. 19.

10. *Shewell Ave.*, 20 Pa. Co. Ct. 278.

In *Patchin v. Brooklyn*, 2 Wend. (N. Y.) 377, power conferred on a municipality to take "lands" for establishment of streets was held to authorize the taking of land occupied by buildings.

11. *Barr v. New Brunswick*, 58 N. J. L. 255. See also *Patchin v. Brooklyn*, 2 Wend. (N. Y.) 377.

12. See the title CEMETERIES, vol. 5, p. 784.

13. **Over Vacated Streets.** — *Chestnut St.*, 15 Pa. Co. Ct. 115.

(5) *Width of Street.* — In some instances the statutes have limited the width of streets to be opened.<sup>1</sup> In the absence of any express restriction there is no limit in respect of the width of the strip of land to be condemned, save only that in some sense the land taken may be regarded as useful or necessary for the purpose for which it is taken,<sup>2</sup> and the discretion conferred upon municipalities as to the proper width of streets to be opened is not reviewable.<sup>3</sup>

(6) *Ordinances and Resolutions.* — Ordinances and resolutions with regard to the opening of a street must be enacted in compliance with the provision of the statute.<sup>4</sup>

(7) *Notices.* — The statutes relating to the opening of streets generally provide for the giving of notice of the proceedings to the property owners to be affected thereby,<sup>5</sup> and where the statute so decrees the property owners must be given an opportunity to be heard.<sup>6</sup> A statute which authorized the taking of land for opening streets without giving notice to property owners to be affected thereby, and the opportunity to be heard upon the question of compensation, would be unconstitutional as a deprivation of property without due process of law.<sup>7</sup> Notice must be given to all who have any interest in the land to be taken,<sup>8</sup> such as lessees,<sup>9</sup> mortgagees,<sup>10</sup> vendor in an executory contract for the sale of land,<sup>11</sup> the heirs of a deceased owner and not his administrator,<sup>12</sup> and a trustee and not the *cestui que trust*.<sup>13</sup> Persons acquiring interests in land to be taken, after the institution of the proceedings for opening the street, need not be made parties.<sup>14</sup> In the absence of a constitutional provision to the contrary, the legislature may authorize local officers to determine certain preliminary matters in regard to the opening of streets, such as the line of the proposed street, the necessity for it, and the mode of constructing it, without notice to the landowners,<sup>15</sup> but if the constitution provides that these questions shall be submitted to a judicial tribunal, notice is necessary.<sup>16</sup>

*Waiver of Notice.* — Property owners whose lands are to be taken for opening a street may waive their right to notice, and it is generally held that where a property owner enters a full appearance to the proceedings, without having received notice, he will be deemed to have waived it.<sup>17</sup>

*Manner of Giving Notice.* — Statutory provisions as to the manner of giving notice must be complied with.<sup>18</sup> It is competent for the legislature to provide

1. Fohl v. Chicago, etc., R. Co., 84 Minn. 314.

2. Curran v. Guilfoyle, 38 N. Y. App. Div. 82.

3. Dobson v. Philadelphia, 7 Pa. Dist. 321.

4. *Ordinances and Resolutions.* — Cohen v. Alameda, 124 Cal. 504; Holden v. Crawfordsville, 143 Ind. 558; State v. Jersey City, 25 N. J. L. 309; Copcutt v. Yonkers, 83 Hun (N. Y.) 178; Titusville St., 3 Pa. Dist. 752; Dorrance v. Dorranceton, 181 Pa. St. 164; Grace v. Walker, 95 Tex. 39.

*Description of Street.* — Stone v. Cambridge, 6 Cush. (Mass.) 270; People v. Delaware, etc., R. Co., 11 N. Y. App. Div. 280; Grace v. Walker, 95 Tex. 39.

The rule *falsa demonstratio non nocet* is applicable. State v. Orange, 32 N. J. L. 49.

5. *Notices.* — James v. St. Paul, 58 Minn. 459; Matter of Opening Oneida St., 37 N. Y. App. Div. 266, reversing (County Ct.) 22 Misc. (N. Y.) 235; In re Apple St., 6 Pa. Dist. 63; Walnut St., 7 Kulp (Pa.) 562.

6. State v. Jersey City, 25 N. J. L. 309.

7. Stuart v. Palmer, 74 N. Y. 190; Owners of Ground v. Albany, 15 Wend. (N. Y.) 374; Hood v. Finch, 8 Wis. 381.

8. All Having Interest in Land Entitled to

*Notice.* — Whitcher v. Benton, 48 N. H. 157, 97 Am. Dec. 597.

9. Storm Lake v. Iowa Falls, etc., R. Co., 62 Iowa 218; Parks v. Boston, 15 Pick. (Mass.) 198; Astor v. Miller, 2 Paige (N. Y.) 68.

10. Sherwood v. Lafayette, 109 Ind. 411, 58 Am. Rep. 414; Astor v. Hoyt, 5 Wend. (N. Y.) 603; Matter of John, etc., St., 19 Wend. (N. Y.) 659.

11. Smith v. Ferris, 6 Hun (N. Y.) 553.

12. Boonville v. Ormrod, 26 Mo. 193.

13. State v. Orange, 32 N. J. L. 49.

14. Stewart v. White, 98 Mo. 226. See also Pickford v. Lynn, 98 Mass. 491.

15. Lent v. Tilson, 72 Cal. 404; Preble v. Portland, 45 Me. 241.

16. Seifert v. Brooks, 34 Wis. 443.

17. Tingley v. Providence, 9 R. I. 388.

A city that has taken land and actually constructed a street over it cannot object that no notice was given of the purpose to locate the way, or that the names of the owners of the land were not stated in the lay-out. Haskell v. Bristol County, 9 Gray (Mass.) 341.

18. *Manner of Giving Notice.* — Darlington v. Com., 41 Pa. St. 68; Adams v. Clarksburg, 23 W. Va. 203.

for the giving of notice by publication or posting.<sup>1</sup>

**Form of Notice.** — The form of notice is generally regulated by statute, and the notice must conform with such requirements.<sup>2</sup>

(8) **Viewers and Commissioners.** — If the statute requires the appointment of viewers or commissioners to lay out the street, such provision must be complied with or the proceedings will be invalid.<sup>3</sup>

**Compensation.** — The compensation of viewers or commissioners in street-opening proceedings is regulated by statute.<sup>4</sup>

**Qualifications.** — Where the statutes provide that the viewers or commissioners shall have certain qualifications, the viewers or commissioners must, of course, have the requisite qualifications.<sup>5</sup> Freeholders and taxpayers of the municipality are not by reason of interest disqualified to act as viewers to assess damages for land taken.<sup>6</sup>

**Report or Return.** — The report or return of the viewers or commissioners must conform to the requirements of the statutes.<sup>7</sup> It must be made within

Where the statute requires notice to be served upon every landowner whose residence is in the city, service by leaving a copy at the residence of a landowner, with a member of his family is sufficient. *Wilson v. Trenton*, 53 N. J. L. 178.

**Notice to a Station Agent** was held good in *Wisconsin* as notice to the "occupant," where the highway was to be laid out through the depot grounds. *State v. O'Connor*, 78 Wis. 282.

1. **Publication or Posting.** — *Davies v. Los Angeles*, 86 Cal. 37; *St. Paul, etc., R. Co. v. Minneapolis*, 35 Minn. 141; *Matter of Opening Orange St.*, (Supm. Ct. Spec. T.) 50 How. Pr. (N. Y.) 244. See also *Matter of Amsterdam*, 55 Hun (N. Y.) 270.

Under the *Maryland* statute (2 Code 1860, art. 4, § 838) requiring that before any ordinance shall be passed for opening, extending, or widening a street in the city of Baltimore, sixty days' notice of an application for its passage shall be given in two of the daily newspapers of the city, it was held that as the statute by its terms requires only one publication the courts could not insert into the statute requirements as to additional publication or repetition of publication. *Central Sav. Bank v. Baltimore*, 71 Md. 515. See also *Philadelphia, etc., R. Co. v. Shipley*, 72 Md. 88, in which it was held discretionary with the examiners for the opening of the street to determine whether more than one publication should be made.

2. **Form of Notice.** — *Hemingway v. Chicago*, 60 Ill. 324; *Whitcher v. Benton*, 48 N. H. 157, 97 Am. Dec. 597; *State v. Elizabeth*, 32 N. J. L. 357; *Matter of Opening Orange St.*, (Supm. Ct. Spec. T.) 50 How. Pr. (N. Y.) 244.

Under the *Wisconsin* statute (S. & B. Ann. Stat., § 1267) requiring the notice of a supervisors' meeting to specify the several tracts of land through which the proposed highway may pass, a notice, where the proposed street is to cross the right of way of a railway company, describing such tract as a portion of the railway company's right of way and depot grounds, and further specifying the government subdivisions of which the same is a part, was held sufficient. *State v. O'Connor*, 78 Wis. 282.

3. **Viewers or Commissioners.** — *Gregory v. Bridgeport*, 52 Conn. 40; *Hough v. Bridgeport*, 57 Conn. 290; *Keifer v. Bridgeport*, 68 Conn.

401; *People v. Brighton*, 20 Mich. 57; *Morseman v. Ionia*, 32 Mich. 283; *State v. Newark*, 28 N. J. L. 491; *Opening of Albany St.*, (Supm. Ct. Spec. T.) 6 Abb. Pr. (N. Y.) 273; *Menges v. Albany*, (Supm. Ct. Gen. T.) 47 How. Pr. (N. Y.) 244; *Havermans v. Troy*, (Supm. Ct. Spec. T.) 50 How. Pr. (N. Y.) 510; *Lumsden v. Milwaukee*, 8 Wis. 485.

In *Maryland*, in answer to the objection that the proceedings of street commissioners for the establishment of streets were invalid because before the conclusion of the proceedings two members of the commission went out of office and were succeeded by other members, it was held that the acts of the commissioners were in no respect personal, but to every intent and purpose official, and that therefore, as in case of acts of other municipal officials, after a change in the members of the board, the board as a whole would proceed to complete the establishment and opening of the street. *Central Sav. Bank v. Baltimore*, 71 Md. 515.

4. **Compensation.** — *Blunt v. New York*, 9 Hun (N. Y.) 330; *Matter of New York*, 33 N. Y. App. Div. 365; *Matter of East One Hundred and Forty-ninth St.*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 558; *In re Wilkins Place*, (Supm. Ct. Spec. T.) 54 N. Y. Supp. 65.

5. **Qualifications.** — *State v. Jersey City*, 25 N. J. L. 309; *State v. Elizabeth*, 32 N. J. L. 357; *State v. Jersey City*, 38 N. J. L. 85; *Northern Pac. Terminal Co. v. Portland*, 14 Oregon 24.

**Under City Charter.** — *Hough v. Bridgeport*, 57 Conn. 290.

Where a city charter required the damages for street openings to be assessed by three freeholders, and one of the three viewers appointed was not a freeholder, it was held that the appointment was not void. The mistake was in the confirmation of their report, which had the effect of a judgment and could not be inquired into collaterally. *Pittsburg v. Cluley*, 74 Pa. St. 262.

6. *Bowker v. Wright*, 54 N. J. L. 130.

7. **Report of Commissioners.** — *Fletcher v. Fugate*, 3 J. J. Marsh. (Ky.) 631; *Wilson v. Simmons*, 89 Me. 242; *State v. Jersey City*, 25 N. J. L. 309; *Matter of Twenty-eighth St.*, 11 Phil. (Pa.) 436, 33 Leg. Int. (Pa.) 64.

Where the statute provides for notice and the hearing of objections to the report before final

the time fixed by the statutes,<sup>1</sup> and the council must take the required action thereon when filed.<sup>2</sup>

(9) *Locating and Opening.*—Where a petition by property owners is the basis of the power of the municipal officers to establish the street, such officers have no right to change the location of the proposed street as described in the petition.<sup>3</sup> In some instances the statutes expressly require the opening of the street to be made within a specified time after the condemnation of the land.<sup>4</sup> But it has been held that the neglect of a municipality to open a street within a reasonable time after acquiring the land for it gives no right of action for damages against the municipality by property owners whose land has been taken.<sup>5</sup>

**Property Owner's Right to Remove Building.**—Where in the condemnation of land for a street the owner of land occupied by a building is given the privilege of moving the building provided such removal is done as soon as necessary for the purpose of making the street, such owner is not entitled to further notice to remove the building, but must himself observe the progress in the construction of the street, and remove the building in time to avoid delay in such construction.<sup>6</sup>

(10) *Compensation for Land Taken.*—Where land is condemned for a street, the owner is, of course, as in other instances where land is condemned for a public use, entitled to compensation, and this is true although the land was already burdened with an easement of a private way.<sup>7</sup>

**Conversion of Alley into Street.**—Since a street furnishes the same access to abutting lots as an alley, the taking of an alley for the purpose of opening a

action thereon all objections to the form of the report not made in the manner prescribed by the statute will be deemed waived. *McKusick v. Stillwater*, 44 Minn. 372.

Where, under the charter of a city, the report of the city surveyor must contain the plat of the survey of the street, a statement in such report that the plat of such survey is "shown on the plat on file with the recorder" is insufficient. *Ladd v. East Portland*, 18 Oregon 87.

1. *In re Allegheny Ave.*, 39 W. N. C. (Pa.) 435; *Knox St.*, 43 W. N. C. (Pa.) 9; *Hansberry St.*, 43 W. N. C. (Pa.) 13.

Where, under the charter of a city, commissioners were required to file their report and a map within twenty days after an ordinance was referred to them by the council, the neglect to file them within the time specified will render void their proceedings. *State v. Bayonne*, 35 N. J. L. 332.

2. *Wilson v. Simmons*, 89 Me. 242.

3. *Location and Opening.*—*People v. Whitney's Point*, 102 N. Y. 81.

4. *Wilcox v. New Bedford*, 140 Mass. 570.

5. *Webster v. Chicago*, 83 Ill. 458.

6. *Mussey v. Cahoon*, 34 Me. 74.

7. *Compensation for Land Taken*—*Connecticut.*—*Roper v. New Britain*, 70 Conn. 459.

*District of Columbia.*—*Cahill v. District of Columbia*, 3 MacArthur (D. C.) 419.

*Indiana.*—*Terre Haute v. Blake*, 9 Ind. App. 403.

*Iowa.*—*Greiner v. Sigourney*, (Iowa 1902) 89 N. W. Rep. 1103.

*Kentucky.*—*Ludlow v. Mackintosh*, (Ky. 1899) 53 S. W. Rep. 524.

*Maryland.*—*Baltimore v. Black*, 56 Md. 333.

*Massachusetts.*—*Haskell v. Bristol County*, 9 Gray (Mass.) 341; *Parks v. Boston*, 15 Pick.

(Mass.) 198; *Foster v. Boston*, 22 Pick. (Mass.) 33.

*Michigan.*—*Turner v. Stanton*, 42 Mich. 506.

*Minnesota.*—*Daley v. St. Paul*, 7 Minn. 390.

*Nebraska.*—*Omaha v. Clarke*, (Neb. 1902) 92 N. W. Rep. 146.

*New Jersey.*—*Cherry v. Keyport*, 52 N. J. L. 544.

*New York.*—*Murray v. Graham*, 6 Paige (N. Y.) 622; *Matter of Lewis St.*, 2 Wend. (N. Y.) 472; *Livingston v. New York*, 8 Wend. (N. Y.) 85, 22 Am. Dec. 622; *Youngs v. Stoddard*, 27 N. Y. App. Div. 162; *Matter of Opening Edgecomb Road*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 119.

*Pennsylvania.*—*Matter of Pittsburgh*, 2 W. & S. (Pa.) 320; *Philadelphia v. Dickson*, 38 Pa. St. 247; *Volkmar St.*, 124 Pa. St. 320; *Bush v. McKeesport*, 166 Pa. St. 57.

In *New Jersey* it has been held that under the constitution of 1844 providing that "private property shall not be taken for public use without just compensation, but land may be taken for public highways as heretofore, until the legislature shall direct compensation to be made," after the legislature has directed that compensation be made for land taken for streets, its control over the subject ceased, and it could not subsequently authorize the taking of land for streets without compensation. *Cherry v. Keyport*, 52 N. J. L. 544. See also *Simmons v. Passaic*, 42 N. J. L. 619.

A landowner by petitioning a municipality to extend a street through his land does not waive his right to compensation for land taken for such street. *Turner v. Stanton*, 42 Mich. 506. See, however, *Ball v. Tacoma*, 9 Wash. 592; *Foster v. Boston*, 22 Pick. (Mass.) 33.

**Right of Municipality to Compensation for Property Held in Trust.**—*Fagan v. Chicago*, 84 Ill. 227.

street does not damage the abutting lots so as to entitle the lot owners to damages.<sup>1</sup>

**Time of Payment.** — The general rule requiring the prepayment of compensation or the giving security therefor before property is taken for a public use applies to the taking of property for the establishment of a street.<sup>2</sup>

**Determination of Compensation.** — The statutes generally provide the method for determining the compensation to be made for land taken for the establishment of streets.<sup>3</sup> The provisions of the statutes with regard to the method of

1. *Fagan v. Chicago*, 84 Ill. 227.

2. **Prepayment of Compensation.** — *Elkhart v. Simonton*, 69 Ind. 196; *Kansas City v. Kansas Pac. R. Co.*, 18 Kan. 331; *Baltimore v. St. Agnes Hospital*, 48 Md. 419; *Goodnow v. Ramsey County*, 11 Minn. 31; *Hennessy v. St. Paul*, 44 Minn. 306; *Hammerslough v. Kansas City*, 57 Mo. 219; *Keene v. Bristol*, 26 Pa. St. 46; *Sower v. Philadelphia*, 35 Pa. St. 231. See also *Jersey City v. Fitzpatrick*, 30 N. J. Eq. 97, and the title *EMINENT DOMAIN*, vol. 10, p. 1137. *Compare Messer v. Wildman*, 53 Conn. 494; *Jersey City v. Gardner*, 33 N. J. Eq. 622.

3. **Determination of Compensation** — *Connecticut*. — *Trinity College v. Hartford*, 32 Conn. 452; *Roper v. New Britain*, 70 Conn. 459; *Potter v. Putnam*, 74 Conn. 189.

*Delaware*. — *Fulton v. Dover*, 8 Houst. (Del.) 78.

*Maine*. — *Cassidy v. Bangor*, 61 Me. 434; *Harris v. Howes*, 75 Me. 436.

*Massachusetts*. — *Allen v. Charlestown*, 109 Mass. 243.

*Michigan*. — *Grand Rapids v. Luce*, 92 Mich. 92.

*Minnesota*. — *James v. St. Paul*, 58 Minn. 459.

*Missouri*. — *McKee v. St. Louis*, 17 Mo. 184; *Albany v. Gilbert*, 144 Mo. 224.

*Nebraska*. — *Omaha v. Clarke*, (Neb. 1902) 92 N. W. Rep. 146.

*New Jersey*. — *Pepin v. Elizabeth*, 57 N. J. L. 653; *Cavanagh v. Bayonne*, 63 N. J. L. 176; *Paret v. Bayonne*, 39 N. J. L. 559; *Cherry v. Keyport*, 52 N. J. L. 544.

*New York*. — *Betts v. Williamsburgh*, 15 Barb. (N. Y.) 255; *Matter of Opening House Ave.*, 67 Barb. (N. Y.) 350; *Buel v. Lockport*, 3 N. Y. 197; *Kingston v. Terry*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 616; *Matter of East One Hundred and Eighty-second St.*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 592.

*Ohio*. — *Hendrickson v. Toledo*, 23 Ohio Cir. Ct. 256.

*Pennsylvania*. — *Spring Garden St. Case*, 4 Rawle (Pa.) 192; *Pittston's Case*, 7 Del. Co. Rep. (Pa.) 482, 9 Kulp (Pa.) 468; *Sharett's Road*, 8 Pa. St. 89; *In re Cresson St.*, 10 Pa. Super. Ct. 332, 44 W. N. C. (Pa.) 295; *Matter of Church St.*, 54 Pa. St. 353; *In re Brady St.*, 99 Pa. St. 591; *In re Opening Magnolia Ave.*, 117 Pa. St. 56.

*Rhode Island*. — *Thornton v. North Providence*, 6 R. I. 433.

*South Carolina*. — *Walker v. Charleston*, *Bailey Eq. (S. Car.)* 443.

*Wisconsin*. — *Lumsden v. Milwaukee*, 8 Wis. 485.

**Application for Assessment of Damages.** — *Sharett's Road*, 8 Pa. St. 89; *In re Merchant St.*, 9 Phila. (Pa.) 590, 29 Leg. Int. (Pa.) 341; *Opening of Sixteenth St.*, 4 Pa. Co. Ct. 124.

**Time of Filing Petition for Assessment of Damages.** — *Russell v. New Bedford*, 5 Gray (Mass.) 31; *Haskell v. Bristol County*, 9 Gray (Mass.) 341; *Loring v. Boston*, 12 Gray (Mass.) 209; *Erskine v. Boston*, 14 Gray (Mass.) 216; *Shute v. Boston*, 99 Mass. 236; *In re Ridge Ave.*, 99 Pa. St. 469.

**Appointment of Viewers or Commissioners.** — *Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636; *Millisor v. Wagner*, 133 Ind. 400; *State v. Keokuk*, 9 Iowa 438; *State v. Bergen*, 33 N. J. L. 72; *Opening of Ruan St.*, 132 Pa. St. 257.

**Qualifications.** — *Judson v. Bridgeport*, 25 Conn. 426; *McKusick v. Stillwater*, 44 Minn. 373.

**Report of Award.** — *State v. Keokuk*, 9 Iowa 438; *Duffield v. Detroit*, 15 Mich. 474; *Bedford St.*, 17 Pa. Co. Ct. 593.

**Confirmation of Report or Award.** — *Matter of Claiborne St.*, 4 La. Ann. 7; *Brooklyn v. Patchen*, 8 Wend. (N. Y.) 47; *McDermott v. New Castle*, 13 Pa. Co. Ct. 474; *Bowers v. Braddock*, 172 Pa. St. 596.

**Time of Making Award.** — *Savage v. Buffalo*, 131 N. Y. 568, *affirming* 59 Hun (N. Y.) 606.

**Review.** — *Piper's Appeal*, 32 Cal. 530; *Coe v. Meriden*, 45 Conn. 155; *Hall v. Meriden*, 48 Conn. 416; *Opening of C. St.*, 118 Pa. St. 171; *Hamilton v. Ft. Wayne*, 73 Ind. 1; *Widening of Roffignac St.*, 4 Rob. (La.) 357; *Farrell v. Baltimore*, 75 Md. 493; *Grimshaw v. Fall River*, 160 Mass. 483; *Jones v. Minneapolis*, 20 Minn. 491; *McKee v. St. Louis*, 17 Mo. 184; *Wright v. Butler*, 64 Mo. 165; *Miller v. Newark*, 35 N. J. L. 460; *Sondley v. Asheville*, 110 N. Car. 84; *Cincinnati v. Coombs*, 16 Ohio 181; *Frederick St.*, 12 Pa. Co. Ct. 577; *Gardner v. Chester*, 13 Pa. Co. Ct. 4; *In re Widening of Chestnut St.*, 128 Pa. St. 214.

**Appeal.** — Under the *Pennsylvania* statute (Act June 13, 1874) which provides that in all cases of damages assessed against any municipal or other corporation or individual invested with the privilege of taking property for public use, etc., whether such assessment shall have been made by viewers or otherwise than on a trial in court, if appeal is provided for by existing laws, an appeal may be taken by either party to the Court of Common Pleas, the effect of the appeal to the Court of Common Pleas is to vest in that court exclusive jurisdiction of the question of damages. *In re Widening of Chestnut Street*, 128 Pa. St. 214.

**Liability of Municipality on Award.** — *Chicago v. Wheeler*, 25 Ill. 478; *Terre Haute v. Blake*, 9 Ind. App. 403; *Busenbark v. Crawfordsville*, 9 Ind. App. 578; *State v. Keokuk*, 9 Iowa 438; *Stafford v. Albany*, 7 Johns. (N. Y.) 541; *Matter of Opening Bay Twenty-third St.*, 20 N. Y.

determining the compensation to be made for land taken for a street must, of course, be strictly complied with.<sup>1</sup>

**Jury Trial.** — In the absence of any statutory or constitutional provision to the contrary, a property owner whose land is taken for a street is not entitled as a matter of right to a jury trial for the determination of the amount of his compensation, but the determination of such compensation may be intrusted to a special tribunal.<sup>2</sup> In some instances, constitutional provisions expressly confer the right to a trial by jury for the determination of the amount of compensation,<sup>3</sup> but even in such cases the right is sufficiently protected by providing for the assessment of compensation by a special tribunal in the first instance and giving to property owners the right to appeal from the award of such tribunal and the right to a jury trial on such appeal.<sup>4</sup>

**Measure of Compensation.** — As a general rule, the measure of compensation for land taken for a street is the market value of the land, or when a part of a tract is taken the difference between the market value as a whole before the taking and the value of the part remaining after the taking;<sup>5</sup> and where a street was laid out across the right of way of a railroad, the measure of damages has been held to be the amount of decrease in the value of the use of the land taken for railroad purposes caused by its use for the purposes of a street.<sup>6</sup> Where the legislature intrusts to commissioners the determination of the amount of compensation to be awarded for land taken, the courts will not, as a general rule, interfere with their decision upon such question.<sup>7</sup>

**Deduction for Benefits.** — Where part of a tract of land is taken for a street the special benefits accruing to the residue of the land may be deducted from the value of the land taken.<sup>8</sup>

App. Div. 28; *Matter of Buffalo*, 78 N. Y. 362; *Pringle St.*, 7 Kulp (Pa.) 346.

**Time of Payment of Award.** — *Hawley v. Harrall*, 19 Conn. 142; *Shannahan v. Waterbury*, 63 Conn. 420; *Fink v. Newark*, 40 N. J. L. 11; *Hamersley v. New York*, 56 N. Y. 533, *affirming* 67 Barb. (N. Y.) 35; *Pittsburgh v. Irwin*, 85 Pa. St. 420.

**Enforcement of Award — Money Paid into Court for Unknown Owners.** — *Matter of Dewint*, 1 Cow. (N. Y.) 595, 2 Cow. (N. Y.) 498; *Fisher v. New York*, 57 N. Y. 344.

**Mandamus to Enforce Payment.** — *In re Kensington, etc.*, Turnpike Co., 97 Pa. St. 260.

**Action on Award.** — *Mobile v. Richardson*, 1 Stew. & P. (Ala.) 12; *Wheeler v. Chicago*, 24 Ill. 105, 76 Am. Dec. 736; *Bragg v. Chicago*, 73 Ill. 152; *Hopper v. Union Tp.*, 54 N. J. L. 243; *Buell v. Lockport*, 11 Barb. (N. Y.) 602; *McCullough v. Brooklyn*, 23 Wend. (N. Y.) 458.

1. **Strict Compliance with Statutes.** — *Wright v. Georgetown*, 4 Cranch (C. C.) 534; *Sage v. Brooklyn*, 89 N. Y. 189; *Cambria St.*, 75 Pa. St. 357; *Frederick St.*, 155 Pa. St. 623.

2. *Livingston v. New York*, 8 Wend. (N. Y.) 85, 22 Am. Dec. 622.

3. *Lamb v. Lane*, 4 Ohio St. 167; *Matter of Wells County Road*, 7 Ohio St. 16.

4. *Steuart v. Baltimore*, 7 Md. 500; *Reckner v. Warner*, 22 Ohio St. 275.

5. **Measure of Compensation — Connecticut.** — *Terry v. Hartford*, 39 Conn. 286; *Lewis v. New Britain*, 52 Conn. 568.

*Indiana.* — *Ft. Wayne v. Hamilton*, 132 Ind. 487, 32 Am. St. Rep. 263.

*Massachusetts.* — *Dorgan v. Boston*, 12 Allen (Mass.) 223; *Edmands v. Boston*, 108 Mass. 535; *Whitney v. Lynn*, 122 Mass. 338; *Cushing*

*v. Boston*, 144 Mass. 317; *Green v. Everett*, 179 Mass. 147.

*Michigan.* — *Grand Rapids v. Luce*, 92 Mich. 92.

*Mississippi.* — *Meridian v. Higgins*, 81 Miss. 376.

*New York.* — *Matter of Wall St.*, 17 Barb. (N. Y.) 617; *Wyman v. New York*, 11 Wend. (N. Y.) 486; *Matter of Opening Eleventh Ave.*, 81 N. Y. 436.

*Ohio.* — *Dobson v. Cincinnati*, 34 Ohio St. 276.

*Oregon.* — *Portland v. Kamm*, 10 Oregon 383.

*Pennsylvania.* — *Darlington v. Allegheny*, 189 Pa. St. 202; *Rankin v. Pittsburgh*, 7 Pa. Dist. 489; *Dobson v. Philadelphia*, 9 Pa. Dist. 139; *Dawson v. Pittsburgh*, 159 Pa. St. 317; *Reyenthaler v. Philadelphia*, 160 Pa. St. 195; *Markle v. Philadelphia*, 163 Pa. St. 344, 35 W. N. C. (Pa.) 346; *J. G. Brill Co. v. Philadelphia*, 167 Pa. St. 1; *Patton v. Philadelphia*, 175 Pa. St. 88, 38 W. N. C. (Pa.) 147; *Albertson v. Philadelphia*, 185 Pa. St. 223, 42 W. N. C. (Pa.) 96; *McCombs v. Pittsburgh*, 194 Pa. St. 348; *De Benneville v. Philadelphia*, 204 Pa. St. 51.

6. *Chicago, etc., R. Co. v. Chicago*, 166 U. S. 226, holding also that the expense to which the railroad company may be put in maintaining gates or flagmen need not be considered.

7. *Matter of Opening Brook Ave.*, 8 N. Y. App. Div. 294. See also *Hancock v. City*, 4 Pa. Dist. 345.

8. **Deduction of Benefits.** — *Waggeman v. North Peoria*, 155 Ill. 545; *Ft. Wayne v. Hamilton*, 132 Ind. 487, 32 Am. St. Rep. 263; *Fairchild v. St. Paul*, 46 Minn. 540; *Owerre v. New York*, 46 Hun (N. Y.) 253; *Livingston v. New York*, 8 Wend. (N. Y.) 85, 22 Am. Dec. 622; *Wyman v. New York*, 11 Wend. (N. Y.) 486; *Genet v.*



**Liability as Between Municipality and County.** — In some instances statutes have been enacted fixing the liability as between the municipality and the county in which it is located, for the payment of damages awarded for the taking of land for the establishment of streets.<sup>1</sup>

(11) *Discontinuance of Proceedings.* — Where proceedings for the opening of a street are instituted by a municipality, the tribunal before which the proceedings are instituted may grant a discontinuance on the application of the municipality, and before rights have become vested by virtue of such proceedings either in the public or in individuals.<sup>2</sup>

**III. VACATION OF STREETS** — 1. **Power to Vacate.** — The legislature, under its general control over the public rights, may vacate streets,<sup>3</sup> and as municipalities have no proprietary interest in the land of a street, may authorize their vacation by the abutting property owners.<sup>4</sup> In the absence of legislative authority a municipality has no power to vacate streets,<sup>5</sup> nor can it sell its streets so as to deprive the public of their rights therein.<sup>6</sup> As has been generally done, the legislature may expressly authorize municipalities to abandon the public use of a street and exonerate themselves from obligation to keep it in repair and otherwise suitable for public use,<sup>7</sup> and it is immaterial whether

Brooklyn, 99 N. Y. 296. See, however, *Atlanta v. Central R., etc., Co.*, 53 Ga. 120; *Benton v. Brookline*, 151 Mass. 250; *Detroit v. Chaffee*, 68 Mich. 635.

1. *Boyer's Petition*, 15 Pa. Co. Ct. 531; *Lancaster County v. Lancaster*, 160 Pa. St. 411; *Lancaster County v. Lancaster*, 170 Pa. St. 108.

2. *Discontinuance of Proceedings.* — *Hyde Park v. Corwith*, 122 Ill. 441; *Pardridge v. Hyde Park*, 131 Ill. 537; *Widening of Roffignac St.*, 4 Rob. (La.) 357; *New Bedford v. Bristol County*, 9 Gray (Mass.) 346; *Martin v. Brooklyn*, 1 Hill (N. Y.) 545; *Matter of Canal St.*, 11 Wend. (N. Y.) 154; *Matter of Anthony St.*, 20 Wend. (N. Y.) 618, 32 Am. Dec. 608; *In re Opening Beech, etc., St.*, 91 Pa. St. 354. See also *Matter of New York Corp.*, 18 Johns. (N. Y.) 506; *People v. Brooklyn*, 1 Wend. (N. Y.) 322, 19 Am. Dec. 502. *Compare People v. Brooklyn*, 22 Barb. (N. Y.) 404; *Matter of Beekman St.*, 20 Johns. (N. Y.) 269; *Strader v. Cincinnati*, 1 Handy (Ohio) 446.

3. **Power of Legislature to Vacate Streets.** — *Polack v. San Francisco Orphan Asylum*, 48 Cal. 492; *San Francisco v. Burr*, 108 Cal. 460; *Eudora v. Darling*, 54 Kan. 654.

**Construction of Statute — Omission of Street from Official Map.** — *People v. Hibernia Sav., etc., Soc.*, 84 Cal. 634; *San Francisco v. Burr*, 108 Cal. 460.

4. *In re Albers*, 113 Mich. 640.

5. **Municipal Power to Vacate.** — *Texarkana v. Leach*, 66 Ark. 40, 74 Am. St. Rep. 68; *Polack v. San Francisco Orphan Asylum*, 48 Cal. 490; *Florida Cent., etc., R. Co. v. Ocala St., etc., R. Co.*, 39 Fla. 306; *Georgia Southern, etc., R. Co. v. Harvey*, 84 Ga. 372; *Louisville v. Bannon*, 99 Ky. 74; *Rohmeiser v. Bannon*, (Ky. 1893) 22 S. W. Rep. 27; *Fitchburg v. Fitchburg R. Co.*, 180 Mass. 535; *Hoboken Land, etc., Co. v. Hoboken*, 36 N. J. L. 540; *Jersey City v. Central R. Co.*, 40 N. J. Eq. 417; *Newark v. Delaware, etc., R. Co.*, 42 N. J. Eq. 196. *Compare McCain v. State*, 62 Ala. 138.

6. **Sale of Streets.** — *Beebe v. Little Rock*, 68 Ark. 39; *Augusta v. Perkins*, 3 B. Mon. (Ky.) 437; *Giltner v. Carrollton*, 7 B. Mon. (Ky.) 680; *Cooper v. Alden, Harr. (Mich.)* 72; *People v.*

*Albany*, 4 Hun (N. Y.) 675; *Com. v. Young Men's Christian Assoc.*, 169 Pa. St. 24. *Compare Acme Brewing Co. v. Central R., etc., Co.*, 115 Ga. 494.

7. **Grant of Power to Municipality to Vacate — California.** — *Polack v. San Francisco Orphan Asylum*, 48 Cal. 490; *Brook v. Horton*, 68 Cal. 554; *San Francisco v. Burr*, 108 Cal. 460.

*Illinois.* — *Parker v. Catholic Bishop*, 41 Ill. App. 74, affirmed 146 Ill. 158.

*Iowa.* — *Williams v. Carey*, 73 Iowa 194; *Brown v. Tabor*, 103 Iowa 1.

*Maryland.* — *Van Witsen v. Gutman*, 79 Md. 405.

*Michigan.* — *In re Albers*, 113 Mich. 640.

*Mississippi.* — *Blocker v. State*, 72 Miss. 720.

*Missouri.* — *Knapp v. St. Louis*, 153 Mo. 560.

*Nebraska.* — *Lindsay v. Omaha*, 30 Neb. 512, 27 Am. St. Rep. 415.

*New Jersey.* — *Reed v. Camden*, 53 N. J. L. 322; *Kean v. Elizabeth*, 54 N. J. L. 462, 55 N. J. L. 337; *United New Jersey R., etc., Co. v. National Docks, etc., R. Co.*, 57 N. J. L. 523.

*New York.* — *People v. Hair*, 29 Hun (N. Y.) 125; *Weinckie v. New York Cent., etc., R. Co.*, 61 Hun (N. Y.) 619, 15 N. Y. Supp. 689; *Fearing v. Irwin*, 55 N. Y. 486; *Matter of New York*, 166 N. Y. 495; *Matter of East One Hundred and Sixty-eighth St.*, 157 N. Y. 409; *Matter of Opening East One Hundred and Eighty-second St.*, 41 N. Y. App. Div. 586; *New York, etc., R. Co. v. New Rochelle*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 195; *Matter of New York*, 56 N. Y. App. Div. 122, affirmed 166 N. Y. 495.

*Ohio.* — *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 264, 87 Am. St. Rep. 600.

*Pennsylvania.* — *Vacation of Henry St.*, 123 Pa. St. 346; *Vacation of Howard St.*, 142 Pa. St. 601; *Swanson St.*, 163 Pa. St. 323; *Carpenter v. Pennsylvania R. Co.*, 195 Pa. St. 160.

*Rhode Island.* — *Mathewson St. M. E. Church v. Shepard*, 22 R. I. 112.

*Tennessee.* — *Anderson v. Turbeville*, 6 Coldw. (Tenn.) 150; *State v. Taylor*, 107 Tenn. 455.

*Wisconsin.* — *Kimball v. Kenosha*, 4 Wis. 321; *Baines v. Janesville*, 100 Wis. 369.

A municipal corporation authorized "to lo-

the street was established in the first instance by dedication or by condemnation under powers of eminent domain,<sup>1</sup> or that special assessments were levied to pay the expense of originally establishing the street.<sup>2</sup> Power to vacate streets will not be implied from a general power of self-government.<sup>3</sup> Under power to vacate streets a municipality may vacate a strip along the side of a street as distinguished from the vacation of the entire street.<sup>4</sup>

**Consent of the Abutting Property Owners** is not, unless expressly made so by the statutes, essential to the exercise of the power to vacate streets,<sup>5</sup> but the statutes, in many instances, require a petition or consent on the part of property owners as a prerequisite to the vacation of streets.<sup>6</sup>

**2. Exercise of Power.** — Where power to vacate streets is conferred upon a municipality, its action in the exercise of the power is discretionary,<sup>7</sup> and where such power is conferred upon a municipality "whenever the public interest or convenience may require," its determination that public convenience requires a street to be closed is conclusive and is not open to review by the courts.<sup>8</sup> If the vacation of a street by a municipality is the result of fraud and collusion, the action may be impeached and avoided.<sup>9</sup> The vacation of a street for a valuable consideration paid to the municipality by an individual to be benefited thereby has been held invalid,<sup>10</sup> but the fact that one of the reasons for vacating a street was to accommodate an individual is not such a fraud as will invalidate the action of the municipality.<sup>11</sup> Where a municipality attempts to vacate a street, property owners not abutting thereon have no grounds for objecting to the validity or

cate and establish streets and alleys, and to vacate the same," may vacate any street, and the right to vacate is not confined to the streets which the city may "locate and establish." *Gray v. Iowa Land Co.*, 26 Iowa 387.

1. *Glasgow v. St. Louis*, 107 Mo. 198.

2. *Kean v. Elizabeth*, 55 N. J. L. 337.

3. Thus, the *Kentucky* statute empowering municipalities "to govern themselves by such ordinances and resolutions for municipal purposes as they may deem proper, not to conflict with this act nor the Constitution," etc., does not convey power to vacate streets. *Louisville v. Bannon*, 99 Ky. 74.

4. *Mt. Carmel v. Shaw*, 155 Ill. 37, 46 Am. St. Rep. 311.

5. **Consent.** — *Read v. Camden*, 54 N. J. L. 347; *Excelsior Brick Co. v. Haverstraw*, 142 N. Y. 146.

6. *Pettibone v. Hamilton*, 40 Wis. 402; *Warren v. Wausau*, 66 Wis. 206; *James v. Darlington*, 71 Wis. 173.

7. **Discretionary Exercise of Power** — *California*. — *Symons v. San Francisco*, 115 Cal. 555.

*Colorado*. — *Whitsett v. Union Depot, etc.*, Co., 10 Colo. 243.

*Iowa*. — *Gray v. Iowa Land Co.*, 26 Iowa 387; *Stubenrauch v. Neyenesch*, 54 Iowa 567; *Platt v. Chicago, etc., R. Co.*, (Iowa 1887) 31 N. W. Rep. 883; *Marshalltown v. Forney*, 61 Iowa 578; *Dempsey v. Burlington*, 66 Iowa 687; *Spitzer v. Runyan*, 113 Iowa 619.

*Maine*. — *Pillsbury v. Augusta*, 79 Me. 71.

*Maryland*. — *Van Witsen v. Gutman*, 79 Md. 405.

*Michigan*. — *Hinchman v. Detroit*, 9 Mich. 103.

*Missouri*. — *Glasgow v. St. Louis*, 107 Mo. 198; *Christian v. St. Louis*, 127 Mo. 109; *Knapp v. St. Louis*, 153 Mo. 560, 156 Mo. 343; *Atkinson v. Wykoff*, 58 Mo. App. 86.

*Nebraska*. — *Bellevue v. Bellevue Imp. Co.*, (Neb. 1902) 90 N. W. Rep. 1002.

*New York*. — *Matter of East One Hundred and Sixty-eighth St.*, 157 N. Y. 409.

*Rhode Island*. — *Atty.-Gen. v. Shepard*, 23 R. I. 9.

*Tennessee*. — *Raht v. Southern R. Co.*, (Tenn. Ch. 1897) 50 S. W. Rep. 72.

8. *Symons v. San Francisco*, 115 Cal. 555.

9. **Vacation Fraudulent.** — *Glasgow v. St. Louis*, 107 Mo. 198; *Knapp v. St. Louis*, 153 Mo. 560.

10. *Louisville v. Bannon*, 99 Ky. 74; *Horton v. Williams*, 99 Mich. 423.

11. *Meyers v. Teutopolis*, 131 Ill. 552; *Parker v. Catholic Bishop*, 146 Ill. 158; *Marshalltown v. Ferney*, 61 Iowa 578; *Kean v. Elizabeth*, 54 N. J. L. 462; *Morris, etc., Dredging Co. v. Jersey City*, 64 N. J. L. 587. *Compare Smith v. McDowell*, 148 Ill. 51; *Louisville v. Bannon*, 99 Ky. 74.

In *Knapp v. St. Louis*, 156 Mo. 343, it was said that the vacation of a portion of a street by a municipality at the instigation of a corporation, that the corporation may use such vacated portion in the extension of its premises, is not such a fraud as will authorize the courts to invalidate the ordinance. *Compare Van Witsen v. Gutman*, 79 Md. 405, where the vacation of an alley so as to enable the owner of property on both sides to erect a continuous building over the closed portion of the alley without regard to public convenience and welfare was held invalid.

That vacation proceedings are had by a village board at the instance and request, and primarily for the benefit, of owners whose property would be benefited by the vacation, is not ground for declaring the action void on the ground of fraud. *Bellevue v. Bellevue Imp. Co.*, (Neb. 1902) 90 N. W. Rep. 1002.

regularity of the proceedings nor the right to an injunction restraining such vacation.<sup>1</sup> A municipality in exercising the power to vacate streets must, as a general rule, comply strictly with the provisions of the statute conferring the power.<sup>2</sup>

**Notice.**—When notice to property owners of the vacation of streets is required, the requirement is obligatory,<sup>3</sup> but notice may be waived by acquiescence without notice.<sup>4</sup> In the absence of statutory requirement, it has been held that the municipality may act without notice.<sup>5</sup>

**Submission of Vacation to Vote.**—In some instances the statutes have required the question as to the vacation of streets to be submitted to popular vote.<sup>6</sup>

**3. Compensation for Vacation.**—The owners of lots bordering upon a street have an easement of way in the street in addition to the use in common with the public generally. This additional right of way is private property within the protection of the law, and cannot by the abandonment of the rights of the public in the street be destroyed without due compensation,<sup>7</sup> and

**1. Non-abutting Owners Cannot Complain**—*California*.—*Symons v. San Francisco*, 115 Cal. 555.

*Colorado*.—*Whitsett v. Union Depot, etc.*, Co., 10 Colo. 243.

*Illinois*.—*Chicago v. Union Bldg. Assoc.*, 102 Ill. 379, 40 Am. Rep. 598; *Hesing v. Scott*, 107 Ill. 600; *Parker v. Catholic Bishop*, 146 Ill. 158.

*Indiana*.—*House v. Greensburg*, 93 Ind. 533. *Compare Spiegel v. Gansberg*, 44 Ind. 418.

*Iowa*.—*Gray v. Iowa Land Co.*, 26 Iowa 387.

*Kansas*.—*Heller v. Atchison, etc.*, R. Co., 28 Kan. 625; *Arnold v. Weiker*, 55 Kan. 510.

*Missouri*.—*Glasgow v. St. Louis*, 107 Mo. 198; *Knapp v. St. Louis*, 153 Mo. 560, 156 Mo. 343.

*Nebraska*.—*Kittle v. Fremont*, 1 Neb. 329.

*New Jersey*.—*Dodge v. Pennsylvania R. Co.*, 43 N. J. Eq. 351, 45 N. J. Eq. 366.

*Rhode Island*.—*Atty.-Gen. v. Shepard*, 23 R. I. 9.

See also *Beutel v. Bay Circuit Judge*, 124 Mich. 521.

**2. Compliance with Statutory Requirements**—*England*.—*Reg. v. Jones*, 12 Ad. & El. 684, 40 E. C. L. 163.

*California*.—*Boorman v. Santa Barbara*, 65 Cal. 313.

*Iowa*.—*Miller v. Schenck*, 78 Iowa 372; *Blennerhassett v. Forest City*, 117 Iowa 680.

*Kansas*.—*Bellevue v. Hallowell*, 41 Kan. 192.

*Kentucky*.—*Martin v. Louisville*, 97 Ky. 30.

*Massachusetts*.—*Loring v. Boston*, 12 Gray (Mass.) 209; *Lincoln v. Warren*, 150 Mass. 309; *Fitchburg v. Fitchburg R. Co.*, 180 Mass. 535.

*Michigan*.—*Hinchman v. Detroit*, 9 Mich. 103; *Price v. Stagrav*, 68 Mich. 17; *Brown v. Suginaw*, 107 Mich. 643; *Furman v. Furman*, 86 Mich. 391.

*Minnesota*.—*Miller v. Corinna*, 42 Minn. 391.

*Missouri*.—*St. Louis v. Gleason*, 93 Mo. 33; *St. Louis v. Ranken*, 96 Mo. 497.

*Nebraska*.—*McNair v. State*, 26 Neb. 259; *Bellevue v. Bellevue Imp. Co.*, (Neb. 1902) 90 N. W. Rep. 1002.

*New Jersey*.—*Hammer v. Elizabeth*, 67 N. J. L. 129.

*New York*.—*People v. Assessors*, 59 Hun (N. Y.) 407; *Schafhaus v. New York*, 28 N. Y.

App. Div. 475; *People v. Shaw*, 34 N. Y. App. Div. 61; *Matter of New York*, 166 N. Y. 495.

*Pennsylvania*.—*Adelphi St. Case*, 2 Whart. (Pa.) 174; *Landsdowne v. Hoffman*, 8 Del. Co. Rep. (Pa.) 149, 14 York Leg. Rec. (Pa.) 163; *Vacation of William St.*, 7 Pa. Dist. 1, 43 W. N. C. (Pa.) 7; *Chestnut St.*, 8 Pa. Co. Ct. 55; *Matter of Fifty-second St.*, 11 Phila. (Pa.) 437; *Pulaski Ave.*, 17 Pa. Co. Ct. 391, 5 Pa. Dist. 1; *Ebe's Appeal*, 31 Pittsb. Leg. J. N. S. (Pa.) 361; *In re East Grant St.*, 121 Pa. St. 596; *Wetherill v. Pennsylvania R. Co.*, 195 Pa. St. 156.

*Rhode Island*.—*Atty.-Gen. v. Shepard*, 23 R. I. 9.

*Wisconsin*.—*Ashland v. Chicago, etc.*, R. Co., 105 Wis. 398; *James v. Darlington*, 71 Wis. 173.

**3. Notice.**—*Cook v. Chambersburg*, 39 N. J. L. 257.

**4. Bellevue v. Bellevue Imp. Co.**, (Neb. 1902) 90 N. W. Rep. 1002.

**5. Dempsey v. Burlington**, 66 Iowa 687.

**6. Lamm v. Chicago, etc.**, R. Co., 45 Minn. 71.

**7. Compensation for Vacation**—*United States*.—*Chicago v. Baker*, 98 Fed. Rep. 830, 39 C. C. A. 318, 86 Fed. Rep. 753.

*Connecticut*.—*Woodruff v. Neal*, 28 Conn. 168; *Cullen v. New York, etc.*, R. Co., 66 Conn. 211.

*Illinois*.—*Chicago v. Burcky*, 158 Ill. 103, 49 Am. St. Rep. 142, affirming 57 Ill. App. 547.

*Indiana*.—*Haynes v. Thomas*, 7 Ind. 38; *Indianapolis v. Croas*, 7 Ind. 9; *Cook v. Quick*, 127 Ind. 477.

*Kentucky*.—*Gargan v. Louisville, etc.*, R. Co., 89 Ky. 212, 28 Am. & Eng. Corp. Cas. 255; *Bannon v. Rohmeiser*, 90 Ky. 48, 29 Am. St. Rep. 355.

*Maryland*.—*Van Witsen v. Gutman*, 79 Md. 405.

*Massachusetts*.—*Webster v. Lowell*, 142 Mass. 324.

*Michigan*.—*Pearsall v. Eaton County*, 74 Mich. 558; *Horton v. Williams*, 99 Mich. 423.

*Missouri*.—*Heinrich v. St. Louis*, 125 Mo. 424, 46 Am. St. Rep. 490.

*Nebraska*.—*Lindsay v. Omaha*, 30 Neb. 512, 27 Am. St. Rep. 415.

*New York*.—*People v. Assessors*, 59 Hun (N. Y.) 407; *Matter of John, etc.*, St., 19 Wend. (N. Y.) 659. *Compare Fearing v. Irwin*, 55 N.

in some instances statutes authorizing the vacation of a street have expressly provided for compensation to abutting property owners.<sup>1</sup> It is generally held that owners of property not abutting on the street vacated have no such property in the street as entitles them to damages for its vacation where there is still left means of communication with other streets, and whatever detriment or inconvenience they may suffer by the closing of the street they must bear in common with the community at large for the public convenience and welfare.<sup>2</sup> In some cases, however, it has been held that the right to compensation is not confined to instances of an actual vacation and closing of the part of the street on which the property stands; it extends likewise to one injured in the market value of his property by the vacating of the street on one side only, so that his property is left at the end of a *cul-de-sac*.<sup>3</sup>

**The Measure of Damages** recoverable for the vacation of a street is the diminution in the market value of the property by reason of the property owner's loss of access.<sup>4</sup> Only special damages suffered by a property owner through the vacation of a street are recoverable and not such as are common to the public.<sup>5</sup>

**The Prepayment of Compensation** to abutting property owners is not a requisite to the legal vacation of the street.<sup>6</sup>

**The Manner of Determining the Damages** from the vacation of streets is generally regulated by statutes.<sup>7</sup>

Y. 486; *Kings County F. Ins. Co. v. Stevens*, 101 N. Y. 411.

*North Carolina*. — *Moose v. Carson*, 104 N. Car. 431, 17 Am. St. Rep. 681.

*Ohio*. — *In re Cincinnati*, etc., R. Co., 10 Ohio Cir. Dec. 286, 19 Ohio Cir. Ct. 582; *Beatty v. Kinnear*, 12 Ohio Cir. Dec. 68, 21 Ohio Cir. Ct. 384.

*Pennsylvania*. — *Butler St.*, 19 Pa. Super. Ct. 48; *In re William St.*, 43 W. N. C. (Pa.) 7. *Compare McGee's Appeal*, 114 Pa. St. 470; *Bauer v. Andrews*, 7 Phila. (Pa.) 359.

*South Carolina*. — *Garraux v. Greenville*, 53 S. Car. 575.

*Tennessee*. — *Anderson v. Turbeville*, 6 Coldw. (Tenn.) 150.

*Compare Hielscher v. Minneapolis*, 46 Minn. 529; *United New Jersey R., etc., Co. v. National Docks, etc.*, R. Co., 57 N. J. L. 523.

Although the owners of lots abutting upon a street cannot be deprived of ingress and egress to and from the same without compensation, yet when such street is vacated by the corporate authorities, upon their petition to have this done, they will be estopped from asserting that an easement remains in the corporation for their benefit, and cannot invoke the principle in defense to an action of ejectment by the owner of such vacated street to recover possession. *Gebhardt v. Reeves*, 75 Ill. 301.

1. **Statutes** — *United States*. — *Chicago v. Baker*, (C. C. A.) 86 Fed. Rep. 753 (*construing Illinois statute*).

*Illinois*. — *Bloomington v. Winslow*, 71 Ill. App. 340.

*Massachusetts*. — *Smith v. Boston*, 7 Cush. (Mass.) 254; *Natick Gas Light Co. v. Natick*, 175 Mass. 246.

*New Hampshire*. — *Cram v. Laconia*, 71 N. H. 41.

*New York*. — *Peters v. Carleton*, 48 Hun (N. Y. 620, 1 N. Y. Supp. 531, *affirmed* 124 N. Y. 637; *People v. Assessors*, 59 Hun (N. Y.) 407; *Matter of Barclay*, 91 N. Y. 430.

*Ohio*. — *In re Cincinnati*, etc., R. Co., 10 Ohio Cir. Dec. 286, 19 Ohio Cir. Ct. 582.

*Pennsylvania*. — *In re Cresson St.*, 6 Pa. Dist. 319; *Vacation of William St.*, 7 Pa. Dist. 1; *Vacation of Howard St.*, 142 Pa. St. 601.

2. **Non-abutting Owners** — *California*. — *Polack v. San Francisco Orphan Asylum*, 48 Cal. 490; *Symons v. San Francisco*, 115 Cal. 555.

*Illinois*. — *East St. Louis v. O'Flynn*, 119 Ill. 200, 59 Am. Rep. 795, *reversing* 19 Ill. App. 64; *Parker v. Catholic Bishop*, 41 Ill. App. 74.

*Indiana*. — *Dantzer v. Indianapolis Union R. Co.*, 141 Ind. 604, 50 Am. St. Rep. 343.

*Kansas*. — *Heller v. Atchison, etc., R. Co.*, 28 Kan. 625.

*Massachusetts*. — *Smith v. Boston*, 7 Cush. (Mass.) 254; *Davis v. Hampshire County*, 153 Mass. 218; *Stanwood v. Malden*, 157 Mass. 17.

*New Hampshire*. — *Cram v. Laconia*, 71 N. H. 41.

*New Jersey*. — *Kean v. Elizabeth*, 54 N. J. L. 462.

*Ohio*. — *In re Cincinnati*, etc., R. Co., 10 Ohio Cir. Dec. 286.

*Pennsylvania*. — *Philadelphia, etc., R. Co.'s Appeal*, 1 Pa. Super. Ct. 63.

*South Carolina*. — *Cherry v. Rock Hill*, 48 S. Car. 553.

3. *Chicago v. Baker*, (C. C. A.) 86 Fed. Rep. 753; *In re Melon St.*, 182 Pa. St. 397; *Carey v. Scranton*, 6 Lack. Leg. N. (Pa.) 233.

4. **Measure of Damages**. — *Heinrich v. St. Louis*, 125 Mo. 424, 46 Am. St. Rep. 490.

5. *Concord's Petition*, 50 N. H. 530; *Candia v. Chandler*, 58 N. H. 127; *Cram v. Laconia*, 71 N. H. 41; *In re Cincinnati*, etc., R. Co., 10 Ohio Cir. Dec. 286.

6. **Prepayment**. — *Parker v. Catholic Bishop*, 146 Ill. 158, *affirming* 41 Ill. App. 74; *Hicks v. Ward*, 69 Me. 436; *Morris v. Philadelphia*, 199 Pa. St. 357.

7. *Rensselaer v. Leopold*, 106 Ind. 29.

**Confirmation of Award**. — *Weinckie v. New York Cent., etc., R. Co.*, 61 Hun (N. Y.) 619, 15 N. Y. Supp. 689, *affirmed* 133 N. Y. 656.

**Review of Award**. — *Hare v. Rice*, 142 Pa. St. 608.

**4. Effect of Vacation.** — Where the fee to a street is in the municipality, upon its vacation the title still remains in the municipality,<sup>1</sup> but where the municipality has only an easement in the land covered by the street, the land reverts to the owners of the fee.<sup>2</sup> In the dedication of a street a provision that upon the vacation of the street the land shall revert to the dedicator is, of course, binding.<sup>3</sup> In some instances the statutes have expressly provided that in the event of the vacation of a street the adjacent lots shall extend to the central line of the street, or the street be divided in accordance with the equities.<sup>4</sup>

**5. Repeal of Vacation.** — After the power to vacate a street has been duly exercised, the municipality cannot by a repeal of the vacating ordinance amend its action in vacating the street.<sup>5</sup>

**IV. ABANDONMENT AND NONUSER.** — The courts have frequently spoken of the loss of public rights in streets by abandonment,<sup>6</sup> but the intention to abandon must be evident.<sup>7</sup> Abandonment does not necessarily follow from a nonuser<sup>8</sup> or from acquiescence in the erection of buildings or other obstruction

**1. Title to Fee in Vacated Streets.** — *Wirt v. McEnery*, 21 Fed. Rep. 233; *San Francisco v. Center*, 133 Cal. 673; *Matthiessen, etc., Zinc Co. v. La Salle*, 117 Ill. 411; *Knapp v. St. Louis*, 153 Mo. 560; *Lindsay v. Omaha*, 30 Neb. 512, 27 Am. St. Rep. 415; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263; *Watson v. New York*, 67 N. Y. App. Div. 573; *Kings County F. Ins. Co. v. Stevens*, 101 N. Y. 411; *Godley v. City*, 7 Phila. (Pa.) 637. Compare *Hunter v. Middleton*, 13 Ill. 50; *Gebhardt v. Reeves*, 75 Ill. 301.

**2. United States.** — *Barclay v. Howell*, 6 Pet. (U. S.) 513; *Harris v. Elliott*, 10 Pet. (U. S.) 26; *U. S. v. Harris*, 1 Sumn. (U. S.) 21; *Wirt v. McEnery*, 21 Fed. Rep. 233.

**Arkansas.** — *Beebe v. Little Rock*, 68 Ark. 39. **California.** — *Bigelow v. Ballerino*, (Cal. 1895) 41 Pac. Rep. 14.

**Connecticut.** — *Benham v. Potter*, 52 Conn. 248.

**Georgia.** — *Cincinnati, etc., R. Co. v. Mims*, 71 Ga. 240.

**Illinois.** — *St. John v. Quitow*, 72 Ill. 334; *Helm v. Webster*, 85 Ill. 116; *Thomsen v. McCormick*, 136 Ill. 135.

**Indiana.** — *Decker v. Evansville, etc., R. Co.*, 133 Ind. 493.

**Iowa.** — *Brown v. Tabor*, 103 Iowa 1; *Day v. Schroeder*, 46 Iowa 546.

**Kansas.** — *Atchison, etc., R. Co. v. Patch*, 28 Kan. 470; *Showalter v. Southern Kansas R. Co.*, 49 Kan. 421.

**Massachusetts.** — *Fairfield v. Williams*, 4 Mass. 427; *Alden v. Murdock*, 13 Mass. 256.

**Minnesota.** — *Lamm v. Chicago, etc., R. Co.*, 45 Minn. 71.

**Nebraska.** — *Bellevue v. Bellevue Imp. Co.*, (Neb. 1902) 90 N. W. Rep. 1002.

**New York.** — *Matter of John, etc., St.*, 19 Wend. (N. Y.) 659; *Dunham v. Williams*, 36 Barb. (N. Y.) 162; *Van Amringe v. Barnett*, 8 Bosw. (N. Y.) 372; *Wheeler v. Clark*, 58 N. Y. 267; *Heard v. Brooklyn*, 60 N. Y. 242; *Matter of New York*, 28 N. Y. App. Div. 143.

**Ohio.** — *Kinnear Mfg. Co. v. Beatty*, 65 Ohio St. 264, 87 Am. St. Rep. 600; *Stevens v. Shannon*, 3 Ohio Cir. Dec. 386, 6 Ohio Cir. Ct. 142.

**Oregon.** — *Huddleston v. Eugene*, 34 Oregon 343.

**Pennsylvania.** — *Bauer v. Andrews*, 7 Phila.

(Pa.) 359; *Newville Road Case*, 8 Watts (Pa.) 172; *Paul v. Carver*, 24 Pa. St. 207, 64 Am. Dec. 649.

**Washington.** — *Burmeister v. Howard*, 1 Wash. Ter. 207.

**3. Plumer v. Johnston**, 63 Mich. 165.

**4. Matthiessen, etc., Zinc Co. v. La Salle**, 117 Ill. 411; *Thomas v. Hunt*, 134 Mo. 392.

**5. Belleville v. Hallowell**, 41 Kan. 192.

**Legality of Ordinances Vacating Street.** — *Gormley v. Day*, 114 Ill. 185.

**6. Abandonment and Nonuser.** — *Cleveland v. Cleveland, etc., R. Co.*, 93 Fed. Rep. 113; *New York, etc., R. Co. v. New Haven*, 46 Conn. 257; *Hewes v. Crete*, 175 Ill. 348; *Lee v. Mound Station*, 118 Ill. 309; *Shirk v. Chicago*, 195 Ill. 298; *Simplot v. Dubuque*, 49 Iowa 630; *Blennerhassett v. Forest City*, 117 Iowa 680; *Baldwin v. Buffalo*, 29 Barb. (N. Y.) 396; *St. Vincent Female Orphan Asylum v. Troy*, 12 Hun (N. Y.) 317; *Evens v. Cincinnati*, 2 Handy (Ohio) 236; *Lake Shore, etc., R. Co. v. Cleveland*, 1 Ohio Dec. 1, 1 Ohio N. P. 1.

**7. Hartford v. New York, etc., R. Co.**, 59 Conn. 250; *Corcoran v. Chicago, etc., R. Co.*, 149 Ill. 291; *Shirk v. Chicago*, 195 Ill. 298.

**8. Nonuser — United States.** — *Cleveland v. Cleveland, etc., R. Co.*, 93 Fed. Rep. 113. See also *Simplot v. Chicago, etc., R. Co.*, 5 McCrary (U. S.) 158.

**Arkansas.** — *Beebe v. Little Rock*, 68 Ark. 39.

**Colorado.** — *Denver v. Girard*, 21 Colo. 447.

**Indiana.** — *Wolfe v. Sullivan*, 133 Ind. 331; *Lawrenceburgh v. Wesler*, 10 Ind. App. 153.

**Iowa.** — *Pettingill v. Devin*, 35 Iowa 344; *Prince v. McCoy*, 40 Iowa 533.

**Louisiana.** — *New Orleans v. Magnon*, 4 Mart. (La.) 2; *Thibodeaux v. Maggioli*, 4 La. Ann. 73; *Sheen v. Stothart*, 29 La. Ann. 630.

**Minnesota.** — *Wilder v. St. Paul*, 12 Minn. 192; *Parker v. St. Paul*, 47 Minn. 317.

**New Jersey.** — *Hoboken Land, etc., Co. v. Hoboken*, 36 N. J. L. 540.

**Rhode Island.** — *Greene v. O'Connor*, 18 R. I. 56.

**South Carolina.** — *Crocker v. Collins*, 37 S. Car. 327, 34 Am. St. Rep. 752; *Chafee v. Aiken*, 57 S. Car. 507.

**Wisconsin.** — *Reilly v. Racine*, 51 Wis. 526; *Madison v. Mayers*, 97 Wis. 399, 65 Am. St. Rep. 127.

upon the street,<sup>1</sup> or the inclosure of the street,<sup>2</sup> or that taxes are paid upon the land over which the street is located by an individual,<sup>3</sup> or from a delay in opening a street after dedication,<sup>4</sup> or in improving the street.<sup>5</sup> In some instances the statutes require, where streets are established, that possession thereof must be taken by the municipality within a specified time and that upon nonuser as highways for a specified time they shall cease to be streets.<sup>6</sup>

**Adverse Possession.** — Under the general principle heretofore announced prohibiting the loss of public rights by adverse possession,<sup>7</sup> it is held by the weight of authority, though the decisions are conflicting, that adverse possession of a portion of a street, no matter how long continued, has no effect by reason of the provisions of the statute of limitations to bar the city of the right to be restored to the possession of the street to the full width thereof. The title to the street is vested in the city in its governmental capacity, to hold for the use of the public, and the statute of limitations does not run in favor of the individual to bar the right of the public.<sup>8</sup>

**V. IMPROVEMENT OF STREETS — 1. Power to Improve — a. IN GENERAL.** — Power to improve and repair their streets is generally expressly conferred upon municipalities,<sup>9</sup> and has been considered to be implied from the general power to control streets and from the duty to keep them in repair,<sup>10</sup> as well as from a general welfare clause in the charter of the municipality.<sup>11</sup>

**"Repair."** — The power to "repair" streets does not include the making of an original improvement of a street, or work of a different character from that previously done thereon.<sup>12</sup>

**Relinquishment of Power.** — The power conferred on a municipality to improve its streets is held in trust for the public, and the municipality cannot abrogate it by contract.<sup>13</sup>

**Drains and Sewers.** — While the power to construct necessary drains and sewers is generally expressly conferred, the right to construct drains to carry off surface water from the streets has been implied under the general power to improve streets.<sup>14</sup>

**Sodding Portion of Street** — The general power to control and improve streets

1. **Acquiescence in Obstructions.** — *Denver v. Girard*, 21 Colo. 447; *Lawrenceburgh v. Wesler*, 10 Ind. App. 153; *Grandville v. Jenison*, 84 Mich. 54.

2. **Inclosure.** — *Solberg v. Decorah*, 41 Iowa 501; *Witherspoon v. Meridian*, 69 Miss. 288; *Nail, etc., Co. v. Furnace Co.*, 46 Ohio St. 544.

3. **Payment of Taxes by Individual.** — *Louisiana Ice Mfg. Co. v. New Orleans*, 43 La. Ann. 217; *Wilder v. St. Paul*, 12 Minn. 192.

4. **Delay in Opening.** — *Beebe v. Little Rock*, 68 Ark. 39; *Reilly v. Racine*, 51 Wis. 526; *State v. Leaver*, 62 Wis. 387.

5. **Delay in Improving.** — *Louisiana Ice Mfg. Co. v. New Orleans*, 43 La. Ann. 217; *Henshaw v. Hunting*, 1 Gray (Mass.) 203.

6. **Statutory Requirements.** — *Wilcox v. New Bedford*, 140 Mass. 570; *Ludlow v. Oswego*, 25 Hun (N. Y.) 260; *Vanderbeck v. Rochester*, 46 Hun (N. Y.) 87; *Cohoes v. Delaware, etc., Canal Co.*, 54 Hun (N. Y.) 558; *Excelsior Brick Co. v. Haverstraw*, 142 N. Y. 146; *Buffalo v. Hoffeld*, (Buffalo Super. Ct. Eq. T.) 6 Misc. (N. Y.) 197; *Dodson v. Cincinnati*, 5 Ohio Dec. (Reprint) 295.

7. **Adverse Possession.** — See the title ADVERSE POSSESSION, vol. 1, p. 878 *et seq.*

8. *Shirk v. Chicago*, 195 Ill. 298; *De Kalb v. Luney*, 193 Ill. 185; *Chicago, etc., R. Co. v. Council Bluffs*, 109 Ill. 425; *Holyoke v. Hadley Co.*, 174 Mass. 424; *Barter v. Com.*, 3 P. & W. (Pa.) 253; *Gay St.*, 6 Pa. Co. Ct. 187;

*Pittsburgh v. Epping-Carpenter Co.*, 29 Pittsb. Leg. J., N. S. (Pa.) 255.

9. **General Powers to Improve Streets.** — *Bolton v. Gilleran*, 105 Cal. 244, 45 Am. St. Rep. 33; *Santa Cruz Rock Pavement Co. v. Broderick*, 113 Cal. 628; *Lawrence v. People*, 188 Ill. 407; *Indianapolis v. Mansur*, 15 Ind. 112; *Cason v. Lebanon*, 153 Ind. 567; *Andrew v. Auditor*, 5 Ohio Dec. 242, 5 Ohio N. P. 123; *Canadian Pac. R. Co. v. Chatham Tp.*, 25 Can. Sup. Ct. 608.

10. *Mullarky v. Cedar Falls*, 19 Iowa 21.

11. *Rushville Gas Co. v. Rushville*, 121 Ind. 206, 16 Am. St. Rep. 388.

12. *Santa Cruz Rock Pavement Co. v. Broderick*, 113 Cal. 628. See also REPAIR, vol. 24, p. 470 *et seq.*

Thus the power to repair streets does not include the power to repave. *Ritterskamp v. Stifel*, 59 Mo. App. 510; *Hurley v. Trenton*, 66 N. J. L. 538.

13. **Cannot Be Abrogated by Contract.** — *Kreigh v. Chicago*, 86 Ill. 407; *National Water Works Co. v. Kansas City*, 20 Mo. App. 237; *Wabash R. Co. v. Defiance*, 52 Ohio St. 262; *Corry v. Cincinnati*, 10 Ohio Dec. (Reprint) 601, 22 Cinc. L. Bul. 194; *Roanoke Gas Co. v. Roanoke*, 88 Va. 810.

14. *Kirkland v. Board of Public Works*, 142 Ind. 123; *Cooper v. Cedar Rapids*, 112 Iowa 367. See also the title DRAINS AND SEWERS, vol. 10, p. 237.

has been held to authorize sodding the centre of a street so as to make a park thereof, where its entire width is not needed for public travel.<sup>1</sup>

**Bridges.** — Under power to grade, pave, and otherwise improve streets, it has been held that the municipality had no power to erect in a street a bridge over railroad tracks.<sup>2</sup> The power to build necessary bridges upon streets is, however, generally expressly conferred upon municipalities.<sup>3</sup>

**Nature of Improvement.** — Where the power to control and improve its streets is conferred upon a municipality, in the exercise of this power the nature of the improvement must to a large extent be left to the discretion of the municipality,<sup>4</sup> and unless restricted by statute it may, after adopting a general plan for the improvement of its streets, change such plan during the making of the improvement.<sup>5</sup>

**The Question What Streets or Portions Thereof May Be Improved** has called for the construction of particular statutes.<sup>6</sup> Under a general power to improve its streets, the municipality is not required to improve a particular street throughout its entire length, but may confine the improvement to what it deems the necessities of the public at the time to require.<sup>7</sup> Where the power is merely to improve its streets, the municipality has no power to improve private ways.<sup>8</sup>

**b. PAVING.** — Power to pave streets is generally expressly conferred upon municipalities,<sup>9</sup> as is also the power to repave where the original paving has become worn out.<sup>10</sup> The power to pave and repave streets has been held to be necessarily implied from general powers to control the use of streets and improve them.<sup>11</sup> The legislature may authorize municipalities to require abutting property owners to pave and keep in repair the portion of the streets upon which their property abuts.<sup>12</sup>

**Necessity and Character of Paving.** — The necessity for paving a street is generally left to the discretion of the municipality,<sup>13</sup> and the same is true with regard to

1. **Sodding.** — *Murphy v. Peoria*, 119 Ill. 509; *Thompson v. Highland Park*, 187 Ill. 265.

2. **Bridges.** — *Phelps v. Detroit*, 120 Mich. 447. See also *Schneider v. Detroit*, 72 Mich. 240.

3. **Home Bldg., etc., Co. v. Roanoke, 91 Va. 52.**

4. **Discretion as to Nature of Improvement.** — *Murphy v. Peoria*, 119 Ill. 509; *English v. Danville*, 150 Ill. 92; *Peyton v. Morgan Park*, 172 Ill. 102; *State v. Miles*, 138 Ind. 692; *State v. Neodesha*, 3 Kan. App. 319; *Brown v. Barstow*, 87 Iowa 344; *Thibideaux v. Maggioli*, 4 La. Ann. 73; *Dunker v. Stiefel*, 57 Mo. App. 379; *Berg v. Grace*, (Supm. Ct. Gen. T.) 1 N. Y. St. Rep. 418; *Parsons v. Columbus*, 50 Ohio St. 460.

5. *State v. Miles*, 138 Ind. 692.

6. **What Streets May Be Improved.** — *Diggins v. Hartshorne*, 108 Cal. 154; *Smith v. Hazard*, 110 Cal. 145; *Flickinger v. Fay*, 119 Cal. 590; *Atlanta v. Smith*, 99 Ga. 462; *Peabody v. Boston, etc., R. Corp.*, 181 Mass. 76.

7. *Indianapolis, etc., R. Co. v. Capital Paving, etc., Co.*, 24 Ind. App. 114; *Neff v. Covington Stone, etc., Co.*, 108 Ky. 457; *Springfield v. Weaver*, 137 Mo. 650.

A power conferred by statute upon a city "to pave again any street on which the pavements are worn out and useless" necessarily carries with it the power to repave only portions of the street if the pavements on such portions are worn out and useless. *Burckhardt v. Atlanta*, 103 Ga. 302.

8. *Spaulding v. Wesson*, 115 Cal. 441.

9. **Paving.** — *Burk v. Altschul*, 6 Cal. 533;

*Alameda Macadamizing Co. v. Williams*, 70 Cal. 534; *Gafney v. San Francisco*, 72 Cal. 146; *Rhodes v. Board of Public Works*, 10 Colo. App. 99; *Johnson v. District of Columbia*, 6 Mackey (D. C.) 21; *Savannah v. Weed*, 96 Ga. 670; *Kittinger v. Buffalo*, 148 N. Y. 332; *New Castle v. Rearic*, 18 Pa. Super. Ct. 350; *Queen St.*, 18 Pa. Super. Ct. 241; *Roundtree v. Galveston*, 42 Tex. 612.

10. **Repaving.** — *Regenstein v. Atlanta*, 98 Ga. 167; *Burckhardt v. Atlanta*, 103 Ga. 302; *Goodwillie v. Detroit*, 103 Mich. 283; *Shimmons v. Saginaw*, 104 Mich. 511; *State v. District Ct.*, 80 Minn. 293; *Hurley v. Trenton*, 66 N. J. L. 538; *Reuting v. Titusville*, 175 Pa. St. 512.

**Right of Property Owners to Old Pavement Removed.** — *Burckhardt v. Atlanta*, 103 Ga. 302; *Scammon v. Chicago*, 42 Ill. 192; *Schmidt v. New Orleans*, 48 La. Ann. 1440; *Shimmons v. Saginaw*, 104 Mich. 511. See also *Fuller v. Grand Rapids*, 105 Mich. 529.

11. *Schmitt v. New Orleans*, 48 La. Ann. 1440; *White v. McKeesport*, 101 Pa. St. 394. *Compare Watson v. Passaic*, 46 N. J. L. 124.

12. *Hart v. Gaven*, 12 Cal. 476; *Paris v. Berry*, 2 J. J. Marsh. (Ky.) 483; *McCormack v. Patchin*, 53 Mo. 33, 14 Am. Rep. 440; *Farrar v. St. Louis*, 80 Mo. 379; *Estes v. Owen*, 90 Mo. 113.

13. **Discretion as to Necessity for and Character of Paving.** — *Dewey v. Des Moines*, 101 Iowa 416; *Regenstein v. Atlanta*, 98 Ga. 167; *Baltimore v. Stewart*, 92 Md. 535; *Shimmons v. Saginaw*, 104 Mich. 511; *Diamond v. Mankato*, (Minn. 1903) 93 N. W. Rep. 911; *Morse v. Westport*, 136 Mo. 276; *Morse v. Omaha*, (Neb. 1903) 93

the character or nature of the paving to be laid<sup>1</sup> and the portion of the street to be paved.<sup>2</sup> And under some statutes the abutting owners are permitted to select the kind of paving to be laid.<sup>3</sup>

**Prior Establishment of Grade.** — In some instances the statutes require the municipality to establish the grade of its streets before exercising the power to pave,<sup>4</sup> but in the absence of such a statutory requirement the prior establishment of the grade of the street and the construction of the street to such grade are not conditions precedent to the exercise of the power to pave.<sup>5</sup>

**Prior Construction of Water and Gas Pipes and Sewers.** — In the absence of statutory requirement, a municipality is not required, before exercising its power to pave streets, to provide for the laying of necessary water mains and sewers.<sup>6</sup> But the statutes may require the construction of sewers and the laying of gas and water pipes in the street before the power to pave can be exercised.<sup>7</sup>

**c. SIDEWALKS.** — Express power to construct sidewalks<sup>8</sup> and to fix the curb line or width of sidewalks to be constructed<sup>9</sup> is generally conferred on municipalities. The term "street," as heretofore stated, is generic, embracing sidewalks, and power to improve "streets" includes authority to improve sidewalks.<sup>10</sup> The statutes frequently expressly authorize municipalities to compel the abutting property owners to construct sidewalks or to pay the cost of their construction,<sup>11</sup> but it has been held that in the absence of statutory

N. W. Rep. 734. Compare *Field v. Barber Asphalt Pav. Co.*, 117 Fed. Rep. 925.

1. *Cram v. Chicago*, 138 Ill. 506; *Peyton v. Morgan Park*, 172 Ill. 102; *Galt v. Chicago*, 174 Ill. 605; *Gunning Gravel, etc., Co. v. New Orleans*, 45 La. Ann. 911; *Grand Rapids v. Board of Public Works*, 87 Mich. 113, 99 Mich. 392; *Morse v. Westport*, 136 Mo. 276; *Schenectady v. Union College*, 66 Hun (N. Y.) 179; *Loughry v. Pittsburgh*, 29 Pittsb. Leg. J. N. S. (Pa.) 426; *Philadelphia v. Evans*, 139 Pa. St. 483.

It has been held that where the contract for paving streets was required to be let to the lowest bidder, the municipality had no authority in its selection of the pavement to limit the use of materials to those mined from a very limited number of mines; the standard or grade of materials should be broad enough to embrace, if not absolutely all, at least a goodly portion of the materials of proper grade offered for sale. *Redersheimer v. Flower*, 52 La. Ann. 2089.

2. *Lightner v. Peoria*, 150 Ill. 80.

Power to "Renew, by the use of any material that may be decided on," any pavement whenever the pavement has become worn out, has been held to authorize repaving with a different material. *Regenstein v. Atlanta*, 98 Ga. 167.

3. *Schmitt v. New Orleans*, 48 La. Ann. 1440; *Moale v. Baltimore*, 61 Md. 224; *Conde v. Schenectady*, 29 N. Y. App. Div. 604.

4. **Prior Establishment of Grade.** — *Dorland v. Bergson*, 78 Cal. 637; *Brewster v. Peru*, 180 Ill. 124; *Allen v. Davenport*, 107 Iowa 90; *State v. Judges*, 51 Minn. 539; *In re Delaware, etc., Canal Co.*, (County Ct.) 8 N. Y. Supp. 352; *Whittaker v. Deadwood* 12 S. Dak. 608.

5. *Knowles v. Seale*, 64 Cal. 377; *Dyer v. Hudson*, 65 Cal. 374; *Weber v. Johnson*, 37 Mo. App. 601; *Wood v. Pleasant Ridge*, 5 Ohio Cir. Dec. 516, 12 Ohio Cir. Ct. 177.

6. **Prior Construction of Sewers, Gas and Water Pipes.** — *English v. Danville*, 150 Ill. 92.

7. *Goodwillie v. Detroit*, 103 Mich. 283.

8. **Sidewalks.** — *Hyman v. Chicago*, 188 Ill. 462; *Burlington, etc., R. Co. v. Spearman*, 12

Iowa 112; *Challiss v. Parker*, 11 Kan. 384; *Huling v. Bandera Flag Stone Co.*, 87 Mo. App. 349.

Under a charter provision authorizing a city to cause streets to be "paved, graded, or macadamized," the city is authorized to construct a sidewalk of plank or other material. *Burlington, etc., R. Co. v. Spearman*, 12 Iowa 112.

**Property Owners' Right to Material of Old Walk Replaced.** — *Snyder v. Lexington*, (Ky. 1899) 49 S. W. Rep. 765.

9. *Marion v. Skillman*, 127 Ind. 130; *Bowers v. Barrett*, 85 Me. 382; *State v. Morristown*, 33 N. J. L. 57; *Moore v. Fairport*, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 146; *Reynoldsville Borough*, 22 Pa. Co. Ct. 461; *McCune v. McKeesport*, 30 Pittsb. Leg. J. N. S. (Pa.) 145; *Darlington v. Com.*, 41 Pa. St. 68.

10. *Taber v. Grafmiller*, 109 Ind. 206; *Wiles v. Hoss*, 114 Ind. 371; *Keith v. Wilson*, 145 Ind. 149; *Buell v. Ball*, 20 Iowa 282; *Warren v. Henly*, 31 Iowa 31.

11. **Compelling Property Owners to Construct Sidewalk** — *United States*. — *Hitchcock v. Galveston*, 3 Woods (U. S.) 287.

*Alabama*. — *Arndt v. Cullman*, 132 Ala. 540, 90 Am. St. Rep. 922.

*Arkansas*. — *James v. Pine Bluff*, 49 Ark. 199.

*Colorado*. — *Palmer v. Way*, 6 Colo. 106.

*Connecticut*. — *Norwich v. Hubbard*, 22 Conn. 588; *Yale College v. New Haven*, 57 Conn. 1.

*Illinois*. — *Hawes v. Chicago*, 158 Ill. 653; *McChesney v. Chicago*, 173 Ill. 75; *Walker v. Morgan Park*, 175 Ill. 570; *Western Springs v. Hill*, 177 Ill. 634.

*Indiana*. — *Wiles v. Hoss*, 114 Ind. 371; *Keith v. Wilson*, 145 Ind. 149; *Drew v. Geneva*, 150 Ind. 662; *Shrum v. Salem*, 13 Ind. App. 115; *Clay City v. Bryson*, 30 Ind. App. 490.

*Iowa*. — *Hartrick v. Farmington*, 108 Iowa 31; *Buell v. Ball*, 20 Iowa 282; *Warren v. Henly*, 31 Iowa 31.

*Kansas*. — *Emporia v. Gilchrist*, 37 Kan. 532; *Seward v. Rheiner*, 2 Kan. App. 95.

*Kentucky*. — *Hood v. Lebanon*, (Ky. 1891) 15 S. W. Rep. 516; *Mackin v. Wilson*, (Ky.



provision this duty cannot be imposed on abutting owners.<sup>1</sup> Under power to construct or to compel property owners to construct sidewalks, the municipality has no authority to construct other improvements not necessarily a part thereof.<sup>2</sup> In the absence of statutory liability a municipality is under no duty to construct sidewalks upon its streets.<sup>3</sup>

**Privilege of Property Owner to Construct.** — In some instances, where sidewalks are to be constructed at the expense of the abutting property owners, the statutes give to such owners the privilege of performing the work within a specified time, and prohibit the municipality within such time from constructing the walk at the cost of the owner.<sup>4</sup>

**Necessity and Character of Sidewalk.** — Where a municipality has general power to compel the construction of sidewalks, the kind or character of walk to be constructed is a matter within its discretion,<sup>5</sup> and the same is true with regard to the necessity and utility of the walk.<sup>6</sup> In some instances, however, the action of municipalities in requiring property owners to replace sidewalks

1898) 45 S. W. Rep. 663; *Hackworth v. Louisville Artificial Stone Co.*, 106 Ky. 234; *Hazelgreen v. McNabb*, 64 S. W. Rep. 431, 23 Ky. L. Rep. 811.

*Massachusetts.* — *Charlestown v. Stone*, 15 Gray (Mass.) 40.

*Michigan.* — *Port Huron v. Jenkinson*, 77 Mich. 414, 18 Am. St. Rep. 409; *In re O'Brien*, 119 Mich. 540.

*Mississippi.* — *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451.

*Missouri.* — *Marionville v. Henson*, 65 Mo. App. 397.

*New Jersey.* — *Paxson v. Sweet*, 13 N. J. L. 196.

*New York.* — *Moore v. Fairport*, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 146.

*Ohio.* — *Cincinnati v. Longworth*, 10 Ohio Dec. (Reprint) 598, 22 Cinc. L. Bul. 153.

*Pennsylvania.* — *Findley v. Pittsburgh*, (Pa. 1887) 11 Atl. Rep. 678; *Athens v. Carmer*, 169 Pa. St. 426; *Jenkintown v. Firmstone*, 12 Pa. Co. Ct. 219; *Pittsburg v. Daly*, 5 Pa. Super. Ct. 528; *Greensburg v. Young*, 53 Pa. St. 280; *Smith v. Kingston*, 120 Pa. St. 357; *Black v. Roebuck*, 17 Pa. Super. Ct. 324; *Pittsburg v. Fay*, 8 Pa. Super. Ct. 269; *Reading v. Heilman*, 19 Pa. Super. Ct. 422.

*Tennessee.* — *Washington v. Nashville*, 1 Swan (Tenn.) 177; *Franklin v. Maberry*, 6 Humph. (Tenn.) 368, 44 Am. Dec. 315.

*Texas.* — *Galveston v. Heard*, 54 Tex. 420. *Virginia.* — *Sands v. Richmond*, 31 Gratt. (Va.) 571, 31 Am. Rep. 742.

*West Virginia.* — *Wilson v. Philippi*, 39 W. Va. 75.

While the power to impose local assessments can be exercised only when conferred in express terms or by necessary implication, power to compel owners of urban property to construct sidewalks in front of their premises and to keep them in repair and free from obstructions is not the taxing, but the police, power, and may be exercised under more general grants of power. *New Iberia v. Fontelieu*, 108 La. 460.

1. *Gridley v. Bloomington*, 88 Ill. 557; *Chicago v. Crosby*, 111 Ill. 538; *Woodward v. Boscobel*, 84 Wis. 226.

2. *Boals v. Bachmann*, 201 Ill. 340, reversing 103 Ill. App. 427. See also *Adams v. Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484.

Thus, when the power is to require abutting

property owners to build and maintain suitable sidewalks, the municipality cannot compel an abutting owner, as a preliminary to construction, to grade the sidewalk so as to bring it to the grade of the remainder of the street. *Little Rock v. Fitzgerald*, 59 Ark. 494; *Hillhouse v. New Haven*, 62 Conn. 344.

3. *Atty.-Gen. v. Boston*, 142 Mass. 200.

4. **Owner Allowed Certain Time to Construct** — *Illinois.* — *Western Springs v. Hill*, 177 Ill. 634.

*Indiana.* — *Clay City v. Bryson*, 30 Ind. App. 490; *Shrum v. Salem*, 13 Ind. App. 115.

*Iowa.* — *Hawley v. Ft. Dodge*, 103 Iowa 573. *Massachusetts.* — *Tufts v. Charlestown*, 98 Mass. 583.

*Michigan.* — *Auditor-General v. Hoffman*, 129 Mich. 541.

*Missouri.* — *Heman v. St. Louis Merchants' Land Imp. Co.*, 75 Mo. App. 372; *Springfield v. Mills*, 99 Mo. App. 141.

*New Jersey.* — *Carroll v. Irvington*, 50 N. J. L. 361.

*New York.* — *Rathbun v. Acker*, 18 Barb. (N. Y.) 393.

*Pennsylvania.* — *Philadelphia v. Meighan*, 159 Pa. St. 495.

*Rhode Island.* — *Simmons v. Gardiner*, 6 R. I. 255.

*South Carolina.* — *Columbia v. Hunt*, 5 Rich. L. (S. Car.) 550.

5. **Necessity and Character.** — *Keith v. Wilson*, 145 Ind. 149; *Burlington, etc., R. Co. v. Spearman*, 12 Iowa 112; *O'Brien v. Markland*, (Ky. 1888) 6 S. W. Rep. 713; *Anderson v. Bitzer*, (Ky. 1899) 49 S. W. Rep. 442; *Dumesnil v. Louisville Artificial Stone Co.*, 109 Ky. 1; *Hazelgreen v. McNabb*, 64 S. W. Rep. 431, 23 Ky. L. Rep. 811; *Scribner v. Grand Rapids*, 119 Mich. 188; *In re O'Brien*, 119 Mich. 540; *Suburban Land, etc., Co. v. Vailsburg*, 67 N. J. L. 461; *Benson v. Waukesha*, 74 Wis. 31.

**Power to Construct Sidewalk on One Side of Street Only.** — *State v. Portage*, 12 Wis. 562. *Compare Mills v. Norwood*, 3 Ohio Cir. Dec. 465, 6 Ohio Cir. Ct. 305.

6. *Walker v. Morgan Park*, 175 Ill. 570; *Keith v. Wilson*, 145 Ind. 149; *Seward v. Rheiner*, 2 Kan. App. 95; *Stewart v. Neodesha*, 3 Kan. App. 330; *Marionville v. Henson*, 65 Mo. App. 397.

with walks of another material has been held invalid as being oppressive and unreasonable.<sup>1</sup>

*d. GRADING.*—Express power to grade their streets is usually conferred on municipalities.<sup>2</sup> Under a general power conferred to improve and keep in repair its streets, it has been held that the municipality has implied authority to grade, cutting down hills and filling up hollows,<sup>3</sup> and the same has been held with regard to power to "alter and amend" streets.<sup>4</sup> The general power to grade its streets is a continuing power, authorizing the municipality to alter the grade established from time to time as the public welfare requires.<sup>5</sup> In exercising this power the determining of the grade is a legislative or judicial act, and cannot be controlled by the courts.<sup>6</sup> The legislature may impose a mandatory duty upon a municipality to bring a street to a certain grade.<sup>7</sup>

*e. WIDENING AND ALTERING.*—The power to widen streets and condemn the necessary land for such purpose,<sup>8</sup> as well as to vacate portions of streets so as to make them narrower,<sup>9</sup> is frequently expressly conferred on municipalities. In the absence of legislative authorization a municipality has no

1. *Hawes v. Chicago*, 158 Ill. 653; *Reading v. Heilman*, 19 Pa. Super. Ct. 422.

2. *Grading Streets—United States.*—*Goszler v. Georgetown*, 6 Wheat. (U. S.) 597.

*California.*—*Houston v. McKenna*, 22 Cal. 559; *Shaw v. Crocker*, 42 Cal. 435; *People v. San Francisco*, 43 Cal. 91; *Himmelmenn v. Hoadley*, 44 Cal. 213; *Napa v. Easterby*, 61 Cal. 509; *Warren v. Riddell*, 106 Cal. 352; *Palmer v. Burnham*, 120 Cal. 364.

*Connecticut.*—*Cook v. Ansonia*, 66 Conn. 413.

*Georgia.*—*Moore v. Atlanta*, 70 Ga. 611.

*Indiana.*—*Lafayette v. Fowler*, 34 Ind. 140; *Mattingly v. Plymouth*, 100 Ind. 545.

*Iowa.*—*Given v. Des Moines*, 70 Iowa 637; *McManus v. Hornaday*, 99 Iowa 507.

*Maryland.*—*Kelly v. Baltimore*, 65 Md. 171.

*Missouri.*—*Kolkmeier v. Jefferson*, 75 Mo. App. 678.

*New Jersey.*—*State v. Jersey City*, 24 N. J. L. 662; *State v. New Brunswick*, 32 N. J. L. 548; *Latta v. Hoboken*, 48 N. J. L. 63; *Provident Inst. v. Jersey City*, 52 N. J. L. 490; *State v. Rutherford*, 52 N. J. L. 499; *Chosen Freeholders v. Bayonne*, 54 N. J. L. 293.

*New York.*—*Brown v. New York*, 3 Thomp. & C. (N. Y.) 155; *Archer v. Mt. Vernon*, 63 N. Y. App. Div. 286.

*Ohio.*—*Leonard v. Cassidy*, 4 Ohio Cir. Dec. 480, 8 Ohio Cir. Ct. 529; *Wabash R. Co. v. Defiance*, 52 Ohio St. 262.

*Pennsylvania.*—*Betterly v. Scranton*, 5 Lack. Leg. N. (Pa.) 179; *McHale v. Easton*, etc., Transit Co., 169 Pa. St. 416; *Shiloh St.*, 165 Pa. St. 386, 44 Am. St. Rep. 671.

*Texas.*—*Denison*, etc., Suburban R. Co. v. James, 20 Tex. Civ. App. 358.

*Washington.*—*Ball v. Tacoma*, 9 Wash. 592; *Findley v. Hull*, 13 Wash. 236.

*Wisconsin.*—*State v. La Crosse*, 107 Wis. 654; *Jorgenson v. Superior*, 111 Wis. 561.

*Grading Without Paving.*—*Taylor v. Patton*, (Ind. 1903) 66 N. E. Rep. 91.

3. *Smith v. Washington*, 20 How. (U. S.) 135; *Himmelmenn v. Hoadley*, 44 Cal. 213; *M. E. Church South v. Wyandotte*, 31 Kan. 721; *Callender v. Marsh*, 1 Pick. (Mass.) 418; *Wolfe v. Pearson*, 114 N. Car. 621; *White v. McKeesport*, 101 Pa. St. 394; *Humes v. Knox*

ville, 1 Humph. (Tenn.) 403, 34 Am. Dec. 657.

4. *Macy v. Indianapolis*, 17 Ind. 267; *Waddell v. New York*, 8 Barb. (N. Y.) 95; *People v. Astin*, (C. Pl. Gen. T.) 49 How. Fr. (N. Y.) 405; *Williamsport v. Com.*, 84 Pa. St. 487, 24 Am. Rep. 208.

5. *United States.*—*Goszler v. Georgetown*, 6 Wheat. (U. S.) 593.

*District of Columbia.*—*Smoot v. Washington*, 2 Hayw. & H. (D. C.) 122.

*Indiana.*—*Kokomo v. Mahan*, 100 Ind. 242; *Mattingly v. Plymouth*, 100 Ind. 545.

*Iowa.*—*Creal v. Keokuk*, 4 Greene (Iowa) 47.

*Minnesota.*—*Rakowsky v. Duluth*, 44 Minn. 188; *Karst v. St. Paul*, etc., R. Co., 22 Minn. 118.

*Missouri.*—*Estes v. Owen*, 90 Mo. 113.

*New Jersey.*—*Trenton v. McQuade*, 52 N. J. Eq. 669.

*New York.*—*Waddell v. New York*, 8 Barb. (N. Y.) 95. *Compare Oakley v. Williamsburgh*, 6 Paige (N. Y.) 262; *Matter of Mutual L. Ins. Co.*, 89 N. Y. 530.

*Ohio.*—*Columbus Gas Light*, etc., Co. v. Columbus, 50 Ohio St. 65, 40 Am. St. Rep. 648.

6. *Fuller v. Atlanta*, 66 Ga. 80; *Kokomo v. Mahan*, 100 Ind. 242; *Yanish v. St. Paul*, 50 Minn. 518; *Estes v. Owen*, 90 Mo. 113; *McHale v. Easton*, etc., Transit Co., 169 Pa. St. 416.

7. *People v. San Francisco*, 36 Cal. 595.

8. *Widening Streets.*—*San Francisco v. Kiernan*, 98 Cal. 614; *Heffernan v. Superior Ct.*, (Cal. 1893) 33 Pac. Rep. 725; *Davies v. Los Angeles*, 86 Cal. 37; *Brown v. San Francisco*, 124 Cal. 274; *Lofland v. Orten*, 4 Houst. (Del.) 622; *Florida Cent.*, etc., R. Co. v. Ocala St., etc., R. Co., 39 Fla. 306; *Dorgan v. Boston*, 12 Allen (Mass.) 223; *Brock v. Dore*, 166 Mass. 161; *Matter of New York*, (Supm. Ct. Spec. T.) 72 N. Y. Supp. 378; *Buckholz v. New York*, etc., R. Co., 71 N. Y. App. Div. 452; *In re Diamond St.*, 196 Pa. St. 254; *Bornot v. Bonschur*, 202 Pa. St. 463; *Philadelphia v. Hinkleley*, 9 Pa. Dist. 125; *Lincoln St.*, 18 Pa. Co. Ct. 410.

9. *Narrowing Streets.*—*Mt. Carmel v. Shaw*, 155 Ill. 37, 46 Am. St. Rep. 311; *Donohue's Appeal*, 169 Pa. St. 210; *In re Cresson St.*, 10 Pa. Super. Ct. 332; *Scott v. Marlin*, 25 Tex. Civ. App. 353.

power to condemn land to widen streets,<sup>1</sup> nor has it power to make its streets narrower.<sup>2</sup> The manner in which the power to alter streets shall be exercised is a matter of statutory regulation.<sup>3</sup>

**2. Exercise of Power — a. IN GENERAL.** — The statutes usually prescribe the manner in which the power to make street improvements shall be exercised,<sup>4</sup> and the general rule that where a power is conferred upon a municipality, and the manner in which that power is to be exercised is prescribed, such requirements must be complied with,<sup>5</sup> applies fully with regard to the exercise of a power to make street improvements.<sup>6</sup>

**b. DISCRETION IN EXERCISE OF POWER.** — In determining whether the power to improve its streets shall be exercised, the municipality acts in a legislative or judicial character, and the advisability of its action as regards the utility or necessity of the proposed improvement cannot be inquired into, nor can the exercise of the power be controlled by the courts.<sup>7</sup> The mere

1. *Jersey Co. v. Jersey City*, 8 N. J. Eq. 715.

2. *State v. Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564; *Lawrence v. New York*, 2 Barb. (N. Y.) 577; *St. Vincent Female Orphan Asylum v. Troy*, 76 N. Y. 108, 32 Am. Rep. 286.

3. **Exercise of Power — California.** — *Dehail v. Morford*, 95 Cal. 457; *San Francisco v. Kiernan*, 98 Cal. 614.

*Illinois.* — *Morris v. Chicago*, 11 Ill. 650.  
*Indiana.* — *Rensselaer v. Leopold*, 106 Ind. 29; *Anderson v. Bain*, 120 Ind. 254; *New Albany v. Endres*, 143 Ind. 192.

*Maine.* — *Jones v. Portland*, 57 Me. 42.  
*Maryland.* — *Baltimore v. Bouldin*, 23 Md. 328; *Hazelhurst v. Baltimore*, 37 Md. 199.

*Missouri.* — *Lexington v. Long*, 31 Mo. 369.  
*New Jersey.* — *State v. Plainfield*, 38 N. J. L. 95.

*New York.* — *Matter of Widening Broadway*, 63 Barb. (N. Y.) 572; *People v. McDonald*, 69 N. Y. 362; *Matter of Opening Flushing Ave.*, 101 N. Y. 678.

*Pennsylvania.* — *Hershberger v. Pittsburgh*, 115 Pa. St. 78; *Frederick St.*, 150 Pa. St. 202, 155 Pa. St. 625.

4. **Exercise of Power.** — *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *San Francisco v. Kiernan*, 98 Cal. 614; *Santa Cruz Rock Pavement Co. v. Heaton*, 105 Cal. 162; *Savannah v. Weed*, 96 Ga. 670; *Ryan v. Boston*, 118 Mass. 248; *Matter of Woolsey*, 95 N. Y. 135; *Matter of Altering Main St.*, 98 N. Y. 454.

5. See the title *MUNICIPAL CORPORATIONS*, vol. 20, p. 1142.

6. **Compliance with Statutory Requirements — United States.** — *Mason v. Fearson*, 9 How. (U. S.) 248; *Rock Island County v. U. S.*, 4 Wall. (U. S.) 435.

*California.* — *Santa Cruz Rock Pavement Co. v. Broderick*, 113 Cal. 628.

*Colorado.* — *Keese v. Denver*, 10 Colo. 112.

*Illinois.* — *Wheeler v. Chicago*, 57 Ill. 415.

*Indiana.* — *Madison v. Smith*, 83 Ind. 502; *Case v. Johnson*, 91 Ind. 477; *Logansport v. Dykeman*, 116 Ind. 15, 24 Am. & Eng. Corp. Cas. 534; *Niklaus v. Conkling*, 118 Ind. 289.

*Maryland.* — *Baltimore v. Porter*, 18 Md. 284, 79 Am. Dec. 686.

*Michigan.* — *Hoyt v. East Saginaw*, 19 Mich. 39, 2 Am. Rep. 76.

*Minnesota.* — *Newbery v. Fox*, 37 Minn. 141, 5 Am. St. Rep. 830.

*Missouri.* — *Thomson v. Boonville*, 61 Mo. 282; *Knopfi v. Gilsonite Roofing, etc., Co.*, 92 Mo. App. 279.

*Nebraska.* — *Fulton v. Lincoln*, 9 Neb. 358.

*New Jersey.* — *State v. Passaic*, 41 N. J. L. 90; *Semon v. Trenton*, 47 N. J. L. 489; *Van Anglen v. Bayonne*, 56 N. J. L. 463.

*New York.* — *Merritt v. Portchester*, 71 N. Y. 309, 27 Am. Rep. 47.

*Ohio.* — *Brophy v. Landman*, 28 Ohio St. 542.

*Oregon.* — *Hawthorne v. East Portland*, 13 Oregon 271.

*Wisconsin.* — *Myrick v. La Crosse*, 17 Wis. 442.

7. **Discretion in Exercise of Power — United States.** — *Goszler v. Georgetown*, 6 Wheat. (U. S.) 593; *Shumate v. Heman*, 181 U. S. 402, affirming *Heman v. Allen*, 156 Mo. 534. Compare *Field v. Barber Asphalt Pav. Co.*, 117 Fed. Rep. 925.

*California.* — *DeWitt v. Duncan*, 46 Cal. 342. Compare *Jacobus v. Oakland*, 42 Cal. 21.

*Connecticut.* — *Fellowes v. New Haven*, 44 Conn. 240.

*Georgia.* — *Bacon v. Savannah*, 105 Ga. 62; *Burckhardt v. Atlanta*, 103 Ga. 302; *Fuller v. Atlanta*, 66 Ga. 80; *Markham v. Atlanta*, 23 Ga. 402.

*Illinois.* — *Gurnee v. Chicago*, 40 Ill. 165; *Dunham v. Hyde Park*, 75 Ill. 371; *Brush v. Carbondale*, 78 Ill. 74; *Louisville, etc., R. Co. v. East St. Louis*, 134 Ill. 556; *Holdom v. Chicago*, 169 Ill. 109; *McChesney v. Chicago*, 171 Ill. 253; *Chicago, etc., R. Co. v. Chicago*, 172 Ill. 66; *Field v. Western Springs*, 181 Ill. 186; *Givins v. Chicago*, 188 Ill. 348.

*Indiana.* — *Snyder v. Rockport*, 6 Ind. 237; *Michigan City v. Roberts*, 34 Ind. 471; *Welch v. Bowen*, 103 Ind. 252; *Elkhart v. Wickwire*, 121 Ind. 331; *Barber Asphalt Paving Co. v. Edgerton*, 125 Ind. 455; *Holden v. Crawfordsville*, 143 Ind. 558; *Keith v. Wilson*, 145 Ind. 149; *Cason v. Lebanon*, 153 Ind. 567; *Coburn v. Bossert*, 13 Ind. App. 359.

*Iowa.* — *Brewster v. Davenport*, 51 Iowa 427; *Dewey v. Des Moines*, 101 Iowa 416; *Miller v. Webster City*, 94 Iowa 162.

*Kansas.* — *Seward v. Rhiner*, 2 Kan. App. 95; *State v. Neodesha*, 3 Kan. App. 319; *Emporia v. Gilchrist*, 37 Kan. 532.

*Kentucky.* — *Henderson v. Sandefur*, 11 Bush (Ky.) 550; *Allen v. Woods*, (Ky. 1898)

fact that an individual agrees to share the expense of a proposed street improvement does not invalidate the exercise of the power to make the improvement.<sup>1</sup> In some instances the duty to make specified street improvements when requested by property owners is made mandatory.<sup>2</sup>

*c.* POWER OF PARTICULAR OFFICERS OR BOARDS. — The right of particular municipal officers or boards to exercise the power to improve the streets is purely a matter of statutory regulation.<sup>3</sup>

*d.* DELEGATION OF POWER. — Where the power to make improvements is vested in particular officers of the municipality, the determination whether a particular improvement shall be made, or of its nature and character, calls for the exercise of discretion, and cannot be delegated to others.<sup>4</sup> But acts

45 S. W. Rep. 106; *Meyer v. Covington*, 103 Ky. 546; *Bullitt v. Selva*, (Ky. 1898) 47 S. W. Rep. 255; *Barfield v. Gleason*, 63 S. W. Rep. 964, 23 Ky. L. Rep. 128; *Hazeltreen v. McNabb*, 64 S. W. Rep. 431, 23 Ky. L. Rep. 811.

*Louisiana.* — *Municipality No. Two v. Dunn*, 10 La. Ann. 57; *Louisiana Ice Mfg. Co. v. New Orleans*, 43 La. Ann. 217; *Schmitt v. New Orleans*, 48 La. Ann. 1440.

*Maryland.* — *Methodist Protestant Church v. Baltimore*, 6 Gill (Md.) 391, 48 Am. Dec. 540; *Baltimore v. Stewart*, 92 Md. 535; *Alberger v. Baltimore*, 64 Md. 1.

*Michigan.* — *Shimmons v. Saginaw*, 104 Mich. 511; *Long v. Battle Creek*, 39 Mich. 323, 33 Am. Rep. 384; *Bauman v. Campau*, 58 Mich. 444; *Irving v. Ford*, 65 Mich. 241; *Grand Rapids v. Luce*, 92 Mich. 92.

*Minnesota.* — *Karst v. St. Paul, etc., R. Co.*, 22 Minn. 118; *Rogers v. St. Paul*, 22 Minn. 494; *Milwaukee, etc., R. Co. v. Faribault*, 23 Minn. 167; *Diamond v. Mankato*, (Minn. 1903) 93 N. W. Rep. 911.

*Missouri.* — *Morse v. Westport*, (Mo. 1895) 33 S. W. Rep. 182; *McCormack v. Patchin*, 53 Mo. 33, 14 Am. Rep. 440; *Kansas City v. Baird*, 98 Mo. 215; *St. Louis v. Brown*, 155 Mo. 545; *Akers v. Kolkmeier*, 97 Mo. App. 520.

*New Jersey.* — *Pope v. Union*, 18 N. J. Eq. 282; *Stoudinger v. Newark*, 28 N. J. Eq. 187; *State v. Jersey City*, 30 N. J. L. 148; *Jelliff v. Newark*, 48 N. J. L. 101; *Oakley v. Atlantic City*, 63 N. J. L. 127.

*New York.* — *Waddell v. New York*, 8 Barb. (N. Y.) 95; *Merrill v. Brooklyn*, 3 Edw. (N. Y.) 421; *Goff v. Nolan*, (Supm. Ct. Spec. T.) 62 How. Pr. (N. Y.) 323; *Whitney v. New York*, 1 Paige (N. Y.) 548; *Lynch v. New York*, 76 N. Y. 60, 32 Am. Rep. 271; *Matter of Burmeister*, 76 N. Y. 174; *Brady v. New York*, 112 N. Y. 480.

*Ohio.* — *Gall v. Cincinnati*, 18 Ohio St. 563; *Johnson v. Avondale*, 1 Ohio Cir. Dec. 124, 1 Ohio Cir. Ct. 229; *Toledo v. Grasser*, 5 Ohio Dec. 178, 7 Ohio N. P. 396; *Wabash R. Co. v. Defiance*, 52 Ohio St. 262.

*Oregon.* — *Smith v. Minto*, 30 Oregon 351;

*Pennsylvania.* — *Clopper v. Greensburg*, 9 Pa. Dist. 598, 31 Pittsb. Leg. J. (Pa.) 112; *McHale v. Easton, etc., Transit Co.*, 169 Pa. St. 416.

*Texas.* — *Wootters v. Crockett*, 11 Tex. Civ. App. 474; *Adams v. Fisher*, 75 Tex. 457.

*Washington.* — *Seattle Transfer Co. v. Seattle*, 27 Wash. 520.

*Wisconsin.* — *Boyd v. Milwaukee*, 92 Wis. 456; *Benson v. Waukesha*, 74 Wis. 31.

1. *Ford v. North Des Moines*, 80 Iowa 626;

*Crockett v. Boston*, 5 Cush. (Mass.) 182; *Parks v. Boston*, 8 Pick. (Mass.) 218, 19 Am. Dec. 322; *North Baptist Church v. Orange*, 54 N. J. L. 111.

2. *Johnson's Appeal*, 75 Pa. St. 96. See also *Rhodes v. Board of Public Works*, 10 Colo. App. 99.

3. *Power of Particular Officers or Board* — *Connecticut.* — *Norwich v. Story*, 25 Conn. 44.

*Georgia.* — *Brunswick v. King*, 91 Ga. 522.

*Idaho.* — *Genesee v. Latah County*, 4 Idaho 141.

*Illinois.* — *Meyer v. Thatcher*, 118 Ill. 520, note; *Shields v. Ross*, 158 Ill. 214.

*Indiana.* — *Sparling v. Dwenger*, 60 Ind. 72; *State v. Mainey*, 65 Ind. 404.

*Iowa.* — *Knowles v. Muscatine*, 20 Iowa 248; *Gallaher v. Head*, 72 Iowa 173.

*Maine.* — *Hamlin v. Biddeford*, 95 Me. 308.

*Maryland.* — *Central Sav. Bank v. Baltimore*, 71 Md. 515; *Smyrk v. Sharp*, 82 Md. 97.

*Massachusetts.* — *Callender v. Marsh*, 1 Pick. (Mass.) 418; *Murphy v. Boston*, 120 Mass. 419.

*Michigan.* — *Campau v. Board of Public Works*, 86 Mich. 372.

*Mississippi.* — *Blocker v. State*, 72 Miss. 720.

*New Jersey.* — *Cross v. Morristown*, 18 N. J. Eq. 305; *State v. Hale*, 25 N. J. L. 324; *State v. Newark*, 28 N. J. L. 491; *Carroll v. Irvington*, 50 N. J. L. 361; *Keyport v. Cherry*, 51 N. J. L. 417; *Matter of Public Road*, 54 N. J. L. 539.

*New York.* — *King v. Brooklyn*, 42 Barb. (N. Y.) 627; *Graves v. Otis*, 2 Hill (N. Y.) 466; *People v. Queens County*, 62 Hun (N. Y.) 619, 16 N. Y. Supp. 705; *Van Doren v. New York*, 9 Paige (N. Y.) 388; *Brooklyn v. Meserole*, 26 Wend. (N. Y.) 132; *O'Rourke v. Hart*, 9 Bosw. (N. Y.) 301; *Astor v. New York*, 62 N. Y. 567; *Matter of Deering*, 85 N. Y. 1; *Matter of Roberts*, 89 N. Y. 618; *Matter of Board of Public Works*, 144 N. Y. 440.

*Ohio.* — *Sheer v. Cincinnati*, 6 Ohio Dec. (Reprint) 1233; *Davis v. Cincinnati*, 6 Ohio Dec. 104, 4 Ohio N. P. 93; *Cincinnati, etc., R. Co. v. Carthage*, 36 Ohio St. 631; *Cincinnati v. Davis*, 58 Ohio St. 225.

*Pennsylvania.* — *Sewickley v. Jennings*, 12 Pa. Co. Ct. 75; *Reading v. Keppelman*, 61 Pa. St. 233.

*Rhode Island.* — *Rounds v. Mumford*, 2 R. I. 144.

*Wisconsin.* — *Brickwell v. Hamele*, 57 Wis. 490.

4. *Delegation of Power* — *California.* — *Richardson v. Heydenfeldt*, 46 Cal. 68; *Bolton v. Gilleran*, 105 Cal. 244, 45 Am. St. Rep. 33; N.

purely ministerial may be delegated to others, as, when an improvement has been determined upon, the duty of its superintendence or construction,<sup>1</sup> or the authority to enter into a contract therefor.<sup>2</sup> It has been held no unauthorized delegation that the advisability of a street improvement was referred for investigation to a committee which was to report to the proper officers, by whom final action was to be taken;<sup>3</sup> and the same has been held with regard to intrusting to a person the drawing of plans for an improvement, such plans to be adopted or refused by the city council in its discretion.<sup>4</sup> An ordinance directing a street improvement upon conditions requiring the consent of particular property owners is not invalid as a delegation of the power to make the improvement, in that their consent thereto is essential to the taking effect of the ordinance.<sup>5</sup>

*e. RECOMMENDATION BY BOARDS OR OFFICERS.* — The statutes frequently require as a prerequisite to the exercise of the power to make a particular street improvement that the improvement be recommended by certain officers or by some board such as the board of public works;<sup>6</sup> and where such is the

*P. Perine Contracting, etc., Co. v. Pasadena*, 116 Cal. 6; *Grant v. Barber*, 135 Cal. 188.

*Illinois.* — *Foss v. Chicago*, 56 Ill. 354; *Andrews v. Chicago*, 57 Ill. 239; *Page v. Chicago*, 60 Ill. 441; *Lake v. Decatur*, 91 Ill. 596; *Rich v. Chicago*, 152 Ill. 18; *De Witt County v. Clinton*, 194 Ill. 521.

*Indiana.* — *Egbert v. Lake Shore, etc., R. Co.*, 6 Ind. App. 350.

*Kentucky.* — *Hydes v. Joyes*, 4 Bush (Ky.) 464, 96 Am. Dec. 311; *Murray v. Tucker*, 10 Bush (Ky.) 240; *Joyes v. Shadburn*, (Ky. 1890) 13 S. W. Rep. 361.

*Maryland.* — *Baltimore v. Stewart*, 92 Md. 535.

*Massachusetts.* — *Collins v. Holyoke*, 146 Mass. 298.

*Michigan.* — *Chilson v. Wilson*, 38 Mich. 267.

*Minnesota.* — *Minneapolis Gas Light Co. v. Minneapolis*, 36 Minn. 159.

*Mississippi.* — *Macon v. Patty*, 57 Miss. 378, 34 Am. Rep. 451.

*Missouri.* — *St. Louis v. Clemens*, 43 Mo. 395; *Ruggles v. Collier*, 43 Mo. 353; *Sheehan v. Gleeson*, 46 Mo. 100; *St. Louis v. Clemens*, 52 Mo. 133; *Thomson v. Boonville*, 61 Mo. 282; *St. Joseph v. Wilshire*, 47 Mo. App. 125; *Westport v. Mastin*, 62 Mo. App. 647, 1 Mo. App. Rep. 563; *McQuiddy v. Brannock*, 70 Mo. App. 535; *Koeppen v. Sedalia*, 89 Mo. App. 648. *Compare Gallagher v. Smith*, 55 Mo. App. 116.

*New Jersey.* — *State v. Trenton*, 36 N. J. L. 198.

*New York.* — *Thompson v. Schermerhorn*, 9 Barb. (N. Y.) 152, affirmed 6 N. Y. 92, 55 Am. Dec. 385; *Tappan v. Young*, 9 Daly (N. Y.) 357; *Matter of New York Presbytery*, (C. Pl. Spec. T.) 57 How. Pr. (N. Y.) 500; *Birdsall v. Clark*, 73 N. Y. 73, 29 Am. Rep. 105, reversing 7 Hun (N. Y.) 351; *Merritt v. Portchester*, 29 Hun (N. Y.) 619; *Phelps v. New York*, 112 N. Y. 216; *People v. Haverstraw*, 137 N. Y. 88. *Compare Burchell v. New York*, 56 Hun (N. Y.) 640, 9 N. Y. Supp. 196.

*Ohio.* — *Lippelman v. Cincinnati*, 2 Ohio Cir. Dec. 576, 4 Ohio Cir. Ct. 327.

*Pennsylvania.* — *Scranton v. McDonough*, 1 Lack. Leg. N. (Pa.) 177.

*Rhode Island.* — *Rounds v. Mumford*, 2 R. I. 154; *Clarke v. Newport*, 5 R. I. 333.

*Texas.* — *Gulf, etc., R. Co. v. Riordan*, (Tex. Civ. App. 1893) 22 S. W. Rep. 519; *Alford v. Dallas*, (Tex. Civ. App. 1896) 35 S. W. Rep. 816.

*Virginia.* — *Page v. Belvin*, 88 Va. 985.

See also the title PUBLIC OFFICERS, vol. 23, p. 365.

Thus, an ordinance directing a street to be curbed, where the curb walls "are not now in a good and sound condition," vesting in the board of public works the determination whether the curbs are in good condition, is an authorized delegation of the power to construct curbs to the board of public works. *Moore v. Chicago*, 60 Ill. 243. *Compare Reid v. Clay*, 134 Cal. 207.

A city council having power to require the construction of sidewalks cannot delegate to the street committee and city engineer the right to determine the width of the walks to be constructed. *McCrowell v. Bristol*, 89 Va. 652.

1. *Superintending Improvement.* — *Bradford v. Pontiac*, 165 Ill. 612; *Gross v. People*, 172 Ill. 571; *Brewster v. Davenport*, 51 Iowa 427; *Bowers v. Barrett*, 85 Me. 382; *Moale v. Baltimore*, 61 Md. 224; *Taber v. New Bedford*, 135 Mass. 162; *Atty.-Gen. v. Boston*, 142 Mass. 200; *Collins v. Holyoke*, 146 Mass. 298; *Bradley v. Van Wyck*, 65 N. Y. App. Div. 293. See also *Northern Cent. R. Co. v. Baltimore*, 21 Md. 93; *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1.

2. *Reuting v. Titusville*, 175 Pa. St. 512.

3. *Dorman v. Lewiston*, 81 Me. 411; *Charleston v. Pinckney*, 3 Brev. (S. Car.) 217; *Whyte v. Nashville*, 2 Swan (Tenn.) 364. *Compare Scranton v. McDonough*, 1 Lack. Leg. N. (Pa.) 177.

4. *People v. Assessors*, 50 N. Y. App. Div. 54.

5. *Baltimore v. Clunet*, 23 Md. 449.

6. *Recommendation by Boards or Officers.* — *Illinois.* — *Middaugh v. Chicago*, 187 Ill. 230; *Givins v. Chicago*, 188 Ill. 348; *Gage v. Chicago*, 192 Ill. 586, 195 Ill. 490, 196 Ill. 512; *De Witt County v. Clinton*, 194 Ill. 521; *Kerfoot v. Chicago*, 195 Ill. 229; *Field v. Chicago*, 198 Ill. 224; *Dodge v. Chicago*, 201 Ill. 68; *McChesney v. Chicago*, 201 Ill. 344.

*Indiana.* — *New Albany v. Endres*, 143 Ind. 192.

case, the city council cannot make the minutes of the board as kept by the clerk thereof the sole or conclusive evidence of the action of the board.<sup>1</sup>

*f. RESOLUTION OF INTENTION TO MAKE OR NECESSITY FOR IMPROVEMENT.* — In some instances the statutes require that before the power to make street improvements shall be exercised a preliminary resolution shall be passed by the city council expressing its intention to make the described improvement<sup>2</sup> or declaring the necessity therefor.<sup>3</sup> But in the absence of statutory requirement such a resolution is not necessary.<sup>4</sup>

*Enactment and Notice.* — The manner in which such a resolution shall be enacted is controlled by statute,<sup>5</sup> as is also the necessity of notice thereof.<sup>6</sup>

*g. PETITION OR CONSENT OF PROPERTY OWNERS.* — Many statutes require as a condition precedent to the exercise of the power to make street improvements that a petition be filed by a certain proportion of the property

*Kentucky.* — *Richardson v. Mehler*, 63 S. W. Rep. 957, 23 Ky. L. Rep. 917.

*Michigan.* — *Butler v. Detroit*, 43 Mich. 552.

*Minnesota.* — *Althen v. Kelly*, 32 Minn. 280; *State v. District Ct.*, 33 Minn. 164.

*Missouri.* — *In re Independence Ave. Boulevard*, 128 Mo. 272; *State v. St. Louis*, 161 Mo. 371; *Heman Constr. Co. v. Loevy*, 64 Mo. App. 430, 2 Mo. App. Rep. 1123; *Bambrick v. Campbell*, 37 Mo. App. 460; *Dunker v. Stiefel*, 57 Mo. App. 379; *Shoenberg v. Field*, 95 Mo. App. 241.

*New Jersey.* — *State v. Jersey City*, 30 N. J. L. 148; *White v. Bayonne*, 49 N. J. L. 311.

*Ohio.* — *Tyler v. Columbus*, 3 Ohio Cir. Dec. 427, 6 Ohio Cir. Ct. 224; *Reynolds v. Schweinefus*, 27 Ohio St. 311; *Brophy v. Landman*, 28 Ohio St. 542; *Hubbard v. Norton*, 28 Ohio St. 116; *Krumberg v. Cincinnati*, 29 Ohio St. 69.

*Texas.* — *Hutcheson v. Storrie*, (Tex. Civ. App. 1898) 48 S. W. Rep. 785.

1. *Reynolds v. Schweinefus*, 27 Ohio St. 311.

2. *Resolution of Intention to Make* — *California.* — *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *Harney v. Heller*, 47 Cal. 15; *Deady v. Townsend*, 57 Cal. 298; *King v. Lamb*, 117 Cal. 401; *Edwards v. Berlin*, 123 Cal. 544; *San Jose Imp. Co. v. Auzeais*, 106 Cal. 498; *Hellman v. Shoulters*, 114 Cal. 136; *Wells v. Wood*, 114 Cal. 255; *Schwiesau v. Mahon*, 128 Cal. 114; *Kutchin v. Engelbert*, 129 Cal. 635; *Banaz v. Smith*, 133 Cal. 102; *Bay Rock Co. v. Bell*, 133 Cal. 150; *Piedmont Paving Co. v. Allman*, 136 Cal. 88; *Lambert v. Marcuse*, 137 Cal. 44; *Bates v. Twist*, 138 Cal. 52.

*Michigan.* — *Owosso v. Richfield*, 80 Mich. 328.

*Missouri.* — *Trenton v. Collier*, 68 Mo. App. 483.

*New York.* — *Matter of Schreiber*, (Supm. Ct. Spec. T.) 3 Abb. N. Cas. (N. Y.) 68.

*Ohio.* — *Anderson v. Cincinnati*, 10 Ohio Dec. (Reprint) 794.

*Oregon.* — *Columbia Bank v. Portland*, 41 Oregon 1.

*Washington.* — *Buckley v. Tacoma*, 9 Wash. 253; *McAllister v. Tacoma*, 9 Wash. 272.

*Sufficiency of Description of Improvement in Resolution of Intention.* — *San Jose Imp. Co. v. Auzeais*, 106 Cal. 498; *Schwiesau v. Mahon*, 128 Cal. 114; *Fay v. Reed*, 128 Cal. 357; *McDonnell v. Gillon*, 134 Cal. 329; *Williamson v. Joyce*, 137 Cal. 107.

3. *Resolution Declaring Necessity* — *United*

*States.* — *Michigan Cent. R. Co. v. Huehn*, 59 Fed. Rep. 335 (Illinois statute).

*Dakota.* — *McLauren v. Grand Forks*, 6 Dak. 397.

*Indiana.* — *Greensbury v. Zoller*, 28 Ind. App. 126. *Compare Pittsburgh, etc., R. Co. v. Hays*, 17 Ind. App. 261; *Willard v. Albertson*, 23 Ind. App. 164.

*Michigan.* — *Hoyt v. East Saginaw*, 19 Mich. 39, 2 Am. Rep. 76; *White v. Saginaw*, 67 Mich. 33; *Davies v. Saginaw*, 87 Mich. 439; *Naegely v. Saginaw*, 101 Mich. 532.

*Missouri.* — *Wheeler v. Poplar Bluff*, 149 Mo. 36.

*Ohio.* — *Welker v. Potter*, 18 Ohio St. 85; *Stephan v. Daniels*, 27 Ohio St. 527; *Krumberg v. Cincinnati*, 29 Ohio St. 69; *Longworth v. Cincinnati*, 10 Ohio Dec. (Reprint) 683, 23 Cinc. L. Bul. 100; *Caldwell v. Carthage*, 49 Ohio St. 334.

*South Dakota.* — *Mason v. Sioux Falls*, 2 S. Dak. 640, 39 Am. St. Rep. 802.

*Texas.* — *Kerr v. Corsicana*, (Tex. Civ. App. 1895) 35 S. W. Rep. 694; *Waco v. Chamberlain*, (Tex. Civ. App. 1898) 45 S. W. Rep. 191.

4. *Cassidy v. Bangor*, 61 Me. 434; *Strowbridge v. Portland*, 8 Oregon 67; *Clinton v. Portland*, 26 Oregon 410; *Elma v. Carney*, 9 Wash. 466.

5. *Enactment.* — *Creighton v. Manson*, 27 Cal. 613; *Thompson v. Hoge*, 30 Cal. 179; *Taylor v. Palmer*, 31 Cal. 241; *Beaudry v. Valdez*, 32 Cal. 269; *Williams v. McDonald*, 58 Cal. 527; *McDonald v. Dodge*, 97 Cal. 112; *Wheeler v. Poplar Bluff*, 149 Mo. 36; *State v. Jersey City*, 30 N. J. L. 93; *Elyria Gas, etc., Co. v. Elyria*, 7 Ohio Cir. Dec. 527, 14 Ohio Cir. Ct. 219; *Upington v. Oviatt*, 24 Ohio St. 232; *Cincinnati v. Anderson*, 52 Ohio St. 600; *Dieckmann v. Sheboygan County*, 89 Wis. 571.

6. *Notice of Resolution.* — *Oakland Sav. Bank v. Sullivan*, 107 Cal. 428; *People v. McCain*, 50 Cal. 210; *Anderson v. De Urioste*, 96 Cal. 404; *Porphyry Paving Co. v. Ancker*, 104 Cal. 340; *Hellman v. Shoulters*, 114 Cal. 136; *White v. Harris*, 116 Cal. 470; *King v. Lamb*, 117 Cal. 401; *Chase v. City Treasurer*, 122 Cal. 540; *California Imp. Co. v. Reynolds*, 123 Cal. 88; *Perine v. Lewis*, 128 Cal. 236, modified on rehearing 128 Cal. 241; *Greenwood v. Hassett*, 128 Cal. xviii; *German Sav., etc., Soc. v. Ramish*, 138 Cal. 120; *Bates v. Twist*, 138 Cal. 52; *City St. Imp. Co. v. Taylor*, 138 Cal. 364; *McGee v. Avondale*, 4 Ohio Cir. Dec. 580, 7 Ohio Cir. Ct. 246.

owners on the street to be improved, requesting or consenting to the improvement;<sup>1</sup> but the legislature may authorize municipalities to make improvements without consent of the property owners.<sup>2</sup> The proportion of petitioners required is a matter of statutory regulation, and depends as a rule on the

1. *Petition or Consent of Property Owners—United States.*—Farrell v. West Chicago Park Com'rs, 181 U. S. 404.

*Alabama.*—Miller v. Mobile, 47 Ala. 163, 11 Am. Rep. 768.

*Arkansas.*—Watkins v. Griffiths, 59 Ark. 344; Ahern v. Board of Improvement, 69 Ark. 68.

*California.*—Turrill v. Grattan, 52 Cal. 97; Dyer v. Miller, 58 Cal. 585; Mulligan v. Smith, 59 Cal. 206; Gately v. Leviston, 63 Cal. 365.

*Illinois.*—Cunningham v. Peoria, 157 Ill. 499; Merritt v. Kewanee, 175 Ill. 537; Bloomington v. Reeves, 177 Ill. 161; Patterson v. Macomb, 179 Ill. 163; Whaples v. Waukegan, 179 Ill. 310; Hammond v. Leavitt, 181 Ill. 416; Taylor v. Bloomington, 186 Ill. 497; Trah v. Grant Park, 192 Ill. 351.

*Indiana.*—Kyle v. Malin, 8 Ind. 34; Covington v. Nelson, 35 Ind. 532; Moberry v. Jeffersonville, 38 Ind. 198; Case v. Johnson, 91 Ind. 477; Wiles v. Hoss, 114 Ind. 371.

*Iowa.*—Farragher v. Keokuk, 111 Iowa 310.

*Kansas.*—Welsford v. Weidlein, 23 Kan. 601; Wahlgren v. Kansas City, 42 Kan. 243; Kansas City v. Breyfogle, 8 Kan. App. 276; Kansas City v. Kimball, 60 Kan. 224; Steinmuller v. Kansas City, 3 Kan. App. 45.

*Kentucky.*—Louisville v. Hyatt, 2 B. Mon. (Ky.) 177, 36 Am. Dec. 594; Covington v. Casey, 3 Bush (Ky.) 698.

*Louisiana.*—McGuinn v. Peri, 16 La. Ann. 326; McKee v. Brown, 23 La. Ann. 306.

*Maryland.*—Henderson v. Baltimore, 8 Md. 352; Swann v. Cumberland, 8 Gill (Md.) 150; Holland v. Baltimore, 11 Md. 186, 69 Am. Dec. 195; Bouldin v. Baltimore, 15 Md. 18; Baltimore v. Eschbach, 18 Md. 276.

*Minnesota.*—Bradley v. West Duluth, 45 Minn. 4.

*Missouri.*—St. Louis v. Clemens, 36 Mo. 467; Marshall v. Rainey, 78 Mo. App. 416, 2 Mo. App. Rep. 285.

*Nebraska.*—Von Steen v. Beatrice, 36 Neb. 421; State v. Birkhauser, 37 Neb. 521; Leavitt v. Bell, 55 Neb. 57; Orr v. Omaha, (Neb. 1902) 90 N. W. Rep. 301; Portsmouth Sav. Bank v. Omaha, (Neb. 1903) 93 N. W. Rep. 331; Omaha v. Gsanter, (Neb. 1903) 93 N. W. Rep. 407.

*New Jersey.*—Carron v. Martin, 26 N. J. L. 594, 69 Am. Dec. 584, 26 N. J. L. 228; App v. Stockton, 61 N. J. L. 520; State v. Elizabeth, 31 N. J. L. 547; State v. Orange, 32 N. J. L. 49; State v. Jersey City, 38 N. J. L. 410; Green v. Jersey City, 42 N. J. L. 565; Chosen Freeholders v. Bayonne, 54 N. J. L. 293.

*New York.*—Lathrop v. Buffalo, 3 Abb. App. Dec. (N. Y.) 30; People v. Rochester, 21 Barb. (N. Y.) 656; Mott v. New York, 2 Hilt. (N. Y.) 358; Matter of Delaware, etc., Canal Co., 60 Hun (N. Y.) 204; Matter of Banta, 60 N. Y. 165; People v. Brooklyn, 71 N. Y. 495; Matter of Garvey, 77 N. Y. 523; Matter of Smith, 99 N. Y. 424; Jex v. New York, 103 N. Y. 536; Folmsbee v. Amsterdam, 142 N. Y. 118; Miller

v. Amsterdam, 149 N. Y. 288; Jones v. Tona-wanda, 158 N. Y. 438.

*Ohio.*—Mocker v. Cincinnati, 4 Ohio Dec. 161, 5 Ohio N. P. 242; Goodall v. Cincinnati, 8 Ohio Dec. 528, 5 Ohio N. P. 428; Andrew v. Auditor, 5 Ohio Dec. 242, 5 Ohio N. P. 123; Hay v. Cincinnati, 9 Ohio Dec. 128, 6 Ohio N. P. 22; Norwood v. Mills, 8 Ohio Dec. 669; Campbell v. Park, 32 Ohio St. 544.

*Oregon.*—Allen v. Portland, 35 Oregon 420. *Pennsylvania.*—Frederick St., 11 Pa. Co. Ct. 114; Erie v. Bootz, 72 Pa. St. 196; Pittsburg v. Walter, 69 Pa. St. 365.

*Wisconsin.*—Lean v. Madison, 9 Wis. 402; Wells v. Burham, 20 Wis. 112; Dieckmann v. Sheboygan County, 89 Wis. 571.

**Whether Petition Must Show Character of Petitioners.**—It has been held that the petition must show on its face that the petitioners possess the requisite qualifications. Kent v. Enosburg Falls, 71 Vt. 255. But see Allen v. Portland, 35 Oregon 420.

2. *California.*—Gafney v. San Francisco, 72 Cal. 146; Napa v. Easterby, 76 Cal. 222, 22 Am. & Eng. Corp. Cas. 443; Spaulding v. Wesson, 84 Cal. 141.

*Illinois.*—Givins v. Chicago, 186 Ill. 399.

*Indiana.*—Lafayette v. Fowler, 34 Ind. 140; Burr v. Newcastile, 49 Ind. 322; McEneney v. Sullivan, 125 Ind. 407; De Puy v. Wabash, 133 Ind. 336; Pittsburgh, etc., R. Co. v. Crown Point, 150 Ind. 536; Cason v. Lebanon, 153 Ind. 567; Shrum v. Salem, 13 Ind. App. 115.

*Kansas.*—Wilkin v. Houston, 48 Kan. 384.

*Louisiana.*—Barber Asphalt Paving Co. v. New Orleans, 41 La. Ann. 1015.

*Michigan.*—Goodwillie v. Detroit, 103 Mich. 283.

*Missouri.*—St. Louis v. Clemens, 36 Mo. 467.

*Nebraska.*—Orr v. Omaha, (Neb. 1902) 90 N. W. Rep. 301.

*New Jersey.*—State v. Jersey City, 24 N. J. L. 662; State v. Jersey City, 28 N. J. L. 500; Jelliff v. Newark, 48 N. J. L. 101, 49 N. J. L. 239; Provident Inst. v. Jersey City, 52 N. J. L. 490; Reed v. Camden, 53 N. J. L. 322.

*New York.*—Ganson v. Buffalo, 2 Abb. App. Dec. (N. Y.) 236; Matter of Walter, 21 Hun (N. Y.) 533, affirmed 83 N. Y. 538.

*Ohio.*—Jessing v. Columbus, 1 Ohio Cir. Dec. 54, 1 Ohio Cir. Ct. 90; Metcalf v. Carter, 10 Ohio Cir. Dec. 269, 19 Ohio Cir. Ct. 196; Corry v. Cincinnati, 10 Ohio Dec. (Reprint) 601, 22 Cinc. L. Bul. 194.

*Pennsylvania.*—Corry v. Corry Chair Co., 18 Pa. Super. Ct. 271; Spring Garden v. Wistar, 18 Pa. St. 195; Philadelphia v. Tryon, 35 Pa. St. 401; Beaumont v. Wilkes Barre, 142 Pa. St. 198; Frederick St., 150 Pa. St. 202; Reuting v. Titusville, 175 Pa. St. 512; In re Greenfield Ave., 29 Pittsb. Leg. J. N. S. (Pa.) 373.

*Texas.*—Waco v. Chamberlain, (Tex. Civ. App. 1898) 45 S. W. Rep. 191.

*Wisconsin.*—Kersten v. Milwaukee, 106 Wis. 200.

amount of property abutting upon the improvement.<sup>1</sup> Where a petition is required, its filing is jurisdictional, and a finding of the municipal authorities that a sufficient petition has been filed is *prima facie* evidence of the fact,<sup>2</sup> but is not conclusive<sup>3</sup> in the absence of legislative provision to that effect.<sup>4</sup>

Where a Petition for a Particular Improvement is filed, the municipality cannot change the character of the improvement and make the petition the basis for a different improvement.<sup>5</sup>

**Writing and Signature.** — Where a petition by the property owners is required, there must be a written petition,<sup>6</sup> signed by the owners of the property or their duly authorized agents.<sup>7</sup> A married man may as owner sign with regard to his own property without his wife joining,<sup>8</sup> but he cannot sign with regard

1. **Number of Petitioners** — *Alabama*. — *Mobile v. Dargan*, 45 Ala. 310.

*Arkansas*. — *Little Rock v. Katzenstein*, 52 Ark. 107.

*California*. — *Kahn v. San Francisco*, 79 Cal. 388.

*Indiana*. — *Kyle v. Malin*, 8 Ind. 34.

*Louisiana*. — *Opening of Royal St.*, 16 La. Ann. 393; *Barber Asphalt Paving Co. v. Gogreve*, 41 La. Ann. 251.

*Maryland*. — *Baltimore v. Bouldin*, 23 Md. 328.

*New Jersey*. — *De Groot v. Jersey City*, 55 N. J. L. 120.

*New York*. — *People v. Rochester*, 21 Barb. (N. Y.) 656; *Matter of Widening Washington St.*, 133 N. Y. 620.

*Ohio*. — *Mocker v. Cincinnati*, 4 Ohio Dec. 161; *Wamelink v. Cleveland*, 40 Ohio St. 381.

*Pennsylvania*. — *Speer v. Pittsburgh*, 166 Pa. St. 86.

*Washington Territory*. — *Wright v. Tacoma*, 3 Wash. Ter. 410.

In *Louisiana*, where the statute requires a petition by one-fourth of the number of property owners, it is not necessary for one-fourth of the front proprietors on the whole length of a street in which improvements are to be made to petition the city council for that purpose. It is sufficient if it be done by those on the portion sought to be improved. *Ready v. New Orleans*, 27 La. Ann. 169.

2. **Finding by Municipality as Evidence of Sufficiency and Filing.** — *Farrell v. West Chicago Park Com'rs*, 182 Ill. 250; *McManus v. People*, 183 Ill. 391; *Wright v. Tacoma*, 3 Wash. Ter. 410. See also *Argentine v. Simmons*, 54 Kan. 699.

3. *Ogden City v. Armstrong*, 168 U. S. 224, affirming 12 Utah 476; *Keese v. Denver*, 10 Colo. 112; *Bloomington v. Reese*, 177 Ill. 161; *Miller v. Amsterdam*, 149 N. Y. 288, affirming 78 Hun (N. Y.) 609; *Allen v. Portland*, 35 Oregon 420. See, however, *Kirchman v. West*, etc., St. R. Co., 58 Ill. App. 515. See also *Union Alley*, 9 Pa. Dist. 209; *Pittsburg v. Walter*, 69 Pa. St. 365. Compare *German Sav., etc., Soc. v. Ramish*, 138 Cal. 120.

4. *Mansfield v. Lockport*, (Supm. Ct. Eq. T.) 24 Misc. (N. Y.) 25.

5. *Conde v. Schenectady*, 29 N. Y. App. Div. 604; *Minor v. Hamilton*, 11 Ohio Cir. Dec. 16, 20 Ohio Cir. Ct. 4.

6. *Merritt v. Kewanee*, 175 Ill. 537; *Tone v. Columbus*, 1 Ohio Cir. Dec. 168, 1 Ohio Cir. Ct. 305. Compare *Stretch v. Hoboken*, 47 N. J. L. 268.

A seal need not be affixed to a signature by a corporation. *Allen v. Portland*, 35 Oregon 420.

7. **Signature.** — *Batty v. Hastings*, 63 Neb. 26; *South Omaha v. Tighe*, (Neb. 1903) 93 N. W. Rep. 946; *Corry v. Cincinnati*, 8 Ohio Dec. 615, 6 Ohio N. P. 325; *Allen v. Portland*, 35 Oregon 420.

**Mortgagor Recognized as Owner.** — *Ahern v. Board of Improvement*, 69 Ark. 68.

A Vendee who has become entitled to a deed of conveyance may sign as owner. *Ahern v. Board of Improvement*, 69 Ark. 68. But a vendee under an oral contract of purchase upon which no payments have been made is not a qualified petitioner. *In re Iowa St.*, 24 Pittsb. Leg. J. N. S. (Pa.) 468.

The Municipality as owner of property on the street to be improved is not a qualified petitioner. *Atlanta v. Smith*, 99 Ga. 462; *Tone v. Columbus*, 1 Ohio Cir. Dec. 168, 1 Ohio Cir. Ct. 305. Compare *Becker v. Columbus*, 18 Ohio Cir. Ct. 888.

The President or Secretary of a Corporation, either singly or jointly, cannot bind the corporate property by signing the corporate name to a petition asking for a street improvement, without being specially authorized. *Morse v. Omaha*, (Neb. 1903) 93 N. W. Rep. 734. See also *Kahn v. San Francisco*, 79 Cal. 388; *Minor v. Hamilton*, 11 Ohio Cir. Dec. 16, 20 Ohio Cir. Ct. 4. Compare *Allen v. Portland*, 35 Oregon 420.

The ratification by the board of trustees of the treasurer's signature of the name of the corporation to an application for a street improvement would estop the corporation or a third person from urging the objection of the want of authority in the original signature. *Day v. Fairview*, 62 N. J. L. 621. Compare *Minor v. Hamilton*, 11 Ohio Cir. Dec. 16, 20 Ohio Cir. Ct. 4.

A Stockholder is not qualified as a petitioner with regard to property held by the corporation. *Rector v. Board of Improvement*, 50 Ark. 116.

**Signature May Be by Agent.** — *Portsmouth Sav. Bank v. Omaha*, (Neb. 1903) 93 N. W. Rep. 231; *Tone v. Columbus*, 1 Ohio Cir. Dec. 168, 1 Ohio Cir. Ct. 305; *Allen v. Portland*, 35 Oregon 420.

See as to the proof of the agent's authority, *Kahn v. San Francisco*, 79 Cal. 388; *Chosen Freeholders v. Bayonne*, 54 N. J. L. 293; and as to the ratification of the agent's signature, *Columbus v. Sohl*, 44 Ohio St. 479.

8. **Husband.** — *Morse v. Omaha*, (Neb. 1903) 93 N. W. Rep. 734.



to his wife's property.<sup>1</sup> A lessee holding under a lease for ninety-nine years, renewable forever, has been held to be so far the owner as to qualify him to petition for the improvement,<sup>2</sup> but a life tenant cannot sign as owner of the entire property,<sup>3</sup> nor can a tenant in common sign except as owner of his own undivided interest.<sup>4</sup> Neither an administrator with regard to land owned by his decedent,<sup>5</sup> nor an executor<sup>6</sup> with regard to property owned by his testator, though he has under the will a power of sale, is qualified as a petitioner. Trustees may sign as owners of the trust property,<sup>7</sup> and guardians have been held to be authorized to sign with regard to the property of their wards.<sup>8</sup> A conveyance by a property owner after the signing of the petition does not affect his qualification as a petitioner.<sup>9</sup>

**Withdrawal of Consent.** — In some instances statutes have expressly restricted the right of a petitioner for a street improvement to revoke his consent,<sup>10</sup> but in the absence of such a restriction it has been held that revocation can be made at any time before the municipal authorities have acted upon the petition.<sup>11</sup>

**h. SUBMISSION OF QUESTION TO POPULAR VOTE.** — The legislature has plenary power to authorize municipalities to make street improvements without submitting to popular vote the question whether the improvement shall be made,<sup>12</sup> but statutes may require the making of particular improvements to be submitted to the electors of the municipality.<sup>13</sup>

**i. NOTICES OF PROPOSED IMPROVEMENT.** — Statutory provisions requiring the giving of notice of an intended street improvement must be complied with to render valid the exercise of the power to make the improvement,<sup>14</sup> but in the absence of a statutory requirement no notice is required.<sup>15</sup>

**Time of Notice.** — The statutes generally provide the time at which the notice must be given,<sup>16</sup> but the fact that a notice was given for a longer time than

1. *Merritt v. Kenawee*, 175 Ill. 537.

2. *Tenant for Ninety-nine Years.* — *Laird v. Cincinnati*, 6 Ohio Dec. (Reprint) 1006; *St. Bernard v. Kemper*, 60 Ohio St. 244. Compare *Holland v. Baltimore*, 11 Md. 186, 69 Am. Dec. 195.

3. *Life Tenant.* — *Ahern v. Board of Improvement*, 69 Ark. 68; *Baltimore v. Boyd*, 64 Md. 10.

4. *Tenant in Common.* — *Ahern v. Board of Improvement*, 69 Ark. 68; *Earl v. Board of Improvement*, 70 Ark. 211; *Merritt v. Kewanee*, 175 Ill. 537; *Andrew v. Auditor*, 5 Ohio Dec. 242, 5 Ohio N. P. 123; *Andrew v. Auditor*, 5 Ohio Dec. 242. Compare *Allen v. Portland*, 35 Oregon 420.

5. *Administrator.* — *Mobile v. Dargan*, 45 Ala. 310; *Rector v. Board of Improvement*, 50 Ark. 116; *Kahn v. San Francisco*, 79 Cal. 388.

6. *Executor.* — *Ahern v. Board of Improvement*, 69 Ark. 68; *Kahn v. San Francisco*, 79 Cal. 388.

7. *Trustees.* — *Portsmouth Sav. Bank v. Omaha*, (Neb. 1903) 93 N. W. Rep. 231. See also *Allen v. Portland*, 35 Oregon 420.

8. *Guardians.* — *Laird v. Cincinnati*, 6 Ohio Dec. (Reprint) 1006. See also *Baltimore v. Boyd*, 64 Md. 10.

9. *Conveyance After Signing.* — *Laird v. Cincinnati*, 6 Ohio Dec. (Reprint) 1006. Compare *Tone v. Columbus*, 1 Ohio Cir. Dec. 168, 1 Ohio Cir. Ct. 305.

10. *Smith v. Syracuse Imp. Co.*, 161 N. Y. 484, reversing 17 N. Y. App. Div. 63.

11. *Irwin v. Mobile*, 57 Ala. 6.

12. *Submission to Popular Vote.* — *Park Ecclesi-*

*astical Soc. v. Hartford*, 47 Conn. 89; *Barber Asphalt Paving Co. v. Gogreve*, 41 La. Ann. 251.

13. See *State v. Kansas City*, 60 Kan. 518.

14. *Notices—California.* — *Perine v. Erzgraber*, 102 Cal. 234.

*Connecticut.* — *Angus v. Hartford*, 74 Conn. 27.

*Indiana.* — *Stephenson v. Salem*, 14 Ind. App. 386. Compare *Bozarth v. McGillicuddy*, 19 Ind. App. 26; *Lewis v. Albertson*, 23 Ind. App. 147; *Willard v. Albertson*, 23 Ind. App. 164; *Spaulding v. Baxter*, 25 Ind. App. 485; *Pittsburgh, etc., R. Co. v. Fish*, 158 Ind. 525.

*Iowa.* — *Roche v. Dubuque*, 42 Iowa 250.

*Kentucky.* — *Fox v. Middlesborough Town Co.*, 96 Ky. 262. Compare *Fehler v. Gosnell*, 99 Ky. 380.

*Maryland.* — *Baltimore v. Grand Lodge, etc.*, 44 Md. 436.

*Massachusetts.* — *Stone v. Boston*, 2 Met. (Mass.) 220.

*Nebraska.* — *Ives v. Ireys*, 51 Neb. 136.

*New Jersey.* — *Clarke v. Long Branch*, 54 N. J. L. 484.

*Ohio.* — *Joyce v. Barron*, 67 Ohio St. 264.

*Oregon.* — *Columbia Bank v. Portland*, 41 Oregon 1; *Cook v. Portland*, 35 Oregon 383.

15. *Bacon v. Elizabeth*, 51 N. J. L. 246; *Matter of Zborowski*, 68 N. Y. 88.

16. *Time of Notice.* — *Chambers v. Satterlee*, 40 Cal. 497; *Fulton v. Dover*, 8 Houst. (Del.) 78; *McChesney v. Chicago*, 201 Ill. 344; *Nugent v. Jackson*, 72 Miss. 1040; *Milner v. Trenton*, 66 N. J. L. 150; *Dyker Meadow Land, etc., Co. v. Cook*, 3 N. Y. App. Div. 164; *Astor v. New York*, 37 N. Y. Super. Ct. 539; *Washington v. Nashville*, 1 Swan (Tenn.) 177.

required by the statute has been held immaterial.<sup>1</sup>

**To Whom Notice to Be Given.** — The question to whom the notice must be given is a matter of statutory regulation.<sup>2</sup>

**The Form of Notice** is regulated by statute.<sup>3</sup>

**Service of Notice.** — The notices are to be given in the manner provided by the statutes.<sup>4</sup>

**Adjournments.** — Where the required notice of a public hearing upon the question of a proposed improvement is duly given, additional notices are not required in case the hearing is adjourned to regular fixed times.<sup>5</sup>

**j. PROTESTS OR REMONSTRANCES AGAINST IMPROVEMENT.** — The statutes sometimes provide that after a resolution of intention to make a street improvement, property owners to be affected thereby may file protests or remonstrances against the contemplated action.<sup>6</sup> Under other statutes pro-

1. *Gage v. Chicago*, 196 Ill. 512 (six days' notice when statute required five days' notice); *Field v. Chicago*, 198 Ill. 224.

2. **To Whom Notice to Be Given.** — *Peck v. Bridgeport*, 75 Conn. 417; *Field v. Chicago*, 198 Ill. 224; *Portsmouth Sav. Bank v. Omaha*, (Neb. 1903) 93 N. W. Rep. 231.

3. **Form of Notice** — *California*. — *Schmidt v. Market St., etc., R. Co.*, 90 Cal. 37.

*Illinois*. — *Gage v. Chicago*, 201 Ill. 93.

*Missouri*. — *Verdin v. St. Louis*, 131 Mo. 26.

*New Jersey*. — *State v. Perth Amboy*, 29 N. J. L. 259; *State v. Plainfield*, 38 N. J. L. 95; *Clarke v. Long Branch*, 54 N. J. L. 484.

*Ohio*. — *Cincinnati v. Corry*, 10 Ohio Dec. (Reprint) 783; *Canton v. Wagner*, 54 Ohio St. 329.

*Oregon*. — *Ladd v. Spencer*, 23 Oregon 193; *Clinton v. Portland*, 26 Oregon 410; *Columbia Bank v. Portland*, 41 Oregon 1.

*Rhode Island*. — *Matter of Mt. Pleasant Ave.*, 10 R. I. 320.

*Utah*. — *Armstrong v. Ogden City*, 9 Utah 255.

4. **Service of Notice** — *United States*. — *Lent v. Tillson*, 140 U. S. 316.

*California*. — *Gill v. Dunham*, (Cal. 1893) 34 Pac. Rep. 68; *Haskell v. Bartlett*, 34 Cal. 281; *Richardson v. Tobin*, 45 Cal. 30; *Miller v. Mayo*, 88 Cal. 568; *Washburn v. Lyons*, 97 Cal. 314; *Oakland Sav. Bank v. Sullivan*, 107 Cal. 428; *Smith v. Hazard*, 110 Cal. 145.

*Connecticut*. — *Peck v. Bridgeport*, 75 Conn. 417.

*Maryland*. — *Baltimore v. Little Sisters of Poor*, 56 Md. 400; *Central Sav. Bank v. Baltimore*, 71 Md. 515.

*Minnesota*. — *State v. Pillsbury*, 82 Minn. 359.

*Missouri*. — *Kansas City v. Duncan*, 135 Mo. 571; *Trenton v. Collier*, 68 Mo. App. 483.

*New Jersey*. — *State v. Elizabeth*, 31 N. J. L. 547; *State v. Plainfield*, 38 N. J. L. 95; *North Baptist Church v. Orange*, 54 N. J. L. 111.

*New York*. — *Guest v. Brooklyn*, 9 Hun (N. Y.) 198; *Matter of Bassford*, 50 N. Y. 509; *Matter of De Pierris*, 82 N. Y. 243; *Gilmore v. Utica*, 131 N. Y. 26.

*Oregon*. — *Ladd v. Spencer*, 23 Oregon 193; *Clinton v. Portland*, 26 Oregon 410; *Columbia Bank v. Portland*, 41 Oregon 1.

*Pennsylvania*. — *Merrifield v. Scranton*, 5 Pa.

Co. Ct. 388; *Womelsdorf Alley*, 8 Pa. Co. Ct. 207; *Olds v. Erie City*, 79 Pa. St. 380.

5. **Adjournments.** — *McChesney v. Chicago*, 201 Ill. 344; *Tonawanda v. Price*, 171 N. Y. 415.

6. **Protests and Remonstrances** — *California*. — *Burnett v. Sacramento*, 12 Cal. 76, 73 Am. Dec. 518; *Los Angeles Lighting Co. v. Los Angeles*, 106 Cal. 156; *Smith v. Hazard*, 110 Cal. 145; *Pacific Paving Co. v. Reynolds*, (Cal. 1900) 62 Pac. Rep. 212; *Thomason v. Carroll*, 132 Cal. 148; *Pacific Paving Co. v. Gallett*, 137 Cal. 174; *Gray v. Burr*, 138 Cal. 109; *City St. Imp. Co. v. Laird*, 138 Cal. 27.

*Indiana*. — *Spiegel v. Gansberg*, 44 Ind. 418; *Kirkland v. Board of Public Works*, 142 Ind. 123.

*Louisiana*. — *Daniel v. New Orleans*, 26 La. Ann. 1.

*Mississippi*. — *Nugent v. Jackson*, 72 Miss. 1040.

*Missouri*. — *Fruin-Bambrick Constr. Co. v. Gelst*, 37 Mo. App. 509; *Forbis v. Bradbury*, 58 Mo. App. 506; *Knopf v. Gilsonite Roofing, etc., Co.*, 92 Mo. App. 279.

*New Jersey*. — *State v. Jersey City*, 25 N. J. L. 309; *Green v. Jersey City*, 42 N. J. L. 565; *Jersey City Brewery Co. v. Jersey City*, 42 N. J. L. 575.

*New York*. — *Matter of Tompkins Square*, (Supm. Ct. Spec. T.) 17 Abb. Pr. (N. Y.) 324, note; *Matter of New York*, 48 Hun (N. Y.) 620, 1 N. Y. Supp. 145; *Matter of Board of St. Opening*, 82 Hun (N. Y.) 580; *Matter of Board of St. Opening*, 133 N. Y. 436.

*Oregon*. — *Clinton v. Portland*, 26 Oregon 410; *Oregon Real Estate Co. v. Portland*, 40 Oregon 56.

**Filing Remonstrances** — *Indorsement of Clerk of City Council*. — *City St. Imp. Co. v. Babcock*, (Cal. 1902) 68 Pac. Rep. 584; *Thomason v. Carroll*, 132 Cal. 148.

**Withdrawal of Protest.** — Where protests against a proposed street improvement have been filed, the effect of which is to deprive the municipality of the power to make the improvement proposed, the protestants cannot by the withdrawal of their protests reinvest the municipality with jurisdiction to continue the making of the improvement. *Knopf v. Gilsonite Roofing, etc., Co.*, 92 Mo. App. 279; *Vanderbeck v. Jersey City*, 44 N. J. L. 626; *Roebbling v. Trenton*, 58 N. J. L. 40; *Armstrong v. Ogden City*, 12 Utah 476. Compare *New Orleans v. Stewart*, 18 La. Ann. 710.

vision is made for allowing to property owners a public hearing upon the question whether the proposed improvement shall be made.<sup>1</sup> The statutes describe the persons qualified to protest against the making of the improvement and the requisite number of protestants.<sup>2</sup> Protests or remonstrances must be filed within the time allowed by statute.<sup>3</sup> The effect of a proper protest or remonstrance is, under some statutes, to deprive the municipality of the right to exercise the power to make the improvement.<sup>4</sup> Under other statutes the object of allowing a hearing to property owners is merely to give them an opportunity to present their objections to the making of the improvement, leaving the making of the improvement discretionary with the municipal officers.<sup>5</sup> In the absence of any statutory provision property owners to be affected by a street improvement are not entitled to a hearing upon the question whether the improvement shall be made.<sup>6</sup>

**6. ESTIMATE OF COST OF IMPROVEMENT.**—The statutes frequently require a preliminary estimate to be made of the cost of the improvement,<sup>7</sup> and generally provide by whom such estimate shall be made.<sup>8</sup> In the absence of a statutory requirement there is no necessity for a preliminary estimate.<sup>9</sup>

1. *People v. Board of Contract*, 39 N. Y. App. Div. 30; *People v. Featherstonhaugh* 172 N. Y. 112.

2. *Los Angeles Lighting Co. v. Los Angeles*, 106 Cal. 156; *House v. Greenburg*, 93 Ind. 533; *Kirkland v. Board of Public Works*, 142 Ind. 123; *Marshall v. Leavenworth*, 44 Kan. 459; *Nugent v. Jackson*, 72 Miss. 1040; *Forbis v. Bradbury*, 58 Mo. App. 506; *Matter of Board of St. Opening*, 61 Hun (N. Y.) 625, 15 N. Y. Supp. 865; *Armstrong v. Ogden City*, 72 Utah 476.

3. *Burnett v. Sacramento*, 12 Cal. 76, 73 Am. Dec. 518; *Thomason v. Carroll*, 132 Cal. 148.

4. *City St. Imp. Co. v. Babcock*, 123 Cal. 205; *Thomason v. Carroll*, 132 Cal. 148; *Pacific Paving Co. v. Geary*, 136 Cal. 373; *Pacific Paving Co. v. Sullivan Estate Co.*, 137 Cal. 261; *Spiegel v. Gausberg*, 44 Ind. 418; *Forbis v. Bradbury*, 58 Mo. App. 506; *Knopff v. Gilsonite Roofing, etc., Co.*, 92 Mo. App. 279.

5. *Harney v. Heller*, 47 Cal. 15; *Ireland v. Rochester*, 51 Barb. (N. Y.) 414; *Matter of Board of St. Opening*, (Supm. Ct.) 12 Misc. (N. Y.) 535; *Buckley v. Tacoma*, 9 Wash. 269.

6. *Washburn v. Chicago*, 198 Ill. 506; *Van Reyphen v. Board of Public Works*, 48 N. J. L. 428.

7. **Estimate of Cost of Improvement**—*United States*.—*Edgar v. Pittsburg*, 114 Fed. Rep. 586.

*Illinois*.—*Galesburg v. Searles*, 114 Ill. 217; *White v. Alton*, 149 Ill. 626; *Jones v. Lake View*, 151 Ill. 663; *Barber v. Chicago*, 152 Ill. 37; *Wadlow v. Chicago*, 159 Ill. 176; *Gage v. Chicago*, 162 Ill. 313; *Illinois Cent. R. Co. v. People*, 170 Ill. 224; *West Chicago Park Com'rs v. Farber*, 171 Ill. 146; *Cramer v. Charleston*, 176 Ill. 507; *Chicago Terminal Transfer Co. v. Chicago*, 178 Ill. 429; *Chicago v. Wilder*, 184 Ill. 397; *Clarke v. Chicago*, 185 Ill. 354; *Bass v. Chicago*, 195 Ill. 109; *McChesney v. Chicago*, 201 Ill. 344.

*Kansas*.—*Kansas Town Co. v. Argentine*, 59 Kan. 779, 54 Pac. Rep. 1131, *affirming* 5 Kan. App. 50; *Gilmore v. Hentig*, 33 Kan. 156; *Olsson v. Topeka*, 42 Kan. 709; *Argentine v. Simmons*, 54 Kan. 699; *Kansas City v. Cullinan*, 65 Kan. 68.

*Kentucky*.—*Nevin v. Roach*, 86 Ky. 492.

*Michigan*.—*Cuming v. Grand Rapids*, 46 Mich. 150; *Goodwillie v. Detroit*, 103 Mich. 283.

*Minnesota*.—*Weller v. St. Paul*, 5 Minn. 95; *Nash v. St. Paul*, 8 Minn. 172, 23 Minn. 132; *Griggs v. St. Paul*, 11 Minn. 308.

*Missouri*.—*Kinealy v. Gay*, 7 Mo. App. 203; *Bambrick v. Campbell*, 37 Mo. App. 460; *Independence v. Briggs*, 58 Mo. App. 241.

*Nebraska*.—*Moss v. Fairbury*, (Neb. 1902) 92 N. W. Rep. 721.

*New York*.—*Matter of Flatbush Ave.*, 1 Barb. (N. Y.) 286; *People v. New York*, 5 Barb. (N. Y.) 43.

*Ohio*.—*Scovill v. Cleveland*, 1 Ohio St. 126; *Longworth v. Cincinnati*, 10 Ohio Dec. (Reprint) 683, 23 Cinc. L. Bul. 100.

*Pennsylvania*.—*Reading v. O'Reilly*, 169 Pa. St. 366; *Erie v. Brady*, 150 Pa. St. 462.

*Texas*.—*Dallas v. Ellison*, 10 Tex. Civ. App. 28; *Dallas v. Atkins*, (Tex. Civ. App. 1895) 32 S. W. Rep. 780; *Kerr v. Corsicana*, (Tex. Civ. App. 1895) 35 S. W. Rep. 694; *Frosh v. Galveston*, 73 Tex. 401; *Corsicana v. Kerr*, 89 Tex. 461; *Ardrey v. Dallas*, 13 Tex. Civ. App. 442.

*Washington*.—*Buckley v. Tacoma*, 9 Wash. 253.

*Wisconsin*.—*Pound v. Chippewa County*, 43 Wis. 63.

**Proof of Making of Estimate.**—*Berry v. Chicago*, 192 Ill. 154; *Madderom v. Chicago*, 194 Ill. 572; *Marshall v. Rainey*, 78 Mo. App. 416, 2 Mo. App. Rep. 285; *Davie v. Galveston*, 16 Tex. Civ. App. 13.

**Report of Commissioners to Make Estimate—Signing Report.**—*Adcock v. Chicago*, 160 Ill. 611; *Moore v. Mattoon*, 163 Ill. 622; *Hinkle v. Mattoon*, 170 Ill. 316; *Markley v. Chicago*, 170 Ill. 358; *Murphy v. Chicago*, 186 Ill. 59.

**Sufficiency of Estimate.**—*Barber v. Chicago*, 152 Ill. 37; *McChesney v. Chicago*, 173 Ill. 75; *Roman v. People*, 193 Ill. 631; *Goodwillie v. Detroit*, 103 Mich. 283; *Cass Farm Co. v. Detroit*, 124 Mich. 433; *Independence v. Briggs*, 58 Mo. App. 241.

8. *Rich Hill v. Donnan*, 82 Mo. App. 386.

**Estimate by Majority of Committee.**—*Hinkle v. Mattoon*, 170 Ill. 316.

9. *Ronan v. People*, 193 Ill. 631.

1. **ORDINANCES DIRECTING OR ORDERING IMPROVEMENT** — (1) *In General*. — The power conferred upon a city council to make street improvements is, as a rule, to be exercised, as in the case of other general powers, by an ordinance directing the making of the improvement, and this is, of course, especially true when the statutes require the exercise of the power by ordinance.<sup>1</sup> In some cases it has been held, however, that the power could be exercised by a resolution, an ordinance being unnecessary.<sup>2</sup>

(2) *Enactment*. — The manner in which ordinances directing street improvements are to be enacted is a matter of statutory regulation.<sup>3</sup> They must, of course, be passed by the requisite number of votes, and the statutes in some states require a greater vote than a majority, in some instances as high as a two-thirds vote.<sup>4</sup>

1. **Ordinances** — *Illinois*. — Chicago, etc., R. Co. v. Chicago, 174 Ill. 439.

*Iowa*. — McManus v. Hornaday, 99 Iowa 507; Blanden v. Ft. Dodge, 102 Iowa 441; Eckert v. Walnut, 117 Iowa 629; Zalesky v. Cedar Rapids, (Iowa 1902) 92 N. W. Rep. 657.

*Kansas*. — Sloan v. Beebe, 24 Kan. 343; Bar-ron v. Krebs, 41 Kan. 338.

*Maryland*. — Baltimore v. Porter, 18 Md. 284, 79 Am. Dec. 686.

*Missouri*. — Springfield v. Weaver, 137 Mo. 650; Ritterskamp v. Stifel, 59 Mo. App. 510; Louisiana v. Miller, 66 Mo. 467; Maudlin v. Trenton, 67 Mo. App. 452; Kolkmeier v. Jefferson, 75 Mo. App. 678; Wheeler v. Poplar Bluff, 149 Mo. 36; Clay v. Mexico, 92 Mo. App. 611; Nevada v. Eddy, 123 Mo. 546. *Compare* Springfield v. Knott, 49 Mo. App. 612.

*Nebraska*. — Fulton v. Lincoln, 9 Neb. 358; Themanson v. Kearney, 35 Neb. 881.

*New Jersey*. — Cross v. Morristown, 18 N. J. Eq. 305; State v. Bayonne, 35 N. J. L. 335; Taylor v. Lambertville, 43 N. J. Eq. 107; Packard v. Bergen Neck R. Co., 48 N. J. Eq. 281; Bergen Neck R. Co. v. Bayonne, 54 N. J. L. 474; Turner v. Brigantine, 54 N. J. L. 476; Ware v. Rutherford, 55 N. J. L. 450.

*Pennsylvania*. — *In re* Powelton Ave., 11 Phila. (Pa.) 447, 33 Leg. Int. (Pa.) 82. *Compare* Sower v. Philadelphia, 35 Pa. St. 231.

*Texas*. — Alford v. Dallas, (Tex. Civ. App. 1896) 35 S. W. Rep. 816; Waco v. Prather, (Tex. Civ. App. 1896) 35 S. W. Rep. 958, 90 Tex. 80; Davie v. Galveston, 16 Tex. Civ. App. 13; Noel v. San Antonio, 11 Tex. Civ. App. 580.

*Washington*. — Buckley v. Tacoma, 9 Wash. 253.

*Compare* National Tube Works Co. v. Chamberlain, 5 Dak. 54; Matter of Knaust, 101 N. Y. 188.

For treatment of ordinances generally, see the title ORDINANCES, vol. 21, p. 943.

2. **Resolution**. — Indianapolis v. Imberry, 17 Ind. 175; Allen County v. Silvers, 22 Ind. 491; Buckley v. Tacoma, 9 Wash. 253.

3. **Enactment of Ordinance** — *United States*. — Alexandria v. Mandeville, 2 Cranch (C. C.) 224, 1 Fed. Cas. No. 184.

*California*. — Napa v. Easterby, 76 Cal. 222. *Connecticut*. — Hough v. Bridgeport, 57 Conn. 290.

*Illinois*. — Parker v. Catholic Bishop, 146 Ill. 158; Nelson v. Chicago, 196 Ill. 390; McLaughlin v. Chicago, 198 Ill. 518.

*Indiana*. — Martindale v. Palmer, 52 Ind. 411.

*Iowa*. — Altman v. Dubuque, 111 Iowa 105.

*Kentucky*. — Mackin v. Wilson, (Ky. 1898) 45 S. W. Rep. 663; Gleason v. Barnett, (Ky. 1899) 49 S. W. Rep. 1060; Fehler v. Gosnell, 99 Ky. 380.

*Massachusetts*. — Pickford v. Lynn, 98 Mass. 491; Cornell v. New Bedford, 138 Mass. 588; Doty v. Lyman, 166 Mass. 318.

*Minnesota*. — State v. Armstrong, 54 Minn. 457.

*Missouri*. — Saxton v. Beach, 50 Mo. 488; Irvin v. Devors, 65 Mo. 627.

*New Jersey*. — State v. Morristown, 34 N. J. L. 445.

*New York*. — Striker v. Kelly, 7 Hill (N. Y.) 9; Kinsella v. Auburn, 54 Hun (N. Y.) 634, 7 N. Y. Supp. 317; Wiggan v. New York, 9 Paige (N. Y.) 16.

*Ohio*. — Tyler v. Columbus, 3 Ohio Cir. Dec. 427, 6 Ohio Cir. Ct. 224; Bode v. Cincinnati, 6 Ohio Cir. Dec. 56, 9 Ohio Cir. Ct. 382; Corry v. Campbell, 25 Ohio St. 134; Campbell v. Cincinnati, 49 Ohio St. 463; Cincinnati v. Anderson, 52 Ohio St. 600.

*Pennsylvania*. — Corry v. Corry Chair Co., 18 Pa. Super. Ct. 271.

*Rhode Island*. — *In re* Canal, etc., St., 18 R. I. 129.

*Wisconsin*. — Wright v. Forrestal, 65 Wis. 341; Hall v. Racine, 81 Wis. 72; Friedrich v. Milwaukee, 114 Wis. 304.

See also the title ORDINANCES, vol. 21, p. 957 *et seq.*

**Reconsidering Vote on Ordinance**. — The general right of reconsidering its action upon legislative measures, inherent in every body possessing legislative powers, applies with regard to the reconsidering of the vote upon an ordinance for a street improvement. Jersey City v. State, 30 N. J. L. 521.

**Enactment at Special Meetings**. — Smith v. Toberner, 32 Mo. App. 601; Dollar Sav. Bank v. Ridge, 62 Mo. App. 324.

**Records**. — Nevin v. Roach, 86 Ky. 492; Chase v. Springfield, 119 Mass. 556; Leominster v. Conant, 139 Mass. 384; State v. Elizabeth, 30 N. J. L. 365; Matter of Schreiber, (Supm. Ct. Spec. T.) 53 How. Pr. (N. Y.) 359; People v. Whitney's Point, 32 Hun (N. Y.) 508; Darling-ton v. Com., 41 Pa. St. 68.

**Proof of Enactment**. — Lexington v. Headley, 5 Bush (Ky.) 508; Matter of Buffalo, 78 N. Y. 362.

4. **Necessary Vote** — *Indiana*. — Logansport v. Legg, 20 Ind. 315; McEnaney v. Sullivan, 125 Ind. 407.

**Publication of Ordinance.** — When required by statute the ordinance must, of course, be published.<sup>1</sup>

(3) **Requisites as to Form and Sufficiency.** — The ordinance must, in positive terms, direct that the improvement be made,<sup>2</sup> but it need not recite or indicate the act of the legislature conferring the power to make the improvement.<sup>3</sup>

**Necessity for Improvement.** — In the absence of a statutory requirement it is not necessary that the ordinance or resolution contain a recital that the improvement is deemed necessary, since the action of the council in ordering the improvement of itself implies a determination of necessity and propriety.<sup>4</sup>

**Description of Improvements.** — While the ordinance need not specify every minute particular of the improvement directed,<sup>5</sup> it should, nevertheless, contain a general description of the locality, character, and nature thereof, to enable the work to be carried out through the ministerial officers of the municipality to whom it is intrusted; and the statutes often expressly so require.<sup>6</sup> The

*Kentucky.* — *Covington v. Casey*, 3 Bush (Ky.) 698.

*Missouri.* — *Simpson v. McGonegal*, 52 Mo. App. 540.

*New York.* — *Matter of Mt. Vernon*, 64 N. Y. App. Div. 619, *affirming* 34 Misc. (N. Y.) 225; *Matter of Buffalo*, 78 N. Y. 362.

*Pennsylvania.* — *Bradford v. Fox*, 171 Pa. St. 343.

*Virginia.* — *Sands v. Richmond*, 31 Gratt. (Va.) 571, 31 Am. Rep. 742.

*Washington.* — *Buckley v. Tacoma*, 9 Wash. 269.

See also the title ORDINANCES, vol. 21, p. 959.

1. **Publication of Ordinance.** — *Enos v. Springfield*, 113 Ill. 65; *Meyer v. Fromm*, 108 Ind. 208; *Chesapeake, etc., R. Co. v. Mullins*, 94 Ky. 355; *Fox v. Middleborough Town Co.*, 96 Ky. 262; *Barr v. New Brunswick*, 58 N. J. L. 255; *Matter of Durkin*, 10 Hun (N. Y.) 269; *Astor's Petition*, 2 Thomp. & C. (N. Y.) 488, *affirmed* 56 N. Y. 625; *Matter of Bassford*, 50 N. Y. 509; *Matter of Smith*, 52 N. Y. 526, *reversing* 65 Barb. (N. Y.) 283; *Matter of Phillips*, 60 N. Y. 16; *Matter of Anderson*, 60 N. Y. 457; *Matter of Burmeister*, 76 N. Y. 174. See also the title ORDINANCES, vol. 21, p. 969 *et seq.*

2. **Form and Sufficiency.** — *Buckley v. Tacoma*, 9 Wash. 269; *Kline v. Tacoma*, 11 Wash. 193.

3. **Methodist Protestant Church v. Baltimore**, 6 Gill (Md.) 391, 48 Am. Dec. 540; *Jones v. Boston*, 104 Mass. 461. And see generally the title ORDINANCES, vol. 21, p. 974 *et seq.*

4. **Necessity for Improvement** — *Maryland.* — *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1.

*Massachusetts.* — *Wright v. Boston*, 9 Cush. (Mass.) 233; *Com. v. Abbott*, 160 Mass. 282.

*Missouri.* — *Taylor v. St. Louis*, 14 Mo. 20, 55 Am. Dec. 89; *Miller v. Anheuser*, 2 Mo. App. 168.

*New York.* — *Elwood v. Rochester*, 43 Hun (N. Y.) 102; *Trinity Church v. Higgins*, 4 Robt. (N. Y.) 1.

*North Carolina.* — *Raleigh v. Peace*, 110 N. Car. 32.

*Ohio.* — *Strauss v. Cincinnati*, 11 Ohio Dec. (Reprint) 92, 24 Cinc. L. Bul. 422.

*Texas.* — *Connor v. Paris*, 87 Tex. 32.

See also *Dorman v. Lewiston*, 81 Me. 411.

5. **Description of Improvement** — *California.* — *Williams v. Bergin*, 116 Cal. 56; *King v. Lamb*, 117 Cal. 401.

*Connecticut.* — *Durand v. Ansonia*, 57 Conn. 70.

*Illinois.* — *Adams County v. Quincy*, 130 Ill. 566; *Woods v. Chicago*, 135 Ill. 582; *Chicago, etc., R. Co. v. Quincy*, 136 Ill. 563, 29 Am. St. Rep. 334; *Kimble v. Peoria*, 140 Ill. 157; *Danville v. McAdams*, 153 Ill. 216; *Newman v. Chicago*, 153 Ill. 469; *Sargent v. Evanston*, 154 Ill. 268; *Carlinville v. McClure*, 156 Ill. 492; *Delamater v. Chicago*, 158 Ill. 575; *Harrison v. Chicago*, 163 Ill. 129; *People v. Markley*, 166 Ill. 48; *Latham v. Wilmette*, 168 Ill. 153; *Trimble v. Chicago*, 168 Ill. 567; *Gross v. People*, 172 Ill. 571; *Chicago, etc., R. Co. v. Chicago*, 174 Ill. 439; *Lehmars v. Chicago*, 178 Ill. 530; *Chicago Terminal Transfer Co. v. Chicago*, 178 Ill. 429; *Clafin v. Chicago*, 178 Ill. 549; *Shannon v. Hinsdale*, 180 Ill. 202; *Givins v. Chicago*, 186 Ill. 399, 188 Ill. 348; *Mead v. Chicago*, 186 Ill. 54; *Hyman v. Chicago*, 188 Ill. 462; *White v. Chicago*, 188 Ill. 392; *Markley v. Chicago*, 190 Ill. 276; *Houston v. Chicago*, 191 Ill. 559; *Fay v. Chicago*, 194 Ill. 136; *Gage v. Chicago*, 201 Ill. 93; *McChesney v. Chicago*, 201 Ill. 344.

*Indiana.* — *Burr v. Newcastle*, 49 Ind. 322; *Taber v. Grafmiller*, 109 Ind. 206; *Connersville v. Merrill*, 14 Ind. App. 303.

*Iowa.* — *Chariton v. Holliday*, 60 Iowa 391.

*Kentucky.* — *Frankfort v. Murray*, 99 Ky. 422; *Augusta v. McKibben*, (Ky. 1901) 60 S. W. Rep. 291; *Richardson v. Mehler*, (Ky. 1901) 63 S. W. Rep. 957; *Horne v. Mehler*, (Ky. 1901) 64 S. W. Rep. 918.

*Massachusetts.* — *Browne v. Boston*, 166 Mass. 229.

*Minnesota.* — *Rogers v. St. Paul*, 22 Minn. 494.

*Missouri.* — *Sheehan v. Gleeson*, 46 Mo. 100; *Barber Asphalt-Paving Co. v. Hezel*, 155 Mo. 391.

*New Jersey.* — *State v. Jersey City*, 24 N. J. L. 662; *State v. Plainfield*, 38 N. J. L. 95.

6. *Illinois.* — *Jacksonville R. Co. v. Jacksonville*, 114 Ill. 562; *Sterling v. Galt*, 117 Ill. 11; *St. John v. East St. Louis*, 136 Ill. 207; *Gage v. Chicago*, 143 Ill. 157, 179 Ill. 392; *Lake Shore, etc., R. Co. v. Chicago*, 144 Ill. 391; *Sargent v. Evanston*, 154 Ill. 268; *Hull v. Chicago*, 156 Ill. 381; *Otis v. Chicago*, 161 Ill. 199; *Mansfield v. People*, 164 Ill. 611; *Sanger v. Chicago*, 169 Ill. 286; *McChesney v. Chicago*, 171 Ill. 253, 173 Ill. 75; *Nicholes v. People*, 171 Ill. 376; *Chicago, etc., R. Co. v. Chicago*, 172

description may be made by reference to maps, plans, specifications, etc., on record or filed,<sup>1</sup> and may employ words which have a well-defined meaning in the locality.<sup>2</sup> It is not necessary to express in the ordinance that the place where the work is to be done is within the corporate limits of the municipality, though the power to make the improvement may be dependent upon such fact, as it will be presumed that the municipality has not exceeded its territorial jurisdiction.<sup>3</sup>

**Improvements Which May Be Included in Single Ordinance.**—While several distinct street improvements are not to be provided for by a single ordinance,<sup>4</sup> still, the grading and paving of a street may constitute a single improvement and not distinct enterprises within this rule.<sup>5</sup> So the paving of several streets may be provided for in a single ordinance.<sup>6</sup>

**m. PLANS AND SPECIFICATIONS OF IMPROVEMENT.**—The statutes frequently require as a preliminary requisite to the exercise of the power to make street improvements that plans and specifications of the proposed work be prepared.<sup>7</sup>

Ill. 66; *Illinois Cent. R. Co. v. Effingham*, 172 Ill. 607; *Holden v. Chicago*, 172 Ill. 263; *Lusk v. Chicago*, 176 Ill. 207; *Jacobs v. Chicago*, 178 Ill. 560; *Davidson v. Chicago*, 178 Ill. 582; *Lingle v. Chicago*, 178 Ill. 628; *Dickey v. Chicago*, 179 Ill. 184; *Essroger v. Chicago*, 185 Ill. 420; *Kuester v. Chicago*, 187 Ill. 21; *Libbey v. Chicago*, 187 Ill. 189; *Fehringer v. Chicago*, 187 Ill. 416; *Rose v. Chicago*, 188 Ill. 347; *Hyman v. Chicago*, 188 Ill. 462; *Willis v. Chicago*, 189 Ill. 103; *Nichols v. Chicago*, 192 Ill. 290; *Job v. People*, 193 Ill. 609; *People v. Hills*, 193 Ill. 281; *Kelly v. Chicago*, 193 Ill. 324; *Moll v. Chicago*, 194 Ill. 28; *People v. Birch*, 201 Ill. 81.

*Indiana*.—*Pittsburgh, etc., R. Co. v. Crown Point*, 150 Ind. 536; *Merrill v. Abbott*, 62 Ind. 549; *Smith v. Duncan*, 77 Ind. 92.

*Iowa*.—*Morton v. Burlington*, 106 Iowa 50.

*Massachusetts*.—*Lowell v. Wheelock*, 11 Cush. (Mass.) 391.

*Missouri*.—*Verdin v. St. Louis*, (Mo. 1894)

27 S. W. Rep. 447; *Haegele v. Mallinckrodt*, 46 Mo. 577; *Rich Hill v. Donnan*, 82 Mo. App. 386.

*New Jersey*.—*Kearney v. Andrews*, 10 N. J. Eq. 70; *Stretch v. Hoboken*, 47 N. J. L. 268.

*New York*.—*Copcutt v. Yonkers*, 83 Hun (N. Y.) 178.

*Ohio*.—*Cincinnati v. Blymyer Mfg. Co.*, 8 Ohio Dec. (Reprint) 288.

*Texas*.—*Waco v. Chamberlain*, (Tex. Civ. App. 1898) 45 S. W. Rep. 191.

**1. References for Description.—California.**—

*Williams v. Bisayno*, (Cal. 1893) 34 Pac. Rep. 640.

*Illinois*.—*Steele v. River Forest*, 141 Ill. 302; *Callon v. Jacksonville*, 147 Ill. 113; *Cunningham v. Peoria*, 157 Ill. 499; *Alton v. Middleton*, 158 Ill. 442; *Chytraus v. Chicago*, 160 Ill. 18; *Carlinville v. McClure*, 156 Ill. 492; *Bradford v. Pontiac*, 165 Ill. 612; *Chicago, etc., R. Co. v. Chicago*, 172 Ill. 66, 174 Ill. 439; *Kunst v. People*, 173 Ill. 79; *Cramer v. Charleston*, 176 Ill. 507; *Lehmers v. Chicago*, 178 Ill. 530; *Mead v. Chicago*, 186 Ill. 54; *Givins v. Chicago*, 186 Ill. 399; *Hardin v. Chicago*, 186 Ill. 424; *Rollo v. Chicago*, 187 Ill. 417; *Biggins v. People*, 193 Ill. 601; *Beach v. Chicago*, 193 Ill. 369; *Whaples v. Waukegan*, 95 Ill. App. 29.

*Indiana*.—*Taber v. Ferguson*, 109 Ind. 227.

*Kentucky*.—*Horne v. Mehler*, 64 S. W. Rep. 918, 23 Ky. L. Rep. 1176.

*Maryland*.—*Burk v. Baltimore*, 77 Md. 469.

*Massachusetts*.—*Stone v. Cambridge*, 6 Cush. (Mass.) 270.

*Michigan*.—*Boehme v. Monroe*, 106 Mich. 401.

*Missouri*.—*Barber Asphalt Paving Co. v. Ullman*, 137 Mo. 543; *Becker v. Washington*, 94 Mo. 375; *Galbreath v. Newton*, 30 Mo. App. 380; *Gallagher v. Smith*, 55 Mo. App. 116; *Roth v. Hax*, 68 Mo. App. 283.

*New Jersey*.—*State v. New Brunswick*, 30 N. J. L. 395; *State v. Orange*, 32 N. J. L. 49.

2. *Levy v. Chicago*, 113 Ill. 650; *Shannon v. Hinsdale*, 180 Ill. 202; *Rawson v. Chicago*, 185 Ill. 87; *Hyman v. Chicago*, 188 Ill. 462; *Job v. People*, 193 Ill. 609; *Gage v. Chicago*, 196 Ill. 512; *Hackworth v. Louisville Artificial Stone Co.*, 106 Ky. 234.

3. **Locality of Improvement.**—*Wheeler v. People*, 153 Ill. 480; *Stanton v. Chicago*, 154 Ill. 23; *Meadowcroft v. People*, 154 Ill. 416; *Young v. People*, 155 Ill. 247; *West Chicago St. R. Co. v. People*, 155 Ill. 299; *Wisner v. People*, 156 Ill. 180; *Zeigler v. People*, 156 Ill. 133; *Bliss v. Chicago*, 156 Ill. 584; *Chicago v. Silverman*, 156 Ill. 601; *Beach v. People*, 157 Ill. 659; *Delamater v. Chicago*, 158 Ill. 575; *Andrews v. People*, 158 Ill. 477; *Chytraus v. Chicago*, 160 Ill. 18; *Pittsburgh, etc., R. Co. v. Hays*, 17 Ind. App. 261.

4. **What May Be Included in Ordinance.**—*Church v. People*, 179 Ill. 205; *Weckler v. Chicago*, 61 Ill. 142; *Mendenhall v. Clugish*, 84 Ind. 94. See also *People v. Yonkers*, 39 Barb. (N. Y.) 266.

5. *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *Murphy v. Peoria*, 119 Ill. 509.

6. *Springfield v. Green*, 120 Ill. 269; *Wilbur v. Springfield*, 123 Ill. 395; *Adams County v. Quincy*, 130 Ill. 566; *Savannah v. Weed*, 96 Ga. 670. See also *Culver v. Chicago*, 171 Ill. 399; *Burlington v. Quick*, 47 Iowa 222; *Cincinnati v. Corry*, 7 Ohio Dec. (Reprint) 415.

7. **Plans and Specifications of Improvement.—California.**—*Gill v. Dunham*, (Cal. 1893) 34 Pac. Rep. 68; *Santa Cruz Rock Pavement Co. v. Heaton*, 105 Cal. 162; *Bolton v. Gilleran*, 105 Cal. 244, 45 Am. St. Rep. 33.

**n. MODE OF MAKING IMPROVEMENT — (1) In General.** — Where the statutes prescribe the mode in which the improvement shall be made, the prescribed mode must be followed.<sup>1</sup> In the absence of any statutory regulation, the municipality may make the improvement either by the employment of laborers and the purchase of the necessary materials or by letting a contract for the work;<sup>2</sup> but it is often provided that the improvement shall be made by letting a contract therefor to the lowest bidder.<sup>3</sup>

**(2) Opportunity to Property Owners to Make Improvement.** — Where street improvements are to be paid for by the abutting property owners, the statutes frequently require that an opportunity to make a proposed improvement be given to such abutting owners before the municipality can make it at their expense.<sup>4</sup>

**o. DEFRAYING COST OF IMPROVEMENT.** — The construction of improvements such as paving, laying sidewalks, grading, etc., is an object of public utility which may be provided for by general taxation or appropriation of the general public funds.<sup>5</sup> Where a municipality has general power to make street improvements without express limitations as to the means by which the cost thereof shall be defrayed, it has power to contract to pay therefor in cash from its general funds,<sup>6</sup> and a mere permissive right to require abutting lot owners to pay the cost does not prohibit such a contract.<sup>7</sup> Where the statute expressly provides that a certain proportion of the cost of the improvement shall be borne by the abutting owners, it has been held that the municipality may contract an indebtedness for the entire cost and collect from the property owners their proportion thereof.<sup>8</sup> The statutes often expressly provide by what means the revenue to defray the cost of street improvements shall be

*Indiana.* — *Taber v. Grafmiller*, 109 Ind. 206.

*Iowa.* — *Jenney v. Des Moines*, 103 Iowa 347.

*Kentucky.* — *Barret v. Falls City Artificial Stone Co.*, (Ky. 1899) 52 S. W. Rep. 947.

*Michigan.* — *Kundinger v. Saginaw*, (Mich. 1903) 93 N. W. Rep. 914.

*Minnesota.* — *Rogers v. St. Paul*, 22 Minn. 494.

*New York.* — *Gilmore v. Utica*, 131 N. Y. 26.

*Ohio.* — *In re Akron St.*, 5 Ohio Dec. 697.

*Pennsylvania.* — *Verona v. Allegheny Valley R. Co.*, 152 Pa. St. 368; *Mazet v. Pittsburgh*, 137 Pa. St. 548.

*Texas.* — *Galveston v. Heard*, 54 Tex. 420.

*Washington.* — *Buckley v. Tacoma*, 9 Wash. 253.

*Wisconsin.* — *Myrick v. La Crosse*, 17 Wis. 442.

**1. Mode of Making Improvement.** — *Matter of New York Presbytery*, 9 Daly (N. Y.) 116; *Matter of Newton*, 19 Hun (N. Y.) 470.

**2. Hitchcock v. Galveston**, 96 U. S. 341; *Aurora v. Fox*, 78 Ind. 1; *Cummins v. Seymour*, 79 Ind. 491, 41 Am. Rep. 618; *Platter v. Seymour*, 86 Ind. 323; *Monroe v. Johnson*, 106 La. 350; *Home Bldg., etc., Co. v. Roanoke*, 91 Va. 52.

**3. Letting to Lowest Bidder.** — *Mappa v. Los Angeles*, 61 Cal. 309; *Boas v. New York*, 85 Hun (N. Y.) 311; *Matter of Emigrant Industrial Sav. Bank*, 75 N. Y. 388; *Matter of Robbins*, 82 N. Y. 131; *Matter of Weil*, 83 N. Y. 543; *Matter of Blodgett*, 91 N. Y. 117; *Matter of Manhattan R. Co.*, 102 N. Y. 301; *Reilly v. New York*, 111 N. Y. 473; *Smith v. New York*, 145 N. Y. 641, *affirming* 82 Hun (N. Y.) 570; *Beers v. Dalles City*, 16 Oregon 334. See the title **MUNICIPAL CORPORATIONS**, vol. 20, p. 1123.

**4. Opportunity to Property Owners to Make Improvement** — *California.* — *Cochran v. Collins*, 29 Cal. 129; *Burke v. Turney*, 54 Cal. 486; *Manning v. Den*, 90 Cal. 610; *N. P. Perine Contracting, etc., Co. v. Quackenbush*, 104 Cal. 684; *California Imp. Co. v. Quinchard*, 119 Cal. 87; *German Sav., etc., Soc. v. Ramish*, 138 Cal. 120.

*Indiana.* — *Loughridge v. Huntington*, 56 Ind. 253.

*Minnesota.* — *Newbery v. Fox*, 37 Minn. 141, 5 Am. St. Rep. 830.

*Mississippi.* — *Nugent v. Jackson*, 72 Miss. 1040.

*Missouri.* — *Leach v. Cargill*, 60 Mo. 316.

*New York.* — *Cowen v. West Troy*, 43 Barb. (N. Y.) 48.

*Pennsylvania.* — *Philadelphia v. Edwards*, 78 Pa. St. 62.

*Wisconsin.* — *Rogers v. Milwaukee*, 13 Wis. 610; *Myrick v. La Crosse*, 17 Wis. 442; *Johnston v. Oshkosh*, 21 Wis. 184; *Fass v. Seehawer*, 60 Wis. 525.

**5. Defraying Cost of Improvement.** — *Cook v. Ansonia*, 66 Conn. 413; *Com. v. George*, 148 Pa. St. 463. See also the title **TAXATION**, *post*.

**6. Memphis v. Brown**, 20 Wall. (U. S.) 289; *Morrison v. King*, 100 Ga. 357; *Clark v. Des Moines*, 19 Iowa 199, 87 Am. Dec. 423; *Bigelow v. Perth Amboy*, 25 N. J. L. 297; *Boots v. Washburn*, 79 N. Y. 207; *Galveston v. Heard*, 54 Tex. 420.

**7. Memphis v. Brown**, 20 Wall. (U. S.) 289; *Chambers v. Satterlee*, 40 Cal. 497; *Guffield v. Bowlinggreen*, 6 B. Mon. (Ky.) 224; *Tappan v. Long Branch Police, etc., Commission*, 59 N. J. L. 371.

**8. Argenti v. San Francisco**, 16 Cal. 255;

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raised,<sup>1</sup> and such means are frequently held to be exclusive.<sup>2</sup> Where a discretionary power is given to the municipality to determine the means by which such revenue shall be raised, the courts cannot control the exercise of the power.<sup>3</sup> The right of the municipality to issue bonds or to levy special assessments to defray the cost of street improvements has been heretofore fully discussed.<sup>4</sup>

*p.* **ABANDONMENT OF IMPROVEMENT.** — Where the municipality has discretionary power to make a street improvement, it may abandon an improvement ordered and repeal the ordinance authorizing it,<sup>5</sup> or it may during the construction of the improvement change the general plan thereof.<sup>6</sup>

*q.* **RESTRAINING STREET IMPROVEMENT.** — Where the making of an unauthorized improvement will result in irreparable injury to the property, and the remedy at law is inadequate,<sup>7</sup> or where the improvement is to be made at the expense of the property owners and may result in casting a cloud on the title,<sup>8</sup> courts of equity have granted injunctions. But the fact that no irreparable injury is threatened or that the remedy at law is adequate is, as in other cases, ground for the denial of the injunction.<sup>9</sup>

**3. Damages for Street Improvement** — *a.* **IN GENERAL.** — Under constitutional provisions prohibiting damage or injury to property for a public use without compensation, abutting property owners who sustain special injuries from the construction of street improvements are held to be entitled to recompense therefor,<sup>10</sup> as, for example, where a bridge or similar obstruction is

*Garden City v. Trigg*, 57 Kan. 632; *Becker v. Henderson*, 100 Ky. 450.

1. *Chambers v. Satterlee*, 40 Cal. 497; *Ricketts v. Hyde Park*, 85 Ill. 110; *Kuehner v. Freeport*, 143 Ill. 92; *People v. Kirk*, 162 Ill. 138, 53 Am. St. Rep. 277; *Indianapolis v. Imberry*, 17 Ind. 175; *Evansville v. Summers*, 108 Ind. 189; *Maddux v. Newport*, (Ky. 1890) 14 S. W. Rep. 957; *Tennant v. Crocker*, 85 Mich. 328; *Murtaugh v. Paterson*, 45 N. J. L. 267; *Matter of Turfler*, 44 Barb. (N. Y.) 46; *Ellis v. Lowville*, 7 Lans. (N. Y.) 434.

2. *Brooks v. San Luis Obispo*, 109 Cal. 50; *Central Covington v. Weighaus*, (Ky. 1898) 44 S. W. Rep. 985; *North Pac. Lumbering, etc., Co. v. East Portland*, 14 Oregon 3; *Finley v. Hull*, 13 Wash. 236; *Stephens v. Spokane*, 14 Wash. 298.

3. *Fagan v. Chicago*, 84 Ill. 227.

4. See the titles **MUNICIPAL SECURITIES**, vol. 21, p. 13; **SPECIAL OR LOCAL ASSESSMENTS**, vol. 25, p. 1166.

5. **Abandonment of Improvement.** — *Earl v. Board of Imp.*, 70 Ark. 211; *Chicago v. Weber*, 94 Ill. App. 561; *Stewart v. Police Jury*, 14 La. Ann. 69; *Black v. Baltimore*, 50 Md. 235, 33 Am. Rep. 320; *St. Joseph v. Farrell*, 106 Mo. 437; *Kaime v. Harty*, 4 Mo. App. 357; *Ashton v. Rochester*, 133 N. Y. 187, 28 Am. St. Rep. 619, *affirming* 60 Hun (N. Y.) 372; *Toledo v. Jacobson*, 5 Ohio Cir. Dec. 137, 11 Ohio Cir. Ct. 220; *Huckestein v. Allegheny*, 165 Pa. St. 367. See also *Gormley v. Day*, 114 Ill. 185. *Compare Lucas v. San Francisco*, 7 Cal. 463.

6. *State v. Miles*, 138 Ind. 692; *Davies v. Saginaw*, 87 Mich. 439; *Fuller v. Grand Rapids*, 105 Mich. 529.

7. **Restraining Street Improvements.** — *Miller v. Mobile*, 47 Ala. 163, 11 Am. Rep. 768; *Schaufele v. Doyle*, 86 Cal. 107; *Covington v. Nelson*, 35 Ind. 532; *Ft. Wayne v. Lake Shore, etc., R. Co.*, 132 Ind. 558, 32 Am. St. Rep. 277; *Wilkin v. St. Paul*, 33 Minn. 181; *Curwens-*

*ville's Appeal*, 129 Pa. St. 74; *Buchanan v. Beaver*, 171 Pa. St. 567.

8. *Dennison v. Kansas City*, 95 Mo. 416; *Moore v. Cincinnati*, 9 Ohio Dec. (Reprint) 587, 15 Cinc. L. Bul. 196; *Sperry v. Albina*, 17 Oregon 481; *Mazet v. Pittsburgh*, 137 Pa. St. 548.

9. **Ground for Denial of Injunction** — *United States*. — *McElroy v. Kansas City*, 21 Fed. Rep. 257.

*Connecticut*. — *Fellowes v. New Haven*, 44 Conn. 240, 26 Am. Rep. 447.

*Georgia*. — *Markham v. Atlanta*, 23 Ga. 402; *Moore v. Atlanta*, 70 Ga. 611.

*Indiana*. — *Columbus v. Storey*, 33 Ind. 195; *Kokomo v. Mahan*, 100 Ind. 242; *Marion v. Skillman*, 127 Ind. 130.

*Iowa*. — *Rockwell v. Bowers*, 88 Iowa 88; *Burlington Gas-light Co. v. Burlington, etc., R. Co.*, 91 Iowa 470.

*Maine*. — *Baldwin v. Bangor*, 36 Me. 518.

*New Jersey*. — *Kearney v. Andrews*, 10 N. J. Eq. 70; *Holmes v. Jersey City*, 12 N. J. Eq. 299; *Cross v. Morristown*, 18 N. J. Eq. 305.

*New York*. — *Blake v. Brooklyn*, 26 Barb. (N. Y.) 301; *Ely v. Rochester*, 26 Barb. (N. Y.) 133.

*Ohio*. — *Leonard v. Cassidy*, 4 Ohio Cir. Dec. 480, 8 Ohio Cir. Ct. 529.

*Pennsylvania*. — *Ridge Ave. Pass. R. Co. v. Philadelphia*, 10 Phila. (Pa.) 37, 30 Leg. Int. (Pa.) 148; *Camp v. Port Allegany*, 11 Pa. Co. Ct. 122; *McHale v. Easton Transit Co.*, 169 Pa. St. 416.

And see generally the title **INJUNCTIONS**, vol. 16, p. 352 *et seq.*

**Defective Manner of Construction.** — The improvement will not be enjoined on the ground that it is being defectively made. *Dever v. Junction City*, 45 Kan. 417.

10. **Damages for Street Improvements.** — *Pause v. Atlanta*, 98 Ga. 92, 58 Am. St. Rep. 290. See also the title **EMINENT DOMAIN**, vol. 10, p. 1173.



erected in a street impairing or depriving the property owner of his right of access or easement for light and air.<sup>1</sup> But a property owner who does not receive any direct injury from the construction of the improvement is not entitled to compensation for indirect injuries which he may suffer in common with the general public.<sup>2</sup> Thus he is not entitled to compensation because the public traffic along the street in front of his property has been diverted, as he has no legal interest in the amount of general travel along the street.<sup>3</sup> The constitutional provision that no man's property shall be "taken" without compensation does not confer upon abutting owners a right to compensation for consequential injuries from the improvement of streets where there is no actual invasion or taking of their property.<sup>4</sup>

**Temporary Obstruction of Access.** — An abutting owner is not entitled to compensation by reason of obstruction of access to his building during the progress of a street improvement, such obstruction being merely a burden incidentally imposed and without which improvements could seldom be made.<sup>5</sup>

**Lateral Support.** — Invasion of the property owner's right of lateral support in the making of street improvements has been fully discussed elsewhere in this work.<sup>6</sup>

**Negligence in Construction of Street Improvements.** — Where a municipal corporation is negligent in the construction of a street improvement it is liable in tort for injuries to abutting owners caused thereby,<sup>7</sup> and this liability extends to negligence in devising plans for the improvement as well as to negligence in executing them.<sup>8</sup> But the municipality is only required to use reasonable care to avoid liability.<sup>9</sup>

1. *Bentley v. Atlanta*, 92 Ga. 623; *Pause v. Atlanta*, 98 Ga. 92, 58 Am. St. Rep. 290; *Tinker v. Rockford*, 137 Ill. 123; *Barrows v. Sycamore*, 150 Ill. 588, 41 Am. St. Rep. 400; *Chicago v. Spoor*, 190 Ill. 340; *Burcky v. Lake*, 30 Ill. App. 23; *Herrmann v. East St. Louis*, 58 Ill. App. 166; *Butler v. East St. Louis*, 74 Ill. App. 649; *Sauer v. New York*, (Supm. Ct. App. Div.) 30 Civ. Pro. (N. Y.) 232; *Matter of Grade Crossing Com'rs*, 52 N. Y. App. Div. 122; *Seattle Transfer Co. v. Seattle*, 27 Wash. 520. *Compare Chicago v. Webb*, 102 Ill. App. 232; *Home Bldg., etc., Co. v. Roanoke*, 91 Va. 52. And see the title EMINENT DOMAIN, vol. 10, p. 1123.

2. *Rigney v. Chicago*, 102 Ill. 64; *In re Cincinnati, etc., R. Co.*, 10 Ohio Cir. Dec. 286, 19 Ohio Cir. Ct. 582. See also the title EMINENT DOMAIN, vol. 10, pp. 1110, 1128.

3. **Diversion of Travel.** — *East St. Louis v. Wiggins Ferry Co.*, 11 Ill. App. 254; *Chicago v. Spoor*, 190 Ill. 340, reversing 91 Ill. App. 472; *Hobson v. Philadelphia*, 155 Pa. St. 131.

4. *Keasy v. Louisville*, 4 Dana (Ky.) 154, 29 Am. Dec. 395. See, however, *Cohen v. Cleveland*, 43 Ohio St. 190. See generally the title EMINENT DOMAIN, vol. 10, p. 1102 *et seq.*

5. **Temporary Inconvenience.** — *Northern Transp. Co. v. Chicago*, 99 U. S. 635 (stated in the title EMINENT DOMAIN, vol. 10, p. 1131); *Tuggle v. Atlanta*, 57 Ga. 114; *Osgood v. Chicago*, 154 Ill. 194, affirming 44 Ill. App. 532; *Chicago v. Rumsey*, 87 Ill. 348; *Sanitary Dist. v. McGuirl*, 86 Ill. App. 392; *Vidalat v. New Orleans*, 43 La. Ann. 1121; *Brooks v. Boston*, 19 Pick. (Mass.) 174. *Compare Lacour v. New York*, 3 Duer (N. Y.) 406.

6. **Lateral Support.** — See the title LATERAL AND SUBJACENT SUPPORT, vol. 18, p. 541. See also *Columbus v. Williard*, 7 Ohio Cir. Dec. 33; *Marsh v. Philadelphia*, 8 Pa. Dist. 340.

7. **Negligence in Making Improvement** — *Colorado*. — *Denver v. Rhodes*, 9 Colo. 554.

*Illinois*. — *Bloomington v. Brokaw*, 77 Ill. 194; *Chicago v. Norton Milling Co.*, 97 Ill. App. 651, affirmed 196 Ill. 580.

*Indiana*. — *Martinsville v. Shirley*, 84 Ind. 546; *Princeton v. Gieske*, 93 Ind. 102.

*Iowa*. — *Cotes v. Davenport*, 9 Iowa 227; *Cooper v. Cedar Rapids*, 112 Iowa 367.

*Kentucky*. — *Louisville v. Coleburne*, 108 Ky. 420.

*Maryland*. — *Hitchins v. Frostburg*, 68 Md. 100, 6 Am. St. Rep. 422, 70 Md. 56.

*Massachusetts*. — *Perkins v. Lawrence*, 136 Mass. 305.

*Missouri*. — *Wegmann v. Jefferson*, 61 Mo. 35.

*New York*. — *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, 53 Am. Dec. 316.

*North Carolina*. — *Mearns v. Wilmington*, 9 Ired. L. (31 N. Car.) 73, 49 Am. Dec. 412.

*Pennsylvania*. — *Stork v. Philadelphia*, 195 Pa. St. 101.

*Rhode Island*. — *O'Donnell v. White*, 23 R. I. 318.

*Texas*. — *Dallas v. Cooper*, (Tex. Civ. App. 1896) 34 S. W. Rep. 321. *Compare Wallace v. Dallas*, 2 Tex. Unrep. Cas. 424.

*Wisconsin*. — *Milwaukee v. Davis*, 6 Wis. 377. See also the title EMINENT DOMAIN, vol. 10, p. 1111.

8. *North Vernon v. Voegler*, 103 Ind. 314.

9. **Degree of Care Required in Construction.** — *Cheever v. Shedd*, 13 Blatchf. (U. S.) 258; *Northern Transp. Co. v. Chicago*, 99 U. S. 635; *Durand v. Ansonia*, 57 Conn. 70; *Fuller v. Atlanta*, 66 Ga. 80; *Castleberry v. Atlanta*, 74 Ga. 164; *Dewein v. Peoria*, 24 Ill. App. 396; *Weis v. Madison*, 75 Ind. 247, 39 Am. Rep. 135; *Platter v. Seymour*, 86 Ind. 323; *Cole v. Muscatine*, 14 Iowa 296; *Watson v. Kingston*, 43 Hun (N. Y.) 367; *Cincinnati v. Penny*, 21

**Diversion of Surface Waters.**—While the municipality cannot collect surface waters and discharge them upon abutting property in large quantities without liability,<sup>1</sup> the mere fact that the flow of surface water is obstructed or diverted by improvements does not render the municipality liable.<sup>2</sup>

**Trespasses.**—A municipality has been held liable for trespasses upon the property of abutting owners, committed in the construction of a street improvement.<sup>3</sup>

A Lessee is entitled to compensation for injuries to the value of his term to the same extent as the owner of a freehold estate in the land.<sup>4</sup>

**The Measure of Damages** for consequential injuries to abutting property from the construction of an improvement is the diminution in the market value of the property as affected thereby.<sup>5</sup>

**Waiver of Claim for Damages—Filing Claim.**—In some instances the statutes require property owners who may be entitled to compensation for injuries from street improvements to file their claims therefor within a certain time.<sup>6</sup>

**b. DAMAGES FOR CHANGE OF STREET GRADE**—(1) *General Right to Damages.*—Where a municipality, without exceeding its authority, changes the grade of a street, any resulting injury to abutting owners is, in the absence of constitutional or statutory provision to the contrary, regarded as *damnum absque injuria* for which no compensation can be recovered.<sup>7</sup> But in the great

Ohio St. 499, 8 Am. Rep. 73; *Alexander v. Milwaukee*, 16 Wis. 247.

1. **Diversion of Surface Waters.**—*Larabee v. Cloverdale*, 131 Cal. 96; *Hoffman v. Muscatine*, 113 Iowa 332; *O'Brien v. St. Paul*, 25 Minn. 331, 33 Am. Rep. 470; *Carll v. Northport*, 11 N. Y. App. Div. 120; *Kensington v. Wood*, 10 Pa. St. 93, 49 Am. Dec. 582.

2. *Hoffman v. Muscatine*, 113 Iowa 332; *Holleran v. Boston*, 176 Mass. 75; *Jordan v. Benwood*, 42 W. Va. 312, 57 Am. St. Rep. 859. Compare *In re Chatham St.*, 191 Pa. St. 604.

3. **Trespass.**—*Platter v. Seymour*, 86 Ind. 323; *Broadwell v. Kansas*, 75 Mo. 213, 42 Am. Rep. 406; *Fairchild v. St. Paul*, 46 Minn. 540; *Inman v. Tripp*, 11 R. I. 520, 23 Am. Rep. 520.

4. *Pause v. Atlanta*, 98 Ga. 92, 58 Am. St. Rep. 290.

5. **Measure of Damages.**—*Herrmann v. East St. Louis*, 58 Ill. App. 166; *Butler v. East St. Louis*, 74 Ill. App. 649; *Sanitary Dist. v. McGulrl*, 86 Ill. App. 392; *Louisville v. Harbin*, 61 S. W. Rep. 1011, 22 Ky. L. Rep. 1865. See also the title EMINENT DOMAIN, vol. 10, p. 1174.

6. **Filing Claim for Damages.**—*Jacobs v. Cincinnati*, 3 Ohio Dec. 60; *Wabash R. Co. v. Defiance*, 52 Ohio St. 262; *Cleveland v. Hyland*, 6 Ohio Cir. Dec. 242, 18 Ohio Cir. Ct. 868; *Geib v. Cleveland*, 2 Ohio Dec. 360, 7 Ohio N. P. 301.

7. **Change of Grade—Right to Damages Decried**—*United States.*—*Hooe v. Alexandria*, 1 Cranch (C. C.) 98.

*Colorado.*—*Denver v. Vernia*, 8 Colo. 399.

*Florida.*—*Selden v. Jacksonville*, 28 Fla. 558, 29 Am. St. Rep. 278.

*Indiana.*—*Aurora v. Fox*, 78 Ind. 1; *Mattingly v. Plymouth*, 100 Ind. 545; *North Vernon v. Voegler*, 103 Ind. 314; *Huntington v. Griffith*, 142 Ind. 280; *Baker v. Shoals*, 6 Ind. App. 319; *Kechn v. McGillicuddy*, 15 Ind. App. 580.

*Iowa.*—*Creal v. Keokuk*, 4 Greene (Iowa) 47; *Meyer v. Burlington*, 52 Iowa 560; *Farmer v. Cedar Rapids*, 116 Iowa 322; *Reilly v. Ft. Dodge*, (Iowa 1902) 92 N. W. Rep. 887.

*Kansas.*—*M. E. Church v. Wyandotte*, 31 Kan. 721.

*Kentucky.*—*West Covington v. Schultz*, (Ky. 1895) 30 S. W. Rep. 410.

*Maryland.*—*Cumberland v. Willison*, 50 Md. 138, 33 Am. Rep. 304.

*Michigan.*—*Detroit v. Beckman*, 34 Mich. 125, 22 Am. Rep. 507.

*Minnesota.*—*Henderson v. Minneapolis*, 32 Minn. 319; *Willis v. Winona*, 59 Minn. 27; *Keough v. St. Paul*, 66 Minn. 114; *Abel v. Minneapolis*, 68 Minn. 89.

*Missouri.*—*Thurston v. St. Joseph*, 51 Mo. 510, 11 Am. Rep. 463; *Tate v. Missouri*, etc., R. Co., 64 Mo. 149; *Broadwell v. Kansas City*, 75 Mo. 213, 42 Am. Rep. 406.

*New Jersey.*—*Pope v. Union*, 18 N. J. Eq. 282.

*New York.*—*Kavanagh v. Brooklyn*, 38 Barb. (N. Y.) 232; *Fish v. Rochester*, 6 Paige (N. Y.) 268; *Watson v. Kingston*, 114 N. Y. 88; *Farrington v. Mt. Vernon*, 166 N. Y. 233; *Matter of Ehrsam*, 37 N. Y. App. Div. 272; *Hosmer v. Gloversville*, (Supm. Ct. Tr. T.) 27 Misc. (N. Y.) 669; *People v. Stillings*, 76 N. Y. App. Div. 143.

*North Carolina.*—*Tate v. Greensboro*, 114 N. Car. 392.

*Pennsylvania.*—*Allentown v. Kramer*, 73 Pa. St. 406; *Folkenson v. Easton*, 116 Pa. St. 523.

*Rhode Island.*—*Rounds v. Mumford*, 2 R. I. 154; *Aldrich v. Providence*, 12 R. I. 241; *Almy v. Coggeshall*, 19 R. I. 549.

*Tennessee.*—*Humes v. Knoxville*, 1 Humph. (Tenn.) 403, 34 Am. Dec. 657. See, however, *Gray v. Knoxville*, 85 Tenn. 99.

*Texas.*—*Allen v. Paris*, 1 Tex. App. Civ. Cas., § 885.

*Virginia.*—*Smith v. Alexandria*, 33 Gratt. (Va.) 208, 36 Am. Rep. 788; *Kehrer v. Richmond*, 81 Va. 745; *Home Bldg., etc., Co. v. Roanoke*, 91 Va. 52; *Harrisonburg v. Roller*, 97 Va. 582.

*Washington.*—*Sargent v. Tacoma*, 10 Wash. 212.

majority of cases a provision for compensation where property is "damaged" has been held to permit a recovery for losses resulting from a change of grade.<sup>1</sup> The right of recovery is not dependent on ownership of the fee in the street<sup>2</sup> or upon the question whether the change of grade was from the natural surface or from a prior established grade.<sup>3</sup> Such a constitutional provision is not to have a retroactive effect so as to confer a right to compensation for changes of grade theretofore made.<sup>4</sup> Where there has been no actual change of grade, the mere passage of an ordinance providing for regrading does not entitle the property owner to damages.<sup>5</sup> So persons whose property does not abut upon

*West Virginia.*—*Jordan v. Benwood*, 42 W. Va. 312, 57 Am. St. Rep. 859.

*Wisconsin.*—*Harrison v. Milwaukee County*, 51 Wis. 647; *Wallich v. Manitowoc*, 57 Wis. 9; *Smith v. Eau Claire*, 78 Wis. 457; *Colclough v. Milwaukee*, 92 Wis. 182; *Walish v. Milwaukee*, 95 Wis. 16. See also the title EMINENT DOMAIN, vol. 10, p. 1124.

*Construction of Viaduct.*—In *Colclough v. Milwaukee*, 92 Wis. 182, it was held that the construction of an elevated approach to a viaduct occupying the entire width of the street constituted merely a change in the grade of the street, and that therefore, in the absence of an express statute allowing it, no damages could be claimed by property owners for injuries to their property caused by the construction of such viaduct.

*Established Grades.*—The rule that no recovery can be had for change of grade is applicable to cases where the change is made from an established grade as well as where the change is from the natural grade. *Russell v. Burlington*, 30 Iowa 262; *Pontiac v. Carter*, 32 Mich. 164; *Hoffman v. St. Louis*, 15 Mo. 651; *O'Connor v. Pittsburg*, 18 Pa. St. 187. See, however, *Hurley v. Brooklyn*, (*Brooklyn City Ct. Gen. T.*) 8 N. Y. Supp. 98; *Allegheny County v. Rowley*, 4 Pa. L. J. Rep. 379, 2 Am. L. J. 307; *Goodall v. Milwaukee*, 5 Wis. 32.

1. *Effect of Provision for Damage to Property.*—*Alabama.*—*Montgomery v. Townsend*, 84 Ala. 478, 80 Ala. 489, 60 Am. Rep. 112; *Montgomery v. Maddox*, 89 Ala. 181.

*California.*—*Reardon v. San Francisco*, 66 Cal. 492; *Eachus v. Los Angeles Consol. Electric R. Co.*, 103 Cal. 614, 42 Am. St. Rep. 149; *Larabee v. Cloverdale*, 131 Cal. 96.

*Georgia.*—*Atlanta v. Green*, 67 Ga. 386; *Roughton v. Atlanta*, 113 Ga. 948.

*Illinois.*—*Pekin v. Brereton*, 67 Ill. 477, 16 Am. Rep. 629; *Elgin v. Eaton*, 83 Ill. 535, 25 Am. Rep. 412; *Rigney v. Chicago*, 102 Ill. 83; *Bloomington v. Pollock*, 141 Ill. 346; *Joliet v. Blower*, 155 Ill. 414, *affirming* 49 Ill. App. 464; *Whaples v. Waukegan*, 95 Ill. App. 29; *Barrington v. Meyer*, 103 Ill. App. 124.

*Kansas.*—*Leavenworth v. Duffy*, 10 Kan. App. 124.

*Kentucky.*—*Henderson v. McClain*, 102 Ky. 402; *Louisville v. Hegan*, (Ky. 1899) 49 S. W. Rep. 532; *Mt. Sterling v. Jephson*, (Ky. 1899) 53 S. W. Rep. 1046.

*Mississippi.*—*Vicksburg v. Hermon*, 72 Miss. 211.

*Missouri.*—*Davis v. Missouri Pac. R. Co.*, 119 Mo. 180, 41 Am. St. Rep. 648; *Hickman v. Kansas City*, 120 Mo. 110, 41 Am. St. Rep. 684; *Smith v. St. Joseph*, 122 Mo. 643; *St. Louis v.*

*Lang*, 131 Mo. 412; *Cole v. St. Louis*, 132 Mo. 633; *Fred v. Kansas City Cable R. Co.*, 65 Mo. App. 121, 2 Mo. App. Rep. 1173; *Carson v. Springfield*, 53 Mo. App. 289; *Waldron v. Kansas City*, 69 Mo. App. 50; *Kroffe v. Springfield*, 86 Mo. App. 530.

*Nebraska.*—*Harmon v. Omaha*, 17 Neb. 548, 52 Am. Rep. 420; *Hammond v. Harvard*, 31 Neb. 635; *Harvard v. Crouch*, 47 Neb. 133.

*Pennsylvania.*—*O'Brien v. Philadelphia*, 150 Pa. St. 589, 30 Am. St. Rep. 832; *Hobson v. Philadelphia*, 150 Pa. St. 595; *Rudderow v. Philadelphia*, 166 Pa. St. 241; *Lewis v. Darby*, 166 Pa. St. 613; *Rodgers v. Philadelphia*, 181 Pa. St. 243.

*Texas.*—*Ft. Worth v. Howard*, 3 Tex. Civ. App. 537; *San Antonio v. Mullaly*, 11 Tex. Civ. App. 596; *Houston v. Hutchins*, (Tex. Civ. App. 1895) 33 S. W. Rep. 269; *Denison, etc., R. Co. v. James*, 20 Tex. Civ. App. 358.

*West Virginia.*—*Blair v. Charleston*, 43 W. Va. 62, 64 Am. St. Rep. 837; *McCray v. Fairmont*, 46 W. Va. 442.

Such a provision of the constitution entitles property owners injured by reason of a change of the grade of a street to compensation only in instances in which a private individual would have been liable to compensate the property owner if similar work had been done by such individual upon his own property. Thus, the fact that a change in the grade of a street prevents the surface water from flowing off a lot does not give the lot owner a right to compensation. *Jordan v. Benwood*, 42 W. Va. 312, 57 Am. St. Rep. 859.

And the same has been held where, by reason of the grading, surface waters are cast upon property, provided such waters are not collected and discharged in a mass. *Yeager v. Fairmont*, 43 W. Va. 259. See also *McCray v. Fairmont*, 46 W. Va. 442. And see the title SURFACE WATERS.

*Lowering Grade of Streets to Pass under Railroad Tracks.*—*Marshall v. Chicago*, 77 Ill. App. 351.

2. *Eachus v. Los Angeles Consol. Electric R. Co.*, 103 Cal. 614, 42 Am. St. Rep. 149.

3. *Davis v. Missouri Pac. R. Co.*, 119 Mo. 180, 41 Am. St. Rep. 648.

4. *Chicago v. Rumsey*, 87 Ill. 348.

5. *Actual Change of Grade Necessary.*—*Eachus v. Los Angeles Consol. Electric R. Co.*, 103 Cal. 614, 42 Am. St. Rep. 149; *Hempstead v. Des Moines*, 63 Iowa 36; *Rodgers v. Freemansburg*, 2 Pa. Co. Ct. 518; *Tyson v. Milwaukee*, 50 Wis. 78. *Compare McCarthy v. St. Paul*, 22 Minn. 527; *Schumacher v. St. Louis*, 3 Mo. App. 297; *Matter of Fifth, etc., St.*, 12 Phila. (Pa.) 587, 34 Leg. Int. (Pa.) 392.

the part of the street graded are not entitled to damages, as the only injury which they may suffer is in common with the public.<sup>1</sup> In grading streets the municipality is liable for direct injuries to the property of abutting owners, as where, in raising the grade, dirt is cast upon such property,<sup>2</sup> or where, in case of a cut, the slope is on the abutting lot.<sup>3</sup>

**Lateral Support.**— Since an owner of land has no right to lateral support for buildings and improvements on his land,<sup>4</sup> he is not entitled to recover when the grading removes the lateral support of his buildings;<sup>5</sup> but he cannot be deprived of the lateral support of his land in its natural condition.<sup>6</sup>

**Promise to Compensate.**— It has been held that where there is no liability on the part of a municipality to compensate abutting owners for injuries from a change of the grade of a street, its promise to give compensation therefor is unenforceable.<sup>7</sup>

**Where an Unauthorized Change of Grade Is Made** under the direction of the municipal authorities, the municipality is liable for injuries resulting to abutting property therefrom;<sup>8</sup> and where a municipality changes the grade of a street, it cannot, to defeat the claim of an abutting owner for compensation, set up defects in its own proceeding for the change.<sup>9</sup>

**A Municipality Is Liable for Negligence** in performing the work of changing the grade of a street.<sup>10</sup>

**Statutory Provisions.**— In some jurisdictions express statutory provisions have

1. *Davenport v. Hyde Park*, 178 Mass. 385; *Gardner v. St. Joseph*, 96 Mo. App. 657; *Eagle White Lead Co. v. Cincinnati*, 1 Cinc. Super. Ct. 154; *Lawrence v. Philadelphia*, 154 Pa. St. 20; *Tucker, etc., St.*, 166 Pa. St. 336. See, however, *Mellor v. Philadelphia*, 160 Pa. St. 614; *Lewis v. Homestead*, 194 Pa. St. 199.

2. *West Covington v. Schultz*, (Ky. 1895) 30 S. W. Rep. 660, *affirming* 30 S. W. Rep. 410; *Ludlow v. Troste*, (Ky. 1898) 45 S. W. Rep. 661; *Mayo v. Springfield*, 136 Mass. 10; *Gardner v. Scranton*, 1 Pa. Dist. 805; *O'Donnell v. White*, 23 R. I. 318. See also *Mott v. Lewis*, 52 N. Y. App. Div. 558.

3. *Munger v. St. Paul*, 57 Minn. 9.

4. See the title LATERAL AND SUBJACENT SUPPORT, vol. 18, p. 545.

5. **Lateral Support.**— *Northern Transp. Co. v. Chicago*, 99 U. S. 635 *affirming* 7 Biss. (U. S.) 45; *Quincy v. Jones*, 76 Ill. 231, 20 Am. Rep. 243; *Cincinnati v. Keating*, 6 Ohio Dec. (Reprint) 605. See also *Mitchell v. Rome*, 49 Ga. 19, 15 Am. Rep. 669.

6. *Cabot v. Kingman*, 166 Mass. 403; *Dyer v. St. Paul*, 27 Minn. 457; *Nichols v. Duluth*, 40 Minn. 389, 12 Am. St. Rep. 743; *Columbus v. Williard*, 7 Ohio Cir. Dec. 33, 7 Ohio Cir. Ct. 113; *Keating v. Cincinnati*, 38 Ohio St. 141, 43 Am. Rep. 421; *Pomroy v. Granger*, 18 R. I. 624; *Stearns v. Richmond*, 88 Va. 992, 29 Am. St. Rep. 758; *Parke v. Seattle*, 5 Wash. 1, 34 Am. St. Rep. 839; *Smith v. Seattle*, 20 Wash. 613. *Compare Cheever v. Shedd*, 13 Blatchf. (U. S.) 258; *Rome v. Omberg*, 28 Ga. 46, 73 Am. Dec. 748; *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 Am. Dec. 357. See the title LATERAL AND SUBJACENT SUPPORT, vol. 18, p. 542.

**The Right to Lateral Support Against a Municipality** is the same as against an individual. *Stearns v. Richmond*, 88 Va. 992, 29 Am. St. Rep. 758.

7. **Promise to Compensate.**— *Healey v. New Haven*, 47 Conn. 305, 49 Conn. 394. See also *Griggs v. Foote*, 4 Allen (Mass.) 195.

8. **Unauthorized Change of Grade**— *United States*.— *Pritchard v. Georgetown*, 2 Cranch (C. C.) 191.

*Alabama*.— *Montgomery v. Townsend*, 84 Ala. 478.

*Colorado*.— *Durango v. Luttrell*, 18 Colo. 123.

*Indiana*.— *Delphi v. Evans*, 36 Ind. 90, 10 Am. Rep. 12.

*Iowa*.— *Brown v. Webster City*, 115 Iowa 511; *Diocese of Iowa v. Anamosa*, 76 Iowa 538; *Blanden v. Ft. Dodge*, 102 Iowa 441.

*Missouri*.— *Beatty v. St. Joseph*, 57 Mo. App. 251; *Hill v. St. Louis*, 59 Mo. 412. *Compare Gehling v. St. Joseph*, 49 Mo. App. 430; *Thomson v. Boonville*, 61 Mo. 282; *Maudling v. Trenton*, 67 Mo. App. 452; *Kolkmeier v. Jefferson*, 75 Mo. App. 678; *Stuebner v. St. Joseph*, 81 Mo. App. 273; *Hall v. Trenton*, 86 Mo. App. 326; *Kroffe v. Springfield*, 86 Mo. App. 530; *Gardner v. St. Joseph*, 96 Mo. App. 657; *Vaile v. Independence*, 116 Mo. 333.

*Ohio*.— *Goodloe v. Cincinnati*, 4 Ohio 500, 22 Am. Dec. 764.

*Tennessee*.— *Chattanooga v. Geiler*, 13 Lea (Tenn.) 611.

*Virginia*.— *Page v. Belvin*, 88 Va. 985.

*Wisconsin*.— *Meinzer v. Racine*, 70 Wis. 561, 68 Wis. 241; *Dore v. Milwaukee*, 42 Wis. 108; *Crossett v. Janesville*, 28 Wis. 420.

See also *Phelps v. Detroit*, 120 Mich. 447; *Collins v. Langan*, 58 N. J. L. 6; *Fuller v. Mt. Vernon*, 171 N. Y. 247.

*Compare Mott v. New York*, 2 Hilt. (N. Y.) 358; *In re Shawmont Ave.*, 5 Pa. Dist. 190; *Huckestein v. Allegheny*, 165 Pa. St. 367.

9. *Schumacher v. St. Louis*, 3 Mo. App. 297; *Second Cong. Church Soc. v. Omaha*, 35 Neb. 103; *Church v. Milwaukee*, 31 Wis. 512.

10. **Negligence**— *Colorado*.— *Durango v. Luttrell*, 18 Colo. 123.

*Connecticut*.— *Healey v. New Haven*, 47 Conn. 305.

*Florida*.— *Dorman v. Jacksonville*, 13 Fla. 538, 7 Am. Rep. 253.

been enacted giving to abutting property owners a right to demand compensation for injuries to their property from changes in street grades,<sup>1</sup> and it has

*Georgia.*—Fuller v. Atlanta, 66 Ga. 80.  
*Illinois.*—Roberts v. Chicago, 26 Ill. 249.  
*Iowa.*—Russell v. Burlington, 30 Iowa 262.  
*Nebraska.*—Beatrice v. Leary, 45 Neb. 149, 50 Am. St. Rep. 546.  
*New York.*—Lacour v. New York, 3 Duer (N. Y.) 406.

*Ohio.*—Birtwhistle v. Cincinnati, 8 Ohio Dec. (Reprint) 453, 8 Cinc. L. Bul. 25.

*Texas.*—Dallas v. Cooper, (Tex. Civ. App. 1896) 34 S. W. Rep. 321; Laager v. San Antonio, (Tex. Civ. App. 1900) 57 S. W. Rep. 61.

See also the title EMINENT DOMAIN, vol. 10, p. 1127.

1. *Statutory Provisions*—*California.*—Smith v. Los Angeles, 136 Cal. 156; German Sav., etc., Soc. v. Ramish, 138 Cal. 120.

*Connecticut.*—Shelton Co. v. Birmingham, 61 Conn. 518; Platt v. Millford, 66 Conn. 320; McGar v. Bristol, 71 Conn. 652.

*Indiana.*—Kokomo v. Mahan, 100 Ind. 242; Lafayette v. Nagle, 113 Ind. 425; Jeffersonville v. Myers, 2 Ind. App. 532; Baker v. Shoals, 6 Ind. App. 319.

*Iowa.*—Hempstead v. Des Moines, 52 Iowa 303; Conklin v. Keokuk, 73 Iowa 343; Chase v. Sioux City, 86 Iowa 603; Richardson v. Webster City, 111 Iowa 427; Millard v. Webster City, 113 Iowa 220; Buser v. Cedar Rapids, 115 Iowa 683.

*Maine.*—Hovey v. Mayo, 43 Me. 322; Chase v. Portland, 86 Me. 367.

*Massachusetts.*—Brown v. Lowell, 8 Met. (Mass.) 172; Fall River Print Works v. Fall River, 110 Mass. 428; Ryan v. Boston, 118 Mass. 248; Cambridge v. Middlesex County, 125 Mass. 529; White v. Medford, 163 Mass. 164; Rand v. Boston, 164 Mass. 354; Webster v. Melrose, 168 Mass. 5; Vigeant v. Marlborough, 175 Mass. 459; Albro v. Fall River, 175 Mass. 590; Davenport v. Hyde Park, 178 Mass. 385; Como v. Worcester, 177 Mass. 543; Davenport v. Dedham, 178 Mass. 382.

*Michigan.*—Harper v. Detroit, 110 Mich. 427; Sligh v. Grand Rapids, 84 Mich. 497.

*Missouri.*—Stickford v. St. Louis, 75 Mo. 309; Saxton Nat. Bank v. Bennett, 138 Mo. 494; St. Louis v. Lang, 131 Mo. 412; Schumacher v. St. Louis, 3 Mo. App. 297; Springfield v. Baker, 56 Mo. App. 637; Jarboe v. Carrollton, 73 Mo. App. 347.

*Nebraska.*—Denise v. Omaha, 49 Neb. 750.

*New Hampshire.*—Hinckley v. Franklin, 69 N. H. 614.

*New Jersey.*—Fritts v. Somerville, 7 N. J. L. J. 90; Lambertville v. Clevinger, 30 N. J. L. 53; Brower v. Tichenor, 41 N. J. L. 345; State v. Sayre, 41 N. J. L. 158; Clark v. Elizabeth, 61 N. J. L. 565; Rogge v. Elizabeth, 64 N. J. L. 491.

*New York.*—Leman v. New York, 5 Bosw. (N. Y.) 414; Bartlett v. Tarrytown, 52 Hun (N. Y.) 380, 55 Hun (N. Y.) 492; Matter of Stack, 50 Hun (N. Y.) 385; McCall v. Saratoga Springs, 56 Hun (N. Y.) 639, 9 N. Y. Supp. 170; Matter of East Ave. Baptist Church, 57 Hun (N. Y.) 590, 11 N. Y. Supp. 113; Matter of Smiddy, 65 Hun (N. Y.) 620, 19 N. Y. Supp. 949; Matter of Greer, 39 N. Y. App. Div. 22;

Sauer v. New York, 10 N. Y. App. Div. 267; Matter of Grade Crossing Com'rs, 17 N. Y. App. Div. 54, 46 N. Y. App. Div. 473, 64 N. Y. App. Div. 71; Matter of New York, 65 N. Y. App. Div. 1; People v. Green, 64 N. Y. 606; Whitmore v. Tarrytown, 137 N. Y. 409; Matter of Grade Crossing Com'rs, 154 N. Y. 550.

*Pennsylvania.*—Seaman v. Washington, 172 Pa. St. 467, 37 W. N. C. (Pa.) 505; *In re* Shawmont Ave., 5 Pa. Dist. 190; Cooper v. Scranton, 21 Pa. Super. Ct. 17; Wray v. Pittsburgh, 46 Pa. St. 365; New Brighton v. Peirsol, 107 Pa. St. 280; Change of Grade in Plan 166, 143 Pa. St. 414.

*Rhode Island.*—Aldrich v. Providence, 12 R. I. 241.

*South Carolina.*—Cherry v. Rock Hill, 48 S. Car. 553; Paris Mountain Water Co. v. Greenville, 53 S. Car. 82; Garraux v. Greenville, 53 S. Car. 575; Bramlett v. Laurens, 58 S. Car. 60.

*Tennessee.*—Chattanooga v. Neely, 97 Tenn. 527; Knoxville v. Harth, 105 Tenn. 436.

*Vermont.*—Fairbank v. Rockingham, (Vt. 1903) 54 Atl. Rep. 186.

*Wisconsin.*—Sargent v. Tacoma, 10 Wash. 212; Goodrich v. Milwaukee, 24 Wis. 422; Church v. Milwaukee, 34 Wis. 66; Dore v. Milwaukee, 42 Wis. 108; Smith v. Eau Claire, 78 Wis. 457; Anderton v. Milwaukee, 82 Wis. 279; Jorgenson v. Superior, 111 Wis. 561.

See also the title EMINENT DOMAIN, vol. 10, p. 1127.

**The Mere Lowering of the Grade of the Gutter** a few inches, the curb elevation being left undisturbed, is not a change of grade of the street so as to entitle the abutting owner to compensation. Coates v. Dubuque, 68 Iowa 550.

**Where in the Original Laying Out of a Street the Grade Is Fixed** on the plan of the street, a subsequent working of the street to such grade is not such a change in the grade of the street as will entitle the property owner to damages under Gen. Stat. Mass., c. 44, §§ 19, 20 (Pub. Stat., c. 52, §§ 15, 16). Brady v. Fall River, 121 Mass. 262.

**Where the Established Grade of a Street Falls Away, Either Gradually or Suddenly,** the restoration of the street to the established grade is not a change in the grade entitling a property owner to damages under Pub. Stat. Mass., c. 52, § 15. Garrity v. Boston, 161 Mass. 530. See also Whitmore v. Tarrytown, 137 N. Y. 409, reversing 62 Hun (N. Y.) 619.

**Lowering of Grade by Street-railway Company.**—Purinton v. Somerset, 174 Mass. 556; Underwood v. Worcester, 177 Mass. 173.

**"Altering."**—A substantial change in the grade of a street is an alteration within the meaning of the city charter directing that compensation shall be made to property owners for damage caused by the "altering" of a street. Garraux v. Greenville, 53 S. Car. 575.

**Compensation to Gas Company When Its Mains Are Taken Up and Relaid.**—Natick Gas Light Co. v. Natick, 175 Mass. 246.

**Change of Grade of Sidewalk.**—McGar v. Bristol, 71 Conn. 652; Hinckley v. Franklin, 69 N. H. 614.

been held that such statutes should be liberally construed for the benefit of the property owners.<sup>1</sup> Thus statutes providing for compensation to abutting property owners where the grade of a "street" is changed have been held to include the change of grade of a sidewalk.<sup>2</sup> Such statutes will not be construed as retroactive, however, so as to allow the recovery of compensation for injuries sustained prior to their enactment.<sup>3</sup>

**Necessity for Prior Establishment of Grade.** — Under some statutes compensation is allowed only where the street is changed from an established grade;<sup>4</sup> but a statute giving a claim for damages resulting from a change or alteration of grade includes a change in the first instance from the natural grade, no artificial grade having been established by the municipality.<sup>5</sup>

**Necessity for Improvement of Property.** — Under some statutes compensation can be claimed only by property owners who have improved their property prior to the change of grade.<sup>6</sup>

**Liability of Contractor.** — Where a contractor performs the work of grading a street with proper care, he incurs no personal liability for the compensation of abutting property owners.<sup>7</sup>

(2) **Measure of Damages.** — Where damages are recoverable for injuries from the change of grade, the measure of recovery is, as a general rule, the difference between the market value of the property before and after the change as effected by the change.<sup>8</sup> But the mere fact that the property is

**Change of Grade Not Extending to Whole Width of Street.** — *Stickford v. St. Louis*, 75 Mo. 309, affirming 7 Mo. App. 217; *Dore v. Milwaukee*, 42 Wis. 108.

1. **Statutes Liberally Construed.** — *New Brighton v. United Presb. Church*, 96 Pa. St. 331; *Nashville v. Nichol*, 3 Baxt. (Tenn.) 338.

2. *Kokomo v. Mahan*, 100 Ind. 242.

3. *Craft v. South Chester*, 2 Pa. Co. Ct. 508; *Folkens v. Easton*, 116 Pa. St. 523. Compare *Beck v. Bethlehem*, 2 Pa. Co. Ct. 511; *Fegley v. Easton*, 2 Pa. Co. Ct. 505.

4. **Necessity for Prior Established Grade — California.** — *Bancroft v. San Diego*, 120 Cal. 432; *German Sav., etc., Soc. v. Ramish*, 138 Cal. 120.

*Indiana.* — *Valparaiso v. Adams*, 123 Ind. 250; *Huntington v. Griffith*, 142 Ind. 280.

*Iowa.* — *Farmer v. Cedar Rapids*, 116 Iowa 322; *Reilly v. Ft. Dodge*, (Iowa 1902) 92 N. W. Rep. 887.

*New York.* — *Hosmer v. Gloversville*, (Supm. Ct. Tr. T.) 27 Misc. (N. Y.) 669; *Farrington v. Mt. Vernon*, 166 N. Y. 233, affirming 51 N. Y. App. Div. 250.

*Rhode Island.* — *Gardiner v. Johnston*, 16 R. I. 94; *Almy v. Coggeshall*, 19 R. I. 549.

*Washington.* — *Sargent v. Tacoma*, 10 Wash. 212.

*Wisconsin.* — *Walish v. Milwaukee*, 95 Wis. 16.

**What Constitutes Established Grade.** — *Keehn v. McGillicuddy*, 15 Ind. App. 580; *Thompson v. Keokuk*, 61 Iowa 187; *Niver v. Bath on the Hudson*, (Supm. Ct. Tr. T.) 27 Misc. (N. Y.) 605.

Under such a statute, where a grade is established other than the original surface of the street, a subsequent change of grade to the original surface is a change from an established grade, so as to entitle to damages a property owner who has improved his property with respect to the prior established grade. *Ressegieu v. Sioux City*, 94 Iowa 543.

To constitute an established grade within the meaning of Code Iowa, § 469, giving to property owners a claim for damages where the "established" grade of a street is changed, the grade must have been properly established by ordinance or other legislative action; the mere improvement of the street is insufficient to render its grade an established grade. *Kepple v. Keokuk*, 61 Iowa 653.

In *New York* it has been held that a street grade may be considered "established" (*Amsterdam City Charter*, Laws 1885, c. 131, § 95) by general user, as well as by ordinance. *Folmsbee v. Amsterdam*, 66 Hun (N. Y.) 214, affirmed 142 N. Y. 118.

5. *Longstreth v. Borough*, 2 Chest. Co. Rep. (Pa.) 86; *New Brighton v. United Presb. Church*, 96 Pa. St. 331; *Hendrick's Appeal*, 103 Pa. St. 358.

6. *State v. Sayre*, 41 N. J. L. 158. See also *People v. Gilon*, 76 Hun (N. Y.) 346.

A property owner who has graded his lots in accordance with the established grade of the street, and has prepared such lots for building, is entitled to compensation for a change of grade, under Code Iowa, § 469, giving the right to compensation to property owners who have "built or made any improvements" on a street "according to the established grade thereof." *Chase v. Sioux City*, 86 Iowa 603.

7. **Liability of Contractor.** — *Shaw v. Crocker*, 42 Cal. 435; *St. Louis v. Clemens*, 42 Mo. 69. See also *Pearson v. Zable*, 78 Ky. 170.

8. **Measure of Damages — Depreciation in Market Value — Alabama.** — *Montgomery v. Townsend*, 80 Ala. 489, 60 Am. Rep. 112; *Montgomery v. Maddox*, 89 Ala. 181.

*California.* — *Eachus v. Los Angeles Consol. Electric R. Co.*, 103 Cal. 614, 42 Am. St. Rep. 149.

*Connecticut.* — *Holley v. Torrington*, 63 Conn. 426; *Platt v. Milford*, 66 Conn. 320; *Cook v. Ansonia*, 66 Conn. 413; *McGar v. Bristol*, 71 Conn. 652; *New Haven Steam Saw Mill Co. v.*

worth as much after the grading as before does not necessarily deprive the owner of the right to compensation, since this may be the result of a general advance in values throughout the locality irrespective of the grading or dependent upon some other municipal improvement.<sup>1</sup> On the other hand, as the market value after the change of grade is not limited to the value for the purpose for which the property is used, but its value for any and all purposes is considered,<sup>2</sup> a diminution in the value of the property for some particular use is not necessarily a damage entitling the property owner to compensation, since the grading of a street may impair the desirability or salability of abutting property for one use, while at the same time it may render such property more desirable for another use, so as in fact to increase its market value.<sup>3</sup>

In *Estimating the Diminution in the Value* of abutting property from a change of grade, improvements upon the lots are to be taken into consideration,<sup>4</sup> but otherwise of improvements made with notice of the proposed change.<sup>5</sup> The

New Haven, 72 Conn. 288; *Peck v. Bristol*, 74 Conn. 483.

*Georgia*.—*Estes v. Macon*, 103 Ga. 780; *Roughton v. Atlanta*, 113 Ga. 948; *Ficken v. Atlanta*, 114 Ga. 970.

*Illinois*.—*Elgin v. Eaton*, 83 Ill. 535, 25 Am. Rep. 412; *Springfield v. Griffith*, 21 Ill. App. 93; *Savanna v. Loop*, 47 Ill. App. 214; *Hopkins v. Ottawa*, 59 Ill. App. 288; *North Alton v. Dorsett*, 59 Ill. App. 612; *Jacksonville v. Loar*, 65 Ill. App. 218; *Joliet v. Adler*, 71 Ill. App. 456; *Chicago v. Jackson*, 88 Ill. App. 130; *Ross v. Chicago*, 91 Ill. App. 416; *Joliet v. Schroeder*, 92 Ill. App. 68; *Danville v. Bolton*, 97 Ill. App. 94; *Chicago v. McShane*, 102 Ill. App. 239; *Barrington v. Meyer*, 103 Ill. App. 124; *Chicago v. Anglum*, 104 Ill. App. 188.

*Indiana*.—*Lafayette v. Nagle*, 113 Ind. 425. *Iowa*.—*Hempstead v. Des Moines*, 52 Iowa 306; *Morton v. Burlington*, 106 Iowa 50.

*Kansas*.—*Parker v. Atchison*, 46 Kan. 14.

*Kentucky*.—*Louisville v. Hegan*, (Ky. 1899) 49 S. W. Rep. 532; *Henderson v. Winstead*, 109 Ky. 328; *Covington v. Taffee*, (Ky. 1902) 68 S. W. Rep. 629.

*Maine*.—*Chase v. Portland*, 86 Me. 367.

*Massachusetts*.—*Como v. Worcester*, 177 Mass. 543.

*Minnesota*.—*McCarthy v. St. Paul*, 22 Minn. 527.

*Mississippi*.—*Vicksburg v. Herman*, 72 Miss. 211.

*Missouri*.—*Markowitz v. Kansas City*, 125 Mo. 485, 46 Am. St. Rep. 498; *Smith v. Kansas City*, 128 Mo. 23; *Wolters v. St. Louis*, 132 Mo. 1; *Cole v. St. Louis*, 132 Mo. 633; *Chouteau v. St. Louis*, 8 Mo. App. 48; *Dale v. St. Joseph*, 59 Mo. App. 566; *Kent v. St. Joseph*, 72 Mo. App. 42; *Hampton v. Kansas City*, 74 Mo. App. 129; *Rives v. Columbia*, 80 Mo. App. 173, 2 Mo. App. Rep. 537; *Taylor v. Jackson*, 83 Mo. App. 641; *Robinson v. St. Joseph*, 97 Mo. App. 503.

*Nebraska*.—*Harvard v. Crouch*, 47 Neb. 133; *Omaha v. Williams*, 52 Neb. 40; *Omaha v. Flood*, 57 Neb. 124; *Omaha v. Hansen*, 36 Neb. 135; *Barr v. Omaha*, 42 Neb. 341; *Smith v. Omaha*, 49 Neb. 883.

*New York*.—*Matter of Grade-Crossing Com'rs*, 64 N. Y. App. Div. 71; *Matter of Opening East One Hundred and Eighty-seventh St.*, 78 N. Y. App. Div. 355; *Matter of Grade Crossing Com'rs*, 169 N. Y. 605, affirming 64 N.

Y. App. Div. 71; *Fuller v. Mt. Vernon*, 171 N. Y. 247.

*Ohio*.—*Little Miami R. Co. v. Martin*, 1 Ohio Dec. (Reprint) 440; *Lotze v. Cincinnati*, 7 Ohio Dec. 227, 4 Ohio N. P. 311; *Cincinnati v. Whetstone*, 9 Ohio Dec. (Reprint) 368, 12 Cinc. L. Bul. 247.

*Pennsylvania*.—*Grier v. Homestead*, 6 Pa. Super. Ct. 542; *O'Neil v. Ben Avon*, 9 Pa. Dist. 130; *Hoster v. Philadelphia*, 12 Pa. Super. Ct. 224; *Chambers v. South Chester*, 140 Pa. St. 510; *Dawson v. Pittsburgh*, 159 Pa. St. 317; *J. G. Brill Co. v. Philadelphia*, 167 Pa. St. 1, 36 W. N. C. (Pa.) 217; *Rudderow v. Philadelphia*, 166 Pa. St. 241; *Tucker, etc., St.*, 166 Pa. St. 336; *Aswell v. Scranton*, 175 Pa. St. 173, 52 Am. St. Rep. 841; *Darlington v. Allegheny*, 189 Pa. St. 202; *Philadelphia Ball Club v. Philadelphia*, 182 Pa. St. 362; *Clark v. Philadelphia*, 185 Pa. St. 503; *Mead v. Pittsburg*, 194 Pa. St. 392.

*Texas*.—*Ft. Worth v. Howard*, 3 Tex. Civ. App. 537; *San Antonio v. Mullaly*, 11 Tex. Civ. App. 596; *Dallas v. Kahn*, 9 Tex. Civ. App. 19. *Washington*.—*Smith v. Seattle*, 20 Wash. 613.

*West Virginia*.—*Blair v. Charleston*, 43 W. Va. 62, 64 Am. St. Rep. 837; *McCray v. Fairmont*, 46 W. Va. 442.

*Wisconsin*.—*Stadler v. Milwaukee*, 34 Wis. 98; *French v. Milwaukee*, 49 Wis. 584.

*Cost of Lowering Building to Grade*.—*McCarthy v. St. Paul*, 22 Minn. 527.

*Interest*.—*New Haven Steam Saw-Mill Co. v. New Haven*, 72 Conn. 276.

1. *Eachus v. Los Angeles Consol. Electric R. Co.*, 103 Cal. 614, 42 Am. St. Rep. 149; *Burcky v. Lake*, 30 Ill. App. 23; *Cole v. St. Louis*, 132 Mo. 633; *Rudderow v. Philadelphia*, 166 Pa. St. 241.

2. *Lowe v. Omaha*, 33 Neb. 587.

3. *Eachus v. Los Angeles Consol. Electric R. Co.*, 103 Cal. 614, 42 Am. St. Rep. 149. *Compare Dallas v. Kahn*, 9 Tex. Civ. App. 19.

4. *Injury to Improvements*.—*Hempstead v. Des Moines*, 52 Iowa 303; *Seasongood v. Cincinnati*, 3 Ohio Cir. Dec. 113, 5 Ohio Cir. Ct. 225; *Chatfield v. Cincinnati*, 7 Ohio Dec. (Reprint) 111; *Seaman v. Washington*, 172 Pa. St. 467. See, however, *Dale v. St. Joseph*, 59 Mo. App. 566.

5. *Davis v. Missouri Pac. R. Co.*, 119 Mo. 180, 41 Am. St. Rep. 648; *Clinkenbeard v. St.*

destruction of sidewalks erected by the property owner in front of his premises,<sup>1</sup> and of shade trees,<sup>2</sup> should be taken into consideration. The cost of grading or otherwise adjusting abutting property to the changed grade of the street is not of itself recoverable as a distinct element of damages,<sup>3</sup> but may be considered as an element tending to show diminution in value.<sup>4</sup> In fact, all circumstances logically tending to show diminution in the value of the property should be admitted in evidence.<sup>5</sup>

**Benefits.** — As the measure of damages is diminution in value, the benefits inuring to the property from the change of grade are to be considered;<sup>6</sup> but from the benefits should be deducted the cost to the owner of the improvement, as, for instance, the amount of a special assessment paid by him.<sup>7</sup> Only benefits accruing by reason of the change of grade are to be regarded.<sup>8</sup> Thus, benefits accruing by reason of improvements made by an adjoining lot owner cannot be considered,<sup>9</sup> and it has been held that the benefits to be taken into account are only such as are special, and do not include general benefits received in common with the public at large.<sup>10</sup>

**Interest.** — It has been held that where the municipality fails to assess the damages resulting from a change of grade, the property owner is entitled in an action therefor to interest on the amount of his damages from the time of the actual change.<sup>11</sup>

In Mitigation of the Damages recoverable it has been held admissible to show in evidence intended further improvements from which the property will derive benefit.<sup>12</sup>

Joseph, 122 Mo. 641; *Axford v. Philadelphia*, 6 Pa. Co. Ct. 246; *Groff v. Philadelphia*, 150 Pa. St. 594. See also *Denver v. Vernia*, 8 Colo. 399; *Matter of Opening Furman St.*, 17 Wend. (N. Y.) 649.

1. **Injury to Sidewalk.** — *Shelton Co. v. Birmingham*, 62 Conn. 456, *distinguishing* former appeal, 61 Conn. 518; *Holley v. Torrington*, 63 Conn. 426; *Cook v. Ansonia*, 66 Conn. 413.

2. **Injury to Shade Trees.** — *Holley v. Torrington*, 63 Conn. 426; *Cook v. Ansonia*, 66 Conn. 413; *Richardson v. Webster City*, 111 Iowa 427; *Walker v. Sedalia*, 74 Mo. App. 70; *Seaman v. Washington*, 172 Pa. St. 467.

3. **Cost of Adjusting Property to New Grade.** — *Shawneetown v. Mason*, 82 Ill. 337, 25 Am. Rep. 321; *Springfield v. Griffith*, 21 Ill. App. 93; *Chase v. Portland*, 86 Me. 367; *Kelly v. Baltimore*, 65 Md. 171; *Greensburg v. Young*, 53 Pa. St. 280; *Chambers v. South Chester*, 140 Pa. St. 510; *Stowell v. Milwaukee*, 31 Wis. 523; *Tyson v. Milwaukee*, 50 Wis. 78. *Compare* *French v. Milwaukee*, 49 Wis. 584.

4. *Cook v. Ansonia*, 66 Conn. 413; *Augusta v. Schrameck*, 96 Ga. 426, 51 Am. St. Rep. 146; *Springfield v. Griffith*, 46 Ill. App. 246; *Thompson v. Keokuk*, 61 Iowa 187; *Topeka v. Martineau*, 42 Kan. 387; *Chase v. Portland*, 86 Me. 367; *Bemis v. Springfield*, 122 Mass. 110; *McCarthy v. St. Paul*, 22 Minn. 527; *Dawson v. Pittsburgh*, 159 Pa. St. 317.

**Evidence of Cost of Filling Lot and Raising Building.** — *Augusta v. Schrameck*, 96 Ga. 426, 51 Am. St. Rep. 146.

5. *Chicago v. Jackson*, 88 Ill. App. 130; *Preston v. Cedar Rapids*, 95 Iowa 71; *Hubbard v. Webster*, 118 Mass. 599; *Bemis v. Springfield*, 122 Mass. 110; *Dana v. Boston*, 176 Mass. 97; *Watson v. Columbia*, 77 Mo. App. 267; *Omaha v. Flood*, 57 Neb. 124; *Matter of Grade Crossing Com'rs*, 17 N. Y. App. Div. 54; *Seaman v. Washington*, 172 Pa. St. 467; *Philadelphia Ball Club v. Philadelphia*, 192 Pa. St.

632, 73 Am. St. Rep. 835; *Dawson v. Pittsburgh*, 159 Pa. St. 317.

**Appearance of Lot and Effect on Rent.** — *Joliet v. Adler*, 71 Ill. App. 456.

**Diversion of Street Traffic.** — *Chicago v. Jackson*, 88 Ill. App. 130.

6. **Benefits** — *Georgia*. — *Atlanta v. Word*, 78 Ga. 276.

*Illinois*. — *Savanna v. Loop*, 47 Ill. App. 214; *Hopkins v. Ottawa*, 59 Ill. App. 288; *North Alton v. Dorsett*, 59 Ill. App. 612.

*Iowa*. — *Meyer v. Burlington*, 52 Iowa 560; *Preston v. Cedar Rapids*, 95 Iowa 71.

*Maine*. — *Chase v. Portland*, 86 Me. 367.

*Massachusetts*. — *Donovan v. Springfield*, 125 Mass. 371; *Cross v. Plymouth County*, 125 Mass. 557; *Abbott v. Cottage City*, 143 Mass. 521, 58 Am. Rep. 143. *Compare* *Godbold v. Chelsea*, 111 Mass. 294.

*Missouri*. — *Kansas City v. Morton*, 117 Mo. 446.

*Nebraska*. — *Lowe v. Omaha*, 33 Neb. 587.

*Tennessee*. — *Chattanooga v. Geiler*, 13 Lea (Tenn.) 611.

*Texas*. — *Dallas v. Kahn*, 9 Tex. Civ. App. 19.

*Wisconsin*. — *Church v. Milwaukee*, 31 Wis. 512; *Stowell v. Milwaukee*, 31 Wis. 523. *Compare* *Drummond v. Eau Claire*, 85 Wis. 556.

*Compare* *Fisher v. Naysmith*, 106 Mich. 71; *Lambertville v. Clevinger*, 30 N. J. L. 53.

7. *Bloomington v. Pollock*, 141 Ill. 346, *affirming* 38 Ill. App. 133.

8. *Cole v. St. Louis*, 132 Mo. 633.

9. *Cook v. Ansonia*, 66 Conn. 413.

10. **General Benefits.** — *Omaha v. Schaller*, 26 Neb. 522; *Omaha v. Hansen*, 36 Neb. 135; *Kirkendall v. Omaha*, 39 Neb. 1; *Rudderow v. Philadelphia*, 166 Pa. St. 241.

11. **Interest.** — *Cincinnati v. Whetstone*, 47 Ohio St. 196. *Compare* *Tyson v. Milwaukee*, 50 Wis. 78.

12. **Mitigation of Damages.** — *Joliet v. Blower*, 155 Ill. 414, *reversing* 49 Ill. App. 464. *Com-*



(3) *Who Entitled to Compensation.* — Only persons are entitled to compensation who have an interest in the property injured<sup>1</sup> at the time when the grade is changed.<sup>2</sup> A subsequent conveyance of the property does not affect the right.<sup>3</sup> Where the statutes provide for compensation to "persons interested in the land injured" a lessee is included.<sup>4</sup>

(4) *Determination of Compensation.* — As a general rule the statutes expressly provide the manner in which the compensation is to be determined.<sup>5</sup>

*pare Estes v. Macon*, 103 Ga. 780; *Slaterry v. St. Louis*, 120 Mo. 183.

1. *Who Entitled to Compensation.* — Thus, the fact that a husband has erected a building on land belonging to his wife does not entitle him to compensation for a change in the grade of the street. *Nebraska City v. Northcutt*, 45 Neb. 456.

2. *Bloomington v. Pollock*, 141 Ill. 346, *affirming* 38 Ill. App. 133; *Stein v. Lafayette*, 6 Ind. App. 414; *Ortwine v. Baltimore*, 16 Md. 387; *Keith v. Bingham*, 100 Mo. 300; *People v. Lord*, 24 N. Y. App. Div. 137; *People v. Lord*, 31 N. Y. App. Div. 221; *Bauman v. New Castle*, 12 Pa. Co. Ct. 22; *Freemansburg v. Rodgers*, (Pa. 1887) 8 Atl. Rep. 872; *New Brighton v. Peirsol*, 107 Pa. St. 280; *Matter of Seattle*, 26 Wash. 602; *Tyson v. Milwaukee*, 50 Wis. 78.

*Right of Municipality to Compensation — Changing Grade Crossing of Railroad.* — *Matter of Grade Crossing Com'rs*, 171 N. Y. 685.

3. *Stein v. Lafayette*, 6 Ind. App. 414; *Hodgman v. Concord*, 69 N. H. 349; *Campbell v. Philadelphia*, 108 Pa. St. 300.

Thus a subsequent sale on foreclosure of an existing mortgage does not carry the mortgagor's claim for compensation. *Matter of Grade Crossing Com'rs*, 169 N. Y. 605, *affirming* 64 N. Y. App. Div. 71; *In re Seattle*, 26 Wash. 602. See also *Tyson v. Milwaukee*, 50 Wis. 78.

In *Minnesota* it has been held that where prior to a mortgage foreclosure sale the municipality had adopted a resolution changing the grade of the street, but no assessment of damages or actual change of grade was made until after the foreclosure sale, the purchaser at such foreclosure sale was entitled to the damages awarded for the change of grade. *Moritz v. St. Paul*, 52 Minn. 409.

4. *Matter of Grade Crossing Com'rs*, 17 N. Y. App. Div. 54; *Gilligan v. Board of Aldermen*, 11 R. I. 258. See also *Stickford v. St. Louis*, 75 Mo. 309.

5. *Determination of Compensation — Iowa.* — *Morton v. Burlington*, 106 Iowa 50.

*Kentucky.* — *Henderson v. Winstead*, 109 Ky. 328.

*Maine.* — *Cassidy v. Bangor*, 61 Me. 434.

*Massachusetts.* — *Goddard v. Worcester*, 9 Gray (Mass.) 88; *Brown v. Lowell*, 8 Met. (Mass.) 172; *Bemis v. Springfield*, 122 Mass. 110; *Viscardi v. Great Barrington*, 174 Mass. 406.

*Minnesota.* — *Abel v. Minneapolis*, 68 Minn. 89.

*Missouri.* — *St. Louis v. Lang*, 131 Mo. 412; *Kansas City v. Duncan*, 135 Mo. 571.

*New Hampshire.* — *Sawyer v. Keene*, 47 N. H. 173.

*New Jersey.* — *Stewart v. Hoboken*, 57 N. J. L. 330.

*New York.* — *People v. Assessors*, (Supm. Ct.

*Gen. T.*) 53 How. Pr. (N. Y.) 280; *Matter of Wiley*, 52 Hun (N. Y.) 382; *Collins v. Saratoga Springs*, 70 Hun (N. Y.) 583; *Matter of Grade Crossing Com'rs*, 154 N. Y. 561; *Matter of Grab*, 157 N. Y. 69, 31 N. Y. App. Div. 610; *Matter of Grade Crossing Com'rs*, 171 N. Y. 685; *People v. Coler*, 45 N. Y. App. Div. 463; *Matter of Caffrey*, 52 N. Y. App. Div. 264; *Matter of Grade Crossing Com'rs*, 66 N. Y. App. Div. 439; *Matter of Nepperhan St.*, 71 N. Y. App. Div. 534; *People v. Stillings*, 75 N. Y. App. Div. 569.

*North Carolina.* — *Miller v. Asheville*, 112 N. Car. 769.

*Pennsylvania.* — *Schuler v. Philadelphia*, (Pa. 1888) 13 Atl. Rep. 947; *Orthodox St.*, 11 Pa. Co. Ct. 154; *Bowers v. Braddock*, 172 Pa. St. 596, 37 W. N. C. (Pa.) 509; *In re Fisher*, 178 Pa. St. 325; *Baldwin v. Pottstown*, 12 Montg. Co. Rep. (Pa.) 185; *Betterly v. Scranton*, 5 Lack. Leg. N. (Pa.) 179; *Thomas v. Edwardsville*, 8 Kulp (Pa.) 458; *Opening of Second Ave.*, 7 Pa. Super. Ct. 62, 42 W. N. C. (Pa.) 104; *Maxwell v. Ludwick*, 7 Pa. Dist. 523; *Stork v. Philadelphia*, 8 Pa. Dist. 339; *In re New Castle*, 16 Pa. Co. Ct. 478; *In re Ridge St.*, 29 Pa. St. 391; *Mooney v. Pittsburg*, 30 Pittsb. Leg. J. N. S. (Pa.) 370; *Lewis v. Homestead*, 194 Pa. St. 199; *Morrison v. Conshohocken*, 16 Montg. Co. Rep. (Pa.) 165.

*Texas.* — *Dallas v. Kahn*, 9 Tex. Civ. App. 19.

*Wisconsin.* — *Pittelkow v. Milwaukee*, 94 Wis. 651.

*Application or Petition for Assessment of Damages.* — *Matter of Beale St.*, 39 Cal. 495; *St. Louis v. Lang*, 131 Mo. 412; *Sawyer v. Keene*, 47 N. H. 173; *Rodgers v. Freemansburg*, 2 Pa. Co. Ct. 518.

*Time for Filing Petition for Assessment of Damages.* — *Fegley v. Easton*, 2 Pa. Co. Ct. 505; *Philadelphia v. Wright*, 100 Pa. St. 235; *Eisenhart v. Philadelphia*, 154 Pa. St. 393.

*Viewers or Commissioners to Assess Damages.* — *Montgomery Ave. Case*, 54 Cal. 579; *Riker v. New York*, 3 Daly (N. Y.) 174; *People v. Gilon*, 76 Hun (N. Y.) 346; *Howell v. Buffalo*, 15 N. Y. 512; *Astor v. New York*, 62 N. Y. 580; *People v. Fitch*, 147 N. Y. 355.

*Jury.* — *Flagg v. Worcester*, 8 Cush. (Mass.) 69; *Sisson v. New Bedford*, 137 Mass. 255.

*Award.* — *Princeton v. Gieske*, 93 Ind. 102; *People v. Gilon*, 67 Hun (N. Y.) 652, 22 N. Y. Supp. 238; *Rodgers v. Freemansburg*, 2 Pa. Co. Ct. 518.

*Review of Award.* — *Matter of Beale St.*, 39 Cal. 495; *Robinson v. St. Paul*, 40 Minn. 228; *St. Louis v. Lang*, 131 Mo. 412; *Bartlett v. Tarrytown*, 55 Hun (N. Y.) 492; *Matter of Myrick*, 59 Hun (N. Y.) 627, 13 N. Y. Supp. 948; *In re Richmond St.*, 11 Phila. (Pa.) 453, 33 Leg. Int. (Pa.) 100; *Nahf v. Tamaqua*, 14 Pa. Co. Ct. 142; *Millvale v. Poxon*, 123 Pa. St. 497;

Though the statute provides methods by which the municipality by proceedings *in invitum* may assess the compensation to which a property owner is entitled for a change in grade, this does not deprive the municipality of the power to submit the question to arbitration.<sup>1</sup>

**Notice of Proceedings to Assess Damages.** — The statutory requirements with regard to notice to property owners in proceedings to assess damages for the change of the grade of a street must, of course, be complied with,<sup>2</sup> and even when the statute makes no such provision it has been held that notice and an opportunity to be heard must be given to property owners, since the question of compensation is essentially judicial.<sup>3</sup>

(5) **Time of Paying Compensation.** — A prepayment to property owners of compensation for injury which they will suffer by reason of a change in the grade of a street is not a condition precedent to the exercise of the power to change the grade unless made so by statute.<sup>4</sup> When such statutes exist, a property owner is entitled to an injunction restraining the change of grade until his compensation is paid or tendered.<sup>5</sup>

(6) **Waiver of Claim for Compensation.** — It is generally held that an abutting property owner waives his claim for compensation for a change of grade by signing a petition requesting that the change be made<sup>6</sup> or by expressly assenting thereto after the work of grading is begun.<sup>7</sup> But he is not deprived of his right to compensation merely by soliciting the municipal authorities to adopt particular methods in the work<sup>8</sup> or by requesting that the grading be completed when it has been partly done.<sup>9</sup>

**Where the Municipality Is Required to Make Compensation Before Grading,** a property owner does not waive his right to compensation by failure to enjoin the grading until his compensation is estimated and paid.<sup>10</sup>

**Negligence.** — The fact that a property owner petitioned for the grading of a street does not waive his claim for damages by reason of the negligent manner in which the work is done.<sup>11</sup>

*Strang v. Braddock*, 172 Pa. St. 601; *Church v. Milwaukee*, 31 Wis. 512; *Smith v. Eau Claire*, 83 Wis. 455.

**Payment and Acceptance of Award.** — *Keil v. St. Paul*, 47 Minn. 288.

**Time of Payment of Award.** — *Moritz v. St. Paul*, 52 Minn. 409.

**Actions on Award.** — *Bloomington v. Brokaw*, 77 Ill. 194; *Reimer v. Philadelphia*, 12 Phila. (Pa.) 408, 35 Leg. Int. (Pa.) 170.

**Conflicting Claims to Award.** — *Cassidy v. New York*, 62 Hun (N. Y.) 338; *Hatch v. New York*, 82 N. Y. 436.

1. **Arbitration.** — *Mallory v. Huntington*, 64 Conn. 88.

2. **Notices.** — *Logansport v. Pollard*, 50 Ind. 151; *Brown v. Lowell*, 8 Met. (Mass.) 172; *McGavock v. Omaha*, 40 Neb. 64; *Stewart v. Hoboken*, 57 N. J. L. 330; *Orthodox St.*, 169 Pa. St. 499.

3. *People v. Gilon*, 121 N. Y. 551. See also *People v. Assessors*, 59 Hun (N. Y.) 407.

4. **Time of Payment — Prepayment.** — *Platt v. Milford*, 66 Conn. 320; *Gilpin v. Ansonia*, 68 Conn. 72; *Dorman v. Jacksonville*, 13 Fla. 538, 7 Am. Rep. 253; *Hirth v. Indianapolis*, 18 Ind. App. 673; *Lafayette v. Spencer*, 14 Ind. 399; *Lafayette v. Bush*, 19 Ind. 326; *Wabash v. Alber*, 88 Ind. 428; *Huntington v. Griffith*, 142 Ind. 280; *Brown v. Lowell*, 8 Met. (Mass.) 172. See, however, *Ryan v. Cincinnati*, 1 Ohio Cir. Dec. 311.

**Statutes Requiring Prepayment or Tender.** — *Logansport v. Pollard*, 50 Ind. 151; *Lafayette v. Wortman*, 107 Ind. 404; *Huntington v.*

*Griffith*, 142 Ind. 280; *Keehn v. McGillicuddy*, 15 Ind. App. 580; *Phillips v. Council Bluffs*, 63 Iowa 576; *Hurford v. Omaha*, 4 Neb. 336; *Sargent v. Tacoma*, 10 Wash. 212.

5. *Phillips v. Council Bluffs*, 63 Iowa 576.

6. **Signing Petition for Change of Grade.** — *Burlington v. Gilbert*, 31 Iowa 357, 7 Am. Rep. 143; *Preston v. Cedar Rapids*, 95 Iowa 71; *Hembling v. Big Rapids*, 89 Mich. 1; *Collins v. Grand Rapids*, 95 Mich. 286; *Cross v. Kansas City*, 90 Mo. 13, 59 Am. Rep. 1; *Vaile v. Independence*, 116 Mo. 333; *Justice v. Lancaster*, 20 Mo. App. 559; *Texarkana v. Talbot*, 7 Tex. Civ. App. 202; *Ball v. Tacoma*, 9 Wash. 592. See also *Taylor v. Jackson*, 83 Mo. App. 641. *Compare Barker v. Taunton*, 119 Mass. 392; *Jones v. Bangor*, 144 Pa. St. 638; *Lewis v. Darby*, 166 Pa. St. 613.

The fact that a person signed a petition to the common council to change the grade of a street does not release his claim for damages for injury to his land caused by the adoption of a new grade lower than that petitioned for. *Luscombe v. Milwaukee*, 36 Wis. 511.

7. *Jeffersonville v. Myers*, 2 Ind. App. 532; *Carson v. St. Joseph*, 91 Mo. App. 324; *Owens v. Milwaukee*, 47 Wis. 461. See also *Matter of Grade Crossing Com'rs*, 66 N. Y. App. Div. 439.

8. *Blanden v. Ft. Dodge*, 102 Iowa 441.

9. *Hickman v. Kansas City*, 120 Mo. 110, 41 Am. St. Rep. 684; *Herzer v. Milwaukee*, 39 Wis. 360.

10. *Henderson v. McClain*, 102 Ky. 402.

11. *Beatrice v. Leary*, 45 Neb. 149, 50 Am. St. Rep. 546.

**Waiver of Claim for Property to Establish Street.** — The waiver of a claim for damages for property taken to establish a street does not waive a claim for compensation for grading it.<sup>1</sup>

**Claim for Damages.** — In the absence of any statutory requirement, the property owner is not required to notify the municipality that he will claim damages for a proposed change in the grade of a street.<sup>2</sup> In some instances, however, the statutes have required all claims for damages to be filed within a prescribed time.<sup>3</sup>

(7) **Remedy of Landowners.** — Where the statute giving the right to damages provides the method for the enforcement of the claim, the property owner must resort to such remedy,<sup>4</sup> and where such proceedings are duly taken the property owner is concluded thereby.<sup>5</sup> Where the statutes require a municipality in exercising its power to change the grade of streets to have the damages to property owners assessed, if the municipality fails in this duty the property owner may maintain an action at law for such damages.<sup>6</sup> Where the remedy for the recovery of damages is not provided by the statute giving the right thereto, an action at law may be maintained therefor,<sup>7</sup> and the same

1. *Clark v. Philadelphia*, 171 Pa. St. 30, 50 Am. St. Rep. 790. See also *Fernald v. Boston*, 12 Cush. (Mass.) 574; *Bartlett v. Tarrytown*, 55 Hun (N. Y.) 492.

2. **Claim for Damages.** — *Platt v. Milford*, 66 Conn. 320; *Seaman v. Washington*, 172 Pa. St. 467; *Jorgenson v. Superior*, 111 Wis. 561. *Compare German Sav., etc., Soc. v. Ramish*, 138 Cal. 120; *State v. Superior*, 108 Wis. 16.

3. *People v. Lord*, 29 N. Y. App. Div. 455; *Matter of Caffrey*, 52 N. Y. App. Div. 264; *People v. Stillings*, 76 N. Y. App. Div. 143; *Jacobs v. Cincinnati*, 3 Ohio Dec. 60; *Miller v. Cincinnati*, 5 Ohio Dec. (Reprint) 472; *Ernst v. Kunkle*, 5 Ohio St. 520; *Toledo v. McMahon*, 4 Ohio Cir. Dec. 3, 9 Ohio Cir. Ct. 194; *Cincinnati v. Sherike*, 47 Ohio St. 217; *Wabash R. Co. v. Defiance*, 52 Ohio St. 262; *Anness v. Providence*, 13 R. I. 17.

4. **Remedy of Landowner — Florida.** — *Dorman v. Jacksonville*, 13 Fla. 538, 7 Am. Rep. 253.

*Indiana.* — *Terre Haute v. Turner*, 36 Ind. 522; *Logansport v. Pollard*, 50 Ind. 151.

*Iowa.* — *Cole v. Muscatine*, 14 Iowa 296.

*Maine.* — *Hovey v. Mayo*, 43 Me. 322.

*Massachusetts.* — *Flagg v. Worcester*, 13 Gray (Mass.) 601; *Boston v. Shaw*, 1 Met. (Mass.) 130; *Andover, etc., Turnpike Corp. v. Gould*, 6 Mass. 40, 4 Am. Dec. 80; *Sullivan v. Fall River*, 144 Mass. 579.

*New Jersey.* — *State v. Lambertville*, (N. J. 1886) 6 Atl. Rep. 432; *Reock v. Newark*, 33 N. J. L. 129; *Ward v. New Brunswick*, 49 N. J. L. 552.

*New York.* — *Heiser v. New York*, 104 N. Y. 68, affirming 29 Hun (N. Y.) 446.

*Ohio.* — *Ernst v. Kunkle*, 5 Ohio St. 520; *Hickox v. Cleveland*, 8 Ohio 543, 32 Am. Dec. 730.

*Pennsylvania.* — *McKee v. Pittsburgh*, 7 Pa. Super. Ct. 397; *Beltzhoover v. Gollings*, 101 Pa. St. 293; *Campbell v. Philadelphia*, 108 Pa. St. 300; *Philadelphia v. Wright*, 100 Pa. St. 235; *Power v. Ridgway*, 149 Pa. St. 317.

*Wisconsin.* — *Owens v. Milwaukee*, 47 Wis. 461. *Compare Benton v. Milwaukee*, 50 Wis. 368.

In case of injuries to a city lot from the alteration of the grade of a street made pursuant to an unauthorized or illegal order of the city council, the city is liable in an ordinary civil action for damages. *Dore v. Milwaukee*, 42 Wis. 108.

5. *Gilpin v. Ansonia*, 68 Conn. 72; *Sisson v. Stonington*, 73 Conn. 348; *Hoster v. Philadelphia*, 12 Pa. Super. Ct. 224; *Almy v. Coggeshall*, 19 R. I. 549.

6. **Action Where Municipality Fails to Have Damages Assessed — United States.** — *Wright v. Georgetown*, 4 Cranch (C. C.) 534.

*Connecticut.* — *Healey v. New Haven*, 49 Conn. 395, 2 Am. & Eng. Corp. Cas. 450; *Holley v. Torrington*, 63 Conn. 426; *Mallory v. Huntington*, 64 Conn. 88; *Platt v. Milford*, 66 Conn. 320; *Cook v. Ansonia*, 66 Conn. 413; *Gilpin v. Ansonia*, 68 Conn. 72.

*Indiana.* — *Lafayette v. Wortman*, 107 Ind. 404.

*Iowa.* — *Hempstead v. Des Moines*, 52 Iowa 303; *Noyes v. Mason City*, 53 Iowa 418.

*Kansas.* — *Topeka v. Sells*, 48 Kan. 520.

*Kentucky.* — *Henderson v. McClain*, 102 Ky. 402; *Louisville v. McGill*, (Ky. 1899) 52 S. W. Rep. 1053.

*Minnesota.* — *Overmann v. St. Paul*, 39 Minn. 120.

*Missouri.* — *Walker v. Sedalia*, 74 Mo. App. 70.

*New York.* — *Folmsbee v. Amsterdam*, 142 N. Y. 118, affirming 66 Hun (N. Y.) 214; *Fuller v. Mt. Vernon*, 171 N. Y. 247.

*Wisconsin.* — *Jorgenson v. Superior*, 111 Wis. 561.

*Compare Reock v. Newark*, 33 N. J. L. 129.

**Limitation of Actions.** — *Gilpin v. Ansonia*, 68 Conn. 72; *Buser v. Cedar Rapids*, 115 Iowa 683; *Omaha v. Flood*, 57 Neb. 124; *Rogge v. Elizabeth*, 64 N. J. L. 491; *People v. Stillings*, 76 N. Y. App. Div. 143; *Chattanooga v. Neely*, 97 Tenn. 527.

7. *McCarthy v. St. Paul*, 22 Minn. 527; *Bear v. Allentown*, 148 Pa. St. 80. See also *Vorrath v. Hoboken*, 49 N. J. L. 285.

**Presentation of Claim to City Council as Condition Precedent to Action.** — *Dayton v. Lincoln*, 39 Neb. 74.

is true under a constitutional provision giving a claim for damages for property injured for a public purpose.<sup>1</sup>

**VI. CONTROL, REGULATION, AND USE OF STREETS — 1. General Control of Streets — a. IN GENERAL.** — The paramount control over the streets is vested in the legislature.<sup>2</sup> This power of control the legislature may delegate, and as a general rule has delegated, to the several municipalities,<sup>3</sup> though in some cases the power has been delegated to other public bodies or officers.<sup>4</sup> Where the regulation of streets is delegated to the legislative and the governmental body of a municipality by name, as to the city council, such body is not in this regard the representative of the state as distinguished from the municipality.<sup>5</sup> When the power is thus delegated, it is held in trust to be exercised as the circumstances may require, and cannot be relinquished without legislative authority.<sup>6</sup> The manner of exercising the power, if prescribed by statute, must be followed.<sup>7</sup>

**b. OWNERSHIP OF FEE.** — As a general rule, the public has only an easement in the streets, the fee remaining in the landowner, subject merely to the right of the public to the use of the street for street purposes.<sup>8</sup> In many instances, however, statutes have provided that in the condemnation or dedication of lands for streets the fee shall vest in the municipality; and the fee may, of course, be so vested by conveyances to municipalities of land for streets.<sup>9</sup>

1. *Householder v. Kansas City*, 83 Mo. 488.

2. **Legislative Control.** — *Com. v. Plaisted*, 148 Mass. 375, 112 Am. St. Rep. 566; *Hall v. Concord*, 71 N. H. 367; *Southwark R. Co. v. Philadelphia*, 47 Pa. St. 314.

3. **Delegation of Control to Municipalities — Louisiana.** — *McCaffrey v. Cavanac*, 30 La. Ann. 882.

*Maine.* — *Bowers v. Barrett*, 85 Me. 382.

*Missouri.* — *Kerney v. Barber Asphalt Paving Co.*, 86 Mo. App. 573.

*New Jersey.* — *State v. Jersey City*, 37 N. J. L. 348; *Budd v. Camden Horse R. Co.*, 63 N. J. Eq. 804.

*New York.* — *Mitchell v. Halsey*, 15 Wend. (N. Y.) 241; *Milbau v. Sharp*, 17 Barb. (N. Y.) 435; *Williams v. New York Cent. R. Co.*, 18 Barb. (N. Y.) 222.

*Ohio.* — *Cincinnati Inclined Plane R. Co. v. Cincinnati*, 5 Ohio Dec. 562, 7 Ohio N. P. 541.

*Wisconsin.* — *Janesville v. Milwaukee, etc., R. Co.*, 7 Wis. 484.

4. *Chicago, etc., R. Co. v. West Chicago Park Com'rs*, 151 Ill. 204; *Deering v. Cumberland County*, 87 Me. 151; *Com. v. Plaisted*, 148 Mass. 375, 12 Am. St. Rep. 566; *Hall v. Concord*, 71 N. H. 367; *Metropolitan Exhibition Co. v. Newton*, 51 Hun (N. Y.) 639, 4 N. Y. Supp. 593.

In *Simon v. Northup*, 27 Oregon 487, Bean, C. J., in regard to the legislative control of city streets, said: "The law is too well settled to be questioned, that the public highways of a city are not the private property of the municipality, but are for the use of the general public, and that, as the legislature is the representative of the public at large, it has, in the absence of any constitutional restriction, paramount authority over such ways, and may grant the use or supervision and control thereof to some other governmental agency so long as they are not diverted to some use substantially different from that for which they were originally intended."

5. *Springfield v. Robberson Ave. R. Co.*, 69 Mo. App. 514.

6. *Macon Consol. St. R. Co. v. Macon*, 112 Ga. 782; *Wabash R. Co. v. Defiance*, 52 Ohio St. 262.

7. *Montgomery v. Parker*, 114 Ala. 118, 62 Am. St. Rep. 95; *Brigantine v. Holland Trust Co.*, (N. J. 1896) 35 Atl. Rep. 344.

8. **Ownership of Fee — United States.** — *Barney v. Keokuk*, 4 Dill. (U. S.) 593, 2 Fed. Cas. No. 1,032, affirmed 94 U. S. 324.

*Indiana.* — *Cox v. Louisville, etc., R. Co.*, 48 Ind. 178.

*Iowa.* — *Dubuque v. Maloney*, 9 Iowa 450, 74 Am. Dec. 358.

*Michigan.* — *Cooper v. Alden, Harr. (Mich.)* 72.

*Minnesota.* — *Rich v. Minneapolis*, 37 Minn. 423, 5 Am. St. Rep. 861.

*New York.* — *Drake v. Hudson River R. Co.*, 7 Barb. (N. Y.) 508; *People v. Law*, 34 Barb. (N. Y.) 494, 22 How. Pr. (N. Y.) 109; *Waterbury v. Dry Dock, etc., R. Co.*, 54 Barb. (N. Y.) 388; *People v. New York, (Supm. Ct. Spec. T.)* 20 How. Pr. (N. Y.) 144; *Hine v. New York El. R. Co.*, 54 Hun (N. Y.) 425; *New York v. New York Cent., etc., R. Co.*, 69 Hun (N. Y.) 324, affirmed 147 N. Y. 710; *Willoughby v. Jenks*, 20 Wend. (N. Y.) 96; *Kernochan v. New York El. R. Co.*, (N. Y. Super. Ct. Spec. T.) 8 N. Y. Supp. 648, affirmed 59 N. Y. Super. Ct. 561; *Mortimer v. New York El. R. Co.*, 57 N. Y. Super. Ct. 244; *Mott v. New York*, 2 Hilt. (N. Y.) 358.

*North Dakota.* — *Donovan v. Allert*, 11 N. Dak. 289.

*Ohio.* — *Cincinnati v. Newell*, 7 Ohio St. 37; *State v. Pittsburgh, etc., R. Co.*, 53 Ohio St. 189.

*Virginia.* — *Western Union Tel. Co. v. Williams*, 86 Va. 696, 19 Am. St. Rep. 908; *Hodges v. Seaboard, etc., R. Co.*, 88 Va. 653; *Page v. Belvin*, 88 Va. 985.

*Washington.* — *Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21.

*Wisconsin.* — *Burbach v. Schweinler*, 56 Wis. 386.

9. *Illinois.* — *Moses v. Pittsburgh, etc., R. Co.*, 21 Ill. 516; *Gebhardt v. Reeves*, 75 Ill. 301; *Shirk v. Chicago*, 195 Ill. 298.

Where the fee is retained by the landowner, the easement or right to the use and control of the street is regarded as a legal and not a mere equitable right.<sup>1</sup>

**Municipality Holds Title in Trust.** — Whether the fee of the street or a mere easement is vested in the municipality, it holds it in trust for the public for the ordinary and necessary purposes to which the streets of a city are usually subjected.<sup>2</sup>

**Where the Fee Is Retained by the Landowner It Passes,** as a rule, with the conveyance of the abutting land, and is in the owner for the time being of the abutting land;<sup>3</sup> but this is not necessarily so, as the owner of the abutting land and of the fee in the street may convey the abutting land without conveying the fee in the street.<sup>4</sup>

**c. TREES.** — Where the fee of the street is vested in the abutting lot owners, shade trees upon the margin of sidewalks are the property of such owners;<sup>5</sup> but it is otherwise where the fee of the street is in the municipality,<sup>6</sup> and this would seem to be true though the trees were planted by the abutting lot owners with the permission of the municipal authorities.<sup>7</sup> Where the municipality is the owner of the shade trees upon the margin of sidewalks, it may, under the general power to control its streets, prohibit injury to such trees by individuals,<sup>8</sup> and such a general prohibition applies fully to the owner of the abutting land,<sup>9</sup> except, of course, where the abutting lot owner, through his ownership of the fee of the street, is the owner of the trees, as in such a case he may remove them at pleasure.<sup>10</sup>

**Removal of Trees.** — Under the general power to control and regulate streets, the municipality may remove shade trees planted upon sidewalks which obstruct the use of the walk, even though the abutting lot owner is the owner of the trees.<sup>11</sup> Where a tree stands on the line of the street, partly on the street and partly on the land of the abutting owner, the municipality may remove the entire tree, if the removal of that part within the street is reasonably necessary and the portion left standing would be dangerous to travel.<sup>12</sup>

**Discretion of Municipality.** — It has been held that in the absence of fraud or

*Iowa.* — *Blennerhassett v. Forest City*, 117 Iowa 680.

*Kansas.* — *Smith v. Leavenworth*, 15 Kan. 81.

*Kentucky.* — *Hawesville v. Hawes*, 6 Bush (Ky.) 232.

*Massachusetts.* — *Gaylord v. King*, 142 Mass. 495.

*Missouri.* — *Thomas v. Hunt*, 134 Mo. 392.

*New York.* — *Kane v. New York El. R. Co.*, 125 N. Y. 164, *affirming* 15 Daly (N. Y.) 294; *New York v. Law*, 125 N. Y. 380, *affirming* 53 Hun (N. Y.) 637; *Duyckinck v. New York El. R. Co.*, 125 N. Y. 710, 34 N. Y. St. Rep. 876; *De Witt v. Elmira Transfer R. Co.*, 55 Hun (N. Y.) 612, 9 N. Y. Supp. 149, *affirmed* 134 N. Y. 495; *Hoag v. Pierce*, 65 Hun (N. Y.) 424; *Mattlage v. New York El. R. Co.*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 291; *Bartow v. Draper*, 5 Duer (N. Y.) 130.

*Wisconsin.* — *Kimball v. Kenosha*, 4 Wis. 321.

1. *Chicago v. Wright*, 69 Ill. 318.

2. *Denver Circle R. Co. v. Nestor*, 10 Colo. 403; *North Chicago St. R. Co. v. Cheetham*, 58 Ill. App. 318; *Springer v. Walters*, 37 Ill. App. 326, *affirmed* 139 Ill. 419; *Glasgow v. St. Louis*, 87 Mo. 678, *affirming* 15 Mo. App. 112; *People v. Kerr*, 37 Barb. (N. Y.) 357, *affirmed* 27 N. Y. 188.

3. *Gould v. Howe*, 131 Ill. 490; *Stetson v. French*, 16 Me. 204; *Palmer v. Dougherty*, 33 Me. 502, 54 Am. Dec. 636. See the title **BOUNDARIES**, vol. 4, p. 809.

4. *Harris v. Elliott*, 10 Pet. (U. S.) 25; *Knott v. Jefferson St. Ferry Co.*, 9 Oregon 530; *Iron Mountain R. Co. v. Bingham*, 87 Tenn. 522.

5. **Trees — Ownership by Abutting Owner.** — *Atlanta v. Holliday*, 96 Ga. 546; *Avis v. Vine-land*, 56 N. J. L. 474; *Lancaster v. Richardson*, 4 Lans. (N. Y.) 136; *Ellison v. Allen*, (Supm. Ct. Spec. T.) 30 N. Y. Supp. 441.

6. **Ownership by Municipality.** — *Atlanta v. Holliday*, 96 Ga. 546; *Baker v. Normal*, 81 Ill. 108; *Mt. Carmel v. Shaw*, 155 Ill. 37, 46 Am. St. Rep. 311. See also *Com. v. Wilder*, 127 Mass. 1.

7. *Baker v. Normal*, 81 Ill. 108.

8. *Consolidated Traction Co. v. East Orange*, 61 N. J. L. 202 (injury to trees by electric street railway).

9. *Baker v. Normal*, 81 Ill. 108 (ordinance prohibiting hitching horses to trees).

10. *Lancaster v. Richardson*, 4 Lans. (N. Y.) 136.

11. **Removal of Trees.** — *Vanderhurst v. Tholcke*, 113 Cal. 147; *Mt. Carmel v. Shaw*, 155 Ill. 37, 46 Am. St. Rep. 311, *reversing* 52 Ill. App. 429; *Hildrup v. Windfall City*, 29 Ind. App. 592; *Wilson v. Simmons*, 89 Me. 242; *Ellison v. Allen*, (Supm. Ct. Spec. T.) 30 N. Y. Supp. 441; *Chase v. Oshkosh*, 81 Wis. 313, 29 Am. St. Rep. 898. See also *Murray v. Norfolk County*, 149 Mass. 328.

12. *Wilson v. Simmons*, 89 Me. 242.

oppression, or circumstances disclosing a manifest abuse of discretion, the decision of the municipality that trees constitute an obstruction to the free use of the sidewalk is not open to question by the courts.<sup>1</sup> In a number of instances, however, the courts have prohibited the arbitrary action of municipalities in removing shade trees as obstructions to travel,<sup>2</sup> and statutes have sometimes been expressly enacted restricting the right of municipalities to remove shade trees standing in the streets.<sup>3</sup>

**Action by Property Owner for Injuries to Trees.** — It has been held that though the abutting lot owner is not the owner of the fee in the street, he may still recover damages as against a third party who wrongfully injures shade trees in front of his property.<sup>4</sup>

**Duty to Care for Trees.** — Where a municipal corporation under its charter powers plants or maintains shade trees on a sidewalk, the owner or occupant of the adjoining premises is not charged in the absence of statute with the duty of properly trimming such trees; but when the fee of the street and the ownership of the trees are in him, it is his duty to prevent the trees from becoming dangerous to travelers, and for an injury resulting from a neglect of this duty he is liable.<sup>5</sup>

**d. REMOVAL OF SOIL — By Property Owner.** — An abutting property owner has no right to remove, for his own use, the soil from the street, though he is the owner of the fee.<sup>6</sup>

**By Municipality.** — Where, in the improvement of streets by a municipality, it becomes necessary to remove the soil of the street, the municipality may use the soil so removed as against the abutting property owner in the improvement of the streets in other places.<sup>7</sup> The municipality has, however, no right to remove the soil from the street if such removal is not necessary for the proper improvement thereof.<sup>8</sup>

**e. TO WHAT USES MUNICIPALITY MAY PUT STREETS.** — The municipalities hold the streets, and power to regulate and control them, in trust for the public, and cannot put them to any use inconsistent with street purposes.<sup>9</sup>

1. *Vanderhurst v. Tholcke*, 113 Cal. 147. See also *Mt. Carmel v. Shaw*, 155 Ill. 37, 46 Am. St. Rep. 311, reversing 52 Ill. App. 429; *Chase v. Oshkosh*, 81 Wis. 313, 29 Am. St. Rep. 898.

2. *Atlanta v. Holliday*, 96 Ga. 546; *Everett v. Council Bluffs*, 46 Iowa 66; *Avis v. Vineland*, 56 N. J. L. 474; *Ellison v. Allen*, (Supm. Ct. Spec. T.) 30 N. Y. Supp. 441; *Evans v. Street Com'rs*, 84 Hun (N. Y.) 206.

3. *White v. Godfrey*, 97 Mass. 472; *Chase v. Lowell*, 149 Mass. 85.

4. *Rockford Gas Light, etc., Co. v. Ernst*, 68 Ill. App. 300; *Lovejoy v. Campbell*, (S. Dak. 1902) 92 N. W. Rep. 24. See also *L'Hussier v. Brosseau*, 20 Quebec Super. Ct. 170.

5. *Weller v. McCormick*, 52 N. J. L. 470, 47 N. J. L. 397, 54 Am. Rep. 175.

6. **Removal of Soil.** — *New Haven v. Sargent*, 38 Conn. 50, 9 Am. Rep. 360; *Matthiessen, etc., Zinc Co. v. La Salle*, 117 Ill. 411; *Palatine v. Kreuger*, 121 Ill. 72, reversing 20 Ill. App. 420; *Union Coal Co. v. La Salle*, 136 Ill. 119, affirming 34 Ill. App. 93; *Madison v. Mayers*, 97 Wis. 399, 65 Am. St. Rep. 127.

7. *New Haven v. Sargent*, 38 Conn. 50, 9 Am. Rep. 360; *Delphi v. Evans*, 36 Ind. 90, 10 Am. Rep. 12; *Cuming v. Prang*, 24 Mich. 514; *Bissell v. Collins*, 28 Mich. 277, 15 Am. Rep. 217; *St. Anthony Falls Water-power Co. v. King Wrought-iron Bridge Co.*, 23 Minn. 186, 23 Am. Rep. 682; *Robert v. Sadler*, 104 N. Y. 229, 58 Am. Rep. 498, reversing 37 Hun (N. Y.) 377; *Huston v. Ft. Atkinson*, 56 Wis. 350.

8. *Georgia*. — *Smith v. Rome*, 19 Ga. 89, 63 Am. Dec. 298; *Macon v. Hill*, 58 Ga. 595.

*Indiana*. — *Delphi v. Evans*, 36 Ind. 90, 10 Am. Rep. 12; *Haas v. Evansville*, 20 Ind. App. 482. *Compare Union Coal Co. v. La Salle*, 34 Ill. App. 93, affirmed 136 Ill. 119.

*Michigan*. — *Cuming v. Prang*, 24 Mich. 514. *Minnesota*. — *Althen v. Kelly*, 32 Minn. 280; *Rich v. Minneapolis*, 37 Minn. 423, 5 Am. St. Rep. 861.

*New Jersey*. — *Glasby v. Morris*, 18 N. J. Eq. 72.

*New York*. — *Robert v. Sadler*, 104 N. Y. 229, 58 Am. Rep. 498, reversing 37 Hun (N. Y.) 377.

A city, to secure the construction of a sewer in a street, entered into a contract with a person that he should take out the stone the whole width of the street and several feet in depth below the grade, construct the sewer, and refill the street to the original grade. As compensation he was to have the stone so removed. It was held that, as to so much of the stone as it was reasonably necessary to remove for the construction of the sewer, the owner of the soil had no cause of action against the city, but otherwise as to the residue. *Viliski v. Minneapolis*, 40 Minn. 304.

9. **Uses Inconsistent with Street Purposes.** — *Stack v. East St. Louis*, 85 Ill. 377, 28 Am. Rep. 619; *Indianapolis v. Croas*, 7 Ind. 9; *Haynes v. Thomas*, 7 Ind. 38; *Tate v. Ohio, etc., R. Co.*, 7 Ind. 479; *Lackland v. North Missouri R. Co.*,

But they may, as a general rule, do anything with a street which is not inconsistent with the ends for which streets are established.<sup>1</sup> Thus, cities have no right to use their streets for the erection of municipal buildings or works,<sup>2</sup> and it has been held that placing a standpipe in a public street, the fee of which was in the municipality, was an unlawful use of the street.<sup>3</sup> The right of the municipality to authorize the erection of monuments in streets with the consent of the owner of the fee has been upheld.<sup>4</sup>

*f.* GRANTS OF PRIVILEGES OR FRANCHISES IN STREETS—(1) *In General.*

—Municipalities have no implied power to grant privileges or franchises to use the streets for private purposes,<sup>5</sup> even though the particular street is little

31 Mo. 180; *Strader v. Cincinnati*, 1 Handy (Ohio) 446; *Green v. Trenton*, 54 N. J. L. 92.  
1. *Murphy v. Chicago*, 29 Ill. 279, 81 Am. Dec. 307.

The primary purpose of a public street is for the accommodation of public travel; but a portion not needed for such purpose may be set apart by the municipality for park or boulevard purposes. *McDonald v. St. Paul*, 82 Minn. 308, 83 Am. St. Rep. 428.

2. *Erection of Municipal Buildings, etc., in Street*—*Alabama*.—*Montgomery First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 45; *State v. Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564.

*Florida*.—*Lutterloh v. Cedar Keys*, 15 Fla. 306.

*Georgia*.—*Columbus v. Jaques*, 30 Ga. 506; *Savannah v. Willson*, 49 Ga. 476.

*Iowa*.—*Pettit v. Grand Junction*, (Iowa 1903) 93 N. W. Rep. 381.

*Michigan*.—*Cooper v. Alden, Harr.* (Mich.) 72.

*New Jersey*.—*Atty.-Gen. v. Heishon*, 18 N. J. Eq. 410.

*Pennsylvania*.—*Wartman v. Philadelphia*, 33 Pa. St. 202; *Com. v. Kepner*, 1 Pearson (Pa.) 182; *Harrisburg's Appeal*, (Pa. 1887) 10 Atl. Rep. 787.

*Texas*.—*O'Neal v. Sherman*, 77 Tex. 182, 19 Am. St. Rep. 743.

3. *Barrows v. Sycamore*, 150 Ill. 588, 41 Am. St. Rep. 400. See also *Davis v. Appleton*, 109 Wis. 580. See, however, *Savage v. Salem*, 23 Oregon 381, 37 Am. St. Rep. 688.

4. *Tompkins v. Hodgson*, 4 Thomp. & C. (N. Y.) 435.

5. *Grants of Privileges in Streets*—*United States*.—*Baltimore Trust, etc., Co. v. Baltimore*, 64 Fed. Rep. 153; *Russel v. The Brig Empire State, Newb. Adm.* 541, 21 Fed. Cas. No. 12,145.

*Alabama*.—*Mobile v. Louisville, etc., R. Co.*, 124 Ala. 132.

*California*.—*Wood v. San Francisco*, 4 Cal. 190.

*Illinois*.—*Hibbard v. Chicago*, 173 Ill. 91; *Snyder v. Mt. Pulaski*, 176 Ill. 397; *Chicago, etc., R. Co. v. Quincy*, 32 Ill. App. 377; *Chicago Gen. R. Co. v. Chicago City R. Co.*, 52 Ill. App. 502; *Chicago Telephone Co. v. Northwestern Telephone Co.*, 100 Ill. App. 57, affirmed 190 Ill. 324. *Compare* *Dickerson v. Le Roy*, 72 Ill. App. 588.

*Kentucky*.—*East Tennessee Telephone Co. v. Russellville*, 106 Ky. 667.

*Maryland*.—*Townsend v. Epstein*, 93 Md. 337, 86 Am. St. Rep. 441.

*Michigan*.—*Sullivan v. Bailey*, 125 Mich. 104, 7 Detroit Leg. N. 419.

*Missouri*.—*Dubach v. Hannibal, etc., R. Co.*, 89 Mo. 483; *Julia Bldg. Assoc. v. Bell Telephone Co.*, 13 Mo. App. 477; *Glasgow v. St. Louis*, 15 Mo. App. 112; *Burnes v. St. Joseph*, 91 Mo. App. 489.

*New Jersey*.—*Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242; *Domestic Tel., etc., Co. v. Newark*, 49 N. J. L. 344.

*New York*.—*Blaschko v. Wurster*, 156 N. Y. 437; *Bates v. Holbrook*, 171 N. Y. 460; *Metro-politan Exhibition Co. v. Newton*, 51 Hun (N. Y.) 639, 4 N. Y. Supp. 593; *Ely v. Compbell*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 333; *New York v. Heft*, 13 Daly (N. Y.) 301; *Gus-thal v. Strong*, 23 N. Y. App. Div. 315; *Norris v. Wurster*, 23 N. Y. App. Div. 124; *People v. Keating*, 62 N. Y. App. Div. 348; *Barhite v. Home Telephone Co.*, 50 N. Y. App. Div. 25.

*Ohio*.—*Brush Electric Light Co. v. Jones Bros. Electric Co.*, 3 Ohio Cir. Dec. 168, 5 Ohio Cir. Ct. 340; *Ampt v. Cincinnati*, 11 Ohio Cir. Dec. 805, 21 Ohio Cir. Ct. 300.

*Pennsylvania*.—*Rahsberry v. Keller*, 9 Pa. Co. Ct. 299.

See also *infra*, this title, *Railroads in Streets*; and the titles *ELECTRIC-LIGHT COMPANIES*, vol. 10, p. 869; *GAS COMPANIES*, vol. 14, p. 921; *STREET RAILWAYS*, *ante*, p. 16; *TELEGRAPHS AND TELEPHONES*, *post*; *WATERWORKS AND WATER COMPANIES*.

*Privilege of Advertising upon Waste Boxes in Streets*.—*State v. St. Louis*, 161 Mo. 371.

*Subway Conduits*.—*State v. Murphy*, 134 Mo. 554, 568, 56 Am. St. Rep. 515.

*Right to Construct Railroad Depots in Streets*.—*Daly v. Georgia Southern, etc., R. Co.*, 80 Ga. 793, 12 Am. St. Rep. 286; *Traphagen v. Jersey City*, 52 N. J. L. 65. See also *Platt v. Chicago, etc., R. Co.*, 74 Iowa 127, reversing (Iowa 1887) 31 N. W. Rep. 883.

The provision of the charter of the city of St. Paul authorizing the common council to grant "the right of way upon, over, and through any of the public streets" to any steam or horse railway company was held only to authorize the grant of the right to trackage, and not the right to occupy and use such grounds as a site for depots, freight houses, etc. *St. Paul v. Chicago, etc., R. Co.*, 63 Minn. 330.

*Public Scales*.—An abutting property owner has no implied right to erect scales in the street. *Emerson v. Babcock*, 66 Iowa 257, 55 Am. Rep. 273. Nor has the municipality any implied authority to authorize their erection. *Tell City v. Bielefeld*, 20 Ind. App. 1; *Berry-*

used by the public.<sup>1</sup>

**Delegation of Power by Legislature.** — The legislature, by virtue of its control over streets as public highways, may empower municipalities to authorize the use of streets for purposes other than passage.<sup>2</sup>

**Exclusive Privilege.** — The power conferred upon municipalities to grant street privileges and franchises is to be exercised as the public good requires, and therefore it is generally held that the mere power to grant certain privileges does not empower the municipality to grant an exclusive privilege or franchise so as to preclude the municipality from subsequently exercising the power and granting a similar privilege or franchise to another;<sup>3</sup> but the fact that the

*Horn Coal Co. v. Scruggs-McClure Coal Co.*, 62 Mo. App. 93.

1. *Marine Ins. Co. v. St. Louis, etc.*, R. Co., 41 Fed. Rep. 643.

2. **Delegation of Power by Legislature** — *United States*. — *Levis v. Newton*, 75 Fed. Rep. 884; *Pike's Peak Power Co. v. Colorado Springs*, 105 Fed. Rep. 1, 44 C. C. A. 333.

*Georgia*. — *Kirtland v. Macon*, 66 Ga. 385; *Hanbury v. Woodward Lumber Co.*, 98 Ga. 54; *Dannenberg v. Macon*, 114 Ga. 174.

*Illinois*. — *Quincy v. Bull*, 106 Ill. 337; *Dickson v. Kewanee Electric Light, etc.*, Co., 53 Ill. App. 379.

*Indiana*. — *Crowder v. Sullivan*, 128 Ind. 486.

*Iowa*. — *Spencer v. Andrew*, 82 Iowa 14;

*Hanson v. Hunter*, 86 Iowa 722.

*Kentucky*. — *Louisville v. Louisville Water Co.*, 105 Ky. 754.

*Maine*. — *Taylor v. Portsmouth, etc.*, St. R. Co., 91 Me. 193, 64 Am. St. Rep. 216.

*Michigan*. — *Kalamazoo v. Kalamazoo Heat, etc.*, Co., 124 Mich. 74.

*Missouri*. — *Western Union Tel. Co. v. Guernsey, etc.*, Electric Light Co., 46 Mo. App. 120.

*Montana*. — *Hershfield v. Rocky Mountain Bell Telephone Co.*, 12 Mont. 102.

*New Jersey*. — *Benton v. Elizabeth*, 61 N. J. L. 693.

*New York*. — *Palmer v. Larchmont Electric Co.*, 158 N. Y. 231; *Johnson v. Thomson-Houston Electric Co.*, 54 Hun (N. Y.) 469; *Consumers' Gas, etc.*, Co. v. Congress Spring Co., 61 Hun (N. Y.) 133; *Chapman v. Albany, etc.*, R. Co., 10 Barb. (N. Y.) 360; *Smith v. Metropolitan Gas-Light Co.*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 187; *People v. Thompson*, (Supm. Ct.) 65 How. Pr. (N. Y.) 407; *Brooklyn v. Jourdan*, (Brooklyn City Ct.) 7 Abb. N. Cas. (N. Y.) 23; *Tuttle v. Brush Electric Illuminating Co.*, 50 N. Y. Super. Ct. 464.

*Ohio*. — *Cincinnati v. Covington, etc.*, Bridge Co., 10 Ohio Cir. Dec. 792, 20 Ohio Cir. Ct. 396; *Prentiss v. Cleveland Telephone Co.*, 1 Ohio Dec. 97, 32 Cinc. L. Bul. 13.

*Pennsylvania*. — *Butler's Appeal*, (Pa. 1886) 6 Atl. Rep. 708; *Allegheny's Appeal*, (Pa. 1887) 11 Atl. Rep. 658.

See also the titles **ELECTRIC-LIGHT COMPANIES**, vol. 10. D. 863; **GAS COMPANIES**, vol. 14, pp. 920, 921; **STREET RAILWAYS**, *ante*, D. 14; **TELEGRAPHS AND TELEPHONES**, *post*; **WATERWORKS AND WATER COMPANIES**. And see *infra*, this title, *Railroads in Streets*.

**Street Fair Privileges.** — *Richmond v. Smith*, (Pa. 1903) 43 S. E. Rep. 345.

**Use of Streets by Contractors for Construction of Subway in New York City.** — *Bates v. Holbrook*, 171 N. Y. 460.

**Millrace.** — *State v. Cowgill, etc.*, Milling Co., 156 Mo. 620.

**Turnpike Franchises.** — *People v. Green*, 116 Mich. 505. See also the title **TURNPIKES AND TOLL ROADS**.

**Subway Conduits.** — *Erwin v. Central Union Telephone Co.*, 148 Ind. 365; *Chesapeake, etc.*, Telephone Co. v. Baltimore, 89 Md. 689; *National Subway Co. v. St. Louis*, 169 Mo. 319; *Cincinnati v. Cincinnati Edison Electric Co.*, 11 Ohio Dec. (Reprint) 315, 26 Cinc. L. Bul. 104; *Edison General Electric Co. v. Cincinnati*, Ohio Prob. 304.

**Pipes to Supply Steam for Heating and Power.** — *Kumler v. Cincinnati*, 6 Ohio Dec. (Reprint) 1018.

**Private Drain.** — *Stevens v. Muskegon*, 111 Mich. 74; *Kumler v. Silsbee*, 38 Ohio St. 445.

**Scales.** — In *Iowa* it is held that a city empowered "to provide for the measuring or weighing of hay, coal, or any other articles of sale" has the power to authorize an abutting property owner to erect scales in the street. *Spencer v. Andrew*, 82 Iowa 14. See, however, *Tell City v. Bielefeld*, 20 Ind. App. 1.

3. **Exclusive Privileges** — *United States*. — *New Orleans City R. Co. v. Crescent City R. Co.*, 12 Fed. Rep. 308; *Jackson County Horse R. Co. v. Interstate Rapid Transit R. Co.*, 24 Fed. Rep. 306; *Saginaw Gas-Light Co. v. Saginaw*, 28 Fed. Rep. 529; *Grand Rapids Electric Light, etc.*, Co. v. *Grand Rapids Edison Electric Light, etc.*, Co., 33 Fed. Rep. 659.

*Alabama*. — *Birmingham, etc.*, R. Co. v. *Birmingham St. R. Co.*, 79 Ala. 465, 58 Am. Rep. 615.

*Connecticut*. — *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19.

*Florida*. — *Capital City Light, etc.*, Co. v. *Tallahassee*, 42 Fla. 462.

*Illinois*. — *Chicago Telephone Co. v. Northwestern Telephone Co.*, 100 Ill. App. 57, *affirmed* 199 Ill. 324.

*Indiana*. — *Citizens' Gas, etc.*, Co. v. *Elwood*, 114 Ind. 332.

*Louisiana*. — *New Orleans, etc.*, R. Co. v. *New Orleans*, 44 La. Ann. 728.

*Michigan*. — *People v. Carpenter*, 1 Mich. 273.

*Mississippi*. — See also *Reid v. Trowbridge*, 78 Miss. 542.

*New Jersey*. — *Compare Atlantic City Water Works Co. v. Atlantic City*, 30 N. J. Eq. 367.

*New York*. — *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167; *Parfitt v. Furguson*, 159



attempt is made to render the grant exclusive does not render it void *in toto*.<sup>1</sup> An exclusive grant may be authorized by the legislature.<sup>2</sup>

**Compensation to Abutting Owners.** — Any proper exercise of governmental power over a street in a municipality for purposes which do not directly encroach upon the abutting property of an individual, though the consequence may be to impair its use, will not entitle the adjoining proprietor to compensation,<sup>3</sup> for he has been compensated at the time of the dedication or appropriation of the land for a street for injuries resulting from its use as such, or for purposes properly incidental to such use; and such incidental uses do not constitute an additional servitude.<sup>4</sup> But when an additional servitude is imposed, the abutting property owner is entitled to compensation.<sup>5</sup> Thus, abutting owners are entitled to compensation where streets are authorized to be used by ordinary commercial railroads,<sup>6</sup> or for the erection of a permanent railroad station in the street.<sup>7</sup>

(2) **Exercise of Power.** — Where the statute conferring upon the municipality the power to grant street privileges or franchises specifies the manner in which the power shall be exercised, such requirement must be followed in the exercise of the power.<sup>8</sup> Thus, when required by statute, the privilege or franchise must be sold,<sup>9</sup> and when the charter prescribes that franchises can be granted by ordinance, it is not competent to make such a grant by resolution;<sup>10</sup> but in the absence of such a charter or statutory restriction, the power may be exercised by resolution.<sup>11</sup>

**Discretion of Municipality.** — Where the power to grant street privileges or fran-

N. Y. 111; *State v. New York*, 3 Duer (N. Y.) 119.

**Ohio.** — *State v. Cincinnati Gas-Light, etc.*, Co., 18 Ohio St. 262; *Cincinnati St. R. Co. v. Smith*, 29 Ohio St. 291; *Toledo Consol. St. R. Co. v. Toledo Electric St. R. Co.*, 3 Ohio Cir. Dec. 493, 6 Ohio Cir. Ct. 362; *Cleveland, etc., R. Co. v. Cincinnati*, Ohio Prob. 269.

**Pennsylvania.** — *Meadville Fuel Gas Co.'s Appeal*, (Pa. 1886) 4 Atl. Rep. 733. See, however, *Meadville Natural Gas Co. v. Meadville Fuel Gas Co.*, 1 Pa. Co. Ct. 448.

**Rhode Island.** — *Smith v. Westerly*, 19 R. I. 437.

**Tennessee.** — *Memphis City R. Co. v. Memphis*, 4 Coldw. (Tenn.) 406.

**West Virginia.** — *Parkersburg Gas Co. v. Parkersburg*, 30 W. Va. 435.

1. *Quincy v. Bull*, 106 Ill. 337; *Carlyle Water, etc., Co. v. Carlyle*, 31 Ill. App. 325. See also *Illinois Trust, etc., Bank v. Arkansas City*, (C. C. A.) 76 Fed. Rep. 271; *Patton v. Chattanooga*, 108 Tenn. 197.

2. *Pereria v. Wallace*, 129 Cal. 397; *Covington Gaslight Co. v. Covington*, 58 S. W. Rep. 805, 22 Ky. L. Rep. 796; *Willamette Iron Works v. Oregon R., etc., Co.*, 26 Oregon 224, 46 Am. St. Rep. 620.

3. **Compensation to Abutting Owner.** — *Western Union Tel. Co. v. Guernsey, etc., Electric Light Co.*, 46 Mo. App. 120; *Loeber v. Butte General Electric Co.*, 16 Mont. 1, 50 Am. St. Rep. 468; *Kelsev v. King*, 32 Barb. (N. Y.) 410, 11 Abb. Pr. (N. Y.) 180; *McDevitt v. People's Natural Gas Co.*, 160 Pa. St. 367; *Provost v. New Chester Water Co.*, 162 Pa. St. 275, 34 W. N. C. (Pa.) 572. See the titles *ELECTRIC-LIGHT COMPANIES*, vol. 10, p. 868; *GAS COMPANIES*, vol. 14, p. 921; *STREET RAILWAYS*, ante, n. 27; *TELEGRAPHS AND TELEPHONES*, post; *WATERWORKS AND WATER COMPANIES*.

4. *Willamette Iron Works v. Oregon R., etc.*,

*Co.*, 26 Oregon 224, 46 Am. St. Rep. 620. See also title *EMINENT DOMAIN*, vol. 10, p. 1130.

5. *McLean v. Brush Electric Light Co.*, 8 Ohio Dec. (Reprint) 619, 9 Cinc. L. Bul. 65; *Willamette Iron Works v. Oregon R., etc., Co.*, 26 Oregon 224, 46 Am. St. Rep. 620. And see the reference in the last note, *supra*.

6. See *infra*, this title, *Railroads in Streets*.

7. *Barney v. Keokuk*, 4 Dill. (U. S.) 593, 2 Fed. Cas. No. 1,032, affirmed 94 U. S. 324.

8. **Exercise of Power — Following Statutory Requirements.** — *Morristown v. East Tennessee Telephone Co.*, (C. C. A.) 115 Fed. Rep. 304; *Hanson v. Hunter*, 86 Iowa 722; *Keokuk v. Ft. Wayne Electric Co.*, 90 Iowa 67; *Metropolitan City R. Co. v. Chicago*, 96 Ill. 620; *Indianapolis v. Miller*, 27 Ind. 394; *Hunt v. Lambertville*, 45 N. J. L. 279; *People's Gas-Light Co. v. Jersey City*, 46 N. J. L. 297; *West Jersey Traction Co. v. Camden Horse R. Co.*, 52 N. J. Eq. 452.

The *California Act* of March 11, 1901, requiring street privileges and franchises to be granted "upon the conditions in this act provided, and not otherwise," is imperative, and requires strict performance as to both time and manner. *Pacific Electric Co. v. Los Angeles*, 118 Fed. Rep. 746.

9. *Pacific Electric Co. v. Los Angeles*, 118 Fed. Rep. 746; *Thompson v. Alameda County*, 111 Cal. 553; *Daly v. Georgia Southern, etc., R. Co.*, 80 Ga. 793, 12 Am. St. Rep. 286; *Board of Liquidation v. New Orleans*, 32 La. Ann. 915.

10. *Morristown v. East Tennessee Telephone Co.*, (C. C. A.) 115 Fed. Rep. 304; *Halsey v. Newark*, 54 N. J. L. 102; *West Jersey Traction Co. v. Shivers*, 58 N. J. L. 124. See also *Indianapolis v. Miller*, 27 Ind. 304.

11. *Merchants' Union Barb-Wire Co. v. Chicago, etc., R. Co.*, 70 Iowa 105; *Babcock v. Scranton Traction Co.*, 1 Lack. Leg. N. (Pa.) 223.

chises is conferred upon the municipality, the exercise of this power is discretionary with the municipality, and its action is not, as a rule, subject to control by the courts.<sup>1</sup>

**Imposing Conditions.** — Where the power to grant is discretionary, the municipality is not restricted to granting or refusing to grant privileges or franchises, but in granting them may impose such conditions and restrictions as it may deem expedient for the good of the public.<sup>2</sup> In a few cases, however, the right to impose unreasonable conditions or restrictions has been denied.<sup>3</sup>

**The Power Cannot Be Delegated,** but must be exercised by the municipality through the officers specified by the statutes.<sup>4</sup>

(3) **Construction and Extent of Privilege or Franchise.** — It is a well-settled rule of construction that where special street privileges or franchises are granted which interfere with the authority of the municipality to control its streets, and with the free use thereof by the public, the grant must be construed strictly in favor of the public and against the grantee.<sup>5</sup>

**Exclusiveness of Privilege or Franchise.** — The grant will not be construed as conferring an exclusive privilege in the absence of language expressly so providing.<sup>6</sup>

(4) **Termination of Privilege.** — The right to exercise the privilege or franchise terminates upon the expiration of the time for which the grant is made.<sup>7</sup>

**Revocation.** — Grants by a municipality under legislative authority of special street privileges or franchises have been recognized as grants of vested rights of which the grantee cannot, as a rule, be deprived at the will of the municipality,<sup>8</sup> though the municipality has the right to impose reasonable regula-

1. *Foreman v. New Orleans, etc.*, R. Co., 40 La. Ann. 446; *Adamson v. Nassau Electric R. Co.*, 89 Hun (N. Y.) 261; *State v. Spokane*, 24 Wash. 53.

2. **Imposing Conditions** — *United States*. — *Southern Bell Telephone, etc., Co. v. Richmond*, 103 Fed. Rep. 31, 44 C. C. A. 147; *Pacific R. Co. v. Leavenworth*, 1 Dill. (U. S.) 393, 18 Fed. Cas. No. 10,649.

*Illinois*. — *Chicago, etc., R. Co. v. Dunbar*, 100 Ill. 110; *People v. Suburban R. Co.*, 178 Ill. 594.

*Indiana*. — *Coverdale v. Edwards*, 155 Ind. 374.

*Kansas*. — *Eureka Light, etc., Co. v. Eureka*, 5 Kan. App. 669.

*Kentucky*. — *Covington St. R. Co. v. Covington*, 9 Bush (Ky.) 127.

*Maryland*. — *Northern Cent. R. Co. v. Baltimore*, 21 Md. 93.

*New York*. — *Troy v. Troy, etc.*, R. Co., 49 N. Y. 657; *Matter of Kings County El. R. Co.*, 105 N. Y. 97; *New York, etc., R. Co. v. New York*, 1 Hilt. (N. Y.) 562.

*Ohio*. — *Chicago, etc., R. Co. v. Hamilton*, 2 Ohio Cir. Dec. 259, 3 Ohio Cir. Ct. 485; *Newark Gas, etc., Co. v. Newark*, 8 Ohio Dec. 418, 7 Ohio N. P. 76; *Cincinnati v. Cincinnati St. R. Co.*, 1 Ohio Dec. 591, 31 Cinc. Law Bul. 308.

*Pennsylvania*. — *Harrisburg v. Pennsylvania Telephone Co.*, 15 Pa. Co. Ct. 518.

*Texas*. — *Indianola v. Gulf, etc., R. Co.*, 56 Tex. 594; *Taylor v. Dunn*, 80 Tex. 652.

3. *People v. Mutual Gas-Light Co.*, 38 Mich. 154; *Sewickley M. E. Church v. Independent Natural Gas Co.*, 22 Pittab. Leg. J. N. S. (Pa.) 274; *Forty Fort v. Forty Fort Water Co.*, 9 Kulp (Pa.) 241; *Aberdeen v. Honey*, 8 Wash. 251.

4. *State v. Bell*, 34 Ohio St. 194.

5. **Grants Strictly Construed.** — *Montgomery v. Capital City Water Co.*, 92 Ala. 361; *Newport v. Newport Light Co.*, 89 Ky. 454; *New Orleans Gas Light Co. v. Hart*, 40 La. Ann. 474, 8 Am. St. Rep. 544; *Baltimore v. Chesapeake, etc., Telephone Co.*, 92 Md. 692; *Ransom v. Citizens' R. Co.*, 104 Mo. 375; *Wabash R. Co. v. Defiance*, 52 Ohio St. 262.

6. **Exclusiveness of Privilege** — *United States*. — *Citizens' St. R. Co. v. Jones*, 34 Fed. Rep. 579.

*California*. — *Oakland R. Co. v. Oakland, etc.*, R. Co., 45 Cal. 365, 13 Am. Rep. 181.

*Connecticut*. — *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19.

*Indiana*. — *Vincennes v. Citizens' Gas Light Co.*, 132 Ind. 114; *Rushville v. Rushville Natural Gas Co.*, 132 Ind. 575.

*Kansas*. — *Coffeyville Min., etc., Co. v. Citizens' Natural Gas, etc., Co.*, 55 Kan. 173.

*New York*. — *Syracuse Water Co. v. Syracuse*, 116 N. Y. 167; *Empire City Subway Co. v. Broadway, etc., R. Co.*, 159 N. Y. 555, 87 Hun (N. Y.) 279.

*Ohio*. — *State v. Cincinnati Gas-Light, etc., Co.*, 18 Ohio St. 262.

*Texas*. — *Gulf City St. R. Co. v. Galveston City R. Co.*, 65 Tex. 502.

7. **Termination of Privilege.** — *Mutual Union Tel. Co. v. Chicago*, 16 Fed. Rep. 309, 11 Bias. (U. S.) 539; *Louisville Trust Co. v. Cincinnati*, 73 Fed. Rep. 716; *Keokuk Gaslight, etc., Co. v. Keokuk*, 80 Iowa 137; *Canal, etc., St. R. Co. v. New Orleans*, 39 La. Ann. 709.

8. **Revocation** — *United States*. — *St. Louis v. Western Union Tel. Co.*, 63 Fed. Rep. 68.

*Illinois*. — *Quincy v. Bull*, 106 Ill. 337, affirming 9 Ill. App. 127; *Chicago Municipal Gas Light, etc., Co. v. Lake*, 130 Ill. 43, affirming 27 Ill. App. 346; *Gregsten v. Chicago*, 145

tions upon the exercise of the franchise.<sup>1</sup> A mere license from a municipality, however, to maintain in a street an obstruction which otherwise would be illegal has been recognized as revocable at the will of the municipality.<sup>2</sup>

**Forfeiture.** — Where the grant is made upon certain conditions, the failure of the grantee to perform such conditions will operate as a forfeiture of the privilege or franchise.<sup>3</sup> But the municipality may waive such a forfeiture,<sup>4</sup> and where there is a condition subsequent, and the privilege becomes vested, the forfeiture cannot be enforced by an ordinance attempting to revoke the grant, but only by a judicial proceeding.<sup>5</sup>

**g. REMOVAL OF SNOW AND ICE FROM SIDEWALKS.** — Though there are decisions to the contrary,<sup>6</sup> the right of the legislature to impose upon property owners the duty of removing snow and ice from the sidewalks in front of their property,<sup>7</sup> or to delegate to municipalities the authority to require such removal,<sup>8</sup> has been recognized. In the absence of any statutory or municipal

Ill. 451, 36 Am. St. Rep. 496; Chicago Telephone Co. v. Northwestern Telephone Co., 100 Ill. App. 57, affirming 199 Ill. 324.

Indiana. — Indianapolis v. Consumers' Gas Trust Co., 140 Ind. 107, 49 Am. St. Rep. 183.

Louisiana. — New Orleans v. Great Southern Telephone, etc., Co., 40 La. Ann. 41, 8 Am. St. Rep. 502; Vicksburg, etc., R. Co. v. Monroe, 48 La. Ann. 1102.

New Jersey. — Hudson Telephone Co. v. Jersey City, 49 N. J. L. 303, 60 Am. Rep. 619; Phillipsburg Electric Lighting, etc., Co. v. Phillipsburg, 66 N. J. L. 505.

New York. — Matter of Kings County El. R. Co., 105 N. Y. 97; Brooklyn Cent. R. Co. v. Brooklyn City R. Co., 32 Barb. (N. Y.) 358; Delaware, etc., R. Co. v. Buffalo, 65 Hun (N. Y.) 464.

Ohio. — Cincinnati, etc., R. Co. v. Carthage, 36 Ohio St. 631.

Oregon. — Savage v. Salem, 23 Oregon 381, 37 Am. St. Rep. 688.

Pennsylvania. — Avoca v. Pittston, etc., R. Co., 7 Kulp (Pa.) 470.

Texas. — Rio Grande R. Co. v. Brownsville, 45 Tex. 88.

Wisconsin. — Ashland v. Wheeler, 88 Wis. 607.

Compare Lake Roland El. R. Co. v. Baltimore, 77 Md. 352.

**Privilege of Constructing Vault under Sidewalk.** — Under legislative authority, a city granted a permit to a person to make a vault under an alley, and took from such person a bond in which the city reserved the right to revoke the permit whenever the public interest should require. It was held that unless the public interest in fact required the abandonment of the vault, the city could not revoke the permit, as the permit constituted a contract not revocable at mere will. Gregsten v. Chicago, 145 Ill. 451, 36 Am. St. Rep. 496.

**Privilege of Erecting Scales in Street.** — Spencer v. Andrew, 82 Iowa 14.

**1. May Impose Reasonable Regulations.** — Alabama. — Montgomery v. Capital City Water Co., 92 Ala. 361.

California. — Arcata v. Arcata, etc., R. Co., 92 Cal. 639.

Illinois. — Chicago, etc., R. Co. v. Joliet, 79 Ill. 25; Quincy v. Bull, 106 Ill. 337.

Kansas. — Wyandotte v. Corrigan, 35 Kan. 21.

Michigan. — Detroit v. Ft. Wayne, etc., R. Co., 90 Mich. 646.

Missouri. — Springfield R. Co. v. Springfield, 85 Mo. 674.

New Jersey. — Water Com'rs v. Hudson, 13 N. J. Eq. 420.

New York. — Matter of Deering, 93 N. Y. 361.

Pennsylvania. — Frankford, etc., Pass. R. Co. v. Philadelphia, 58 Pa. St. 119, 98 Am. Dec. 242; Pittsburgh's Appeal, 115 Pa. St. 4; Philadelphia v. Western Union Tel. Co., 11 Phila. (Pa.) 327, 33 Leg. Int. (Pa.) 129.

**2. License to Maintain Obstruction Revocable.** — Winter v. Montgomery, 83 Ala. 589; Denver v. Girard, 21 Colo. 447; Augusta v. Burum, 93 Ga. 68; Indianapolis v. Miller, 27 Ind. 394; Shepherd v. Third Municipality, 6 Rob. (La.) 349, 41 Am. Dec. 269; Everett v. Marquette, 53 Mich. 450; Eddy v. Granger, 19 R. I. 105; Norfolk v. Chamberlaine, 29 Gratt. (Va.) 534.

**3. Forfeiture.** — Pacific R. Co. v. Leavenworth, 1 Dill. (U. S.) 393, 18 Fed. Cas. No. 10,649; Chicago Municipal Gas Light, etc., Co. v. Lake, 130 Ill. 42, affirming 27 Ill. App. 346.

**4.** Chicago City R. Co. v. People, 73 Ill. 541.

**5.** Citizens' Horse R. Co. v. Belleville, 47 Ill. App. 388, affirmed 152 Ill. 171; Knight v. Kansas City, etc., R. Co., 70 Mo. 231.

**6. Removal of Snow and Ice.** — Gridley v. Bloomington, 88 Ill. 554, 30 Am. Rep. 566; Chicago v. O'Brien, 111 Ill. 532, 53 Am. Rep. 640; State v. Jackman, 69 N. H. 318.

**7.** Agents solely for the rental or sale of property are not within the meaning of Act Cong., March 2, 1897, requiring owners, agents, or tenants of real estate within the District of Columbia to remove snow and ice from sidewalks in front of their property. Holtsman v. U. S., 14 App. Cas. (D. C.) 454.

**8.** Clinton v. Welch, 166 Mass. 133; Com. v. Goddard, Thach. Crim. Cas. (Mass.) 420, 16 Pick. (Mass.) 504, 28 Am. Dec. 259; Carthage v. Frederick, 122 N. Y. 268, 19 Am. St. Rep. 490. See also Vandye v. Cincinnati, 1 Disney (Ohio) 532.

**"Building."** — It has been held that the term "building," as used in a municipal ordinance requiring the removal of snow by the tenant or owner of any "building," includes a tenement, so that where a building consists of two tenements, one of which is occupied by a tenant and the other is vacant, it is the owner's

requirement, no duty to remove snow and ice therefrom is imposed upon such owners.<sup>1</sup>

**2. Obstruction of Streets — a. IN GENERAL.** — The primary purpose of streets is for the free passage of the public, and individuals have no authority to obstruct such use,<sup>2</sup> nor can the right to obstruct streets be acquired by prescription,<sup>3</sup> or by permission from the municipality given without legislative authority.<sup>4</sup> But from the necessity of the case persons may be justified in making particular uses of streets which to a limited extent operate as an obstruction of free passage.<sup>5</sup> The power to prevent the obstruction of streets is, as a rule, expressly conferred upon municipalities.<sup>6</sup>

**b. PARTICULAR OBSTRUCTIONS — (1) Deposit of Building Materials.** — Owners of abutting lots have a right to the use of a reasonable or necessary part of the street on which to deposit building materials while erecting buildings,<sup>7</sup> and the same has been held with regard to the temporary deposit of earth excavated from building sites.<sup>8</sup> This right of deposit arises of necessity, otherwise the construction of buildings in cities would be impossible.<sup>9</sup> But the abutting owner can make only a reasonable use of the street for such purposes,<sup>10</sup> and the municipality has a right to prescribe terms and conditions for the deposit of building materials which are reasonably proper to secure the safety of persons passing along the street.<sup>11</sup>

**(2) Removal of Merchandise or Other Property from and to Buildings.** — Abutting property owners are entitled to make a reasonable use of the street for the purpose of moving property or merchandise to and from their build-

duty to remove the snow and ice from the sidewalk. *Easthampton v. Hill*, 162 Mass. 302.

**"Flagged" Sidewalk.** — Under a city ordinance requiring the removal of snow and ice from sidewalks, but excepting walks which have not been curbed, guttered, and flagged, the sidewalk is to be deemed sufficiently flagged to impose upon the abutting owner the duty to remove the snow and ice, where a line of flagstones four feet in width has been laid in the centre of the walk, although the entire width of the walk has not been covered thereby. *New York v. Brown*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 218.

**Liability to Pedestrians.** — The failure of an abutting property owner to remove snow and ice from the sidewalk as required by a city ordinance does not impose any liability upon him for injuries to pedestrians. *Flynn v. Canton Co.*, 40 Md. 312, 17 Am. Rep. 603. See also *Vandyke v. Cincinnati*, 1 Disney (Ohio) 532.

1. *Kirby v. Boylston Market Assoc.*, 14 Gray (Mass.) 249, 74 Am. Dec. 682; *Vandyke v. Cincinnati*, 1 Disney (Ohio) 532.

The owner of a building, part of which he has let to one tenant and the rest to another, is not liable for neglect to remove snow from the adjoining sidewalk under a city ordinance which provides that it shall be removed by the "tenant, occupant, and, in case there shall be no tenant, the owner," although the owner occupies rooms in the building as a boarder with one of his tenants. *Com. v. Watson*, 97 Mass. 562.

**2. Obstruction of Streets.** — *State v. Mobile*, 5 Port. (Ala.) 279, 30 Am. Dec. 564; *Louth v. Thompson*, 1 Penn. (Del.) 149; *Columbus v. Jaques*, 30 Ga. 506; *Hibbard v. Chicago*, 173 Ill. 91; *Com. v. Smyth*, 14 Gray (Mass.) 33; *Atlantic City v. Snee*, 68 N. J. L. 39; *Northern Pac. R. Co. v. Lake*, 10 N. Dak. 541; *Winslow v. Cincinnati*, 9 Ohio Dec. 89, 6 Ohio N. P. 47.

**Guy Wire.** — *Lundeen v. Livingston Electric Light Co.*, 17 Mont. 32.

**Flagstaff.** — *Dreher v. Yates*, 43 N. J. L. 473. Compare *Allegheny v. Zimmerman*, 95 Pa. St. 287, 40 Am. Rep. 649.

**Hitching Post.** — *Gray v. Henry County*, (Ky. 1897) 42 S. W. Rep. 333. Compare *Weinstein v. Terre-Haute*, 147 Ind. 556.

3. *Webb v. Demopolis*, 95 Ala. 116. *Harn v. Dadeville*, 100 Ala. 199; *Lewiston v. Booth*, 3 Idaho 692; *Waterloo v. Union Mill Co.*, 72 Iowa 437; *Wyman v. St. Johns*, 100 Mich. 571; *Boyer v. Little Falls*, 5 N. Y. App. Div. 1; *Elster v. Springfield*, 49 Ohio St. 82. Compare *Big Rapids v. Comstock*, 65 Mich. 78.

4. *Webb v. Demopolis*, 95 Ala. 116.

5. *Denver v. Mullen*, 7 Colo. 345; *Brown v. Duplessis*, 14 La. Ann. 854.

6. *Shinkle v. Covington*, 83 Ky. 420.

7. **Deposit of Building Materials.** — *King v. Cleveland*, 28 Fed. Rep. 835; *Wood v. Mears*, 12 Ind. 515, 74 Am. Dec. 222; *O'Linda v. Lothrop*, 21 Pick. (Mass.) 297, 32 Am. Dec. 261; *State v. Omaha*, 14 Neb. 265, 45 Am. Rep. 108; *Clark v. Fry*, 8 Ohio St. 358, 72 Am. Dec. 590; *Palmer v. Silverthorn*, 32 Pa. St. 65; *Mallory v. Griffey*, 85 Pa. St. 275; *Raymond v. Keseberg*, 84 Wis. 302.

8. *Hundhausen v. Bond*, 36 Wis. 29; *Raymond v. Sheboygan*, 70 Wis. 318.

9. *O'Linda v. Lothrop*, 21 Pick. (Mass.) 297, 32 Am. Dec. 261.

10. *Wilson v. West, etc., Mill Co.*, 28 Wash. 312; *Hundhausen v. Bond*, 36 Wis. 29; *Raymond v. Keseberg*, 84 Wis. 302.

11. *King v. Cleveland*, 28 Fed. Rep. 835; *McCarthy v. Chicago*, 53 Ill. 38; *Martin v. Chicago, etc.*, R. Co., 87 Ill. App. 208; *Lowell v. Simpson*, 10 Allen (Mass.) 88; *Whalen v. Willis*, 18 N. Y. App. Div. 350; *Naylor v. Glasier*, 5 Duer (N. Y.) 161.

ings, though such use may temporarily obstruct the free use of the street by the public, as in the case of the removal of merchandise by tradesmen to and from their stores.<sup>1</sup> Thus, the right of a merchant to place skids temporarily across a sidewalk to remove merchandise from a store has been upheld.<sup>2</sup> But the use for this as for other purposes must be reasonable and must be subordinate to the general rights of the public.<sup>3</sup> Thus, it has been held unreasonable to appropriate half of a much traveled street for alternate hours each day for loading and unloading goods from wagons,<sup>4</sup> or to obstruct the sidewalk by placing skids across it for four or five hours each day.<sup>5</sup> Whether the use in the particular case is reasonable must be determined from the surrounding facts and circumstances.<sup>6</sup>

(3) *Deposit or Display of Merchandise, etc., on Sidewalks.*—Abutting property owners have no right to use any portion of the sidewalk for the deposit and display of merchandise or other articles kept for sale,<sup>7</sup> nor have they the right to place upon the sidewalks showboards, placards, or other articles.<sup>8</sup> It has been held that the municipality cannot, without legislative authority, grant the privilege of using sidewalks for such purposes,<sup>9</sup> and a license from the municipality permitting the use of a certain portion of the sidewalk for the display of merchandise is revocable.<sup>10</sup>

(4) *Booths and Stands on Sidewalks.*—Neither abutting owners nor other persons have any right to obstruct sidewalks by booths or stands for the sale of fruit, papers, etc.,<sup>11</sup> nor has the municipality any implied power to authorize the erection upon sidewalks of such booths or stands.<sup>12</sup> But the power to

1. *Removal of Property to and from Abutting Building*—*England.*—*Atty.-Gen. v. Brighton, etc., Co-operative Supply Assoc.,* (1900) 1 Ch. 276, 69 L. J. Ch. 204, 81 L. T. N. S. 762, 48 W. R. 314.

*United States.*—*General Electric R. Co. v. Chicago, etc., R. Co.,* 107 Fed. Rep. 771, 46 C. C. A. 629; *Pennsylvania Co. v. Donovan,* 116 Fed. Rep. 907.

*Iowa.*—*Haight v. Keokuk,* 4 Iowa 199.

*Maine.*—*Mathews v. Kelsey,* 58 Me. 56, 4 Am. Rep. 248.

*New Jersey.*—*Halsey v. Rapid Transit St. R. Co.,* 47 N. J. Eq. 380.

*New York.*—*Walsh v. Wilson,* 101 N. Y. 254, 54 Am. Rep. 698; *Callanan v. Gilman,* 107 N. Y. 360, 1 Am. St. Rep. 831.

*Wisconsin.*—*Jochem v. Robinson,* 66 Wis. 638, 57 Am. Rep. 298.

2. *Welsh v. Wilson,* 101 N. Y. 254, 54 Am. Rep. 698.

3. *Unreasonable Use*—*England.*—*Atty.-Gen. v. Brighton, etc., Co-operative Supply Assoc.,* (1900) 1 Ch. 276, 69 L. J. Ch. 204, 81 L. T. N. S. 762, 48 W. R. 314; *Rex v. Russell,* 6 East 427; *Benjamin v. Storr,* L. R. 9 C. P. 400; *Rex v. Jones,* 3 Campb. 230. See also *Rex v. Cross,* 3 Campb. 224.

*United States.*—*Marine Ins. Co. v. St. Louis, etc., R. Co.,* 41 Fed. Rep. 643.

*Maine.*—*Mathews v. Kelsey,* 58 Me. 56, 4 Am. Rep. 248.

*New York.*—*Callanan v. Gilman,* 107 N. Y. 360, 1 Am. St. Rep. 831; *Flynn v. Taylor,* 127 N. Y. 596, *affirming* 53 Hun (N. Y.) 167; *Manley v. Leggett,* 62 Hun (N. Y.) 562; *Stevenson v. Pucci,* (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 464; *Richardson, etc., Co. v. Barstow Stove Co.,* (Supm. Ct. Spec. T.) 26 Abb. N. Cas. (N. Y.) 150, *affirmed* 59 Hun (N. Y.) 624; *People v. Cunningham,* 1 Den. (N. Y.) 524, 43 Am. Dec. 709.

*Pennsylvania.*—*Com. v. Passmore,* 1 S. & R. (Pa.) 217.

*Wisconsin.*—*Hobart v. Milwaukee City R. Co.,* 27 Wis. 194, 9 Am. Rep. 461; *Jochem v. Robinson,* 66 Wis. 638, 57 Am. Rep. 298.

4. *Atty.-Gen. v. Brighton, etc., Co-operative Supply Assoc.,* (1900) 1 Ch. 276, 69 L. J. Ch. 204, 81 L. T. N. S. 762, 48 W. R. 314.

5. *Callanan v. Gilman,* 107 N. Y. 360, 1 Am. St. Rep. 831.

6. *Atty.-Gen. v. Brighton, etc., Co-operative Supply Assoc.,* (1900) 1 Ch. 276, 69 L. J. Ch. 204, 81 L. T. N. S. 762, 48 W. R. 314; *State v. Edens,* 85 N. Car. 527; *Jochem v. Robinson,* 66 Wis. 638, 57 Am. Rep. 298.

7. *Deposit and Display of Merchandise on Sidewalk.*—*Denver v. Girard,* 21 Colo. 447; *State v. Messolongitis,* 74 Minn. 165; *State v. Summerfield,* 107 N. Car. 895; *Truchelut v. Charleston,* 1 Nott. & M. (S. Car.) 227. See also *Hexamer v. Webb,* 101 N. Y. 377, 54 Am. Rep. 703.

A Constable, in enforcing an execution for possession of a house, is not justified in placing and leaving the furniture of the execution defendant upon the sidewalk in violation of an ordinance against obstructing sidewalks. *Com. v. Lennon,* 172 Mass. 434.

8. *Com. v. McCafferty,* 145 Mass. 384; *Stewart v. Porter Mfg. Co.,* (Supm. Ct. Gen. T.) 13 N. Y. St. Rep. 220; *People v. Van Houten,* (Ct. Sess.) 13 Misc. (N. Y.) 603; *Wilkes-Barre v. Burgunder,* 7 Kulp (Pa.) 63.

9. *People v. Willis,* 9 N. Y. App. Div. 214.

10. *Denver v. Girard,* 21 Colo. 447.

11. *Booths and Stands on Sidewalks.*—*Costello v. State,* 108 Ala. 45; *Denver v. Girard,* 21 Colo. 447; *State v. Berdett,* 73 Ind. 185, 38 Am. Rep. 117; *Viaduct v. New Orleans,* 43 La. Ann. 1121; *Com. v. Wentworth, Bright,* (Pa.) 318.

12. *Costello v. State,* 108 Ala. 45; *Schopp v.*

authorize the erection of such structures may be expressly granted to the municipality by the legislature.<sup>1</sup>

(5) *Projections from Buildings — Bay Windows, Awnings, etc.* — Abutting property owners have no general right to encroach upon the street with any part of buildings erected by them,<sup>2</sup> nor can the municipality under its general power to regulate and control streets authorize such encroachments.<sup>3</sup> Thus, ornamental columns,<sup>4</sup> cornices,<sup>5</sup> porches and platforms,<sup>6</sup> bay or oriel windows,<sup>7</sup> awnings,<sup>8</sup> signs,<sup>9</sup> and steps or stairways, projecting beyond the street line,<sup>10</sup> have been held to constitute illegal encroachments upon the street. Overhead passages or archways connecting buildings on the opposite sides of the street have likewise been held to be illegal encroachments.<sup>11</sup> The legislature, under its paramount control of streets, may authorize directly, or empower the municipality to authorize, encroachments by abutting lot owners upon sidewalks,<sup>12</sup> such as bay windows,<sup>13</sup> awnings,<sup>14</sup> steps or stairways,<sup>15</sup> etc.

(6) *Cellar Ways, Vaults, etc.* — Abutting property owners have not, as a general rule, any right to construct cellar ways in the sidewalks to give access

St. Louis, 117 Mo. 131. Compare *Barling v. West*, 29 Wis. 307, 9 Am. Rep. 576.

A municipality has no standing in equity to enjoin the maintenance of a booth or stand erected upon a sidewalk in pursuance of a privilege especially granted by a municipal ordinance, though without legislative authority. *Philadelphia v. Sheppard*, 158 Pa. St. 347.

1. *People v. Keating*, 168 N. Y. 390, reversing 62 N. Y. App. Div. 348.

2. *Encroachments by Buildings*. — U. S. v. Cole, 18 D. C. 504; *McCormick v. South Park Com'rs*, 150 Ill. 516; *Townsend v. Epstein*, 93 Md. 537, 86 Am. St. Rep. 441; *Philadelphia v. Clare*, 17 Phila. (Pa.) 59, 42 Leg. Int. (Pa.) 286. Compare *Philadelphia v. Presbyterian Board*, 9 Phila. (Pa.) 499, 29 Leg. Int. (Pa.) 53. See, however, *Beecher v. People*, 38 Mich. 289, 31 Am. Rep. 316.

3. *Montgomery First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 46; *Hibbard v. Chicago*, 173 Ill. 91, affirming 59 Ill. App. 470; *John Anisfield Co. v. Crossman*, 98 Ill. App. 180; *Pettis v. Johnson*, 56 Ind. 139; *Townsend v. Epstein*, 93 Md. 537, 86 Am. St. Rep. 441; *Beecher v. Newark*, 64 N. J. L. 475, affirmed 65 N. J. L. 307; *Hoey v. Gilroy*, (C. Pl. Gen. T.) 14 N. Y. Supp. 159; *Reimer's Appeal*, 100 Pa. St. 182, 45 Am. Rep. 373; *Caldwell v. Galt*, 27 Ont. App. 162.

4. *Montgomery First Nat. Bank v. Tyson*, 133 Ala. 459, 91 Am. St. Rep. 46.

5. *Garland v. Towne*, 55 N. H. 55, 20 Am. Rep. 164. See, however, *Farnsworth v. Rockland*, 83 Me. 508.

6. *Murphy v. Leggett*, 29 N. Y. App. Div. 309; *Caldwell v. Galt*, 27 Ont. App. 162. See, however, *Bagley v. People*, 43 Mich. 355, 38 Am. Rep. 192.

7. *McCormick v. South Park Com'rs*, 150 Ill. 516; *John Anisfield Co. v. Grossman*, 98 Ill. App. 180; *Jenks v. Williams*, 115 Mass. 217; *Com. v. Goodnow*, 117 Mass. 114; *Reimer's Appeal*, 100 Pa. St. 182, 45 Am. Rep. 373; *Livingston v. Wolf*, 136 Pa. St. 519, 20 Am. St. Rep. 936, 27 W. N. C. (Pa.) 5; *Hess v. Lancaster*, 4 Pa. Dist. 737.

The fact that the municipality has tolerated the existence of certain appurtenances to houses, such as bay windows, encroaching on the street line, does not give to other property owners the

right to maintain similar encroachments. *Broadbelt v. Loew*, 162 N. Y. 642, affirming 15 N. Y. App. Div. 343.

8. *Awnings*. — *Georgia*. — *Augusta v. Burum*, 93 Ga. 68.

*Illinois*. — *Hibbard v. Chicago*, 173 Ill. 91, affirming 59 Ill. App. 470.

*Massachusetts*. — *Pedrick v. Bailey*, 12 Gray (Mass.) 161.

*Minnesota*. — *Fox v. Winona*, 23 Minn. 10.

*New Jersey*. — *Ivins v. Trenton*, 68 N. J. L.

501. *New York*. — *Farrell v. New York*, (Supm. Ct. Spec. T.) 5 N. Y. Supp. 672; *Brinkman v. Eisler*, (N. Y. City Ct. Gen. T.) 16 N. Y. Supp. 154, affirming (N. Y. City Ct. Tr. T.) 7 N. Y. Supp. 193; *Simis v. Brookfield*, (N. Y. Super. Ct. Spec. T.) 13 Misc. (N. Y.) 569; *Trenor v. Jackson*, (N. Y. Super. Ct. Spec. T.) 15 Abb. Pr. N. S. (N. Y.) 115.

But see *Hawkins v. Sanders*, 45 Mich. 491; *Hisey v. Mexico*, 61 Mo. App. 248, 1 Mo. App. Rep. 393.

9. *Ivins v. Trenton*, 68 N. J. L. 501. See, however, *State v. Higgs*, 126 N. Car. 1014.

10. *Pettis v. Johnson*, 56 Ind. 139; *People v. Carpenter*, 1 Mich. 273; *Molhumes v. Cleveland*, 4 Ohio Dec. (Reprint) 488, 2 Cleve. L. Rep. 236.

11. *Bybee v. State*, 94 Ind. 443, 48 Am. Rep. 175; *Townsend v. Epstein*, 93 Md. 537, 86 Am. St. Rep. 441; *Beecher v. Newark*, 65 N. J. L. 307, affirming 64 N. J. L. 475. See also *Knox v. New York*, 55 Barb. (N. Y.) 404.

12. *Legislative Power to Authorize Encroachments*. — *Luth v. Thompson*, 1 Penn. (Del.) 149; *U. S. v. Cole*, 18 D. C. 504; *Rutter v. Fidler*, 11 Pa. St. 181.

*Power May Be Delegated to Municipalities*. — *Hoey v. Gilroy*, 129 N. Y. 132, reversing (C. Pl. Gen. T.) 14 N. Y. Supp. 159.

13. *Wormser v. Brown*, 149 N. Y. 163, affirming 72 Hun (N. Y.) 93; *Broadbelt v. Loew*, 162 N. Y. 642, affirming 15 N. Y. App. Div. 343; *State v. Tooker*, 3 Ohio Dec. 171, 6 Ohio Cir. Dec. 562, 9 Ohio Cir. Ct. 558; *Livingston v. Wolf*, 136 Pa. St. 519, 20 Am. St. Rep. 936.

14. *Laviosa v. Chicago*, etc., R. Co., McGloin (La.) 299; *Hoey v. Gilroy*, 129 N. Y. 132, reversing (C. Pl. Gen. T.) 14 N. Y. Supp. 159.

15. *Cushing v. Boston*, 128 Mass. 330, 35 Am. Rep. 383.

to their cellars, irrespective of the question whether such ways are open or protected by coverings,<sup>1</sup> nor have they the right to excavate and construct vaults or cellars under the sidewalk;<sup>2</sup> and municipalities cannot grant the right to maintain openings in sidewalks.<sup>3</sup> But in a number of cases where the fee in the street is vested in the abutting property owners, the right to excavate and construct vaults and cellars under the sidewalk, provided they do not interfere with free traffic upon the sidewalk, has been upheld.<sup>4</sup> The legislature may expressly grant such rights to abutting owners, or authorize municipalities to do so,<sup>5</sup> and when this is done the municipalities may, for the protection of the public, regulate the manner of their use and the precautions to be taken to prevent injury to the public.<sup>6</sup>

(7) *Excavations in Streets.*—Property owners have no general right to make openings in the street surface, so as to obstruct the free passage of the street,<sup>7</sup> but the right to make reasonable excavations extending into the sidewalk in the course of the construction of buildings has been upheld.<sup>8</sup>

*Incidental to Privilege Granted.*—Persons to whom street privileges or franchises have been lawfully granted impliedly acquire the right to open the surface of the street when necessary to the enjoyment of their special privileges or franchises.<sup>9</sup>

*Restriction and Regulation of Right.*—The right of the municipality to impose reasonable restrictions or regulations with regard to the opening of the surface of the street is upheld,<sup>10</sup> but unreasonable regulations cannot be imposed.<sup>11</sup>

c. REMEDIES FOR OBSTRUCTION OF STREETS—(1) *Remedies on Behalf of State or Municipality*—(a) *Injunction.*—A bill in equity at the instance of the state or of the attorney-general on behalf of the state may be maintained to restrain or abate the maintenance of an obstruction in a street as a nuisance.<sup>12</sup>

1. *Cellar Way.*—Smith v. Leavenworth, 15 Kan. 81; Clifford v. Dam, 44 N. Y. Super. Ct. 391, affirmed 81 N. Y. 52.

2. *Vaults.*—Gregsten v. Chicago, 40 Ill. App. 607; Deshong v. New York, 74 N. Y. App. Div. 234; Patten v. New York El. R. Co., (C. Pl. Spec. T.) 3 Abb. N. Cas. (N. Y.) 306.

3. Smith v. McDowell, 148 Ill. 51; Smith v. Leavenworth, 15 Kan. 81.

4. *When Fee in Abutting Owner*—Iowa.—Dubuque v. Maloney, 9 Iowa 450, 74 Am. Dec. 358.

Maine.—Farnsworth v. Rockland, 83 Me. 508.

Massachusetts.—Allen v. Boston, 159 Mass. 324, 38 Am. St. Rep. 423.

Michigan.—Fisher v. Thirkell, 21 Mich. 1, 4 Am. Rep. 422.

Missouri.—Gordon v. Peltzer, 56 Mo. App. 599.

New Jersey.—State v. Hoboken, 33 N. J. L. 280.

New York.—McCarthy v. Syracuse, 46 N. Y. 194.

South Dakota.—Dell Rapids Mercantile Co. v. Dell Rapids, 11 S. Dak. 116, 74 Am. St. Rep. 783.

Wisconsin.—Papworth v. Milwaukee, 64 Wis. 389.

5. *Cellar Ways.*—Louth v. Thompson, 1 Penn. (Del.) 149; Nelson v. Godfrey, 12 Ill. 20; Gridley v. Bloomington, 68 Ill. 47; Jorgensen v. Squires, 144 N. Y. 280; Buek v. Collis, 17 N. Y. App. Div. 465; Rutter v. Fidler, 11 Pa. St. 181.

Vaults.—Gregstein v. Chicago, 145 Ill. 451, 36 Am. St. Rep. 496, reversing 40 Ill. App. 607; Heineck v. Grosse, 99 Ill. App. 441; Babbage v.

Powers, 130 N. Y. 281, affirming 54 Hun (N. Y.) 635; People v. Collis, 17 N. Y. App. Div. 448; Buek v. Collis, 17 N. Y. App. Div. 465; Deshong v. New York, 74 N. Y. App. Div. 234.

6. Morrison v. McAvoy, (Cal. 1902) 70 Pac. Rep. 626; Davis v. Clinton, 50 Iowa 585; Schroeck v. Reiss, 46 N. Y. App. Div. 502.

7. *Excavations in Street.*—San Francisco v. Buckman, 111 Cal. 25; Beatty v. Gilmore, 16 Pa. St. 463, 55 Am. Dec. 514; Boyle v. Hazelton, 171 Pa. St. 167; Mahanoy v. Bissell, 9 Pa. Co. Ct. 469.

8. Clark v. Fry, 8 Ohio St. 358, 72 Am. Dec. 590.

9. Allen v. Jersey City, 53 N. J. L. 522. See also the titles GAS COMPANIES, vol. 14, p. 920 et seq.; WATERWORKS AND WATER COMPANIES.

10. *Restrictions and Regulations.*—Everett v. Marquette, 53 Mich. 450; Northern Liberties v. Northern Liberties Gas Co., 12 Pa. St. 318; Boyle v. Hazelton, 171 Pa. St. 167; Williamsport v. Williamsport Water Co., 7 Pa. Dist. 206; Lansdowne v. Springfield Water Co., 16 Pa. Super. Ct. 490; Gas Co. v. Pittsburg, 34 Pittsb. Leg. J. (Pa.) 240.

11. Allen v. Jersey City, 53 N. J. L. 522; Madison v. Morristown Gaslight Co., 63 N. J. Eq. 120; Ft. Pitt Gas Co. v. Sewickley, 30 Pittsb. Leg. J. N. S. (Pa.) 419.

An ordinance prohibiting a gas company from opening a paved street for the purpose of laying pipes from the main to the opposite side of the street is unreasonable and void. Northern Liberties v. Northern Liberties Gas Co., 12 Pa. St. 318.

12. *Injunction on Behalf of State.*—Hoole v. Atty.-Gen., 22 Ala. 190; People v. Beaudry, 91 Cal. 213; Smith v. McDowell, 148 Ill. 51; Peo-

The fact that the municipality also has power to abate such nuisance is immaterial where the latter remedy is not made by the statute exclusive.<sup>1</sup> Where the general power to control and regulate its streets is given to the municipality its right to maintain a suit to enjoin the obstruction of a street is implied.<sup>2</sup> The fact that the municipality may summarily remove the obstruction is immaterial.<sup>3</sup>

(b) **Ejectment.** — An action of ejectment may be maintained by a municipal corporation for the recovery of possession of a street wrongfully obstructed by an individual irrespective of the ownership of the fee, whether in the corporation or in the adjoining proprietor.<sup>4</sup>

(c) **Summary Removal.** — In some instances the statutes expressly authorize municipalities to remove in a summary manner obstructions upon their streets,<sup>5</sup> and it seems that their power to do so will be implied from the general power to keep the streets free from obstructions.<sup>6</sup> Where the legal existence of the

ple *v. Equity Gas Light Co.*, 141 N. Y. 232; *People v. Metropolitan Telephone, etc., Co.*, 31 Hun (N. Y.) 596; *Atty.-Gen. v. Lombard, etc.*, St. Pass. R. Co., 10 Phila. (Pa.) 352, 32 Leg. Int. (Pa.) 238. *Compare People v. Law*, (Supm. Ct. Spec. T.) 22 How. Pr. (N. Y.) 109. See generally the title ABATEMENT OF NUISANCES, vol. 1, p. 64 *et seq.*; NUISANCES, vol. 21, p. 703. 1. *Hooie v. Atty.-Gen.*, 22 Ala. 190. See, however, *People v. Equity Gas Light Co.*, 141 N. Y. 232.

2. **Injunction on Behalf of Municipality** — *United States*. — *Detroit v. Detroit City R. Co.*, 56 Fed. Rep. 867.

*Alabama*. — *Demopolis v. Webb*, 87 Ala. 659; *Reed v. Birmingham*, 92 Ala. 339; *Mobile v. Louisville, etc.*, R. Co., 124 Ala. 132.

*California*. — *San Francisco v. Clark*, 1 Cal. 386; *San Francisco v. Buckman*, 111 Cal. 25.

*Connecticut*. — *Stamford v. Stamford Horse R. Co.*, 56 Conn. 381.

*Georgia*. — *Savannah, etc., R. Co. v. Shiels*, 33 Ga. 610; *Kavanagh v. Mobile, etc., R. Co.*, 78 Ga. 803.

*Illinois*. — *Metropolitan City R. Co. v. Chicago*, 96 Ill. 620; *Chicago, etc., R. Co. v. Quincy*, 136 Ill. 489.

*Indiana*. — *Cheek v. Aurora*, 92 Ind. 107.

*Kentucky*. — *Ellison v. Louisville*, (Ky. 1895) 31 S. W. Rep. 723.

*Michigan*. — *Big Rapids v. Comstock*, 65 Mich. 78; *Mt. Clemens v. Mt. Clemens Sanitarium Co.*, 127 Mich. 115, 8 Detroit Leg. N. 282.

*Minnesota*. — *Buffalo v. Harling*, 50 Minn. 551.

*New Jersey*. — *Newark v. Delaware, etc., R. Co.*, 42 N. J. Eq. 196. *Compare Brigantine v. Holland Trust Co.*, (N. J. 1897) 37 Atl. Rep. 438.

*New York*. — *Davis v. New York*, 14 N. Y. 506, 67 Am. Dec. 186; *Hempstead v. Ball Electric Light Co.*, 9 N. Y. App. Div. 48.

*Ohio*. — *Cincinnati Northern R. Co. v. Cincinnati*, 8 Ohio Dec. (Reprint) 554, 8 Cinc. L. Bul. 334.

*Pennsylvania*. — *Moyamensing v. Long*, 1 Pars. Eq. Cas. (Pa.) 143; *Philadelphia v. Lombard, etc.*, St. Pass. R. Co., 5 Phila. (Pa.) 248, 20 Leg. Int. (Pa.) 173; *Philadelphia v. Friday*, 6 Phila. (Pa.) 275, 24 Leg. Int. (Pa.) 109; *Philadelphia v. Thirteenth, etc.*, St. Pass. R. Co., 8 Phila. (Pa.) 648; *Philadelphia v. Crump*, 1 Brews. (Pa.) 320.

*Wisconsin*. — *Waukesha Hygeia Mineral Spring Co. v. Waukesha*, 83 Wis. 475; *Eau Claire v. Matzke*, 86 Wis. 291, 39 Am. St. Rep. 900; *Cook v. Bellack*, 109 Wis. 391; *Chippewa Falls v. Hopkins*, 109 Wis. 611; *Wauwatosa v. Dreutzer*, 116 Wis. 117.

3. *Stamford v. Stamford Horse R. Co.*, 56 Conn. 381; *Cheek v. Aurora*, 92 Ind. 107; *Wauwatosa v. Dreutzer*, 116 Wis. 117. See, however, *Waterloo v. Waterloo St. R. Co.*, 71 Iowa 193.

4. **Ejectment** — *Cleveland v. Cleveland, etc., R. Co.*, 93 Fed. Rep. 113; *San Francisco v. Sullivan*, 50 Cal. 603; *Chicago v. Wright*, 69 Ill. 318; *Augusta v. Perkins*, 3 B. Mon. (Ky.) 437; *Chambersburg v. Manko*, 39 N. J. L. 496; *New York v. Law*, 125 N. Y. 380, *affirming* 53 Hun (N. Y.) 637, 6 N. Y. Supp. 628. See, however, *Grand Rapids v. Whittlesey*, 33 Mich. 109. See generally the title EJECTMENT, vol. 10, pp. 473, 475.

5. **Summary Removal** — *Connecticut*. — *Hartford v. Hartford St. R. Co.*, 73 Conn. 327; *Hawley v. Harrall*, 19 Conn. 142.

*Georgia*. — *Laing v. Americus*, 86 Ga. 756; *Carlisle v. Wilson*, 110 Ga. 860.

*Mississippi*. — *Nixon v. Biloxi*, (Miss. 1889) 5 So. Rep. 621.

*New York*. — *Metropolitan Exhibition Co. v. Newton*, 51 Hun (N. Y.) 639, 4 N. Y. Supp. 593; *Delaware, etc., R. Co. v. Buffalo*, 4 N. Y. App. Div. 562, *affirming* 158 N. Y. 266.

*Wisconsin*. — *Childs v. Nelson*, 69 Wis. 125; *Pauer v. Albrecht*, 72 Wis. 416.

See also the title ABATEMENT OF NUISANCES, vol. 1, p. 87.

6. *Illinois*. — *Hibbard v. Chicago*, 173 Ill. 91, *affirming* 59 Ill. App. 470; *Hatton v. Chatham*, 24 Ill. App. 622.

*Indiana*. — *Terre Haute v. Turner*, 36 Ind. 522; *Coverdale v. Edwards*, 155 Ind. 374.

*Iowa*. — *Philbrick v. University Place*, 88 Iowa 354.

*Kansas*. — *Bitzer v. Levertton*, 9 Kan. App. 76.

*Kentucky*. — *Dudley v. Frankfort*, 12 B. Mon. (Ky.) 610.

*Louisiana*. — *Sheen v. Stothart*, 29 La. Ann. 630; *Daublin v. New Orleans*, 1 Mart. (La.) 184; *Tourne v. Lee*, 8 Mart. N. S. (La.) 548, 20 Am. Dec. 260.

*Maine*. — *Mussey v. Cahoon*, 34 Me. 74.

*Massachusetts*. — *Pedrick v. Bailey*, 12 Gray (Mass.) 161.



street is in dispute the right of the municipality summarily to remove alleged obstructions thereon has been denied,<sup>1</sup> and where municipalities attempt to proceed summarily, and the land upon which the obstruction is located is claimed by an individual in whose possession it is, injunctions have been granted pending the determination as to the existence of the street.<sup>2</sup> It has been held that where the obstruction was erected under permission from the municipality, its summary removal is unwarranted unless it clearly appears that the permission was exceeded.<sup>3</sup>

**Exercise of Power.** — Statutory requirements with regard to the exercise of the power to remove summarily street obstructions must, of course, be complied with.<sup>4</sup> Thus, the power can be exercised only by the designated officer,<sup>5</sup> and provisions with regard to notice to the persons creating the obstruction must be regarded.<sup>6</sup> In summarily removing alleged obstructions, municipalities act at their peril, and in case the removal was unauthorized are liable in damages to the person injured.<sup>7</sup>

(a) **Criminal Prosecution.** — The obstruction of streets is a public nuisance and is indictable as such,<sup>8</sup> and in a number of jurisdictions is expressly prohibited, under penalty, by statute.<sup>9</sup>

**Ordinances Imposing Penalties.** — Municipalities having general power to prevent the obstruction of streets may enact ordinances against such obstruction, imposing penalties for their violation,<sup>10</sup> and power to pass such ordinances is often expressly conferred.<sup>11</sup>

*Michigan.* — *Grand Rapids v. Hughes*, 15 Mich. 54.

*Missouri.* — *Bierwith v. Pieronnet*, 65 Mo. App. 431.

*New Jersey.* — *New York, etc., R. Co. v. South Amboy*, 57 N. J. L. 252; *Delaware, etc., Telephone Co. v. Pensauken Tp.*, 67 N. J. L. 91, affirmed 67 N. J. L. 531.

*New York.* — *Walker v. Caywood*, 31 N. Y. 51; *Kiernan v. Newton*, (Supm. Ct.) 20 Abb. N. Cas. (N. Y.) 398; *Ely v. Campbell*, (Supm. Ct. Spec. T.) 59 How. Pr. (N. Y.) 333; *Simis v. Brookfield*, (N. Y. Super. Ct. Spec. T.) 13 Misc. (N. Y.) 569; *Delaware, etc., R. Co. v. Buffalo*, 4 N. Y. App. Div. 562.

*Ohio.* — *Evens v. Cincinnati*, 2 Handy (Ohio) 236; *Cincinnati Northern R. Co. v. Cincinnati*, 8 Ohio Dec. (Reprint) 554, 8 Cinc. L. Bul. 334.

*Pennsylvania.* — *Philadelphia v. Philadelphia, etc., R. Co.*, 58 Pa. St. 253; *Yost v. Borough*, 4 Lanc. L. Rev. 62.

*Texas.* — *Compton v. Waco Bridge Co.*, 62 Tex. 715.

*Virginia.* — *Roanoke Gas Co. v. Roanoke*, 88 Va. 810.

*Washington.* — *Spokane St. R. Co. v. Spokane Falls*, 6 Wash. 521.

In *Cape May, etc., R. Co. v. Cape May*, 58 N. J. L. 565, in regard to the summary removal of obstructions, Lippincott, J., said: "We are not unmindful of the existence of cases which require judicial intervention in order to settle disputed claims of right. These cases are easily distinguished from those in which the usurpation or violation of law is at once apparent, for it is only in these latter cases that the summary police intervention is justifiable."

1. **Dispute as to Existence of Street.** — *Beecher v. People*, 38 Mich. 289, 31 Am. Rep. 316; *Dawes v. Hightstown*, 45 N. J. L. 501; *New York, etc., R. Co. v. South Amboy*, 57 N. J. L. 252. See also *Sheldon v. Kalamazoo*, 24 Mich. 383; *Teass v. St. Albans*, 38 W. Va. 1; *Childs v. Nelson*, 69 Wis. 125.

2. *Manko v. Chambersburgh*, 25 N. J. Eq. 168.

3. **Permissive Obstructions.** — *Cape May v. Cape May, etc., R. Co.*, 60 N. J. L. 224.

4. **Exercise of Power.** — *Avis v. Vineland*, 55 N. J. L. 285.

5. *Naylor v. Glasier*, 5 Duer (N. Y.) 161.

6. *Dawes v. Hightstown*, 45 N. J. L. 127.

7. *Howard v. Robbins*, 1 Lans. (N. Y.) 63.

8. **Criminal Prosecutions.** — *Clark v. Com.*, 14 Bush (Ky.) 166; *Com. v. Boston*, 97 Mass. 555; *Garland v. Towne*, 55 N. H. 55, 20 Am. Rep. 164; *Com. v. Passmore*, 1 S. & R. (Pa.) 217. See also the title NUISANCES, vol. 21, p. 711.

9. **Statutory Penalties.** — *Ex p. Taylor*, 87 Cal. 91; *Ex p. Rinaldo*, (Cal. 1890) 25 Pac. Rep. 260; *Wabash, etc., R. Co. v. People*, 12 Ill. App. 448; *State v. Junker*, 37 Tex. 478; *State v. Leaver*, 62 Wis. 387.

10. **Ordinances Imposing Penalties.** — *Dover v. Tawressey*, 2 Marv. (Del.) 285; *Illinois Cent. R. Co. v. Galena*, 40 Ill. 344; *Hibbard v. Chicago*, 173 Ill. 91; *Hatton v. Chatham*, 24 Ill. App. 622; *Com. v. Robertson*, 5 Cush. (Mass.) 438; *Giardina v. Greenville*, 70 Miss. 896; *Carlisle v. Baker*, 1 Yeates (Pa.) 471; *State v. Cleveland*, 3 R. I. 117; *Warwick v. Mayo*, 15 Gratt. (Va.) 528. See generally the title ORDINANCES, vol. 21, p. 999.

In *Grand Rapids v. Hughes*, 15 Mich. 54, a charter provision empowering the common council to prevent and remove all encroachments upon the streets was held not to authorize it to impose penalties for such encroachments, where the charter specifically enumerated various powers, not including this, which the council might render effectual by penal prosecutions.

A municipality empowered merely to "abate" nuisances has no power to impose a fine for the obstruction of streets, such obstruction having been declared a nuisance by statute. *Nevada v. Hutchins*, 59 Iowa 506.

11. *Ex p. Taylor*, 87 Cal. 91; *Ex p. Rinaldo*, (Cal. 1890) 25 Pac. Rep. 260; *Toledo, etc., R.*

(2) *Remedies of Individuals* — (a) *Injunction*. — A private individual who receives special injuries from the obstruction of streets, such as an abutting owner whose easement of access, air, light, or view is obstructed, may maintain a suit to enjoin the obstruction,<sup>1</sup> and it is not necessary that he first apply to the municipal authorities for relief<sup>2</sup> or that he own the fee in the street.<sup>3</sup> But to entitle an individual to enjoin the obstruction of a street he must receive some special injury therefrom differing in kind from that suffered by the general public.<sup>4</sup> It has also been held that it must appear that the individual

Co. v. Chenoa, 43 Ill. 209; State v. Lochte, 45 La. Ann. 1405.

1. *Remedies of Individuals* — *Injunction* — *United States*. — Hart v. Buckner, 54 Fed. Rep. 925, 2 U. S. App. 488.

*Alabama*. — Montgomery First Nat. Bank v. Tyson, 133 Ala. 459, 91 Am. St. Rep. 46.

*California*. — Schauffele v. Doyle, 86 Cal. 107; Helm v. McClure, 107 Cal. 199.

*Florida*. — Price v. Stratton, (Fla. 1903) 33 So. Rep. 644.

*Georgia*. — Macon v. Harris, 75 Ga. 761; Kavanagh v. Mobile, etc., R. Co., 78 Ga. 271; Cohen v. State Bank, 81 Ga. 723; Savannah, etc., R. Co. v. Woodruff, 86 Ga. 94; Southern Cotton Oil Co. v. Bull, 116 Ga. 776.

*Illinois*. — Carter v. Chicago, 57 Ill. 283; Earll v. Chicago, 136 Ill. 277; Field v. Barling, 149 Ill. 556, 41 Am. St. Rep. 311.

*Indiana*. — Debolt v. Carter, 31 Ind. 355; Pettis v. Johnson, 56 Ind. 139; Chicago, etc., R. Co. v. Eisert, 127 Ind. 156; Williams v. Citizens' R. Co., 130 Ind. 71, 30 Am. St. Rep. 201.

*Iowa*. — Ingram v. Chicago, etc., R. Co., 38 Iowa 669; Pettit v. Grand Junction, (Iowa 1903) 93 N. W. Rep. 381.

*Kansas*. — Palmer v. Waddell, 22 Kan. 352; Mikesell v. Durkee, 34 Kan. 509; Atchison St. R. Co. v. Nave, 38 Kan. 744, 5 Am. St. Rep. 800.

*Kentucky*. — Alexander v. Tebeau, 71 S. W. Rep. 427, 24 Ky. L. Rep. 1305; Gibson v. Black, (Ky. 1888) 9 S. W. Rep. 379; Louisville, etc., R. Co. v. Sonne, (Ky. 1899) 53 S. W. Rep. 274.

*Maryland*. — White v. Flannigan, 1 Md. 525, 54 Am. Dec. 668; Roman v. Strauss, 10 Md. 89; Townsend v. Epstein, 93 Md. 537, 86 Am. St. Rep. 441.

*Michigan*. — Pratt v. Lewis, 39 Mich. 7.

*Minnesota*. — Schurmeier v. St. Paul, etc., R. Co., 10 Minn. 82, 88 Am. Dec. 59; Gustafson v. Hamm, 56 Minn. 334.

*Mississippi*. — Canton Cotton Warehouse Co. v. Potts, 69 Miss. 31; Biloxi City R. Co. v. Maloney, (Miss. 1896) 19 So. Rep. 832.

*Missouri*. — Glaessner v. Anheuser-Busch Brewing Assoc., 100 Mo. 508; Longworth v. Sedevic, 165 Mo. 221; Charles H. Heer Dry-Goods Co. v. Citizens' R. Co., 41 Mo. App. 63.

*New Jersey*. — Atty.-Gen. v. Morris, etc., R. Co., 19 N. J. Eq. 386.

*New York*. — Callanan v. Gilman, 107 N. Y. 360, 1 Am. St. Rep. 831, *modifying* 52 N. Y. Super. Ct. 112, which *affirmed* (N. Y. Super. Ct. Spec. T.) 67 How. Pr. (N. Y.) 464; Bates v. Holbrook, 171 N. Y. 460, *affirming* 67 N. Y. App. Div. 25; Crooke v. Anderson, 23 Hun (N. Y.) 266; Hallock v. Scheyer, 33 Hun (N. Y.) 111; Overton v. Olean, 37 Hun (N. Y.) 47; Wilcken v. West Brooklyn R. Co., 49 Hun (N. Y.) 609, 1 N. Y.

Supp. 791; Flynn v. Taylor, 53 Hun (N. Y.) 167, *affirmed* 127 N. Y. 596; Wetmore v. Story, 22 Barb. (N. Y.) 414; Jaques v. National Exhibit Co., (Supm. Ct. Eq. T.) 15 Abb. N. Cas. (N. Y.) 250; Elias v. Sutherland, (Supm. Ct. Spec. T.) 18 Abb. N. Cas. (N. Y.) 126; Hersee v. Buffalo, Sheld. (N. Y.) 445; Porth v. Manhattan R. Co., 58 N. Y. Super. Ct. 356, *affirmed* 134 N. Y. 615.

*Ohio*. — Herrick v. Cleveland, 4 Ohio Cir. Dec. 684, 7 Ohio Cir. Ct. 470; Mantell v. Bucyrus Telephone Co., 11 Ohio Cir. Dec. 274, 20 Ohio Cir. Ct. 345; Root v. Pennsylvania Co., 5 Ohio Dec. 315, 7 Ohio N. P. 337; Harrison v. Pike, 7 Ohio Dec. (Reprint) 603, 4 Cinc. L. Bul. 156.

*Pennsylvania*. — Sterling's Appeal, 111 Pa. St. 35, 56 Am. Rep. 246; Potts v. Quaker City El. R. Co., 161 Pa. St. 396, 34 W. N. C. (Pa.) 261; Thomas v. Inter-County St. R. Co., 167 Pa. St. 120, 36 W. N. C. (Pa.) 176; Faust v. Second, etc., St. Pass. R. Co., 3 Phila. (Pa.) 164, 15 Leg. Int. (Pa.) 221; Barker v. Hartman Steel Co., 6 Pa. Co. Ct. 183; Daffinger v. Pittsburgh, etc., Tel. Co., 31 Pittsb. Leg. J. N. S. (Pa.) 37, 14 York. Leg. Rec. 46.

*Tennessee*. — Leake v. Cannon, 2 Humph. (Tenn.) 169.

*Texas*. — Kalteyer v. Sullivan, 18 Tex. Civ. App. 488.

See also the title ABATEMENT OF NUISANCES, vol. 1, p. 71; ABUTTING OWNERS, vol. 1, p. 226; NUISANCES, vol. 21, p. 706.

2. Montgomery First Nat. Bank v. Tyson, 133 Ala. 459, 91 Am. St. Rep. 46; Herrick v. Cleveland, 4 Ohio Cir. Dec. 684, 7 Ohio Cir. Ct. 470.

3. Hart v. Buckner, 54 Fed. Rep. 925, 2 U. S. App. 488.

4. *United States*. — Currier v. West Side El. Patent R. Co., 6 Blatchf. (U. S.) 487, 6 Fed. Cas. No. 3,493.

*California*. — Marini v. Graham, 67 Cal. 130.

*Connecticut*. — Norwich Gas Light Co. v. Norwich City Gas Co., 25 Conn. 19.

*Florida*. — Garnett v. Jacksonville, etc., R. Co., 20 Fla. 889.

*Georgia*. — Ison v. Manley, 76 Ga. 804.

*Idaho*. — Stufflebeam v. Montgomery, 3 Idaho 20.

*Illinois*. — Stetson v. Chicago, etc., R. Co., 75 Ill. 74; Patterson v. Chicago, etc., R. Co., 75 Ill. 588; Truesdale v. Peoria Grape Sugar Co., 101 Ill. 561; Corcoran v. Chicago, etc., R. Co., 149 Ill. 291; Pittsburgh, etc., R. Co. v. Cheevers, 149 Ill. 430, *affirming* 44 Ill. App. 118; Chicago Telephone Co. v. Northwestern Telephone Co., 199 Ill. 324, *affirming* 100 Ill. App. 57; Gutter v. Glenn, 201 Ill. 275; Parlin v. Mills, 11 Ill. App. 396; Phelps v. Lake St. El. R. Co., 60 Ill. App. 471; McWethy v. Aurora Electric Light, etc., Co., 202 Ill. 218, *affirming* 104 Ill. App. 479,

will suffer some material injury that will be irreparable in its nature and cannot be fully compensated in damages.<sup>1</sup> Laches on the part of an abutting property owner may, as in other cases, be ground for denying an injunction at his instance.<sup>2</sup> And if the complainant is himself obstructing a street, he has no standing in equity to enjoin a similar obstruction by a third person.<sup>3</sup>

(b) **Action for Damages.** — A private individual may maintain an action at law to recover special damages suffered by him by reason of the obstruction of a street,<sup>4</sup> and it is immaterial whether he is or is not the owner of the fee of the street.<sup>5</sup> But only those who suffer special injury different in kind from that suffered by the general public can recover damages.<sup>6</sup>

(c) **Ejectment.** — It has been held that ejectment will lie as a remedy to

*Kansas.* — *Billard v. Erhart*, 35 Kan. 611; *Coffeyville Min., etc., Co. v. Citizens' Natural Gas, etc., Co.*, 55 Kan. 173.

*Kentucky.* — *Hyland v. Short-Route R. Transfer Co.*, (Ky. 1889) 11 S. W. Rep. 79.

*Louisiana.* — *New Orleans Gas Light Co. v. Hart*, 40 La. Ann. 474, 8 Am. St. Rep. 544. See, however, *New Orleans v. Gravier*, 11 Mart. (La.) 620.

*Massachusetts.* — *Jenks v. Williams*, 115 Mass. 217.

*Michigan.* — *Hawkins v. Sanders*, 45 Mich. 491.

*Minnesota.* — *Gundlach v. Hamm*, 62 Minn. 42.

*Missouri.* — *Charles H. Heer Dry-Goods Co. v. Citizens R. Co.*, 41 Mo. App. 63.

*Montana.* — *Loeber v. Butte Gen. Electric Co.*, 16 Mont. 1, 50 Am. St. Rep. 468.

*Nebraska.* — *State v. Omaha*, 14 Neb. 265, 45 Am. Rep. 108.

*New Jersey.* — *Morris, etc., R. Co. v. Newark Pass. R. Co.*, 51 N. J. Eq. 379.

*New York.* — *Pegram v. New York El. R. Co.*, 147 N. Y. 135, *affirming* (N. Y. Super. Ct. Gen. T.) 8 Misc. (N. Y.) 425; *Brooklyn City, etc., R. Co. v. Coney Island, etc., R. Co.*, 35 Barb. (N. Y.) 364; *Sixth Ave. R. Co. v. Gilbert El. R. Co.*, (N. Y. Super. Ct. Tr. T.) 3 Abb. N. Cas. (N. Y.) 372; *Hamilton v. New York, etc., R. Co.*, 9 Paige (N. Y.) 171; *Gallagher v. Keating*, 40 N. Y. App. Div. 81.

*Ohio.* — *Webb v. Ohio Gas Fuel Co.*, 9 Ohio Dec. (Reprint) 662, 16 Cinc. L. Bul. 121; *Harrison v. Mt. Auburn Cable R. Co.*, 9 Ohio Dec. (Reprint) 805, 17 Cinc. L. Bul. 265; *Glidden v. Cincinnati*, 11 Ohio Dec. (Reprint) 853, 30 Cinc. L. Bul. 213.

*Pennsylvania.* — *Blanchard v. Reyburn*, 10 Phila. (Pa.) 427, 32 Leg. Int. (Pa.) 239; *Seitz v. Lafayette Traction Co.*, 5 Pa. Co. Ct. 469; *Cunningham v. Entekin*, 3 Pa. Dist. 201, 34 W. N. C. (Pa.) 353; *Horner v. Craig*, 2 W. N. C. (Pa.) 11.

*Tennessee.* — *Patton v. Chattanooga*, 108 Tenn. 197.

1. *McWethy v. Aurora Electric Light, etc., Co.*, 202 Ill. 218, *affirming* 104 Ill. App. 479; *Ofstie v. Kelly*, 33 Minn. 440; *Roake v. American Telephone, etc., Co.*, 41 N. J. Eq. 35; *Herbert v. Pennsylvania R. Co.*, 43 N. J. Eq. 21; *Adler v. Metropolitan El. R. Co.*, 138 N. Y. 173, *reversing* (N. Y. Super. Ct. Gen. T.) 28 Abb. N. Cas. (N. Y.) 198; *Wormser v. Brown*, 72 Hun (N. Y.) 93, *affirmed* 149 N. Y. 163; *Spader v. New York El. R. Co.*, (N. Y. Super.

Ct. Spec. T.) 3 Abb. N. Cas. (N. Y.) 467; *Ohio River R. Co. v. Gibbens*, 35 W. Va. 57.

2. *Daflinger v. Pittsburg, etc., Tel. Co.*, 31 Pittsb. Leg. J. N. S. (Pa.) 37, 14 York Leg. Rec. (Pa.) 46.

3. *Price v. Strattan*, (Fla. 1903) 33 So. Rep. 644.

4. **Action for Damages** — *California.* — *Schulte v. North Pac. Transp. Co.*, 50 Cal. 592.

*Colorado.* — *Jackson v. Kiel*, 13 Colo. 378, 16 Am. St. Rep. 207.

*District of Columbia.* — *Hopkins v. Baltimore, etc., R. Co.*, 6 Mackey (D. C.) 311.

*Indiana.* — *Musselman v. Manly*, 42 Ind. 462.

*Iowa.* — *Dubuque v. Maloney*, 9 Iowa 450, 74 Am. Dec. 358; *McGregor v. Boyle*, 34 Iowa 268; *Cain v. Chicago, etc., R. Co.*, 54 Iowa 255.

*Kentucky.* — *Bannon v. Romeiser*, (Ky. 1896) 34 S. W. Rep. 1084.

*Massachusetts.* — *Stetson v. Faxon*, 19 Pick. (Mass.) 147, 31 Am. Dec. 123.

*Minnesota.* — *Kaje v. Chicago, etc., R. Co.*, 57 Minn. 422, 47 Am. St. Rep. 627.

*Mississippi.* — *New Orleans, etc., R. Co. v. Moye*, 39 Miss. 374.

*New Jersey.* — *Runyon v. Bordine*, 14 N. J. L. 472.

*New York.* — *Pierce v. Dart*, 7 Cow. (N. Y.) 609.

*Ohio.* — *Parrot v. Cincinnati, etc., R. Co.*, 10 Ohio St. 624.

*Texas.* — *Shepherd v. Barnett*, 52 Tex. 638.

*Washington.* — *Wilson v. West, etc., Mill Co.*, 28 Wash. 312.

See also the title NUISANCES, vol. 21, p. 713 *et seq.*

**Measure of Damages.** — *Hopkins v. Western Pac. R. Co.*, 50 Cal. 190; *Florida Southern R. Co. v. Brown*, 23 Fla. 104; *Advance Elevator, etc., Co. v. Eddy*, 23 Ill. App. 352; *Brakken v. Minneapolis, etc., R. Co.*, 29 Minn. 41. See also *Uline v. New York Cent., etc., R. Co.*, 101 N. Y. 98, 54 Am. Rep. 661; *Baugh v. Texas, etc., R. Co.*, 80 Tex. 56.

**Excessive Damages.** — *Bannon v. Romeiser*, (Ky. 1896) 34 S. W. Rep. 1084.

5. *Wildier v. De Cou*, 26 Minn. 10; *Brakken v. Minneapolis, etc., R. Co.*, 29 Minn. 41.

6. *Hogan v. Central Pac. R. Co.*, 71 Cal. 83; *East Tennessee, etc., R. Co. v. Boardman*, 96 Ga. 356; *McDonald v. English*, 85 Ill. 232; *Daly v. Cincinnati St. R. Co.*, 8 Ohio Dec. (Reprint) 742, 9 Cinc. L. Bul. 270; *Wilson v. West, etc., Mill Co.*, 28 Wash. 312.

**The Fact that the Injury Differs in Degree Merely**, without difference in kind, is insufficient to entitle the individual to maintain an action

the owner of premises abutting on a street, as owner of the fee subject to the public easement, for special injury caused by the permanent obstruction by a third person of the surface of the street adjacent to the property.<sup>1</sup>

(a) **Abatement.** — Individuals may abate obstructions in streets in accordance with the general principles applicable to the abatement of nuisances.<sup>2</sup>

**3. Regulation of Uses of Streets** — *a. IN GENERAL.* — The legislature has power to regulate or may delegate to municipalities the regulation of general street traffic. Thus, requirements that vehicles shall carry lights at night,<sup>3</sup> and prohibitions against placing or carrying on sidewalks any showboard, placard, or sign for display,<sup>4</sup> against the distribution of handbills which the recipients would naturally throw into the street,<sup>5</sup> against the obstruction of streets by persons idly standing or congregating thereon,<sup>6</sup> and against smoking in streets,<sup>7</sup> have been sustained. But it has been held that under a general power to prevent nuisances a municipality cannot prohibit the showing or exhibition of stud horses on the streets of a town.<sup>8</sup> So the legislature cannot empower a municipality to exclude all "business avocations" from property abutting on boulevards.<sup>9</sup>

*b. MOVING BUILDINGS ON STREETS.* — The right of an individual to use streets for moving buildings through them, proper expedition being employed so as to cause no unnecessary obstruction, has been recognized;<sup>10</sup> but a third person injured by the failure to use due diligence, for instance a street-railway company whose tracks are obstructed, is entitled to recover damages.<sup>11</sup> And where the building is abandoned in the street so as to obstruct travel, the municipality may recover the cost of removing it.<sup>12</sup> Under their general power of control over streets, municipalities may adopt reasonable regulations regarding the moving of buildings thereon, such as regulations requiring a permit from particular officers,<sup>13</sup> and may, it seems, absolutely prohibit the

for damages. *Shaubert v. St. Paul, etc., R. Co.*, 21 Minn. 502; *Pittsburg, etc., R. Co. v. Hambleton*, 6 Ohio Dec. (Reprint) 721.

1. **Ejectment.** — *Thomas v. Hunt*, 134 Mo. 392. See, however, *Redfield v. Utica, etc., R. Co.*, 25 Barb. (N. Y.) 54. See generally the title **EJECTMENT**, vol. 10, p. 473.

2. **Abatement.** — *Consumers' Gas Trust Co. v. Huntsinger*, 14 Ind. App. 156; *Laviosa v. Chicago, etc., R. Co.*, McGloin (La.) 299; *Pater-son R. Co. v. Grundy*, 51 N. J. Eq. 213; *Electric Constr. Co. v. Heffernan*, 58 Hun (N. Y.) 605, 12 N. Y. Supp. 336; *Wolfe v. Pearson*, 114 N. Car. 621; *Maffatt v. Perry*, 3 Pittsb. (Pa.) 8. And see the title **ABATEMENT OF NUISANCES**, vol. 1, p. 63.

3. **Regulation of Uses of Streets.** — *Dane v. Mobile*, 36 Ala. 304.

4. *Com. v. McCafferty*, 145 Mass. 384, wherein an ordinance providing that "no person shall place or carry or cause to be placed or carried on any sidewalk any showboard, placard, or sign for the purpose of there displaying the same," was sustained as reasonable, and it was held that such ordinance was violated where the defendant walked upon the sidewalk, having over his shoulders a piece of oilcloth, which he wore like a vest or coat, on which was printed the inscription: "Lasters on strike. All lasters are requested to keep away from P. P. Sherry until the present trouble is settled. Per order L. P. U."

5. *Wettengel v. Denver*, 20 Colo. 552.

In *Michigan* it has been held that a municipality empowered to clean its streets and prevent the obstruction thereof could not absolutely

prohibit the distribution of circulars, handbills, or advertising cards upon the street. *People v. Armstrong*, 73 Mich. 290, 16 Am. St. Rep. 578.

6. *Com. v. Challis*, 8 Pa. Super. Ct. 130.

**Salvation Army.** — In *Bloomington v. Richardson*, 38 Ill. App. 60, an ordinance prohibiting "public meetings" on streets was held to apply only to meetings held pursuant to some notice intended and adopted to reach the general public, and was not violated by members of the "Salvation Army" who, without previous arrangement or notice, stopped on the street and proceeded to sing, pray, and testify, thereby collecting a crowd.

7. *Com. v. Thompson*, 12 Met. (Mass.) 231.

8. *Nolin v. Franklin*, 4 Yerg. (Tenn.) 163.

9. *St. Louis v. Dorr*, 145 Mo. 466, 68 Am. St. Rep. 575.

10. **Moving Buildings.** — *Day v. Green*, 4 Cush. (Mass.) 433; *Graves v. Shattuck*, 35 N. H. 257, 69 Am. Dec. 536; *Toronto St. R. Co. v. Dollery*, 12 Ont. App. 679; *Rice v. Whilby*, 25 Ont. App. 191. See also *Rice v. Buffalo Steel House Co.*, 17 N. Y. App. Div. 462. Compare *Dickson v. Kewanee Electric Light etc., Co.*, 35 Ill. App. 379.

Where a building being moved is allowed to obstruct traffic unreasonably it may, after notice, be destroyed by the municipality. *Keating v. Macdonald*, 73 Conn. 125.

11. *Toronto St. R. Co. v. Dollery*, 12 Ont. App. 679.

12. *Concord v. Budleigh*, 67 N. H. 106. See also *Caldwell v. Pre-emption*, 74 Ill. App. 32.

13. *Keating v. Macdonald*, 73 Conn. 125; *Woodward v. Boston*, 115 Mass. 81; *Day v.*

moving of buildings through the streets.<sup>1</sup>

**c. PARADES AND PROCESSIONS.** — The rights of individuals to make a reasonable use of streets for parades or processions has frequently been upheld.<sup>2</sup> But an unreasonable use of the streets for such purposes, so as materially to obstruct travel, is not warranted.<sup>3</sup> Reasonable regulations with regard to the use of streets for parades and processions may be imposed by the municipality,<sup>4</sup> such as requirements that a permit be obtained from particular municipal officers.<sup>5</sup> But it seems that the use of streets for such purposes cannot be absolutely prohibited without regard to circumstances.<sup>6</sup>

**d. NOISES ON STREETS.** — Municipalities may be empowered to impose reasonable regulations with regard to the making of noises on streets,<sup>7</sup> such as the beating of drums<sup>8</sup> or the delivery of orations or harangues.<sup>9</sup> Ordinances prohibiting the making of such noises without a permit being first acquired from particular municipal officers have been sustained as valid.<sup>10</sup>

**e. RESTRICTIONS AS TO VEHICLES AND LOADS.** — The power reasonably to regulate the use of streets by vehicles of unusually large size, or by those whose mode of use would greatly embarrass or endanger public travel, has been upheld, and regulations prescribing certain streets for such vehicles and prohibiting their presence in other streets have been held to be reasonable.<sup>11</sup>

**Driving Cattle Through Streets.** — In *New Jersey* it has been held that a municipality empowered to "regulate and control" the driving of cattle through streets was not empowered to prohibit such driving.<sup>12</sup>

**Restriction as to Weight of Loads.** — Under the general power to regulate the use of streets, municipalities may impose reasonable restrictions as to the weight of loads to be hauled.<sup>13</sup> Thus, an ordinance prohibiting persons hauling greater

*Green*, 4 Cush. (Mass.) 433; *Concord v. Burleigh*, 67 N. H. 106; *Eureka City v. Wilson*, 15 Utah 53; *Toronto St. R. Co. v. Dollery*, 12 Ont. App. 679.

1. *Eureka City v. Wilson*, 15 Utah 53.

2. **Parades and Processions.** — *Matter of Flaherty*, 105 Cal. 558; *Chicago v. Trotter*, 136 Ill. 430; *Anderson v. Wellington*, 40 Kan. 173, 10 Am. St. Rep. 175; *People v. Rochester*, 44 Hun (N. Y.) 166; *State v. Hughes*, 72 N. Car. 25; *Matter of Gribben*, 5 Okla. 379.

3. **Marching "Salvation Army" Procession**, marching on Sunday through city streets, has been held not to constitute a nuisance or to violate a city ordinance forbidding noise in streets. *People v. Rochester*, 44 Hun (N. Y.) 166.

4. *Mackall v. Ratchford*, 82 Fed. Rep. 41; *Chariton v. Simmons*, 87 Iowa 226; *Cook v. Dolan*, 19 Pa. Co. Ct. 401.

5. *Chariton v. Simmons*, 87 Iowa 226.

6. *Chariton v. Simmons*, 87 Iowa 226. See, however, *Chicago v. Trotter*, 136 Ill. 430, *affirming* 33 Ill. App. 206; *Rich v. Naperville*, 42 Ill. 222; *Matter of Frazee*, 63 Mich. 399, 6 Am. St. Rep. 310.

7. **Noises on Streets.** — *Com. v. Plaisted*, 148 Mass. 375, 12 Am. St. Rep. 566 (stated under *ITINERANT*, vol. 17, p. 578); *People v. Rochester*, 44 Hun (N. Y.) 166. See also *Matter of Gribben*, 5 Okla. 379, holding that an ordinance against noise of drums and other musical instruments was not authorized under the charter powers.

8. *Matter of Flaherty*, 105 Cal. 558. See *Roderick v. Whitson*, 51 Hun (N. Y.) 620.

9. *Pedrick v. Bailey*, 12 Gray (Mass.) 161; *Com. v. Abrahams*, 156 Mass. 57.

Making a speech in the street is not necessarily illegal at common law. *Fairbanks v. Kerr*, 70 Pa. St. 86, 10 Am. Rep. 664.

10. *Matter of Flaherty*, 105 Cal. 558; *Roderick v. Whitson*, 51 Hun (N. Y.) 620. See, however, *Rich v. Naperville*, 42 Ill. App. 222; *Anderson v. Wellington*, 40 Kan. 173, 10 Am. St. Rep. 175.

11. **Exclusion of Particular Wagons from Streets.** — *Cicero Lumber Co. v. Cicero*, 176 Ill. 9, 68 Am. St. Rep. 155; *Brodline v. Revere*, 182 Mass. 598; *Com. v. Stodder*, 42 Ill. App. 222; *Waddell*, 49 Minn. 500.

**The Use of Traction Engines on a street** cannot, it has been held, be forbidden under statutory authority "to regulate the use of coaches, hacks, drays, and other vehicles, for the transportation of passengers, freight or other articles," and to exercise a general exclusive power over the streets. *Bogue v. Bennett*, 156 Ind. 478, 83 Am. St. Rep. 212.

**Exclusion Unreasonable.** — In *Maine* it has been held that an ordinance limiting the use by wagons carrying a specified load to a certain part of a street would be invalid as unreasonable if the portion of the street set apart for wagons so loaded was not suitable for the purpose. *State v. Boardman*, 93 Me. 73.

12. *McConvill v. Jersey City*, 39 N. J. L. 38.

13. **Restrictions as to Loads.** — *State v. Boardman*, 93 Me. 73; *Utica v. Blakeslee*, (County Ct.) 46 How. Pr. (N. Y.) 165; *People v. Wilson*, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 583.

loads than three thousand five hundred pounds upon wagons whose tires are less than three inches wide,<sup>1</sup> and an ordinance prohibiting the carrying on any vehicle of a load the weight whereof exceeds three tons, unless such load consists of an article which cannot be divided,<sup>2</sup> have been upheld.

*f.* REGULATIONS AS TO SPEED. — Municipalities have power to impose reasonable regulations upon the speed of vehicles,<sup>3</sup> and ordinances restricting speed have been held to be applicable to fire engines and wagons responding to fire alarms,<sup>4</sup> and also to ambulances.<sup>5</sup> In a prosecution under an ordinance prohibiting fast driving, the fact that no one was endangered by such driving is immaterial, and evidence of the defendant's reputation as a careful driver is inadmissible.<sup>6</sup> The motive under which a defendant acted in driving at a speed violative of a municipal ordinance does not affect the question of his guilt, though such motive, it has been held, should be considered with a view to inflicting an appropriate penalty.<sup>7</sup>

*g.* BICYCLES. — The use of streets and sidewalks by bicycles has been treated in another place.<sup>8</sup>

*h.* RIDING OR DRIVING ON SIDEWALKS. — The primary object of sidewalks is for the accommodation of pedestrians, and riding or driving thereon may be prohibited.<sup>9</sup> On the other hand, the municipality may authorize the use of sidewalks by teams, as in a case where the street proper is so obstructed by street-car tracks as to prevent the standing of a team on the street without obstructing the tracks.<sup>10</sup> It has been held not to be necessarily illegal to back a wagon across a sidewalk for the purpose of unloading merchandise through the window of a building.<sup>11</sup> General prohibitions against

1. *Harrison v. Elgin*, 53 Ill. App. 452.

2. *Com. v. Mulhall*, 162 Mass. 496, 44 Am. St. Rep. 387.

3. *Speed Regulations.* — *Carswell v. Wilmington*, 2 Marv. (Del.) 360; *Morton v. Princeton*, 18 Ill. 383; *Nealis v. Hayward*, 48 Ind. 19; *Com. v. Worcester*, 3 Pick. (Mass.) 462; *People v. Little*, 86 Mich. 125; *City Council v. Dunn*, 1 McCord L. (S. Car.) 333.

An ordinance imposing a fine upon any person who shall wilfully, etc., ride or drive animals on the streets "faster than an ordinary trot" is not unreasonable, and the description of the gait is not vague or uncertain. *Nealis v. Hayward*, 48 Ind. 19.

In *Massachusetts* it has been held that a city empowered by ordinance to prohibit persons from riding or driving upon any street "at a rate of speed which it deems inconsistent with the public safety" could not prohibit the riding or driving "at an immoderate gait so as to endanger or expose to injury any person standing, walking, or riding in or on the same." The court, while recognizing that the ordinance could prohibit driving or riding at a particular gait, as at a trot or gallop, as in *Com. v. Worcester*, 3 Pick. (Mass.) 462, said that it did not authorize the imposition of a penalty for driving at a rate of speed or at a gait which should be found upon inquiry into the circumstances to have been immoderate so as to expose persons to injury, the intention of the legislature being that the city should determine what specific act should be unlawful. *Com. v. Roy*, 140 Mass. 432.

*Question of Law.* — The question whether a speed regulation is reasonable or not is a question of law for the decision of the court. *Com. v. Worcester*, 3 Pick. (Mass.) 462.

4. *Fire Department.* — *Carswell v. Wilmington*, 2 Marv. (Del.) 360; *Morse v. Sweeney*, 15

Ill. App. 486. But see *State v. Sheppard*, 64 Minn. 287; *Farley v. New York*, 152 N. Y. 222, 57 Am. St. Rep. 511; and the title *LAW OF THE ROAD*, vol. 18, p. 587.

5. *Ambulances.* — *People v. Little*, 86 Mich. 125.

6. *Com. v. Worcester*, 3 Pick. (Mass.) 462.

7. *Morton v. Princeton*, 18 Ill. 383.

8. *Bicycles.* — See the title *BICYCLES*, vol. 4, p. 15. See also *Mercer v. Corbin*, 117 Ind. 450, 10 Am. St. Rep. 76; *Swift v. Topeka*, 43 Kan. 671; *Purple v. Greenfield*, 138 Mass. 1; *Custer v. New Philadelphia*, 11 Ohio Cir. Dec. 9, 20 Ohio Cir. Ct. 177; *Com. v. Forrest*, 170 Pa. St. 40, 37 W. N. C. (Pa.) 19.

*Authorizing Riding of Bicycles on Sidewalks.* — *Lee v. Port Huron*, 128 Mich. 533, 8 Detroit Leg. N. 754; *Lechner v. Newark*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 452.

*Lights After Night.* — *Des Moines v. Keller*, 116 Iowa 648, 93 Am. St. Rep. 268.

*Prohibitions Against Riding Bicycle on Sidewalk.* — *Fuller v. Redding*, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 634; *People v. Meyer*, (County Ct.) 26 Misc. (N. Y.) 117; *Com. v. Forrest*, 170 Pa. St. 40. A prohibition against riding a bicycle on the sidewalk does not apply to a tricycle operated by hand by a cripple. *Wheeler v. Boone*, 108 Iowa 235.

*Sounding Alarm at Street Crossings.* — *Emporia v. Wagoner*, 6 Kan. App. 659.

9. *Riding or Driving on Sidewalks.* — *Indianapolis v. Higgins*, 141 Ind. 1; *Com. v. Forrest*, 170 Pa. St. 40.

*Condition of Street as Excuse When Known Beforehand.* — *State v. Brown*, 109 N. Car. 802.

*Liability of Master for Act of Servant in Driving on Sidewalk.* — *State v. Bacon*, 40 Vt. 456. 10. *Merritt v. Fitzgibbons*, 102 N. Y. 362.

11. *Hand v. Klinker*, 54 N. Y. Super. Ct. 433. In backing wagons or trucks across sidewalks

riding or driving on sidewalks have been held not to apply to crossing sidewalks in removing dirt from excavations<sup>1</sup> or to driving across them in entering or leaving stables or other buildings on lots abutting on streets.<sup>2</sup>

**Persons Driving Animals Along a Street** may be prohibited from allowing them to go upon sidewalks.<sup>3</sup>

**i. STANDING WAGONS ON STREETS.** — The length of time during which vehicles shall be allowed to stand upon streets may be prescribed or regulated,<sup>4</sup> and municipalities may prohibit the stopping of vehicles upon crosswalks,<sup>5</sup> the leaving of teams unfastened or unattended in the street,<sup>6</sup> or the leaving in the streets of vehicles not in use.<sup>7</sup> A prohibition against stopping with a vehicle longer than a specified time has been held to refer to a voluntary and not to an involuntary stoppage,<sup>8</sup> but to apply to licensed peddlers.<sup>9</sup> At common law stopping a wagon upon a street is not illegal unless it unreasonably obstructs the travel upon the street.<sup>10</sup>

**j. HACK STANDS.** — Municipalities have no implied power to authorize the exclusive use by an individual of a part of a street for a hack stand<sup>11</sup> nor to permit a use for such purpose which will unreasonably obstruct street travel.<sup>12</sup> The power to establish stands for hacks in streets in front of public buildings<sup>13</sup> or quasi-public buildings, such as depots,<sup>14</sup> has been upheld, but it is otherwise as to streets in front of private property in the absence of consent of the owner.<sup>15</sup> The power to prohibit the standing of hacks except at designated places has been upheld.<sup>16</sup> Hackmen have, however, the right to make a reasonable use of the streets for taking up and letting down their passengers.<sup>17</sup>

**k. MARKETS.** — The subject of the use of streets for markets, and their regulation and control, has been treated in another place.<sup>18</sup>

for the purpose of unloading merchandise, drivers must, of course, use reasonable care to avoid injuring pedestrians. *Goff v. Akers*, (N. Y. Super. Ct. Gen. T.) 1 Misc. (N. Y.) 468.

1. *In re O'Keefe*, (Brooklyn City Ct. Gen. T.) 19 N. Y. Supp. 676.

2. *In re O'Keefe*, (Brooklyn City Ct. Gen. T.) 19 N. Y. Supp. 676; *Philadelphia v. Wright*, 4 Phila. (Pa.) 138, 17 Leg. Int. (Pa.) 349.

3. *Com. v. Curtis*, 9 Allen (Mass.) 266 (swine).

4. **Standing Wagons on Streets.** — *Com. v. Fenton*, 139 Mass. 195; *Com. v. Rowe*, 141 Mass. 79; *Com. v. Lagorio*, 141 Mass. 81; *Com. v. Harding*, Thach. Crim. Cas. (Mass.) 270.

5. **A Prohibition Against Stopping Vehicles on Crosswalks** is violated whether travel over the crosswalk is stopped or not. *Com. v. Derby*, 162 Mass. 183.

**Railroad Trains.** — The charter of a city authorizing the adoption of ordinances to prevent the encumbering of streets with carriages authorizes an ordinance to prevent the stopping of railroad trains over street crossings. *Duluth v. Mallett*, 43 Minn. 204. See also *Burger v. Missouri Pac. R. Co.*, 112 Mo. 238, 34 Am. St. Rep. 379.

6. *Bott v. Pratt*, 33 Minn. 323, 53 Am. Rep. 47; *Sondheim v. Nassau Brewing Co.*, 60 N. Y. App. Div. 463.

7. *State v. Rayantis*, 55 Minn. 126, holding also that such an ordinance was not applicable to a push-cart peddler stopping for half an hour to sell his wares.

8. *Com. v. Brooks*, 99 Mass. 434.

9. *Com. v. Fenton*, 139 Mass. 195; *Com. v. Lagorio*, 141 Mass. 81.

10. *State v. Edens*, 85 N. Car. 522.

11. **Hack Stands.** — In *Curry v. Dist. of Co-*

lumbia, 14 App. Cas. (D. C.) 423, the police regulation of the commissioners of the District of Columbia setting apart a portion of a street for the exclusive use of the hack service of a railroad company was held invalid as giving exclusive privileges to the railroad company and prohibiting all other persons from engaging in a lawful business at the place designated. See, however, *Odell v. Bretnay*, 62 N. Y. App. Div. 595.

12. *Odell v. Bretnay*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 603.

13. *Masterson v. Short*, (N. Y. Super. Ct. T.) 33 How. Pr. (N. Y.) 481, 3 Abb. Pr. N. S. (N. Y.) 154, 7 Robt. (N. Y.) 241.

14. *Pennsylvania Co. v. Chicago*, 181 Ill. 289.

15. *McCaffrey v. Smith*, 41 Hun (N. Y.) 117; *Branahan v. Cincinnati Hotel Co.*, 39 Ohio St. 333, 48 Am. St. Rep. 457, affirming *Cincinnati Hotel Co. v. Branahan*, 8 Ohio Dec. (Reprint) 305, 7 Cinc. L. Bul. 57. See also the title **ABUTTING OWNERS**, vol. 1, p. 226, where the last case is quoted.

16. *Montgomery v. Parker*, 114 Ala. 118, 62 Am. St. Rep. 95; *Com. v. Matthews*, 122 Mass. 60.

**Such Ordinance Not Applicable to Hotel Omnibus.** — *Oswego v. Collins*, 38 Hun (N. Y.) 171.

**Necessity for Definiteness.** — Where an ordinance provided that "cabs shall stand on B. between J. and W. streets," etc., without an express prohibition against their standing on other parts of other streets, it was held that their standing in other places was not prohibited. *Helena v. Gray*, 7 Mont. 486.

17. *People v. Brookfield*, 6 N. Y. App. Div. 398.

18. **Markets.** — See the title **MARKETS**, vol. 19,

Volume XXVII.

**VII. CARE AND REPAIR OF STREETS** — 1. *In General.* — The duty to keep streets in repair is imposed as a general rule upon the municipalities,<sup>1</sup> and in order to perform this duty they may do whatever is necessary to make the streets safe and convenient for travel. Thus, the municipality may, when necessary to render the street safe for travel, erect a barrier across an open passageway below the level of the street.<sup>2</sup> In some instances statutes have imposed upon abutting owners the duty to keep the streets in repair, and have authorized the municipality, where the abutting owner refuses to perform such duty, to make the necessary repairs and collect the reasonable cost thereof from such owner.<sup>3</sup>

2. *Work on Street by Inhabitants.* — The subject of requiring inhabitants to work upon the street of the municipality will be found treated elsewhere in this volume.<sup>4</sup>

3. *Injuries from Defective Streets and Sidewalks.* — The liability of municipalities for injuries to travelers from defects in streets and sidewalks is treated under another title.<sup>5</sup>

**VIII. ACTIONS FOR INJURIES TO STREETS.** — Municipalities upon which the duty of maintaining the streets in repair is imposed may sue to recover damages for injuries thereto by individuals.<sup>6</sup>

**IX. RAILROADS IN STREETS** — 1. *Scope of Section.* — This section is designed to treat of the longitudinal occupation of streets in cities and towns by ordinary steam railroads used for the carriage of both goods and passengers, and by private railroads operated by steam. The law in regard to the use of rural highways by railroads,<sup>7</sup> the occupation of streets and highways by street railroads,<sup>8</sup> and the crossing of streets and highways by railroads, is fully treated elsewhere in this volume.<sup>9</sup>

2. *Right to Use Streets for Railroad Purposes* — *a. LEGISLATIVE AUTHORITY* — (1) *Necessity for.* — In the absence of clear authority conferred by the legislature, or by a municipality acting as its agent, a steam railroad cannot be built in a public street.<sup>10</sup>

(2) *Power of Legislature to Give.* — Subject to constitutional limitations, it is clearly within the power of the legislature to authorize the occupation of

p. 1139. See also *Savannah v. Wilson*, 49 Ga. 476; *Atwater v. Newark*, 7 N. J. L. J. 176; *McDonald v. Newark*, 42 N. J. Eq. 136; *Matter of Fiegle*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 27; *St. John v. New York*, 3 Bosw. (N. Y.) 483; *Wilder v. Cincinnati*, 4 Ohio Dec. 104, 1 Ohio N. P. 347; *Hites v. Dayton*, 8 Ohio Dec. (Reprint) 170, 6 Cinc. L. Bul. 142; *Denehey v. Harrisburg*, 2 Pearson (Pa.) 330.

1. *Care and Repair of Streets.* — *Noyes v. Ward*, 19 Conn. 250; *M'Gowan v. Windham*, 25 Conn. 86; *Leverich v. New York*, 66 Barb. (N. Y.) 623.

2. *Alger v. Lowell*, 3 Allen (Mass.) 402.

3. *Hait v. Gaven*, 12 Cal. 476.

4. See the title *TAXATION*, *post*.

5. See the title *HIGHWAYS*, vol. 15, p. 420 *et seq.*

6. *Action for Injury to Street.* — *Centerville v. Woods*, 57 Ind. 192; *Sioux City v. Weare*, 59 Iowa 95; *Powell County v. Kentucky Union Lumber Co.*, (Ky. 1893) 24 S. W. Rep. 114; *Monmouth v. Gardiner*, 35 Me. 247; *New Salem v. Eagle Mill Co.*, 138 Mass. 8; *Shrewsbury v. Brown*, 25 Vt. 197.

*Action by Abutting Property Owner.* — *Parish v. Baird*, 160 N. Y. 302.

7. *Use of Rural Highways by Railroads.* — See the title *RAILROADS*, vol. 23, p. 706.

8. *Occupation of Streets and Highways by Street Railroads.* — See the title *STREET RAILWAYS*, *ante*, p. 3.

9. *Crossing of Streets and Highways by Railroads.* — See the title *CROSSINGS*, vol. 8, p. 335.

10. *No Right in Absence of Clear Legislative Authority.* — *Augusta, etc., R. Co. v. Augusta*, 100 Ga. 701; *Georgia Southern, etc., R. Co. v. Ray*, 84 Ga. 378; *Daly v. Georgia Southern, etc., R. Co.*, 80 Ga. 793, 12 Am. St. Rep. 286; *Owensboro v. Owensboro, etc., R. Co.*, (Ky. 1897) 40 S. W. Rep. 916; *Cornwall v. Louisville, etc., R. Co.*, 87 Ky. 72; *Fort St. Union Depot Co. v. State R. Crossing Board*, 81 Mich. 248; *Pennsylvania R. Co.'s Appeal*, 115 Pa. St. 514; *Com. v. Erie, etc., R. Co.*, 27 Pa. St. 339, 67 Am. Dec. 471. And see *People's Rapid Transit Co. v. Dash*, 125 N. Y. 93.

The Streets of the City of Washington cannot be used for railroad purposes without authority from Congress. *District of Columbia v. Baltimore, etc., R. Co.*, 114 U. S. 453.

The Purchase of the Fee in lands included in a public street will not authorize a railroad to occupy such street in the absence of legislative authority. *Atty.-Gen. v. Morris, etc., R. Co.*, 19 N. J. Eq. 387, *reversed* on another point, 20 N. J. Eq. 530.



streets in cities and towns by steam railroads,<sup>1</sup> even without the consent of the municipalities concerned;<sup>2</sup> and this power of authorization may either be exercised by the legislature directly, or its exercise may be delegated to the municipal authorities.<sup>3</sup>

*b. MUNICIPAL CONSENT* — (1) *Necessity for.* — Railroad companies are frequently required by their charters, or by the general statutes of the state, to obtain the consent of the municipal authorities before occupying public streets in cities and towns.<sup>4</sup> But where such consent is not required by stat-

**1. Legislature May Authorize Use of Streets by Railroads** — *District of Columbia.* — Glick *v.* Baltimore, etc., R. Co., 19 D. C. 412.

*Georgia.* — Davis *v.* East Tennessee, etc., R. Co., 87 Ga. 605; Daly *v.* Georgia Southern, etc., R. Co., 80 Ga. 793, 12 Am. St. Rep. 286.

*Illinois.* — Chicago, etc., R. Co. *v.* Joliet, 79 Ill. 25.

*Kentucky.* — Fulton *v.* Short Route R. Transfer Co., 85 Ky. 640, 7 Am. St. Rep. 619; Lexington, etc., R. Co. *v.* Applegate, 8 Dana (Ky.) 289, 33 Am. Dec. 497.

*Louisiana.* — Werges *v.* St. Louis, etc., R. Co., 35 La. Ann. 641; Harrison *v.* New Orleans Pac. R. Co., 34 La. Ann. 462, 44 Am. Rep. 438; New Orleans, etc., R. Co. *v.* New Orleans, 26 La. Ann. 517.

*Maryland.* — O'Brien *v.* Baltimore Belt R. Co., 74 Md. 363.

*Missouri.* — Dubach *v.* Hannibal, etc., R. Co., 89 Mo. 483.

*New Jersey.* — Paterson, etc., Horse R. Co. *v.* Paterson, 24 N. J. Eq. 158; Morris, etc., R. Co. *v.* Newark, 10 N. J. Eq. 352.

*New York.* — Matter of New York Cent., etc., R. Co., 77 N. Y. 248; People *v.* Long Island R. Co., (Supm. Ct. Spec. T.) 9 Abb. N. Cas. (N. Y.) 181.

*Pennsylvania.* — Mercer *v.* Pittsburgh, etc., R. Co., 36 Pa. St. 99; Com. *v.* Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471; Yost *v.* Philadelphia, etc., R. Co., 29 Leg. Int. (Pa.) 85.

*Tennessee.* — Tennessee, etc., R. Co. *v.* Adams, 3 Head (Tenn.) 596.

The legislature cannot authorize a railroad to use the streets of a city without compensation to abutting owners of the fee. Williams *v.* New York Cent. R. Co., 16 N. Y. 97, 69 Am. Dec. 651.

**Ownership of Fee in Street Immaterial.** — Fulton *v.* Short Route R. Transfer Co., 85 Ky. 640, 7 Am. St. Rep. 619.

**Destruction of Public Easement Not Within Power of Legislature.** — See Werges *v.* St. Louis, etc., R. Co., 35 La. Ann. 641; Chicago, etc., R. Co. *v.* Joliet, 79 Ill. 25. And see also *infra*, this subsection, *g. Nature and Extent of Rights Acquired.*

**2. Legislature May Authorize Without Consent of Municipality.** — Floyd County *v.* Rome St. R. Co., 77 Ga. 615; Ruttle *v.* Covington, 10 S. W. Rep. 644, 10 Ky. L. Rep. 766. *Contra*, Donnaher *v.* State, 8 Smed. & M. (Miss.) 640.

**Compensation to City — Legislature Not Bound to Require.** — Floyd County *v.* Rome St. R. Co., 77 Ga. 614. *Contra*, Donnaher *v.* State, 8 Smed. & M. (Miss.) 649.

**Where the Railroad Company and the City Authorities Cannot Agree** as to what streets shall be occupied, the question is to be determined by the state engineer or other person appointed by

the governor. Rio Grande R. Co. *v.* Brownsville, 45 Tex. 88.

**3. Power May Be Exercised Directly or Delegated to Municipal Authorities.** — Harrison *v.* New Orleans Pac. R. Co., 34 La. Ann. 462, 44 Am. Rep. 438; Mercer *v.* Pittsburgh, etc., R. Co., 36 Pa. St. 99.

**4. Consent of Municipality Required by Statute** — *California.* — Arcata *v.* Arcata, etc., R. Co., 92 Cal. 639; California Southern R. Co. *v.* Kimball, 61 Cal. 90. And see Eisenhuth *v.* Ackerson, 105 Cal. 87; People *v.* Stanford, 77 Cal. 360.

*Illinois.* — Illinois Cent. R. Co. *v.* Chicago, 173 Ill. 471, *affirmed* 176 U. S. 646; Chicago, etc., R. Co. *v.* Dunbar, 100 Ill. 110; Hickey *v.* Chicago, etc., R. Co., 6 Ill. App. 172.

*Indiana.* — New Castle *v.* Lake Erie, etc., R. Co., 155 Ind. 18.

*Kansas.* — Pacific R. Co. *v.* Leavenworth, 1 Dill. (U. S.) 393.

*Maine.* — Veazie *v.* Mayo, 45 Me. 560.

*Missouri.* — Lockwood *v.* Wabash R. Co., 122 Mo. 86, 43 Am. St. Rep. 547. And see Knapp *v.* St. Louis Transfer R. Co., 126 Mo. 26; Kansas City, etc., R. Co. *v.* St. Joseph Terminal R. Co., 97 Mo. 457.

*Pennsylvania.* — Pittsburg *v.* Pittsburg, etc., R. Co., 205 Pa. St. 13; Philadelphia *v.* River Front R. Co., 173 Pa. St. 334; Railroad Co. *v.* Kensington, etc., R. Co., 33 W. N. C. (Pa.) 182; Philadelphia *v.* Lombard, etc., R. Co., 3 Grant. Cas. (Pa.) 403. And see Com. *v.* Central Pass. R. Co., 52 Pa. St. 506.

*Texas.* — Galveston, etc., R. Co. *v.* Galveston, (Tex. Civ. App. 1896) 37 S. W. Rep. 27.

**Where the Consent of Adjacent Property Owners Is Also Required** in addition to the consent of the city authorities, it is immaterial which consent is first obtained. Paterson, etc., Horse R. Co. *v.* Paterson, 24 N. J. Eq. 158. And see California Southern R. Co. *v.* Kimball, 61 Cal. 90.

**Facts Held to Show Abandonment of Application for Consent.** — See Klosterman *v.* Chesapeake, etc., R. Co., (Ky. 1900) 56 S. W. Rep. 820.

**Statute Requiring Municipal Consent Construed.** — Where a railroad company is required by statute to obtain the consent of a city before laying tracks in its streets, such consent is a condition precedent to the construction of depots, engine houses, and other appurtenances of the road, as well as the main track; and the requirement also applies to the construction of the road over land subsequently included in the city limits. Illinois Cent. R. Co. *v.* Chicago, 176 U. S. 646, *affirming* 173 Ill. 471; Pittsburg, etc., R. Co. *v.* Chicago, 159 Ill. 369. And such consent is also a condition precedent to the construction of additional tracks at a subse-

ute a railroad acting under legislative authority may occupy the streets without municipal license.<sup>1</sup>

(2) *Power of City to Give.* — When expressly empowered by the legislature municipal corporations may authorize the use of their streets by steam railroads;<sup>2</sup> but in the absence of an express legislative grant they have no such power.<sup>3</sup> Unless the power is unequivocally granted by the city charter, or other statute, it must be taken to be withheld.<sup>4</sup> Authority to make such a

quent time. *Pittsburg, etc., R. Co. v. Chicago*, 159 Ill. 369.

1. *Use of Streets Without Municipal Consent Authorized by Statute — Florida.* — *State v. Jacksonville St. R. Co.*, 29 Fla. 590.

*Missouri.* — *Atlantic, etc., R. Co. v. St. Louis*, 66 Mo. 228.

*Pennsylvania.* — *Millvale v. Evergreen R. Co.*, 131 Pa. St. 1; *South Chester v. Chester, etc., R. Co.*, 5 Del. Co. Rep. (Pa.) 114; *Railroad Co.'s Appeal*, 1 Montg. Co. Rep. (Pa.) 129. And see *Hestonville, etc., Pass. R. Co. v. Philadelphia*, 89 Pa. St. 210.

*Municipality Not Entitled to Compensation.* — *Rio Grande R. Co. v. Brownsville*, 45 Tex. 88. But compare *Indianola v. Indianola R. Co.*, 2 Tex. Unrep. Cas. 337.

*Use under License Not a Waiver of Right to Use Without License.* — *Atlantic, etc., R. Co. v. St. Louis*, 66 Mo. 228.

2. *City May Grant Use of Streets When Empowered by Statute — California.* — *Arcata v. Arcata, etc., R. Co.*, 92 Cal. 639.

*Colorado.* — *Denver, etc., R. Co. v. Domke*, 11 Colo. 247.

*Illinois.* — *Chicago Dock, etc., Co. v. Garrity*, 115 Ill. 155; *Parlin v. Mills*, 11 Ill. App. 396.

*Indiana.* — *New Castle v. Lake Erie, etc., R. Co.*, 155 Ind. 18; *Cox v. Louisville, etc., R. Co.*, 48 Ind. 178; *Haslett v. New Albany Belt, etc., R. Co.*, 7 Ind. App. 603.

*Iowa.* — *Burlington Gaslight Co. v. Burlington, etc., R. Co.*, 91 Iowa 470; *Heath v. Des Moines, etc., R. Co.*, 61 Iowa 11; *Frith v. Dubuque*, 45 Iowa 406; *Cook v. Burlington*, 36 Iowa 357.

*Kentucky.* — *Wolfe v. Covington, etc., R. Co.*, 15 B. Mon. (Ky.) 404.

*Louisiana.* — *New Orleans v. Steinhart*, 52 La. Ann. 1043.

*New York.* — *Milbau v. Sharp*, 15 Barb. (N. Y.) 193.

*Texas.* — *Texarkana, etc., R. Co. v. Texas, etc., R. Co.*, 28 Tex. Civ. App. 551.

*Washington.* — *Seattle v. Columbia, etc., R. Co.*, 6 Wash. 379.

*West Virginia.* — *Yates v. West Grafton*, 34 W. Va. 783.

*Power of City to Forbid Use of Streets by Steam Railroads.* — See *Richmond, etc., R. Co. v. Richmond*, 26 Gratt. (Va.) 83.

*Where Land Is Dedicated for Use as a Public Street* with the provision that it shall never be used for any other purpose, the city cannot authorize the destruction of the public easement by the construction of a railroad thereon. *Savannah, etc., R. Co. v. Shiels*, 33 Ga. 601. But see *Murphy v. Chicago*, 29 Ill. 279, 81 Am. Dec. 307. And see generally the title DEDICATION, vol. 9, p. 84.

*Consideration for Grant — What Insufficient.* — See *Daly v. Georgia Southern, etc., R. Co.*, 80

Ga. 793, 12 Am. St. Rep. 286; *Board of Liquidation v. New Orleans*, 32 La. Ann. 915.

*Contract Between City and Railroad Company Held Void as Against Public Policy.* — See *New Haven v. New Haven, etc., R. Co.*, 62 Conn. 252.

3. *City Cannot Authorize Use of Streets by Railroad Unless Empowered by Statute — Alabama.* — *Louisville, etc., R. Co. v. Mobile, etc., R. Co.*, 124 Ala. 162.

*Colorado.* — *Denver, etc., R. Co. v. Denver City R. Co.*, 2 Colo. 673.

*Georgia.* — *Davis v. East Tennessee, etc., R. Co.*, 87 Ga. 605; *Daly v. Georgia Southern, etc., R. Co.*, 80 Ga. 793, 12 Am. St. Rep. 286; *Kavanaugh v. Mobile, etc., R. Co.*, 78 Ga. 271.

*Iowa.* — *Stanley v. Davenport*, 54 Iowa 463, 37 Am. Rep. 216.

*Kentucky.* — *Com. v. Frankfort*, 92 Ky. 149; *Ruttles v. Covington*, 10 S. W. Rep. 644, 10 Ky. L. Rep. 766.

*Missouri.* — *Atlantic, etc., R. Co. v. St. Louis*, 66 Mo. 228.

*New Jersey.* — *Thompson v. Ocean City R. Co.*, 60 N. J. L. 74.

*New York.* — *People v. New York, etc., R. Co.*, (Supm. Ct. Spec. T.) 26 How. Pr. (N. Y.) 44, 45 Barb. (N. Y.) 73.

*Pennsylvania.* — *Philadelphia v. River Front R. Co.*, 173 Pa. St. 334; *Potts v. Quaker City El. R. Co.*, 161 Pa. St. 396.

An act of the legislature declaring certain streets in a city to be forever established as public highways cannot be repealed or modified by an ordinance granting the use of such streets to a railroad company. *Com. v. Erie, etc., R. Co.*, 27 Pa. St. 339, 67 Am. Dec. 471.

Where the occupation and use of the same street by two or more railroad companies for a distance of more than five blocks is forbidden by statute, a city has no power to authorize the use of a street by a railroad contrary to the terms of such statute. *People v. Rich*, 54 Cal. 74.

*City Without Power to Enlarge Rights Granted to Railroad by Legislature.* — *M. E. Church v. Pennsylvania R. Co.*, 48 N. J. Eq. 452.

*Consent Refused — Subsequent Ordinance Granting Consent Invalid.* — *Musser v. Fairmount, etc., R. Co.*, 5 Pa. L. J. Rep. 466, 7 Am. L. Reg. 284.

4. *Power to Vacate Streets* does not empower city authorities to authorize the occupation of the street by a railroad. *McAboy's Appeal*, 107 Pa. St. 548.

A clause in a city charter empowering the city to make ordinances concerning rights of way, regulation of street cars, street railways and all other railroads, does not give the city power to authorize the use of its streets by a railroad company. *Louisville, etc., R. Co. v. Mobile, etc., R. Co.*, 124 Ala. 162.

grant is not conferred by a general clause in the charter giving the city control over its streets,<sup>1</sup> or by a clause empowering it to grant the use of its streets to street railways.<sup>2</sup>

**Nature of Power.** — In granting the right to use its streets in the manner here considered, a city acts as agent of the state.<sup>3</sup> The power of the municipal authorities is legislative in its nature, and is not referable for its support to the power of making contracts.<sup>4</sup>

**Limitations upon Power.** — Power conferred upon a city to permit the use of its streets by railroads must be construed as subject to the qualification that no property rights of abutting owners shall be invaded thereby.<sup>5</sup> It is sometimes provided by statute that the city shall grant authority only upon the petition of adjacent property owners,<sup>6</sup> or after notice to persons interested.<sup>7</sup> General grants of authority without limitations as to the location of the road in the street<sup>8</sup> or the duration of the privilege,<sup>9</sup> and grants which derogate from the power of the city to legislate upon the subject in the future, are generally held to be void.<sup>10</sup>

**Manner of Giving Consent.** — The manner in which the consent of a municipality is to be given, whether by resolution of the city council or other legislative body, or by permit from the city officers, will depend upon the municipal charter or other statute by which the power to give consent is conferred.<sup>11</sup>

Authority to permit the connection by common depots, tracks, or otherwise of all railroads in the city, does not include power to authorize the longitudinal occupation of a street by a steam railroad. *Augusta, etc., R. Co. v. Augusta*, 100 Ga. 701.

**1. General Clause in Charter Authorizing City to Control Streets Not Sufficient.** — *Denver, etc., R. Co. v. Denver City R. Co.*, 2 Colo. 673; *Daly v. Georgia Southern, etc., R. Co.*, 80 Ga. 793, 12 Am. St. Rep. 286; *Ruttles v. Covington, (Ky. 1889)* 10 S. W. Rep. 644; *Com. v. Frankfort*, 92 Ky. 149; *St. Paul v. Chicago, etc., R. Co.*, 63 Minn. 330; *Tallon v. Hoboken*, 60 N. J. L. 212; *Davis v. New York*, 14 N. Y. 516, 67 Am. Dec. 186. *Compare New Castle v. Lake Erie, etc., R. Co.*, 155 Ind. 18; *Yates v. West Grafton*, 34 W. Va. 783.

In *Chicago, etc., R. Co. v. Quincy*, 136 Ill. 489, it was held that a city charter conferring upon the city council exclusive power over the streets of the city authorizes the council to grant the use of the streets to a railroad company.

**2. Power to Authorize Street Railways Not Power to Authorize Steam Railways.** — *Tallon v. Hoboken*, 60 N. J. L. 212. But see *New Orleans v. Steinhardt*, 52 La. Ann. 1043.

**3. City Acts as Agent of State.** — *Mobile v. Louisville, etc., R. Co.*, 84 Ala. 115, 5 Am. St. Rep. 342; *Delaware, etc., R. Co. v. Buffalo*, 158 N. Y. 478.

**4. Power of Municipal Authorities Legislative and Not Contractual.** — *South Pasadena v. Los Angeles Terminal R. Co.*, 109 Cal. 315.

**5. Property Rights of Abutting Owners Not to Be Invaded.** — *Reining v. New York, etc., R. Co.*, 128 N. Y. 157. And see *Kelly v. Pittsburgh, etc., R. Co.*, 28 Ind. App. 457, 91 Am. St. Rep. 134; *Wichita, etc., R. Co. v. Fechheimer*, 36 Kan. 45.

**Provision for Condemnation and Compensation.** — *Wilkins v. Gaffney City*, 54 S. Car. 199.

**6. Petition of Property Owners a Condition Precedent.** — *McGann v. People*, 194 Ill. 526; *Ches-*

*ter v. Wabash, etc., R. Co.*, 182 Ill. 382; *Chicago Dock, etc., Co. v. Garrity*, 115 Ill. 155; *McCartney v. Chicago, etc., R. Co.*, 112 Ill. 611; *Schuchert v. Wabash, etc., R. Co.*, 10 Ill. App. 397. But see *Wiggins Ferry Co. v. East St. Louis Union R. Co.*, 107 Ill. 450.

**7. Notice to Persons Interested Required by Statute.** — *Klosterman v. Chesapeake, etc., R. Co.*, (Ky. 1900) 56 S. W. Rep. 820.

**8. Grant Not Specifying Location of Road Void.** — *Hickey v. Chicago, etc., R. Co.*, 6 Ill. App. 172. *Compare Chicago, etc., R. Co. v. Dunbar*, 100 Ill. 110.

**9. Grant Without Time Limitations Void.** — *Atty.-Gen. v. New York*, 3 Duer (N. Y.) 119. And see *Chester v. Wabash, etc., R. Co.*, 182 Ill. 382.

**Contra — Grant Not Void for Perpetuity.** — *Seattle v. Columbia, etc., R. Co.*, 6 Wash. 379. And see *Mobile v. Louisville, etc., R. Co.*, 84 Ala. 115, 5 Am. St. Rep. 342.

**10. Grants Derogating from Powers of City as to Future Legislation Void.** — *Atty.-Gen. v. New York*, 3 Duer (N. Y.) 119; *Railroad Co. v. City*, 3 Del. Co. Rep. (Pa.) 18.

But see *Cleveland v. Cleveland, etc., R. Co.*, 93 Fed. Rep. 113, in which case a grant of authority without limitation as to time, and without reservation in favor of the city, was held valid on the ground that it was a mere confirmation by the city of powers granted to the railroad by the legislature.

**Surrender by City of Power to Change Grade of Street Void.** — *Wabash R. Co. v. Defiance*, 8 Ohio Cir. Dec. 703, 10 Ohio Cir. Ct. 27; *Railroad Co. v. City*, 3 Del. Co. Rep. (Pa.) 18. And see *Kansas City, etc., R. Co. v. Morley*, 45 Mo. App. 304.

**11. Manner of Giving Consent.** — *Eisenhuth v. Ackerson*, 105 Cal. 87; *Arcata v. Arcata, etc., R. Co.*, 92 Cal. 639; *Quincy v. Chicago, etc., R. Co.*, 92 Ill. 21; *Merchants' Union Barb-Wire Co. v. Chicago, etc., R. Co.*, (Iowa 1886) 20 N. W. Rep. 822; *Merchants' Union Barb Wire Co. v. Chicago, etc., R. Co.*, 70 Iowa 105; *Vea-*

Statutes providing for the sale of franchises for the operation of street railroads to the highest bidder do not apply to applications by steam railroads for permission to occupy the public streets.<sup>1</sup>

**Delegation of Power.** — As a general rule power to authorize the use of its streets for this purpose cannot be delegated by the city to an administrative board or other subordinate body.<sup>2</sup>

**c. AUTHORIZED USE NOT A NUISANCE OR TRESPASS.** — When authorized by the legislature, or by a city having power to grant such authority, a railroad may use the public streets, and where the road is properly constructed and operated such use does not constitute a nuisance or a trespass as against abutting owners.<sup>3</sup>

**d. WHAT CONSTITUTES GRANT OF AUTHORITY.** — While the legislature, or a city to which power has been delegated by the legislature, may authorize the use of public streets by railroads, the intention to grant such authority must appear in the statute or ordinance by express words or necessary implication, and will not be implied from doubtful language.<sup>4</sup> Thus, authority to occupy a street longitudinally will not be implied from charter provisions authorizing the construction of the road between certain designated termini,<sup>5</sup> or between certain cities,<sup>6</sup> or to and into a city,<sup>7</sup> or upon or across any highway intersected;<sup>8</sup> nor does a statute authorizing a railroad company to erect a depot in a certain city authorize it to lay its tracks and run its engines over the streets of that city.<sup>9</sup>

**e. HOW AND BY WHOM RIGHT MAY BE QUESTIONED.** — Ordinarily the right of a railroad to occupy a public street must be determined in a direct proceeding, and cannot be questioned collaterally.<sup>10</sup> Nor can the validity of

*zie v. Mayo*, 45 Me. 560; *Lockwood v. Wabash R. Co.*, 122 Mo. 86, 43 Am. St. Rep. 547; *Union Depot Co. v. St. Louis*, 76 Mo. 393; *Gallagher v. Keating*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 131, *affirmed* 40 N. Y. App. Div. 81; *Irvine v. Atlantic Ave. R. Co.*, 23 N. Y. App. Div. 112; *Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21. And see the title **MUNICIPAL CORPORATIONS**, vol. 20, p. 1142.

**1. Statute Requiring Sale of Franchise to Highest Bidder Not Applicable.** — *People v. Craycroft*, 111 Cal. 544; *East Louisiana R. Co. v. New Orleans*, 46 La. Ann. 526.

**2. Power Not Susceptible of Delegation.** — *Board of Liquidation v. New Orleans*, 32 La. Ann. 915; *Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21.

**3. Authorized Use of Street by Railroad Not a Nuisance or Trespass.** — *Denver, etc., R. Co. v. Domke*, 11 Colo. 247; *Vasor v. South Carolina R. Co.*, 42 Ga. 631; *Cook County v. Great Western R. Co.*, 119 Ill. 218; *Chicago, etc., R. Co. v. Loeb*, 118 Ill. 203, 59 Am. Rep. 341; *State v. Louisville, etc., R. Co.*, 86 Ind. 114; *Milburn v. Cedar Rapids*, 12 Iowa 246; *Lexington, etc., R. Co. v. Applegate*, 8 Dana (Ky.) 299, 33 Am. Dec. 407; *Randle v. Pacific R. Co.*, 65 Mo. 325; *Stephenson v. Missouri Pac. R. Co.*, 68 Mo. App. 648; *Drake v. Hudson River R. Co.*, 7 Barb. (N. Y.) 508; *Hodgkinson v. Long Island R. Co.*, 4 Edw. (N. Y.) 411; *Sargent v. Ohio, etc., R. Co.*, 1 Handy (Ohio) 52; *Faust v. Second, etc., St. Pass. R. Co.*, 3 Phila. (Pa.) 164, 15 Leg. Int. (Pa.) 221; *Iron Mountain R. Co. v. Bingham*, 87 Tenn. 522. And see *Chicago, etc., R. Co. v. Berg*, 10 Ill. App. 607; *Chicago, etc., R. Co. v. George*, 10 Ill. App. 646.

**4. Authority Must Be Given Expressly or by Necessary Implication.** — *Chicago, etc., R. Co. v.*

*Chicago*, 121 Ill. 176; *Ruttles v. Covington*, (Ky. 1889) 10 S. W. Rep. 644; *Thompson v. Ocean City R. Co.*, 60 N. J. L. 74; *Cincinnati Northern R. Co. v. Cincinnati*, 8 Ohio Dec. (Reprint) 554, 8 Cinc. L. Bul. 334; *Pennsylvania R. Co.'s Appeal*, 115 Pa. St. 514. *Compare Yost v. Philadelphia, etc., R. Co.*, 29 Leg. Int. (Pa.) 85; *Baltimore, etc., R. Co. v. Reaney*, 42 Md. 117.

**Authority to Occupy Rural Highways Not Authority to Occupy City Streets.** — *Columbus, etc., R. Co. v. Witherow*, 82 Ala. 190.

**5. Savannah, etc., R. Co. v. Shiels, 33 Ga. 601; *Thompson v. Ocean City R. Co.*, 60 N. J. L. 74; *Burlington v. Pennsylvania R. Co.*, 56 N. J. Eq. 259.**

**6. Davis v. East Tennessee, etc., R. Co.**, 87 Ga. 605; *Daly v. Georgia Southern, etc., R. Co.*, 80 Ga. 793, 12 Am. St. Rep. 286.

**7. Chicago, etc., R. Co. v. Chicago, 121 Ill. 176. But to the contrary see *Tennessee, etc., R. Co. v. Adams*, 3 Head (Tenn.) 596.**

**Power to Build Through Borough.** — A railroad company which is authorized to build its road through a certain borough may occupy a public street therein. *Cleveland, etc., R. Co. v. Speer*, 56 Pa. St. 325, 94 Am. Dec. 84. But see *St. Louis, etc., R. Co. v. Haller*, 82 Ill. 208.

**8. New Castle v. Lake Erie, etc., R. Co.**, 155 Ind. 18. *Compare Milburn v. Cedar Rapids*, 12 Iowa 246; *Hughes v. Mississippi, etc., R. Co.*, 12 Iowa 261.

**9. Daly v. Georgia Southern, etc., R. Co.**, 80 Ga. 793, 12 Am. St. Rep. 286.

**10. Right to Use Street Not Subject to Collateral Attack.** — *Glass v. Memphis, etc., R. Co.*, 94 Ala. 581; *Arcata v. Arcata, etc., R. Co.*, 92 Cal. 630; *Vicksburg, etc., R. Co. v. Monroe*, 48 La. Ann. 1102.

an ordinance permitting such use be questioned by a private individual who has suffered no special or peculiar injury therefrom.<sup>1</sup>

*f. POWER OF CITY TO IMPOSE CONDITIONS AND REGULATE USE.*—In giving its consent to the construction of a railroad upon its streets, a city may impose such reasonable conditions as it sees fit.<sup>2</sup> So where a railroad occupies a city street by direct authority of the legislature, its use thereof is subject to reasonable regulations imposed by the municipal authorities.<sup>3</sup> And in the absence of fraud or oppression, the discretion of the city in imposing such conditions and restrictions will not be interfered with by the courts.<sup>4</sup> Thus, reasonable stipulations as to the location of the track,<sup>5</sup> the manner of constructing the road,<sup>6</sup> and the time within which it must be constructed, will be upheld.<sup>7</sup> A stipulation that other railroad companies shall be permitted to use the track is valid.<sup>8</sup> And the same is true of reasonable conditions prohibiting the use of the track during certain hours,<sup>9</sup> or forbidding the carriage of freight through the streets without permission of the municipal authorities,<sup>10</sup> or providing that the company shall not use its road as a street railroad in competition with other companies operating street railroads in the city.<sup>11</sup> Conditions thus imposed, if accepted by the railroad company, are binding upon it,<sup>12</sup> and upon its successors.<sup>13</sup> For breach thereof the ordinance granting

**Right of Street-railroad Company to Enjoin Operation of Steam Railroad in Street.**—See *Denver, etc., R. Co. v. Denver City R. Co.*, 2 Colo. 673.

1. *Coffeen v. Chicago, etc., R. Co.*, 53 U. S. App. 673, 84 Fed. Rep. 46; *Kitchell v. Manchester Road Electric R. Co.*, 79 Mo. App. 340.

2. **City May Impose Reasonable Conditions upon Grant.**—*New York, etc., R. Co. v. New York*, 4 Blatchf. (U. S.) 193; *Pacific R. Co. v. Leavenworth*, 1 Dill. (U. S.) 393, 18 Fed. Cas. No. 10,649; *Pittsburg, etc., R. Co. v. Hood*, (C. C. A.) 94 Fed. Rep. 618; *O'Neil v. Lamb*, 53 Iowa 725; *Northern Cent. R. Co. v. Baltimore*, 21 Md. 93; *Union Depot R. Co. v. Southern R. Co.*, 105 Mo. 562; *Springfield R. Co. v. Springfield*, 85 Mo. 674; *Hudson River Telephone Co. v. Watervliet Turnpike, etc., Co.*, 135 N. Y. 393, 31 Am. St. Rep. 838; *New York, etc., R. Co. v. New York*, 1 Hilt. (N. Y.) 562.

**A Stipulation as to the Number of Freight Trains that may pass over the road is not reasonable, and cannot be imposed in advance as a condition precedent to the use of the street, where such use is authorized by the legislature.** *Kentucky, etc., Bridge Co. v. Krieger*, 93 Ky. 243.

**Condition Subsequent Defeating Right Granted by State Void.**—*Galveston, etc., R. Co. v. Galveston*, 91 Tex. 17.

**Railroads in City of Washington Not Subject to Municipal Control.**—*Barnes v. District of Columbia*, 1 MacArthur (D. C.) 322.

**Power of City to Release Railroad from Performance of Conditions.**—See *Galveston v. Galveston City R. Co.*, 46 Tex. 435.

3. *Pittsburg, etc., R. Co. v. Chicago*, 159 Ill. 369; *Cain v. Chicago, etc., R. Co.*, 54 Iowa 255; *Allen v. Jersey City*, 53 N. J. L. 522; *Pennsylvania R. Co. v. Jersey City*, 47 N. J. L. 286.

**Regulations Must Be Reasonable.**—*Pennsylvania R. Co. v. Jersey City*, 47 N. J. L. 286.

4. **Discretion of City.**—*Byrne v. Chicago Gen. R. Co.*, 169 Ill. 75; *Sargent v. Ohio, etc., R. Co.*, 1 Handy (Ohio) 52. And see *Cairo, etc., R. Co. v. People*, 92 Ill. 170.

5. *Cain v. Chicago, etc., R. Co.*, 54 Iowa 255.

6. *Owensboro v. Owensboro, etc., R. Co.*, (Ky. 1897) 40 S. W. Rep. 916; *Kentucky, etc., Bridge Co. v. Krieger*, 93 Ky. 243; *Albany v. Watervliet Turnpike, etc., Co.*, 108 N. Y. 14.

7. *Seattle v. Columbia, etc., R. Co.*, 6 Wash. 379. And see *Indianola v. Gulf, etc., R. Co.*, 56 Tex. 594, 2 Tex. Unrep. Cas. 337. Compare *Galveston, etc., R. Co. v. Galveston*, 90 Tex. 398.

**In the Absence of Express Provision as to Time, delay in building is only evidence of abandonment.** *Denison, etc., R. Co. v. St. Louis S. W. R. Co.*, (Tex. 1903) 72 S. W. Rep. 161.

**Forfeiture for Failure to Construct Within Time Limited—When Not Enforced.**—*State v. Cockrem*, 25 La. Ann. 356.

8. *Chicago, etc., R. Co. v. Dunbar*, 100 Ill. 110; *Louisville, etc., R. Co. v. Mississippi, etc., R. Co.*, 92 Tenn. 681. And see *Joy v. St. Louis*, 138 U. S. 1; *Chicago, etc., R. Co. v. Kansas City, etc., R. Co.*, 52 Fed. Rep. 178.

**In the Absence of a Stipulation to that effect a city has no power to authorize a railroad company to use tracks laid in a street by another company without the consent of the latter.** *Texarkana, etc., R. Co. v. Texas, etc., R. Co.*, 28 Tex. Civ. App. 551.

9. *Pittsburg, etc., R. Co. v. Hood*, (C. C. A.) 94 Fed. Rep. 618.

10. *Powell v. Macon, etc., R. Co.*, 92 Ga. 209.

11. *Buswell v. Southern Pac. R. Co.*, 114 Cal. 445.

12. **Conditions Binding upon Company.**—*Pacific R. Co. v. Leavenworth*, 1 Dill. (U. S.) 393; *Pittsburg, etc., R. Co. v. Hood*, (C. C. A.) 94 Fed. Rep. 618; *Chicago G. W. R. Co. v. People*, 79 Ill. App. 520, affirmed 170 Ill. 441; *Byrne v. Chicago Gen. R. Co.*, 169 Ill. 75; *Tudor v. Chicago, etc., R. Co.*, 154 Ill. 129; *Troy v. Troy, etc., R. Co.*, 49 N. Y. 657; *Matter of Appleby*, 26 Hun (N. Y.) 427.

13. *Joy v. St. Louis*, 138 U. S. 1; *Chicago, etc., R. Co. v. Chicago*, 183 Ill. 341. But see *Chicago, etc., R. Co. v. Kansas City, etc., R. Co.*, 38 Fed. Rep. 58.

authority may be repealed,<sup>1</sup> and the city may re-enter and take possession of the street and remove the track,<sup>2</sup> or may sue for damages<sup>3</sup> or specific performance.<sup>4</sup>

*g. NATURE AND EXTENT OF RIGHTS ACQUIRED* — (1) *Construction of Statutes and Ordinances Granting Right*. — Statutes and ordinances authorizing the occupation of public streets by steam railroads are to be construed strictly against the grantees and in favor of the public.<sup>5</sup> Thus, an ordinance authorizing the construction of a single track does not warrant the building of a double track.<sup>6</sup>

(2) *Easement or Fee*. — Whether the railroad takes the fee in the part of the street occupied by it, or only an easement, will depend upon the terms of the grant.<sup>7</sup>

(3) *Width of Right of Way*. — In *Pennsylvania* it has been held that the presumption arising under the General Railroad Laws that a railroad company takes, when it enters by virtue of the right of eminent domain, the full breadth of sixty feet for its right of way, is only applicable where the entry is adverse, and on property subject to seizure or appropriation under general laws; and that it does not apply to an entry on a public street, whether made under the authority of the act of assembly incorporating the company, or by virtue of municipal consent.<sup>8</sup>

(4) *Exclusive Use*. — In the absence of express statutory authority a railroad has no right to occupy or use the whole width of the street to the exclusion of the public<sup>9</sup> or of other railroad companies.<sup>10</sup> Nor has a city, in the absence of such authority, any power to grant to a railroad company such

1. *New Orleans v. Texas*, etc., R. Co., 171 U. S. 312.

Breach of the conditions attached to the grant of the right of way does not *ipso facto* terminate the railroad company's license so as to render its occupation of the street a nuisance as regards an abutting owner. *Knight v. Kansas City*, etc., R. Co., 70 Mo. 231.

*Waiver by City of Right to Declare Grant Void*. — See *Seattle v. Columbia*, etc., R. Co., 6 Wash. 379.

2. *Pacific R. Co. v. Leavenworth*, 1 Dill. (U. S.) 393.

3. *Cincinnati*, etc., R. Co. v. *Carthage*, 36 Ohio St. 631.

4. *Louisville Southern R. Co. v. Harrodsburg*, (Ky. 1895) 32 S. W. Rep. 604; *Louisville*, etc., R. Co. v. *Mississippi*, etc., R. Co., 92 Tenn. 681.

5. *Grants of Authority Construed Strictly Against Trustees*. — *Ransom v. Citizens' R. Co.*, 104 Mo. 375; *Wabash R. Co. v. Defiance*, 52 Ohio St. 262; *Pennsylvania Schuylkill Valley R. Co. v. Philadelphia*, etc., R. Co., 157 Pa. St. 42.

*Where the Streets to Be Used Are Specified* in the ordinance or statute the railroad acquires no right to occupy streets not mentioned therein. *Chicago*, etc., R. Co. v. *Chicago*, 121 Ill. 176; *District of Columbia v. Baltimore*, etc., R. Co., 114 U. S. 453.

6. *Klosterman v. Chesapeake*, etc., R. Co., (Ky. 1900) 56 S. W. Rep. 820.

7. *Grants Construed as Passing Easement Only*. — See *Chicago*, etc., R. Co. v. *Quincy*, 139 Ill. 355; *Yates v. West Grafton*, 34 W. Va. 783.

8. *Jones v. Erie*, etc., Valley R. Co., 169 Pa. St. 333, 47 Am. St. Rep. 916. And see *Railroad Co. v. Railroad Co.*, 2 Woodw. (Pa.) 361. Compare *Jones v. Erie*, etc., R. Co., 144 Pa. St. 629.

9. *No Right to Exclusive Use of Street in Absence of Statutory Authority* — *Arkansas*. — *St. Louis*, etc., R. Co. v. *Neely*, 63 Ark. 636.

*Colorado*. — *Jackson v. Kiel*, 13 Colo. 378, 16 Am. St. Rep. 207.

*Illinois*. — *General Electric R. Co. v. Chicago*, etc., R. Co., 184 Ill. 588; *Toledo*, etc., R. Co. v. *Harmon*, 47 Ill. 298, 95 Am. Dec. 489; *Illinois Cent. R. Co. v. Hutchinson*, 47 Ill. 408.

*Kentucky*. — *Com. v. Frankfort*, 92 Ky. 149; *Maysville*, etc., R. Co. v. *Sparks*, 14 Ky. L. Rep. 671.

*Michigan*. — *Riedinger v. Marquette*, etc., R. Co., 62 Mich. 29.

*Missouri*. — *St. Louis Transfer R. Co. v. St. Louis Merchants Bridge Terminal R. Co.*, 111 Mo. 666; *Dubach v. Hannibal*, etc., R. Co., 89 Mo. 483; *Lackland v. North Missouri R. Co.*, 31 Mo. 180; *Neier v. Missouri Pac. R. Co.*, 12 Mo. App. 35.

*Nebraska*. — *Chicago*, etc., R. Co. v. *Steel*, 47 Neb. 741.

*Ohio*. — *Lake Shore*, etc., R. Co. v. *Elyria*, 7 Ohio Cir. Dec. 312, 14 Ohio Cir. Ct. 48; *Cleveland*, etc., R. Co. v. *Cincinnati*, Ohio Prob. 269.

*Pennsylvania*. — *Jones v. Erie*, etc., Valley R. Co., 169 Pa. St. 333, 47 Am. St. Rep. 916.

*West Virginia*. — *Mason v. Ohio River R. Co.*, 51 W. Va. 183.

*Wisconsin*. — *Evans v. Chicago*, etc., R. Co., 86 Wis. 597, 30 Am. St. Rep. 908; *Farrand v. Chicago*, etc., R. Co., 21 Wis. 435.

*Right to Exclusive Use Acquired by Grant from Legislature*. — See *Cleveland v. Cleveland*, etc., R. Co., 93 Fed. Rep. 113; *Yost v. Philadelphia*, etc., R. Co., 29 Leg. Int. (Pa.) 85.

10. *Atchison*, etc., R. Co. v. *General Electric R. Co.*, (C. C. A.) 112 Fed. Rep. 689; *St. Louis Transfer R. Co. v. St. Louis Merchants Bridge Terminal Co.*, 111 Mo. 666;

exclusive use of the street as will destroy its usefulness as a public thoroughfare.<sup>1</sup> Accordingly, in the absence of express words, or their equivalent, giving an exclusive right to the street or a defined part of it, the grant, whether legislative or municipal, will be construed most strongly against the grantee and most favorably in aid of the previously existing public right of passage.<sup>2</sup>

**4. REVOCATION OF LICENSE.** — Where a city has granted permission to a railroad company to use its streets the authority cannot be revoked without cause<sup>3</sup> or without notice to the company.<sup>4</sup> Nor can the city virtually repeal its license by the enactment of subsequent ordinances imposing conditions which render the operation of the road impossible.<sup>5</sup> If the ordinance granting authority reserves the right of amendment, the railroad company may be required to submit to such amendments as are reasonable.<sup>6</sup> But the ordinance cannot be repealed or amended in such manner as to interfere with vested rights.<sup>7</sup> As a general rule a forfeiture of the company's right to use the street can be enforced only by the state or city.<sup>8</sup>

**Power to Compel Removal of Tracks or Change of Location.** — While a railroad company may, in a proper case, be compelled to remove its tracks from a street, or to change their location,<sup>9</sup> such removal cannot be compelled on the ground that

Kansas City, etc., R. Co. v. St. Joseph Terminal R. Co., 97 Mo. 457; Pennsylvania Schuylkill Valley R. Co. v. Philadelphia, etc., R. Co., 160 Pa. St. 232, 157 Pa. St. 42; Philadelphia, etc., R. Co.'s Appeal, 16 W. N. C. (Pa.) 165; Railroad Co. v. Railroad Co., 2 Woodw. (Pa.) 361; Janes v. Milwaukee, etc., R. Co., 7 Wis. 484.

**1. City Cannot Grant Right to Exclusive Use** — Georgia. — Savannah, etc., R. Co. v. Shiels, 33 Ga. 601.

Illinois. — St. Louis, etc., R. Co. v. Belleville, 20 Ill. App. 580.

Kentucky. — Com. v. Frankfort, 92 Ky. 149; Elizabethtown, etc., R. Co. v. Walton, 9 Ky. L. Rep. 243.

Missouri. — Corby v. Chicago, etc., R. Co., 150 Mo. 457; Sherlock v. Kansas City Belt R. Co., 142 Mo. 172, 64 Am. St. Rep. 551; Knapp v. St. Louis Transfer R. Co., 126 Mo. 26; Lockwood v. Wabash R. Co., 122 Mo. 86, 43 Am. St. Rep. 547; St. Louis Transfer R. Co. v. St. Louis Merchants Bridge Terminal R. Co., 111 Mo. 666; Dubach v. Hannibal, etc., R. Co., 89 Mo. 483.

New Jersey. — Traphagen v. Jersey City, 52 N. J. L. 65.

Ohio. — Wabash R. Co. v. Defiance, 52 Ohio St. 262; Cleveland, etc., R. Co. v. Cincinnati, Ohio Prob. 269.

Texas. — San Antonio, etc., R. Co. v. Bergsland, 12 Tex. Civ. App. 97.

Utah. — Dooly Block v. Salt Lake Rapid Transit Co., 9 Utah 31.

But see Heath v. Des Moines, etc., R. Co., 61 Iowa 11; Re McKinnin, 33 U. C. Q. B. 502.

**Deep Cuts and High Embankments** cannot be authorized where such construction would destroy the street as a highway. Savannah, etc., R. Co. v. Shiels, 33 Ga. 601.

But see O'Brien v. Baltimore Belt R. Co., 74 Md. 363, holding that where a statute authorized a railroad company to construct its road through a tunnel in a city, a city ordinance authorizing the construction of such road through an open cut, in places where this method of construction was found to be proper and necessary, was valid,

**2. Grants Construed Against Exclusive Right.** — Brown v. Chicago G. W. R. Co., 137 Mo. 529; Jones v. Erie, etc., Valley R. Co., 169 Pa. St. 333, 47 Am. St. Rep. 916; Pennsylvania Schuylkill Valley R. Co. v. Philadelphia, etc., R. Co., 157 Pa. St. 42. And see Tate v. Ohio, etc., R. Co., 7 Ind. 479; St. Louis, etc., R. Co. v. Belleville, 122 Ill. 376.

**3. Permission to Use Streets Not a Mere Revocable License.** — Workman v. Southern Pac. R. Co., 129 Cal. 536; Arcata v. Arcata, etc., R. Co., 92 Cal. 639; East Louisiana R. Co. v. New Orleans, 46 La. Ann. 526. And see Mobile v. Louisville, etc., R. Co., 84 Ala. 115, 5 Am. St. Rep. 342; Seattle v. Columbia, etc., R. Co., 6 Wash. 379.

**Failure to Complete Road Within City Limits in Time Limited No Ground for Revocation.** — Galveston, etc., R. Co. v. Galveston, 90 Tex. 398.

**Before Acceptance, Grant May Be Revoked.** — East St. Louis Union R. Co. v. East St. Louis, 39 Ill. App. 398.

**4. Alexandria v. Morgan's Louisiana, etc., R. Co.,** 109 La. 50; Vicksburg, etc., R. Co. v. Monroe, 48 La. Ann. 1102.

**5. Owensboro v. Owensboro, etc., R. Co.,** (Ky. 1897) 40 S. W. Rep. 916.

**6. Chicago, etc., R. Co. v. Minnesota Cent. R. Co.,** 14 Fed. Rep. 525.

**7. Chicago, etc., R. Co. v. Minnesota Cent. R. Co.,** 14 Fed. Rep. 525.

**License Not Revocable After Railroad Has Incurred Expense in Reliance Thereon.** — Rio Grande R. Co. v. Brownville, 45 Tex. 88.

**Arbitrary Change of Street Grade Impairing Vested Rights Not Permissible.** — Seattle v. Columbia, etc., R. Co., 6 Wash. 379.

**8. Denison, etc., R. Co. v. St. Louis S. W. R. Co.,** (Tex. 1903) 72 S. W. Rep. 161, 30 Tex. Civ. App. 474.

**Power to Declare Forfeiture Judicial.** — City Without Authority to Declare. — Alexandria v. Morgan's Louisiana, etc., R. Co., 109 La. 50.

**9. Where a Street Is Obstructed** by reason of the improper location or construction of a railroad the city may compel the railroad company to change the location of its tracks or

the tracks in question are being used improperly, where the company's right to use the street for proper purposes is not questioned.<sup>1</sup>

*i.* **ACQUIREMENT OF RIGHT BY PRESCRIPTION.** — A grant of the right to maintain a railroad in a public street may be presumed from long-continued exercise of such right under such circumstances as would give rise to a title by prescription in other cases;<sup>2</sup> especially where the city has indirectly recognized the existence of such right by the enactment of ordinances regulating the use of the street by the railroad.<sup>3</sup> But in such cases the railroad will be confined to the character of the use enjoyed during the prescriptive period, and will not be permitted to change the nature or extent of such use to the prejudice of abutting owners or the public.<sup>4</sup>

*j.* **TRANSFER OF RIGHT.** — In the absence of stipulations to the contrary a grant of the right to use a street for railroad purposes enures to the benefit of a company which has succeeded to all the rights, property, and franchises of the original grantee.<sup>5</sup>

*k.* **UNAUTHORIZED USE.** — The unauthorized use of a public street by a railroad is a public nuisance,<sup>6</sup> which may be enjoined by any person specially injured thereby.<sup>7</sup> Such use also constitutes an injury to abutting or adjacent owners which entitles them to sue for damages<sup>8</sup> or to bring an action of

to remove them entirely. *Mason v. Ohio River R. Co.*, 51 W. Va. 183. And see *Snyder v. Pennsylvania R. Co.*, 55 Pa. St. 340.

**Order to Tear Up Tracks Held Void.** — In *Sinnot v. Chicago, etc., R. Co.*, 81 Wis. 95, it was held that the board of public works of a city had no power to make an order requiring a railroad company, on twenty-five days' notice, to tear up part of its tracks, where compliance with such order would prevent the company from running its trains to its general depot, and continuously over its lines of road beyond such depot, as it had been doing, without objection or interruption, for eighteen years.

**Order to Compel Removal of Tracks and Change of Location Refused.** — See *Wayzata v. Great Northern R. Co.*, 67 Minn. 385.

**1. Improper Use of Tracks Not Ground for Removal.** — *Chicago v. Union Stock-Yards, etc., Co.*, 164 Ill. 224.

**2. Grant of Right Presumed from Long Exercise.** — *New Castle v. Lake Erie, etc., R. Co.*, 155 Ind. 18; *Cox v. Louisville, etc., R. Co.*, 48 Ind. 178; *Pope v. New York, etc., R. Co.*, 74 N. Y. App. Div. 175.

**A Railroad Does Not Acquire Title by Adverse Possession,** as against the public, by the construction and occasional use of its road upon land which has been platted as a street, but which has never been opened, worked, or used as such. *St. Paul, etc., R. Co. v. Duluth*, 73 Minn. 270.

**3. Chicago v. Union Stock-Yards, etc., Co.**, 164 Ill. 224.

**4. Alabama, etc., R. Co. v. Inge**, (Miss. 1897) 22 So. Rep. 294.

**5. Quincy v. Chicago, etc., R. Co.**, 94 Ill. 537.

**What Not a Violation of Stipulation Prohibiting Sale or Transfer of Right.** — *Taylor v. Dunn*, 80 Tex. 652.

**6. Unauthorized Occupation Is Public Nuisance.** — *Louisville, etc., R. Co. v. Mobile, etc., R. Co.*, 124 Ala. 162; *Denver, etc., R. Co. v. Denver City R. Co.*, 2 Colo. 673; *Kavanagh v. Mobile, etc., R. Co.*, 78 Ga. 271; *Savannah, etc., R. Co. v. Shiels*, 33 Ga. 601; *McCartney*

*v. Chicago, etc., R. Co.*, 112 Ill. 611; *Rosenthal v. Taylor, etc., R. Co.*, 79 Tex. 325; *Schwede v. Heinrich Bros. Brewing Co.*, 29 Wash. 21.

Where a railroad company has lawfully built its road upon private land outside the city limits, the subsequent annexation of such land to the city, and its acceptance as a public street, do not render the occupation and possession of such street by the railroad a public nuisance subject to be abated by mere resolution of the city council. *Denver v. Denver, etc., R. Co.*, 17 Colo. 583.

**City Officers Not Authorized to Tear Up Tracks Without Order of City Council.** — *Cincinnati Northern R. Co. v. Cincinnati*, 8 Ohio Dec. (Reprint) 554, 8 Cinc. L. Bul. 334.

**7. Unauthorized Use May Be Enjoined.** — *Louisville, etc., R. Co. v. Mobile, etc., R. Co.*, 124 Ala. 162; *Kavanagh v. Mobile, etc., R. Co.*, 78 Ga. 271; *Hickey v. Chicago, etc., R. Co.*, 6 Ill. App. 172; *Harrington v. St. Paul, etc., R. Co.*, 17 Minn. 215; *Schurmeier v. St. Paul, etc., R. Co.*, 10 Minn. 82, 88 Am. Dec. 59; *Pennsylvania R. Co.'s Appeal*, 115 Pa. St. 514; *Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21. And see *Cornwall v. Louisville, etc., R. Co.*, 87 Ky. 72.

**Unauthorized Use Enjoined at Suit of City.** — *Niagara Falls v. New York Cent., etc., R. Co.*, 41 N. Y. App. Div. 93, *affirmed* 168 N. Y. 610; *Morris, etc., R. Co. v. Newark*, 10 N. J. Eq. 352.

**Mandatory Interlocutory Injunction Refused Where Injury Is Not Irreparable.** — *Cincinnati Northern R. Co. v. Cincinnati*, 8 Ohio Dec. (Reprint) 554, 8 Cinc. L. Bul. 334.

**Suit by Another Railroad Company — Defense.** — In a suit by one railroad company to enjoin the unauthorized use of a public street by another railroad company, it is no defense that the complainant is itself operating a railroad along said street. *Louisville, etc., R. Co. v. Mobile, etc., R. Co.*, 124 Ala. 162.

**8. Abutting Owners May Sue for Damages.** — *Baltimore, etc., R. Co. v. Taylor*, 6 App. Cas. (D. C.) 259; *Trook v. Baltimore, etc., R. Co.*,



ejectionment.<sup>1</sup> But the unauthorized use may be legalized by a subsequent grant of authority from the city or legislature.<sup>2</sup>

7. **PRIVATE RAILROADS.** — Railroads designed for purely private uses cannot be constructed or operated upon public streets, nor has a city any power to grant the use of its streets for such a purpose.<sup>3</sup> But there may be a grant to private individuals or corporations of the right to lay branch tracks or switches in the streets, connecting with public railroad tracks previously laid, and extending to the manufacturing or business establishments of those laying them. In such cases the tracks so laid become, in legal contemplation, tracks of the railway with which they are connected, and are open to the public use and control.<sup>4</sup>

3. **Construction and Operation of Road — a. IN GENERAL.** — Where a railroad is located upon a public street it must be constructed and operated in such manner as to cause the least possible interference with the rights of the public and of abutting owners.<sup>5</sup> The obstruction of a street by the improper construction or operation of a railroad constitutes a public nuisance.<sup>6</sup>

3 MacArthur (D. C.) 392; Grand Rapids, etc., R. Co. v. Heisel, 47 Mich. 393; Hussner v. Brooklyn City R. Co., 30 Hun (N. Y.) 409.

**Compensation for Additional Servitude Not Recoverable in Action of Trespass.** — Adams v. Hastings, etc., R. Co., 18 Minn. 260.

1. **Abutter Entitled to Maintain Ejectionment.** — Montgomery v. Santa Ana Westminster R. Co., 104 Cal. 197, 43 Am. St. Rep. 89; Weyl v. Sonoma Valley R. Co., 69 Cal. 202.

2. **Unauthorized Use Legalized by Subsequent Grant of Authority.** — Owensboro v. Owensboro, etc., R. Co., (Ky. 1897) 40 S. W. Rep. 916. And see McCartney v. Chicago, etc., R. Co., 112 Ill. 611.

**Charter Amendment Construed as Ratification of Authority.** — McAuley v. Columbus, etc., R. Co., 83 Ill. 348.

**Prior Acts of Trespass Not Justified by Subsequent Ordinance Granting Authority.** — Southern California R. Co. v. Southern Pac. R. Co., (Cal. 1896) 43 Pac. Rep. 1123.

**When Unauthorized Use Cannot Be Legalized.** — Where the original occupation of a street by a railroad is unlawful because of failure to give notice to persons interested, as required by the charter of the company, such occupation is not legalized by subsequent ordinances of the city regulating the operation of the railroad within its limits. Klosterman v. Chesapeake, etc., R. Co., (Ky. 1900) 56 S. W. Rep. 820.

3. **Private Railroads — Streets Cannot Be Used For.** — Macon v. Harris, 73 Ga. 428; Heath v. Des Moines, etc., R. Co., 61 Iowa 11; Mikesell v. Durkee, 36 Kan. 97, 34 Kan. 509; Com. v. Frankfort, 92 Ky. 149; Green v. Portland, 32 Me. 431; Gustafson v. Hamm, 56 Minn. 334; Glaessner v. Anheuser-Busch Brewing Assoc., 100 Mo. 508; State v. Trenton, 36 N. J. L. 79; Chamberlain v. Elizabethport Steam Cordage Co., 41 N. J. Eq. 43; Barker v. Hartman Steel Co., 129 Pa. St. 551, 6 Pa. Co. Ct. 183; Schwede v. Hemrich Bros. Brewing Co., 29 Wash. 21. But see Guess v. Stone Mountain Granite, etc., Co., 67 Ga. 215.

**Presumption that Railroad Is for Public Use.** — O'Neil v. Lamb, 53 Iowa 725.

**Use of Street by Private Railroad Prevented by Injunction.** — Hopkins v. Satasauqua Mfg. Co., 180 Pa. St. 199; Barker v. Hartman Steel Co., 6 Pa. Co. Ct. 183, 129 Pa. St. 551.

4. **Branches and Switches to Private Property.** — Hanbury v. Woodward Lumber Co., 98 Ga. 54; Chicago Dock, etc., Co. v. Garrity, 115 Ill. 155; Brown v. Chicago G. W. R. Co., 137 Mo. 529; Knapp v. St. Louis Transfer R. Co., 126 Mo. 26; Clarke v. Blackmar, 47 N. Y. 150; Pittsburgh, etc., R. Co. v. Cincinnati, 9 Ohio Dec. (Reprint) 695, 16 Cinc. L. Bul. 367. But see Com. v. Frankfort, 92 Ky. 149.

**Petition by Abutting Owners a Condition Precedent to Grant of Right.** — McGann v. People, 194 Ill. 526.

**A Railroad Used in Connection with a Grain Elevator is not such a public railroad as may be constructed and operated through a public street.** Mikesell v. Durkee, 36 Kan. 97. And see People v. Chicago, etc., R. Co., 57 Ill. 436. But compare Clarke v. Blackmar, 47 N. Y. 150.

5. **Rights of Public and Abutters Must Be Regarded.** — Kelly v. Pittsburgh, etc., R. Co., 28 Ind. App. 457, 91 Am. St. Rep. 134; Goodrich v. Burlington, etc., R. Co., 103 Iowa 412; Cadle v. Muscatine Western R. Co., 44 Iowa 11; Laviosa v. Chicago, etc., R. Co., McGloin (La.) 299; Ridge v. Pennsylvania R. Co., 58 N. J. Eq. 172; Delaware, etc., R. Co. v. Buffalo, 158 N. Y. 478.

**No Liability in Absence of Negligence.** — Mazzetti v. New York, etc., R. Co., 3 E. D. Smith (N. Y.) 98.

**Use of T Rails Not Unlawful.** — Millvale v. Evergreen R. Co., 131 Pa. St. 1.

6. **Obstruction of Street by Improper Construction or Operation a Nuisance.** — State v. Davenport, etc., R. Co., 47 Iowa 507; Com. v. Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471; State v. Vermont Cent. R. Co., 30 Vt. 108; Oshkosh v. Milwaukee, etc., R. Co., 74 Wis. 534, 17 Am. St. Rep. 175. But see Gedge v. Com., 9 Bush (Ky.) 65.

**A City May Enjoin a Railroad Company from Obstructing Its Streets** in violation of the terms of the contract under which the company uses such streets. Chicago, etc., R. Co. v. Quincy, 136 Ill. 489.

**When Abutting Owner May Enjoin.** — Where a railroad is improperly constructed upon a public street in such manner as to inflict special injury upon an abutting owner, it constitutes both a public and a private nuisance which may be enjoined; and the fact that the complainant has

**b. LOCATION OF TRACKS.** — If the right to occupy the street is derived from a grant by the city, the provisions of the grant as to the location of the tracks must be complied with.<sup>1</sup> But where the street is occupied by direct authority of the legislature, a municipal ordinance requiring the track to be laid in the centre of the street does not render its construction in another part of the street illegal.<sup>2</sup>

**c. CONFORMITY TO GRADE OF STREET — CUTS AND EMBANKMENTS.** — As a general rule the railroad must be built in conformity to the established grade of the street;<sup>3</sup> but it may be built in a cut or upon an embankment or other elevation where such mode of construction is authorized by statute.<sup>4</sup>

**d. WHAT APPURTENANCES MAY BE LOCATED IN STREET.** — Permission to a railroad company to construct and maintain its road upon a street carries with it authority to construct necessary turnouts<sup>5</sup> and switch tracks therein;<sup>6</sup> but it does not authorize the obstruction of the street by the erection thereon

received freight from the track complained of does not affect his right to sue. *Knapp v. St. Louis Transfer R. Co.*, 126 Mo. 26.

**1. Location of Tracks.** — *Hogencamp v. Paterson Horse R. Co.*, 17 N. J. Eq. 83. And see *Merchants' Union Barb Wire Co. v. Chicago*, etc., R. Co., 70 Iowa 105.

**The Word "Along,"** as used in an ordinance authorizing a railroad company to build its road in a city street, does not mean by the side of the street, but upon and over it. *Heath v. Des Moines*, etc., R. Co., 61 Iowa 11.

**The Words "Line of the Railroad,"** as used in an ordinance providing that the line of the railroad should not approach the sidewalk nearer than fifteen feet, were held to mean the rails thereof. *Chicago*, etc., R. Co. *v. Eisert*, 127 Ind. 156.

**Right to Use Sidewalk.** — In *Knapp v. St. Louis Transfer R. Co.*, 126 Mo. 26, it was held that an ordinance authorizing the construction of the railroad along the western portion of a named street did not restrict the company to the roadway as distinguished from the sidewalk.

**Location upon Street Crossing.** — A railroad company which is authorized to build its road upon a certain street may lay its tracks across another street which intersects the street named in the grant. *Knight v. Carrollton R. Co.*, 9 La. Ann. 284.

**Location Contrary to Ordinance a Nuisance Entitling Abutter to Damages.** — *Cain v. Chicago*, etc., R. Co., 54 Iowa 255.

**Right of Company to Change Location of Track.** — See *Snyder v. Pennsylvania R. Co.*, 55 Pa. St. 340; *Barr v. New Brunswick*, 58 N. J. L. 255.

**2. Street Occupied by Authority of Legislature — Ordinance Prescribing Location Not Binding upon Company.** — *First Cong. Church v. Milwaukee*, etc., R. Co., 77 Wis. 158.

**3. Conformity to Grade of Street.** — *Smith v. Kansas City*, etc., R. Co., 98 Mo. 20; *Cross v. St. Louis*, etc., R. Co., 77 Mo. 318; *Stephenson v. Missouri Pac. R. Co.*, 68 Mo. App. 648; *Long Island R. Co. v. Brooklyn*, (Supm. Ct. Gen. T.) 29 N. Y. St. Rep. 381; *Little Miami R. Co. v. Hambleton*, 40 Ohio St. 496; *Wilkesbarre v. Coalville Pass. R. Co.*, 7 Leg. Gaz. (Pa.) 397.

**Where Authority Is Given to Raise the Grade**

of the street to a certain height, a greater elevation is unlawful. *Given v. Des Moines*, 70 Iowa 637.

**A City Cannot Legally Authorize a Railroad to Change the Grade of a street in its discretion.** *Little Miami R. Co. v. Martin*, 1 Ohio Dec. (Reprint) 440, 10 West. L. J. 54.

**4. Eirrell v. New York, etc., R. Co., 41 N. Y. App. Div. 506; *Arbenz v. Wheeling*, etc., R. Co., 33 W. Va. 1.**

**Rights in Soil of Street Not Waived by Construction in Tunnel.** — *Junction R. Co. v. Boyd*, 8 Phila. (Pa.) 224.

**Construction on Viaduct.** — See *Welde v. New York*, etc., R. Co., 28 N. Y. App. Div. 379; *Pape v. New York*, etc., R. Co., 74 N. Y. App. Div. 175.

**Right to Connect with Elevated Road by Means of Viaduct.** — See *Gallagher v. Keating*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 131.

**Right to Change from Cut to Viaduct** — See *Fries v. New York*, etc., R. Co., 169 N. Y. 270; *Lewis v. New York*, etc., R. Co., 162 N. Y. 202, 40 N. Y. App. Div. 343; *Muhler v. New York*, etc., R. Co., 60 N. Y. App. Div. 621.

**Elevation of Railroad.** — Where a city ordinance, confirmed by a subsequent amendment of the charter of the railroad company, authorizes an elevation of the road in passing through a city, portions of such road may be elevated even though the elevation was not authorized by the original charter of the company. *Fulton v. Short Route R. Transfer Co.*, 85 Ky. 640, 7 Am. St. Rep. 619.

But see *Potts v. Quaker City El. R. Co.*, 161 Pa. St. 396, holding that a statute authorizing the elevation or depression of an ordinary surface railroad at street crossings did not authorize the construction of an elevated road through the city. And see the title **ELEVATED RAILROADS**, vol. 10, p. 896.

**5. Necessary Turnouts.** — *Knight v. Carrollton R. Co.*, 9 La. Ann. 284; *New Orleans*, etc., R. Co. *v. Second Municipality*, 1 La. Ann. 128; *Philadelphia v. River Front R. Co.*, 133 Pa. St. 134; *Burgess v. R. Co.*, 3 Montg. Co. Rep. (Pa.) 5.

**6. Houston v. Gulf, etc., R. Co., (Tex. Civ. App. 1806) 35 S. W. Rep. 74.**

**Provisions of Ordinance as to Location of Switches Construed.** — *Galveston Wharf Co. v. Gulf*, etc., R. Co., 81 Tex. 494.

of repair shops,<sup>1</sup> water tanks,<sup>2</sup> depots, or freight houses.<sup>3</sup>

*e.* **RIGHT TO LAY ADDITIONAL TRACKS.** — Whether or not a railroad which has been authorized to occupy a street and has constructed one or more tracks thereon may subsequently lay additional tracks, without a new grant of authority, will depend upon the terms of the original grant.<sup>4</sup>

*f.* **RIGHT TO ALTER GAUGE OF TRACKS.** — Where an ordinance authorizing a railroad company to build its road upon a public street does not limit the width of the track, a subsequent change of gauge will not be enjoined at the suit of an abutting owner,<sup>5</sup> especially where the width of the roadbed and the length of the ties will not be increased by the alteration.<sup>6</sup> But where the company is limited by its charter to the construction of a narrow-gauge road, it cannot alter the gauge of its tracks upon a city street without the consent of the city.<sup>7</sup>

*g.* **RESTORATION AND REPAIR OF STREET.** — Railroad companies are generally required by statute or ordinance to restore streets occupied by their roads to their former state or to such state as not unnecessarily to impair their usefulness;<sup>8</sup> and after restoration the street must be kept in a reasonable state of repair.<sup>9</sup>

*h.* **OPERATION.** — Authority to build a railroad upon a public street includes authority to operate it in a proper manner after it is constructed.<sup>10</sup> The company may run trains in the night as well as the daytime, and may run heavy freight trains, ring bells, and sound whistles;<sup>11</sup> but it cannot use the street for the purpose of storing cars, or shifting, switching, or making up trains, or unloading or loading freight.<sup>12</sup>

1. *Frankle v. Jackson*, 30 Fed. Rep. 398.

2. *Chicago G. W. R. Co. v. Leavenworth First M. E. Church*, (C. C. A.) 102 Fed. Rep. 85.

3. *Barney v. Keokuk*, 94 U. S. 324; *St. Paul v. Chicago*, etc., R. Co., 63 Minn. 330.

4. **Right to Lay Additional Tracks Upheld.** — *Workman v. Southern Pac. R. Co.*, 129 Cal. 536; *Noblesville v. Lake Erie*, etc., R. Co., 130 Ind. 1; *Chicago*, etc., R. Co. *v. Eisert*, 127 Ind. 156; *Morris*, etc., R. Co. *v. Prudden*, 20 N. J. Eq. 530; *Conabeer v. New York Cent.*, etc., R. Co., 156 N. Y. 474; *Varwig v. Cleveland*, etc., R. Co., 3 Ohio Cir. Dec. 528, 6 Ohio Cir. Ct. 439; *Simpson v. Philadelphia*, etc., R. Co., 4 Montg. Co. Rep. (Pa.) 102. And see *Davis v. Chicago*, etc., R. Co., 46 Iowa 389.

**Right to Lay Additional Tracks Denied.** — *Savannah*, etc., R. Co. *v. Woodruff*, 86 Ga. 94; *Pennsylvania Schuylkill Valley R. Co. v. Philadelphia*, etc., R. Co., 157 Pa. St. 42. And see *Jones v. Erie*, etc., Valley R. Co., 169 Pa. St. 333, 47 Am. St. Rep. 916; *Riedding v. Marquette*, etc., R. Co., 62 Mich. 29.

5. *Denver*, etc., R. Co. *v. Domke*, 11 Colo. 247.

6. *Denver*, etc., R. Co. *v. Barsaloux*, 15 Colo. 290; *Denver*, etc., R. Co. *v. Toohey*, 15 Colo. 298.

7. *Walker v. Denver*, (C. C. A.) 76 Fed. Rep. 670.

8. **Restoration of Street Required by Statute or Ordinance.** — *Knapp v. St. Louis Transfer R. Co.*, 126 Mo. 26; *Gilmore v. Utica*, 121 N. Y. 561; *Bell v. New York Cent.*, etc., R. Co., 29 Hun (N. Y.) 560; *Oshkosh v. Milwaukee*, etc., R. Co., 74 Wis. 534, 17 Am. St. Rep. 175; *Oconto v. Chicago*, etc., R. Co., 44 Wis. 231.

**Duty to Provide Substitute Street.** — See

*Stroudsburg v. Wilkes Barre*, etc., R. Co., 12 Pa. Co. Ct. 395.

9. **Duty to Keep in Repair.** — *Ohio*, etc., R. Co. *v. People*, 32 Ill. App. 69; *State v. St. Paul*, etc., R. Co., 35 Minn. 131, 59 Am. Rep. 313; *Kansas City v. Corrigan*, 86 Mo. 67; *Kitchell v. Manchester Road Electric R. Co.*, 79 Mo. App. 340; *Gilmore v. Utica*, 121 N. Y. 561; *Cincinnati*, etc., R. Co. *v. Carthage*, 36 Ohio St. 631; *Lake Shore*, etc., R. Co. *v. Wiley*, 193 Pa. St. 496; *Pennsylvania R. Co. v. Irwin*, 85 Pa. St. 336; *Galveston v. Galveston City R. Co.*, 46 Tex. 435.

**Lessor of Road Liable for Lessee's Failure to Repair.** — *Anderson v. Union Terminal R. Co.*, 161 Mo. 411.

10. **Authority to Operate Railroad Included in Authority to Build.** — *Com. v. Erie*, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471. And see *Paterson*, etc., Horse R. Co. *v. Paterson*, 24 N. J. Eq. 158.

11. *Frankle v. Jackson*, 30 Fed. Rep. 398.

12. **Storing Cars, Switching and Making Up Trains, etc., Improper.** — *Glick v. Baltimore*, etc., R. Co., 21 D. C. 363; *Glick v. Baltimore*, etc., R. Co., 19 D. C. 412; *Fitzgerald v. Baltimore*, etc., R. Co., 19 D. C. 513; *Kavanagh v. Mobile*, etc., R. Co., 78 Ga. 803; *Owensborough*, etc., R. Co. *v. Sutton*, (Ky. 1890) 13 S. W. Rep. 1086; *Kentucky*, etc., Bridge Co. *v. Krieger*, 93 Ky. 243; *Stephenson v. Missouri Pac. R. Co.*, 68 Mo. App. 642; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1; *Thompson v. Pennsylvania R. Co.*, (N. J. 1888) 14 Atl. Rep. 897. But see *Rafferty v. Missouri Pac. R. Co.*, 91 Mo. 33; *Lake Shore*, etc., R. Co. *v. Wiley*, 193 Pa. St. 496.

**Right to Load and Unload Cars in Street Acquired by Long Exercise.** — *Mobile v. Louisville*, etc., R. Co., 84 Ala. 115, 5 Am. St. Rep. 342.

**4. Rights and Remedies of Property Owners — a. RIGHT OF ABUTTING OWNERS TO COMPENSATION OR DAMAGES — (1) Rule Where Abutter Owns Fee in Street.** — The construction of an ordinary commercial steam railroad upon a public street is generally regarded as the imposition of an additional servitude,<sup>1</sup> which entitles an abutter who owns the fee in the street to compensation.<sup>2</sup>

(2) *Rule Where Fee Is in City or Public.* — In some jurisdictions the right to compensation is extended to abutters who do not own the fee;<sup>3</sup> but in many states it is held that where the fee is in the city or the public, the occupation of the street by a railroad does not amount to a taking of land within the constitutional guaranty of compensation,<sup>4</sup> unless the abutting owner is

**1. Steam Railroad in Street an Additional Servitude — Alabama.** — *Western R. Co. v. Alabama Grand Trunk R. Co.*, 96 Ala. 272.

*Colorado.* — *Denver Circle R. Co. v. Nestor*, 10 Colo. 403; *Denver Circle R. Co. v. Wiggins*, 10 Colo. 426; *Denver Circle R. Co. v. Bigler*, 10 Colo. 428; *Denver Circle R. Co. v. Clark*, 10 Colo. 427; *Denver Circle R. Co. v. Martin*, 10 Colo. 428; *Denver v. Bayer*, 7 Colo. 113.

*Connecticut.* — *Imlay v. Union Branch R. Co.*, 26 Conn. 249, 68 Am. Dec. 392.

*Illinois.* — *Bond v. Pennsylvania R. Co.*, 171 Ill. 508.

*Indiana.* — *Cox v. Louisville, etc., R. Co.*, 48 Ind. 178.

*Michigan.* — *Nichols v. Ann Arbor, etc., R. Co.*, 87 Mich. 361; *Grand Rapids, etc., R. Co. v. Heisel*, 47 Mich. 393.

*Minnesota.* — *Harrington v. St. Paul, etc., R. Co.*, 17 Minn. 215.

*New York.* — *Williams v. New York Cent. R. Co.*, 16 N. Y. 97, 69 Am. Dec. 651; *Syracuse Solar Salt Co. v. Rome, etc., R. Co.*, 67 Hun (N. Y.) 153.

**Contra — Not an Additional Servitude.** — *Montgomery v. Santa Ana Westminster R. Co.*, 104 Cal. 186, 43 Am. St. Rep. 89; *Knapp v. St. Louis Transfer R. Co.*, 126 Mo. 26; *Gaus, etc., Mfg. Co. v. St. Louis, etc., R. Co.*, 113 Mo. 308, 35 Am. St. Rep. 706; *Hulett v. Missouri, etc., R. Co.*, 80 Mo. App. 87. *Compare O'Connor v. Southern Pac. R. Co.*, 122 Cal. 681; *Weyl v. Sonoma Valley R. Co.*, 69 Cal. 202.

**Coal House and Hoisting Apparatus Maintained in Street by Railroad an Additional Burden.** — *Chicago, etc., R. Co. v. O'Connor*, 42 Neb. 90.

**Railroad Platform or Passenger Depot in Street an Increased Burden.** — *Higbee v. Camden, etc., R. Co.*, 19 N. J. Eq. 276.

**2. Abutting Owner of Fee Entitled to Compensation — Alabama.** — *Western R. Co. v. Alabama Grand Trunk R. Co.*, 96 Ala. 272.

*Arkansas.* — *Reichert v. St. Louis, etc., R. Co.*, 51 Ark. 491.

*Connecticut.* — *Imlay v. Union Branch R. Co.*, 26 Conn. 249, 68 Am. Dec. 392.

*Florida.* — *Florida Southern R. Co. v. Brown*, 23 Fla. 104.

*Illinois.* — *Bond v. Pennsylvania R. Co.*, 171 Ill. 508; *Indianapolis, etc., R. Co. v. Hartley*, 67 Ill. 439, 16 Am. Rep. 624.

*Indiana.* — *Porter v. Midland R. Co.*, 125 Ind. 476; *Burkam v. Ohio, etc., R. Co.*, 122 Ind. 344; *Haslett v. New Albany Belt, etc., R. Co.*, 7 Ind. App. 603.

*Iowa.* — *Kucheman v. Chicago, etc., R. Co.*, 46 Iowa 366.

*Maryland.* — *Phipps v. Western Maryland R. Co.*, 66 Md. 319.

*Michigan.* — *Grand Rapids, etc., R. Co. v. Heisel*, 38 Mich. 62, 31 Am. Rep. 306.

*Minnesota.* — *Adams v. Hastings, etc., R. Co.*, 18 Minn. 260; *Harrington v. St. Paul, etc., R. Co.*, 17 Minn. 215; *Molitor v. First Div. St. Paul, etc., R. Co.*, 14 Minn. 285; *Gray v. First Div. St. Paul, etc., R. Co.*, 13 Minn. 315; *Schurmeier v. St. Paul, etc., R. Co.*, 10 Minn. 82, 88 Am. Dec. 59.

*Nebraska.* — *Hastings, etc., R. Co. v. Ingalls*, 15 Neb. 123.

*New Jersey.* — *M. E. Church v. Pennsylvania R. Co.*, 48 N. J. Eq. 452; *Jersey City, etc., R. Co. v. Jersey City, etc., Horse R. Co.*, 20 N. J. Eq. 61.

*New York.* — *Wager v. Troy Union R. Co.*, 25 N. Y. 526; *Williams v. New York Cent. R. Co.*, 16 N. Y. 97, 69 Am. Dec. 651; *Burt v. Lima, etc., R. Co.*, (Supm. Ct. Spec. T.) 21 N. Y. Supp. 482; *Syracuse Solar Salt Co. v. Rome, etc., R. Co.*, 67 Hun (N. Y.) 153; *Craig v. Rochester City, etc., R. Co.*, 39 Barb. (N. Y.) 494. And see *Matter of Prospect Park, etc., R. Co.*, 16 Hun (N. Y.) 261.

*Pennsylvania.* — *Jones v. Erie, etc., R. Co.*, 151 Pa. St. 30, 31 Am. St. Rep. 722.

*Tennessee.* — *East End St. R. Co. v. Doyle*, 88 Tenn. 747, 17 Am. St. Rep. 933.

*Wisconsin.* — *Carl v. Sheboygan, etc., R. Co.*, 46 Wis. 625; *Hegar v. Chicago, etc., R. Co.*, 26 Wis. 624.

See also the title ABUTTING OWNERS, vol. 1, p. 227.

**3. Abutter Who Does Not Own Fee Entitled to Compensation.** — *Mollandin v. Union Pac. R. Co.*, 14 Fed. Rep. 394; *Alabama, etc., R. Co. v. Bloom*, 71 Miss. 247; *Theobald v. Louisville, etc., R. Co.*, 66 Miss. 279, 14 Am. St. Rep. 564. And see *St. Paul v. Chicago, etc., R. Co.*, 63 Minn. 330; *Dooly Block v. Salt Lake Rapid Transit Co.*, 9 Utah 31; *Kaufman v. Tacoma, etc., R. Co.*, 11 Wash. 632; *Pomeroy v. Milwaukee, etc., R. Co.*, 16 Wis. 640; *Ford v. Chicago, etc., R. Co.*, 14 Wis. 609, 80 Am. Dec. 791. See also the title ABUTTING OWNERS, vol. 1, p. 225.

**Ownership of Fee Immaterial if Property Is Injured.** — *Lamm v. Chicago, etc., R. Co.*, 45 Minn. 71; *White v. Northwestern North Carolina R. Co.*, 113 N. Car. 610, 37 Am. St. Rep. 639. And see *Ridley v. Seaboard, etc., R. Co.*, 118 N. Car. 006.

**4. No Right to Compensation in Absence of Ownership of Fee — California.** — *Carson v. Central R. Co.*, 35 Cal. 325.

*Illinois.* — *Illinois Cent. R. Co. v. Turner*, 194

thereby deprived of the reasonable use of the street.<sup>1</sup>

(3) *Ownership of Fee Immaterial.* — In other jurisdictions still, the ownership of the fee is regarded as immaterial, the abutter's right to compensation depending upon the manner in which the road is constructed and used. If he is deprived of the reasonable use of the street he will be entitled to compensation even though the fee is in the public;<sup>2</sup> otherwise he cannot recover compensation even though he owns the fee.<sup>3</sup>

(4) *Consequential and Special Injuries.* — Where, under the constitution and laws of a state, compensation is limited to "property taken" and does not cover "property damaged," and the fee of the street is not in the adjacent lot-owner, the mere use of the street by a railroad company, when authorized by law, for the laying down of a track and the running of trains, gives no cause of action to the lot-owner, although consequential injuries may result to him therefrom. The interference with the free use of the street he suffers in common with all *pro bono publico*, although he may suffer more than others.<sup>4</sup>

Ill. 575, affirming 97 Ill. App. 219; *Moses v. Pittsburgh, etc.*, R. Co., 21 Ill. 516.

Indiana. — *New Albany, etc.*, R. Co. v. O'Daily, 13 Ind. 353, 12 Ind. 551.

Iowa. — *Davenport v. Stevenson*, 34 Iowa 225.

Kansas. — *Chicago, etc.*, R. Co. v. Union Invest. Co., 51 Kan. 600; *Ottawa, etc.*, R. Co. v. Peterson, 51 Kan. 604, 40 Kan. 310; *Herndon v. Kansas, etc.*, R. Co., 46 Kan. 560; *Kansas, etc.*, R. Co. v. Mahler, 45 Kan. 565; *Wichita, etc.*, R. Co. v. Smith, 45 Kan. 264; *Kansas, etc.*, R. Co. v. Cuykendall, 42 Kan. 234, 16 Am. St. Rep. 479. And see *Atchison, etc.*, R. Co. v. Davidson, 52 Kan. 739.

Maryland. — *O'Brien v. Baltimore Belt R. Co.*, 74 Md. 363.

Minnesota. — *Rochette v. Chicago, etc.*, R. Co., 32 Minn. 201.

New Jersey. — *Paterson, etc.*, Horse R. Co. v. Paterson, 24 N. J. Eq. 158; *Morris, etc.*, R. Co. v. Newark, 10 N. J. Eq. 361.

New York. — *Fobes v. Rome, etc.*, R. Co., 121 N. Y. 505; *Sixth Ave. R. Co. v. Gilbert El. R. Co.*, 43 N. Y. Super. Ct. 292; *Greene v. New York Cent., etc.*, R. Co., (N. Y. Super. Ct.) 65 How. Pr. (N. Y.) 154; *People v. Kerr*, 37 Barb. (N. Y.) 357, 38 Barb. (N. Y.) 369, overruling (Supm. Ct. Spec. T.) 20 How. Pr. (N. Y.) 130; *Drake v. Hudson River R. Co.*, 7 Barb. (N. Y.) 508. *Contra*, *Falker v. New York, etc.*, R. Co., (Supm. Ct. Spec. T.) 17 Abb. N. Cas. (N. Y.) 279.

Pennsylvania. — *Philadelphia, etc.*, R. Co.'s Case, 6 Whart. (Pa.) 25, 36 Am. Dec. 202; *Faust v. Second, etc.*, St. Pass. R. Co., 3 Phila. (Pa.) 164, 15 Leg. Int. (Pa.) 221.

Tennessee. — *Iron Mountain R. Co. v. Birmingham*, 87 Tenn. 522.

Texas. — *Houston, etc.*, R. Co. v. Odum, 53 Tex. 343.

West Virginia. — *Yates v. West Grafton*, 34 W. Va. 783.

Wisconsin. — *Hanlin v. Chicago, etc.*, R. Co., 61 Wis. 515.

Canada. — *Day v. Grand Trunk R. Co.*, 5 U. C. C. P. 420.

And see *New Mexican R. Co. v. Hendricks*, 6 N. Mex. 611.

**Ordinance Providing for Payment of Damages.** — Where the ordinance authorizing a railroad to occupy the streets of a town provides that the

company shall pay all damages resulting to abutting owners, such owners may recover damages by virtue of the ordinance. *St. Louis, etc.*, R. Co. v. Haller, 82 Ill. 208.

1. **Deprivation of Use of Street a Taking of Property.** — *Kentucky Cent. R. Co. v. Clark*, 5 Ky. L. Rep. 184; *Cleveland Burial Case Co. v. Erie R. Co.*, 24 Ohio Cir. Ct. 107; *State v. Superior Ct.*, 26 Wash. 278. And see *Burlington, etc.*, R. Co. v. Reinhackle, 15 Neb. 279, 48 Am. Rep. 342.

2. **Ownership of Fee Immaterial — Abutter Deprived of Use of Street May Recover.** — *Western R. Co. v. Alabama Grand Trunk R. Co.*, 96 Ala. 272; *Montgomery v. Santa Ana Westminster R. Co.*, 104 Cal. 186, 43 Am. St. Rep. 89; *Holmes v. Louisville, etc.*, R. Co., 16 Ky. L. Rep. 318; *Owensborough, etc.*, R. Co. v. Sutton, 13 S. W. Rep. 1086, 12 Ky. L. Rep. 247; *Elizabethtown, etc.*, R. Co. v. Tierney, 11 Ky. L. Rep. 526; *Fulton v. Short Route R. Transfer Co.*, 85 Ky. 640, 7 Am. St. Rep. 619; *Knapp v. St. Louis Transfer R. Co.*, 126 Mo. 26.

3. **Owner of Fee Not Entitled to Compensation Unless Deprived of Use of Street.** — *Western R. Co. v. Alabama Grand Trunk R. Co.*, 96 Ala. 272; *Perry v. New Orleans, etc.*, R. Co., 55 Ala. 413, 28 Am. Rep. 740; *Fulton v. Short Route R. Transfer Co.*, 85 Ky. 640, 7 Am. St. Rep. 619; *Lexington, etc.*, R. Co. v. Applegate, 8 Dana (Ky.) 289, 33 Am. Dec. 497; *Elizabethtown, etc.*, R. Co. v. Thompson, 1 Ky. L. Rep. 395; *Kansas City, etc.*, R. Co. v. St. Joseph Terminal R. Co., 97 Mo. 457; *Hulett v. Missouri, etc.*, R. Co., 80 Mo. App. 87. And see *Louisville, etc.*, R. Co. v. Brown, 17 B. Mon. (Ky.) 763.

In *West Virginia* an abutting owner, whether he owns the fee of the street or not, cannot enjoin the construction of a railroad in the street unless the value of his property is entirely destroyed so as to amount to a taking thereof. *Yates v. West Grafton*, 34 W. Va. 783; *Arbenz v. Wheeling, etc.*, R. Co., 33 W. Va. 1; *Spencer v. Point Pleasant, etc.*, R. Co., 23 W. Va. 406.

4. **Consequential Injuries — Fee in City or Public.** — *Brewer, J.*, in *Frankle v. Jackson*, 30 Fed. Rep. 398. See also the following cases:

*United States.* — *Simplat v. Chicago, etc.*, R. Co., 5 McCrary (U. S.) 158.

*Georgia.* — *Burrus v. Columbus*, 105 Ga. 42.

But where the abutter suffers special injury,<sup>1</sup> such as exclusion from the street, he may recover damages therefor.<sup>2</sup> And in states where "property damaged" is within the constitutional guaranty of compensation, any lot owner, the value of whose lot is diminished by the laying of a railroad track and the running of trains in a street in front thereof, may have an action for such damages.<sup>3</sup>

(5) *Statutory Provisions in Iowa and Ohio.* — In *Iowa*, by statute, an abutting owner whose property has been depreciated in value by the construction of a railroad in a public street is entitled to damages;<sup>4</sup> but this statutory right is not based upon the taking or appropriating of his property,<sup>5</sup> and in the absence of actual injury thereto, he cannot recover either under the statute or at common law.<sup>6</sup> In *Ohio*, by statute, railroad companies laying tracks upon

*Iowa.* — O'Connor v. St. Louis, etc., R. Co., 56 Iowa 735.

*Kansas.* — Atchison, etc., R. Co. v. Garside, 10 Kan. 552.

*Louisiana.* — Hill v. Chicago, etc., R. Co., 38 La. Ann. 599.

*Michigan.* — Grand Rapids, etc., R. Co., v. Heisel, 38 Mich. 62, 31 Am. Rep. 306.

*Missouri.* — Knapp v. St. Louis Transfer R. Co., 126 Mo. 26.

*New Jersey.* — Beseman v. Pennsylvania R. Co., 50 N. J. L. 235; Morris, etc., R. Co. v. Newark, 10 N. J. Eq. 352.

*New York.* — Reining v. New York, etc., R. Co., 128 N. Y. 157; Fobes v. Rome, etc., R. Co., 121 N. Y. 505; Birrell v. New York, etc., R. Co., 41 N. Y. App. Div. 506; Trelford v. Coney Island, etc., R. Co., 5 N. Y. App. Div. 464; Plant v. Long Island R. Co., 10 Barb. (N. Y.) 26; Adams v. Saratoga, etc., R. Co., 11 Barb. (N. Y.) 414; Corey v. Buffalo, etc., R. Co., 23 Barb. (N. Y.) 482; Barnes v. South Side R. Co., (Supm. Ct. Spec. T.) 2 Abb. Pr. N. S. (N. Y.) 415.

*Pennsylvania.* — Jones v. Erie, etc., R. Co., 144 Pa. St. 629; Ryan v. Pennsylvania Schuylkill Valley R. Co., 1 Pa. Co. Ct. 650.

See further the title EMINENT DOMAIN, vol. 10, p. 1103 *et seq.*

1. **Abutter Suffering Special Injury.** — Burlington, etc., R. Co. v. Reinhackle, 15 Neb. 279, 48 Am. Rep. 342; Omaha, etc., R. Co. v. Rogers, 16 Neb. 117; Gulf, etc., R. Co. v. Bock, 63 Tex. 245; Gulf, etc., R. Co. v. Eddins, 60 Tex. 656; Patton v. Olympia Door, etc., Co., 15 Wash. 210.

2. **Reining v. New York, etc., R. Co., 128 N. Y. 157.** And see *infra*, this subsection, *c. Remedies of Abutting Owner—Action for Damages.*

3. **Property Damaged** — *United States.* — Hot Springs R. Co. v. Williamson, 45 Ark. 429, affirmed 136 U. S. 121; Frankle v. Jackson, 30 Fed. Rep. 398.

*Colorado.* — Mollandin v. Union Pac. R. Co., 14 Fed. Rep. 394; Denver Circle R. Co. v. Nestor, 10 Colo. 403; Denver v. Bayer, 7 Colo. 113.

*Illinois.* — Illinois Cent. R. Co. v. Turner, 194 Ill. 575, affirming 97 Ill. App. 219; Galt v. Chicago, etc., R. Co., 157 Ill. 125; Rigney v. Chicago, 102 Ill. 64; Metropolitan West Side El. R. Co. v. Goll, 100 Ill. App. 323.

*Michigan.* — Marquette, etc., R. Co. v. Longyear, (Mich. 1903) 94 N. W. Rep. 670, 10 Detroit Leg. N. 111.

*Nebraska.* — Chicago, etc., R. Co. v. O'Neill, 58 Neb. 239.

*Pennsylvania.* — Mercantile Trust Co. v. Pittsburgh, etc., R. Co., 29 Fed. Rep. 732.

*Texas.* — Ft. Worth, etc., R. Co. v. Downie, 82 Tex. 383; Rosenthal v. Taylor, etc., R. Co., 79 Tex. 325; Gainesville, etc., R. Co. v. Hall, 78 Tex. 169, 22 Am. St. Rep. 42; Gulf, etc., R. Co. v. Bock, 63 Tex. 245; Gulf, etc., R. Co. v. Eddins, 60 Tex. 656.

*Wisconsin.* — Kuhl v. Chicago, etc., R. Co., 101 Wis. 42.

**Damages Must Be Real and Not Speculative.** — Chicago, etc., R. Co. v. Francis, 70 Ill. 238.

4. **Iowa Statute.** — Kelleher v. Chicago, etc., R. Co., 97 Iowa 144; Nicks v. Chicago, etc., R. Co., 84 Iowa 27; Cook v. Chicago, etc., R. Co., 83 Iowa 278; Enos v. Chicago, etc., R. Co., 78 Iowa 28; Merchant's Union Barb Wire Co. v. Chicago, etc., R. Co., 70 Iowa 105; McClean v. Chicago, etc., R. Co., 67 Iowa 568; Hanson v. Chicago, etc., R. Co., 61 Iowa 588; Heath v. Des Moines, etc., R. Co., 61 Iowa 11; Mulholland v. Des Moines, etc., R. Co., 60 Iowa 740; Drady v. Des Moines, etc., R. Co., 57 Iowa 393. And see Merchants' Union Barb Wire Co. v. Chicago, etc., R. Co., 70 Iowa 105; Frith v. Dubuque, 45 Iowa 406.

For the rule in *Iowa* prior to the enactment of the statute, see Franz v. Sioux City, etc., R. Co., 55 Iowa 107; State v. Davenport, etc., R. Co., 47 Iowa 507; Davis v. Chicago, etc., R. Co., 46 Iowa 389; Hine v. Keokuk, etc., R. Co., 42 Iowa 636; Chicago, etc., R. Co. v. Newton, 36 Iowa 299; Davenport v. Stevenson, 34 Iowa 225; Slatten v. Des Moines Valley R. Co., 29 Iowa 148, 4 Am. Rep. 205.

**Abutter Entitled to Damages Where Railroad Crosses Street Diagonally.** — Gates v. Chicago, etc., R. Co., 82 Iowa 518; Enos v. Chicago, etc., R. Co., 78 Iowa 28.

**Sale or Lease of Easement by Abutting Owner.** — An abutting owner who does not own the fee of the street may sell or lease his easement in such street to a railroad company. Hileman v. Chicago G. W. R. Co., 113 Iowa 591.

**Waiver or Assignment of Right to Compensation.** — See Pratt v. Des Moines Northwestern R. Co., 72 Iowa 249.

5. **Fowler v. Des Moines, etc., R. Co., 91 Iowa 533; Merchants' Union Barb Wire Co. v. Chicago, etc., R. Co., 79 Iowa 613; Nicks v. Chicago, etc., R. Co., 84 Iowa 27.**

6. **Barney v. Keokuk, 94 U. S. 324; Cook v. Chicago, etc., R. Co., 83 Iowa 278; Bennett v.**

the public streets are responsible for injuries inflicted upon private or public property lying upon or near to such ground.<sup>1</sup>

(6) *Abutter's Rights Not Subject to Abridgment by City or Legislature.* — Where the abutting owner is entitled to compensation as owner of the fee, or to damages for special injuries inflicted upon his property, he cannot be deprived thereof by the city,<sup>2</sup> or by the legislature, when the right to compensation is guaranteed by the constitution.<sup>3</sup>

(7) *City Not Liable for Compensation or Damages.* — The owner's right to compensation or damages is against the railroad company and not against the city.<sup>4</sup>

**b. RIGHTS OF OWNERS OF PROPERTY NOT ABUTTING.** — As a general rule an owner whose property does not abut upon that portion of the street which is taken for a railroad has no right to damages,<sup>5</sup> or to relief by injunction.<sup>6</sup> Nor does the construction of the railroad upon one side of a street entitle an owner of property on the opposite side to damages.<sup>7</sup> But owners of property upon a street which crosses a railroad are entitled to damages for the construction thereupon of an approach to the railroad track.<sup>8</sup>

**c. REMEDIES OF ABUTTING OWNERS** — (1) *Condemnation Proceedings.* — An abutting owner whose property is not taken can neither institute condemnation proceedings nor compel the railroad company to do so. If he has suffered special injury from the use of the street by the railroad his remedy is by an action for damages.<sup>9</sup>

(2) *Ejectment.* — An abutter who owns the fee in the street may maintain an action of ejectment against a railroad company which has constructed its

Chicago, etc., R. Co., 73 Fed. Rep. 696; Barr v. Oskaloosa, 45 Iowa 275.

1. *Ohio Statute.* — Dillenbach v. Xenia, 41 Ohio St. 207. And see Zanesville v. Fannan, 53 Ohio St. 605, 53 Am. St. Rep. 664.

2. *Rights Not Subject to Abridgment by City.* — Sorensen v. Greeley, 10 Colo. 369; Denver v. Bayer, 7 Colo. 113; South Carolina R. Co. v. Steiner, 44 Ga. 546; Stange v. Dubuque, 62 Iowa 303; Grand Rapids, etc., R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306, 47 Mich. 393; Omaha, etc., R. Co. v. Rogers, 16 Neb. 117; Burlington, etc., R. Co. v. Reinhackle, 15 Neb. 279, 48 Am. Rep. 342; Reining v. New York, etc., R. Co., 128 N. Y. 157; Wilkins v. Gaffney City, 54 S. Car. 199; Kaufman v. Tacoma, etc., R. Co., 11 Wash. 632; Pomeroy v. Milwaukee, etc., R. Co., 16 Wis. 640; Ford v. Chicago, etc., R. Co., 14 Wis. 609, 80 Am. Dec. 791.

3. *Rights Not Subject to Abridgment by Legislature.* — Gulf, etc., R. Co. v. Fuller, 63 Tex. 467; Ford v. Chicago, etc., R. Co., 14 Wis. 609, 80 Am. Dec. 791. See also the title EMINENT DOMAIN, vol. 10, pp. 1050, 1133.

4. *City Not Liable for Compensation or Damages.* — Denver v. Bayer, 7 Colo. 113; Murphy v. Chicago, 29 Ill. 279, 81 Am. Dec. 307; Burkam v. Ohio, etc., R. Co., 122 Ind. 344; Hedrick v. Olathe, 30 Kan. 348; Green v. Portland, 32 Me. 431; Swenson v. Lexington, 69 Mo. 157; Dillenbach v. Xenia, 41 Ohio St. 207. And see Zanesville v. Fannan, 53 Ohio St. 605, 53 Am. St. Rep. 664. But compare Torpey v. Independence, 24 Mo. App. 288.

**Liability When Viaduct Is Constructed by City for Railroad.** — See Chicago, etc., R. Co. v. Chicago, 183 Ill. 341; Culbertson, etc., Packing, etc., Co. v. Chicago, 111 Ill. 651; Atchison, etc., R. Co. v. Lenz, 35 Ill. App. 330.

5. *Owner of Property Not Abutting.* — East St.

Louis v. O'Flynn, 119 Ill. 200, 59 Am. Rep. 795; Matter of New York, etc., R. Co., 39 Hun (N. Y.) 338; Pennsylvania L., etc., Ins. Co. v. Pennsylvania Schuylkill Valley R. Co., 151 Pa. St. 334, 31 Am. St. Rep. 762.

**Under the Ohio Statute** the right to damages is not limited to owners of property immediately upon the street occupied by the railroad, but extends to those whose property is near the street. Shepherd v. Baltimore, etc., R. Co., 130 U. S. 430.

6. Dodge v. Pennsylvania R. Co., 43 N. J. Eq. 351; Gallagher v. Keating, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 131, affirmed 40 N. Y. App. Div. 81.

7. *Owner of Property on Opposite Side of Street.* — Stephenson v. Missouri Pac. R. Co., 68 Mo. App. 642; Beck v. Erie Terminal R. Co., 11 Pa. Co. Ct. 363; Heiss v. Milwaukee, etc., R. Co., 69 Wis. 555. And see Haslett v. New Albany Belt, etc., R. Co., 7 Ind. App. 603; Sinnott v. Chicago, etc., R. Co., 81 Wis. 95.

**But to the Contrary** see Florida Southern R. Co. v. Brown, 23 Fla. 104; Marquette, etc., R. Co. v. Longyear, (Mich. 1903) 94 N. W. Rep. 670.

8. Hitchcock v. Chicago, etc., R. Co., 88 Iowa 242; Gates v. Chicago, etc., R. Co., 82 Iowa 518. Compare Rinard v. Burlington, etc., R. Co., 66 Iowa 440; Morgan v. Des Moines, etc., R. Co., 64 Iowa 589, 52 Am. Rep. 462.

9. *Abutter Cannot Institute Condemnation Proceedings.* — New Albany, etc., R. Co. v. O'Daily, 13 Ind. 353; New Albany, etc., R. Co. v. O'Daily, 12 Ind. 551; Fowler v. Des Moines, etc., R. Co., 91 Iowa 533; Harbach v. Des Moines, etc., R. Co., 80 Iowa 593; Wilson v. Des Moines, etc., R. Co., 67 Iowa 509; Mulholland v. Des Moines, etc., R. Co., 60 Iowa 740; Drady v. Des Moines, etc., R. Co., 57

road therein without tender or payment of damages,<sup>1</sup> provided he has not estopped himself by acquiescence in such use of the street.<sup>2</sup>

(3) *Injunction*. — Where the abutting owner has title to the fee in the street,<sup>3</sup> or where payment of compensation is, by statute, made a condition precedent, he may enjoin the construction of the road until compensation has been paid or tendered.<sup>4</sup> According to some decisions, an abutter who does not own the fee in the street cannot enjoin the construction of a road therein, his only remedy being by an action for damages;<sup>5</sup> but there are other decisions which hold that such an owner may have an injunction if specially injured.<sup>6</sup> In the absence of special and peculiar injury an abutting owner cannot enjoin the construction of the railroad where the fee of the street is in the city or the public.<sup>7</sup>

*Loss of Right by Acquiescence in Use of Street*. — An abutter may lose his right to enjoin the operation of a railroad in the street by long-continued acquiescence in the use of the street for that purpose.<sup>8</sup>

(4) *Action for Damages* — (a) *In General*. — An abutting owner who has

Iowa 393; Chicago, etc., R. Co. v. O'Neill, 58 Neb. 239. And see Stough v. Chicago, etc., R. Co., 71 Iowa 641.

1. *Abutting Owner of Fee May Bring Ejectment*. — Reichert v. St. Louis, etc., R. Co., 51 Ark. 491; Porter v. Midland R. Co., 125 Ind. 476; Terre Haute, etc., R. Co. v. Rodel, 89 Ind. 128, 46 Am. Rep. 164; Sharpe v. St. Louis, etc., R. Co., 49 Ind. 296; Cox v. Louisville, etc., R. Co., 48 Ind. 178; Syracuse Solar Salt Co. v. Rome, etc., R. Co., 67 Hun (N. Y.) 153. But to the contrary see Montgomery v. Santa Ana Westminster R. Co., 104 Cal. 186, 43 Am. St. Rep. 89, holding that ejectment does not lie where the use of the street has been authorized by the city.

See also the title EJECTMENT, vol. 10, p. 473.

*Ejectment Maintainable Where Use of Street by Railroad Is Unauthorized*. — See *supra*, this section, 2. *k. Unauthorized Use*.

2. *Acquiescence*. — Reichert v. St. Louis, etc., R. Co., 51 Ark. 491. And see Porter v. Midland R. Co., 125 Ind. 476.

3. *Abutter Owning Fee Entitled to Injunction Where Compensation Has Not Been Made*. — O'Connor v. Southern Pac. R. Co., 122 Cal. 681; Bond v. Pennsylvania R. Co., 171 Ill. 508; Porter v. Midland R. Co., 125 Ind. 476; Cox v. Louisville, etc., R. Co., 48 Ind. 178; Williams v. New York Cent. R. Co., 16 N. Y. 97, 69 Am. Dec. 651; Syracuse Solar Salt Co. v. Rome, etc., R. Co., 67 Hun (N. Y.) 153; Taphorn v. Cincinnati, etc., R. Co., 6 Ohio Dec. (Reprint) 865, 8 Am. L. Rec. 489, 7 Ohio Dec. (Reprint) 690, 4 Cinc. L. Bul. 988. And see Washington Cemetery v. Prospect Park, etc., R. Co., 7 Hun (N. Y.) 655. But to the contrary see Spencer v. Point Pleasant, etc., R. Co., 23 W. Va. 406; Arbenz v. Wheeling, etc., R. Co., 33 W. Va. 1.

*An Injunction Will Not Be Granted* where the remedy at law is adequate, or where the injury is past and not continuing. Cox v. Louisville, etc., R. Co., 48 Ind. 178.

4. *Payment of Compensation Required by Statute — Abutter Entitled to Injunction*. — Columbus, etc., R. Co. v. Witherow, 82 Ala. 190; Georgia Southern, etc., R. Co. v. Ray, 84 Ga. 376; Fowler v. Des Moines, etc., R. Co., 91 Iowa 533; Harbach v. Des Moines, etc., R. Co., 80

Iowa 593; Morris, etc., R. Co. v. Hudson Tunnel R. Co., 25 N. J. Eq. 384; Dillenbach v. Xenia, 41 Ohio St. 207; Ford v. Chicago, etc., R. Co., 14 Wis. 609, 80 Am. Dec. 791.

*Damages Awarded in Prior Condemnation Proceedings*. — In Phipps v. Western Maryland R. Co., 66 Md. 319, an injunction was refused upon the ground that the abutting owner had already received compensation as a part of the damages awarded in prior condemnation proceedings against another tract of land.

5. *Abutter Who Does Not Own Fee Not Entitled to Injunction*. — Denver, etc., R. Co. v. Barsaloux, 15 Colo. 290; Denver, etc., R. Co. v. Domke, 11 Colo. 247; Bond v. Pennsylvania R. Co., 171 Ill. 508; Mills v. Parlin, 106 Ill. 60; People v. New York, etc., R. Co., (Supm. Ct. Spec. T.) 26 How. Pr. (N. Y.) 44, 45 Barb. (N. Y.) 73; Drake v. Hudson River R. Co., 7 Barb. (N. Y.) 508; Taphorn v. Cincinnati, etc., R. Co., 6 Ohio Dec. (Reprint) 865, 8 Am. L. Rec. 489, 7 Ohio Dec. (Reprint) 690, 4 Cinc. L. Bul. 988.

6. *Abutter Entitled to Injunction When Specially Injured*. — Dubach v. Hannibal, etc., R. Co., 89 Mo. 483; Scioto Valley R. Co. v. Lawrence, 38 Ohio St. 41, 43 Am. Rep. 419; Dooly Block v. Salt Lake Rapid Transit Co., 9 Utah 31.

*The Exclusive Appropriation of a Street* by a railroad may be enjoined at the suit of an abutting owner who is specially injured thereby even though the construction of the railroad in the street has been authorized by the city. Corby v. Chicago, etc., R. Co., 150 Mo. 457; Knapp v. St. Louis Transfer R. Co., 126 Mo. 26.

7. *Abutter Cannot Enjoin Unless Specially Injured*. — Crowley v. Davis, 63 Cal. 460; Decker v. Evansville, etc., R. Co., 133 Ind. 495; Black v. Philadelphia, etc., R. Co., 58 Pa. St. 249; Peterson v. Navy Yard, etc., R. Co., 5 Phila. (Pa.) 199, 20 Leg. Int. (Pa.) 4; Magee v. London, etc., R. Co., 6 Grant Ch. (U. C.) 170.

8. *Acquiescence*. — Denver, etc., R. Co. v. Barsaloux, 15 Colo. 290; Denver, etc., R. Co. v. Toohey, 15 Colo. 298; Denver, etc., R. Co. v. Domke, 11 Colo. 247; Porter v. Midland R. Co., 125 Ind. 476; Klosterman v. Chesapeake, etc., R. Co., (Ky. 1900) 56 S. W. Rep. 820.



suffered special injury from the construction of a railroad in a public street, different from that suffered by the general public, may sue at law for damages;<sup>1</sup> but in the absence of such special and peculiar injury, no action lies.<sup>2</sup>

**Purchaser After Construction of Road.**—As a general rule a person who purchases land abutting on a street upon which a railroad is already in operation will be presumed to have received compensation by acquiring the land at a reduced price, and will not be allowed to recover damages by action.<sup>3</sup>

**Liability of Grantee or Lessee of Railroad.**—Where the railroad has been sold or leased, the liability of the vendee or lessee will depend upon the terms of the

1. **Suit for Damages.**—*California.*—Ford v. Santa Cruz R. Co., 59 Cal. 290.

*Illinois.*—Metropolitan West Side El. R. Co. v. Goll, 100 Ill. App. 323.

*Indiana.*—Porter v. Midland R. Co., 125 Ind. 476; White v. Chicago, etc., R. Co., 128 Ind. 317.

*Iowa.*—Stough v. Chicago, etc., R. Co., 71 Iowa 641; Wilson v. Des Moines, etc., R. Co., 67 Iowa 509; Stange v. Dubuque, 62 Iowa 303; Cain v. Chicago, etc., R. Co., 54 Iowa 255; Frith v. Dubuque, 45 Iowa 406; Park v. Chicago, etc., R. Co., 43 Iowa 636.

*Kansas.*—Central Branch Union Pac. R. Co. v. Andrews, 30 Kan. 590.

*Kentucky.*—Fulton v. Short Route R. Transfer Co., 85 Ky. 640, 7 Am. St. Rep. 619; Jeffersonville, etc., R. Co. v. Esterle, 13 Bush (Ky.) 667.

*Nebraska.*—Omaha, etc., R. Co. v. Janeczek, 30 Neb. 276, 27 Am. St. Rep. 399; Burlington, etc., R. Co. v. Reinhackle, 15 Neb. 279, 48 Am. Rep. 342; Gottschalk v. Chicago, etc., R. Co., 14 Neb. 550.

*New Mexico.*—New Mexican R. Co. v. Hendricks, 6 N. Mex. 611.

*Texas.*—Texas, etc., R. Co. v. Goldberg, 68 Tex. 685; Gulf, etc., R. Co. v. Bock, 63 Tex. 245; Gulf, etc., R. Co. v. Eddins, 60 Tex. 656.

*Washington.*—Patton v. Olympia Door, etc., Co., 15 Wash. 210.

*Wisconsin.*—Evans v. Chicago, etc., R. Co., 86 Wis. 597, 39 Am. St. Rep. 908.

**General Nature of Action.**—"In all cases in which a cause of action may exist, and in which it springs solely from the laying down of the track, and the subsequent running of trains in an ordinary, proper, and lawful manner, there is but a single cause of action; it involves, for the purpose of determining the compensation, the question of a diminution in value of the lot caused by the construction of the railroad; it arises at the time of the occupation of the street by the railroad company; and it is barred, like any other cause of action, after the lapse of the prescribed number of years from that date. A change in the ownership of the railroad property neither revives an old nor creates a new cause of action. 'Unlike actions for trespass to realty, where the plaintiff can only recover for the injury done up to the commencement of the suit, in suits of this kind a single recovery may be had for the whole damage to result from the act, the injury being continuing and permanent.'" Frankle v. Jackson, 30 Fed. Rep. 398, per Brewer, J. And see Covington, etc., El. R. Transfer, etc., Co. v. Kleymeier, 105 Ky. 609.

**Elements of Damages.**—See Chicago, etc., R.

Co. v. O'Connor, 42 Neb. 90; Iron Mountain R. Co. v. Bingham, 87 Tenn. 522.

**An Abutting Owner Injured by the Erection and Operation of Coal Bins in the street may recover damages although he could not enjoin their operation because of his acquiescence in their construction.** Louisville, etc., R. Co. v. Walton, (Ky. 1902) 67 S. W. Rep. 988.

**Action for Damages Not Maintainable—Damages Recoverable in Mode Specified by Charter.**—Tennessee, etc., R. Co. v. Adams, 3 Head (Tenn.) 596.

**Plaintiff's Title Established by Proof of Adverse Possession.**—Lawrence R. Co. v. Cobb, 35 Ohio St. 94.

**Estoppel of Defendant to Deny Existence of Public Street.**—See Maltman v. Chicago, etc., R. Co., 72 Ill. App. 378.

**Bill by Railroad to Enjoin Suits for Damages.**—See Guess v. Stone Mountain Granite, etc., Co., 67 Ga. 215; South Carolina R. Co. v. Steiner, 44 Ga. 546.

**No Action in Absence of Special and Peculiar Injury—United States.**—Jackson v. Chicago, etc., R. Co., 41 Fed. Rep. 656.

*Colorado.*—Union Pac. R. Co. v. Foley, 19 Colo. 280; Union Pac. R. Co. v. Benson, 19 Colo. 285; Denver v. Bayer, 7 Colo. 113; Colorado Midland R. Co. v. Trevarthen, 1 Colo. App. 152.

*Connecticut.*—Newton v. New York, etc., R. Co., 72 Conn. 420.

*Illinois.*—Metropolitan West Side El. R. Co. v. Goll, 100 Ill. App. 323; Chicago, etc., R. Co. v. Berg, 10 Ill. App. 607.

*Indiana.*—Indiana, etc., R. Co. v. Eberle, 110 Ind. 542, 59 Am. Rep. 225; Terre Haute, etc., R. Co. v. Bissell, 108 Ind. 113; Dwenger v. Chicago, etc., R. Co., 98 Ind. 153.

*Kansas.*—Central Branch Union Pac. R. Co. v. Andrews, 41 Kan. 370, 30 Kan. 590.

*Minnesota.*—Rochette v. Chicago, etc., R. Co., 32 Minn. 201.

*Missouri.*—Stephenson v. Missouri Pac. R. Co., 68 Mo. App. 642.

*Ohio.*—Flichman v. Cleveland, etc., R. Co., 11 Ohio Dec. (Reprint) 543, 27 Cinc. L. Bul. 302; Wheeling, etc., R. Co. v. McLaughlin, 7 Ohio Cir. Dec. 647, 15 Ohio Cir. Ct. 1.

*Texas.*—Ft. Worth, etc., R. Co. v. Garvin, (Tex. Civ. App. 1894) 29 S. W. Rep. 794; Morrow v. St. Louis, etc., R. Co., 81 Tex. 405.

**Purchase After Construction.**—Galt v. Chicago, etc., R. Co., 157 Ill. 125; Conabee v. New York Cent., etc., R. Co., 156 N. Y. 474, affirming 84 Hun (N. Y.) 34. And see Pratt v. Des Moines Northwestern R. Co., 72 Iowa 249; Stickley v. Chesapeake, etc., R. Co., 93 Ky. 323.

sale or lease and upon the nature of the injury inflicted.<sup>1</sup>

(b) **What Injuries Actionable** — *aa. CHANGE OF GRADE — IMPAIRMENT OF ACCESS.* — A change in the grade of a street resulting from the construction of a railroad therein constitutes a special injury which entitles an abutting owner to damages,<sup>2</sup> especially where ingress to and egress from his property are prevented or substantially impaired thereby.<sup>3</sup>

*bb. OVERFLOW OF LAND.* — Where the railroad is so constructed as to cast water upon the land of an abutting owner, or to prevent the flow of water therefrom, the railroad company is liable in damages.<sup>4</sup>

*cc. SMOKE, CINDERS, NOISE, VIBRATION, ETC.* — Where smoke, cinders, or fire are cast upon abutting property by a railroad operated in a public street, the owner

**1. Railroad Sold or Leased — What Company Liable.** — See *Stickley v. Chesapeake, etc., R. Co.*, 93 Ky. 323; *Louisville, etc., R. Co. v. Orr*, 91 Ky. 109; *Patton v. Olympia Door, etc., Co.*, 15 Wash. 210; *Guinn v. Ohio River R. Co.*, 46 W. Va. 151, 76 Am. St. Rep. 806; *Lenz v. Chicago, etc., R. Co.*, 111 Wis. 198; *Hamilton v. Covert*, 16 U. C. C. P. 205; *Grand Trunk R. Co. v. Fitzgerald*, 19 Can. Sup. Ct. 359.

**2. Change in Grade of Street Actionable.** — *Alabama.* — *Alabama Midland R. Co. v. Williams*, 92 Ala. 277.

*Indiana.* — *Pennsylvania Co. v. Stanley*, 10 Ind. App. 421; *Egbert v. Lake Shore, etc., R. Co.*, 6 Ind. App. 350.

*Iowa.* — *Hitchcock v. Chicago, etc., R. Co.*, 88 Iowa 242; *Nicks v. Chicago, etc., R. Co.*, 84 Iowa 27; *Gates v. Chicago, etc., R. Co.*, 82 Iowa 518.

*Kentucky.* — *Louisville, etc., R. Co. v. Finley*, 86 Ky. 294; *Jeffersonville, etc., R. Co. v. Esterle*, 13 Bush (Ky.) 667.

*Minnesota.* — *Baldwin v. Chicago, etc., R. Co.*, 35 Minn. 354.

*Missouri.* — *Smith v. Kansas City, etc., R. Co.*, 98 Mo. 20; *Sheehy v. Kansas City Cable R. Co.*, 94 Mo. 574, 4 Am. St. Rep. 396; *Hulett v. Missouri, etc., R. Co.*, 80 Mo. App. 87.

*New York.* — *Henderson v. New York Cent. R. Co.*, 78 N. Y. 423, *affirming* 17 Hun (N. Y.) 344. But see *Wilson v. New York Cent., etc., R. Co.*, 39 Hun (N. Y.) 651, 2 N. Y. Supp. 65.

*Ohio.* — *Little Miami R. Co. v. Hambleton*, 40 Ohio St. 496; *Little Miami R. Co. v. Martin*, 1 Ohio Dec. (Reprint) 440, 10 West L. J. 54.

*Pennsylvania.* — *Hare v. Pittsburg, etc., R. Co.*, 10 Pa. Super. Ct. 647.

*Washington.* — *Kaufman v. Tacoma, etc., R. Co.*, 11 Wash. 632.

*Wisconsin.* — *Shealy v. Chicago, etc., R. Co.*, 72 Wis. 471; *Buchner v. Chicago, etc., R. Co.*, 56 Wis. 403. But see *First Cong. Church v. Milwaukee, etc., R. Co.*, 77 Wis. 158.

**Change of Grade Not Actionable When Authorized by City or Legislature.** — *Atchison, etc., R. Co. v. Church*, 53 Kan. 621; *Atchison, etc., R. Co. v. Leuning*, 52 Kan. 732; *Atchison, etc., R. Co. v. Arnold*, 52 Kan. 729; *Louisville, etc., R. Co. v. Brown*, 17 B. Mon. (Ky.) 763; *Wolfe v. Covington, etc., R. Co.*, 15 B. Mon. (Ky.) 409; *Lexington, etc., R. Co. v. Applegate*, 8 Dana (Ky.) 289, 33 Am. Dec. 497; *Ottenot v. New York, etc., R. Co.*, 119 N. Y. 603; *Rauenstein v. New York, etc., R. Co.*, 120 N. Y. 661, 136 N. Y. 528, *reversing* (Buffalo

Super. Ct. Gen. T.) 19 N. Y. Supp. 833; *Iron Mountain R. Co. v. Bingham*, 87 Tenn. 522.

**Abutter Not Entitled to Damages When Street Is Improved by Change of Grade.** — *Jackson v. Chicago, etc., R. Co.*, 41 Fed. Rep. 656.

**3. Impairment of Access — Illinois.** — *Atchison, etc., R. Co. v. Pratt*, 53 Ill. App. 263.

*Indiana.* — *Indianapolis, etc., R. Co. v. Smith*, 52 Ind. 428; *Egbert v. Lake Shore, etc., R. Co.*, 6 Ind. App. 350.

*Kansas.* — *Leavenworth, etc., R. Co. v. Curtan*, 51 Kan. 432; *Kansas, etc., R. Co. v. McAfee*, 42 Kan. 239; *Central Branch Union Pac. R. Co. v. Twine*, 23 Kan. 585, 33 Am. Rep. 203.

*Kentucky.* — *Henderson Belt R. Co. v. Dechamp*, 95 Ky. 219; *Elizabethtown, etc., R. Co. v. Combs*, 10 Bush (Ky.) 382, 19 Am. Rep. 67.

*Maryland.* — *Phipps v. Western Maryland R. Co.*, 66 Md. 319.

*Minnesota.* — *Brakken v. Minneapolis, etc., R. Co.*, 29 Minn. 41.

*Missouri.* — *Smith v. Kansas City, etc., R. Co.*, 98 Mo. 20; *Cross v. St. Louis, etc., R. Co.*, 77 Mo. 318; *Hulett v. Missouri, etc., R. Co.*, 80 Mo. App. 87.

*Ohio.* — *Parrot v. Cincinnati, etc., R. Co.*, 10 Ohio St. 624; *Little Miami R. Co. v. Naylor*, 2 Ohio St. 235, 59 Am. Dec. 667; *English v. Cincinnati Southern R. Co.*, 8 Ohio Dec. (Reprint) 442, 8 Cinc. L. Bul. 15; *Cincinnati, etc., R. Co. v. Pfitzer*, Ohio Prob. 248.

*West Virginia.* — *Guinn v. Ohio River R. Co.*, 46 W. Va. 151, 76 Am. St. Rep. 806.

*Wisconsin.* — *Evans v. Chicago, etc., R. Co.*, 86 Wis. 597, 39 Am. St. Rep. 908.

**What Not an Impairment of Access.** — See *Dulaney v. Louisville, etc., R. Co.*, 100 Ky. 628; *Louisville, etc., R. Co. v. Orr*, 91 Ky. 109; *Cosby v. Owensboro, etc., R. Co.*, 10 Bush (Ky.) 293.

**Measure of Damages.** — See *Hetzel v. Baltimore, etc., R. Co.*, 169 U. S. 26; *Jackson v. Kiel*, 13 Colo. 378, 16 Am. St. Rep. 207; *Elizabethtown, etc., R. Co. v. Combs*, 10 Bush (Ky.) 382, 19 Am. Rep. 67.

**4. Overflow of Abutting Property Actionable.** — *Rock Island, etc., R. Co. v. Krapp*, 74 Ill. App. 158 *affirmed* 173 Ill. 219; *Indianapolis, etc., R. Co. v. Smith*, 52 Ind. 428; *Louisville, etc., R. Co. v. Finley*, 86 Ky. 294; *Louisville, etc., R. Co. v. Hodge*, 6 Bush (Ky.) 142; *Adams v. Hastings, etc., R. Co.*, 18 Minn. 263; *Parrot v. Cincinnati, etc., R. Co.*, 10 Ohio St. 624; *New Castle, etc., R. Co. v. McChesney*, 85 Pa. St. 522.

of the property may recover damages for the injury.<sup>1</sup> So, where the vibration caused by passing trains is such as to injure buildings in the vicinity, the railroad company is liable.<sup>2</sup> But, by the weight of authority, an abutting owner cannot recover damages for the annoyance resulting from the noise caused by passing trains, at least where such noise is incidental to the ordinary and proper operation of the railroad.<sup>3</sup>

*dd.* OBSTRUCTION OF STREET. — Where a public street is obstructed by the improper construction or operation of a railroad therein, an abutting owner who suffers special injury may recover damages.<sup>4</sup>

*ee.* IMPROPER AND NEGLIGENT CONSTRUCTION OF ROAD. — Damages resulting from improper and negligent construction of the road are recoverable by an abutting owner who suffers special injury.<sup>5</sup>

*ff.* INJURIES INFLICTED DURING CONSTRUCTION. — A railroad company which builds its road in a public street is liable to an abutting owner for injuries inflicted upon his property while the road is being built as well as for the permanent injuries resulting from its construction.<sup>6</sup>

*gg.* INCREASE IN NUMBER OF TRACKS. — An increase in the number of tracks laid in the street may, in some cases, entitle an abutting owner to additional damages,<sup>7</sup> but not where such increase was contemplated and provided for at the time of the original assessment.<sup>8</sup>

1. **Smoke, Cinders, or Fire Cast upon Property — Owner Entitled to Damages.** — South Carolina R. Co. v. Steiner, 44 Ga. 546; Illinois Cent. R. Co. v. Turner, 194 Ill. 575; Covington, etc., El. R. Transfer, etc., Co. v. Kleymeier, 105 Ky. 609; Chesapeake, etc., R. Co. v. Gross, (Ky. 1897) 43 S. W. Rep. 203; Henderson Belt R. Co. v. Dechamp, 95 Ky. 219; Louisville, etc., R. Co. v. Orr, 91 Ky. 109; Jeffersonville, etc., R. Co. v. Esterle, 13 Bush (Ky.) 667; Elizabethtown, etc., R. Co. v. Combs, 10 Bush (Ky.) 392, 19 Am. Rep. 67; Columbus, etc., R. Co. v. Gardner, 45 Ohio St. 309; Cincinnati, etc., R. Co. v. Pfitzer, Ohio Prob. 248; Texarkana, etc., R. Co. v. Bulgier, (Tex. Civ. App. 1898) 47 S. W. Rep. 1047.

**Contra — No Liability Where Road Is Properly Operated.** — Where the railroad is authorized by law and properly operated, the company is not liable in damages to abutting owners for annoyance caused by smoke, cinders, etc. Atchison, etc., R. Co. v. Garside, 10 Kan. 552; Louisville Southern R. Co. v. Hooe, (Ky. 1896) 38 S. W. Rep. 131; Parrot v. Cincinnati, etc., R. Co., 10 Ohio St. 624; Werges v. St. Louis, etc., R. Co., 35 La. Ann. 641; Struthers v. Dunkirk, etc., R. Co., 87 Pa. St. 282; Cleveland, etc., R. Co. v. Speer, 56 Pa. St. 325, 94 Am. Dec. 84.

**Actual Contact with Property Essential.** — Annoyance from smoke and fire is not actionable unless the abutter is damaged by their actual contact with his property. Cosby v. Owensboro, etc., R. Co., 10 Bush (Ky.) 288.

2. **Vibration Caused by Passing Trains.** — South Carolina R. Co. v. Steiner, 44 Ga. 546; Louisville Southern R. Co. v. Hooe, (Ky. 1896) 38 S. W. Rep. 131; Parrot v. Cincinnati, etc., R. Co., 3 Ohio St. 331. But see *In re Devlin*, etc., R. Co., 40 U. C. Q. B. 160.

3. **Noise Incident to Operation Not Actionable.** — Atchison, etc., R. Co. v. Garside, 10 Kan. 552; Covington, etc., El. R. Transfer, etc., Co. v. Kleymeier, 105 Ky. 609; Chesapeake, etc., R. Co. v. Gross, (Ky. 1897) 43 S. W. Rep. 203; Cosby v. Owensboro, etc., R. Co., 10 Bush

(Ky.) 294; Werges v. St. Louis, etc., R. Co., 35 La. Ann. 641; Struthers v. Dunkirk, etc., R. Co., 87 Pa. St. 282; Cleveland, etc., R. Co. v. Speer, 56 Pa. St. 325, 94 Am. Dec. 84.

**Contra — Abutter Entitled to Recover for Noise.** — Columbus, etc., R. Co. v. Gardner, 45 Ohio St. 309; Cincinnati, etc., R. Co. v. Pfitzer, Ohio Prob. 248; Texarkana, etc., R. Co. v. Bulgier, (Tex. Civ. App. 1898) 47 S. W. Rep. 1047.

**Unusual Noise Actionable.** — Louisville Southern R. Co. v. Hooe, (Ky. 1898) 47 S. W. Rep. 621.

4. **Obstruction of Street.** — Frankle v. Jackson, 30 Fed. Rep. 398; Grafton v. Baltimore, etc., R. Co., 21 Fed. Rep. 309; Jackson v. Kiel, 13 Colo. 378, 16 Am. St. Rep. 207; Illinois Cent. R. Co. v. Turner, 194 Ill. 575; Ottawa, etc., R. Co. v. Larson, 40 Kan. 301; Atchison, etc., R. Co. v. Garside, 10 Kan. 552; Louisville, etc., R. Co. v. Orr, 91 Ky. 109; Com. v. Erie, etc., R. Co., 27 Pa. St. 339, 67 Am. Dec. 471.

5. **Improper and Negligent Construction of Road.** — Eslich v. Mason City, etc., R. Co., 75 Iowa 443; O'Connor v. St. Louis, etc., R. Co., 56 Iowa 735; Cain v. Chicago, etc., R. Co., 54 Iowa 255; Cadle v. Muscatine Western R. Co., 44 Iowa 11.

**Ditch in Street — Railroad Company Liable to Abutting Owner.** — Jackson v. Chicago, etc., R. Co., 41 Fed. Rep. 656.

6. **Injuries Inflicted During Construction.** — Shepherd v. Baltimore, etc., R. Co., 130 U. S. 433; St. Louis, etc., R. Co. v. Capps, 72 Ill. 188; Chicago, etc., R. Co. v. Union Invest. Co., 51 Kan. 600; Baltimore, etc., R. Co. v. Reaney, 42 Md. 117. And see Alabama Midland R. Co. v. Coskry, 92 Ala. 254; Taylor v. New York, etc., R. Co., 27 N. Y. App. Div. 190.

7. **Additional Tracks.** — Chesapeake, etc., R. Co. v. Gross, (Ky. 1897) 43 S. W. Rep. 203.

**Ownership of Fee Immaterial — Statute of Limitations.** — Illinois Cent. R. Co. v. Davis, 71 Ill. App. 99.

8. **Chicago, etc., R. Co. v. Eisert**, 127 Ind. 156; **White v. Chicago, etc., R. Co.**, 122 Ind.

(c) **Limitations.** — The time within which an action of this nature must be brought is a matter of local law dependent upon the statute of limitations of the particular state.<sup>1</sup>

(d) **Defenses** — *aa. MUNICIPAL LICENSE.* — As a general rule a license from a city to use a street constitutes no defense to an action against a railroad company to recover damages arising from such use.<sup>2</sup>

*bb. RELEASE OF DAMAGES.* — An abutting owner who has executed to the railroad company a release of all damages is bound thereby, and, in the absence of proof that such release was procured by fraud or deception, he cannot afterwards recover damages for any injuries resulting from the proper construction and operation of the road, or from the laying of additional tracks.<sup>3</sup>

*cc. ESTOPPEL.* — An abutting owner who has agreed to the occupation of a street by a railroad cannot question its right to maintain its tracks therein, nor can his grantee.<sup>4</sup> So where a railroad company has located its road in a street because of inducements held out by an abutting owner, the latter is estopped to sue for damages resulting from the use of the street.<sup>5</sup>

(e) **Measure of Damages.** — The measure of damages in an action of this nature is generally the diminution in the market or rental value of the plaintiff's property resulting from the occupation of the street by the railroad.<sup>6</sup> Remote

317; *Hileman v. Chicago G. W. R. Co.*, 113 Iowa 591; *Chicago, etc., R. Co. v. O'Connor*, 42 Neb. 90.

1. In Iowa the statutory period of limitation is five years. *Pratt v. Des Moines Northwestern R. Co.*, 72 Iowa 249. And the statute begins to run when the track is laid. *Mulholland v. Des Moines, etc., R. Co.*, 60 Iowa 740.

In Kentucky the statutory limitation is five years. Where the action is for damages naturally resulting from the proper operation of the road the statute runs from the time when the cars begin to run; but when the damages are caused by improper operation it does not begin to run until the injury is inflicted. *Louisville, etc., R. Co. v. Orr*, 91 Ky. 109.

But the above rules do not apply where the occupation of the street by the railroad is unauthorized. *Klosterman v. Chesapeake, etc., R. Co.*, (Ky. 1900) 56 S. W. Rep. 820.

In Ohio the period of limitation is two years from the completion of the road. *Columbus, etc., R. Co. v. Mowatt*, 35 Ohio St. 284; *Columbus, etc., R. Co. v. Gardner*, 45 Ohio St. 309. But see *Little Miami R. Co. v. Hambleton*, 40 Ohio St. 496.

2. **Municipal License.** — *Denver Circle R. Co. v. Nestor*, 10 Colo. 403; *Illinois Cent. R. Co. v. Turner*, 194 Ill. 575; *Pittsburgh, etc., R. Co. v. Harper*, 11 Ind. App. 481; *Leavenworth, etc., R. Co. v. Curtan*, 51 Kan. 432; *Henderson Belt R. Co. v. Dechamp*, 95 Ky. 219; *Louisville, etc., R. Co. v. Finley*, 86 Ky. 294; *Elizabethtown, etc., R. Co. v. Combs*, 10 Bush (Ky.) 382, 19 Am. Rep. 67; *Riedinger v. Marquette, etc., R. Co.*, 62 Mich. 29; *Lake Shore, etc., R. Co. v. Brown*, 9 Ohio Cir. Dec. 37, 16 Ohio Cir. Ct. 269; *Thompson v. Pennsylvania R. Co.*, (N. J. 1888) 14 Atl. Rep. 897; *Duke v. Baltimore, etc., R. Co.*, 129 Pa. St. 422. But see *Colorado Cent. R. Co. v. Mollandin*, 4 Colo. 154; *Franz v. Sioux City, etc., R. Co.*, 55 Iowa 107; *Mazetti v. New York, etc., R. Co.*, 3 E. D. Smith (N. Y.) 68.

3. **Release of Damages.** — *Denver, etc., R. Co. v. Toohey*, 15 Colo. 297; *Indianapolis, etc., R.*

*Co. v. Calvert*, 110 Ind. 555; *Kansas City, etc., R. Co. v. Hicks*, 30 Kan. 288.

**Release Construed.** — A release of damages resulting from the operation of a railroad in front of certain specified lots does not bar the abutting owner from suing for injuries to other lots not mentioned in the release. *McDonald v. Southern California R. Co.*, (Cal. 1895) 41 Pac. Rep. 812.

4. **Estoppel by Agreement.** — *Merchants' Union Barb-Wire Co. v. Chicago, etc., R. Co.*, 79 Iowa 613; *Pratt v. Des Moines Northwestern R. Co.*, 72 Iowa 249; *Jolly v. Des Moines Northwestern R. Co.*, 72 Iowa 759; *Hileman v. Chicago G. W. R. Co.*, 113 Iowa 591.

5. **Street Occupied by Invitation of Abutting Owner.** — *Penn Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35, 33 Am. St. Rep. 273, in which case, however, it was further held that the evidence was insufficient to establish an estoppel.

In Texas it has been held that an abutting owner may sue for damages notwithstanding the fact that he was one of a number of persons who procured the right of way for the railroad by contract with the company. *Taylor, etc., R. Co. v. Robson*, (Tex. Civ. App. 1893) 24 S. W. Rep. 37.

6. **Measure of Damages** — *California.* — *Muller v. Southern Pac. Branch R. Co.*, 83 Cal. 240.

*Colorado.* — *Union Pac. R. Co. v. Foley*, 19 Colo. 280; *Denver, etc., R. Co. v. Bourne*, 11 Colo. 59; *Denver, etc., R. Co. v. Schmitt*, 11 Colo. 56; *Denver, etc., R. Co. v. Domke*, 11 Colo. 247; *Denver Circle R. Co. v. Nestor*, 10 Colo. 403; *Denver v. Bayer*, 7 Colo. 113.

*Georgia.* — *Streyer v. Georgia Southern, etc., R. Co.*, 90 Ga. 56.

*Illinois.* — *Illinois Cent. R. Co. v. Turner*, 104 Ill. 575; *Chicago, etc., R. Co. v. Hall*, 90 Ill. 42; *St. Louis, etc., R. Co. v. Haller*, 82 Ill. 208.

*Iowa.* — *Nicks v. Chicago, etc., R. Co.*, 84 Iowa 27; *Cadle v. Muscatine Western R. Co.*, 44 Iowa 11.

*Kentucky.* — *Maysville, etc., R. Co. v. Ingram*, (Ky. 1895) 30 S. W. Rep. 8; *Maysville, etc., R. Co. v. Conner*, (Ky. 1895) 29 S. W. Rep. 344; *Maysville, etc., R. Co. v. Urban*, 10

## STREETS AND SIDEWALKS — STRICTLY CONFIDENTIAL.

and speculative damages cannot be recovered.<sup>1</sup>

**STREET WORK.** — See note 2.

**STRESS OF WEATHER.** — See note 3.

**STRETCHING.** — See note 4.

**STRICT COMPLIANCE.** — See note 5.

**STRICT CONSTRUCTION.** (See also the titles INTERPRETATION AND CONSTRUCTION, vol. 17, p. 1; STATUTES, vol. 26, p. 657.) — “‘Strict construction’ is that which refuses to expand the law by implications or equitable considerations, but confines its operation to cases which are clearly within the letter of the statute, as well as within its spirit or reason.”<sup>6</sup>

**STRICTEST.** — See note 7.

**STRICTLY.** — See note 8.

**STRICTLY CONFIDENTIAL.** — See note 9.

Ky. L. Rep. 1061; Louisville, etc., R. Co. v. Geikel, 9 Ky. L. Rep. 813; Elizabethtown, etc., R. Co. v. Walton, 9 Ky. L. Rep. 243; Jeffersonville, etc., R. Co. v. Esterle, 13 Bush (Ky.) 667.

Michigan. — Grand Rapids, etc., R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306, 47 Mich. 393.

Minnesota. — Demueles v. St. Paul, etc., R. Co., 44 Minn. 436; Carli v. Union Depot, etc., Co., 32 Minn. 101; Karst v. St. Paul, etc., R. Co., 22 Minn. 118.

Missouri. — Stevenson v. Missouri Pac. R. Co., (Mo. 1895) 31 S. W. Rep. 793.

Nebraska. — Chicago, etc., R. Co. v. O'Neill, 58 Neb. 239; Chicago, etc., R. Co. v. O'Connor, 42 Neb. 90.

Rhode Island. — Johnston v. Old Colony R. Co., 18 R. I. 642, 49 Am. St. Rep. 800.

Texas. — Gulf, etc., R. Co. v. Fuller, 63 Tex. 467; Haney v. Gulf, etc., R. Co., 3 Tex. App. Civ. Cas., § 279.

West Virginia. — Stewart v. Ohio River R. Co., 38 W. Va. 438.

Wisconsin. — Blesch v. Chicago, etc., R. Co., 43 Wis. 183.

1. **Remote and Speculative Damages.** — Henderston Belt R. Co. v. Dechamp, 95 Ky. 219.

2. **Street Work.** — “*Street work* is a phrase of common usage, and has a well-defined signification. The words mean exactly what they indicate upon their face, namely, work upon a street — work in repairing or making a street.” Electric Light, etc., Co. v. San Bernardino, 100 Cal. 351.

3. **Stress of Weather.** — A contract for carriage of live stock relieved the carrier for delay caused by *stress of weather*. It was held that delay caused in midwinter by very cold weather, whereby the pipes froze so that water could not be carried from the tank to the boiler, was not, in the latitude of Indiana, within the meaning of the phrase *stress of weather* in the contract. “It is not shown that the weather was unusual for that latitude.” Cleveland, etc., R. Co. v. Heath, 22 Ind. App. 47.

4. In Frier v. Jackson, 8 Johns. (N. Y.) 509, it was said: “In giving my opinion in the case of Van Gorden v. Jackson, 5 Johns. (N. Y.) 462, I said that the word *stretching*, in its common use in grants during the early periods of the English colonial government here, was applied either to the extent of a single line or

to a rolling location, in which the breadth, being described by lines or surfaces, was carried with such breadth to the object described at its terminus. This I still think correct, when applied either to a line or to a rolling patent, not limited in its lateral extension after departing from its base.”

5. **Strict Compliance.** — The rule that the right to attach on mesne process can be acquired only by a *strict compliance* with the terms of the statute has been construed to mean by a substantial compliance therewith. Hoormann v. Climax Cycle Co., 9 N. Y. App. Div. 585, per Barrett, J.

6. Barber Asphalt Paving Co. v. Watt, 51 La. Ann. 1351.

7. **Strictest and Utmost.** — An instruction that a carrier was bound to exercise the *strictest* vigilance in carrying a passenger to his destination was held to be unobjectionable, and the phrases “utmost vigilance” and “*strictest* vigilance” in this connection were held to be synonymous. Waller v. Hannibal, etc., R. Co., 83 Mo. 616. See also Kelly v. Hannibal, etc., R. Co., 70 Mo. 609, and the title CARRIERS OF PASSENGERS, vol. 5, p. 558.

8. **Strictly County Purposes.** — A constitutional provision prohibited a county from incurring a debt for any other than *strictly* county purposes. In construing this provision the court said: “The word *strictly* lends little or no additional meaning to the provision. It could not have been intended thereby to limit counties to ordinary running expenses, and a canal may be as *strictly* a county purpose as a highway or a bridge, etc.” Lancey v. King County, 15 Wash. 12.

9. **Strictly Confidential.** (See also the titles CIVIL SERVICE, vol. 6, p. 93; PUBLIC OFFICERS, vol. 23, p. 440.) — A statute prohibited the removal of veterans except after a hearing upon due notice upon a charge made, but provided further that the act should not be considered to apply to the position of private secretary or deputy of an official or department, or to any person holding a *strictly confidential* position. It was held that a secretary of a fire department in the city of New York held a *strictly confidential* position within this statute. People v. Scannell, 51 N. Y. App. Div. 360.

In People v. Gardiner, 157 N. Y. 520, *revers-*  
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**STRICT MEASURE.** — See note 1.

**STRICT SETTLEMENT.** (See also the title MARRIAGE SETTLEMENTS, vol. 19, p. 1224.) — See note 2.

**STRIKE.** — See the title MINES AND MINING CLAIMS, vol. 20, p. 728.

**STRIKES.** — See the title LABOR COMBINATIONS, vol. 18, p. 80.

**STRIKING BALANCE.** — See note 3.

**STRIKING JURY.** — See the title JURY AND JURY TRIAL, vol. 17, p. 1195. And see **STRUCK JURY**, *post*.

**STRINGER.** — See note 4.

**STRIP.** — See note 5.

**STRONG.** — See note 6.

**STRONG LIQUORS.** (See also the title INTOXICATING LIQUORS, vol. 17, p. 189.) — See note 7.

**STRONGLY CORROBORATED.** (See also the titles CORROBORATIVE EVIDENCE, vol. 7, p. 866; PERJURY, vol. 22, p. 695.) — See note 8.

**STRUCK JURY.** (See also JURY AND JURY TRIAL, vol. 17, p. 1195.) — See note 9.

**STRUCK OFF.** (See also the title AUCTIONS AND AUCTIONEERS, vol. 3, p. 487.) — In common parlance and in the language of the auction-room, property is understood to be struck off when the auctioneer, by the fall of his

ing 33 N. Y. App. Div. 207, it was held that a subpoena server in the office of the district attorney was in a *strictly confidential* position.

1. **Strict Measure.** — After a description of land conveyed in a deed by metes and bounds were the following words: "containing one hundred and eighty acres, *strict measure*." It was held that a deficiency of nearly nine acres in the quantity of land was no breach of the covenant of title. *Andrews v. Rue*, 34 N. J. L. 402.

2. **Strict Settlement.** — In *Davenport v. Davenport*, 1 Hem. & M. 779, it was said: "The term *strict settlement*, without more, is understood, in accordance with the common form of such instruments, to imply estates for life without impeachment of waste; in fact, the largest possible estate consistent with the preservation of the property in the family, comprising, as such settlements do in their ordinary form, the largest powers for jointures, portions, and the like, so as to make the tenant for life, as nearly as may be, owner, so far as that character can be separated from the power of alienation." See also *Douglas v. Congreve*, 4 Bing. N. Cas. 1, 33 E. C. L. 261.

3. **Striking Balance.** — As to the use of the term *striking a balance* in the sense of agreeing upon a balance, see *Rose v. Bradley*, 91 Wis. 619. See also the title ACCOUNTS, vol. 1, p. 433.

4. **Stringer.** (See also the title MINES AND MINING CLAIMS, vol. 20, p. 677.) — In *McShane v. Kenkle*, 18 Mont. 215, it was said that a *stringer* is "commonly understood by miners to be a crack or crevice filled by mineral deposit, and occurring in the country rock, and by means of which the prospector anticipates being led to an ore body or deposit of commercial value."

5. **Strip of Steel.** — In *Magone v. Vom Cleff*, (C. C. A.) 70 Fed. Rep. 981, it was said: "The evidence showed that the merchandise was steel varying from six to twelve millimeters in

width, from twelve-hundredths to twenty-hundredths of a millimetre in thickness, and from two hundred to five hundred feet in length. It is imported in coils, and used for the manufacture of steel tape measures. Manifestly, each of these long, narrow coils is fairly within the ordinary meaning of the words 'steel *strip*,' since it is steel, and is 'a narrow piece, comparatively long,' which is the definition of *strip* given by Webster's Unabridged and by the Century Dictionary."

6. **Strong — Relative Term.** — In *People v. Crilley*, 20 Barb. (N. Y.) 248, it was said: "The words *strong* and 'weak' are relative terms, both having reference to the medium of the class to which they are applied — one being above and the other below it."

7. **Strong Liquors.** — See *People v. Crilley*, 20 Barb. (N. Y.) 248.

8. **Strongly Corroborated.** — Under a statute permitting a conviction of perjury on the testimony of one credible witness *strongly corroborated* by other evidence, "the corroborating evidence must relate to a material matter, that is, must tend to show the falsity of defendant's oath, and taken all together, it must be, in the opinion of both the court and the jury, strong, that is, cogent, powerful, forcible, calculated to make a deep or effectual impression upon the mind. But this character of corroborating evidence may be produced by the proof of independent facts and circumstances which when considered separately would not be sufficient, but when considered in the concrete would be strong." *Hernandez v. State*, 18 Tex. App. 150, 51 Am. Rep. 297. See also the title PERJURY, vol. 22, pp. 694, 695.

9. **Struck Juries.** — A statute enacted that on the trial of any indictment the attorney-general should be entitled to challenge peremptorily three of the panel of jurors, "provided that this act shall not apply to cases of *struck juries*." It was held that the term *struck juries* in the statute was used in its technical meaning. *Cook v. State*, 24 N. J. L. 847.

hammer or by any other audible or visible announcement, signifies to the bidder that he is entitled to the property on paying the amount of his bid according to the terms of the sale.<sup>1</sup>

**STRUCTURAL DAMAGES.**— See note 2.

**STRUCTURE.** (See also the title **MECHANICS' LIENS**, vol. 20, p. 255.)— In the broadest sense a structure is any production or piece of work artificially built up or composed of parts joined together in some definite manner; any construction;<sup>2</sup> that which is built; a building; especially a building of some size or magnificence; an edifice.<sup>3</sup>

1. **Struck Off.**— *Sherwood v. Reade*, 7 Hill (N. Y.) 439, *per* Bockee, senator, *quoted* in *State v. Hoboken Second Nat. Bank*, 84 Md. 331.

**Sale Set Aside.**— In *State v. Hoboken Second Nat. Bank*, 84 Md. 325, where a statute declared that a certain tax should be paid each and every time property should be *struck off* at an auction sale, it was held that the term *struck off* must be treated as signifying a consummated sale, and did not include one subsequently set aside.

2. **Structural Damages.**— See *Toronto*, etc., R. Co. v. Kerner, 28 Ont. 14.

3. **Structure.**— *Karasek v. Peier*, 22 Wash. 425, *quoting* Cent. Dict.

Upon the meaning of the term *structure* in a mechanics' lien, in *Haskell v. Gallagher*, 20 Ind. App. 225, the court said: "The term, when applied to a material thing made by human labor, whether considered etymologically or with reference to common usage or with regard to the words by which it is immediately preceded in the statute, means something composed of parts or portions which have been put together by human exertion."

**Demolished Building.**— Under a *Texas* statute defining arson as the wilful burning of any building, edifice, or *structure* inclosed with walls and covered, it was held, in *Mulligan v. State*, 25 Tex. App. 199, 8 Am. St. Rep. 435, that a person could not be convicted of arson who first pulled down a crib and then burned the materials.

**Fences.**— A statute made it criminal to displace, remove, or destroy "a rail, sleeper, switch, bridge, viaduct, culvert, embankment, or *structure* \* \* \* appertaining to or connected with a railway." It was held not to be applicable to a *structure*, such as a fence, not constituting any part of the railroad proper. *State v. Walsh*, 43 Minn. 444.

But a fence has been held to be a *structure* within the meaning of a statute providing for an injunction to restrain the malicious erection of any *structure* intended to spite, injure, or annoy an adjoining proprietor. *Karasek v. Peier*, 22 Wash. 419.

**Structure—Oil Well.**— An oil well has been held to be a *structure* within a mechanics' lien law. *Haskell v. Gallagher*, 20 Ind. App. 224.

**Ship.**— In *Chaffee v. Union Dry Dock Co.*, 68 N. Y. App. Div. 578, it was held that a ship in the course of construction in a dry dock was a *structure* within the *New York* labor law. As to the meaning of *structure* in this connection, see *Wingert v. Krakauer*, 76 N. Y. App. Div. 34.

4. *Karasek v. Peier*, 22 Wash. 424, *quoting* *Webst. Dict.*

**Mines.**— In *Helm v. Chapman*, 66 Cal. 291, it was said that a mine or pit might be called a *structure*. See also *Williams v. Mountaineer Gold Min. Co.*, 102 Cal. 141. But see *Watson v. Noonday Min. Co.*, 37 Oregon 287.

**Railroads.**— In *Rutherford v. Cincinnati*, etc., R. Co., 35 Ohio St. 559, it was held, applying the *ejusdem generis* rule, that a railroad was not a *structure* within the meaning of a statute providing for a mechanics' lien on "any house, mill, manufactory, or other building, fixture, bridge, or other *structure*." See also *Pennsylvania Steel Co. v. J. E. Potts Salt, etc., Co.*, (C. C. A.) 63 Fed. Rep. 11.

But in *Giant-Powder Co. v. Oregon Pac. R. Co.*, 42 Fed. Rep. 473, it was said: "A railway is literally and technically a *structure*. It consists of the bed or foundation, which may be of earth, stone, or trestle-work, on which are laid the ties and rails. These, taken together, constitute a *structure* in the full sense of the word—a something joined together, built, constructed." See also *Ban v. Columbia Southern R. Co.*, (C. C. A.) 117 Fed. Rep. 31; *Forbes v. Willamette Falls Electric Co.*, 19 Oregon 61.

**A Railway Train.**— A *Connecticut* statute provided that when an injury on a highway was caused by a *structure* legally placed upon it by a railroad company, the company should be liable therefor. It was held that a moving train of cars was not a *structure* within the meaning of the statute, the court saying that the word obviously referred to some permanent stationary erection. *Lee v. Barkhamsted*, 46 Conn. 213.

**Telegraph Company.**— In *Forbes v. Willamette Falls Electric Co.*, 19 Oregon 61, it was held that poles set in the ground and connected by wire for the transmission of electricity constitute a *structure* within the statute.

**Seating.**— An English statute provided that where a building or *structure* was about to be begun, the builder should serve a building notice on the district surveyor. The owners of a certain large building situated in London, called the Agricultural Hall, which was used for the purpose of public exhibitions or shows, were possessed of certain movable seating consisting of tiers of wooden platforms and capable of accommodating upwards of three thousand people, which seating they from time to time erected for the accommodation of the spectators at such of the exhibitions as required it. It was held that such seating was not a "building, *structure*, or work" within the meaning of the statute. *Venner v. M'Donell*, (1897) 1 Q. B. 421.

**Wagon Road.**— In *Williams v. Toledo Coal Co.*, 25 Oregon 426, a wagon road was held not

**STRUGGLE.** — See COMBAT, vol. 6, p. 215.

**STRUMPET.** — See note 1.

**STUBBLE.** — See note 2.

**STUB BOOK.** — See note 3.

**STUB TRAIN.** — See note 4.

**STUDENT.** — See the titles DOMICIL, vol. 10, p. 36; ELECTIONS, vol. 10, pp. 604, 606; SCHOOLS, vol. 25, p. 4; STATUTES, vol. 26, p. 606; UNIVERSITIES AND COLLEGES.

**STUD POKER.** — See note 5.

**STUFF.** — See note 6.

**STUMP.** (See also the titles LOGS AND LUMBER, vol. 19, p. 522; TIMBER.) — One of the definitions of the word "stump" given by Webster is: "The part of a tree or plant remaining in the earth after the stem or trunk is cut off; the stub." This is its usual meaning.<sup>7</sup>

**STUMPAGE.** (See also the titles LOGS AND LUMBER, vol. 19, p. 522; TIMBER.) — "Stumpage" means the sum to be paid by agreement to an owner for trees standing (or lying) upon his land, the party purchasing being permitted to enter upon the land and to cut down and remove such trees. In other words, it is the price paid for a license to cut. Usually the price is measured according to the thousand feet cut in an operation, but it may be by the tree, or the cord, or the like. As a general thing the practice is for the owner, in some form of agreement, to retain a lien on the lumber cut for payment of the stumpage due thereon. Stumpage on lumber is somewhat of the nature of a percentage paid on copyright, or of a royalty for the use of a patent, or of a duty paid on mineral productions.<sup>8</sup>

to be a *structure* as the latter term was used in a mechanics' lien law.

**Wall.** — The question whether a wall is a "building, *structure*, or erection" within the meaning of the English Metropolis Management Act, 1862, § 75, depends on the height of the wall and the purpose for which it is built. *Lavy v. London County Council*, (1895) 2 Q. B. 577, *affirming* (1895) 1 Q. B. 915, wherein it was held that a dwarf boundary wall between two and three feet high was not within the act.

1. **Strumpet.** — In *Williams v. Bryant*, 4 Ala. 44, it was held that a charge in a declaration that a woman was called a whore was not established by proving that she was called a *strumpet*.

2. **Stubble.** — As to evidence of usage held to be admissible to prove that the word *stubble* used in an agreement included and designated whatever was left on the ground after the harvest time, see *Callahan v. Stanley*, 57 Cal. 478.

3. **Stub Book.** — In *Noble v. Douglas*, 56 Kan. 92, the introduction in evidence of a *stub book* of tax-sale assignments, without any further showing than that it was found in the vault of the office of the county treasurer of the county, was held to be error, the court saying: "This *stub book* was not admissible under section 387 [378] of the Code of Civil Procedure. It could hardly be called a book of account, and there was no proof whatever as to when the entries were made, who made them, nor of their correctness." See generally the title DOCUMENTARY EVIDENCE, vol. 9, p. 918.

4. **Stub Train.** — See *Curl v. Chicago, etc., R. Co.*, 63 Iowa 426.

5. **Stud Poker.** (See also the title GAMING, vol. 14, p. 664.) — In *Flynn v. State*, 34 Ark. 441,

it was held that proof of playing *stud poker* would sustain an indictment for playing poker.

6. **Stuff.** — As to parol evidence held to be admissible to explain the meaning of the word *stuff* in a contract of sale, see *Johnston v. Wilson*, 28 U. C. C. P. 432.

**Cross-examination.** — One sense of the word *stuff* has been said to be "trash; nonsense; foolish or irrational language." *State v. Weems*, 96 Iowa 426, wherein it was held to be improper to ask a witness on cross-examination whether he thought it would benefit him "to tell that *stuff*." The court said that in the question *stuff* evidently meant "falsehood," and had the witness said "yes," he would have said inferentially that what he had said was false.

7. **Stump.** — *Cremer v. Portland*, 36 Wis. 96, holding that an averment, in a complaint against a town, that there was a large *stump* in or near the middle of the road, against which the plaintiff's wagon struck, was sufficient.

8. **Stumpage.** — *Blood v. Drummond*, 67 Me. 478.

**Stumpage** is the compensation paid to an owner of land by another for the privilege of going on the premises and cutting down timber for his own use. *Baker v. Whiting*, 3 Sumn. (U. S.) 484, 2 Fed. Cas. No. 787.

The defendant, by a written agreement, promised to convey to the plaintiff an interest in certain timber lands when he had received his advances and certain costs and expenses "from the *stumpage* cut on the land." It was held that "*stumpage* cut on the land" meant money received or expected to be received from the sale of licenses to cut and remove timber from the land. *Blood v. Drummond*, 67 Me. 476.



**STUMP-TAIL.** — See note 1.

**STUPOR.** — See note 2.

**STYLE.** — See note 3.

**SUBAGENT.** — See the title AGENCY, vol. 1, p. 930.

**SUBCONTRACT — SUBCONTRACTOR.** — (See also the titles INDEPENDENT CONTRACTORS, vol. 16, p. 186; MECHANICS' LIENS, vol. 20, p. 255; WORKING CONTRACTS.) — A subcontractor is an under-contractor — one who takes under the original contract and is to perform in accordance with the original contract;<sup>4</sup> one who has entered into a contract, express or implied, for the performance of an act with a person who has already contracted for its performance.<sup>5</sup>

**SUBDIVISION.** (See also SECTION, vol. 25, p. 177.) — See note 6.

**SUBFREIGHT.** — See note 7.

**SUBJACENT SUPPORT.** — See the title LATERAL AND SUBJACENT SUPPORT, vol. 18, p. 541.

**SUBJECT.** (See also the titles ALIENS, vol. 2, p. 64; CITIZENSHIP, vol. 6, p. 14.) — The term "subject" refers to one who owes obedience to the laws.<sup>6</sup>

**SUBJECT — SUBJECT-MATTER.** — I. The word "subject" as a noun is that on which any operation, either mental or material, is performed; as, a

1. *Stump-tail in Sense of Depreciated Currency.* — See Webster v. Pierce, 35 Ill. 163.

2. *Stupor and Excitement.* — In Baldridge v. State, (Tex. Crim. 1903) 74 S. W. Rep. 919, it was said: "*Stupor* means a different thing from excitement. It signifies a 'suspension or great diminution of sensibility, a state in which the faculties are deadened or dazed.'"

3. *Style in Sense of Designs or Patterns.* — See Herrick v. Noble, 27 Vt. 6.

*Style of Process.* — See Thompson v. Bickford, 19 Minn. 17; Hanna v. Russell, 12 Minn. 80. And see the title SUMMONS AND PROCESS, 20 ENCYC. OF PL. AND PR. 1116.

*Right of Support.* — In Gorey v. Kelly, 64 Neb. 608, the lower court instructed the jury that the word "support," in a civil damage act, did not mean the bare necessities of life, but included all such means of support as would enable the plaintiffs to live in the *style* and condition, and with a degree of comfort, suitable and becoming to their station in life. In holding this instruction to be no error the court said: "The use of the term *style* is criticised as being a matter purely of individual taste. In Warrick v. Rounds, 17 Neb. 411, it is said that 'the right of support is not necessarily limited to the bare necessities of life. The condition of the family is proper to be considered by the jury.' The word *style* means mode or manner. We are unable to see how the use of the word *style* in the instruction could have worked to the defendant's prejudice."

4. *Subcontractor.* — Avery v. Ionia County, 71 Mich. 547. See also Farmer's L. & T. Co. v. Canada, etc., R. Co., 127 Ind. 257; Kent v. New York Cent. R. Co., 12 N. Y. 628.

In Duignan v. Montana Club, 16 Mont. 192, it was said: "A *subcontractor* in the second, third, or any degree is one of the persons 'furnishing things or doing work.'"

*Subcontract.* — In Central Trust Co. v. Richmond, etc., R. Co., 54 Fed. Rep. 724, it was said: "The language of the first section is 'all persons who perform labor, or who furnish

labor, \* \* \* by contract \* \* \* with the owner or owners, \* \* \* or by *subcontract* thereunder, shall have a lien,' etc., and the controlling words on this inquiry are 'by *subcontract* thereunder.' *Subcontract* is defined to be 'a contract under another,' and 'thereunder,' 'under that or this.' See Worcester and Webster. The sentence means contracts under the contract made with the owner or owners. Worcester defines a *subcontractor* as 'one who contracts for the principal contractor.'"

*Distinguished from Laborer and Materialman.* — The term *subcontractor* in a mechanics'-lien law does not include a laborer or materialman. Farmers' L. & T. Co. v. Canada, etc., R. Co., 127 Ind. 257. See also Merriman v. Jones, 43 Minn. 29.

5. Phillips on Mechanics' Liens, § 44; followed in Lester v. Houston, 101 N. Car. 605.

6. *Subdivision.* — "The word *subdivision* is used to indicate a quantity of land, greater or less, and in its connection is synonymous with the word 'tract.'" Corbin v. De Wolf, 25 Iowa 128.

7. "*Subfreights*, which is an expression in common use and easily understood, embraces all freights which a charterer stipulates to receive for the carriage of goods, whether he takes the ship by demise or otherwise." American Steel Barge Co. v. Chesapeake, etc., Coal Agency Co., (C. C. A.) 115 Fed. Rep. 672. See generally the title CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES, vol. 7, p. 156.

8. Republica v. Chapman, 1 Dall. (Pa.) 60.

*Natural-born Subject.* — In Lynch v. Clarke, 1 Sandf. Ch. (N. Y.) 639, it was said: "By the common law, all persons born within the allegiance of the crown of England were natural-born *subjects*, without reference to the status or condition of their parents. So if a Frenchman and his wife came into England, and had a son during their stay, he was a liege man." This case is extensively quoted under the title CITIZENSHIP, vol. 6, p. 17, where also additional cases are cited.

subject for contemplation or controversy;<sup>1</sup> that of which anything is affirmed or predicated; the theme of a proposition or discourse; that which is spoken of.<sup>2</sup>

II. The meaning of the word "subject" as an adjective is being under the dominion of; as, states subject to a foreign power.<sup>3</sup> "The word 'subject' is

1. **Subject.**—Glen, etc., *Mfg. Co. v. Hall*, 61 N. Y. 236.

**Broad Meaning of Term.**—In *Dorsey's Appeal*, 72 Pa. St. 195, it was said: "The word *subject* has a large signification, often embracing different kinds, different classes, and various modes, all belonging to the general *subject*."

**Indefinite Term.**—In *Ex p. Pollard*, 40 Ala. 98, it was said: "*Subject* is a very indefinite word. A phrase may state the *subject* in a very general or indefinite manner, or with minute particularity." See also *Ex p. Thomas*, 113 Ala. 1.

2. *State v. Superior Ct.*, 28 Wash. 325, *quoting* *Webst. Dict.* See to the same effect *Matter of Mayer*, 50 N. Y. 507.

"**Subject**" and "**Matter**" **Distinguished.**—See *MATTER*, vol. 20, p. 234.

"**Subject**" and "**Object**" **Distinguished.**—See *OBJECT*, vol. 21, p. 756, and see *Allopathic State Board of Medical Examiners v. Fowler*, 50 La. Ann. 1358.

**Bill to Contain No More than One Subject.**—See the title *STATUTES*, vol. 26, pp. 572, 575. See also *OBJECT*, vol. 21, p. 756.

In *Devlin v. New York*, 63 N. Y. 20, it was said: "The *subject* of an act is that concerning which it is enacted, and not the substance of the act itself." See also *Morton v. Comptroller-Gen.*, 4 S. Car. 442.

**Subject to Be Expressed in Title—Amending Act—Reference by Number Insufficient.**—In *State v. Superior Court*, 28 Wash. 317, it was held, contrary to what appeared to be the settled doctrine in that state (see the title *STATUTES*, vol. 26, p. 592), that a constitutional provision requiring the *subject* of a statute to be expressed in the title was not satisfied by an amendatory act which in its title referred to the act amended by its section number in the code only.

**Subject of Action.**—In *Chamboret v. Cagney*, (N. Y. Super. Ct. Gen. T.) 41 How. Pr. (N. Y.) 130, it was said: "These words must be deemed to mean the *subject-matter* in dispute, or, to be still more explicit, the facts constituting the cause of action."

"The *subject* of an action is either property (as illustrated by real action) or a violated right." Glen, etc., *Mfg. Co. v. Hall*, 61 N. Y. 236.

**Same—Cause of Action Distinguished.**—In *Scarborough v. Smith*, 18 Kan. 406, it was said: "The '*subject* of action' is not the 'cause of action,' or the cause of any action, or any cause of action. It is simply one of the elements of each of the several causes of action, uniting and binding them together in one action." See also *CAUSE OF ACTION*, vol. 5, p. 777.

**Same—Situated Within the State.**—Under the former *New York* statute regulating actions against foreign corporations (see the title *FOREIGN CORPORATIONS*, vol. 13, pp. 899, 900), it was held that an action based on a contract

executed, delivered, and made payable in a foreign country was not a case where the *subject* of the action was situated within the state. *Campbell v. Champlain, etc.*, R. Co., (Supm. Ct. Spec. T.) 18 How. Pr. (N. Y.) 412.

Under the same statute, in an action for the breach of a contract made out of the state, it was held that the *subject* of the action was the claim therein asserted by the plaintiff, and the satisfaction of which he seeks out of the property, and that the property itself is not the *subject* of the action. *Whitehead v. Buffalo, etc.*, R. Co., (Supm. Ct. Gen. T.) 18 How. Pr. (N. Y.) 218.

**Same—Real Property.**—Under a statute providing that certain actions "must be tried in the county in which the *subject* of the action or some part thereof is situated," an action to subject lands to the payment of debts, etc., is properly brought in a county where two or three tracts of land sought to be charged are situated. *Barrett v. Watts*, 13 S. Car. 441.

**Same—Jurisdiction of Subject of Action and Jurisdiction of Action.**—Where a statute providing for service of nonresidents by publication required an affidavit stating that "the court has jurisdiction of the *subject* of the action," it was held that an affidavit was a compliance with the statute which alleged that the court had "jurisdiction of the action," for the reason, apparently, that the latter term necessarily included both the *subject* of the action and of the parties thereto, and that the surplusage in the actual affidavit did not vitiate it. *Hartzell v. Vigen*, 6 S. Dak. 117.

**Same—Counterclaim Connected with Subject of Action.**—See the title *SET-OFF, RECOURSE, AND COUNTERCLAIM*, vol. 25, p. 594 *et seq.*

**Same—Intervention.**—Under a *New York* statute authorizing the intervention of a third party in an action (see the title *INTERVENTION*, vol. 17, p. 182), the requirement of "an interest in the *subject*" of the action must be understood of an interest in the *subject-matter* of the action. *Merchants' Nat. Bank v. Hagemeyer*, 4 N. Y. App. Div. 55. See also *Chapman v. Forbes*, 123 N. Y. 539; *Hilton Bridge Constr. Co. v. New York Cent., etc.*, R. Co., 145 N. Y. 396.

**Subject of Action Distinguished from Object of Action.**—See *OBJECT*, vol. 21, p. 756.

**Subject Insured.**—In *Granger v. Howard Ins. Co.*, 5 Wend. (N. Y.) 203, in construing a statute allowing the purchaser or assignee of the *subject* insured to take an assignment of the policy and sue thereon in his own name, it was held that to bring himself within the act "the plaintiff must have the whole interest insured," for "it is not any interest in the *subject* insured which authorizes the assignment of the policy and the right of action."

3. *Kansas City v. Bacon*, 147 Mo. 312, *per* *Sherwood, J., dissenting, quoting* *Standard Dict.*

**Subordinate.**—"One of the chief synonyms of *subject* is 'subordinate.'" *Kansas City v.*

defined by Webster as taken from the Latin word *subjectus*, meaning 'lying under.' Webster gives the meaning of the word 'subject' to be 'placed or situated under that in which any quality, attribute, or relation inheres to bring under the power.' "1

### III. The subject-matter is the subject or matter presented for consideration

Bacon, 147 Mo. 312, *per* Sherwood, J., *dissenting*, quoting Standard Dict.

1. **Subject.** — Territory v. Neville, 10 Okla. 102.

**Subject To.** — The provision in a memorandum of an agreement for a transfer of stock that the transfer was "*subject to*" a certain agreement named "gave to the transferee the benefits, as well as it imposed the disadvantages, provided for in that agreement." Bacon v. Grossman, 71 N. Y. App. Div. 578.

**Same — Conclusiveness of Recital that Instrument Is Subject to Prior Mortgage.** — See the title RECITALS, vol. 24, p. 63.

**Same — Act Opening New Territory.** — An act of Congress provided that lands in the Cherokee Outlet, when opened to settlement, should be *subject to* the organic act of the territory of Oklahoma. It was held that this meant that the land should be placed or situated under the organic act of the territory, and that all the provisions, regulations, requirements, and benefits of the said organic act should apply to and have full force and effect in every and all the counties composing the said Cherokee Outlet. Territory v. Neville, 10 Okla. 79.

**Subject to Constitution and Laws.** — Of this phrase in a state constitution in reference to municipal charters it has been said that it "implies a separation from the state at large for certain purposes, and also unnecessarily implies an independent separation for the exercise of some rights and powers, otherwise a provision of the constitution making them '*subject to*' would be a wholly useless and unnecessary provision." State v. Carson, 6 Wash. 253.

The Missouri Constitution requires municipal charters to be "in harmony with and *subject to*" the constitution and laws of the state. In Kansas City v. Bacon, 147 Mo. 312, Sherwood, J., *dissenting*, remarked that *subject to* meant restrained by, controlled by, and of consequence in harmony with the constitution and laws. See also HARMONY, vol. 15, p. 286.

**Subject to Check.** — A charge that "*subject to check*" meant *subject to* payment without limitation or restriction, except that the check must be presented to the bank within banking hours, on banking days, was held to be substantially correct. Dottenheim v. Union Sav. Bank, etc., Co., 114 Ga. 788.

**Subject to Control.** — Where a father deposited money for his daughter in her name, *subject to* the father's control, it was held that this created a trust in the money for the benefit of the daughter, and that the words "*subject to* the control" of the father did not import the retaining of ownership or title, but simply of the management. Millard v. Clark, 80 Hun (N. Y.) 141.

"*Subjection to the Will and Control*," said of

land, is synonymous with *possessio pedis* and "occupation," and signifies actual possession. See Lawrence v. Fulton, 19 Cal. 690, quoted in McKenzie v. Brandon, 71 Cal. 211.

**Subject to Correction — Bill of Lading.** (See also the title BILLS OF LADING, vol. 4, p. 531.) — Where a bill of lading recited that the weights therein named were *subject to* correction, it was held that the clause "*subject to* correction" deprived the bill of lading of conclusive effect. Johnson v. Ft. Worth, etc., R. Co., 9 Tex. Civ. App. 619; Gulf, etc., R. Co. v. Nelson, 4 Tex. Civ. App. 345. See also Gulf, etc., R. Co. v. Loonie, 84 Tex. 262; Atchison, etc., R. Co. v. Roberts, 3 Tex. Civ. App. 370.

**"Subject to Foregoing Provisions of My Will."** (See generally the title WILLS.) — In Thorp v. Munro, 47 Hun (N. Y.) 249, it was said: "The words '*subject to*' the foregoing provisions of this, my will," leave no doubt upon the question. The lexicographers define the word *subject* as meaning 'to make liable; to bring under the control or action of; to make subservient.' No other interpretation can be given to the language thus employed, which, indeed, may be regarded without perversion of its meaning as an express direction to that effect."

**Subject to Mortgage.** — See the titles MORTGAGES, vol. 20, p. 987; VENDOR AND PURCHASER.

**Subject to Overflow.** — In Heath v. Wallace, 138 U. S. 584, in discussing whether lands "*subject to* overflow" are overflowed lands, it was said: "The term 'overflowed,' as thus used, has reference to a permanent condition of the lands to which it is applied, \* \* \* while '*subject to* periodical overflow' has reference to a condition which may or may not exist, and which when it does exist is of a temporary character."

**"Subject to Be Produced Thereafter in Evidence in Any Court of Law or Equity in Upper Canada."** — See Manary v. Dash, 23 U. C. Q. B. 580.

**Subject to Service of Process.** — The clause of the Kansas Constitution providing that legislators shall not be "*subject to* the service of any civil process during the session" does not give a personal privilege which may be exercised by the legislator or waived by him, but means that he "is not 'liable to' the service of civil process." Cook v. Senior, 3 Kan. App. 278.

**Subject to Following Stipulations.** — In a lease there was no express proviso for re-entry, but the lease was stated to be made "*subject to* the following stipulations." Then followed a number of clauses, one of which was that the lessee should not assign the lease without the consent in writing of the lessor. It was held that the words *subject*, etc., had not the effect of making the succeeding clauses conditions so as to cause a forfeiture and right of entry for their breach, and therefore that ejectment would not lie for assigning the lease without the consent of the lessor. McIntosh v. Samo, 24 U. C. C. P. 625.

Definitions. *SUBJECT AND CITIZEN—SUBJECTIVE SYMPTOMS.*

in some written or oral statement or discussion; <sup>1</sup> the subject.<sup>2</sup>

**SUBJECT AND CITIZEN.** — “‘Subjects’ and ‘citizens’ are, in a degree, convertible terms as applied to natives; and though the term ‘citizen’ seems to be appropriate to republican freemen, yet we are, equally with the inhabitants of all other countries, ‘subjects,’ for we are equally bound by allegiance and subjection to the government and law of the land.”<sup>3</sup>

**SUBJECTIVE SYMPTOMS.** — See note 4.

1. Cent. Dict.

**Contracts — Parol Evidence Admissible to Ascertain or to Explain Subject-matter.** — *Sorensen v. Keyser*, 2 U. S. App. 177, 51 Fed. Rep. 30; *Consolidated Coal, etc., Co. v. Mercer*, 16 Ind. App. 504. See also the title *PAROL EVIDENCE*, vol. 21, pp. 1108, 1119.

**2. Jurisdiction of Subject-matter.** (See the title *JURISDICTION*, vol. 17, p. 1060.) — The term *subject-matter* is defined as “the cause, the object, the thing in dispute.” *People v. Lindsay*, 1 Idaho 399, *quoting* *Bouv. L. Dict.*

“By jurisdiction of the *subject-matter* is meant jurisdiction of the class of cases to which the particular case belongs.” *Chicago, etc., R. Co. v. Sutton*, 130 Ind. 405. See also *Goodman v. Winter*, 64 Ala. 410; *Block v. Henderson*, 82 Ga. 23; *Perkins v. Hayward*, 132 Ind. 105.

Jurisdiction of the *subject-matter* has been defined to be “the power to adjudge the general question involved.” *Hunt v. Hunt*, 72 N. Y. 229, *quoted in* *In re Peraltareavis*, 8 N. Mex. 27. See also *Groenvelt v. Burwell*, 1 Ld. Raym. 466.

**Same — In Suits for Divorce.** (See also the title *DIVORCE*, vol. 9, p. 739.) — In *Hunt v. Hunt*, 72 N. Y. 228, it was said: “A text-writer of repute says that ‘it is the act or acts which constitute the cause of action’ which ‘is the *subject-matter* in a suit for divorce.’ See 3 Am. L. Reg. N. S. 206. And in *Holmes v. Holmes*, 4 Lans. (N. Y.) 388, the learned and able judge who delivered the opinion of the court speaks of the acts relied upon to obtain a divorce as being the *subject-matter*. The definitions of lexicographers imply a broader scope to the phrase, a more general meaning. It is ‘the cause; the object; the thing in dispute.’ *Bouv. L. Dict.* ‘The matter or thought presented for consideration in some statement or discussion.’ *Webst. Dict.* \* \* \* So that there is a more general meaning to the phrase *subject-matter*, in this connection, than power to act upon a particular state of facts. It is the power to act upon the general and, so to speak, the abstract question, and to determine and adjudge whether the particular facts presented call for the exercise of the abstract power.”

**Interrogatories.** — A statute provided that a party interrogated might require that the whole of the answers upon any *subject-matter* inquired of should be read if part of them was read. It was held that *subject-matter* did not mean the particular fact covered by any one or more interrogations, but the matter to be in issue by the pleas and thus to be inquired of. *Churchill v. Ricker*, 100 Mass. 211.

**Subject-matter Involved.** — In *Jacobson v. Miller*, 41 Mich. 93, it was said: “The *subject-matter* involved in a litigation is the right which one party claims as against the other,

and demands the judgment of the court upon; as, for example, the right in ejectment to have possession of the lands; in assumpsit to recover a demand; in equity to have a mortgage foreclosed for an amount claimed to be due upon it, or to have specific performance of a contract, and so on.”

**Same — New York Code.** — Upon the meaning of *subject-matter*, as used in Code Civ. Pro. N. Y., providing for additional allowances of costs, see *Devlin v. New York*, (C. Pl. Spec. T.) 15 Abb. Pr. N. S. (N. Y.) 31; *Coleman v. Chauncey*, 7 Robt. (N. Y.) 578; *Godley v. Kerr Salt Co.*, 3 N. Y. App. Div. 20; *Ogdensburgh, etc., R. Co. v. Vermont, etc., R. Co.*, 63 N. Y. 176; *Lattimer v. Livermore*, 72 N. Y. 174; *Conaughty v. Saratoga County Bank*, 92 N. Y. 401; *Spofford v. Texas Land Co.*, 41 N. Y. Super. Ct. 228; *Rothery v. New York Rubber Co.*, 24 Hun (N. Y.) 172; *Empire City Subway Co. v. Broadway, etc., R. Co.*, 87 Hun (N. Y.) 279. And see the title *ADDITIONAL ALLOWANCES OF COSTS*, 1 ENCYC. OF PL. AND PR. 211.

**Subject-matter in Controversy Equivalent to Cause of Action.** — See *Borst v. Corey*, 15 N. Y. 509; *Norfolk, etc., R. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574.

**Res Judicata.** (See also the title *RES JUDICATA*, vol. 24, p. 778.) — In *Hughes v. Kline*, 30 Pa. St. 230, it was said: “Was the *subject-matter* the same in that case as in this? These words, ‘the *subject-matter*’ — terms always used in this connection in the law — indicate plainly that if the substance or essence of the controversy be the same, being between the same parties or privies, then the conclusiveness of the decree or judgment follows.”

**3. Subject and Citizen.** — 2 Kent’s Com. (13th ed.) 258, note, *quoted in* U. S. v. Wong Kim Ark, 160 U. S. 649. See to the same effect *In re Birdsong*, 39 Fed. Rep. 601; *State v. Manuel*, 4 Dev. & B. L. (20 N. Car.) 26. See also the title *CITIZENSHIP*, vol. 6, p. 16.

**Treaty — “Subject” in Treaty Held Equivalent to “Citizen” or “Inhabitant.”** — The *Pizarro*, 2 Wheat. (U. S.) 227.

**Treaty Defining “Subject.”** — In *Reg. v. Ganz*, 9 Q. B. D. 101, Pollock, B., said: “Then when we come to the third article of the treaty there is an express definition of what is meant by the word *subject*. It is to include not only naturalized citizens of the country, but also such foreigners as according to the laws of either of the contracting parties are assimilated to subjects, as well as such foreigners who, being domiciled in the country and having married a citizen thereof, have one or more children by that marriage born there.”

**4. Subjective Symptoms.** — *Abbot v. Heath*, 84 Wis. 316, where a medical expert explained *subjective symptoms* as symptoms related by the patient, which the physician obtains not by observation, but by questioning.

**SUBLEASE** — See the titles LANDLORD AND TENANT, vol. 18, p. 149; LEASES, vol. 18, p. 593, and especially as to the distinction between an assignment and a sublease, p. 656 *et seq.*

**SUBMISSION**. (See also the title ARBITRATION AND AWARD, vol. 2, p. 539.) — A submission is an act by which parties refer any matter in dispute between them to the decision of a third person.<sup>1</sup> The submission is the agreement of the parties to refer. It is therefore a contract, and will in general be governed by the law concerning contracts.<sup>2</sup>

**SUBMISSION TO COURT (ON AGREED CASE)** (See also the title AGREED CASE, 1 ENCYC. OF PL. AND PR. 384, also in this work CASE, vol. 5, p. 750.) — See note 3.

**SUBMIT**. (See also SUBMISSION, *supra*.) — “A thing submitted to another is put under his control.”<sup>4</sup>

**SUBORDINATE OFFICER**. — See note 5.

**SUBORNATION OF PERJURY**. — See the title PERJURY, vol. 22, p. 697.

**SUBPŒNA**. (See also the title WITNESSES, 22 ENCYC. OF PL. AND PR. 1328.) — A subpœna, or, more fully, a subpœna *ad testificandum*, is defined as “a process to cause a witness to appear and give testimony, commanding him to lay aside all pretenses and excuses and appear before a court or magistrate therein named, at a time therein mentioned, to testify for the party named, under a penalty therein mentioned.”<sup>6</sup>

In *Chancery Practice* a subpœna, or subpœna *ad respondendum*, is a mandatory writ or process directed to and requiring one or more persons to appear at a time to come and answer the matters charged against him or them under a certain penalty.<sup>7</sup>

1. *Garr v. Gomez*, 9 Wend. (N. Y.) 661, *per* Seward, senator.

2. *Submission*. — *District of Columbia v. Bailey*, 171 U. S. 171, *quoting* Morse on Arbitration and Award 50.

*Remedy for Breach of Agreement to Submit*. — In *Miller v. Brumbaugh*, 7 Kan. 351, Bacon's Abridgment was quoted as follows: “The *submission* may be by word or deed. If the *submission* be by word, there is no remedy to enforce the party to perform the award; but reciprocal actions on the case, and an action of debt, will lie if money be awarded, for it is in nature of a simple contract.”

*Final Submission*. — See FINAL — FINALLY, vol. 13, p. 21.

*Parol or Written Submission*. — In *re Cruickshank*, 30 U. C. C. P. 466.

*Submission and Reference*. — By a *submission* the costs of the “reference and award” were to be in the discretion of the arbitrators, and they directed that the defendants should pay the costs of the “*submission* and award.” It was held that the award was final, for that the costs of the *submission* included the costs of the reference. The court said: “*Submission* and ‘reference,’ we think, mean the same thing, and if the costs of proving the case before the arbitrators can properly be awarded as part of the costs of the reference, they could equally be awarded as part of the costs of the *submission*, and *vice versa*.” *Ellwood v. Middlesex County*, 19 U. C. Q. B. 25.

3. *Submission to Court*. — In *Shed v. Kansas City, etc., R. Co.*, 67 Mo. 691, it was said: “We do not regard the clerk entitled to a fee for a *submission*. This term, as used in the statute, is used either in a strictly technical sense (2 Bouv. 553) or else in its statutory import, as, *e. g.*, where ‘parties to a question in differ-

ence \* \* \* present a *submission* of the same to any court which would have jurisdiction if any action had been brought,’ etc.” 2 Wag. Stat., § 25, p. 1056. \* \* \* The legislature may, therefore, be presumed to have employed the term in a sense peculiar to matters in the Circuit Courts, and not as intending by that word to convey the idea of the mere *submitting* a cause to the court or jury for final determination.”

4. *Submit*. — *Brouwer v. Cotheal*, 10 Barb. (N. Y.) 218. That case turned on a provision of a statute that the books of a corporation should be *submitted* to the stockholders for examination, and it was held that the stockholder had a right not only to inspect the books, but also to take memoranda. See generally the title STOCK AND STOCKHOLDERS, vol. 26, p. 951, especially p. 954.

The word *submitted*, when used of a proceeding in court, has been said always to imply that the party or parties who *submitted* dispensed with the benefit of argument. *Ridgely v. Carey*, 4 Har. & M. (Md.) 174.

*Distinguished from Consent*. — “There is a difference between consent and *submission*. Every consent involves a *submission*, but it by no means follows that a mere *submission* involves consent.” *Reg. v. Day*, 9 C. & P. 722, 38 E. C. L. 306.

5. *Subordinate Officer of Customs*. — The collector of customs of the port of New York has been held not to be a *subordinate officer* of customs. *Childs v. Comstock*, 69 N. Y. App. Div. 160.

6. *Subpœna ad Testificandum*. — *Alexander v. Harrison*, 2 Ind. App. 53, *quoting* Bouv. L. Dict.; *Matter of Strauss*, 30 N. Y. App. Div. 613. See also *Dills v. State*, 59 Ind. 19.

7. In *Chancery*. — Bouv. L. Dict.: Story's Eq.

Volume XXVII.

**Definitions. SUBPŒNA DUCES TECUM—SUBPŒNA SERVERS.**

**SUBPŒNA DUCES TECUM.** (See also the title WITNESSES, 22 ENCYC. OF PL. AND PR. 1328.)—See note 1.

**SUBPŒNA SERVERS.**—See note 2.

Pl. (10th ed.), § 44. And see the title SUMMONS AND PROCESS, 20 ENCYC. OF PL. AND PR. 1103. See also 1 Spence's Eq. Jur. 338, 369.

"Under the old chancery practice, every suit was commenced by a writ of *subpœna* requiring the defendant to appear; hence, in the old books, *subpœna* is equivalent to 'suit in equity' or 'bill of complaint.' \* \* \* *Subpœna* to hear judgment was another kind used in chancery practice. It was issued by the party setting down a cause for hearing and served on the opposite party. If the party served did not appear at the hearing the court might make a decree against him." Sweet's L. Dict.

The writ of *subpœna* is usually said to have been invented by John Waltham, chancellor (or more accurately master of the rolls and later keeper of the seal) under Richard II. 3 Black. Com. 51. But it appears to have been in use in the reign of Edward III. 1 Spence Eq. Jur. 338, note *b*; 369, note *a*.

"All the essential parts of the *subpœna*," says Mr. Kerly (Hist. Eq. 45), "are to be found in writs issued by the authority of Parliament and the council during the reign of Edward III., and the use of the penal clause in statutes and orders of all descriptions was much older." See also "Early English Equity," 1 L. Quar. Rev. 162, by Judge O. W. Holmes.

"The *subpœna* was the former process to bring in a party to answer a charge before the king in council, \* \* \* and was, for some

remedial purposes, a usual process of the Court of Chancery as early as the reign of Edward III., when the jurisdiction of the court was beginning to show traces of a partial independence of that of the council. \* \* \* The present equitable jurisdiction of the court, if not that which was thus exercised at that period, originated in it; and the process was indubitably the same." Winter v. Ludlow, 30 Fed. Cas. No. 17,891.

1. *Subpœna Duces Tecum.*—In Matter of Strauss, 30 N. Y. App. Div. 613, it was said: "At common law there was \* \* \* a writ known as a '*subpœna duces tecum*,' which, in addition to requiring the attendance of a witness to testify, required him to bring and produce to the court books or papers in his hands tending to elucidate the matter in issue." See generally the title PRODUCTION OF DOCUMENTS, vol. 23, p. 166.

2. *Subpœna Servers.*—In People v. Gardiner, 157 N. Y. 523, it was said: "For convenience the persons so appointed have been called *subpœna servers*, and we shall hereafter speak of them as such, although there is no statutory office of that character. It is a designation of a class of persons in a district attorney's office who are engaged in serving *subpœnas* as well as in other work." In this case it was held that a *subpœna server* was in a "strictly confidential position," and therefore not within the New York veteran's act. See STRICTLY CONFIDENTIAL, ante, p. 189.

# SUBROGATION.

BY CHARLES H. STREET.

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#### CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPEDIA OF PLEADING AND PRACTICE*, title *SUBROGATION*, vol. 20, p. 996.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ACCOMMODATION PAPER*, vol. 1, p. 371; *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 65; *CARRIERS OF GOODS*, vol. 5, p. 422; *CONTRIBUTION AND EXONERATION*, vol. 7, p. 325; *FIRE INSURANCE*, vol. 13, p. 86; *FORTHCOMING AND DELIVERY BONDS*, vol. 13, p. 1157; *LIENS*, vol. 19, p. 26; *MARSHALING ASSETS*, vol. 19, p. 1255; *MARSHALING DECEDENTS' ESTATES*, vol. 19, p. 1374; *SURETYSHIP*, *post*.

**I. DEFINITION AND GENERAL PRINCIPLES — 1. Definition.** — Subrogation is the substitution of one person in place of another, whether as a creditor or as the possessor of any other rightful claim, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim and its rights, remedies, or securities.<sup>1</sup>

**2. Legal and Conventional Subrogation Distinguished.** — Subrogation may be either legal or conventional. Legal subrogation is allowed only in cases where the person advancing money to pay the debt of another stands in the position of surety or is compelled to pay the debt to protect his own rights. Conventional subrogation results from an agreement, made either with the debtor or creditor, that the person paying shall be subrogated.<sup>2</sup>

<sup>1</sup> **1. Subrogation Defined.** — *Leavitt v. Canadian Pac. R. Co.*, 90 Me. 153; *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508, 52 Am. Rep. 728.

For Other Definitions of the Term, see *Swarts v. Siegel*, (C. C. A.) 117 Fed. Rep. 13; *Houston v. Branch Bank*, 25 Ala. 257; *Knighton v. Curry*, 62 Ala. 408; *Merchants, etc., Bank v. Tillman*, 106 Ga. 55; *Fuller v. Davis*, 184 Ill. 505; *Townsend v. Cleveland Fire Proofing Co.*,

18 Ind. App. 568; *Richards v. Cowles*, 105 Iowa 734; *Allen v. Pierrine*, 103 Ky. 521; *Liles v. Rogers*, 113 N. Car. 197, 37 Am. St. Rep. 627; *In re Minor Fire Clay Co.*, 9 Ohio Dec. 630.

<sup>2</sup> **2. Legal and Conventional Subrogation Distinguished.** — *Wilkins v. Gibson*, 113 Ga. 42, 84 Am. St. Rep. 204; *Freehold First Nat. Bank v. Thompson*, 61 N. J. Eq. 188. And see *infra*, this title, VII. *Persons Paying or Advancing*

**3. Subrogation an Equitable Doctrine Not Dependent on Contract or Privity.** — The right of subrogation is a doctrine of equity jurisprudence. It does not depend on privity or contract, express or implied, except in so far as the known equity may be supposed to be imported into the transaction and thus raise a contract by implication.<sup>1</sup> It is founded on the facts and circumstances of each particular case, and on the principles of natural justice.<sup>2</sup> The right, however, though not dependent on contract, may be modified or extinguished thereby.<sup>3</sup>

**4. When Subrogation Will Be Allowed in General.** — The doctrine of subrogation will be applied, in general, wherever any person, other than a mere volunteer, pays a debt or demand which in equity or good conscience should have been satisfied by another,<sup>4</sup> or where a liability of one person is discharged out of a fund belonging to another,<sup>5</sup> or where one person is compelled for his

*Money to Pay Debts of Others — In General — Conventional Subrogation.*

**1. Subrogation an Equitable Doctrine Not Dependent on Contract or Privity — England.** — *Hodgson v. Shaw*, 3 Myl. & K. 183.

*United States.* — *Etna L. Ins. Co. v. Middleport*, 124 U. S. 534; *Memphis, etc., R. Co. v. Dow*, 120 U. S. 287; *Goodyear Shoe Machinery Co. v. Dancel*, (C. C. A.) 119 Fed. Rep. 692; *In re Nickerson*, 116 Fed. Rep. 1003; *Seattle First Nat. Bank v. City Trust, etc., Co.*, (C. C. A.) 114 Fed. Rep. 529; *Matthews v. Fidelity Title, etc., Co.*, 52 Fed. Rep. 687.

*Alabama.* — *Knighton v. Curry*, 62 Ala. 408.

*Delaware.* — *Miller v. Stout*, 5 Del. Ch. 259.

*Illinois.* — *Hughes v. Hartford F. Ins. Co.*, 17 Ill. App. 518.

*Indiana.* — *Davis v. Schlemmer*, 150 Ind. 472; *Warford v. Hankins*, 150 Ind. 489.

*Kansas.* — *Van Pelt v. Strickland*, 60 Kan. 584; *Crippen v. Chappel*, 35 Kan. 499, 57 Am. Rep. 187.

*Kentucky.* — *Duke v. Pigman*, (Ky. 1901) 62 S. W. Rep. 867.

*Maine.* — *Leavitt v. Canadian Pac. R. Co.*, 90 Me. 153.

*Mississippi.* — *Gowing v. Bland*, 2 How. (Miss.) 813.

*Nebraska.* — *Aultman v. Bishop*, 53 Neb. 545; *South Omaha Nat. Bank v. Wright*, 45 Neb. 23; *Eaton v. Hasty*, 6 Neb. 419, 29 Am. Rep. 365.

*New Hampshire.* — *Keene Five Cents Sav. Bank v. Herrick*, 62 N. H. 174; *Philbrick v. Shaw*, 61 N. H. 356.

*New York.* — *Gans v. Thieme*, 93 N. Y. 225; *Mathews v. Aikin*, 1 N. Y. 595; *Cheesebrough v. Millard*, 1 Johns. Ch. (N. Y.) 409, 7 Am. Dec. 494.

*North Carolina.* — *Grainger v. Lindsay*, 123 N. Car. 216.

*Ohio.* — *In re Minor Fire Clay Co.*, 9 Ohio Dec. 630.

*Pennsylvania.* — *Mosier's Appeal*, 56 Pa. St. 80, 93 Am. Dec. 783; *Cottrell's Appeal*, 23 Pa. St. 294; *Kyner v. Kyner*, 6 Watts (Pa.) 221.

*Virginia.* — *Lee v. Swepson*, 76 Va. 173.

*West Virginia.* — *McNeil v. Miller*, 29 W. Va. 480.

Subrogation is founded on the maxim that "equality is equity." See the title *EQUITY*, vol. 11, p. 188.

**Subrogation Permitted Where Contract Is Unenforceable.** — A wife who, as surety for her husband, has paid his debt out of her own

property will be subrogated to the rights of the creditor even in a jurisdiction where contracts between husband and wife are held to be unenforceable. *In re Nickerson*, 116 Fed. Rep. 1003.

**Where the Relation Between the Parties Is Simply that of Debtor and Creditor** there is no room for an application of the doctrine of subrogation. *Fuller v. Davis* 184 Ill. 505. But see *infra*, this title, III. *Subrogation of Creditors*.

**2. Dependent on Circumstances of Particular Case.** — *Van Pelt v. Strickland*, 60 Kan. 584; *Crippen v. Chappel*, 35 Kan. 499, 57 Am. Rep. 187; *Duke v. Pigman*, (Ky. 1901) 62 S. W. Rep. 867; *Aultman v. Bishop*, 53 Neb. 545; *South Omaha Nat. Bank v. Wright*, 45 Neb. 23; *Eaton v. Hasty*, 6 Neb. 419, 29 Am. Rep. 365.

**3. Right May Be Modified or Extinguished by Contract.** — *Hughes v. Hartford F. Ins. Co.*, 17 Ill. App. 518.

**4. Person Paying Debt Which Should Have Been Paid by Another.** — *Wilson v. Wilson*, 6 Idaho 597; *Davis v. Schlemmer*, 150 Ind. 477; *Warford v. Hankins*, 150 Ind. 489; *Keene Five Cents Sav. Bank v. Herrick*, 62 N. H. 174; *Cole v. Malcolm*, 66 N. Y. 363; *Comer v. Mackey*, 73 Hun (N. Y.) 236, *affirmed* 147 N. Y. 574; *Harnsberger v. Yancey*, 33 Gratt. (Va.) 527; *McNeil v. Miller*, 29 W. Va. 480.

**5. Liability of One Person Discharged Out of Fund of Another.** — *Foley v. Gibson*, (Ky. 1891) 15 S. W. Rep. 780; *Markillie v. Allen*, 120 Mich. 360; *Aiken v. Taylor*, (Tenn. Ch. 1900) 62 S. W. Rep. 200. And see *Byron v. Gunn*, 102 Ga. 565.

**Where a Husband Uses the Separate Property of His Wife** to redeem a pledge of his own property, without her consent, she will be subrogated to the rights of the pledgee against the husband. *Greiner v. Greiner*, 58 Cal. 115.

**Where a Partner Misappropriates the Partnership Funds** in discharging a lien on his individual property, the other partner will be subrogated to the rights of the lienholder for reimbursement. *Shinn v. Macpherson*, 58 Cal. 596.

**When Claimant Has No Real Interest in Fund Used.** — *In Dover v. Rhea*, 108 N. Car. 88, the claim of a daughter to be subrogated to the rights of judgment creditors, whose claims had been satisfied out of lands alleged to have been reserved for her benefit by her deceased father, was denied on the ground that the claimant had never acquired any real interest in the lands in question.

own protection, or that of some interest which he represents, to pay a debt for which another is primarily liable,<sup>1</sup> or wherever a denial of the right would be contrary to equity and good conscience.<sup>2</sup>

**5. When Not Allowed**—*a. IN GENERAL*—WHERE INJUSTICE WOULD RESULT. — Subrogation being the creature of equity it will not be permitted where it would work injustice to the rights of those having equal or superior equities.<sup>3</sup> Thus it will not be enforced against a *bona fide* purchaser for value without notice,<sup>4</sup> or in favor of a person guilty of fraud,<sup>5</sup> or for the benefit of one who would thereby be enabled to derive an advantage from, or to establish his claim through, his own wrong or negligence, or inequitable or illegal conduct.<sup>6</sup>

**1. Person Paying Debt of Another for His Own Protection.**—*Alfred Richards Brick Co. v. Rothwell*, 18 App. Cas. (D. C.) 516; *Beifeld v. International Cement Co.*, 79 Ill. App. 318; *Cockrum v. West*, 122 Ind. 372; *Weiss v. Guérineau*, 109 Ind. 438; *Lowrey v. Byers*, 80 Ind. 443; *Simily v. Adams*, 88 Mo. App. 621; *Fowler v. Fowler*, 78 Mo. App. 330; *Cole v. Malcolm*, 66 N. Y. 363; *Holden v. Strickland*, 116 N. Car. 185; *In re Lentz*, 5 Pa. St. 103; *Galbraith v. Howard*, 11 Tex. Civ. App. 230.

**2. Where Denial of Right Would Be Contrary to Equity.**—*Arlington State Bank v. Paulsen*, 57 Neb. 717; *Philbrick v. Shaw*, 61 N. H. 356; *Amick v. Woodworth*, 3 Ohio Dec. 220; *Mosier's Appeal*, 56 Pa. St. 76, 93 Am. Dec. 783.

**3. Where Injustice Would Result**—*United States*.—*Mercantile Trust Co. v. Hart*, (C. C. A.) 76 Fed. Rep. 673.

*Illinois*.—*Makeel v. Hotchkiss*, 190 Ill. 311; *Schmitt v. Henneberry*, 48 Ill. App. 322.

*Indiana*.—*Bunch v. Grave*, 111 Ind. 351; *Townsend v. Cleveland Fire-Proofing Co.*, 18 Ind. App. 568.

*Iowa*.—*Sheppard v. Messenger*, 107 Iowa 717.

*Kansas*.—*Hargis v. Robinson*, 63 Kan. 686.

*Kentucky*.—*Allen v. Perrine*, 103 Ky. 516; *Stewart v. Com.*, 104 Ky. 489.

*Michigan*.—*Dwight v. Scranton, etc.*, *Lumber Co.*, 82 Mich. 624; *Kelly v. Kelly*, 54 Mich. 47.

*Missouri*.—*Bissett v. Grantham*, 67 Mo. App. 23.

*New York*.—*Platt v. Brick*, 35 Hun (N. Y.) 121; *Shotwell v. Jefferson Ins. Co.*, 5 Bosw. (N. Y.) 247.

*Ohio*.—*In re Minor Fire Clay Co.*, 9 Ohio Dec. 630.

*Pennsylvania*.—*Shimp's Estate*, 197 Pa. St. 128; *Keely v. Cassidy*, 93 Pa. St. 318; *Bleakley's Appeal*, 66 Pa. St. 187; *McGinnis's Appeal*, 16 Pa. St. 445; *Cassidy v. Keely*, 13 Phila. (Pa.) 112, 36 Leg. Int. (Pa.) 136; *Himes v. Keller*, 3 W. & S. (Pa.) 401.

*Virginia*.—*Exchange Bldg., etc., Co. v. Bayless*, 91 Va. 134.

*West Virginia*.—*Hawker v. Moore*, 40 W. Va. 49.

**4. Subrogation Not Enforced Against Bona Fide Purchaser.**—*Persons v. Shaeffer*, 65 Cal. 79; *Richards v. Griffith*, 92 Cal. 493, 27 Am. St. Rep. 156; *Gaskill v. Wales*, 36 N. J. Eq. 527; *Amick v. Woodworth*, 58 Ohio St. 86, 3 Ohio Dec. 220.

In *Mississippi* it has been held that the entry of the word "settled" on the judgment docket by the plaintiff's attorney, without showing by

whom the payment was made, would not defeat the surety's right of subrogation, even as against a purchaser for value relying on such entry, in the absence of anything to show that the entry was made at the instance or under the direction of the surety. *Yates v. Mead*, 68 Miss. 787.

But where the party paying the judgment himself causes satisfaction thereof to be certified upon the judgment roll, he cannot be subrogated to the judgment as against a subsequent *bona fide* purchaser of the debtor's land. *Taylor v. Alliance Trust Co.*, 71 Miss. 694.

**5. Party Guilty of Fraud.**—*Bleakley's Appeal*, 66 Pa. St. 187; *Greig v. Rice*, 66 S. Car. 171; *Bates v. Swiger*, 40 W. Va. 420. And see *Mansur, etc., Implement Co. v. Jones*, 143 Mo. 253.

**A Mortgagee Who Wrongfully Alters a Mortgage** in a material respect, thereby rendering it void, cannot be subrogated to the benefit of another mortgage which was paid off with the money advanced by him. *Johnson v. Moore*, 33 Kan. 90.

**A Purchaser Who Is Guilty of Fraud in Preventing Competition in Bidding** at a guardian's sale, and who afterwards pays off a mortgage on the land, will not, if the sale is set aside, be subrogated to the benefit of the mortgage so as to be entitled to the high rate of interest which it carries. *Devine v. Harkness*, 117 Ill. 145. And to the same effect see *Hays's Estate*, 159 Pa. St. 381.

**6. Party Who Would Benefit by His Own Wrong or Negligence.**—*German Bank v. U. S.*, 148 U. S. 573; *Wilkinson v. Babbitt*, 4 Dill. (U. S.) 207; *Milwaukee, etc., R. Co. v. Soutter*, 13 Wall. (U. S.) 517; *Starke v. Bernheim*, 102 Ala. 464; *Wiley v. Boyd*, 38 Ala. 625; *Allen v. Perrine*, 103 Ky. 521; *Bussey v. Page*, 13 Me. 459; *Rowley v. Towsley*, 53 Mich. 329; *Lumbermen's Mut. Ins. Co. v. Kansas City, etc., R. Co.*, 149 Mo. 177; *Guckenheimer v. Angevine*, 81 N. Y. 394; *Drake v. Paige*, 52 Hun (N. Y.) 292; *Farmers' L. & T. Co. v. Carroll*, 5 Barb. (N. Y.) 613; *Hargis v. Robinson*, 63 Kan. 686; *Conner v. Welch*, 51 Wis. 431.

Thus a sub-lessee who has permitted his lessor to sell crops turned over in satisfaction of rent, without giving notice to the superior landlord, cannot, on being compelled to turn over further crops to the superior landlord in satisfaction of his lessor's rent, be subrogated to the rights of such landlord. *Starke v. Bernheim*, 102 Ala. 464.

**A Guardian Making an Illegal Investment** of the money of his ward cannot, after a compulsory accounting to the ward, be subrogated

Nor will it be enforced at the expense of a legal right,<sup>1</sup> or where resort to a usurious agreement or security would be necessary for its establishment.<sup>2</sup>

**b. NOT ALLOWED IN FAVOR OF ONE ULTIMATELY LIABLE FOR DEBT PAID.** — Subrogation will not be permitted in favor of one who is ultimately or really liable for the debt discharged.<sup>3</sup> Thus a person who has wrongfully pledged the property of another to secure his own debt cannot be subrogated to the rights of the pledgee on payment of the debt.<sup>4</sup> Nor is one who has been fully reimbursed for assuming and paying the debt of another entitled to subrogation.<sup>5</sup>

**6. When Right to Subrogation Becomes Complete.** — It is generally stated by the authorities that the right of subrogation will not be enforced until the creditor or other person to whose place substitution is claimed has been fully satisfied.<sup>6</sup> But this rule applies only where it is necessary for the protection of the creditor. As against the debtor, subrogation may arise on payment of a part of the debt.<sup>7</sup>

to the benefits of the investment. *Rowley v. Towsley*, 53 Mich. 329.

**Party Participating in Breach of Trust or Tort.** — Banks purchasing government bonds from an administrator under circumstances putting them on inquiry as to the authority of the seller, and failing to make such inquiry, cannot, when held liable for conversion of the bonds, be subrogated to the rights, if any, of the estate, or beneficiaries, against the government as joint tortfeasor in conversion, for improperly transferring the bonds. *German Bank v. U. S.*, 148 U. S. 573.

The rule approved in this case, that one who has been held liable for a breach of trust or a tort cannot avail himself of the principles of subrogation, does not seem to have been observed in *Huff v. Hatch*, 2 Disney (Ohio) 63, where a banker, who by his neglect had caused the discharge of an indorser of a note, was subrogated to the rights of the holder against the estate of a maker.

**1. Subrogation Not Enforced at Expense of Legal Right.** — *Schmitt v. Henneberry*, 48 Ill. App. 322; *State Bank v. Potius*, 10 Watts (Pa.) 148; *Fink v. Mahaffy*, 8 Watts (Pa.) 384.

**2. No Subrogation to Benefit of Usurious Agreement.** — *Roe v. Kiser*, 62 Ark. 92, 54 Am. St. Rep. 288; *Tribble v. Nichols*, 53 Ark. 271, 22 Am. St. Rep. 190; *Perkins v. Hall*, 105 N. Y. 539. But see *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204.

**One Who Advances Money at a Usurious Rate of Interest** for the purpose of satisfying a prior lien will not be subrogated to the benefit of such lien. *Baldwin v. Moffett*, 94 N. Y. 82, distinguishing *Patterson v. Birdsall*, 64 N. Y. 294, 21 Am. Rep. 609. But to the contrary see *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204; *Giveans v. McMurtry*, 16 N. J. Eq. 468.

**3. Not Allowed in Favor of Person Ultimately Liable** — *California*. — *Sacramento Bank v. Pacific Bank*, 124 Cal. 147, 71 Am. St. Rep. 36; *McDonald v. Cutter*, 120 Cal. 44.

*Iowa*. — *Bolton v. Lambert*, 72 Iowa 483.

*Kentucky*. — *Clay v. Clay*, (Ky. 1903) 72 S. W. Rep. 810; *Allen v. Perrine*, 103 Ky. 521.

*Louisiana*. — *New Orleans Nat. Bank v. Eagle Cotton Warehouse, etc., Co.*, 43 La. Ann. 814.

*Maine*. — See *Williams v. Thurlow*, 31 Me. 394.

*Maryland*. — *Woodside v. Grafflin*, 91 Md. 422.

*Massachusetts*. — *Kneeland v. Moore*, 138 Mass. 198; *Thompson v. Heywood*, 129 Mass. 401; *Putnam v. Collamore*, 120 Mass. 454; *Butler v. Seward*, 10 Allen (Mass.) 466. And see *Carlton v. Jackson*, 121 Mass. 592; *Kilborn v. Robbins*, 8 Allen (Mass.) 466.

*Minnesota*. — *Probstfield v. Czizek*, 37 Minn. 420.

*New York*. — *Russell v. Pistor*, 7 N. Y. 171, 57 Am. Dec. 509; *Smith v. Cornell*, 52 N. Y. Super. Ct. 499; *Pulitzer v. National L. Assoc.*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 18; *Schreyer v. Saunders*, 39 N. Y. App. Div. 8; *Morse v. Brockett*, 67 Barb. (N. Y.) 234.

*Rhode Island*. — *Dean v. Rounds*, 18 R. I. 436.

*South Carolina*. — *Dargan v. McSween*, 33 S. Car. 324.

*Vermont*. — *Willson v. Burton*, 52 Vt. 394; *Converse v. Cook*, 8 Vt. 164.

*Wisconsin*. — *Frey v. Vanderhof*, 15 Wis. 397.

**Subrogation Refused to Maker of Note.** — In *Texas* it has been held that the maker of a note, on paying the same, is not entitled to subrogation to the rights of the payee on the note against a third person who has contracted to pay the note, but has failed to do so. *Halbert v. Paddleford*, (Tex. Civ. App. 1896) 33 S. W. Rep. 592.

**4. Wrongful Pledge of Property of Another.** — *Woodside v. Grafflin*, 91 Md. 422; *Grand Council, etc., v. Cornelius*, 198 Pa. St. 46.

**5. Person Reimbursed for Assuming and Paying Debt.** — *Steinreide v. Tegge*, (Ky. 1895) 29 S. W. Rep. 626. And see *Eaton v. Hasty*, 6 Neb. 419, 29 Am. Rep. 365.

**6. No Subrogation until Creditor Is Fully Satisfied.** — *Wilkins v. Gibson*, 113 Ga. 51, 84 Am. St. Rep. 204; *Carter v. Neal*, 24 Ga. 346, 71 Am. Dec. 136; *Stuckman v. Roose*, 147 Ind. 402; *Lumbermen's Ins. Co. v. Sprague*, 59 Minn. 208; *Sickels v. Herold*, (C. Pl. Gen. T.) 15 Misc. (N. Y.) 116; *State Bank v. Potius*, 10 Watts (Pa.) 148; *Kyner v. Kyner*, 6 Watts (Pa.) 221; *Muller v. Flavin*, 13 S. Dak. 595; *Featherstone v. Emerson*, 14 Utah 12.

**7. Rule for Protection of Creditor Only.** — *Nettleton v. Ramsey County Land, etc., Co.*, 54 Minn. 395, 40 Am. St. Rep. 342; *Skinkle v. Huffman*, 52 Neb. 20.

**7. Nature and Extent of Rights Acquired — a. PARTY SUBROGATED ENTITLED TO ALL RIGHTS OF ORIGINAL CREDITOR.** — A party entitled to subrogation will be placed in all respects in the place of the party to whose rights he is subrogated.<sup>1</sup> Thus where the original creditor would have been entitled to set aside a conveyance by the debtor on the ground of fraud, a party subrogated to his rights is entitled to pursue the same remedy.<sup>2</sup> And if the debt paid is a preferred debt he will be entitled to the preference.<sup>3</sup>

**Subrogation to the Rights of a Corporation Against a Debtor Stockholder** includes the lien of the corporation on the stock of the delinquent.<sup>4</sup>

**Subrogation to the Rights of a Landlord** includes the landlord's lien,<sup>5</sup> and his right to distrain.<sup>6</sup>

**Subrogation to the Rights of a Junior Mortgagee** includes the right of the latter to redeem from a prior mortgage, and to foreclose his own.<sup>7</sup>

**Subrogation to the Rights of the Vendor in a Conditional Sale** of a chattel includes the right to take possession of the chattel on failure of the vendee to pay the purchase price.<sup>8</sup>

**Subrogation to Rights of Government.** — According to some authorities a person who is subrogated to the rights of the state will be entitled to all rights of priority existing in its favor,<sup>9</sup> and also to the exemption of the state from the operation of the statute of limitations.<sup>10</sup> But in a recent case a distinction has been drawn between subrogation to the rights of private persons and subrogation to public rights and remedies, as regards the extent of the rights acquired.<sup>11</sup>

**b. RIGHTS ACQUIRED NO GREATER THAN THOSE OF ORIGINAL CREDITOR.** — The rights acquired by a party entitled to subrogation cannot be

**1. Party Subrogated Takes All Rights of Original Creditor.** — *Sperry v. Butler*, 75 Conn. 369; *Whitbeck v. Ramsay*, 74 Ill. App. 542; *King v. Dwight*, 3 Rob. (La.) 2; *Ohio L. Ins., etc., Co. v. Winn*, 4 Md. Ch. 253; *Wyckoff v. Noyes*, 36 N. J. Eq. 227; *Person v. Perry*, 70 N. Car. 697. And see *Schoonover v. Allen*, 40 Ark. 132.

A person who advances money to take up a note may be subrogated to the creditor's right of action against a corporation for the fraud of its transfer agent in certifying that a certificate of stock, pledged as collateral, was valid, when in fact such certificate was fraudulently issued by the transfer agent. *Mutual L. Ins. Co. v. Forty-second St., etc., R. Co.*, 74 Hun (N. Y.) 505; *Hellman v. Forty-second St., etc., R. Co.*, 74 Hun (N. Y.) 529, *affirmed* without opinion 148 N. Y. 727.

**2. Right to Set Aside Fraudulent Conveyance Included.** — *Bragg v. Patterson*, 85 Ala. 233; *Rudy v. Austin*, 56 Ark. 73, 35 Am. St. Rep. 85; *Tatum v. Tatum*, 1 Ired. Eq. (36 N. Car.) 113; *Williams v. Tipton*, 5 Humph. (Tenn.) 66, 42 Am. Dec. 420. See also the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, pp. 317, 337.

**3. Party Paying Preferred Debt Entitled to Preference.** — *Muldoon v. Crawford*, 14 Bush (Ky.) 125; *Schoonfield v. Rudd*, 9 B. Mon. (Ky.) 291; *Zell's Appeal*, 111 Pa. St. 532. And see *infra*, this title, II. 1. *e. Whether Payment by Surety Extinguishes Specialty.*

**4. Subrogation to Lien on Stock.** — *Young v. Vough*, 23 N. J. Eq. 325; *Klopp v. Lebanon Bank*, 46 Pa. St. 88. But see *Perrine v. Fireman's Ins. Co.*, 22 Ala. 575. See also the title STOCK AND STOCKHOLDERS, vol. 26, p. 874.

**5. Subrogation to Rights of Landlord.** — *Rubel v. Avritt*, (Ky. 1898) 47 S. W. Rep. 460.

**6. Hall v. Hoxsey**, 84 Ill. 616.

**7. Subrogation to Rights of Junior Mortgagee.** — *Schell City Bank v. Reed*, 54 Mo. App. 94. See *infra*, this title, IV. *Persons Interested in Encumbered Estates — Junior Mortgagees, Judgment Creditors, etc.*

**8. Subrogation to Rights of Vendor in Conditional Sale of Chattel.** — *Nyc v. Daniels*, 75 Vt. 81.

**9. Person Subrogated to Rights of State Entitled to Priorities.** — *Orem v. Wrightson*, 51 Md. 34, 34 Am. Rep. 286.

**10. Exemption from Statute of Limitations.** — *American Bonding Co. v. National Mechanic's Bank*, (Md. 1903) 55 Atl. Rep. 395.

**11. Subrogation to Rights of Government Distinguished.** — In *Sperry v. Butler*, 75 Conn. 369, the court, after stating the general rule that a party subrogated is put in all respects in the place of the original creditor, said: "When the case is one of the subrogation of the individual to public rights and remedies, the situation assumes an aspect not presented where the substitution relates to private rights. Questions of public policy — questions as to the propriety of turning over the governmental machinery to individuals, and conferring upon them the powers of the organized public — at once arise. The inquiry becomes one not of legislative power to provide for a complete or partial substitution, but one of judicial discretion in the administration of equitable principles under equitable considerations. So it is that the courts ought to hesitate, and have hesitated, to apply the doctrine of subrogation to cases where the substitution would result in conferring upon individuals rights and powers peculiarly designed for and adapted to public purposes, and as a part of the governmental machinery, without statutory sanction, express or implied."

extended beyond the rights of the party under whom subrogation is claimed.<sup>1</sup> Subrogation contemplates some original privilege on the part of him to whose place substitution is claimed,<sup>2</sup> and where no such privilege exists, or where it has been waived by the creditor, there is nothing on which the right can be based.<sup>3</sup> While a surety who pays the debt of his principal is subrogated to the rights of the holder of the claim, he takes such rights subject to all disqualifications and limitations which attached to them in the hands of his predecessor.<sup>4</sup>

c. RIGHT LIMITED TO REIMBURSEMENT. — Subrogation being a doctrine of equity it will be carried no further than the strict demands of equity and justice require. In general, the equitable lien of one who has paid the debt of another extends only so far as may be necessary for his reimbursement.<sup>5</sup>

## II. SURETIES, GUARANTORS, AND PARTIES TO NEGOTIABLE INSTRUMENTS—

1. Subrogation of Sureties — a. GENERAL PRINCIPLES — (1) *Surety Paying Debt Entitled to Subrogation.* — The general rule is that a surety who pays the debt of his principal will be subrogated<sup>6</sup> to all the securities, liens, and

And to the same effect see *Griffing v. Pintard*, 25 Miss. 173; *Wallace's Estate*, 59 Pa. St. 401; *Hinchman v. Morris*, 29 W. Va. 673. But compare *Hart v. Tiernan*, 59 Conn. 521; *Meyer v. Burritt*, 60 Conn. 117. And see *infra*, IX. *Subrogation Arising from Payment of Taxes and Duties.*

1. Only Rights of Original Creditor Acquired. — *Franklin Sav. Bank v. Taylor*, 131 Ill. 376; *Leavitt v. Canadian Pac. R. Co.*, 90 Me. 153; *Demourelle v. Piazza*, 77 Miss. 433; *Dunn v. Missouri Pac. R. Co.*, 45 Mo. App. 29; *Gray v. Taylor*, (N. J. 1897) 38 Atl. Rep. 951; *Liles v. Rogers*, 113 N. Car. 197, 37 Am. St. Rep. 627; *Knapp v. Sturges*, 36 Vt. 721.

2. Privilege on Part of Original Creditor. — *Kirkham v. Dupont*, 14 Cal. 565.

3. Campan v. Molle, 124 Cal. 415; *Fairman v. Heath*, 19 Ind. 63; *Walsh v. McBride*, 72 Md. 45; *George v. Somerville*, 153 Mo. 7; *Liles v. Rogers*, 113 N. Car. 197, 37 Am. St. Rep. 627; *Harris v. Elliott*, 45 W. Va. 245.

4. Rights Taken Subject to Disqualifications, etc. — *Swarts v. Siegel*, (C. C. A.) 117 Fed. Rep. 13.

5. Right Limited to Reimbursement. — *Seattle First Nat. Bank v. City Trust, etc., Co.*, (C. C. A.) 114 Fed. Rep. 529; *Kilpatrick v. Dean*, 15 Daly (N. Y.) 182.

Measure of Recovery — Amount Paid and Legal Interest. — In *Faires v. Cockerell*, 88 Tex. 428, it is said: "It has been held by our court and others that where one is subrogated to the securities held by the creditor he is not entitled to recover the rate of interest expressed in the judgment or note which is the evidence of the debt. *Burns v. Ledbetter*, 56 Tex. 282; *Close v. Fields*, 2 Tex. 232; *Smith v. Johnson*, 23 Cal. 64; *Waldrip v. Black*, 74 Cal. 409; *Bushnell v. Bushnell*, 77 Wis. 435. The amount of the payment made, with legal interest, is the measure of recovery."

6. Surety Paying Debt of Principal — England. — *Forbes v. Jackson*, 19 Ch. D. 615; *Simpkins v. Poulett*, 2 L. J. Ch. 81; *Drew v. Lockett*, 32 Beav. 499; *Pearl v. Deacon*, 24 Beav. 186; *Newton v. Chorlton*, 10 Hare 646; *Yonge v. Reynell*, 9 Hare 809; *Craythorne v. Swinburne*, 14 Ves. Jr. 160; *Gammon v. Stone*, 1 Ves. 339; *Heyman v. Dubois*, L. R. 13 Eq. 158; *Woolbridge v. Norris*, L. R. 6 Eq. 470; *Lake v.*

*Brutton*, 8 De G. M. & G. 440; *Hodgson v. Shaw*, 3 Myl. & K. 183; *Mara v. Ryan*, 2 Jones (Ir.) 715; *Copis v. Middleton*, T. & R. 224; *Harberton v. Bennett*, Beatty 386; *Goddard v. Whyte*, 2 Giff. 449; *Praed v. Gardiner*, 2 Cox Ch. 86; *Mayhew v. Crickett*, 2 Swanst. 191.

*United States.* — *Union Trust Co. v. Morrison*, 125 U. S. 591; *Hunter v. U. S.*, 5 Pet. (U. S.) 173; *Dennis v. Rider*, 2 McLean (U. S.) 451; *Swarts v. Siegel*, (C. C. A.) 117 Fed. Rep. 13; *Matter of Lawrence*, 5 Fed. Rep. 349; *U. S. Bank v. Winston*, 2 Brock. (U. S.) 252.

*Alabama.* — *Fawcetts v. Kimmey*, 33 Ala. 261; *Houston v. Branch Bank*, 25 Ala. 250; *Colvin v. Owens*, 22 Ala. 782; *Brown v. Lang*, 4 Ala. 50; *Foster v. Athenæum*, 3 Ala. 302; *Cullum v. Emanuel*, 1 Ala. 23, 34 Am. Dec. 757.

*Arkansas.* — *Talbot v. Wilkins*, 31 Ark. 411; *Newton v. Field*, 16 Ark. 216.

*California.* — *Waldrup v. Black*, 74 Cal. 409.

*Connecticut.* — *Belcher v. Hartford Bank*, 15 Conn. 381.

*Delaware.* — *McDowell v. Wilmington Bank*, 1 Harr. (Del.) 369; *Hardcastle v. Commercial Bank*, 1 Harr. (Del.) 374, note.

*District of Columbia.* — *Alfred Richards' Brick Co. v. Rothwell*, 18 App. Cas. (D. C.) 516.

*Georgia.* — *Wilkins v. Gibson*, 113 Ga. 42, 84 Am. St. Rep. 204; *Davis v. Smith*, 5 Ga. 274, 48 Am. Dec. 279; *Lumpkin v. Mills*, 4 Ga. 343.

*Illinois.* — *Lochenmeyer v. Fogarty*, 112 Ill. 572; *City Nat. Bank v. Dudgeon*, 65 Ill. 11; *Billings v. Sprague*, 49 Ill. 509; *Whitbeck v. Ramsay*, 74 Ill. App. 542; *Pierce v. Garrett*, 65 Ill. App. 682.

*Indiana.* — *Frank v. Traylor*, 130 Ind. 145; *Thomas v. Stewart*, 117 Ind. 50; *Lowry v. Smith*, 97 Ind. 466; *Pence v. Armstrong*, 95 Ind. 191; *Rooker v. Benson*, 83 Ind. 250; *Manford v. Firth*, 68 Ind. 83; *State Bank v. Davis*, 4 Ind. 653.

*Iowa.* — *Manning v. Ferguson*, 103 Iowa 561; *Searing v. Berry*, 58 Iowa 20; *Keokuk v. Love*, 31 Iowa 119; *Sears v. Laforce*, 17 Iowa 473.

*Kentucky.* — *Wilkerson v. Tichenor*, 62 S. W. Rep. 870, 23 Ky. L. Rep. 244; *Highland v. Anderson*, (Ky. 1891) 17 S. W. Rep. 866; *Black v. Bush*, 7 B. Mon. (Ky.) 212; *Dunlap v.*

equities, rights, remedies, and priorities held by the creditor against the principal, and entitled to enforce them against the latter in a court of equity or of equitable jurisdiction. His right to subrogation is not affected by the fact that he made no stipulation therefor at the time of payment of the debt of his principal, nor by the fact that he was then ignorant of the existence of such right; <sup>1</sup> nor will the right be denied him on the ground that he assumed the obligation without being requested to do so by his principal.<sup>2</sup>

O'Bannon, 5 B. Mon. (Ky.) 393; Burk v. Chrisman, 3 B. Mon. (Ky.) 50; Storms v. Storms, 3 Bush (Ky.) 77.

*Louisiana.*—Davidson v. Carroll, 20 La. Ann. 199; Scott v. Featherston, 5 La. Ann. 306; West v. His Creditors, 3 La. Ann. 529; Groves v. Steel, 2 La. Ann. 480, 46 Am. Dec. 551; Howe v. Frazer, 2 Rob. (La.) 424.

*Maine.*—Leavitt v. Canadian Pac. R. Co., 90 Me. 153.

*Maryland.*—Tuck v. Calvert, 33 Md. 209; Semmes v. Naylor, 12 Gill & J. (Md.) 358; Colegate v. Frederick-Town Sav. Inst., 11 Gill & J. (Md.) 114; Sasscer v. Young, 6 Gill & J. (Md.) 243; Merryman v. State, 5 Har. & J. (Md.) 423; Ghiselin v. Fergusson, 4 Har. & J. (Md.) 522; Winder v. Diffenderffer, 2 Bland. (Md.) 166.

*Massachusetts.*—Rice v. Southgate, 16 Gray (Mass.) 142; Johnson v. Bartlett, 17 Pick. (Mass.) 477.

*Michigan.*—Myres v. Yapple, 60 Mich. 339.

*Minnesota.*—Dick v. Moon, 26 Minn. 309.

*Mississippi.*—McMullen v. Hinkle, 39 Miss. 142; Parchman v. Conway, 28 Miss. 85; Dozier v. Lewis, 27 Miss. 679; Conway v. Strong, 24 Miss. 665; Stanwood v. Clappitt, 23 Miss. 372; Bank of England v. Tarleton, 23 Miss. 173.

*Missouri.*—Hackett v. Watts, 138 Mo. 502; Benne v. Schnecko, 100 Mo. 250; Taylor v. Tarr, 84 Mo. 420; Allison v. Sutherlin, 50 Mo. 274; Sweet v. Jeffries, 48 Mo. 279; Arnot v. Woodburn, 35 Mo. 99; Cole County v. Angney, 12 Mo. 132; Miller v. Woodward, 8 Mo. 169.

*Nebraska.*—Wilson v. Burney, 8 Neb. 39.

*New Hampshire.*—Low v. Blodgett, 21 N. H. 121; Dearborn v. Taylor, 18 N. H. 153.

*New Jersey.*—Young v. Vough, 23 N. J. Eq. 325; Irick v. Black, 17 N. J. Eq. 189.

*New York.*—Ellsworth v. Lockwood, 42 N. Y. 89; Lewis v. Palmer, 28 N. Y. 271; Clason v. Morris, 10 Johns. (N. Y.) 524; Hayes v. Ward, 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554; King v. Baldwin, 2 Johns. Ch. (N. Y.) 554; Cheesebrough v. Millard, 1 Johns. Ch. (N. Y.) 409, 7 Am. Dec. 494; Van Horne v. Everson, 13 Barb. (N. Y.) 526; New York State Bank v. Fletcher, 5 Wend. (N. Y.) 85; Ottman v. Moak, 3 Sandf. Ch. (N. Y.) 431; Bullock v. Boyd, Hoffm. (N. Y.) 294; Smith v. National Surety Co., 46 N. Y. App. Div. 633; Sternbach v. Friedman, 34 N. Y. App. Div. 534; People v. Anthony, 7 N. Y. App. Div. 132, affirmed 151 N. Y. 620. And see Cory v. Leonard, 56 N. Y. 494.

*North Carolina.*—Kessler v. Linker, 82 N. Car. 456; Towe v. Newbold, 4 Jones Eq. (57 N. Car.) 212; Barnes v. Morris, 4 Ired. Eq. (39 N. Car.) 22; Smith v. McLeod, 3 Ired. Eq. (38 N. Car.) 390; Tatum v. Tatum, 1 Ired. Eq. (36 N. Car.) 113; Heart v. Bryan, 2 Dev. Eq. (17 N. Car.) 147;

*Ohio.*—Hill v. King, 48 Ohio St. 75; Dempsey v. Bush, 18 Ohio St. 376. And see Connor v. Stewart, 2 Ohio Dec. 466, 7 Ohio N. P. 167.

*Oklahoma.*—McClure v. Johnson, 10 Okla. 669.

*Pennsylvania.*—Budd v. Olver, 148 Pa. St. 194; McCormick v. Irwin, 35 Pa. St. 111; Cottrell's Appeal, 23 Pa. St. 294; Hill v. Voorhies, 22 Pa. St. 68; Erb's Appeal, 2 P. & W. (Pa.) 296; Cornwell's Appeal, 7 W. & S. (Pa.) 305; Himes v. Keller, 3 W. & S. (Pa.) 401; Greiner's Estate, 2 Watts (Pa.) 414; Cochran v. Shields, 2 Grant Cas. (Pa.) 437.

*South Carolina.*—Canaday v. Boliver, 25 S. Car. 547; *Ex p.* Ware, 5 Rich. Eq. (S. Car.) 473; Shultz v. Carter, Spears Eq. (S. Car.) 533; Smith v. Swain, 7 Rich. Eq. (S. Car.) 112; Lowndes v. Chisholm, 2 McCord Eq. (S. Car.) 455, 16 Am. Dec. 667; Perkins v. Kershaw, 1 Hill Eq. (S. Car.) 344.

*Tennessee.*—Bittick v. Wilkins, 7 Heisk. (Tenn.) 307; Wade v. Green, 3 Humph. (Tenn.) 547; Henry v. Compton, 2 Head (Tenn.) 549; Rodes v. Crockett, 2 Yerg. (Tenn.) 346, 24 Am. Dec. 489; Scanland v. Settle, Meigs (Tenn.) 169.

*Texas.*—Saunders v. Ireland, 87 Tex. 316; Willson v. Phillips, 27 Tex. 543; James v. Jacques, 26 Tex. 320, 82 Am. Dec. 613; Darrow v. Summerhill, 24 Tex. Civ. App. 208; Mitchell v. De Witt, 25 Tex. Supp. 180, 78 Am. Dec. 561.

*Vermont.*—Hurd v. Spencer, 40 Vt. 581.

*Virginia.*—Flood v. Hutter, (Va. 1898) 32 S. E. Rep. 64; Hauser v. King, 76 Va. 731; Chrisman v. Harman, 29 Gratt. (Va.) 494, 26 Am. Rep. 387; Hill v. Manser, 11 Gratt. (Va.) 522; Leake v. Ferguson, 2 Gratt. (Va.) 419; M'Clung v. Beirne, 10 Leigh (Va.) 410, 34 Am. Dec. 739; Miller v. Pendleton, 4 Hen. & M. (Va.) 436; Edmunds v. Venable, 1 Patt. & H. (Va.) 121; Eppes v. Randolph, 2 Call (Va.) 125.

*Washington.*—Bay View Brewing Co. v. Tecklenberg, 19 Wash. 469.

*West Virginia.*—Hawker v. Moore, 40 W. Va. 49; Highland v. Highland, 5 W. Va. 63.

And see the titles FORTHCOMING AND DELIVERY BONDS, vol. 13, p. 1157; FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 337.

1. *Absence of Agreement and Ignorance of Right Immaterial.*—Simpson v. Ennis, 114 Ga. 208; Hill v. King, 48 Ohio St. 75.

2. *Request from Principal Debtor Not Essential.*—Mathews v. Aikin, 1 N. Y. 595, in which case the demand for subrogation was resisted by the creditor. But it was also said in this case that the rule might be otherwise where the objection was raised by the principal debtor, especially if the latter was able to show that the surety entered into the obligation not only against his wish or request, but for some purpose of fraud or oppression.



**One Who Is Surety for Part Only of a Debt** may pay the whole and succeed to the creditor's rights and remedies against those liable for the other part.<sup>1</sup>

**Payment by the Surety in Person Is Not Essential.** — He is equally entitled to subrogation where the debt is paid by the principal with money which he has furnished with directions to apply it to the debt.<sup>2</sup>

**The Estate of a Surety** paying the debt of the principal will have the same right of subrogation as the surety himself.<sup>3</sup>

(2) **When Right Arises.** — The right springs up at the time the suretyship is contracted,<sup>4</sup> though it is not consummated until the debt is paid.<sup>5</sup>

(3) **Rights as Against Third Persons.** — A surety who pays the debt of his principal is entitled not only to all the equities of the creditor as against the principal, but also against all persons claiming under him,<sup>6</sup> such as subsequent purchasers of the debtor's lands, with notice of his rights.<sup>7</sup> And he may also be subrogated to the rights of the principal debtor against third persons.<sup>8</sup>

**§. SURETY ENTITLED TO ALL SECURITIES APPLICABLE TO DEBT.** — A surety paying the debt of his principal is entitled to the benefit of all securities for the debt which are held by the creditor<sup>9</sup> or by his

1. **Surety for Part of Debt Paying Whole.** — *Gerber v. Sharp*, 72 Ind. 553.

2. **Surety Advancing Money to Pay Debt.** — *Zuellig v. Hemerlie*, 60 Ohio St. 27, 71 Am. St. Rep. 707.

3. **Estate of Surety Entitled to Subrogation.** — *Ward's Appeal*, 100 Pa. St. 289. And see *McWilliams v. Lee*, 76 Ga. 838. See also the title *DEBTS OF DECEDENTS*, vol. 8, p. 1046.

4. **Right Incident to Contract of Suretyship.** — *Dixon v. Steel*, (1901) 2 Ch. 602; *Prairie State Bank v. U. S.*, 164 U. S. 227; *Bragg v. Patterson*, 85 Ala. 233; *Keel v. Larkin*, 72 Ala. 493; *Hatfield v. Merod*, 82 Ill. 113; *Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 460; *Sargent v. Salmond*, 27 Me. 539; *Loughridge v. Bowland*, 52 Miss. 546; *Schell City Bank v. Reed*, 54 Mo. App. 94; *Dickson v. Back*, 32 Oregon 234; *Wayland v. Tucker*, 4 Gratt. (Va.) 268, 50 Am. Dec. 76. See also *Thompson v. Thompson*, 19 Me. 244; *Howe v. Ward*, 4 Me. 195; *Carlisle v. Rich*, 8 N. H. 44.

**Surety Entitled to Priority Over Intervening Liens.** — As the surety's right of subrogation relates back to the time when the suretyship is contracted, it takes precedence over liens in favor of third parties arising after the assumption of the obligation by the surety although prior to the payment of the debt by him. *Prairie State Bank v. U. S.*, 164 U. S. 227.

5. **Right Not Consummated until Debt Is Paid.** — See *infra*, this section, *c. When Right to Subrogation Becomes Complete*.

6. **Extent of Right.** — *Drew v. Lockett*, 32 Beav. 499; *Dempsey v. Bush*, 18 Ohio St. 376.

7. **Subsequent Purchaser of Debtor's Land.** — *Hackett v. Watts*, 138 Mo. 502.

**Lands Purchased from Debtor Pending Appeal.** — A surety who pays a judgment after it has been affirmed on appeal will be subrogated to the rights of the judgment creditor against the lands of the principal in the hands of one who purchased from the principal pending the appeal, and will have priority over an assignee of a mortgage given by such purchaser to secure the purchase money. *Hill v. King*, 48 Ohio St. 75.

8. **Where the Principal Debtor Is Entitled to a Lien on Land** by reason of improvements

which he has made thereon, the surety, on paying the debt, will be subrogated to such lien. *Mechanics' Sav. Bank, etc., Co. v. Scoggin*, (Tenn. Ch. 1899) 52 S. W. Rep. 718.

9. **Right to All Securities** — *England*. — *Woolbridge v. Norris*, L. R. 6 Eq. 410; *Newton v. Charlton*, 10 Hare 646.

*Connecticut.* — *Stamford Bank v. Benedict*, 15 Conn. 437.

*Illinois.* — *Rice v. Rice*, 108 Ill. 199; *Whitbeck v. Ramsay*, 74 Ill. App. 524.

*Iowa.* — *Manning v. Ferguson*, 103 Iowa 567.

*Louisiana.* — *Pratt's Succession*, 16 La. Ann. 357; *Kennedy v. Bossiere*, 16 La. Ann. 445.

*Maryland.* — *Chase v. M'Donald*, 7 Har. & J. (Md.) 160.

*Massachusetts.* — *Johnson v. Bartlett*, 17 Pick. (Mass.) 477. But see *Stafford v. New Bedford Five Cents Sav. Bank*, 132 Mass. 315.

*Missouri.* — *Taylor v. Tarr*, 84 Mo. 420; *Berthold v. Berthold*, 46 Mo. 557; *Schell City Bank v. Reed*, 54 Mo. App. 94; *Bauer v. Gray*, 18 Mo. App. 164.

*New Jersey.* — *Irick v. Black*, 17 N. J. Eq. 189.

*New York.* — *Lewis v. Palmer*, 28 N. Y. 271; *Vartie v. Underwood*, 18 Barb. (N. Y.) 561; *Smith v. National Surety Co.*, 46 N. Y. App. Div. 633; *Clason v. Morris*, 10 Johns. (N. Y.) 524.

*North Carolina.* — *Carlton v. Simonton*, 94 N. Car. 401; *York v. Landis*, 65 N. Car. 535; *Towe v. Newbold*, 4 Jones Eq. (57 N. Car.) 212.

*Pennsylvania.* — *Pott v. Nathans*, 1 W. & S. (Pa.) 155, 37 Am. Dec. 456.

*South Carolina.* — *Muller v. Wadlington*, 5 S. Car. 342.

*South Dakota.* — *Park v. Robinson*, 15 S. Dak. 551.

*Tennessee.* — *Wade v. Green*, 3 Humph. (Tenn.) 547; *Rodes v. Crockett*, 2 Yerg. (Tenn.) 246, 24 Am. Dec. 489; *Allen v. Henley*, 2 Lea (Tenn.) 141. And see *supra*, the cases cited in the first note to this section, *Surety Paying Debt Entitled to Subrogation*.

**Subrogation of Creditor to Benefit of Securities Held by Surety.** — See *infra*, this title, III. *Subrogation of Creditors* — *Subrogation to Securities Given to Surety*.

cosureties,<sup>1</sup> and may follow such securities in the hands of all persons chargeable with notice of his rights, even though he did not know of their existence or rely upon them at the time when he assumed the obligation.<sup>2</sup>

**Creditor Not Allowed to Interfere with Surety's Rights.**—The surety is entitled to actual possession of all collateral securities immediately on payment of the debt,<sup>3</sup> and the creditor, after receiving payment, has no right to discharge or cancel any security without his consent,<sup>4</sup> nor has he the right to burden the securities with subsequent debts owing to him by the principal debtor.<sup>5</sup>

**The Surety Is Not Entitled to the Benefit of Any Other Securities** or rights of the creditor than those applicable to the contract on which he is bound.<sup>6</sup> Thus a surety for a part of a debt is not entitled to the benefit of a security given by the debtor to the creditor, at a different time, for another part of the debt.<sup>7</sup>

**Right Not Defeated by Seizure by Another Creditor.**—*McMullen v. Ritchie*, 64 Fed. Rep. 253.

**Rule Not Applicable as Against Bona Fide Purchaser.**—*Sanders v. Reed*, 12 N. H. 558.

**Where the Securities Have Been Exhausted by the Creditor** the surety is not subrogated thereto, even though he is compelled to make up a deficiency. *Belcher v. Hartford Bank*, 15 Conn. 381.

**1. Securities Held by Cosureties.**—*Scribner v. Adams*, 73 Me. 541; *Blanton v. Bostic*, 126 N. Car. 418; *Park v. Robinson*, 15 S. Dak. 551.

**Payment of Debt a Condition Precedent.**—*Nash v. Burchard*, 87 Mich. 85.

**2. Following Securities in Hands of Third Persons.**—*Aldrich v. Cooper*, 8 Ves. Jr. 388; *Wheatley v. Bastow*, 7 De G. M. & G. 279; *Scott v. Knox*, 2 Jones (Ir.) 778; *Lidderdale v. Robinson*, 2 Brock. (U. S.) 160, 12 Wheat. (U. S.) 596; *Atwood v. Vincent*, 17 Conn. 583; *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119, 41 Am. Dec. 685; *Hayes v. Ward*, 4 Johns. Ch. (N. Y.) 130, 8 Am. Dec. 554; *Stevens v. Cooper*, 1 Johns. Ch. (N. Y.) 430, 7 Am. Dec. 499; *Cheesebrough v. Millard*, 1 Johns. Ch. (N. Y.) 413, 7 Am. Dec. 494; *Lichtenthaler v. Thompson*, 13 S. & R. (Pa.) 157, 15 Am. Dec. 581.

**Ignorance of Existence of Lien Immaterial.**—One who executes a note as collateral security for a note secured by a lien on real estate will, if compelled to pay such collateral note, be subrogated to the lien in question, though he did not know of its existence when he made his note, and was informed of an assignment of the original note by the creditor to a third person. *Hevener v. Berry*, 17 W. Va. 474.

**3. Right to Possession of Securities.**—*Jacques v. Fackney*, 64 Ill. 87; *Murray v. Catlett*, 4 Greene (Iowa) 108; *Loughridge v. Bowland*, 52 Miss. 546; *Smith v. Schneider*, 23 Mo. 447; *Klopp v. Lebanon Bank*, 46 Pa. St. 88; *Lowndes v. Chisholm*, 2 McCord Eq. (S. Car.) 455, 16 Am. Dec. 667.

**Debt Secured by Chattel Mortgage.**—If the security consists of a chattel mortgage, the surety will, on payment of the debt, be entitled to the possession of the chattels. *Torp v. Gulseth*, 37 Minn. 135.

**The Court May Direct a Transfer of the Securities** to the surety before rendition of judgment against him for the debt of his principal. *Knoblauch v. Foglesong*, 37 Minn. 320. And see *infra*, this section, c. *When Right to Subrogation Becomes Complete*.

**4. Creditor Not Allowed to Cancel Securities.**—*City Nat. Bank v. Dudgeon*, 65 Ill. 11; *Woods v. People's Nat. Bank*, 83 Pa. St. 57; *Chrisman v. Harman*, 29 Gratt. (Va.) 494, 26 Am. Rep. 387.

**5. Creditor Not Allowed to Hypothecate Securities.**—*Schell City Bank v. Reed*, 54 Mo. App. 94, holding that a surety on a mortgage debt need not pay off a subsequent mortgage, securing a distinct debt, in order to be subrogated to the rights of the creditor on the debt for which he was surety. The court explained, as based on the obsolete rule of tacking, a contrary statement of some of the text-writers and to the same effect see *Holliday v. Brown*, 33 Neb. 657.

**6. Securities Applicable to Other Debts—England.**—*Ex p. Rushforth*, 10 Ves. Jr. 409; *South v. Bloxam*, 2 Hem. & M. 457; *Wade v. Coope*, 2 Sim. 155.

**Alabama.**—*Houston v. Branch Bank*, 25 Ala. 250.

**Kentucky.**—*Flannary v. Utley*, (Ky. 1887) 3 S. W. Rep. 413; *Downing v. Linville*, 3 Bush (Ky.) 472.

**Louisiana.**—*Tardy v. Allen*, 3 La. Ann. 66; *Old v. Chambliss*, 3 La. Ann. 205; *Trent v. Calderwood*, 2 La. Ann. 942.

**Massachusetts.**—*Towne v. Ammidown*, 20 Pick. (Mass.) 535; *Brazer v. Clark*, 5 Pick. (Mass.) 96; *Bowman v. Blodgett*, 2 Met. (Mass.) 308.

**New York.**—*Tom v. Goodrich*, 2 Johns. (N. Y.) 213.

**North Carolina.**—*Osborn v. Cunningham*, 4 Dev. & B. L. (20 N. Car.) 423; *Carter v. Black*, 4 Dev. & B. L. (20 N. Car.) 425; *Hutchins v. McCauley*, 2 Dev. & B. Eq. (22 N. Car.) 399.

**Illustrations of Rule.**—In *Stafford v. New Bedford Five Cents Sav. Bank*, 132 Mass. 315, a surety of a bankrupt corporation was held not entitled to the benefit of stock taken by the creditor, a bank, in a new corporation composed of the creditors of the old bankrupt corporation, such stock being in no manner collateral security for the indebtedness of the old corporation.

An undertaking to pay the holders of a note any deficiency not exceeding a given sum which may exist after exhausting certain collaterals furnished by an indorser of the note, creates a separate and independent responsibility, and gives the undertaker no right of subrogation to the benefit of the collaterals. *Tracy v. Pomeroy*, 120 Pa. St. 14.

**7. Security Given for Another Part of Debt.**—*Wade v. Coope*, 2 Sim. 155; *Crump v. Mc-*

c. WHEN RIGHT TO SUBROGATION BECOMES COMPLETE — (1) *Full Satisfaction of Debt as a Condition Precedent*. — The creditor is entitled to full satisfaction of the debt before the right of subrogation may be invoked; the surety may not meddle with any of his rights and securities so long as any portion of the debt remains unsatisfied.<sup>1</sup> As against the rights of the creditor payment of a part of the debt by the surety will not subrogate him to a proportionate part of the securities applicable to the debt.<sup>2</sup> Where a mortgage is given to secure several notes the surety is not entitled to subrogation until all of the notes are paid.<sup>3</sup> It seems, however, that an exception will be made to the general rule when necessary to prevent a needless multiplicity of suits, no detriment resulting thereby to the creditor.<sup>4</sup> Thus in *Iowa* it has been

Murtry, 8 Mo. 408; *Grubbs v. Wysors*, 32 Gratt. (Va.) 127. Compare *Lynch v. Hancock*, 14 S. Car. 66; *Scott v. Knox*, 2 Jones (Ir.) 778.

1. *Necessity of Full Satisfaction of Debt* — *England*. — *Cooper v. Jenkins*, 32 Beav. 337; *Farebrother v. Wodehouse*, 23 Beav. 18; *Ex p. Rushforth*, 10 Ves. Jr. 409; *Ewart v. Latta*, 4 Macq. H. L. 983; *Hodgson v. Shaw*, 3 Myl. & K. 183; *Davies v. Humphreys*, 6 M. & W. 153; *Copis v. Middleton*, T. & R. 224; *Reg. v. O'Callaghan*, 1 Ir. Eq. 439.

*United States*. — *Columbia Finance, etc., Co. v. Kentucky Union R. Co.*, (C. C. A.) 60 Fed. Rep. 794.

*Arkansas*. — *Schoonover v. Allen*, 40 Ark. 132; *McConnell v. Beattie*, 34 Ark. 113.

*Connecticut*. — *Stamford Bank v. Benedict*, 15 Conn. 437.

*Georgia*. — *Bridges v. Nicholson*, 20 Ga. 90. *Illinois*. — *Conwell v. McCowan*, 53 Ill. 363; *Darst v. Bates*, 51 Ill. 439.

*Indiana*. — *Opp v. Ward*, 125 Ind. 241, 21 Am. St. Rep. 220; *Johnson v. Amana Lodge No. 82*, 92 Ind. 150; *Vert v. Voss*, 74 Ind. 566; *Covey v. Neff*, 63 Ind. 391. Compare *Rooker v. Benson*, 83 Ind. 250; *Zook v. Clemmer*, 44 Ind. 15.

*Iowa*. — *James v. Day*, 37 Iowa 164.

*Kansas*. — *Bartholomew v. Salina First Nat. Bank*, 57 Kan. 594.

*Kentucky*. — *Rice v. Downing*, 12 B. Mon. (Ky.) 44; *Glass v. Pullen*, 6 Bush (Ky.) 346; *Hopkinsville Bank v. Rudy*, 2 Bush (Ky.) 326.

*Louisiana*. — *Pickett v. Bates*, 3 La. Ann. 627.

*Maryland*. — *Com. v. State*, 32 Md. 501; *Swan v. Patterson*, 7 Md. 164; *Bullock v. Campbell*, 9 Gill (Md.) 182; *Neptune Ins. Co. v. Dorsey*, 3 Md. Ch. 334; *Lawson v. Snyder*, 1 Md. 79; *Union Bank v. Edwards*, 1 Gill & J. (Md.) 346.

*Massachusetts*. — *Child v. New York, etc., R. Co.*, 129 Mass. 170; *Richardson v. Washington Bank*, 3 Met. (Mass.) 536; *Wilcox v. Fairhaven Bank*, 7 Allen (Mass.) 270.

*Minnesota*. — *London, etc., Mortg. Co. v. Fitzgerald*, 55 Minn. 71.

*Mississippi*. — *Magee v. Leggett*, 48 Miss. 139; *Lee v. Griffin*, 31 Miss. 632.

*New Hampshire*. — *Gannett v. Blodgett*, 39 N. H. 150.

*New Jersey*. — *New Jersey Midland R. Co. v. Wortendyke*, 27 N. J. Eq. 658.

*North Carolina*. — See *Towe v. Newbold*, 4 Jones Eq. (57 N. Car.) 212.

*Ohio*. — *Williams v. Williams*, 5 Ohio 444; *People's Ins. Co. v. Straehle*, 2 Cinc. Super. Ct. 186.

*Pennsylvania*. — *Musgrave v. Dickson*, 172

Pa. St. 629, 51 Am. St. Rep. 765; *Allegheny Nat. Bank's Appeal*, (Pa. 1887) 7 Atl. Rep. 788; *Brough's Estate*, 71 Pa. St. 460; *State Bank v. Potius*, 10 Watts (Pa.) 148; *Kyner v. Kyner*, 6 Watts (Pa.) 227; *Coates's Appeal*, 7 W. & S. (Pa.) 99.

*Rhode Island*. — *Church's Petition*, 16 R. I. 231.

*Tennessee*. — *Hall v. Hall*, 10 Humph. (Tenn.) 352; *Gilliam v. Esselman*, 5 Sneed (Tenn.) 86; *Delaney v. Tipton*, 3 Hayw. (Tenn.) 15; *Harlan v. Sweeny*, 1 Lea (Tenn.) 682.

*Texas*. — *Cason v. Connor*, 83 Tex. 26; *Beville v. Boyd*, 16 Tex. Civ. App. 491.

*Vermont*. — *Field v. Hamilton*, 45 Vt. 35.

*Virginia*. — *Barton v. Brent*, 87 Va. 385.

2. *Effect of Partial Payment*. — *Willingham v. Ohio Valley Banking, etc., Co.*, (Ky. 1900) 56 S. W. Rep. 706; *Hollingsworth v. Floyd*, 2 Har. & G. (Md.) 87; *London, etc., Mortg. Co. v. Fitzgerald*, 55 Minn. 71; *Ames v. Huse*, 55 Mo. App. 422. And see the cases cited in the preceding note. But compare *Bowen v. Barksdale*, 33 S. Car. 142; *Williams v. Tipton*, 5 Humph. (Tenn.) 66, 42 Am. Dec. 420.

*Surety for Part of Debt*. — In *Missouri* it is held that a surety for the payment of part of the indebtedness of his principal, by paying that sum, becomes entitled to a proportionate share with the other creditors of the proceeds arising from the sale of the principal debtor's property, and for that purpose may be subrogated to all the rights of the remaining creditors so as to have the benefit of all the securities in their hands. *Allison v. Sutherlin*, 50 Mo. 274.

3. *Mortgage to Secure Several Notes*. — *Rice v. Morris*, 82 Ind. 204; *London, etc., Mortg. Co. v. Fitzgerald*, 55 Minn. 71. And see *Wilcox v. Fairhaven Bank*, 7 Allen (Mass.) 270. But compare *Schell City Bank v. Reed*, 54 Mo. App. 94.

4. *Exception to Prevent Multiplicity of Suits*. — Where a father was guardian of his minor children, and after his death they brought suit against the sureties on his bond as guardian to recover a balance due them, it was decided that they being heirs of their father and liable for his debts to the extent of assets received from him, the sureties should be subrogated to their rights as wards and allowed to offset the one liability against the other. *State v. Atkins*, 53 Ark. 303. See also *Rice v. Rice*, 108 Ill. 199; *Lusk v. Hopper*, 3 Bush (Ky.) 179.

When the debt is due, the surety, even though he has not paid any part thereof, may sue the creditor and the principal debtor in equity to compel the debtor to pay the debt;

held that a court of equity, in the exercise of its power to declare future rights and duties, may order that sureties who have not yet paid the demand of the creditor be subrogated to his rights when they shall have paid the debt of their principal.<sup>1</sup> And should the creditor permit the surety to resort to the right of subrogation before the debt has been entirely paid, neither the principal debtor nor any other creditor may complain.<sup>2</sup>

(2) *What Constitutes Payment of Debt.* — The creditor is entitled to actual payment of the debt.<sup>3</sup> A tender of the amount accompanied with conditions will not suffice.<sup>4</sup> But it is not necessary that the entire debt should be paid by the surety alone; part may be paid by the surety and part by the principal,<sup>5</sup> or by cosureties.<sup>6</sup> Nor is it necessary that the payment be in money; the note of the surety, though unpaid,<sup>7</sup> or anything else that the creditor accepts as an equivalent and in satisfaction of the debt, will confer the right of subrogation.<sup>8</sup>

*d. HOW FAR SUBROGATION WILL BE CARRIED* — (1) *Rights of Surety Measured by Right of Creditor.* — The surety is entitled to all the rights of the person to whose place he is subrogated,<sup>9</sup> but to no greater rights.<sup>10</sup>

and if he has paid part of the debt he may, in such a suit, be subrogated to the creditor's liens after satisfaction out of the debtor's property of the balance of the debt. *Neal v. Buffington*, 42 W. Va. 327.

In *Moore v. Topliff*, 107 Ill. 241, it was held that a surety against whom alone judgment had been obtained might, before paying the debt, file a bill bringing both the principal and the creditors into court, and obtain the benefit of a mortgage executed by the principal to secure the creditors. Compare *Darst v. Bates*, 51 Ill. 439; *Conwell v. McGowan*, 53 Ill. 363; *Parkersburg First Nat. Bank v. Crawford*, 2 Cinc. Super. Ct. 125.

1. *Subrogation Ordered in Advance.* — *Manning v. Ferguson*, 103 Iowa 561; *Keokuk v. Love*, 31 Iowa 119.

2. *Nonpayment Waived by Creditor.* — *Gedye v. Matson*, 25 Beav. 310; *Schoonover v. Allen*, 40 Ark. 132; *Nettleton v. Ramsey County Land, etc., Co.*, 54 Minn. 395, 40 Am. St. Rep. 342; *Fisher v. Columbia Bldg., etc., Assoc.*, 59 Mo. App. 430; *Motley v. Harris*, 1 Lea (Tenn.) 577; *Spaulding v. Crane*, 46 Vt. 292. And see *McConnell v. Beattie*, 34 Ark. 113; *Walmsley v. Theus*, 107 La. 417; *Bowen v. Barksdale*, 33 S. Car. 142; *Mechanics' Sav. Bank, etc., Co. v. Scoggin*, (Tenn. Ch. 1899) 52 S. W. Rep. 718. And see *infra*, this title, VII. *Persons Paying or Advancing Money to Pay Debts of Others* — *In General* — *Conventional Subrogation* — *Payment of Entire Debt Not a Condition Precedent*.

3. *Necessity of Actual Payment.* — *Pigou v. French*, 1 Wash. (U. S.) 278; *Judah v. Judd*, 1 Conn. 309; *Grieff v. Steamboat D. S. Stacy*, 12 La. Ann. 8; *Combs v. Candler*, 95 Va. 7.

*Signing of Note to Raise Money Not Payment.* — A stay surety will not be subrogated to the rights of the judgment creditor merely by reason of the fact that he has signed a note, as surety, for the purpose of raising money to pay the judgment. *Lichty v. Moore*, 38 Neb. 269.

*Surety Appointed Administrator of Creditor* — *Payment Presumed.* — If a surety for a debt on which judgment has been obtained becomes administrator of the estate of the judgment creditor, he will be considered to have paid the judgment, and will be entitled to foreclose a

mortgage executed for his indemnity. *Lane v. Westmoreland*, 79 Ala. 372. And see *In re Nickerson*, 116 Fed. Rep. 1003.

4. *Conditional Tender Not Sufficient.* — *Schmitt-diel v. Moore*, 101 Mich. 590; *Forest Oil Co.'s Appeals*, 118 Pa. St. 138, 4 Am. St. Rep. 584. And see *Wadley v. Poucher*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 50, 55 Hun (N. Y.) 612.

*Unconditional Tender Sufficient.* — *Snook v. Munday*, 96 Md. 514.

5. *Payment by Surety Alone Not Essential.* — *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204; *Barnes v. Barnes*, (Ky. 1903) 72 S. W. Rep. 282; *Magee v. Leggett*, 48 Miss. 139; *Hess's Estate*, 69 Pa. St. 272; *Neal v. Buffington*, 42 W. Va. 327. And see *Vert v. Voss*, 74 Ind. 565; *Comins v. Culver*, 35 N. J. Eq. 94; *Field v. Hamilton*, 45 Vt. 35.

6. *Part Payment by Cosurety.* — *Magee v. Leggett*, 48 Miss. 139.

7. *Payment in Money Not Essential.* — *Owen v. McGehee*, 61 Ala. 440; *Pinkston v. Taliaferro*, 9 Ala. 547; *Bausman v. Credit Guarantee Co.*, 47 Minn. 377; *Combs v. Candler*, 95 Va. 7.

*But It Is Otherwise* where it does not appear that the note or other obligation was received by the creditor as payment, nor even that it was negotiable, so that a presumption might arise that it was received as payment. In such case the right of subrogation will not arise until payment of the obligation. *Hoover v. Epler*, 52 Pa. St. 522; *Combs v. Candler*, 95 Va. 7.

8. *Anything Accepted by Creditor as Equivalent of Money Sufficient.* — *Knighton v. Curry*, 62 Ala. 404; *Schoonover v. Allen*, 40 Ark. 132; *Keokuk v. Love*, 31 Iowa 119.

9. *Surety Entitled to All Rights of Creditor.* — See *supra*, this title, I. *Definition and General Principles* — *Nature and Extent of Rights Acquired*.

*A Surety Paying a Note Which Provides for Attorney's Fees* in case suit is brought is entitled to collect such fees from his principal, even though he paid the note without being sued thereon. *Beville v. Boyd*, 16 Tex. Civ. App. 491; *Carpenter v. Minter*, 72 Tex. 370. But to the contrary see *Cleveland v. Carr*, (Tex. Civ. App. 1897) 40 S. W. Rep. 406.

10. *Surety's Rights No Greater than Those of Creditor.* — *Heth Tp. v. Lewis*, 114 Ind. 508;

(2) *Debt Compromised or Paid in Depreciated Currency.* — Indemnification and not profit is the measure of the surety's recourse against his principal; he will not be permitted to speculate in the obligations of his principal.<sup>1</sup> Accordingly, if he compromises with the creditor and settles the debt by payment of a part,<sup>2</sup> or pays it in depreciated currency, warrants, or notes of banks or other institutions, the general rule is that he will be entitled to claim from the principal only the actual amount paid.<sup>3</sup> And in the cases of depreciated currency, warrants, and notes, it will be assumed that he paid only what is shown to be their market value, unless he proves the contrary.<sup>4</sup>

(3) *Rule Where Set-off Is Granted to Surety.* — Where the sureties in an action by the creditor against them plead and have allowed a set-off to a part of his claim, their right of subrogation will not be limited to the amount of the judgment against them for the balance, but will extend to the whole amount of the creditor's claim.<sup>5</sup>

c. *WHETHER PAYMENT BY SURETY EXTINGUISHES SPECIALTY* — (1) *Rule in England.* — According to the early English rule a bond or other specialty or a judgment is not extinguished by the payment thereof by the surety, but is in equity preserved for his benefit and protection.<sup>6</sup> But by a later rule in England the security was deemed *ipso facto* extinguished by the act of payment, thereby preventing the subrogation of the surety thereto; the claim of the latter against the principal being deemed a mere *assumpsit* for money paid to his use and benefit.<sup>7</sup> At present, however, the early rule again prevails by force of act of Parliament.<sup>8</sup>

(2) *Civil-law Rule.* — The principle of the civil law is absolute and unrestricted substitution; by that law, the debt in favor of the surety is treated not as a paid, extinguished debt, but as sold to him — all its original obligatory force continuing against the principal.<sup>9</sup>

(3) *Rule in United States.* — In the United States the decided preponderance of judicial opinion favors the view that the security is not extinguished, but is kept alive for the benefit of the surety in equity.<sup>10</sup> And this rule seems to

Morsell v. Baden, 22 Md. 391; Schur v. Schwartz, 140 Pa. St. 53; Barton v. Brent, 87 Va. 385; Hopewell v. Cumberland Bank, 10 Leigh (Va.) 214; Stephenson v. Taverners, 9 Gratt. (Va.) 398. And see *supra*, this title, I. *Definition and General Principles — Nature and Extent of Rights Acquired.*

1. *Surety Entitled to Indemnity Only.* — Schoonover v. Allen, 40 Ark. 132; Beville v. Boyd, 16 Tex. Civ. App. 491; Cleveland v. Carr, (Tex. Civ. App. 1897) 40 S. W. Rep. 406; Butler v. Butler, 8 W. Va. 674.

2. *Debt Compromised or Settled by Part Payment.* — Pickett v. Bates, 3 La. Ann. 627; Darrow v. Summerhill, 24 Tex. Civ. App. 208.

3. *Debt Paid in Depreciated Currency, Warrants, Notes, etc.* — Jordan v. Adams, 7 Ark. 348; Miles v. Bacon, 4 J. J. Marsh. (Ky.) 457; Crozier v. Grayson, 4 J. J. Marsh. (Ky.) 514; Dinkgrave's Succession, 31 La. Ann. 703; Martindale v. Brock, 41 Md. 571; Gillespie v. Creswell, 12 Gill & J. (Md.) 36; Blake v. Traders' Nat. Bank, 149 Mass. 250; Scott v. Scott, 83 Va. 251; Kendrick v. Forney, 22 Gratt. (Va.) 748; Feamster v. Withrow, 9 W. Va. 296; Butler v. Butler, 8 W. Va. 674.

4. *Presumption as to Value When Debt Is Paid in Depreciated Currency.* — Dinkgrave's Succession, 31 La. Ann. 703; Butler v. Butler, 8 W. Va. 674; Feamster v. Withrow, 9 W. Va. 296.

5. *Subrogation Not Reduced by Set-off.* — Keokuk v. Love, 31 Iowa 119.

6. *Early English Doctrine.* — *Ex p. Crisp*, 1

Atk. 133; Wright v. Morley, 11 Ves. Jr. 21; Parsons v. Briddock, 2 Vern. 608; Morgan v. Seymour, 1 Ch. Rep. 120. And see Robinson v. Wilson, 2 Madd. 434.

7. *Later English Rule.* — Copis v. Middleton, T. & R. 224; Hodgson v. Shaw, 3 Myl. K. 183.

8. *Present English Rule.* — Mercantile Law Amendment Act, 19 & 20 Vict., c. 97, § 5; *In re Cochran*, L. R. 5 Eq. 209; *In re M'Myn*, 33 Ch. D. 575.

9. *Civil-law Rule — Debt Not Extinguished.* — McClure v. Johnson, 10 Okla. 669; 1 Domat Civ. Law (Cush. ed.), bk. III., tit. 1, § 3, arts. 6, 7. And see 1 Story Eq. Jur. (13th ed.), c. 8, § 500.

This rule is adopted in all the countries which derive their jurisprudence from the civil law.

10. *Specialty or Judgment Not Extinguished by Payment — Alabama.* — Bragg v. Patterson, 85 Ala. 233. For the contrary rule, prevailing prior to the enactment of section 3157 of the code, see Preslar v. Stallworth, 37 Ala. 402; Smith v. Harrison, 33 Ala. 706; Houston v. Branch Bank, 25 Ala. 250; Hogan v. Reynolds, 21 Ala. 56, 56 Am. Dec. 236; Sanders v. Watson, 14 Ala. 199; Morrison v. Marvin, 6 Ala. 797; Bartlett v. McRae, 4 Ala. 688; Foster v. Athenæum, 3 Ala. 302.

*Arkansas.* — Newton v. Field, 16 Ark. 216; Schoonover v. Allen, 40 Ark. 132.

*Delaware.* — Merriken v. Godwin, 2 Del. Ch. 236; Dodd v. Wilson, 4 Del. Ch. 399.

*Georgia.* — Ezzard v. Bell, 100 Ga. 150; Pat-

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be more in consonance with the general principles of equitable subrogation than the rule which declares that the debt is extinguished by payment on the part of the surety. "It looks to the relations of the parties and the substantial rights and duties which are incident to such relations, and not to considerations purely technical, and considers that the debt and the evidence of it, and

*terson v. Clark*, 96 Ga. 494; *McWilliams v. Lee*, 76 Ga. 838; *Thomason v. Wade*, 72 Ga. 160; *Burke v. Lee*, 59 Ga. 165; *McDougald v. Dougherty*, 14 Ga. 674; *Lumpkin v. Mills*, 4 Ga. 344.

*Illinois*.—*Katz v. Moessinger*, 110 Ill. 372; *Chandler v. Higgins*, 109 Ill. 602; *Allen v. Powell*, 108 Ill. 584.

*Indiana*.—*Harter v. Songer*, 138 Ind. 161; *Johnson v. Amana Lodge No. 82*, 92 Ind. 150; *Gerber v. Sharp*, 72 Ind. 553. And see *Jones v. Tinch*, 15 Ind. 308, 77 Am. Dec. 92; *Vert v. Voss*, 74 Ind. 565.

*Iowa*.—*Searing v. Berry*, 58 Iowa 20; *Johnston v. Belden*, 49 Iowa 301. And see *Schleissman v. Kallenberg*, 72 Iowa 338, 2 Am. St. Rep. 247; *Hollingsworth v. Pearson*, 53 Iowa 53; *Bones v. Aiken*, 35 Iowa 534.

*Kansas*.—*Harris v. Frank*, 29 Kan. 200.

*Kentucky*.—*Roberts v. Bruce*, 91 Ky. 379.

*Louisiana*.—*Connely v. Bourg*, 16 La. Ann. 108, 79 Am. Dec. 568; *Fluker v. Bobo*, 11 La. Ann. 609; *Sprigg v. Beaman*, 6 La. 63; *Tardy v. Allen*, 3 La. Ann. 66; *Trent v. Calderwood*, 2 La. Ann. 942. Compare *McKee v. Amonett*, 6 La. Ann. 207. And see *supra*, this section, (2) *Civil-law Rule*.

*Maryland*.—*Hollingsworth v. Floyd*, 2 Har. & G. (Md.) 87; *Norwood v. Norwood*, 2 Har. & J. (Md.) 238; *Sotherton v. Reed*, 4 Har. & J. (Md.) 307; *Merryman v. State*, 5 Har. & J. (Md.) 423; *Orem v. Wrightson*, 51 Md. 44, 34 Am. Rep. 286; *Lawson v. Snyder*, 1 Md. 79; *Grove v. Brien*, 1 Md. 438; *Creager v. Brengle*, 5 Har. & J. (Md.) 234, 9 Am. Dec. 516; *Crisfield v. State*, 55 Md. 192.

*Michigan*.—*Smith v. Rumsey*, 33 Mich. 183.

*Minnesota*.—*McArthur v. Martin*, 23 Minn. 74.

*Mississippi*.—*Magee v. Leggett*, 48 Miss. 139.

*Missouri*.—*Benne v. Schneco*, 100 Mo. 250; *Campbell v. Pope*, 96 Mo. 468; *Berthold v. Berthold*, 46 Mo. 557; *Furnold v. State Bank*, 44 Mo. 336; *Seely v. Beck*, 42 Mo. 143; *McCune v. Belt*, 38 Mo. 281; *Miller v. Woodward*, 8 Mo. 169; *Harper v. Kemble*, 65 Mo. App. 514; *Harper v. Rosenberger*, 56 Mo. App. 388. Compare *McDaniel v. Lee*, 37 Mo. 204.

*Nebraska*.—*Eaton v. Lambert*, 1 Neb. 339; *Wilson v. Burney*, 8 Neb. 39; *Potvin v. Meyers*, 27 Neb. 749.

*New Hampshire*.—*Low v. Blodgett*, 21 N. H. 121; *Rockingham Bank v. Claggett*, 29 N. H. 292; *Brewer v. Franklin Mills*, 42 N. H. 292; *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207. Compare *Robinson v. Leavitt*, 7 N. H. 99.

*New Jersey*.—*Durand v. Trusdell*, 44 N. J. L. 597.

*New York*.—*Townsend v. Whitney*, 75 N. Y. 431, 15 Hun (N. Y.) 93; *Ellsworth v. Lockwood*, 42 N. Y. 98; *Lewis v. Palmer*, 28 N. Y. 271; *Eno v. Crooke*, 10 N. Y. 60; *Goodyear v. Watson*, 14 Barb. (N. Y.) 481; *Corey v. White*, 3 Barb. (N. Y.) 12 [*overruling Salina Bank v.*

*Abbot*, 3 Den. (N. Y.) 181, and *explaining and questioning Ontario Bank v. Walker*, 1 Hill (N. Y.) 652]; *Alden v. Clark*, (Supm. Ct. Gen. T.) 11 How. Pr. (N. Y.) 209; *Fielding v. Waterhouse*, 40 N. Y. Super. Ct. 424; *Waller v. Harris*, 7 Paige (N. Y.) 167; *Speiglemyer v. Crawford*, 6 Paige (N. Y.) 254; *Cuyler v. Ensworth*, 6 Paige (N. Y.) 32; *New York State Bank v. Fletcher*, 5 Wend. (N. Y.) 85; *Clason v. Morris*, 10 Johns. (N. Y.) 524; *Cheesebrough v. Millard*, 1 Johns. Ch. (N. Y.) 413, 7 Am. Dec. 494; *Harger v. McCullough*, 2 Den. (N. Y.) 119.

*Ohio*.—*Hill v. King*, 48 Ohio St. 75; *Neal v. Nash*, 23 Ohio St. 483. See also *Dempsey v. Bush*, 18 Ohio St. 376; *Neilson v. Fry*, 16 Ohio St. 552, 91 Am. Dec. 110.

*Oklahoma*.—*McClure v. Johnson*, 10 Okla. 663.

*Pennsylvania*.—*Budd v. Olver*, 148 Pa. St. 194; *Brown v. Black*, 96 Pa. St. 482; *Duffield v. Cooper*, 87 Pa. St. 443; *Wright v. Grover*, etc., *Sewing Mach. Co.*, 82 Pa. St. 80; *King v. Blackmore*, 72 Pa. St. 347, 13 Am. Rep. 684; *Hess's Estate*, 69 Pa. St. 272; *Richter v. Cummings*, 60 Pa. St. 441; *Springer v. Springer*, 43 Pa. St. 518; *McCormick v. Irwin*, 35 Pa. St. 111; *Cottrell's Appeal*, 23 Pa. St. 294; *Hill v. Voohries*, 22 Pa. St. 68; *Baily v. Brownfield*, 20 Pa. St. 41; *Gossin v. Brown*, 11 Pa. St. 527; *Morris v. Oakford*, 9 Pa. St. 498; *Himes v. Keller*, 3 W. & S. (Pa.) 401; *Erb's Appeal*, 2 P. & W. (Pa.) 296; *Fleming v. Beaver*, 2 Rawle (Pa.) 128, 19 Am. Dec. 629; *Farrow v. Yoder*, 9 Pa. Dist. 67, 23 Pa. Co. Ct. 326; *Kirby v. Coolbaugh*, 7 Pa. Super. Ct. 91. But see *Gring's Appeal*, 89 Pa. St. 336; *Lathrop's Appeal*, 1 Pa. St. 512; *Armstrong's Appeal*, 5 W. & S. (Pa.) 352.

*South Carolina*.—*Thompson v. Palmer*, 3 Rich. Eq. (S. Car.) 139; *Smith v. Swain*, 7 Rich. Eq. (S. Car.) 112; *Wilson v. Wright*, 7 Rich. L. (S. Car.) 399; *King v. Aughtry*, 3 Strobb. Eq. (S. Car.) 149; *Ex p. Ware*, 5 Rich. Eq. (S. Car.) 473; *Lenoir v. Wint*, 4 Desaus. (S. Car.) 65, 6 Am. Dec. 597; *Kinard v. Baird*, 20 S. Car. 377; *Sutton v. Sutton*, 26 S. Car. 33; *Garvin v. Garvin*, 27 S. Car. 472; *Perkins v. Kershaw*, 1 Hill Eq. (S. Car.) 344. But see *Pride v. Boyce*, *Rice Eq. (S. Car.)* 275, 33 Am. Dec. 78; *Cunningham v. Smith*, *Harp. Eq. (S. Car.)* 90.

*Tennessee*.—*M'Nairy v. Eastland*, 10 Yerg. (Tenn.) 310; *Rodes v. Crockett*, 2 Yerg. (Tenn.) 346, 24 Am. Dec. 489; *Bittick v. Wilkins*, 7 Heisk. (Tenn.) 307; *Wade v. Green*, 3 Humph. (Tenn.) 547. And see *Williams v. Tipton*, 5 Humph. (Tenn.) 66, 42 Am. Dec. 420; *Floyd v. Goodwin*, 8 Yerg. (Tenn.) 484, 29 Am. Dec. 130.

*Texas*.—*Slaughter v. Moore*, 17 Tex. Civ. App. 233; *Beville v. Boyd*, 16 Tex. Civ. App. 491; *Murphy v. Gage*, (Tex. Civ. App. 1893) 21 S. W. Rep. 396; *Tutt v. Thornton*, 57 Tex. 35 [*overruling Holliman v. Rogers*, 6 Tex. 97];

legal benefits built upon it in the form of liens, ought not to be considered as annihilated if the purposes of equity and justice require the contrary; and where the intention with which the payment is made requires that the security should survive, either generally or against particular persons, and the situation and relations of the parties will fairly admit it, a court of equity will generally, in this country, respect the intention, and treat the security as in being to the end designed, and recognize and enforce the right of subrogation."<sup>1</sup> But the specialty or judgment is kept alive in equity only, and not at law, unless otherwise provided by statute.<sup>2</sup>

**Various Views as to Assignment of Judgment.** — In some of the states it is held that a surety on paying a judgment is entitled to an assignment thereof,<sup>3</sup> and that, having taken such assignment, either to himself or to a third person, he may enforce the judgment against his principal.<sup>4</sup> In others it is held that

*Jordan v. Hudson*, 11 Tex. 82. But see *Faires v. Cockerell*, 88 Tex. 428 [*overruling Sublett v. McKinney*, 19 Tex. 438]; *Cleveland v. Carr*, (Tex. Civ. App. 1897) 40 S. W. Rep. 406; *Morris v. Davis*, (Tex. Civ. App. 1895) 31 S. W. Rep. 850, in which last-named case it was held that where one of two sureties paid a judgment before the lien thereof was fixed on the land, by record of the abstract, such judgment was discharged, and the one making the payment was remitted to a personal action against his co-obligor. And see also *Huggins v. White*, 7 Tex. Civ. App. 563, holding that the intention of the surety in purchasing the judgment is decisive.

*Virginia*. — *Old Dominion Bank v. Allen*, 76 Va. 200; *Coffman v. Hopkins*, 75 Va. 645; *Hill v. Manser*, 11 Gratt. (Va.) 522; *Rodgers v. M'Cluer*, 4 Gratt. (Va.) 81, 47 Am. Dec. 715; *Leake v. Ferguson*, 2 Gratt. (Va.) 419; *Watts v. Kinney*, 3 Leigh (Va.) 272, 23 Am. Dec. 266; *Tinsley v. Oliver*, 5 Munf. (Va.) 419; *Miller v. Pendleton*, 4 Hen. & M. (Va.) 436; *Tinsley v. Anderson*, 3 Call (Va.) 329. But see *Powell v. White*, 11 Leigh (Va.) 322; *Cromer v. Cromer*, 29 Gratt. (Va.) 280; *Kendrick v. Forney*, 22 Gratt. (Va.) 748; *Carr v. Glasscock*, 3 Gratt. (Va.) 333.

*Washington*. — *Murray v. Meade*, 5 Wash. 693.

*West Virginia*. — *Hawker v. Moore*, 40 W. Va. 49.

*Wisconsin*. — *German American Sav. Bank v. Fritz*, 68 Wis. 390.

1. *Smith v. Rumsey*, 33 Mich. 195, *per* Graves, J. And see *Lumpkin v. Mills*, 4 Ga. 343.

2. **Security Not Preserved at Law in Absence of Statute** — *Georgia*. — *Knight v. Morrison*, 79 Ga. 55, 11 Am. St. Rep. 405; *Griffin v. Thomas*, 21 Ga. 198; *Elam v. Rawson*, 21 Ga. 139; *McDougald v. Dougherty*, 14 Ga. 674; *Davenport v. Hardeman*, 5 Ga. 580.

*Iowa*. — *Drefahl v. Tuttle*, 42 Iowa 177; *Bones v. Aiken*, 35 Iowa 534.

*Maryland*. — *Crisfield v. State*, 55 Md. 192.

*Tennessee*. — *Miller v. Porter*, 5 Humph. (Tenn.) 294; *Uzzell v. Mack*, 4 Humph. (Tenn.) 319, 40 Am. Dec. 648; *Topp v. Branch of Alabama Bank*, 2 Swan (Tenn.) 184.

**Security Preserved at Law by Statute.** — In *Mississippi*, formerly, a surety paying a judgment against his principal was substituted to all the rights of the plaintiff in the judgment only in equity. *Dinkins v. Bailey*, 23 Miss.

284; *Conway v. Strong*, 24 Miss. 665. But by Code of Mississippi, 1871, § 2258, this right is protected at law also. *Swan v. Smith*, 57 Miss. 548. And payment by the surety operates *per se* as a transfer of the judgment. *Dibrell v. Dandridge*, 51 Miss. 55. And see *Yates v. Mead*, 68 Miss. 787. But compare *Taylor v. Alliance Trust Co.*, 71 Miss. 694.

3. **Surety Entitled to Assignment of Judgment** — *Iowa*. — *Searing v. Berry*, 58 Iowa 20. And see *Johnston v. Belden*, 49 Iowa 301; *Hollingsworth v. Pearson*, 53 Iowa 53.

*Kentucky*. — In Kentucky the surety is entitled by statute to an assignment of the judgment. *Duke v. Pigman*, (Ky. 1901) 62 S. W. Rep. 867; *Veach v. Wickersham*, 11 Bush (Ky.) 261; *Joyce v. Joyce*, 1 Bush (Ky.) 474; *Alexander v. Lewis*, 1 Met. (Ky.) 407. For the rule in this state before the enactment of the statute see *Morrison v. Page*, 9 Dana (Ky.) 433; *Morris v. Evans*, 2 B. Mon. (Ky.) 84, 36 Am. Dec. 591; *Joyce v. Joyce*, 1 Bush (Ky.) 474; *Buckner v. Morris*, 2 J. J. Marsh. (Ky.) 121; *Justices v. Lee*, 1 T. B. Mon. (Ky.) 247.

*Missouri*. — *Benne v. Schnecko*, 100 Mo. 250; *Campbell v. Pope*, 96 Mo. 468; *Harper v. Rosenberger*, 56 Mo. App. 388; *Berthold v. Berthold*, 46 Mo. 557.

*New York*. — *Smith v. National Surety Co.*, 46 N. Y. App. Div. 633.

*Pennsylvania*. — See *Porter v. Vanderlin*, 158 Pa. St. 146.

4. **Enforcement Against Principal.** — *Schleissman v. Kallenberg*, 72 Iowa 338, 2 Am. St. Rep. 247; *Kimmel v. Lowe*, 28 Minn. 265; *Folsom v. Carli*, 5 Minn. 333, 80 Am. Dec. 429; *Harper v. Kemble*, 65 Mo. App. 514; *Neal v. Nash*, 23 Ohio St. 483; *Cochran v. Shields*, 2 Grant Cas. (Pa.) 437. And see *Park v. Robinson*, 15 S. Dak. 551.

**In Alabama by Statute** (Code, § 3157) a surety who has paid a judgment rendered against his principal and himself, and taken an assignment of it to himself, may enforce such judgment against his principal. *Bragg v. Patterson*, 85 Ala. 233. But the assignment, to confer the statutory right, must be in writing, made by the plaintiff in the judgment or his agent or attorney of record. *Blackman v. Joiner*, 81 Ala. 344. And the statute, being in derogation of the principles of the common law, must be strictly construed as to the rights created by it. *Vanderveer v. Ware*, 65 Ala. 606.

**Right to Revive Dormant Judgment.** — As to

no assignment is necessary. The surety is considered on equitable principles as entitled to an assignment, and equity will consider that as done which ought to have been done, and, if necessary for his protection, will decree an assignment to be made.<sup>1</sup> In others still the assignment must be made to a third person, an assignment to the surety himself extinguishing the original obligation.<sup>2</sup>

**Judgment or Specialty Extinguished by Payment.** — In a few jurisdictions it is held that payment of a judgment or other specialty by a surety extinguishes the same, and remits the surety to his remedy as a simple contract creditor.<sup>3</sup>

**Joint Judgment Against Several Defendants.** — In some jurisdictions where a joint judgment is rendered against several defendants subrogation is not enforceable until the question of suretyship has been determined in a judicial proceeding.<sup>4</sup>

**Judgment Paid with Money of Third Person.** — A judgment which is paid with the money of a third person, without any agreement that the security shall be assigned or kept on foot for his benefit, is absolutely extinguished.<sup>5</sup>

**f. SUBROGATION TO RIGHT OF SET-OFF.** — Any right of set-off accruing to the principal may be availed of by the surety, if it grows out of the transac-

the right of a surety who has taken an assignment of a judgment against himself and his principal to revive such judgment when it has become dormant, see *Harper v. Kemble*, 65 Mo. App. 514; *Neal v. Nash*, 23 Ohio St. 483; *Peters v. McWilliams*, 36 Ohio St. 155.

**1. Actual Assignment Unnecessary.** — *Manford v. Firth*, 68 Ind. 83; *Duffield v. Cooper*, 87 Pa. St. 443; *Wright v. Grover, etc.*, *Sewing Mach. Co.*, 82 Pa. St. 80; *Fleming v. Beaver*, 2 Rawle (Pa.) 128, 19 Am. Dec. 629; *Eppes v. Randolph*, 2 Call (Va.) 125.

**2. Assignment to Third Person Required.** — *Browning v. Porter*, 116 N. Car. 62; *Liles v. Rogers*, 113 N. Car. 197, 37 Am. St. Rep. 627; *Tiddy v. Harris*, 101 N. Car. 589; *Bledsoe v. Nixon*, 68 N. Car. 521; *Hodges v. Armstrong*, 3 Dev. L. (14 N. Car.) 253; *Sherwood v. Collier*, 3 Dev. L. (14 N. Car.) 380, 24 Am. Dec. 264; *Briley v. Sugg*, 1 Dev. & B. Eq. (21 N. Car.) 366, 30 Am. Dec. 172; *Newbern v. Dawson*, 10 Ired. L. (32 N. Car.) 436; *Brown v. Long*, 1 Ired. Eq. (36 N. Car.) 191, 36 Am. Dec. 43; *Hanner v. Douglass*, 4 Jones Eq. (57 N. Car.) 263.

**The Only Modification of the Rule in North Carolina** is in favor of a surety who has paid the debt of a deceased principal. *Liles v. Rogers*, 113 N. Car. 197, 37 Am. St. Rep. 627.

**In Illinois** a surety on paying a judgment may have the same assigned to a third person to be kept alive for his benefit. *Katz v. Moessinger*, 110 Ill. 372; *Chandler v. Higgins*, 109 Ill. 602; *Rice v. Rice*, 108 Ill. 199; *Allen v. Powell*, 108 Ill. 584. Or he may treat the judgment as satisfied and discharged and resort to an action against his principal, and in the event of his choosing the latter course it is immaterial that there is a formal assignment of the judgment which he had procured to be made. Notwithstanding such assignment the surety may still treat the judgment as discharged and resort to his action. *Katz v. Moessinger*, 110 Ill. 372.

**3. Judgment or Specialty Extinguished by Payment** — *United States*. — *U. S. v. Preston*, 4 Wash. (U. S.) 446; *McLean v. Lafayette Bank*, 3 McLean (U. S.) 587; *Dennis v. Rider*, 2 McLean (U. S.) 451; *Findlay v. U. S. Bank*,

2 McLean (U. S.) 44. Compare *Lidderdale v. Robinson*, 2 Brock. (U. S.) 159, affirmed 12 Wheat. (U. S.) 594.

**Maine.** — *Whittier v. Heminway*, 22 Me. 238, 38 Am. Dec. 309; *Morse v. Williams*, 22 Me. 17. Compare *Norton v. Soule*, 2 Me. 341.

**Massachusetts.** — *Holmes v. Day*, 108 Mass. 563; *Adams v. Drake*, 11 Cush. (Mass.) 504; *Hammatt v. Wyman*, 9 Mass. 138; *Brackett v. Winslow*, 17 Mass. 153; *Pray v. Maine*, 7 Cush. (Mass.) 253.

**Nevada.** — *Frevort v. Henry*, 14 Nev. 191.

**In Vermont** payment of the debt by the surety extinguishes all liens or securities created or obtained in the proceedings to enforce its collection at law. *Moore v. Campbell*, 36 Vt. 361. Compare *Field v. Hamilton*, 45 Vt. 35.

But it seems that the surety may procure a third person to purchase the debt and take an assignment, and this will keep the debt on foot so as to enable him to get the benefit of the security. *Ætna Ins. Co. v. Wires*, 28 Vt. 93; *Bradley v. French*, Super. Ct. Windsor County, not reported, cited in *Moore v. Campbell*, 36 Vt. 361. and see *Bellows v. Allen*, 23 Vt. 169.

**4. Subrogation Not Enforceable until Suretyship Has Been Determined.** — *Todd v. Oglebay*, 158 Ind. 595; *Smith v. Harbin*, 124 Ind. 434; *Johnson v. Amana Lodge No. 82*, 92 Ind. 150; *Shields v. Moore*, 84 Ind. 440; *Kane v. State*, 78 Ind. 103; *Laval v. Rowley*, 17 Ind. 36. Compare *Stout v. Duncan*, 87 Ind. 383. And see *Montgomery v. Vickery*, 110 Ind. 211; *Harter v. Songer*, 138 Ind. 161; *Scherer v. Schultz*, 83 Ind. 543; *Peters v. McWilliams*, 36 Ohio St. 155; *Hill v. King*, 48 Ohio St. 75; *Budd v. Olver*, 148 Pa. St. 194.

**5. Judgment Paid by Third Person.** — *Hooper v. Robinson*, 98 U. S. 539; *St. Francis Mill Co. v. Sugg*, 83 Mo. 476; *Sandford v. McLean*, 3 Paige (N. Y.) 117, 23 Am. Dec. 773; *Banta v. Garmo*, 1 Sandf. Ch. (N. Y.) 384; *Terry v. O'Neal*, 71 Tex. 592; *National Bank v. Cushing*, 51 Vt. 326; *Janney v. Stephen*, 2 Patt. & H. (Va.) 11. And see *infra*, this title, VII. *Persons Paying or Advancing Money to Pay Debts of Others* — *In General* — *Volunteers and Strangers*.



tion in respect to which his obligation was assumed;<sup>1</sup> but it is otherwise if it grows out of a separate transaction.<sup>2</sup> But the "separate transaction" rule does not apply if the principal has availed himself of the set-off in a joint action against himself and the surety.<sup>3</sup> This privilege has been held not to extend to equitable defenses accruing to the principal by reason of the creditor's breach of contract — *e. g.*, a vendor's breach of his contract to convey good title.<sup>4</sup>

**g. WHEN SURETY IS NOT SUBROGATED — (1) Debt Paid by Principal Debtor.** — No right of subrogation arises in favor of the surety where the debt is paid by the principal debtor himself.<sup>5</sup>

(2) *Surety Indebted to Principal.* — If the surety is himself indebted to the principal, neither he nor his creditor will be subrogated to the rights of the creditor against the principal, so long as such indebtedness exists;<sup>6</sup> but the principal will not be permitted to collect the debt, without first indemnifying the surety, especially if he is shown to be insolvent.<sup>7</sup>

(3) *Debt Paid Not Enforceable Against Surety.* — A surety who has volun-

**1. Surety Entitled to Set-off Growing Out of Same Transaction — England.** — *Bechervaise v. Lewis*, L. R. 7 C. P. 272; *Murphy v. Glass*, L. R. 2 P. C. 408.

*Alabama.* — *Baines v. Barnes*, 64 Ala. 375; *Cole v. Justice*, 8 Ala. 793.

*Illinois.* — *Waterman v. Clark*, 76 Ill. 428.

*Indiana.* — *Myers v. State*, 45 Ind. 160; *Turner v. Simpson*, 12 Ind. 413; *Slayback v. Jones*, 9 Ind. 470.

*Kentucky.* — *Hughart v. Spratt*, 78 Ky. 313.

*Louisiana.* — *Stewart v. Levis*, 42 La. Ann. 37.

*Michigan.* — *McHardy v. Wadsworth*, 8 Mich. 350.

*Missouri.* — *Rubey v. Watson*, 22 Mo. App. 428.

*North Carolina.* — *Jarratt v. Martin*, 70 N. Car. 459.

*Tennessee.* — *Gill v. Morris*, 11 Heisk. (Tenn.) 614, 27 Am. Rep. 744; *Rodes v. Crockett*, 2 Yerg. (Tenn.) 346, 24 Am. Dec. 489.

And see the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM, vol. 25, pp. 540 *et seq.*, 558, 578.

**An Accommodation Indorser of a Note Given for Chattels Sold** may be subrogated in equity to a counterclaim or defense accruing to his principal on account of breach of warranty as to the quality of such chattels, where the principal is insolvent, or where, for any other reason, the allowance of such defense or counterclaim in favor of the indorser is essential to his protection. *Hiner v. Newton*, 30 Wis. 640; *McDonald Mfg. Co. v. Moran*, 52 Wis. 203.

**2. Surety Not Entitled to Set-off Arising from Separate Transaction.** — *Gillespie v. Torrance*, 25 N. Y. 306, 82 Am. Dec. 355, *affirming* 4 Bosw. (N. Y.) 36; *La Farge v. Halsey*, 1 Bosw. (N. Y.) 171; *Lasher v. Williamson*, 55 N. Y. 619. Unless the principal is insolvent. *Morgan v. Smith*, 70 N. Y. 537; *Coffin v. McLean*, 80 N. Y. 560. See also *Emery v. Baltz*, 22 Hun (N. Y.) 434; *Vastine v. Dinan*, 42 Mo. 269; *State v. Modrell*, 15 Mo. 421; *Thalheimer v. Crow*, 13 Colo. 397.

**3. When "Separate Transaction" Rule Does Not Apply.** — *Waterman on Set-off*, § 237; *Himrod v. Baugh*, 85 Ill. 435; *Harris v. Rivers*, 53 Ind. 216; *Concord v. Pillsbury*, 33 N. H. 310;

*Mahurin v. Pearson*, 8 N. H. 539; *Woods v. Carlisle*, 6 N. H. 27; *Bathgate v. Haskin*, 59 N. Y. 533; *Springer v. Dwyer*, 50 N. Y. 19; *Crist v. Brindle*, 2 Rawle (Pa.) 121; *Brundridge v. Whitecomb*, 1 D. Chip. (Vt.) 180; *Wartman v. Yost*, 22 Gratt. (Va.) 595.

**4. Equitable Defenses Arising from Creditor's Breach of Contract.** — *Lyon v. Leavitt*, 3 Ala. 430; *Lewis v. McMillen*, 41 Barb. (N. Y.) 420; *Henry v. Daley*, 17 Hun (N. Y.) 210; *Putnam v. Schuyler*, 4 Hun (N. Y.) 166; *Ross v. Woodville*, 4 Munf. (Va.) 324.

**5. Debt Paid by Principal Debtor.** — *Dilburn v. Youngblood*, 85 Ala. 449; *Morrison v. Cassell*, 25 Ill. 368; *Tarbell v. Parker*, 101 Mass. 165. And see *Shackelford v. Stockton*, 6 B. Mon. (Ky.) 390; *Kinley v. Hill*, 4 W. & S. (Pa.) 426.

**6. Surety Indebted to Principal.** — *Fulton v. Harrington*, 7 Houst. (Del.) 182; *Lewis v. Lewis*, 92 Ill. 237; *Wright v. Crump*, 25 Ind. 339; *Eaton v. Hasty*, 6 Neb. 419, 29 Am. Rep. 365; *Coates's Appeal*, 7 W. & S. (Pa.) 99. And see *Matthews v. Blanks*, 68 Ark. 497. *Compare* *Barney v. Grover*, 28 Vt. 391.

**The Principal May Set Off a Subsequent Liability** to him on the part of the surety, against the surety's demand for subrogation; as, when the principal afterwards becomes surety for his surety and as such discharges a liability of the latter. *Harrington v. Fulton*, 5 Del. Ch. 492.

But the surety's right of subrogation will not be affected by the fact that the principal has become surety on a note of the surety which was given only for the purpose of raising money to pay the original principal's debt. *Owen's Appeal*, 11 W. N. C. (Pa.) 488.

**7. Principal Required to Indemnify Surety.** — *Abbey v. Van Campen, Freeman*. (Miss.) 273; *Mattingly v. Sutton*, 19 W. Va. 19.

**Surety's Liability Available as Counterclaim.** — In *Walker v. Dicks*, 80 N. Car. 263, it was held that a surety, before he has suffered from his suretyship, may use his liability as such as an equitable counterclaim against a debt due from him to his insolvent principal. And this defense will avail him equally against an assignee of the note past due when assigned, or assigned with notice. See also *Scott v. Timberlake*, 83 N. Car. 382; *Dorsheimer v. Bucher*, 7 S. & R. (Pa.) 9.

tarily paid a debt of his principal which he could not have been compelled to pay, either because of his prior release from the obligation of suretyship,<sup>1</sup> or because of the bar of the statute of limitations, will not be entitled to subrogation.<sup>2</sup> Nor will the right be extended to a party who pays a debt for which he supposes himself to be liable as surety, when in fact he is under no legal obligation to pay.<sup>3</sup> But the right exists even though the debt paid by the surety was barred by limitation as against the principal, provided it constituted a valid obligation against the surety.<sup>4</sup>

(4) *Subrogation Unnecessary for Protection of Surety.* — It has been held that a surety will not be subrogated to the rights of the creditor, unless necessary for his protection.<sup>5</sup>

(5) *No Subrogation Against Rights Prior to Obligation of Suretyship.* — Subrogation will not be enforced in favor of a surety so as to defeat an interest acquired and held by a third party, when that interest, though subordinate to that of the creditor, is prior in date to the surety's undertaking.<sup>6</sup>

*h. VARIOUS INSTANCES OF SURETYSHIP* — (1) *Sureties of Decedents, Bankrupts, and Corporations.* — A surety of a decedent who pays a claim against the estate of his principal is subrogated to the rights of the creditor.<sup>7</sup>

A surety of a bankrupt will be substituted in the place of a creditor of the bankrupt whose claim he has satisfied.<sup>8</sup>

1. *Debt Not Enforceable Against Surety.* — *Kimble v. Cummins*, 3 Met. (Ky.) 327; *Spilman v. Smith*, 15 B. Mon. (Ky.) 134.

*Not Necessary that Payment Be Enforced by Execution.* — Provided the debt paid was enforceable, the surety is entitled to subrogation even though execution was not issued against him. *McNeilly v. Cooksey*, 2 Lea (Tenn.) 39.

*Debt Paid at Express Request of Principal.* — A surety who pays the debt of his principal at the express request of the latter will be subrogated to the rights of the creditor even though it turns out that the obligation could not have been enforced against him. *Lyth v. Green*, 21 N. Y. App. Div. 300.

2. *Payment of Debt Barred by Limitation.* — *Hatchett v. Pegram*, 21 La. Ann. 722; *Randolph v. Randolph*, 3 Rand. (Va.) 490.

3. *Belief of Surety as to Liability.* — *Dawson v. Lee*, 83 Ky. 49; *Bancroft v. Abbott*, 3 Allen (Mass.) 524; *State Bank v. Napier*, 46 N. Y. App. Div. 406.

*Where the Mistake Is One of Fact and not of law, the rule stated in the text does not apply, unless it should appear that the party had the means of correct information within his power, but negligently omitted to avail himself of them.* Accordingly, where one, in the belief that he was surety on the bond of an administrator, settled with the next of kin, who were under the same impression, the administrator being insolvent, he was adjudged entitled to be subrogated to the rights of the next of kin against the real sureties on the bond. *Copehart v. Mhoon*, 5 Jones Eq. (58 N. Car.) 178; *State Bank v. Napier*, 46 N. Y. App. Div. 406.

4. *Debt Barred as Against Principal but Valid as Against Surety.* — *Darrow v. Summerhill*, 24 Tex. Civ. App. 208.

5. *Subrogation Never Enforced When Unnecessary.* — *Myers v. Sierra Valley Stock, etc., Assoc.*, 122 Cal. 669; *Matter of Hewitt*, 25 N. J. Eq. 210. And see *Joliet, etc., R. Co. v. Healy*, 94 Ill. 416. Compare *Shirey v. Bicknell*, 87 Ill. App. 429.

*Burden of Showing Necessity on Person Claim-*

*ing Right.* — *Myers v. Sierra Valley Stock, etc., Assoc.*, 122 Cal. 669.

6. *Rights Prior to Obligation of Suretyship.* — *Fishback v. Bodman*, 14 Bush (Ky.) 117; *Farmers, etc., Bank v. Sherley*, 12 Bush (Ky.) 304; *Johnson v. Morrison*, 5 B. Mon. (Ky.) 106; *Patterson v. Pope*, 5 Dana (Ky.) 243.

7. *Surety of Decedent Entitled to Subrogation.* — *Harman v. Harman*, 62 Neb. 452; *Drake v. Coltrane*, Busb. L. (44 N. Car.) 300. And see *Taylor v. Taylor*, 8 B. Mon. (Ky.) 419, 48 Am. Dec. 400.

*Surety Entitled to Benefit of Steps Taken by Creditor to Collect.* — In *Brought v. Griffith*, 16 Iowa 26, it was held that a surety who pays the debt upon which he is liable, after the creditor has "stated, sworn to, and filed the same" as a claim against the estate of the deceased principal debtor, as required by Rev. Stat. of Iowa, § 2393, stands in the place of the creditor as to the steps already taken to enforce the claims against the estate, and is subrogated to his right to prosecute the same to an allowance and to demand payment of the administrator in the class in which it was placed by the original filing.

8. *Subrogation of Surety of Bankrupt.* — *Watkins v. Worthington*, 2 Bland (Md.) 509. See also the title *INSOLVENCY AND BANKRUPTCY*, vol. 16, p. 682.

*Repayment of Unlawful Preference a Condition Precedent.* — An accommodation maker, indorser, or surety on the obligations of a bankrupt, who pays them and takes them up after the principal debtor has given a preference thereon to their original holder, cannot present an allowable claim against the estate of the bankrupt, either for the amount owing by him upon the obligations or for the amount that the surety paid to take them up, unless the amount paid to give the preference is first returned to the estate of the bankrupt. *Swarts v. Siegel*, (C. C. A.) 117 Fed. Rep. 13. And see *infra*, this title, XIV. *Enforcement of Right — Claimant Required to Do Equity.*

**Sureties of Corporations.** — Directors of a corporation, who have become its sureties to creditors, will, on insolvency, be subrogated to the rights of the creditors.<sup>1</sup>

(2) **Sureties of Fiduciaries.** — The sureties of a fiduciary who are compelled to satisfy a liability occasioned by his default, *devastavit*, or breach of trust, will be subrogated to all the rights and remedies of the *cestuis que trustent*, creditors, or other beneficiaries, against the fiduciary and those participating in the default, *devastavit*, or breach of trust.<sup>2</sup> This rule is, perhaps, most frequently applied in favor of sureties on the bonds of defaulting administrators;<sup>3</sup> but it is equally applicable in favor of the sureties of guardians,<sup>4</sup> receivers,<sup>5</sup> and all other persons occupying a fiduciary relation.<sup>6</sup>

**Subrogation of Surety to Rights of Fiduciary.** — Where a trustee *bona fide* incurs expense, or pays out money in behalf of the trust fund to realize on the same, and the surety has to make good the expenditure, the latter is entitled to be subrogated to the rights of the trustee to reimbursement out of the trust fund.<sup>7</sup> So where an executor has a claim against the estate of his testator for commission, a surety on his bond, who is compelled to answer for his default, will be subrogated to such claim.<sup>8</sup>

**Payment by Surety as a Condition Precedent.** — Although the general rule is that the right to subrogation does not arise until the default of the principal has

1. **Directors Acting as Sureties Entitled to Subrogation.** — Taylor v. Gray, 59 N. J. Eq. 621. And see Sickels v. Herold, (C. Pl. Gen. T.) 15 Misc. (N. Y.) 116.

2. **Subrogation of Sureties of Fiduciaries.** — Farmers', etc., Bank v. Fidelity, etc., Co., 108 Ky. 384; Blake v. Traders' Nat. Bank, 145 Mass. 13; Pierce v. Holzer, 65 Mich. 263; Wernecke v. Kenyon, 66 Mo. 275; Thompson v. Humphrey, 83 N. Car. 416; Harris v. Harrison, 78 N. Car. 202; Wilson v. Doster, 7 Ired. Eq. (42 N. Car.) 231; Walker v. Crowder, 2 Ired. Eq. (37 N. Car.) 478; Fox v. Alexander, 1 Ired. Eq. (36 N. Car.) 340; McClelland v. Davis, 4 Lea (Tenn.) 97; Edmunds v. Venable, 1 Patt. & H. (Va.) 121. See also Pinckard v. Woods, 8 Gratt. (Va.) 140.

3. **Sureties of Administrators.** — Cowgill v. Linville, 20 Mo. App. 138; Rhame v. Lewis, 13 Rich. Eq. (S. Car.) 269; Kennedy v. Pickens, 3 Ired. Eq. (38 N. Car.) 147; Scott v. Patchin, 54 Vt. 253. And see Stetson v. Moulton, 140 Mass. 597.

**One of Two Sureties on an Administration Bond Who Pays One-half of a debt recovered against the insolvent administrator will not be subrogated to the rights of the creditor whose debt he has discharged, but to the rights of the administrator for whom the debt was paid.** Clark v. Williams, 70 N. Car. 679.

**When Not Subrogated.** — A surety of an administrator who has been compelled to pay a judgment recovered on his bond by the heirs cannot maintain a suit in equity against an agent of the administrator who has moneys belonging to the estate in his hands, since the remedy of the heirs themselves, in such a case, is limited to an action at law. Winslow v. Otis, 5 Gray (Mass.) 360.

4. **Sureties of Guardians.** — State v. Atkins, 53 Ark. 303; Gilbert v. Neely, 35 Ark. 25; McNeil v. Morrow, Rich. Eq. Cas. (S. Car.) 172.

**Subrogation to Right to Enforce Resulting Trust.** — The surety of a guardian who is compelled to make good to the ward or his personal representative the defalcation of his principal,

will, in equity, be subrogated to the ward's right to enforce a resulting trust against the guardian, arising out of the purchase by the latter of land with the funds of the ward, and may have such lands sold for his reimbursement. Rice v. Rice, 108 Ill. 199.

**When Not Subrogated.** — A surety on the bond of a guardian, who has been held liable for the default of his principal, is not entitled to a dividend from the assignee of the guardian under an assignment for benefit of creditors, where such assignment was made before the default by the guardian occurred. Church's Petition, 16 R. I. 231.

5. **Sureties of Receivers.** — Clark v. Harrisonville First Nat. Bank, 57 Mo. App. 277.

6. **A Surety on the Bond of an Assignee for the Benefit of Creditors who has been held liable for a devastavit by his principal is subrogated to the rights of the latter and of creditors against a third party who has participated in such devastavit.** Wheeler v. Hawkins, 116 Ind. 515.

**The Sureties of a Bank Cashier who have been compelled to make good a loss caused by stock-gambling transactions of their principal will be subrogated to the rights of the bank against the broker responsible for the loss.** Mendel v. Boyd, (Neb. 1902) 91 N. W. Rep. 860.

7. **Surety Subrogated to Rights of Trustee.** — Boyd v. Myers, 12 Lea (Tenn.) 175.

**The Surety of an Administrator who pays a debt of the intestate which the administrator had become bound to pay, is entitled to the same lien on the estate which the administrator would have had, had he paid the debt.** Gowing v. Bland, 2 How. (Miss.) 813.

**A Surety for the Trustees of a Church on their note for the payment of money advanced to build the church, who pays the obligation of the trustees, is entitled to be subrogated to their rights to enforce payment of the debt against the church.** Bushong v. Taylor, 82 Mo. 660.

8. **Surety of Executor Subrogated to Rights of Principal.** — Albro v. Robinson, 93 Ky. 195. And see Clark v. Williams, 70 N. Car. 679.

been made good, yet it seems that if he is insolvent, or there has been fraud, subrogation will be enforced before payment.<sup>1</sup>

**Voluntary Payment by Surety.** — It has been held that when the surety is bound to make good money owing by the guardian on his bond, he need not wait until judgment or execution, but may pay at once and succeed to all the securities of the creditors or beneficiaries in the bond, and also to all the securities in the hands of his cosureties, though they were intended for the latter's indemnification alone, unless he consented that they might be given to his exclusion. But in such a case the surety, by paying voluntarily, undertakes the burden of establishing the fact of his obligation to pay.<sup>2</sup>

(3) **Sureties on Official Bonds** — (a) **In General.** — Sureties on bonds of government officials, on being compelled to make good the default of their principal, will be subrogated to the position of the government, in respect of all its securities, liens, and priorities, for the purpose of enforcing reimbursement from their principal,<sup>3</sup> or contribution from their cosureties.<sup>4</sup> And it is immaterial how the government's right of priority originated — whether out of common-law prerogative, positive statute, or contract; once established that it is entitled to rank as a preferred creditor, the same preference will be upheld by way of subrogation for the benefit of the surety.<sup>5</sup>

**Where the Consideration of the Contract of Suretyship Is Illegal** the sureties are not entitled to subrogation.<sup>6</sup>

(b) **Sureties of State or County Treasurer.** — In accordance with the general principles already stated, sureties on the bonds of state<sup>7</sup> or county treasurers who are held liable for the defaults of their principals are subrogated to the rights of the state or county against such principals, and against all persons participating in their misfeasance.<sup>8</sup>

(c) **Sureties of Tax Collector.** — The sureties of a tax collector, on being compelled to make good a loss arising from the misappropriation of tax money by the collector, are entitled to be subrogated to all the rights and remedies of the government against their principal;<sup>9</sup> and they may follow the money in the hands of all persons who have received it with knowledge of its true

1. **When Subrogation Will Be Enforced Before Payment.** — *Bunting v. Ricks*, 2 Dev. & B. Eq. (22 N. Car.) 130, 32 Am. Dec. 699; *Powell v. Jones*, 1 Ired. Eq. (36 N. Car.) 337; *Adams v. Gleaves*, 10 Lea (Tenn.) 367.

2. **Voluntary Payment by Surety.** — *Fishback v. Weaver*, 34 Ark. 569.

3. **Sureties on Official Bonds.** — *Hunter v. U. S.*, 5 Pet. (U. S.) 173; *Knighton v. Curry*, 62 Ala. 404; *West v. His Creditors*, 3 La. Ann. 529; *Miller v. Woodward*, 8 Mo. 169; *Dias v. Bouchaud*, 10 Paige (N. Y.) 445; *Myers v. Miller*, 45 W. Va. 595.

**Sureties on the Bond of a Court Clerk**, who have been held liable for the default of their principal, will be subrogated to the rights of the state against a bank which has participated in such default. *American Bonding Co. v. National Mechanics' Bank*, (Md. 1903) 55 Atl. Rep. 395.

But where fraudulent witness certificates issued by a deputy clerk have been sold to innocent purchasers for value, sureties upon the official bond of the clerk have no right of subrogation against such purchasers upon being compelled to reimburse the state for money paid thereon. *Stewart v. Com.*, 104 Ky. 489.

4. **Contribution from Cosureties Enforced by Subrogation.** — *Jackson v. Davis*, 4 Mackey (D. C.) 194; *Orem v. Wrightson*, 51 Md. 34, 34 Am. Rep. 286; *Robertson v. Trigg*, 32 Gratt. (Va.) 76.

5. **Origin of Government's Right of Priority Immaterial.** — *Jackson v. Davis*, 4 Mackey (D. C.) 194; *Orem v. Wrightson*, 51 Md. 34, 34 Am. Rep. 286; *Myers v. Miller*, 45 W. Va. 595.

6. *Ramsay v. Whitbeck*, 183 Ill. 550, holding that persons who have become sureties upon the bond of a public officer under a contract providing for the deposit of public funds in a private bank, contrary to law, were not subrogated to the rights of the state against the officer, on making good his default.

7. **Surety of State Treasurer Subrogated to Rights and Priorities of State.** — *Whitbeck v. Ramsay*, 74 Ill. App. 524.

8. **Surety of County Treasurer.** — *Stokes v. Little*, 65 Ill. App. 255; *Skipwith v. Hurt*, 94 Tex. 322.

**Measure of Recovery.** — In *Pennsylvania*, a surety on the bond of a county treasurer, upon being compelled to make good the default of his principal, will be subrogated to the rights of the county upon the bond, and without any formal order of substitution may claim thereon a dividend out of the assigned estate of the treasurer. In such a case the dividend is to be awarded, not upon the penalty named in the bond, but upon the amount the surety has been compelled to pay; the latter being the real debt. *Boltz's Estate*, 133 Pa. St. 77.

9. **Sureties of Tax Collector.** — *Schuessler v. Dudley*, 80 Ala. 547, 60 Am. Rep. 124; *Irby v. Livingston*, 81 Ga. 281; *Hook v. Richeson*,

character.<sup>1</sup> In some jurisdictions, sureties of tax collectors on making good the default of their principal arising from his failure to collect taxes are held to be entitled to subrogation to the rights and remedies of the government against the derelict taxpayers,<sup>2</sup> while in other jurisdictions this right is denied.<sup>3</sup>

(a) *Sureties of Sheriff.* — As a general rule sureties on the official bond of a sheriff who have been obliged to answer for the default of their principal are entitled to relief by subrogation.<sup>4</sup> Thus where they pay a judgment against the sheriff for an erroneous seizure of property they will be subrogated to his rights in respect to any indemnity which he may have demanded and received from the judgment creditor,<sup>5</sup> and also to the rights of the owner of the property seized against the party in whose favor the seizure was made.<sup>6</sup> If they are obliged to pay a judgment on account of the failure of the sheriff to return a writ or make collection of a debt, they are entitled to be subrogated to the lien of the judgment creditor.<sup>7</sup> If held liable for his failure to pay over money collected on execution, they are subrogated to the rights of the execution plaintiff both against the sheriff and the execution defendant.<sup>8</sup> And sureties of a sheriff who are held liable for the default of a deputy will be subrogated to all the rights of their principal against such deputy and his sureties.<sup>9</sup>

(4) *Sureties of Vendee and Vendor of Lands or Chattels* — (a) *Sureties of Vendee.* — A surety for the purchase price of land has a right to be subrogated to the lien of the vendor on the land, on being compelled to discharge the obligation of his principal.<sup>10</sup> So, sureties for the purchase price of land sold

115 Ill. 431; *Richeson v. Crawford*, 94 Ill. 165; *Baker v. Fidelity, etc., Co.*, 73 S. W. Rep. 1025, 24 Ky. L. Rep. 2196; *Myers v. Miller*, 45 W. Va. 595.

*Sureties Not Volunteers Though Bond Is Irregular.* — *Boone County Bank v. Byrum*, 68 Ark. 71.

*No Subrogation Where Debt Paid Is Really That of Surety.* — *Turner v. Teague*, 73 Ala. 554.

*Waiver of Right of Subrogation.* — *Crawford v. Richeson*, 101 Ill. 351.

1. *A Bank Which Has Participated in the Misappropriation of Tax Moneys* by the collector will be held liable to the sureties of that officer where such sureties have been obliged to make good the default. *Carroll County Bank v. Rhodes*, 69 Ark. 43; *Boone County Bank v. Byrum*, 68 Ark. 71, in which latter case it was also held that the defendant bank could not avail itself of the objection that the sureties had not paid to the state the interest or penalty imposed by statute for the default of their principal.

*It Is No Defense* that the party receiving the money received it in payment for property sold, if at the time he had notice, actual or constructive, of the character of the money; but a *bona fide* seller for a valuable consideration without notice, actual or constructive, is entitled to full protection. *Brown v. Houck*, 41 Hun (N. Y.) 16.

2. *Sureties Entitled to Subrogation Against Delinquent Taxpayers.* — *Livingston v. Anderson*, 80 Ga. 175. See also *White v. State*, 51 Ga. 252; *Prather v. Johnson*, 3 Har. & J. (Md.) 487.

3. *Contra* — *Sureties Not Subrogated Against Taxpayers.* — *Jones v. Gibson*, 82 Ky. 561. See also *Wallace's Estate*, 50 Pa. St. 401; *Hinchman v. Morris*, 29 W. Va. 673.

4. *Sureties of Sheriff Entitled to Subrogation.* — *Sweet v. Jeffries*, 48 Mo. 279.

*Sureties of Deputy Sheriff.* — *Philbrick v. Shaw*, 61 N. H. 356.

*Rights of Sureties Where Sheriff Acts as Tax Collector.* — See *supra*, this section, *Sureties of Tax Collector*.

5. *Liability for Wrongful Seizure.* — *People v. Schuyler*, 4 N. Y. 173. And see *Meyer Bros. Drug Co. v. Davis*, 68 Ark. 112.

6. *Skiff v. Cross*, 21 Iowa 459.

7. *Failure to Return Writ or Collect Debt.* — *Bittick v. Wilkins*, 7 Heisk. (Tenn.) 307; *Faires v. Cockerell*, 88 Tex. 428; *Sayles v. Taylor*, 36 Tex. 313.

*In Mississippi, by Statute*, where a sheriff fails to make due return of an execution, and the plaintiff moves against him and his sureties and obtains judgment, and recovers from him the amount thereof, he is entitled to sue out a new execution on the original judgment and collect the money for his own use; but the statute does not authorize the sureties of the sheriff who have paid money for him, he being dead, to pursue the same course. *Dillon v. Cook*, 5 Smed. & M. (Miss.) 773.

*Technical Failure to Return Writ* — *Sureties Not Subrogated.* — Where a sheriff has collected money under legal process and has properly applied it to the satisfaction of the writ, his sureties have no right of subrogation even though they are compelled to answer for his default in failing to return the writ. *Wright v. Fitzgerald*, 17 Ohio St. 635.

8. *Officer's Failure to Pay Over Money.* — *Saint v. Ledyard*, 14 Ala. 244. Compare *Bellogs v. Allen*, 23 Vt. 169.

9. *Default of Deputy.* — *Brinson v. Thomas*, 2 Jones Eq. (55 N. Car.) 414, 67 Am. Dec. 224; *Blalock v. Penke*, 3 Jones Eq. (56 N. Car.) 323; *Nebergall v. Tyree*, 2 W. Va. 474.

10. *Surety of Vendee Subrogated to Vendor's Lien* — *Arkansas.* — *Beattie v. Dickinson*, 39 Ark. 205.

under a decree of a court of equity, where the title is retained until the purchase price is paid, are entitled, on the insolvency of their principal, before payment of the debt, to enjoin the conveyance of the land and to have it applied to their relief, even though the purchaser has assigned his interest therein to a third person.<sup>1</sup> And where a judgment is recovered for the purchase price of land a surety of the vendee, on paying such judgment, is subrogated to the lien thereof against all land owned by his principal in the county where the judgment is docketed, including the land purchased.<sup>2</sup>

**Rights as Against Subsequent Purchasers.**—A surety for the purchase price of land cannot assert his right to subrogation as against a subpurchaser of part of the tract, when the purchase money paid by the latter has been applied in partial payment of the note on which the surety was bound.<sup>3</sup> It seems, however, that the surety may be subrogated to the right of the vendor to maintain an action against a subsequent purchaser of the property, to rescind the sale as simulated and fraudulent, although made before payment by him of the principal's debt.<sup>4</sup>

**Where the Vendor Retains No Lien** the doctrine of subrogation is, of course, inapplicable.<sup>5</sup>

(b) **Sureties of Vendor.**—The sureties of a vendor of land, on a bond to make title to the purchaser, may, on being held liable for the default of their prin-

*Indiana.*—*Ballew v. Roler*, 124 Ind. 557; *Gerber v. Sharp*, 72 Ind. 553.

*Kentucky.*—*Barnes v. Barnes*, (Ky. 1903) 72 S. W. Rep. 282; *Riggs v. Chapman*, (Ky. 1898) 46 S. W. Rep. 692; *Highland v. Anderson*, (Ky. 1891) 17 S. W. Rep. 866; *Burk v. Chrisman*, 3 B. Mon. (Ky.) 50.

*Maryland.*—*Tuck v. Calvert*, 33 Md. 209; *Ghiselin v. Fergusson*, 4 Har. & J. (Md.) 522; *Magruder v. Peter*, 11 Gill & J. (Md.) 217.

*Missouri.*—*Fulkerson v. Brownlee*, 69 Mo. 371.

*North Carolina.*—*Stenhouse v. Davis*, 82 N. Car. 432; *Ex p. Pettillo*, 80 N. Car. 50; *Walke v. Moody*, 65 N. Car. 599; *Ferrer v. Barrett*, 4 Jones Eq. (57 N. Car.) 455.

*Pennsylvania.*—*Deitzler v. Mishler*, 37 Pa. St. 82.

*Tennessee.*—*Carter v. Sims*, 2 Heisk. (Tenn.) 166; *Ellis v. Roscoe*, 4 Baxt. (Tenn.) 418; *Uzzell v. Mack*, 4 Humph. (Tenn.) 319, 40 Am. Dec. 648.

*Texas.*—*Faires v. Cockerell*, 88 Tex. 428.

*Virginia.*—*Hatcher v. Hatcher*, 1 Rand. (Va.) 53.

**Contra.**—*McNeill v. McNeill*, 36 Ala. 109, 76 Am. Dec. 320; *Foster v. Athenæum*, 3 Ala. 302.

**Who a Surety Within Rule.**—Where an assignee receives a promissory note of a third person before maturity, in consideration of the tuted to the lien of the vendor on the land, and, executes a bond to the assignor to make him a deed when the note is collected or paid, the maker of the note becomes thereby a surety for the assignor, and will be entitled to be substituted to the lien of the vendor on the land, and, the payee being insolvent, to have the land sold for his indemnity in advance of the payment of the debt. *Gallihier v. Gallihier*, 10 Lea (Tenn.) 23.

**Concealment and Bad Faith** on the part of one surety for the purchase price of land will not deprive his cosureties of their rights of subrogation to the vendor's lien where they are otherwise entitled thereto. *Kleiser v. Scott*, 6 Dana (Ky.) 138.

**Surety of Vendee in Ejectment Proceedings.**—Where upon a sale of land the vendor agrees to reimburse the vendee for all expenses incurred by the latter in perfecting his title to the land conveyed, a surety of the vendee in ejectment proceedings who is compelled to pay damages and interest in consequence of the failure of the suit will be subrogated to the rights of the vendee against the vendor for reimbursement. *American Land Co. v. Grady*, 33 Ark. 550.

**Surety for Purchase Price of Chattel Entitled to Subrogation.**—*Myres v. Yapple*, 65 Mich. 403, 60 Mich. 339.

**1. Sureties for Price of Land Sold under Decree of Court.**—*Green v. Crockett*, 2 Dev. & B. Eq. (22 N. Car.) 390; *Polk v. Gallant*, 2 Dev. & B. Eq. (22 N. Car.) 395, 34 Am. Dec. 410; *Shoffner v. Fogleman*, Winst. Eq. (60 N. Car.) 12; *Arnold v. Hicks*, 3 Ired. Eq. (38 N. Car.) 17; *Barnes v. Morris*, 4 Ired. Eq. (39 N. Car.) 22; *Egerton v. Alley*, 6 Ired. Eq. (41 N. Car.) 188. See also *Myres v. Yapple*, 60 Mich. 339; *Torp v. Gulseth*, 37 Minn. 135; *Smith v. Schneider*, 23 Mo. 447; *Henry v. Compton*, 2 Head (Tenn.) 549.

**2. Subrogation to Lien of Judgment for Price.**—*Woods v. Douglas*, 46 W. Va. 657.

**3. Subrogation as Against Subpurchaser.**—*Sawyers v. Baker*, 72 Ala. 50.

**4. Subrogation to Right to Rescind Sale.**—*Groves v. Steel*, 2 La. Ann. 480, 46 Am. Dec. 551. See also *Torregano v. Segura*, 2 Mart. N. S. (La.) 158; *Tatum v. Tatum*, 1 Ired. Eq. (36 N. Car.) 113.

**5. Failure to Retain Vendor's Lien.**—*Miller v. Miller*, Phil. Eq. (62 N. Car.) 85. See also *Bradford v. Marvin*, 2 Fla. 463.

**Lien Refused to Vendor — Res. Judicata as Against Surety.**—Where a surety pays a judgment on a purchase-money note, obtained by the vendor against himself and principal, but in the suit the court refuses to decree a vendor's lien on the land, he may not subsequently claim to be entitled to such a lien by subrogation to the rights of the vendor; being a party to the action in which the vendor was refused a lien,

principal, be subrogated to the equitable rights of the vendee as against a subsequent purchaser of the land at a sheriff's sale against the insolvent vendor.<sup>1</sup>

(5) *Surety of Surety*. — The sureties of a surety and also the assignees of a surety are entitled, precisely as the original surety, to be substituted in the place of the creditor as to all the latter's remedies against the principal debtor or his estate.<sup>2</sup> But the surety of a surety, though compelled to pay the creditor, is not entitled to be substituted to the latter's position for the purpose of enforcing payment against the principal debtor if the latter has paid the immediate surety.<sup>3</sup>

(6) *Cosureties*. — A surety who is compelled to pay the debt of his principal is entitled to be subrogated to all the rights and remedies of the creditor as against his cosureties<sup>4</sup> or against another party who has assumed the payment of the debt, in precisely the same manner as against the principal debtor,<sup>5</sup> unless subrogation would work injustice to intervening creditors.<sup>6</sup> But the extent of this right will be regulated by what he actually pays; he may not speculate in the common debt to the disadvantage of his principal. Accordingly, the cosureties will be entitled to the benefit of any compromise effected by the paying surety, or any discount that he has obtained by paying the common debt in depreciated currency, notes of banks, or the like.<sup>7</sup>

(7) *Successive Sureties*. — A surety on paying the debt of his principal will be subrogated to the rights of the creditor against a subsequent surety.<sup>8</sup> So, a surety on a second bond for the same debt will, on paying the first bond and taking an assignment thereof, be substituted to the rights of the obligee in the first bond against the estate of the deceased obligor.<sup>9</sup> But a surety is not entitled to subrogation against a subsequent guarantor of the principal debtor.<sup>10</sup>

(8) *Wife as Surety for Husband*. — The general rule, that a surety paying

he is bound by that adjudication. *Blake v. Koons*, 71 Iowa 356.

1. *Vendor's Sureties Subrogated to Rights of Vendee*. — *Freeman v. Mebane*, 2 Jones Eq. (55 N. Car.) 44.

2. *Surety or Assignee of Surety Entitled to Subrogation*. — *Hall v. Smith*, 5 How. (U. S.) 96; *Dodd v. Wilson*, 4 Del. Ch. 399; *King v. Baldwin*, 2 Johns. Ch. (N. Y.) 554; *Cheesebrough v. Millard*, 1 Johns. Ch. (N. Y.) 412, 7 Am. Dec. 494; *Cuyler v. Ensworth*, 6 Paige (N. Y.) 32; *Elwood v. Deifendorf*, 5 Barb. (N. Y.) 398; *Rittenhouse v. Levering*, 6 W. & S. (Pa.) 190; *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274; *Leake v. Ferguson*, 2 Gratt. (Va.) 419.

3. *When Not Subrogated Against Principal Debtor*. — *New York State Bank v. Fletcher*, 5 Wend. (N. Y.) 85.

4. *Surety Subrogated Against Cosureties*. — *Lidderdale v. Robinson*, 2 Brock. (U. S.) 160, *affirmed* 12 Wheat. (U. S.) 594; *Hollingsworth v. Pearson*, 53 Iowa 53; *Felton v. Bissel*, 25 Minn. 15; *Cuyler v. Ensworth*, 6 Paige (N. Y.) 32; *Blanton v. Bostic*, 126 N. Car. 418; *Croft v. Moore*, 9 Watts (Pa.) 451; *Hess's Estate*, 69 Pa. St. 272; *Fleming v. Beaver*, 2 Rawle (Pa.) 128, 19 Am. Dec. 629; *Burrows v. M'Whann*, 1 Desaus. (S. Car.) 409, 1 Am. Dec. 677; *German American Sav. Bank v. Fritz*, 68 Wis. 390.

In Order to Secure the Benefit of the Lien of a Judgment as against a cosurety, the paying surety should ordinarily resort to an equitable proceeding. *Hull v. Sherwood*, 59 Mo. 173; *McDaniel v. Lee*, 37 Mo. 204.

Yet when such cosurety has made a motion, based on such payment, that the judgment be

canceled and declared satisfied as to all the defendants, the court may order the judgment to stand as against him to the extent of his liability to contribute, and may award execution thereon against him for that amount. *German American Sav. Bank v. Fritz*, 68 Wis. 390.

5. *Surety Subrogated Against Party Assuming Payment of Debt*. — *Rodenbarger v. Bramblett*, 78 Ind. 213; *Gilbert v. Adams*, 99 Iowa 519; *Rodes v. Crockett*, 2 Yerg. (Tenn.) 346, 24 Am. Dec. 489.

6. *No Subrogation to Prejudice of Intervening Creditors*. — *Himes v. Keller*, 3 W. & S. (Pa.) 401; *Lloyd v. Galbraith*, 32 Pa. St. 103.

7. *Right Limited to Amount of Actual Payment*. — *Owen v. McGehee*, 61 Ala. 440; *Jones v. Bradford*, 25 Ind. 305; *Hickman v. McCurdy*, 7 J. J. Marsh. (Ky.) 555; *Fuselier v. Babineau*, 14 La. Ann. 777; *New Bedford Sav. Inst. v. Hathaway*, 134 Mass. 69, 45 Am. Rep. 289; *Kelly v. Page*, 7 Gray (Mass.) 213; *Apperson v. Wilbourn*, 58 Miss. 440; *Sinclair v. Redington*, 56 N. H. 146; *Edmonds v. Sheahan*, 47 Tex. 443; *Tarr v. Ravenscroft*, 12 Gratt. (Va.) 642. And see *supra*, this section, *d. How Far Subrogation Will Be Carried*.

8. *Surety Subrogated Against Subsequent Surety*. — *McCormick v. Irwin*, 35 Pa. St. 111.

As to Successive Sureties in Judicial Proceedings, see *infra*, this section, *Sureties in Judicial Proceedings* — *Subrogation as Between Successive Sureties*.

9. *Surety on Second Bond Paying First Bond*. — *Hodgson v. Shaw*, 3 Myl. & K. 183.

10. *Surety Not Subrogated Against Subsequent Guarantor*. — *Longley v. Griggs*, 10 Pick. (Mass.) 121. And see *Hamilton v. Johnston*, 82 Ill. 39.

the debt of his principal is entitled to subrogation, applies in favor of a wife who has become surety for the debt of her husband.<sup>1</sup> A wife who joins with her husband in a mortgage of her own property to secure his debts occupies the position of a surety<sup>2</sup> and is entitled to be subrogated to the rights of the creditor against her husband's property.<sup>3</sup> If she joins in a mortgage relinquishing her dower in her husband's estate, she will, on redeeming the mortgage with her own means, be subrogated to the benefits thereof, as against intervening lien creditors.<sup>4</sup>

(9) *Sureties in Judicial Proceedings* — (a) *In General*. — A surety on an appeal bond who pays the judgment after affirmance is entitled to be subrogated to the rights of the plaintiff in the judgment.<sup>5</sup> And the same equity arises in favor of sureties who have been held liable on bonds for the stay of execution,<sup>6</sup> bonds to restrain the enforcement of judgments,<sup>7</sup> forthcoming bonds,<sup>8</sup> and

1. *Wife as Surety Entitled to Subrogation*. — *In re Nickerson*, 116 Fed. Rep. 1003.

*Wife Entitled to Subrogation Against Subsequent Lien Creditors*. — Subsequent lien creditors cannot compel the sale of the wife's property to pay the husband's debt for which she is surety, so as to give them the benefit of the husband's property. If her property is taken to pay a prior lien against her husband, for which she is surety, she is entitled to be subrogated thereto as against subsequent lien creditors. *Hall v. Hyer*, 48 W. Va. 353.

2. See generally the title SEPARATE PROPERTY OF MARRIED WOMEN, vol. 25, p. 417.

3. *Wife Joining in Mortgage with Husband a Surety* — *England*. — *Aguilar v. Aguilar*, 5 Madd. 414.

*California*. — *Hassey v. Wilke*, 55 Cal. 525; *Spear v. Ward*, 20 Cal. 659.

*Indiana*. — *Orr v. White*, 106 Ind. 341; *Keller v. Orr*, 106 Ind. 406; *Carithers v. Stuart*, 87 Ind. 424; *Moffitt v. Roche*, 77 Ind. 48; *Medsker v. Parker*, 70 Ind. 509.

*Kansas*. — *Burtis v. Wait*, 33 Kan. 478; *Hubbard v. Ogden*, 22 Kan. 363.

*Maryland*. — *Snook v. Munday*, 96 Md. 514; *Johns v. Reardon*, 11 Md. 465.

*Massachusetts*. — *Savage v. Winchester*, 15 Gray (Mass.) 453.

*Michigan*. — *Carley v. Fox*, 38 Mich. 387.

*Minnesota*. — *Allis v. Ware*, 28 Minn. 166; *Agnew v. Merritt*, 10 Minn. 308; *Wolf v. Banning*, 3 Minn. 202.

*Missouri*. — *Barrett v. Davis*, 104 Mo. 549; *Wilcox v. Todd*, 64 Mo. 388.

*New Jersey*. — *McFillin v. Hoffman*, 42 N. J. Eq. 144; *Hanford v. Bockee*, 20 N. J. Eq. 101.

*New York*. — *Erie County Sav. Bank v. Roop*, 80 N. Y. 591; *Albion Bank v. Burns*, 46 N. Y. 170; *Smith v. Townsend*, 25 N. Y. 479; *Vartie v. Underwood*, 18 Barb. (N. Y.) 563; *Van Horne v. Everson*, 13 Barb. (N. Y.) 526; *Hawley v. Bradford*, 9 Paige (N. Y.) 200, 37 Am. Dec. 390; *Neimcewicz v. Gahn*, 3 Paige (N. Y.) 614, 11 Wend. (N. Y.) 312; *Loomer v. Wheelwright*, 3 Sandf. Ch. (N. Y.) 135; *Fitch v. Cothel*, 2 Sandf. Ch. (N. Y.) 29.

*North Carolina*. — *Gore v. Townsend*, 105 N. Car. 228; *Parvis v. Carstaphan*, 73 N. Car. 575.

*Ohio*. — *Eisenberg v. Albert*, 40 Ohio St. 631.

*Pennsylvania*. — *Sheidle v. Weishlee*, 16 Pa. St. 134.

*Tennessee*. — *Roach v. Hacker*, 2 Lea (Tenn.) 633.

**A Wife Whose Separate Estate Has Been Taken**

under Foreclosure of a mortgage executed by her to secure a loan to her husband will be subrogated to the rights of the mortgagee against a third party who has converted a draft accepted by the mortgagee to insure the making of the loan secured by the mortgage. *Tobin v. Kirk*, 73 Hun (N. Y.) 229.

4. *Wife Redeeming from Mortgage Subrogated Thereto*. — *Jefferson v. Edrington*, 53 Ark. 545. And in this case it was held that this right was not affected by the fact that there was no proof of a specific intent at the time of payment to keep the mortgage alive. And see *infra*, this title, *Persons Interested in Encumbered Estates*.

5. *Sureties on Appeal Bonds*. — *Smith v. National Surety Co.*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 628, affirmed 46 N. Y. App. Div. 633; *Green v. Milbank*, (Supm. Ct. Spec. T.) 3 Abb. N. Cas. (N. Y.) 138; *Faires v. Cockerell*, 88 Tex. 428; *Black v. Epperson*, 40 Tex. 180; *Hill v. Manser*, 11 Gratt. (Va.) 522; *Leake v. Ferguson*, 2 Gratt. (Va.) 420; *Rodgers v. M'Cluer*, 4 Gratt. (Va.) 81, 47 Am. Dec. 715; *M'Clung v. Beirne*, 10 Leigh (Va.) 410, 34 Am. Dec. 739. And see *McDonald v. Assay*, 37 Ill. App. 469. *Compare Babbitt v. McDermott*, (N. J. 1893) 26 Atl. Rep. 889; *Wadley v. Poucher*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 50.

**Rights as Against Other Lienholders**. — Sureties in an appeal bond who pay the same have no equities superior to those of incumbrancers subsequent to the lien of the plaintiff in the judgment appealed from but prior to the undertaking of the sureties themselves. *Powell v. Allen*, 11 Ill. App. 129.

But their equities are superior to those of a purchaser in good faith, who buys the land on which the judgment is a lien after the execution of the appeal bond. *Peirce v. Higgins*, 101 Ind. 178.

6. *Surety in Stay Bond*. — *Davis v. Schlemmer*, 150 Ind. 472; *Dessar v. King*, 110 Ind. 69. And see *Johnson v. Morrison*, 5 B. Mon. (Ky.) 106.

**Sureties on a Bond to Stay Execution on appeal**, who, after affirmance, are compelled to make good a loss of the property levied on, will be subrogated to the benefit of the judgment appealed from. *Gifford v. Rising*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 430.

7. *Surety on Injunction Bond Subrogated to Vendor's Liens Held by Judgment Creditor*. — *Darrow v. Summerhill*, 24 Tex. Civ. App. 208.

8. **A Surety in a Forthcoming Bond** is a surety for the debt, and when he pays it he is entitled



delivery bonds.<sup>1</sup> But where two joint obligors are sued and one of them gives bail, such bail cannot, on being compelled to pay the debt, maintain an action against the other obligor for money paid, there being no privity between the bail of one obligor and his co-obligor.<sup>2</sup>

(b) *Subrogation as Between Successive Sureties.* — The general rule is, that one who becomes a surety in the course of legal proceedings against the principal, for the benefit of the latter alone, without the assent or sanction of the surety on the obligation in suit, will not be subrogated to the rights and remedies of the creditor against the prior surety; on the contrary, he is entitled to stand in the creditor's place only as to the latter's rights against the principal; as to any prior interest in the property which may be under pledge, he must occupy the place of the debtor.<sup>3</sup> There are, however, a few decisions which seem to run counter to this rule;<sup>4</sup> and it is clear that it does not apply where the subsequent surety becomes bound for a purpose in which both the principal and the prior surety have an interest, and the assent of the prior surety is expressly given or may be clearly inferred from the circumstances of the case.<sup>5</sup> On the other hand, the weight of authority is that where the prior

to all the rights of the creditor against the original debtor subsisting at the time he became bound for the debt. *Hill v. Manser*, 11 Gratt. (Va.) 522; *Rorer v. Ferguson*, 96 Va. 411; *Neal v. Buffington*, 42 W. Va. 327.

1. *Sureties in Delivery Bonds.* — *Dechard v. Edwards*, 2 Sneed (Tenn.) 93.

2. *Bail of One Joint Obligor Not Subrogated Against Other Obligor.* — *Carter v. Black*, 4 Dev. & B. L. (20 N. Car.) 425; *Osborn v. Cunningham*, 4 Dev. & B. L. (20 N. Car.) 423. And see *Hinton v. Odenheimer*, 4 Jones Eq. (57 N. Car.) 406.

*Bail of a Partner*, who have paid a judgment against him for a partnership debt, cannot be subrogated to the rights of the judgment creditor against the other partners. *Bowman v. Blodgett*, 2 Met. (Mass.) 308.

3. *Successive Sureties in Judicial Proceedings — United States.* — *U. S. Bank v. Winston*, 2 Brock. (U. S.) 252.

*Alabama.* — *Fitzpatrick v. Hill*, 9 Ala. 783. *Arkansas.* — *Fletcher v. Menken*, 37 Ark. 206; *Chrisman v. Jones*, 34 Ark. 73.

*California.* — *March v. Barnet*, 121 Cal. 419, 66 Am. St. Rep. 44.

*Indiana.* — *Barlow v. Deibert*, 39 Ind. 16.

*Kentucky.* — *Bohannon v. Combs*, 12 B. Mon. (Ky.) 563; *Brandenburg v. Flynn*, 12 B. Mon. (Ky.) 397; *Kellar v. Williams*, 10 Bush (Ky.) 216; *Hammock v. Baker*, 3 Bush (Ky.) 208; *Hopkinsville Bank v. Rudy*, 2 Bush (Ky.) 326; *Yoder v. Briggs*, 3 Bibb (Ky.) 228; *Paterson v. Pope*, 5 Dana (Ky.) 241; *Havens v. Foudry*, 4 Met. (Ky.) 247.

*Nebraska.* — *Anderson v. Hendrickson*, (Neb. 1901) 95 N. W. Rep. 844.

*New York.* — *Culliford v. Walser*, 158 N. Y. 65, 70 Am. St. Rep. 437; *Hinckley v. Kreitz*, 58 N. Y. 583. See *Chester v. Broderick*, 131 N. Y. 549.

*North Carolina.* — *Daniel v. Joyner*, 3 Ired. Eq. (38 N. Car.) 513.

*Ohio.* — *Denier v. Myers*, 20 Ohio St. 336; *Smith v. Bing*, 3 Ohio 33.

*Pennsylvania.* — *Armstrong's Appeal*, 5 W. & S. (Pa.) 352.

*Tennessee.* — *Moore v. Lassiter*, 16 Lea (Tenn.) 630; *Coles v. Anderson*, 8 Humph. (Tenn.) 489; *Chaffin v. Campbell*, 4 Sneed (Tenn.)

184; *Tennessee Hospital v. Fuqua*, 1 Lea (Tenn.) 608; *Higgs v. Landrum*, 1 Coldw. (Tenn.) 81.

*Vermont.* — *Pierson v. Catlin*, 18 Vt. 77.

*Virginia.* — *Hanby v. Henritze*, 85 Va. 177; *Sherman v. Shaver*, 75 Va. 1; *Givens v. Nelson*, 10 Leigh (Va.) 397; *Langford v. Perrin*, 5 Leigh (Va.) 552; *Bentley v. Harris*, 2 Gratt. (Va.) 358.

*West Virginia.* — *Dent v. Wait*, 9 W. Va. 41.

*Wisconsin.* — *Riemer v. Schlitz*, 49 Wis. 273.

*Surety on Injunction Bond Not Subrogated Against Surety on Forthcoming Bond.* — *Douglass v. Fagg*, 8 Leigh (Va.) 588.

4. *Subsequent Surety Subrogated to Rights of Creditor Against Prior Surety.* — In *Kane v. State*, 78 Ind. 103, where a bond with surety, conditioned for the observance of the liquor laws, was executed, and fines assessed against the obligor for violations of those laws were paid by a third person as surety on a stay of execution for such fines, it was held that such surety was entitled to be subrogated to the rights of the state in the original bond, and might recover from the surety therein the amount so paid to the use of the principal. See also *Deaser v. King*, 110 Ind. 69; *Burgett v. Paxton*, 99 Ill. 288.

In *Louisiana* it is held that the later surety is entitled to subrogation against the prior surety, on the ground that it must be presumed that he relied upon the undertaking of the first surety as a protection against loss. *Howe v. Frazer*, 2 Rob. (La.) 424.

5. *When Subsequent Surety Will Be Subrogated.* — *Monson v. Drakeley*, 40 Conn. 552, 16 Am. Rep. 74; *Howe v. Frazer*, 2 Rob. (La.) 424; *Smith v. Anderson*, 18 Md. 520; *Dillon v. Scofield*, 11 Neb. 419; *Hartwell v. Smith*, 15 Ohio St. 200; *Yeager's Appeals*, (Pa. 1887) 8 Atl. Rep. 225; *Cowan v. Duncan*, Meigs (Tenn.) 470. See also *Craythorne v. Swinburne*, 14 Ves. Jr. 160; *Harris v. Warner*, 13 Wend. (N. Y.) 400; *Harrison v. Lane*, 5 Leigh (Va.) 414, 27 Am. Dec. 607.

*Subrogation by Agreement with Creditor.* — In *La Grange v. Merrill*, 3 Barb. Ch. (N. Y.) 625, it was held that where a judgment has been recovered against the principal debtor and sureties, and a third party agrees with the

surety is compelled to pay the debt he will be subrogated to the rights of the creditor against the subsequent surety;<sup>1</sup> although there are some jurisdictions in which it is held that neither the prior nor the subsequent surety is entitled to subrogation against the other.<sup>2</sup>

(10) *Codebtors, Tenants in Common, and Partners* — (a) *Codebtors*. — A joint debtor who has been compelled to pay the whole debt or more than his share thereof is regarded as a surety for his codebtor, and will, in the absence of a contravening equity, be subrogated to the rights of the creditor against the latter for his ratable share of the debt.<sup>3</sup> He will be entitled to the benefit of collaterals deposited with the creditor by the other joint debtor, and will have a lien on such securities in the hands of the creditor to the extent of the share which the other joint debtor should have paid.<sup>4</sup>

If the Debt Be Compromised or Paid in Depreciated Currency, the actual outlay, and not the nominal amount of the debt, will regulate the extent of the paying debtor's recovery against his codebtor.<sup>5</sup>

creditor to become surety for the debt, upon an agreement with such creditor that the new surety shall have the benefit of the judgment, he has a prior equity over the first sureties, and is entitled to enforce the collection of the judgment for his own benefit and protection.

1. *Prior Surety Subrogated Against Subsequent Surety* — *England*. — Parsons v. Briddock, 2 Vern. 608; Wright v. Morley, 11 Ves. Jr. 22.

*Illinois*. — Friberg v. Donovan, 23 Ill. App. 58.

*Indiana*. — Opp v. Ward, 125 Ind. 241, 21 Am. St. Rep. 220; Graeter v. De Wolf, 112 Ind. 1; Hays v. Wilstach, 101 Ind. 100; Opp v. Ten Eyck, 99 Ind. 345.

*Kentucky*. — Wilson v. Wilson, (Ky. 1899) 50 S. W. Rep. 260; Brandenburg v. Flynn, 12 B. Mon. (Ky.) 397; Patterson v. Pope, 5 Dana (Ky.) 241.

*New York*. — Culliford v. Walser, 158 N. Y. 65, 70 Am. St. Rep. 437.

*North Carolina*. — Hanner v. Douglass, 4 Jones Eq. (57 N. Car.) 262.

*Ohio*. — Hartwell v. Smith, 15 Ohio St. 205.

*Pennsylvania*. — Schnitzel's Appeal, 49 Pa. St. 23; McCormick v. Irwin, 35 Pa. St. 111; Burns v. Huntingdon Bank, 1 P. & W. (Pa.) 395; Pott v. Nathans, 1 W. & S. (Pa.) 155, 37 Am. Dec. 456.

*Tennessee*. — Winchester v. Beardin, 10 Humph. (Tenn.) 247, 51 Am. Dec. 702; McNeilly v. Cooksey, 2 Lea (Tenn.) 39.

*Texas*. — Mitchell v. De Witt, 25 Tex. Supp. 180, 78 Am. Dec. 561.

In *Rosenbaum v. Goodman*, 78 Va. 121, the court refused to subrogate a surety on a replevin bond to the rights of the creditor as against sureties on appeal bonds subsequently executed by the same principal, the ground of the decision being that the undertakings of the different sets of sureties were entirely distinct.

2. *No Subrogation as Between Successive Sureties*. — Morse v. Williams, 22 Me. 17; Semmes v. Naylor, 12 Gill & J. (Md.) 358, criticising Parsons v. Briddock, 2 Vern. 608; Holmes v. Day, 108 Mass. 563.

3. *Joint Debtor Subrogated Against Codebtor* — *United States*. — Pratt v. Law, 9 Cranch (U. S.) 456; Campbell v. Pratt, 5 Wheat. (U. S.) 429.

*Alabama*. — Truss v. Miller, 116 Ala. 494.

*Arkansas*. — Dowdy v. Blake, 50 Ark. 205, 7 Am. St. Rep. 88.

*Connecticut*. — Sumner v. Rhodes, 14 Conn. 135.

*Illinois*. — Schoenewald v. Dieden, 8 Ill. App. 389.

*Indiana*. — Rardin v. Walpole, 38 Ind. 146; Hall v. Hall, 34 Ind. 314.

*Kentucky*. — Smith v. Latimer, 15 B. Mon. (Ky.) 75.

*Louisiana*. — Randolph v. Stark, 51 La. Ann. 1121; Shropshire v. His Creditors, 15 La. Ann. 705; Whitehead's Succession, 3 La. Ann. 396.

*Maine*. — Hatch v. Norris, 36 Me. 419; Goodall v. Wentworth, 20 Me. 322.

*New Hampshire*. — Newton v. Newton, 53 N. H. 537; Henderson v. McDuffee, 5 N. H. 38, 20 Am. Dec. 557.

*New York*. — Cornell v. Prescott, 2 Barb. (N. Y.) 16; Cherry v. Monro, 2 Barb. Ch. (N. Y.) 618.

*Oklahoma*. — Keokuk Falls Imp. Co. v. Kingsland, etc., Mfg. Co., 5 Okla. 42.

*Oregon*. — Baer v. Ballingall, 37 Oregon 416.

*Pennsylvania*. — Ackerman's Appeal, 106 Pa. St. 1; Roddy's Appeal, 72 Pa. St. 98.

*Tennessee*. — Greenlaw v. Pettit, 87 Tenn. 467.

*Virginia*. — Dobyns v. Rawley, 76 Va. 537; Wheatley v. Calhoun, 12 Leigh (Va.) 264, 37 Am. Dec. 654; Boyd v. Boyd, 3 Gratt. (Va.) 113; Tompkins v. Mitchell, 2 Rand. (Va.) 428.

*Contra* — *No Subrogation as Between Codebtors*. — Bispham's Equity, § 337; Dering v. Winchelsea, 1 Hare & W. Lead. Cas. 82; Aldrich v. Cooper, 8 Ves. Jr. 382; McCormick v. Irwin, 35 Pa. St. 117. See also Adams v. Keeler, 30 Ga. 86; Tompkins v. Chicago Fifth Nat. Bank, 53 Ill. 57; Stanley v. Nutter, 16 N. H. 22; Hendrickson v. Hutchinson, 29 N. J. L. 180; Morley v. Stevens, (Supm. Ct. Spec. T.) 47 How. Pr. (N. Y.) 228; Greiner's Estate, 2 Watts (Pa.) 414.

4. *Joint Debtor Entitled to Collaterals Deposited by Codebtor*. — McCready v. Van Antwerp, 24 Hun (N. Y.) 322; Gould v. Central Trust Co., (Supm. Ct. Spec. T.) 6 Abb. N. Cas. (N. Y.) 381; Vincent v. Logsdon, 17 Oregon 284; McGonnigle v. McGonnigle, 5 Pa. Super. Ct. 168, 178.

5. *Debt Compromised or Paid in Depreciated Currency*. — See *supra*, this section, *d. How Far Subrogation Will Be Carried*. See also Shropshire v. His Creditors, 15 La. Ann. 705; Walker v. Municipality No. One, 5 La. Ann. 10,

**Subrogation Will Not Be Enforced** in favor of one apparently a joint principal, but really a surety, to the prejudice of an intervening security taken by a creditor from the principal, *bona fide*, and in ignorance of the suretyship.<sup>1</sup> Nor will a copromisor who pays a debt barred by the statute of limitations, against the consent of his codebtor, be subrogated as against the latter.<sup>2</sup>

(b) **Tenants in Common.** — If one of several tenants in common pays off a lien binding the common property, there will be no merger of his demand, but he will be considered a surety for his cotenants, and subrogated to the rights of the creditor against them for their proportion of the debt.<sup>3</sup> Thus where several persons are interested in land encumbered by a mortgage, whether as tenants in common of the whole or as owners of distinct parcels, and one of them redeems for the protection of his own interest, he becomes substituted in equity to the rights of the mortgagee.<sup>4</sup> And one of two joint purchasers of land, who pays more than his share of the purchase money, will be subrogated to the rights of the vendor as against a subsequent purchaser from the other vendee with notice.<sup>5</sup>

**The Lien Discharged Must Be an Actual Existing Incumbrance**, and not a limited or inchoate one, in order to entitle the tenant discharging it to subrogation against his cotenant.<sup>6</sup>

(c) **Partners.** — Mere payment of a partnership debt by one partner does not entitle him to subrogation as against his copartners.<sup>7</sup> But such subrogation

1. **No Subrogation to Prejudice of Intervening Security.** — *Orvis v. Newell*, 17 Conn. 97. But see *Rogers v. School Trustees*, 46 Ill. 428.

2. **Debt Barred by Limitations.** — *Ellicott v. Nichols*, 7 Gill (Md.) 85, 48 Am. Dec. 546. See *Lovell v. Nelson*, 11 Allen (Mass.) 101, 87 Am. Dec. 706; *Screven v. Joyner*, 1 Hill Eq. (S. Car.) 252, 26 Am. Dec. 199.

3. **Subrogation Between Tenants in Common — California.** — *Shaffer v. McCloskey*, 101 Cal. 576; *Calkins v. Steinbach*, 66 Cal. 117.

*Connecticut.* — *Lyon v. Robbins*, 45 Conn. 513; *Young v. Williams*, 17 Conn. 393.

*Illinois.* — *Simpson v. Gardiner*, 97 Ill. 237; *Fisher v. Dillon*, 62 Ill. 379.

*Indiana.* — *Higham v. Harris*, 108 Ind. 246.

*Massachusetts.* — *Barker v. Flood*, 103 Mass. 474.

*Nebraska.* — *Oliver v. Lansing*, 57 Neb. 352. *New York.* — *Sawyer v. Lyon*, 10 Johns. (N. Y.) 32; *Van Horne v. Fonda*, 5 Johns. Ch. (N. Y.) 388; *Cornell v. Prescott*, 2 Barb. (N. Y.) 16.

*Pennsylvania.* — *Watson's Appeal*, 90 Pa. St. 426; *Gearhart v. Jordan*, 11 Pa. St. 325; *Champlin v. Williams*, 9 Pa. St. 341; *Duncan v. Drury*, 9 Pa. St. 332, 49 Am. Dec. 565.

**When Paying Cotenant Will Not Be Subrogated as Against Purchaser** from nonpaying cotenant, see *Ohio L. Ins., etc., Co. v. Ledyard*, 8 Ala. 866; *Clark v. Warren*, 55 Ga. 575.

4. **Mortgage Paid by One of Several Persons Interested in Land.** — *Aiken v. Gale*, 37 N. H. 501; *Hubbard v. Ascutney Mill Dam Co.*, 20 Vt. 402, 50 Am. Dec. 41. See also *Newbold v. Smart*, 67 Ala. 326; *Carter v. Penn*, 99 Ill. 390; *Tittsworth v. Stout*, 49 Ill. 78, 95 Am. Dec. 577; *Lowrey v. Byers*, 80 Ind. 443; *Adams v. Rose*, 75 Ind. 471; *Rardin v. Walpole*, 38 Ind. 146; *Brooks v. Harwood*, 8 Pick. (Mass.) 497; *Pease v. Egan*, 131 N. Y. 262; *Colton v. Colton*, 3 Phila. (Pa.) 24, 15 Leg. Int. (Pa.) 20; *Gee v. Gee*, 2 Sneed (Tenn.) 395; *Rankin v. Black*, 1 Head (Tenn.) 650. And see *infra*,

this title, IV. *Persons Interested in Encumbered Estates.*

**A Tenant in Common Is Not Entitled to Subrogation** upon paying off a mortgage at the request of his cotenant in order to prevent foreclosure, but he is entitled to contribution, and to a lien upon his cotenant's share for reimbursement. *Koboliska v. Swehla*, 107 Iowa 124, citing *Leach v. Hall*, 95 Iowa 619.

5. **Joint Purchaser of Land Entitled to Subrogation.** — *Dowdy v. Blake*, 50 Ark. 205, 7 Am. St. Rep. 88. But see *Engles v. Engles*, 4 Ark. 286, 38 Am. Dec. 37; *Walsh v. McBride*, 72 Md. 45, in which last-named case it was held that one of two tenants in common who paid the entire purchase money and took a note from the other tenant for his share would not, on the death of such tenant, be subrogated to the vendor's lien on his interest in the land. And see also *Furman v. McMillian*, 2 Lea (Tenn.) 121; *Birdsall v. Cropsey*, 29 Neb. 679.

6. **Lien Discharged Must Be Actual Existing Incumbrance.** — *Preston v. Wright*, 81 Me. 306, 10 Am. St. Rep. 257. See also *Moon v. Jennings*, 119 Ind. 130; *Oliver v. Montgomery*, 42 Iowa 36, 39 Iowa 601; *Weare v. Van Meter*, 42 Iowa 128, 20 Am. Rep. 616; *Watkins v. Eaton*, 30 Me. 529, 50 Am. Dec. 637; *Hurley v. Hurley*, 148 Mass. 444; *Harrison v. Harrison*, 56 Miss. 174.

**Vendor's Lien Barred by Lapse of Time.** — Where one joint tenant discharges a vendor's lien for a balance of purchase money due on the land, after that lien has become barred by lapse of time, he will have no recourse against the other tenant by substitution to the rights of the vendor. *Screven v. Joyner*, 1 Hill Eq. (S. Car.) 252, 26 Am. Dec. 199. See also *Ellicott v. Nichols*, 7 Gill (Md.) 85, 48 Am. Dec. 546, a decision based on the same principle.

7. **Subrogation Between Partners.** — *Baily v. Brownfield*, 20 Pa. St. 45.

**The Reason Why Subrogation Is Not Allowed** to one partner as against his copartner, or to

will be allowed where a partner, after dissolution of the partnership, pays a firm debt out of his private means;<sup>1</sup> or where one partner is compelled to pay a debt which his copartner has agreed to pay;<sup>2</sup> or where a partner who has retired from a firm, and has been indemnified by the remaining partners against all partnership debts, is subsequently compelled to pay such a debt. In such a case the retiring partner is considered a surety for his former copartners.<sup>3</sup>

**Loan to Surviving Partner to Pay Firm Debts.** — One who in good faith lends money to a surviving partner, which is faithfully applied by the latter in satisfaction of the firm liabilities, will be subrogated to the rights of the partner to have the loan repaid out of the firm assets.<sup>4</sup>

**A Purchaser of the Property of a Firm** who assumes the firm debts succeeds to the rights of the firm against a deceased member thereof who has misappropriated firm property.<sup>5</sup>

**Adjustment of Partnership Accounts a Condition Precedent.** — As a general rule there must be an adjustment of the partnership accounts, and of the equities between the partners, before subrogation will be enforced.<sup>6</sup>

(11) **Sureties on Obligations to Government** — (a) **In General.** — Sureties on bonds and other obligations to a state will, as a general rule, on paying the debt of their principal be subrogated to the rights of the state.<sup>7</sup>

one merely a joint debtor as against his co-debtor, is because that, as between them, there is no obligation to pay the debt resting upon one superior to that which rests upon the other." *Per Strong, J.*, in *McCormick v. Irwin*, 35 Pa. St. 111. And see *In re Hoge*, 188 Pa. St. 527. But see *supra*, this subsection, (a) *Codebtors*.

**Right of Subrogation Conferred by Statute.** — A partner paying off a judgment against the individuals of the firm for money borrowed by them in their individual names, but for use in the firm business, out of his private means, is entitled to the benefit of a statute giving a debtor who pays off a judgment against himself and his codebtors the right to issue execution on such judgment against the latter for reimbursement. *O'Bryan v. Neel*, 84 Ga. 134; *Pearce v. Chastain*, 3 Ga. 226, 46 Am. Dec. 423. And under the statute of *Indiana* subrogation will be enforced in favor of a surviving partner who has paid joint judgments against himself and the estate of a deceased partner. *Harter v. Songer*, 138 Ind. 161.

**1. Payment of Firm Debt After Dissolution.** — *In re Smith*, 16 Nat. Bankr. Reg. 113; *Downs v. Jackson*, 33 Ill. 465, 85 Am. Dec. 289; *Tibbetts v. Magruder*, 9 Dana (Ky.) 80; *Schuyler v. Booth*, (Supm. Ct. App. Div.) 79 N. Y. Supp. 1146; *Gilfillan v. Dewoody*, 157 Pa. St. 601; *Eakin v. Knox*, 6 S. Car. 14; *National Bank v. Cushing*, 53 Vt. 321; *Sands v. Durham*, 99 Va. 263, 86 Am. St. Rep. 884, reversing 98 Va. 392; *Hill v. Huston*, 15 Gratt. (Va.) 350.

**This Right Has Been Extended to the Representatives of a Deceased Partner** who have paid the partnership debt on account of their intestate. *Sells v. Hubbell*, 2 Johns. Ch. (N. Y.) 394; *Gee v. Humphries*, 49 S. Car. 253. But see *Bartlett v. McRae*, 4 Ala. 688; *Hogan v. Reynolds*, 21 Ala. 56, 56 Am. Dec. 236.

**Where a Partnership Creditor Has Been Paid Out of Partnership Assets** the partner making the payment is not entitled to a lien, by subrogation, on the separate estate of his copartner in bankruptcy, for a balance found due him upon settlement of the partnership affairs. *In re Smith*, 16 Nat. Bankr. Reg. 113.

**2. Partner Paying Debt Assumed by Copartner.** — *Field v. Hamilton*, 45 Vt. 35. And see *Shinn v. Shinn*, 91 Ill. 477; *Laylin v. Knox*, 41 Mich. 40.

**Fraudulent Conveyances Executed by Copartner Vacated.** — Where a partner pays judgments obtained by the firm creditors on claims which by an award were to be settled by his copartner, the former is entitled to be subrogated to the position of the creditors, and may maintain a bill to vacate a fraudulent conveyance executed by the copartner. *Swan v. Smith*, 57 Miss. 548.

**3. Retiring Partner Indemnified Against Firm Debts.** — *Brown v. Black*, 96 Pa. St. 482; *Scott's Appeal*, 88 Pa. St. 173; *Frow's Estate*, 73 Pa. St. 459; *Sands v. Durham*, 98 Va. 396. See also *Conwell v. McCowan*, 81 Ill. 285; *Cherry v. Monroe*, 2 Barb. Ch. (N. Y.) 618; *Buchanan v. Clark*, 10 Gratt. (Va.) 164.

**Retiring Partner Subrogated to Benefit of Securities in Hands of Co-surety.** — *Butler v. Birkey*, 13 Ohio St. 514.

**4. Loan to Surviving Partner to Pay Firm Debts.** — *Durant v. Pierson*, 124 N. Y. 444, 21 Am. St. Rep. 686; *Haynes v. Brooks*, (Supm. Ct. Spec. T.) 8 Civ. Pro. (N. Y.) 106.

**5. Subrogation of Purchaser of Partnership Property.** — *Miller's Estate*, 157 Pa. St. 224.

**6. Adjustment of Partnership Accounts.** — *Bittner v. Hartman*, 139 Pa. St. 632; *Fessler v. Hickernell*, 82 Pa. St. 150; *Singizer's Appeal*, 28 Pa. St. 524. See also *Shattuck v. Lawson*, 10 Gray (Mass.) 405; *Lyons v. Murray*, 95 Mo. 23, 6 Am. St. Rep. 17; *McDonald v. Holmes*, 22 Oregon 212; *Baily v. Brownfield*, 20 Pa. St. 41.

**7. A Surety for a Bank Which Is a Depository of State Funds**, on being compelled to pay a judgment against him on the bond, will be subrogated to the rights of the state against assets of the bank in the hands of its receiver. *Cullinan v. Union Surety, etc., Co.*, 79 N. Y. App. Div. 409.

**A Surety on a Liquor Dealer's Bond**, upon payment of a judgment thereon, will be subrogated to the rights of the state against the undisclosed principal in the bond, and may maintain

The Subrogation of Persons Paying Taxes and Customs Duties to the rights of the government is discussed in a subsequent part of this article.<sup>1</sup>

(b) **Bail in Criminal Cases.** — While bail in criminal cases may be subrogated to the means of enforcing the performance of that which the recognizance of bail is intended to secure the performance of, they are not entitled to be subrogated to the peculiar remedies which the government may possess for collecting the penalty; to allow the latter would be to aid the bail to get rid of their obligation and to relieve them from the motives to exert themselves in securing the appearance of the principal.<sup>2</sup> Nor does the statute entitling sureties on bonds given to the federal government to subrogation to the government's priority embrace recognizances in criminal cases.<sup>3</sup> So in *England*, while the sureties of a crown debtor for customs and other civil duties, on paying the debt of their principal, are entitled to have the benefit of prerogative process to aid them in coercing payment from the principal and compelling contribution from their cosureties,<sup>4</sup> the rule is confined to such cases, and it is not applied in favor of bail in criminal proceedings; indeed, it has even been held that the law raises no liability on the part of the principal to indemnify his bail for what they have been compelled to pay on their recognizance by reason of his default.<sup>5</sup>

(12) **Underwriters of Loans.** — Underwriters of a loan who have been compelled to pay the same will be subrogated to the rights of the lender against the borrower and his sureties.<sup>6</sup>

**2. Subrogation of Guarantors.** — A guarantor, on payment of the debt guaranteed, will be subrogated to the rights of the creditor against his principal,<sup>7</sup> and his coguarantors.<sup>8</sup> And when the guaranty of a bond is executed at the solicitation of the obligee therein, his assignee, who has by suit and judgment fixed the guarantor's liability, will not be permitted to defeat the latter's claim to subrogation on the ground that he assumed the obligation without the request of the principal debtor.<sup>9</sup>

**The Guarantor of a Promissory Note** occupies the position of a surety, and will be subrogated to the rights of the holder to whom he has been compelled to make payment.<sup>10</sup> If the note be secured by mortgage, and the guaranty be

an action against him for its breach. *City Trust, etc., Co. v. American Brewing Co.*, 70 N. Y. App. Div. 511. See also *Kane v. State*, 78 Ind. 103. But see *Knoll v. Marshall County*, 114 Iowa 647, for a case in which subrogation was refused to sureties upon the bond of a saloon-keeper.

**1. Subrogation of Persons Paying Taxes and Customs Duties.** — See *infra*, this title, IX. *Subrogation Arising from Payment of Taxes and Duties.*

**2. Subrogation of Bail in Criminal Cases.** — *U. S. v. Ryder*, 110 U. S. 729.

**3. U. S. v. Ryder, 110 U. S. 729. In this case it was held further, that even if the bail were entitled under the act (§ 3468, U. S. Rev. Stat.) to the same priority which the federal government has, they are not entitled to use the name of the United States in prosecuting their claim. The statute expressly declares that they must sue in their own names. The reason is obvious. The government has many advantages in proceeding which are not possessed by individuals, and is not liable for costs, and individuals prosecuting claims against other individuals ought not to have the advantage of the name and prestige of the United States. And to the same effect see *U. S. v. Preston*, 4 Wash. (U. S.) 446.**

**4. Sureties Paying Customs Duties Entitled to Subrogation.** — See *infra*, this title, IX. *Subro-*

*gation Arising from Payment of Taxes and Duties.*

**5. Bail in Criminal Cases Not Subrogated in England.** — *Jones v. Orchard*, 16 C. B. 614, 81 E. C. L. 614; *Cripps v. Hartnoll*, 4 B. & S. 414, 116 E. C. L. 414.

**6. Underwriters of Loans Entitled to Subrogation.** — *Parr's Bank v. Albert Mines Syndicate*, 5 Com'l Cas. 116.

**7. Warehousemen Who Guarantee Payment of Advances** made by a trust company on stored goods will be subrogated to the rights of the lender, on payment of the amount loaned, and may hold the goods for their reimbursement. *Kilpatrick v. Dean*, (N. Y. City Ct. Gen. T.) 3 N. Y. Supp. 60.

**Subrogation of Estate of Deceased Guarantor.** — *Lee v. Butler*, 167 Mass. 426.

**8. Guarantor Subrogated Against Coguarantors.** — *Cincinnati Fifth Nat. Bank v. Woolsey*, 31 N. Y. App. Div. 61.

**9. Immaterial that Debtor Did Not Request Guarantor to Assume Obligation.** — *Mathews v. Aikin*, 1 N. Y. 595.

**10. Guarantor of Promissory Note.** — *Babcock v. Blanchard*, 86 Ill. 165; *Rand v. Barrett*, 66 Iowa 731; *Washington Bank v. Shurtleff*, 4 Met. (Mass.) 30; *Grady v. O'Reilly*, 116 Mo. 346. See also *Darst v. Bates*, 95 Ill. 493; *Pennsylvania R. Co. v. Pemberton, etc.*, R. Co., 28 N. J. Eq. 338. Compare *Putnam v. Tash*, 12 Gray

enforced, the guarantor will be substituted to the benefit of the mortgage.<sup>1</sup>

**3. Subrogation of Parties to Negotiable Instruments** — *a. INDORSERS OF BILLS AND NOTES.* — An indorser who pays a bill or note to the holder thereof will be subrogated to all the rights of the holder against antecedent parties,<sup>2</sup> including the benefit of all securities given for its payment.<sup>3</sup> And if he pays a judgment on the instrument he will, in most jurisdictions, be subrogated to the rights of the judgment creditor.<sup>4</sup> In general, the acceptor for value of a bill of exchange is the principal debtor and the other parties thereto are sureties for him; accordingly, on payment by an indorser, he is entitled to exoneration from such acceptor, and to be subrogated to the benefit of securities deposited by the latter with the holder.<sup>5</sup>

**Rule Where Paper Is Overdue or Indorser Takes with Notice.** — An indorser's right to subrogation will not be affected by the fact that he acquired the paper when overdue, or took it with notice of equities between prior parties, if he himself took from a *bona fide* purchaser for value before maturity and without notice of any such equities.<sup>6</sup>

(Mass.) 121. And see *infra*, this section, 3. *Subrogation of Parties to Negotiable Instruments.*

**1. Guarantor Subrogated to Mortgage Securing Note.** — *Rand v. Barrett*, 66 Iowa 731; *Conner v. Howe*, 35 Minn. 518; *Havens v. Willis*, 100 N. Y. 482.

**2. Indorser of Bill or Note Entitled to Subrogation.** — *Ex p. Ryswicke*, 2 P. Wms. 89; *Ex p. Royal Bank*, 2 Rose 197; *Ex p. Wyldman*, 2 Ves. 115; *Dooley v. Lackey*, 55 Ill. App. 30; *Schleissman v. Kallenberg*, 72 Iowa 338, 2 Am. St. Rep. 247; *National Mount Wollaston Bank v. Porter*, 122 Mass. 308; *Blake v. Ames*, 8 Allen (Mass.) 318; *Sohier v. Loring*, 6 Cush. (Mass.) 537. See also *Lyon v. Bolling*, 9 Ala. 463, 44 Am. Dec. 444; *Smith v. Arden*, 5 Cranch (C. C.) 485; *Corey v. White*, 3 Barb. (N. Y.) 12; *Cottrell's Appeal*, 23 Pa. St. 294. But see *Heighe v. Farmer's Bank*, 5 Har. & J. (Md.) 68.

**Estate of Assignor of Note Subrogated Against Estate of Maker.** — *Place v. Oldham*, 10 B. Mon. (Ky.) 403.

**Guarantor of Note Entitled to Subrogation.** — See *supra*, this section, 2. *Subrogation of Guarantors.*

**3. Indorser Entitled to Benefit of Securities.** — *Woodward v. American Exposition R. Co.*, 39 La. Ann. 566; *Bridgman v. Johnson*, 44 Mich. 492; *McCurdy v. Clark*, 27 Mich. 445; *George v. Somerville*, 153 Mo. 7; *Kingman v. Cornell-Tebbetts Mach., etc., Co.*, 150 Mo. 282; *Malone Third Nat. Bank v. Shields*, 55 Hun (N. Y.) 274.

**4. Indorser Subrogated to Judgment on Instrument.** — *Schleissman v. Kallenberg*, 72 Iowa 338, 2 Am. St. Rep. 247; *Connely v. Bourg*, 16 La. Ann. 109, 79 Am. Dec. 568; *Sprigg v. Beaman*, 6 La. 63; *Scott v. Featherston*, 5 La. Ann. 313; *Yates v. Mead*, 68 Miss. 787; *Wilson v. Wright*, 7 Rich. L. (S. Car.) 400; *Schilb v. Moon*, 50 W. Va. 47. Compare *Dibrell v. Dandridge*, 51 Miss. 55. And see *supra*, this section, 1. *Subrogation of Sureties* — *e. Whether Payment by Surety Extinguishes Specialty.*

**Surety on Note Subrogated to Rights of Payee in Judgment Thereon.** — *Utah Nat. Bank v. Forbes*, 18 Utah 225.

**If Separate Judgments Be Recovered against the maker and indorser of a note, and judgment**

be recovered in another state on the judgment against the indorser, and he satisfies the same, he will be subrogated to the lien of the judgment which was obtained against the maker. *Old Dominion Bank v. Allen*, 76 Va. 200.

**Suit Discontinued — New Notes Given by Indorser.** — If an indorser procures a suit against himself and the maker to be discontinued as to himself upon his giving new notes for the debt, he will not be subrogated to the benefit of a judgment obtained against the maker, unless he has paid the notes executed by himself. *Payton v. Wight*, 2 Hilt. (N. Y.) 77.

**5. Indorser Subrogated as Against Acceptor for Value.** — *Duncan v. North, etc., Wales Bank*, 6 App. Cas. 1. See also *Underwood v. Metropolitan Nat. Bank*, 144 U. S. 669; *Fowler v. Gate City Nat. Bank*, 88 Ga. 29; *Salaun v. Relf*, 4 La. Ann. 575; *Trimble v. City Nat. Bank*, (Ky. 1891) 15 S. W. Rep. 853.

**6. Rule Where Paper Is Overdue or Indorser Takes with Notice — England.** — *May v. Chapman*, 16 M. & W. 355; *Fairclough v. Pavia*, 9 Exch. 690; *Carruthers v. West*, 11 Q. B. 143, 63 E. C. L. 143; *Robinson v. Reynolds*, 2 Q. B. 196, 42 E. C. L. 634; *Chalmers v. Lanion*, 1 Campb. 383.

**United States.** — *Marion County v. Clark*, 94 U. S. 278.

**California.** — *Sonoma County Bank v. Gove*, 63 Cal. 355, 49 Am. Rep. 92.

**Georgia.** — *Hogan v. Moore*, 48 Ga. 156; *Robinson v. Vason*, 37 Ga. 66.

**Illinois.** — *Woodworth v. Huntoon*, 40 Ill. 131, 89 Am. Dec. 340.

**Indiana.** — *Riley v. Schawacker*, 50 Ind. 592.

**Iowa.** — *Mornyer v. Cooper*, 35 Iowa 257; *Simon v. Merritt*, 33 Iowa 537.

**Louisiana.** — *Cotton v. Sterling*, 20 La. Ann. 282; *Howell v. Crane*, 12 La. Ann. 126, 68 Am. Dec. 765; *Cook v. Larkin*, 10 La. Ann. 507.

**Maine.** — *Dillingham v. Blood*, 66 Me. 140; *Roberts v. Lane*, 64 Me. 108, 18 Am. Rep. 242; *Woodman v. Churchill*, 52 Me. 58.

**Maryland.** — *Boyd v. McCann*, 10 Md. 118.

**Massachusetts.** — *Barker v. Parker*, 10 Gray (Mass.) 339.

**Michigan.** — *Kost v. Bender*, 25 Mich. 515.

**New York.** — *Williams v. Matthews*, 3 Cow. (N. Y.) 252.

**Ohio.** — *Bassett v. Avery*, 15 Ohio St. 299.

**One Who Becomes Accommodation Indorser for Two Joint Makers** of a promissory note at the request of only one of them, on being compelled to pay, will be subrogated to the rights of the original creditor, and may maintain suit against the other maker, as both of them presumptively stand to him as principals.<sup>1</sup>

**Joint Indorsers.** — It has been held that joint indorsers of negotiable paper are liable as copromisors, and as such have no rights of subrogation against each other.<sup>2</sup>

**Payment a Condition Precedent to Subrogation.** — As a general rule an indorser may not claim to be subrogated to the rights of the holder, in securities held by the latter, until he has paid the note.<sup>3</sup>

**b. ACCOMMODATION ACCEPTOR OF BILL.** — The rule in regard to an accommodation acceptor may be stated thus: at law he is regarded as the principal debtor, in favor of a *bona fide* holder, but as between himself and the drawer he, in equity, occupies the position of a surety, and, on payment of the bill, is entitled to be subrogated to the rights of the holder in respect of any securities received by the latter from the drawer.<sup>4</sup>

**c. VOLUNTEER PAYING PROTESTED BILL FOR HONOR OF PARTY THERETO.** — An exception to the rule that a volunteer is not entitled to subrogation is made in the interest of commerce in favor of one who pays a protested bill of exchange for the honor of the drawer or other party thereto; in such case the payor will be subrogated to the rights of the holder against those for whose honor payment was made.<sup>5</sup> But a stranger who takes up a note at or after maturity, with nothing to show an intent to purchase, thereby satisfies the note, and may not claim to be subrogated to the rights of the person to whom he made payment, against prior parties.<sup>6</sup>

*Pennsylvania.* — *Wilson v. Mechanics' Sav. Bank*, 45 Pa. St. 488.

*Virginia.* — *Prentice v. Zane*, 2 Gratt. (Va.) 262.

**1. Accommodation Indorser for Joint Makers.** — *Hoffman v. Butler*, 105 Ind. 371.

**2. Joint Indorsers Not Subrogated Against Each Other.** — *West Branch Bank v. Armstrong*, 40 Pa. St. 278. But see *supra*, this section, *Subrogation of Sureties—Various Instances of Suretyship—Codebtors, Tenants in Common, and Partners—Codebtors*.

**3. Payment a Condition Precedent to Subrogation.** — *Ross v. Jones*, 22 Wall. (U. S.) 576; *Matter of Babcock*, 3 Story (U. S.) 393; *Buffalo First Nat. Bank v. Wood*, 71 N. Y. 405, 27 Am. Rep. 66; *Malone Third Nat. Bank v. Shields*, 55 Hun (N. Y.) 274. See also *supra*, this section, *Subrogation of Sureties—When Right to Subrogation Becomes Complete*.

**Payment of Interest.** — In *Telford v. Garrels*, 132 Ill. 550, it was held that where an indorser of notes secured by a trust deed pays to the assignee interest on the notes in discharge of his agreement and liability to the latter, he will be subrogated to the security of the deed, and may, on bill to foreclose by the holder of the notes, by his cross-bill, have decree for the interest so paid, as against the original debtor or mortgagor.

**4. Accommodation Acceptor of Bill Entitled to Subrogation.** — *Wodehouse v. Farebrother*, 5 El. & Bl. 277, 85 E. C. L. 277; *Toronto Bank v. Hunter*, 4 Bosw. (N. Y.) 646. See also *Byers v. Franklin Coal Co.*, 106 Mass. 131; *Meggett v. Baum*, 57 Miss. 22; *New York First Nat. Bank v. Morris*, 1 Hun (N. Y.) 680; *Rigney v. Vanzandt*, 5 Grant Ch. (U. C.) 494. But see *Gomez v. Lazarus*, 1 Dev. Eq. (16 N. C.)

205. See also the title ACCOMMODATION PAPER, vol. 1, p. 371 *et seq.*

In England it seems that an accommodation acceptor is in equity a surety for the drawer as against all parties who have notice of his true character. *Bailey v. Edwards*, 4 B. & S. 761, 116 E. C. L. 761.

**5. Volunteer Paying Protested Bill for Honor.** — *Vandewall v. Tyrrell*, M. & M. 87, 22 E. C. L. 258; *Mertens v. Winnington*, 1 Esp. 113; *Cox v. Earle*, 3 B. & Ald. 430, 5 E. C. L. 334; *Goodall v. Polhill*, 1 C. B. 233, 50 E. C. L. 233; *In re Overend*, L. R. 6 Eq. 344; *Ex p. Wackerbarth*, 5 Ves. Jr. 574; *Hoare v. Cazenove*, 16 East 391; *Williams v. Germaine*, 7 B. & C. 468, 14 E. C. L. 84; *König v. Bayard*, 1 Pet. (U. S.) 250; *Bishop v. O'Conner*, 69 Ill. 431; *Winder v. Diffenderffer*, 2 Bland (Md.) 166; *Douglass v. Fagg*, 8 Leigh (Va.) 601.

**If the Payment Be Made for the Honor of a Particular Indorser**, the person so paying will be subrogated only to the rights of that indorser. 2 Daniel Neg. Inst., § 1254; *Mertens v. Winnington*, 1 Esp. 113; *Chitty on Bills* 509.

**Rule Not Applicable to Protested Note.** — When a person other than a regular party to a note voluntarily pays it for the honor or credit of any indorser, without request, he does not thereby acquire a right to repayment from any of the prior parties thereto. *Smith v. Sawyer*, 55 Me. 141, 92 Am. Dec. 576; *Willis v. Hobson*, 37 Me. 405.

**6. Stranger Paying Note At or After Maturity Not Subrogated.** — *Dooley v. Virginia F. & M. Ins. Co.*, 3 Hughes (U. S.) 221; *Weil v. Enterprise Ginnery, etc., Co.*, 42 La. Ann. 492; *Oliver v. Bragg*, 15 La. Ann. 402; *Eastman v. Plumer*, 32 N. H. 238; *Lancey v. Clark*, 64 N. Y. 209, 21 Am. Rep. 604; *Citizens Bank v. Lay*, 80 Va.

*d.* **INDORSER OF CERTIFICATE OF DEPOSIT.** — One who indorses a certificate of deposit in good faith and in ignorance of its fraudulent inception will, if compelled to pay it, be subrogated to the rights of the holder against prior indorsers and the issuing bank.<sup>1</sup>

*e.* **HOLDER OF BANK CHECK.** — A holder of a bank check is subrogated to the rights of the depositor, and may sue the bank for wrongfully refusing payment.<sup>2</sup>

*f.* **INDORSEE OR TRANSFEREE OF BILL OR NOTE.** — The indorsee or transferee of a bill or note will be subrogated to the rights and remedies of the transferor against all parties to the note prior to himself, and to the benefit of all securities originally provided for the payment of the note, though there has been no actual transfer of the security to him.<sup>3</sup> Thus an indorsee of a bill drawn against a consignment of merchandise and secured by a warehouse

440. *Compare* Teberg v. Swenson, 32 Kan. 225; Bishop v. Rowe, 71 Me. 263; Pacific Bank v. Mitchell, 9 Met. (Mass.) 297; Swope v. Leffingwell, 72 Mo. 348; Campbell v. Allen, 38 Mo. App. 30.

1. **Indorser of Certificate of Deposit.** — Beckwith v. Webber, 78 Mich. 390.

2. **Holder of Bank Check.** — Fonner v. Smith, 31 Neb. 107, 28 Am. St. Rep. 510.

3. **Indorsee or Transferee of Negotiable Instrument Subrogated to Rights of Transferor** — *England.* — Cook v. Lister, 13 C. B. N. S. 543, 106 E. C. L. 543; Randall v. Moon, 12 C. B. 261, 74 E. C. L. 261; Jones v. Broadhurst, 9 C. B. 173; Williams v. James, 15 Q. B. 498, 69 E. C. L. 498; Woodward v. Pell, L. R. 4 Q. B. 55; Duncan v. North, etc., Wales Bank, 6 App. Cas. 1; *Ex p.* Smart, L. R. 8 Ch. 220; City Bank v. Luckie, L. R. 5 Ch. 773; *Ex p.* Waring, 19 Ves. Jr. 345; Pollard v. Ogden, 2 El. & Bl. 459, 75 E. C. L. 459.

*United States.* — Bird v. Louisiana State Bank, 93 U. S. 96; Sawyer v. Prickett, 19 Wall. (U. S.) 146; Carpenter v. Longan, 16 Wall. (U. S.) 273.

*Alabama.* — Wolfe v. Nall, 62 Ala. 24; Bankhead v. Owen, 60 Ala. 457; Graham v. Newman, 21 Ala. 497; Toulmin v. Hamilton, 7 Ala. 362.

*Arkansas.* — Biscoe v. Royston, 18 Ark. 508.

*California.* — Bennett v. Solomon, 6 Cal. 134.

*Connecticut.* — Hartford, etc., Transp. Co. v. Hartford First Nat. Bank, 46 Conn. 569; Dudley v. Cadwell, 19 Conn. 218.

*Delaware.* — Marriken v. Godwin, 2 Del. Ch. 236.

*Georgia.* — Printup v. Johnson, 19 Ga. 73.

*Illinois.* — Barrett v. Hinckley, 124 Ill. 40, 7 Am. St. Rep. 331; Mutual Mill Ins. Co. v. Gordon, 121 Ill. 366; McIntire v. Yates, 104 Ill. 497; Crawford v. Logan, 97 Ill. 396; Keohane v. Smith, 97 Ill. 156; Chicago, etc., R. Co. v. Loewenthal, 93 Ill. 451; U. S. Mortgage Co. v. Gross, 93 Ill. 483; Melendy v. Keen, 89 Ill. 395; Bryant v. Vix, 83 Ill. 14; Petillon v. Noble, 73 Ill. 567; Kleeman v. Frisbie, 63 Ill. 482; Hamilton v. Lubukee, 51 Ill. 415, 99 Am. Dec. 562; Walker v. Dement, 42 Ill. 278; Wayman v. Cochrane, 35 Ill. 151; Mapps v. Sharpe, 32 Ill. 13; Olds v. Cummings, 31 Ill. 188; Pardee v. Lindley, 31 Ill. 174, 83 Am. Dec. 219; Sargent v. Howe, 21 Ill. 148.

*Iowa.* — Dougherty v. Deeney, 45 Iowa 443; Updegraff v. Edwards, 45 Iowa 515; Preston v. Case, 42 Iowa 549; Indiana Bank v. Ander-

son, 14 Iowa 544, 83 Am. Dec. 390; Crow v. Vance, 4 Iowa 441.

*Kansas.* — Burhans v. Hutcheson, 25 Kan. 625, 37 Am. Rep. 274.

*Kentucky.* — Duncan v. Louisville, 13 Bush (Ky.) 385, 26 Am. Rep. 201.

*Louisiana.* — Seixas v. Gonsoulin, 40 La. Ann. 351; Perot v. Levasseur, 21 La. Ann. 529; Connely v. Bourg, 16 La. Ann. 109, 79 Am. Dec. 568; Scott v. Turner, 15 La. Ann. 346; Scott v. Featherston, 5 La. Ann. 313.

*Maryland.* — Boyd v. Parker, 43 Md. 182; McCracken v. German F. Ins. Co., 43 Md. 471; Ohio L. Ins., etc., Co. v. Winn, 4 Md. Ch. 253.

*Massachusetts.* — North Nat. Bank v. Hamlin, 125 Mass. 506; Wolcott v. Winchester, 15 Gray (Mass.) 461; Rice v. Dewey, 13 Gray (Mass.) 47; Breen v. Seward, 11 Gray (Mass.) 118; Young v. Miller, 6 Gray (Mass.) 152; Bryant v. Damon, 6 Gray (Mass.) 564; Pacific Bank v. Mitchell, 9 Met. (Mass.) 297; Taylor v. Page, 6 Allen (Mass.) 86; Crane v. March, 4 Pick. (Mass.) 137, 16 Am. Dec. 329.

*Michigan.* — Beckwith v. Webber, 78 Mich. 390; Judge v. Vogel, 38 Mich. 568; Helmer v. Krolick, 36 Mich. 373; Martin v. McReynolds, 6 Mich. 70; Dutton v. Ives, 5 Mich. 515.

*Minnesota.* — Blumenthal v. Jassoy, 29 Minn. 177.

*Mississippi.* — Hobson v. Edwards, 57 Miss. 128; Stratton v. Gold, 40 Miss. 778; Dick v. Mawry, 9 Smed. & M. (Miss.) 448.

*Missouri.* — McQuie v. Peay, 58 Mo. 56; Potter v. Stevens, 40 Mo. 229; St. Louis Bldg., etc., Assoc. v. Clark, 36 Mo. 601; Merchants' Nat. Bank v. Aberathy, 32 Mo. App. 222; Gottschalk v. Neal, 6 Mo. App. 596.

*Nebraska.* — Mundy v. Whittemore, 15 Neb. 647.

*New Hampshire.* — Barton v. Croydon, 63 N. H. 417; Esty v. Graham, 46 N. H. 169; Blake v. Williams, 36 N. H. 39; Southerin v. Mendum, 5 N. H. 420.

*New York.* — Auburn Bank v. Throop, 18 Johns. (N. Y.) 505; Green v. Hart, 1 Johns. (N. Y.) 580; Heath v. Hand, 1 Paige (N. Y.) 329; Gould v. Marsh, 4 Thomp. & C. (N. Y.) 128; Riverside Bank v. Totten, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 519; Koehler v. Farmers', etc., Nat. Bank, (Supm. Ct. Spec. T.) 5 N. Y. Supp. 745.

*North Carolina.* — Hyman v. Devereux, 63 N. Car. 624.

*Ohio.* — Paine v. French, 4 Ohio 318; Cook v. Shiras, 1 Cinc. Super. Ct. 398.



receipt or bill of lading for the merchandise, will be subrogated to the rights of the indorser against the consignee;<sup>1</sup> and a bank discounting the note of another bank, indorsed for accommodation by its directors, will be entitled to the benefit of collaterals provided for the security of such indorsers.<sup>2</sup>

**Note Assigned Several Times — Last Assignor Insolvent.** — Where a note has been assigned several times and the last assignor is insolvent, or a nonresident, but his assignor is a resident, the last assignee may be subrogated to the rights of his assignor to have recourse against a prior assignor.<sup>3</sup>

**First Indorser Discharged by Negligence of Holder.** — It seems that if the first indorser has been discharged from his liability on the note, by reason of the negligence of the holder in not giving him due notice of dishonor, no subsequent party to the paper may claim to be subrogated to the benefit of securities executed for his indemnity.<sup>4</sup>

**g. ASSIGNEE OF PURCHASE-MONEY NOTES.** — Where the assignee of unpaid purchase-money notes receives from the original vendor in an executory contract for the sale of land, a transfer of his superior title which exists until the contract of sale is consummated by complete payment, he is entitled to be subrogated to the rights of the original vendor, and may enforce his rights by a sale of the land, in default of payment, though a note be barred by limitation.<sup>5</sup> But if the vendor of land conveys it to the vendee by deed, receiving his note for the purchase price, an assignee will not, by the mere assignment of the note, be subrogated to the vendor's lien on the land to enforce payment of the note.<sup>6</sup>

**III. SUBROGATION OF CREDITORS — 1. Subrogation to Securities Given to Surety.** — As a general rule a creditor is entitled in equity to the benefit of all collateral securities which the debtor has given to his sureties or to persons standing in the situation of sureties;<sup>7</sup> though there are some authorities which hold

*Pennsylvania.* — *Harmony Nat. Bank's Appeal*, 101 Pa. St. 428; *Partridge v. Partridge*, 38 Pa. St. 78; *Philips v. Lewistown Bank*, 18 Pa. St. 394.

*Rhode Island.* — *Bank of America v. Senior*, 11 R. I. 376.

*South Carolina.* — *Garvin v. State Bank*, 7 S. Car. 266.

*Tennessee.* — *Planters' Bank v. Douglass*, 2 Head (Tenn.) 699.

*Vermont.* — *Nash v. Kelley*, 50 Vt. 425; *Keyes v. Wood*, 21 Vt. 331.

*Wisconsin.* — *Kelley v. Whitney*, 45 Wis. 110, 30 Am. Rep. 697; *Bange v. Flint*, 25 Wis. 544; *Gordon v. Mulhare*, 13 Wis. 22; *Cornell v. Hichens*, 11 Wis. 353; *Croft v. Bunster*, 9 Wis. 503; *Martineau v. McCollum*, 4 Chand. (Wis.) 153; *Fisher v. Otis*, 3 Chand. (Wis.) 83. And see *infra*, this title, III. *Subrogation of Creditors*.

See also titles **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 308; **MUNICIPAL SECURITIES**, vol. 21, p. 63.

**When Not Subrogated to Benefit of Mortgage.** — The holder of a note will not be entitled to the benefit of a mortgage executed by the maker to indemnify a surety and which the surety transferred to a *bona fide* purchaser for value. *Waller v. Oglesby*, 85 Tenn. 321.

**Securities Held for Note and Other Claims.** — The indorsee of a note will not be subrogated to the rights of his indorser in securities held by the latter for such note and for other claims, unless he pays all claims for which the securities are held. *Vose v. Scatcherd*, 16 Alb. L. J. 33. See also *Swan v. Patterson*, 7 Md. 167.

**1. Bill Secured by Warehouse Receipt, Etc.** — *Michigan State Bank v. Gardner*, 15 Gray (Mass.) 362; *Syracuse First Nat. Bank v. New York Cent., etc., R. Co.*, 85 Hun (N. Y.) 160. Compare *Wigton v. Bowley*, 130 Mass. 252; *In re Barned's Banking Co.*, L. R. 5 H. L. 157.

**2. Warner's Appeal**, (Pa. 1886) 7 Atl. Rep. 216. See *Rice's Appeal*, 79 Pa. St. 168; *Kramer's Appeal*, 37 Pa. St. 71.

**3. Note Assigned Several Times — Last Assignor Insolvent.** — *Turney v. Hunt*, 8 B. Mon. (Ky.) 407; *McFadden v. Finnell*, 3 B. Mon. (Ky.) 121.

**4. Negligence of Holder Discharging First Indorser.** — *State Bank v. Boisseau*, 12 Leigh (Va.) 388; *Hopewell v. Cumberland Bank*, 10 Leigh (Va.) 214.

**5. Assignee of Purchase-money Notes.** — *Hamblen v. Folts*, 70 Tex. 132. See also *Hall v. Mobile, etc., R. Co.*, 58 Ala. 10; *Felton v. Smith*, 84 Ind. 485; *Stevens v. Chadwick*, 10 Kan. 406, 15 Am. Rep. 348; *Edwards v. Bohannan*, 2 Dana (Ky.) 98; *Hagerman v. Sutton*, 91 Mo. 520; *Lee v. Clark*, 89 Mo. 553; *Sloan v. Campbell*, 71 Mo. 387, 36 Am. Rep. 493.

**6. Shall v. Biscoe**, 18 Ark. 150. See also *Salem First Nat. Bank v. Salem Capital Flour Mills Co.*, 39 Fed. Rep. 89; *Rogers v. James*, 33 Ark. 77; *Williams v. Christian*, 23 Ark. 255; *Pillow v. Helm*, 7 Baxt. (Tenn.) 545.

**7. Creditor Subrogated to Securities Given to Surety — United States.** — *Swift v. Kortrecht*, (C. C. A.) 112 Fed. Rep. 709; *Brown, etc., Co. v. Ligon*, 92 Fed. Rep. 851; *U. S. v. Sturges*, 1 Paine (U. S.) 525.

*Alabama.* — *Alabama Gold L. Ins. Co. v. Anderson*, 67 Ala. 425; *Branch Bank v. Robert-*

that this rule does not apply to securities which are given for the sole purpose of indemnifying the surety, and not for the purpose of creating a security for the debt, or of providing means for its payment.<sup>1</sup>

**Where There Are a Number of Creditors** the securities will enure to their benefit in proportion to the amounts of their respective claims.<sup>2</sup>

**Rule Where Surety Is Also a Creditor.**—If the security be to indemnify the surety, and also to secure to him an absolute debt, it will be applied to both debts *pro rata*.<sup>3</sup>

**Principal Debt Barred by Limitations.**—It seems that the right here considered exists in favor of the creditor even though his remedy against the surety on the principal debt is barred by the statute of limitations.<sup>4</sup>

**Right of Surety to Release Securities.**—The surety cannot defeat the rights of the creditor by appropriating the property pledged to his own use, without satis-

son, 19 Ala. 798; Ohio L. Ins., etc., Co. v. Ledyard, 8 Ala. 866.

*Arkansas.*—Whitehead v. Henderson, 67 Ark. 200.

*California.*—Van Orden v. Durham, 35 Cal. 136.

*Colorado.*—Poole v. Lowe, 24 Colo. 475.

*Illinois.*—Chambers v. Prewitt, 71 Ill. App. 119.

*Indiana.*—Plaut v. Storey, 131 Ind. 46; Loehr v. Colborn, 92 Ind. 24.

*Iowa.*—Nourse v. Weitz, (Iowa 1903) 95 N. W. Rep. 251.

*Kentucky.*—Magoffin v. Boyle Nat. Bank, 69 S. W. Rep. 702, 24 Ky. L. Rep. 585; Kerr v. Hough, (Ky. 1901) 61 S. W. Rep. 262; Macklin v. Northern Bank, 83 Ky. 315; U. S. Bank v. Stewart, 4 Dana 27.

*Maine.*—In re Fickett, 72 Me. 266.

*Maryland.*—Owens v. Miller, 29 Md. 144.

*Michigan.*—Albion State Bank v. Knickerbocker, 125 Mich. 311; Union Nat. Bank v. Rich, 116 Mich. 414; Butterworth v. Kritzer Milling Co., 115 Mich. 1; Union Nat. Bank v. Rich, 106 Mich. 319.

*Mississippi.*—Bibb v. Martin, 14 Smed. & M. (Miss.) 87.

*Missouri.*—Thornton v. National Exch. Bank, 71 Mo. 221; Haven v. Foley, 18 Mo. 136; First Nat. Bank v. Davis, 87 Mo. App. 242.

*Nebraska.*—Harlan County v. Whitney, (Neb. 1902) 90 N. W. Rep. 993; Oak Creek Valley Bank v. Helmer, 59 Neb. 176; South Omaha Nat. Bank v. Wright, 45 Neb. 23.

*New Hampshire.*—Newport First Nat. Bank v. Hunton, 70 N. H. 224.

*New Jersey.*—Meyers v. Campbell, 59 N. J. L. 378; Whitehead v. Hamilton Rubber Co., 52 N. J. Eq. 78.

*New York.*—Binghamton Sav. Bank v. Binghamton Trust Co., 85 Hun (N. Y.) 75; Vail v. Foster, 4 N. Y. 312; Central Trust Co. v. New York Equipment Co., 87 Hun (N. Y.) 421.

*North Carolina.*—Sherrod v. Dixon, 120 N. Car. 60; Ijames v. Gaither, 93 N. Car. 362; Matthews v. Joyce, 85 N. Car. 258; Wiswall v. Potts, 5 Jones Eq. (58 N. Car.) 188.

*Ohio.*—Coons v. Clifford, 58 Ohio St. 480; Pendery v. Allen, 50 Ohio St. 121; Green v. Dodge, 6 Ohio 80, 25 Am. Dec. 736.

*Pennsylvania.*—Kramer's Appeal, 37 Pa. St. 71; Hincken v. McGlathery, 8 Pa. Co. Ct. 267.

*Tennessee.*—Ray v. Proffett, 15 Lea (Tenn.) 517; Cowan v. Telford, 5 Lea (Tenn.) 449.

*Texas.*—Magill v. Brown, 20 Tex. Civ. App.

662; Bellville First Nat. Bank v. Wheeler, 12 Tex. Civ. App. 489.

*Vermont.*—Morrill v. Morrill, 53 Vt. 74; 38 Am. Rep. 659; Paris v. Hulett, 26 Vt. 308. And see Smith v. Steele, 25 Vt. 427, 60 Am. Dec. 276.

*Virginia.*—Roberts v. Colvin, 3 Gratt. (Va.) 348.

And see *supra*, this title, II. *Sureties, Guarantors, and Parties to Negotiable Instruments*—*Subrogation of Parties to Negotiable Instruments*—*Indorsee or Transferee of Bill or Note*.

**Defendant in Replevin Subrogated to Securities Given by Plaintiff to Bondsmen.**—Lindsay v. Morse, 129 Mich. 350.

**A Creditor of a Public Officer** will be subrogated to a mortgage given by the officer to his bondsmen as indemnity, and his rights under such mortgage will be superior to those of a subsequent purchaser of the mortgaged land who takes with notice. Dowell v. Woodside, (Ky. 1894) 27 S. W. Rep. 853.

**The Creditor Is Not Obligated to Resort to Securities** held by a surety before suing the latter on the debt. Stone v. Hammell, (Cal. 1889) 22 Pac. Rep. 203.

**1. Securities Given Merely to Indemnify Surety.**—Daniel v. Hunt, 77 Ala. 567; Macklin v. Northern Bank, 83 Ky. 318; Clay v. Freeman, 74 Miss. 816; Pool v. Doster, 59 Miss. 258; Albany v. Andrews, 29 N. Y. App. Div. 20; John Shillito Co. v. Henderson-Achert Lithographing Co., 9 Ohio Dec. 7, 6 Ohio N. P. 25; Fertz v. Henne, 197 Pa. St. 560. *Contra*, Ijames v. Gaither, 93 N. Car. 362.

**2. Several Creditors Entitled to Share in Securities Pro Rata.**—Courier-Journal Job-Printing Co. v. Schaefer-Meyer Brewing Co., (C. C. A.) 101 Fed. Rep. 699; Wheeler v. Bellville First Nat. Bank, (Tex. Civ. App. 1897) 41 S. W. Rep. 376.

**3. Surety Also a Creditor.**—Moore v. Moberly, 7 B. Mon. (Ky.) 299 [*distinguishing* Moore v. Moore, 4 Hawks (11 N. Car.) 358, 15 Am. Dec. 523]; Helm v. Young, 9 B. Mon. (Ky.) 394; Ross v. Wilson, 7 Smed. M. (Miss.) 753. See also First Cong. Soc. v. Snow, 1 Cush. (Mass.) 510; McCune v. Belt, 45 Mo. 174; Brown v. Ray, 18 N. H. 102, 45 Am. Dec. 361; Miller v. Sawyer, 30 Vt. 412. *Contra*, Ten Eyck v. Holmes, 3 Sandf. Ch. (N. Y.) 428.

**4. Debt Barred by Limitations.**—Sherrod v. Dixon, 120 N. Car. 60; Ijames v. Gaither, 93 N. Car. 362.

fying the debt;<sup>1</sup> nor has he any right to release the securities against the consent of the creditor.<sup>2</sup>

**Rights of Creditor Measured by Rights of Surety.** — The rights acquired by the creditor cannot extend beyond those of the surety in whose place he is substituted.<sup>3</sup>

**Recovery of Judgment as a Condition Precedent.** — In some jurisdictions the creditor's right of subrogation to securities held by sureties cannot be enforced until he has recovered judgment on his claim.<sup>4</sup>

**When Creditor Will Not Be Subrogated.** — A creditor will not be subrogated to securities taken by a surety with whom he is not in privity,<sup>5</sup> or to securities given by a surety to his cosurety,<sup>6</sup> or to securities given by a stranger with whom he is not in privity,<sup>7</sup> or to a fund given to the surety by the principal debtor with directions to apply it to the debt.<sup>8</sup> Nor does the right of subrogation here considered arise where the securities taken by the surety are void<sup>9</sup> or unenforceable as against subsequent incumbrancers.<sup>10</sup>

**Right Not Enforceable Against Innocent Purchaser.** — The creditor's right of subrogation is not enforceable as against an innocent purchaser of the securities.<sup>11</sup>

**2. Subrogation to Rights of Debtor Against Third Persons.** — A creditor may be subrogated to the rights of his debtor against a third person who is, in equity and good conscience, ultimately liable for the debt.<sup>12</sup> Thus where a judgment debtor fraudulently conveys property to his wife the creditor will be subrogated to the benefit of a note for the purchase money given by an innocent purchaser of the land from the wife.<sup>13</sup>

**Creditor Not Subrogated to Rights of Debtor Against Tortfeasor.** — A creditor whose means of recovery against the debtor have been destroyed or impaired by the tort of a third person,<sup>14</sup> or whose obligations as a contractor have been increased by such tort, cannot be subrogated to the rights of the debtor against the wrongdoer.<sup>15</sup> Nor can the creditor have the benefit of any indemnity which the wrongdoer may have taken for any liability which he might incur by reason of the tort.<sup>16</sup>

**IV. PERSONS INTERESTED IN ENCUMBERED ESTATES** — 1. **In General.** — The general rule is that any person having an interest in property on which there is a lien or encumbrance may, if necessary for his own protection, pay off the same and be substituted to the rights and remedies of the holder thereof.<sup>17</sup>

1. *Streeter v. Seigman*, (N. J. 1901) 48 Atl. Rep. 907.

2. *Surety Cannot Release Securities.* — *Oak Creek Valley Bank v. Helmer*, 59 Neb. 176; *Blanton v. Bostic*, 126 N. Car. 418; *Southerland v. Fremont*, 107 N. Car. 565. But see *Stone v. Furber*, 22 Mo. App. 498.

3. *Rights of Creditor Measured by Rights of Surety.* — *Bush v. Stamps*, 26 Miss. 463.

4. *Necessity of Recovery of Judgment.* — Importers, etc., *Bank v. McGhee*, 88 Ga. 702; *Nashville Bank v. Grundy*, Meigs (Tenn.) 256. And see *Weir-Booger Dry Goods Co. v. Kelly*, 80 Miss. 64. But compare *Ray v. Proffet*, 15 Lea (Tenn.) 517.

5. *Creditor Not in Privity with Surety.* — *American Surety Co. v. Lawrenceville Cement Co.*, 110 Fed. Rep. 717.

6. *Securities Given to Surety by Cosurety.* — *Hampton v. Phipps*, 108 U. S. 260.

7. *Securities Given by Stranger.* — *Macklin v. Northern Bank*, 83 Ky. 315.

8. *Spalding v. Henshaw*, 80 Ky. 55, 44 Am. Rep. 463, in which case the fund had been recovered back by the principal debtor on failure of the surety to apply it to the debt.

9. *Void Securities.* — *Lawry Banking Co. v. Empire Lumber Co.*, 91 Ga. 624; *Whitehead v. Hamilton Rubber Co.*, 52 N. J. Eq. 78.

10. *Securities Not Enforceable.* — *Thompson v. White*, 48 Conn. 509.

11. *Creditor's Right to Securities Not Enforceable Against Innocent Purchaser.* — *Stone v. Furber*, 22 Mo. App. 498. And see *Streeter v. Seigman*, (N. J. 1901) 48 Atl. Rep. 907.

12. *Creditor Subrogated Against Person Assuming Payment.* — *Green v. McDonald*, 70 Vt. 372.

*Note Given by Defaulting Agent to Cover Deficit — Subrogation of Creditor.* — *Lauderdale County v. Alford*, 65 Miss. 63, 7 Am. St. Rep. 637.

*Where the Debtor Has Been Guilty of Fraud*, and thereby waived his right to call upon a third party for reimbursement, the creditor can acquire no rights against such third party by subrogation. *Green v. Turner*, 80 Fed. Rep. 41.

13. *Judgment Creditor Subrogated to Rights of Debtor Against Third Person.* — *Garrett v. Wagner*, 125 Mo. 450.

14. *No Subrogation Against Tortfeasor.* — *Green v. Kimble*, 6 Blackf. (Ind.) 552; *Dale v. Grant*, 34 N. J. L. 142.

15. *Anthony v. Slaid*, 11 Met. (Mass.) 290.

16. *Indemnity Taken by Wrongdoer.* — *McGay v. Keilback*, (N. Y. Super. Ct. Spec. T.) 14 Abb. Pr. (N. Y.) 142.

17. *Persons Interested in Encumbered Estates in General — England.* — *Exall v. Partridge*, 8 T. R. 308; *Greswold v. Marsham*, 2 Ch. Cas. 170.

Thus where the owner of property is compelled to pay the debt of another in order to remove a lien from his land, he will be subrogated to the benefit of the lien discharged.<sup>1</sup> A married woman who pays off a mortgage executed by herself and husband will be subrogated to such mortgage where necessary for the protection of her interest.<sup>2</sup> A widow who discharges a lien on the estate of which she is dowable, or whose interest has been subjected to the payment of such charges, will be subrogated to the rights of the lien creditor.<sup>3</sup>

*United States.*—Russell v. Howard, 2 McLean (U. S.) 489.

*Connecticut.*—Young v. Williams, 17 Conn. 393.

*Georgia.*—Wilkins v. Gibson, 113 Ga. 42, 84 Am. St. Rep. 204.

*Illinois.*—Pratt v. Pratt, 96 Ill. 184; Chandler v. Green, 101 Ill. App. 409 (reversed on another point, Bennett v. Chandler, 199 Ill. 97); Home Sav. Bank v. Bierstadt, 68 Ill. App. 659, affirmed 168 Ill. 618, 61 Am. St. Rep. 146.

*Indiana.*—Milburn v. Phillips, 143 Ind. 97.

*Iowa.*—Knowles v. Rablin, 20 Iowa 101; Street v. Beal, 16 Iowa 68, 85 Am. Dec. 504; Massie v. Wilson, 16 Iowa 390; White v. Hampton, 13 Iowa 259.

*Kentucky.*—Ft. Jefferson Imp. Co. v. Dupoyster, (Ky. 1902) 66 S. W. Rep. 1048.

*Louisiana.*—Ventress v. His Creditors, 20 La. Ann. 359.

*Massachusetts.*—Loud v. Lane, 8 Met. (Mass.) 517.

*Michigan.*—Powers v. Golden Lumber Co., 43 Mich. 468; Lucking v. Wesson, 25 Mich. 443.

*Minnesota.*—Elliott v. Tainter, 88 Minn. 377; Willis v. Jelineck, 27 Minn. 18.

*Mississippi.*—Staples v. Fox, 45 Miss. 667.

*Missouri.*—Mellier v. Bartlett, 106 Mo. 381.

*Nebraska.*—Johnson v. Payne, 11 Neb. 269; Southard v. Dorrington, 10 Neb. 119.

*New Hampshire.*—Brown v. Simons, 44 N. H. 475; Robinson v. Leavitt, 7 N. H. 73; Page v. Foster, 7 N. H. 392; Marsh v. Rice, 1 N. H. 167.

*New Jersey.*—Denman v. Nelson, 31 N. J. Eq. 452; Bigelow v. Cassidy, 26 N. J. Eq. 557; Hamilton v. Dobbs, 19 N. J. Eq. 227.

*New York.*—Arnold v. Green, 116 N. Y. 566; Clark v. Mackin, 95 N. Y. 346; Southworth v. Scofield, 51 N. Y. 513; McLean v. Tompkins, (Supm. Ct. Gen. T.) 18 Abb. Pr. (N. Y.) 24; Bacon v. Van Schoonhoven, 19 Hun (N. Y.) 158; Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370; Matter of Coster, 2 Johns. Ch. (N. Y.) 503; Dings v. Parshall, 7 Hun (N. Y.) 522; Dale v. M'Evers, 2 Cow. (N. Y.) 118.

*Ohio.*—Joyce v. Dauntz, 55 Ohio St. 538; Armstrong v. McAlnin, 18 Ohio St. 184.

*Pennsylvania.*—Mosier's Appeal, 56 Pa. St. 76, 93 Am. Dec. 783.

*Tennessee.*—Evans v. Saunders, 3 Lea (Tenn.) 734.

*Vermont.*—Downer v. Fox, 20 Vt. 388.

**Assignment of Mortgage Debt and Subrogation to Lien of Mortgage Creditor Distinguished.**—Gatewood v. Gatewood, 75 Va. 407.

**Various Views on Question of Assignment of Mortgage.**—In Robinson v. Leavitt, 7 N. H. 73, Parker, J., said: "The true principle, I apprehend, is, that where money due on a mortgage

is paid, it shall operate as a discharge of the mortgage, or in the nature of an assignment of it, substituting him who pays in the place of the mortgagee, as may best serve the purposes of justice and the just intent of the parties." And see Bacon v. Goodnow, 59 N. H. 415; Hastings v. Stevens, 29 N. H. 564; Heath v. West, 26 N. H. 191; Johnson v. Elliot, 26 N. H. 67; Towle v. Hoit, 14 N. H. 61; Houston First Nat. Bank v. Ackerman, 70 Tex. 315. See also the title MORTGAGES, vol. 20, pp. 1055, 1064.

**1. Owner Subrogated on Payment of Incumbrance.**—Kinnah v. Kinnah, 184 Ill. 284; Cole v. Malcolm, 66 N. Y. 363.

**Owner Paying Off Senior Lien in Ignorance of Existence of Junior Lien.**—Darrow v. Herbert-Kraft Co. Bank, 125 Cal. 272.

**Owner Not Subrogated Merely to Avoid Payment of Junior Liens.**—Pulitzer v. National L. Assoc., (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 18.

**Execution Defendant Paying Execution to Release Lien on Land.**—In Harvey v. Warren, 31 Neb. 155, the sheriff collected the amount of an execution, marked the judgment "satisfied," but failed to return the same or to pay the money into court or to the creditor. Subsequently, to release the lien upon his land, the plaintiff paid the creditor the amount of the judgment and costs, and instituted an action against the sheriff and his surety to recover the money so paid by him. It was held that the plaintiff was entitled to be subrogated to the rights of the creditor, and could recover from the sheriff and the surety.

**2. Married Woman Paying Off Mortgage Subrogated Thereto.**—Ohmer v. Boyer, 89 Ala. 273; Smith v. Hall, 67 N. H. 200.

**Land Conveyed by Husband in Fraud of Creditors.**—Where a judgment debtor conveyed land to a third person for the purpose of enabling such third person to obtain a loan thereon and discharge certain incumbrances, and the transferee conveyed to the debtor's wife, it was held, in an action by the creditors to subject the land to the payment of their judgments, that the wife was entitled to be subrogated to the rights of those whose liens she had paid, and also to the lien of certain taxes paid by her before the judgments were recovered. Brownell v. Stoddard, 42 Neb. 177.

**3. Widow Discharging Incumbrance.**—Crouch v. Edwards, 52 Ark. 499; Stinson v. Anderson, 96 Ill. 373; Fowler v. Fowler, 78 Mo. App. 330; Becker v. Carey, (N. J. 1897) 36 Atl. Rep. 770; Coudert v. Coudert, 43 N. J. Eq. 407; Durante v. Eannaco, 65 N. Y. App. Div. 435; Bayles v. Husted, 40 Hun (N. Y.) 376; Kenyon v. Segar, 14 R. I. 490; Literer v. Huddleston, (Tenn. Ch. 1808) 52 S. W. Rep. 1003; Gatewood v. Gatewood, 75 Va. 407; Simmons v. Lyle, 32 Gratt. (Va.) 752.

And, under similar circumstances, the same equity will arise in favor of life tenants,<sup>1</sup> tenants in common,<sup>2</sup> sureties on the mortgage,<sup>3</sup> creditors of the mortgagor,<sup>4</sup> mortgagees,<sup>5</sup> and assignees of terms.<sup>6</sup>

**Volunteer Not Entitled to Subrogation.**—A mere volunteer who, without any agreement for subrogation, removes a lien or incumbrance from land in which he has no interest to protect, will not be subrogated thereto.<sup>7</sup> But the interest of the person paying off the incumbrance need not be absolute. A contingent interest is sufficient.<sup>8</sup>

**Redemption and Subrogation Distinguished.**—In regard to the question of mortgages, it should be observed that the right of the redeeming party to subrogation does not follow as a matter of course from the right of redemption. That right depends on the relation of the parties liable to be foreclosed, to each other, the particular situation of the party claiming such right, and especially and generally on the inquiry whether such subrogation is necessary for the protection of the redeeming party, and consequently on the circumstances in which the right of redemption is sought to be exercised. Thus, where there are several successive mortgages on the same premises, the mortgagor may have a decree for the redemption of the first mortgage, though by payment under such decree he acquires no right to subrogation; so the grantee of the mortgagor, holding the fee subject to the mortgages, may redeem the first mortgage, but he does not thereby become entitled to subrogation.<sup>9</sup>

**Full Payment of Incumbrance a Condition Precedent.**—As in other cases, the right of subrogation does not become complete, as a general rule, until the incumbrance has been fully paid.<sup>10</sup>

## 2. Purchasers — *a.* IN GENERAL. — One of the most familiar instances of

**1. Life Tenant Discharging Incumbrance.**—*Kinthead v. Ryan*, 64 N. J. Eq. 454; *Kocher v. Kocher*, 56 N. J. Eq. 545; *Wilder v. Wilder*, (Vt. 1903) 53 Atl. Rep. 1072.

**2. Tenant in Common Removing Incumbrance.**—*Oliver v. Lansing*, 57 Neb. 358; *Kinthead v. Ryan*, 64 N. J. Eq. 454; *Haverford Loan, etc., Assoc. v. Fire Assoc.*, 180 Pa. St. 522, 57 Am. St. Rep. 657.

**3. Surety Removing Incumbrance Entitled to Subrogation.**—*Heisler v. Aultman*, 56 Minn. 454, 45 Am. St. Rep. 486; *Sears v. Patterson*, 54 Mo. App. 278.

**4. In Louisiana, by Statute, an Ordinary Creditor of the mortgagor upon paying off the mortgage is entitled to subrogation.** *Walmsley v. Theus*, 107 La. 417; *Hall v. Hawley*, 49 La. Ann. 1046; *Zeigler v. His Creditors*, 49 La. Ann. 144; *Spiller v. Their Creditors*, 16 La. Ann. 292.

**Right of Judgment Creditor to Subrogation.**—See *infra*, this section, 3. *Junior Mortgagees, Judgment Creditors, etc.*

**5. Mortgage Canceled by Mistake.**—Where a mortgagee takes a new mortgage as a substitute for a former one, and cancels and releases the latter, in ignorance of an existing lien upon the mortgaged premises, equity will, in the absence of some special disqualifying fact, restore him to his former position, when it can be done without interfering with any new rights acquired on the faith of the altered condition of the record. *Capital Lumbering Co. v. Ryan*, 34 Oregon 73.

**Subrogation Refused to Mortgagee.**—Where a *cestui que trust* recovers lands purchased by the trustee with trust funds, a mortgagee of such land, whose mortgage is held to be invalid, will not be subrogated to the rights of the

*cestui que trust* against the vendor. *Royalty v. Shirley*, (Ky. 1899) 53 S. W. Rep. 1044.

**Further as to Subrogation of Mortgagees,** see *infra*, this section, 3. *Junior Mortgagees, Judgment Creditors, etc.*

**6. Assignees of Terms.**—The assignees of a term may, in order to protect their own interest, redeem a mortgage executed by the lessor prior to the date of their lease, though the demised premises constitute a portion only of those embraced in the mortgage. And upon such redemption the assignees are entitled to an assignment of the mortgage and an acknowledgment thereof, if the mortgage be recorded. *Averill v. Taylor*, 8 N. Y. 44.

**7. Volunteer Not Entitled to Subrogation.**—*Roberts v. Best*, 172 Mo. 67; *Fowler v. Fowler*, 78 Mo. App. 330; *Bigelow v. Cassedy*, 26 N. J. Eq. 557; *Schreyer v. Saunders*, 39 N. Y. App. Div. 8; *Nelson v. Loder*, 132 N. Y. 288; *Ellsworth v. Lockwood*, 42 N. Y. 89; *Averill v. Taylor*, 8 N. Y. 44; *Johnson v. Zink*, 52 Barb. (N. Y.) 396, 51 N. Y. 333; *Cherry v. Monroe*, 2 Barb. Ch. (N. Y.) 618; *Speiglemyer v. Crawford*, 6 Paige (N. Y.) 257; *Holland v. Citizens' Sav. Bank*, 16 R. I. 734. And see *infra*, this section, 5. *Persons Advancing Money to Pay Off Incumbrances.*

**8. Contingent Interest Sufficient to Support Subrogation.**—*Pease v. Egan*, 131 N. Y. 262.

**9. Redemption and Subrogation Distinguished.**—*Jenkins v. Continental Ins. Co.*, (C. Pl. Spec. T.) 12 How. Pr. (N. Y.) 66; *Dauchy v. Bennett*, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 375. *Compare Pardee v. Van Anken*, 3 Barb. (N. Y.) 534.

**10. Full Payment of Incumbrance.**—*Springer v. Foster*, 27 Ind. App. 15; *Featherstone v. Emerson*, 14 Utah 12.

the application of the doctrine of subrogation is where the purchaser of encumbered property, without having assumed the incumbrance, pays it off, in order to protect his own interest, or to perfect his own title; in such cases, it is uniformly held that he is entitled to be subrogated to the position of the incumbrancer, in respect of all the latter's securities, rights, remedies, and priorities.<sup>1</sup> And this rule applies to purchasers of chattels as well as to purchasers of real property.<sup>2</sup> But, generally speaking, to entitle a purchaser to subrogation, the claims which he satisfies must be such as would be enforceable against the land in his hands.<sup>3</sup>

**Satisfaction of Incumbrance a Condition Precedent.** — As a general rule a purchaser will not be subrogated to the benefit of an incumbrance on the land purchased until he has fully satisfied the same.<sup>4</sup>

**Against Whom Right May Be Enforced.** — A purchaser of property who has discharged an incumbrance thereon will be subrogated to the lien of such incumbrance as against the holders of other incumbrances of which he had no notice;<sup>5</sup> but not as against the holders of other incumbrances of which he

**1. Purchaser Paying Off Incumbrance Entitled to Subrogation in General** — *United States*. — *Re Pierce*, 2 Lowell (U. S.) 343; *Bright v. Boyd*, 1 Story (U. S.) 478.

*Arkansas*. — *Lane v. Hallum*, 38 Ark. 385.

*Georgia*. — *Simpson v. Ennis*, 114 Ga. 202; *Corbally v. Hughes*, 59 Ga. 493.

*Illinois*. — *Hazle v. Bondy*, 173 Ill. 302; *Stiger v. Bent*, 111 Ill. 328; *Beaver v. Slanker*, 94 Ill. 175.

*Indiana*. — *Chaplin v. Sullivan*, 128 Ind. 50; *Harlan v. Jones*, 104 Ind. 107; *Dunning v. Seward*, 90 Ind. 63; *Rush v. State*, 20 Ind. 432. And see *Hines v. Drescher*, 93 Ind. 551.

*Kansas*. — *Fuller v. Irvin*, 1 Kan. App. 248. *Kentucky*. — *Duke v. Pigman*, (Ky. 1901) 62 S. W. Rep. 867.

*Maryland*. — *Dircks v. Logsdon*, 59 Md. 173; *Gibson v. McCormick*, 10 Gill & J. (Md.) 65.

*Massachusetts*. — *Fowler v. Parsons*, 143 Mass. 401.

*Michigan*. — *Bush v. Wadsworth*, 60 Mich. 255.

*Mississippi*. — *Planters' Bank v. Dodson*, 9 Smed. & M. (Miss.) 527.

*Missouri*. — *Gooch v. Moore*, 110 Mo. 425.

*New Hampshire*. — *Kelly v. Duff*, 61 N. H. 435.

*New Jersey*. — *Coudert v. Coudert*, 43 N. J. Eq. 407.

*New York*. — *Simpson v. Del Hoyo*, 94 N. Y. 189; *Cole v. Malcolm*, 66 N. Y. 366; *Johnson v. Parmely*, 14 Hun (N. Y.) 398.

*North Carolina*. — *Scott v. Dunn*, 1 Dev. & B. Eq. (21 N. Car.) 425, 30 Am. Dec. 174.

*Ohio*. — *Joyce v. Dauntz*, 55 Ohio St. 538.

*Oregon*. — *Morrell v. Miller*, 28 Oregon 354.

*Pennsylvania*. — *Ziegler v. Long*, 2 Watts (Pa.) 205.

*Tennessee*. — *Hurt v. Reeves*, 5 Hayw. (Tenn.) 50.

*Texas*. — *Davis v. John V. Farwell Co.*, (Tex. Civ. App. 1899) 49 S. W. Rep. 656.

*Virginia*. — *Fulkerson v. Taylor*, 100 Va. 426; *Armentrout v. Gibbons*, 30 Gratt. (Va.) 632.

See also the title MORTGAGES, vol. 20, p. 1064 *et seq.*

**Purchaser by Parol of Part of Mortgaged Land Paying Off Whole Mortgage.** — *Champlin v. Williams*, 9 Pa. St. 341.

**Purchaser of Husband's Interest in Land Not**

**Subrogated as Against Wife's Interest.** — *Zeller v. Henry*, 157 Pa. St. 1.

**Purchaser from Guardian of Insane Person — When Not Subrogated.** — *Evison v. Hallock*, 108 Wis. 249. Compare *Cathcart v. Sugeneheimer*, 18 S. Car. 123.

**Grantee of Partnership Property — When Not Subrogated.** — See *Hubbard v. Moore*, 67 Vt. 532.

**A Subpurchaser of land subject to a mortgage, who is compelled to satisfy the mortgage in order to prevent a sale, will be subrogated to the rights of the mortgagee against the mortgagor on the mortgage note, but not as to expenses of advertising a sale of the lands.** *Bock v. Gallagher*, 114 Mass. 28.

**In Louisiana** the subrogation acquired under article 2161 of the Revised Civil Code by a purchaser who employs the price of his purchase in paying the creditors to whom the property is mortgaged is a special one. It is an equitable defensive subrogation, intended to consolidate the property in the hands of the purchaser, and protect him from eviction therefrom at the instance of other creditors. When the amount paid by the purchaser to the mortgage creditors does not exceed the purchase price, the subrogation acquired by him is limited to the property purchased, and does not confer rights upon him to be actively exercised against third parties. *Randolph v. Stark*, 51 La. Ann. 1121.

**2. Purchaser of Encumbered Chattel.** — *Alford v. Cobb*, 28 Hun (N. Y.) 22; *Illinois Trust, etc., Bank v. Alexander Stewart Lumber Co.*, (Wis. 1903) 94 N. W. Rep. 777. And see *Eby v. McTavish*, 32 Ont. 190. Compare *Bufford v. Raney*, 122 Ala. 565.

**3. No Subrogation Unless Claim Satisfied Was Enforceable.** — *Faulk v. Calloway*, 123 Ala. 335; *Carpentier v. Brenham*, 40 Cal. 221.

**4. Full Satisfaction of Incumbrance.** — *Hubbard v. Le Barron*, 110 Iowa 443.

But see *Sowers's Appeal*, (Pa. 1888) 15 Atl. Rep. 898, holding that a purchaser who deposited a fund in court for the payment of an incumbrance was entitled to subrogation even though the amount deposited was insufficient, where the insufficiency arose from a mistake in calculation merely.

**5. Purchaser without Notice of Incumbrance.** — *Fowler v. Maus*, 141 Ind. 47; *Ayers v. Adams*,

had notice, either actual or constructive.<sup>1</sup> Subrogation will not be enforced in such cases to the prejudice of persons having equal or superior equities.<sup>2</sup>

*b. PURCHASER UNDER WARRANTY DEED.*—Where land is sold with a warranty against incumbrances, the purchaser, on being compelled to discharge an incumbrance thereon, will be subrogated to the rights of the creditor against the vendor.<sup>3</sup>

*c. PURCHASER WHOSE TITLE HAS FAILED—(1) In General.*—As a general rule where the purchaser's title to the land fails he will be subrogated to the rights of the holders of liens or incumbrances which he has paid, or which have been paid out of the purchase money.<sup>4</sup>

(2) *Purchaser at Invalid Tax Sale.*—A purchaser of land at an invalid tax sale will be subrogated to the state's lien for the purchase price and all taxes paid by him.<sup>5</sup>

(3) *Purchasers at Foreclosure, Judicial, and Quasi-judicial Sales.*—The generally received doctrine is that purchasers at foreclosure sales will be subrogated to the rights of holders of claims which have been paid out of the purchase money, in the event that the sale is ineffectual to convey title to the property sold.<sup>6</sup> And the same equity will arise, under like circumstances, in

82 Ind. 109; *Stevens v. King*, 84 Me. 291; *Johnson v. Tootle*, 14 Utah 482.

1. *Purchaser with Notice of Incumbrance.*—*Hargis v. Robinson*, 63 Kan. 686; *Hayden v. Huff*, 60 Neb. 625; *Garwood v. Eldridge*, 2 N. J. Eq. 145, 34 Am. Dec. 195; *Campbell v. Hamilton*, (Tenn. Ch. 1897) 39 S. W. Rep. 895. But to the contrary see *Joyce v. Dauntz*, 55 Ohio St. 538.

2. *No Subrogation to Prejudice of Other Parties.*—*Tarboro v. Micks*, 118 N. Car. 162; *Robinson v. Lowery*, 52 S. Car. 464.

3. *Purchaser under Warranty Deed Subrogated on Payment of Incumbrance.*—*Beaver v. Slanker*, 94 Ill. 175; *Nixon v. Jullian*, 72 Miss. 570; *Freiberg v. De Lamar*, 7 Tex. Civ. App. 263; *Beall v. Walker*, 26 W. Va. 741. See also *Hoke v. Jones*, 33 W. Va. 501.

4. *Purchaser Whose Title Has Failed Subrogated to Incumbrance Paid—Alabama.*—*Faulk v. Calloway*, 123 Ala. 325.

*Illinois.*—*St. Louis, etc., Coal, etc., Co. v. Sandoval Coal, etc., Co.*, 116 Ill. 170; *Young v. Ward*, 115 Ill. 264.

*Iowa.*—*Dillow v. Warfel*, 71 Iowa 106.

*Kansas.*—*Hofman v. Demple*, 52 Kan. 756.

*Kentucky.*—*Mallory v. Dauber*, 83 Ky. 239.

*Louisiana.*—*Hobgood v. Schuler*, 44 La. Ann. 537.

*Michigan.*—*Webb v. Williams*, Walk. (Mich.)

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*Minnesota.*—*Arnold v. Hoschildt*, 69 Minn. 101.

*Mississippi.*—*Phillips v. Chamberlain*, 61 Miss. 740.

*Missouri.*—*Wade v. Beldmeir*, 40 Mo. 487.

*Nebraska.*—*Betts v. Sims*, 35 Neb. 840, 37 Am. St. Rep. 470.

*New York.*—*Easthampton v. Bowman*, 136 N. Y. 521; *Eddy v. Traver*, 6 Paige (N. Y.) 521, 31 Am. Dec. 261.

*North Carolina.*—*Browne v. Davis*, 109 N. Car. 23.

*Ohio.*—*Sidener v. Hawes*, 37 Ohio St. 533.

*Oregon.*—*House v. Fowle*, 22 Oregon 303.

*Pennsylvania.*—*In re McGill*, 6 Pa. St. 504.

*Rhode Island.*—*Brewer v. Nash*, 16 R. I. 458, 27 Am. St. Rep. 749.

*Tennessee.*—*Caldwell v. Palmer*, 6 Lea (Tenn.) 652.

*Texas.*—*Murphy v. Smith*, (Tex. Civ. App. 1899) 50 S. W. Rep. 1040.

*Virginia.*—*Nalle v. Farish*, 98 Va. 130.

*West Virginia.*—*Blair v. Mounts*, 41 W. Va. 706; *James v. Burbridge*, 33 W. Va. 272.

*Wisconsin.*—*Stewart v. Stewart*, 90 Wis. 516, 48 Am. St. Rep. 949.

*Incumbrance Discharged by Payment—Purchaser Not Subrogated Thereeto.*—*Brooks v. Wentz*, 61 N. J. Eq. 474.

*Purchaser from Insane Person Not Entitled to Subrogation.*—*German Sav., etc., Soc. v. De Lashmutt*, 67 Fed. Rep. 399. But see *Cathcart v. Sugenhimer*, 18 S. Car. 123.

5. *Purchaser at Invalid Tax Sale.*—*Gregory v. Bartlett*, 55 Ark. 30; *Hershey v. Thompson*, 50 Ark. 485; *Bagley v. Castile*, 42 Ark. 77; *Reed v. Kalfsbeck*, 147 Ind. 148; *Arn v. Hopkin*, 25 Kan. 707; *Leavitt v. Bartholomew*, (Neb. 1901) 93 N. W. Rep. 856; *Green v. Hellman*, 61 Neb. 875; *John v. Connell*, 61 Neb. 267; *Weston v. Meyers*, 45 Neb. 95; *McDonald v. Beer*, 42 Neb. 437; *Stegeman v. Faulkner*, 42 Neb. 53. See also *Meher v. Cole*, 50 Ark. 361, 7 Am. St. Rep. 101. And see *infra*, this title, IX. *Subrogation Arising from Payment of Taxes and Duties.* But see *contra*, *Finegan v. New York*, 4 N. Y. App. Div. 15.

6. *Purchaser at Foreclosure Sale—United States.*—*Brobst v. Brock*, 10 Wall. (U. S.) 534.

*Arkansas.*—*Turman v. Bell*, 54 Ark. 273, 26 Am. St. Rep. 35.

*Georgia.*—*Dutcher v. Hobby*, 86 Ga. 198, 22 Am. St. Rep. 444.

*Illinois.*—*Bruschke v. Wright*, 166 Ill. 183, 57 Am. St. Rep. 125. And see *Harts v. Brown*, 77 Ill. 226.

*Indiana.*—*Logansport v. Case*, 124 Ind. 254; *Cockrum v. West*, 122 Ind. 372; *Watkins v. Winings*, 102 Ind. 330; *Curtis v. Gooding*, 99 Ind. 45; *Willson v. Brown*, 82 Ind. 471; *Parker v. Goddard*, 81 Ind. 294; *Muir v. Berkshire*, 52 Ind. 149. See also *Shannon v. Hay*, 106 Ind. 589.

*Iowa.*—*Brown v. Brown*, 73 Iowa 430.

favor of purchasers at judicial sales,<sup>1</sup> execution sales,<sup>2</sup> and other sales of like nature, such as administrator's, executor's, and guardian's sales;<sup>3</sup> and also in

*Kansas*.—Russell v. Hudson, 28 Kan. 99.  
*Louisiana*.—Wolf v. Lowry, 10 La. Ann. 272.

*Maryland*.—Johnson v. Robertson, 34 Md. 165.

*Michigan*.—Hoffman v. Harrington, 33 Mich. 392; Gilbert v. Cooley, Walker (Mich.) 494.

*Minnesota*.—Johnson v. Sandhoff, 30 Minn. 197.

*Mississippi*.—Bonner v. Lessley, 61 Miss. 392. See also Clark v. Wilson, 56 Miss. 753.

*Missouri*.—Lanier v. McIntosh, 117 Mo. 508, 38 Am. St. Rep. 676; Moore v. Lindsey, 52 Mo. App. 474; Honaker v. Shough, 55 Mo. 472. And see Long v. Long, 111 Mo. 12.

*Nebraska*.—Merriam v. Rauen, 23 Neb. 217. And see Milligan v. Gallen, 64 Neb. 561.

*New York*.—Miner v. Beekman, 50 N. Y. 337; Winslow v. Clark, 47 N. Y. 261; Robinson v. Ryan, 25 N. Y. 320; Jackson v. Bowen, 7 Cow. (N. Y.) 13.

*North Carolina*.—Smith v. Brittain, 3 Ired. Eq. (38 N. Car.) 347, 42 Am. Dec. 175.

*Ohio*.—Doyle v. Breneman, 4 Ohio Dec. 22, 2 Ohio N. P. 415; Timmerman v. Howell, 1 Ohio Cir. Dec. 342, 2 Ohio Cir. Ct. 27; Frische v. Kramer, 16 Ohio 125, 47 Am. Dec. 368.

*South Carolina*.—Bailey v. Bailey, 41 S. Car. 337, 44 Am. St. Rep. 713; Givins v. Carroll, 40 S. Car. 413, 42 Am. St. Rep. 889; Zylstra v. Keith, 2 Desaus. (S. Car.) 140.

*South Dakota*.—Home Invest. Co. v. Clarson, 15 S. Dak. 513.

*Texas*.—Davis v. Roosevelt, 53 Tex. 305. And see Shearer v. City Nat. Bank, 115 Ala. 352; Swain v. Stockton Sav., etc., Soc., 78 Cal. 600, 12 Am. St. Rep. 118.

**Right Not Waived by Delay in Payment.**—Bodkin v. Merit, 102 Ind. 293.

**Right Limited to Amount Paid.**—Martin v. Kelly, 59 Miss. 652.

**Necessity of Taking Assignment of Prior Liens.**—For circumstances under which a purchaser of mortgaged premises will be required to take an assignment of liens which accrued prior to his purchase, in order to protect his interest, see Boyd v. Parker, 43 Md. 182.

**1. Purchaser at Judicial Sale.**—*Illinois*.—Chambers v. Jones, 72 Ill. 275; Kinney v. Knoebel, 51 Ill. 112.

*Indiana*.—Bunting v. Gilmore, 124 Ind. 113; Bodkin v. Merit, 102 Ind. 293; Dunning v. Seward, 90 Ind. 63; Short v. Sears, 93 Ind. 505; Carver v. Howard, 92 Ind. 173; Reily v. Burton, 71 Ind. 118; Bunts v. Cole, 7 Blackf. (Ind.) 265, 41 Am. Dec. 226.

*Kentucky*.—Weakley v. Davis, (Ky. 1898) 44 S. W. Rep. 637.

*Louisiana*.—Jouet v. Mortimer, 29 La. Ann. 207; Barelli v. Gauche, 24 La. Ann. 324; Stockton v. Downey, 6 La. Ann. 581.

*Tennessee*.—Hays v. Dalton, 5 Lea (Tenn.) 555 (overruling Wright v. Dufield, 2 Baxt. (Tenn.) 218).

*Texas*.—French v. Grenet, 57 Tex. 273.

*Virginia*.—Hudgin v. Hudgin, 6 Gratt. (Va.) 320, 52 Am. Dec. 124.

*West Virginia*.—Hull v. Hull, 35 W. Va. 155, 29 Am. St. Rep. 800; Hutson v. Sadler, 31

W. Va. 358; Haymond v. Camden, 22 W. Va. 180.

**2. Purchaser at Execution Sale.**—Bruschke v. Wright, 166 Ill. 183, 57 Am. St. Rep. 125; McHany v. Schenk, 88 Ill. 357; Milburn v. Phillips, 143 Ind. 93; Bodkin v. Merit, 102 Ind. 293; Jones v. Smith, 55 Tex. 383. See also Tappan v. Hunt, 74 Ga. 545; Smith v. Jordan, 25 Ga. 687; Shepherd v. Burkhalter, 13 Ga. 443, 58 Am. Dec. 523.

**Purchaser of Chattel at Execution Sale Entitled to Subrogation.**—M'Ghee v. Ellis, 4 Litt. (Ky.) 244, 14 Am. Dec. 124. See also McLaughlin v. Daniel, 8 Dana (Ky.) 182; Geoghegan v. Ditto, 2 Met. (Ky.) 433, 74 Am. Dec. 413.

**In Ohio the Right of Subrogation Is Accorded by Statute** (Rev. Stat. 1892, § 5410) to purchasers at execution sales whose titles fail by reason of defects in the proceedings. But this statute does not apply where the sale is regular; and a purchaser at a sheriff's sale in a creditor's suit, not being in privity with a mortgage on the land, is not subrogated to any supposed rights of the mortgagee. Jewett v. Feldheiser, 68 Ohio St. 523.

**Right Not Affected by Acts of Judgment Debtor.**—Campbell v. Lowe, 9 Md. 500, 66 Am. Dec. 339. See also Rinehart v. Long, 95 Mo. 401; Lionberger v. Baker, 88 Mo. 447; Ryland v. Callison, 54 Mo. 513.

**Notice that Property Sold Belonged to Stranger.**—It seems that the purchaser's right of subrogation will not be affected by the fact that he was aware at the time of the sale that the property sold belonged to a stranger, and, therefore, was not subject to the execution. McLaughlin v. Daniel, 8 Dana (Ky.) 183. But see Halcombe v. Loudermilk, 3 Jones L. (48 N. Car.) 491.

**No Subrogation Where Sale Is Valid.**—Gray v. Denson, 129 Ala. 406.

**3. Purchaser at Administrator's, Executor's, and Guardian's Sales.**—*United States*.—Davis v. Gaines, 104 U. S. 386.

*Arkansas*.—Bond v. Montgomery, 56 Ark. 563, 35 Am. St. Rep. 119; Meher v. Cole, 50 Ark. 361, 7 Am. St. Rep. 101; Nichols v. Shearon, 49 Ark. 75.

*Indiana*.—Paxton v. Sterne, 127 Ind. 289; Duncan v. Gainey, 108 Ind. 579; Hines v. Drescher, 93 Ind. 551; Jones v. French, 92 Ind. 138; Carver v. Howard, 92 Ind. 173; Hawkins v. Miller, 26 Ind. 173.

*Kentucky*.—Beall v. Barclay, 10 B. Mon. (Ky.) 261; Goring v. Shreve, 7 Dana (Ky.) 64; Shepherd v. McIntire, 5 Dana (Ky.) 574.

*Louisiana*.—Blanton v. Ludeling, 30 La. Ann. 1232; Dufour v. Camfranc, 11 Mart. (La.) 607, 13 Am. Dec. 360.

*Minnesota*.—Millis v. Lombard, 32 Minn. 259.

*Mississippi*.—Pool v. Ellis, 64 Miss. 555; McGee v. Wallis, 57 Miss. 638, 34 Am. Rep. 484; Douglas v. Bennett, 51 Miss. 680; Short v. Porter, 44 Miss. 533; Ragland v. Green, 14 Smed. & M. (Miss.) 194; Grant v. Lloyd, 12 Smed. & M. (Miss.) 191.

*Missouri*.—Rinehart v. Long, 95 Mo. 396; Vallé v. Fleming, 29 Mo. 152, 77 Am. Dec. 557.



favor of the grantees of such purchasers.<sup>1</sup> There is, however, a line of cases which deny this position, on the ground that such purchasers are volunteers, acting without compulsion, and for no purpose of protecting any interest of their own, and under a mistake of law, and are, therefore, not entitled to the protection of courts of equity.<sup>2</sup>

(4) *When Purchaser Will Not Be Subrogated.*—Subrogation will not be enforced in favor of a purchaser unless it is necessary for his protection.<sup>3</sup> A purchaser at a void executor's sale will not be entitled to subrogation where he was cognizant of the executor's want of authority to sell, and was warned not to purchase.<sup>4</sup> Nor does the right arise where the sale is adjudged void by reason of fraud on the part of the purchaser.<sup>5</sup>

*North Carolina.*—Perry v. Adams, 98 N. Car. 167, 2 Am. St. Rep. 326; Springs v. Harven, 3 Jones Eq. (56 N. Car.) 96; Scott v. Dunn, 1 Dev. & B. Eq. (21 N. Car.) 425, 30 Am. Dec. 174.

*Ohio.*—Wehrle v. Wehrle, 39 Ohio St. 365; Barr v. Hatch, 3 Ohio 527.

*Oregon.*—Levy v. Riley, 4 Oregon 392.

*South Carolina.*—Hunter v. Hunter, 58 S. Car. 393, 63 S. Car. 78, 90 Am. St. Rep. 663; Cathcart v. Sugenheimer, 18 S. Car. 123; Bentley v. Long, 1 Strobb. Eq. (S. Car.) 43, 47 Am. Dec. 523.

*Tennessee.*—Bennett v. Coldwell, 8 Baxt. (Tenn.) 483.

*Texas.*—Faires v. Cockerell, 88 Tex. 428; Harrison v. Ilgner, 74 Tex. 86; Mayes v. Blanton, 67 Tex. 245; Cline v. Upton, 59 Tex. 27; Burns v. Ledbetter, 54 Tex. 374; Walker v. Lawler, 45 Tex. 538; Herndon v. Rice, 21 Tex. 456; Andrews v. Richardson, 21 Tex. 287; Morton v. Welborn, 21 Tex. 772; Howard v. North, 5 Tex. 290, 51 Am. Dec. 769; Stone v. Darnell, 25 Tex. Supp. 430, 78 Am. Dec. 582.

*Virginia.*—Hudgin v. Hudgin, 6 Gratt. (Va.) 320, 52 Am. Dec. 124.

*Wisconsin.*—Hart v. Smith, 44 Wis. 213; Mohr v. Tulip, 40 Wis. 66; Winslow v. Crowell, 32 Wis. 639; Blodgett v. Hitt, 29 Wis. 169; Wilkinson v. Filby, 24 Wis. 441.

**Qualification of Rule.**—A purchaser of land at an administrator's sale is not entitled in equity to be subrogated to the claims of the creditors which have been paid by the purchase money, where the title fails for want of jurisdiction in the court ordering the same over the person of the heir. Borders v. Hodges, 154 Ill. 498; Bishop v. O'Conner, 69 Ill. 431. But see Bruschke v. Wright, 166 Ill. 183, 57 Am. St. Rep. 125.

**Sale of Homestead by Administrator Contrary to Law.**—Under a statute making it a misdemeanor for an administrator to attempt to sell lands reserved from sale as a homestead, a person assuming to be the purchaser at the pretended sale commits no offense under the act; he stands as though the effort to sell were not made a criminal offense, and is entitled to be subrogated to the rights against the estate which were held by the creditors whose claims have been paid with his money. Nor will the mere fact that he assisted the administrator in appraising the lands for the sale make him an accomplice in the former's misdemeanor, and thereby bar his right; in order that his act may have this effect, it must be done with the in-

tent to encourage and induce the administrator to make the sale. Bond v. Montgomery, 56 Ark. 563, 35 Am. St. Rep. 119; Harris v. Watson, 56 Ark. 574.

**A Purchaser under a Void Trustee's Sale,** if the money paid by him is applied to the extinguishment of the trust debt, becomes the equitable assignee of the debt, and is subrogated to the rights of the original *cestui que trust*, and, as such, entitled to charge the land in equity with the debt. Bonner v. Lessley, 61 Miss. 392.

**If a Sale of Lands under Insolvency Proceedings Be Set Aside** at the instance of the heirs who were not made parties thereto, and the purchaser seeks to be subrogated to the rights of the creditors whose claims were allowed and who received a dividend, it is competent for the heirs to show that such claims were barred before inception of the proceedings. Sivley v. Summers, 57 Miss. 712.

**1. Grantee of Purchaser.**—Jordan v. Sayre, 29 Fla. 100; Bruschke v. Wright, 166 Ill. 183, 57 Am. St. Rep. 125; Ray v. Detchon, 79 Ind. 56; O'Brien v. Harrison, 59 Iowa 686; Richards v. Morton, 18 Mich. 255; Jellison v. Halloran, 44 Minn. 199; Rogers v. Benton, 39 Minn. 39, 12 Am. St. Rep. 613; Bonner v. Lessley, 61 Miss. 392; Winslow v. Clark, 47 N. Y. 261; Finlayson v. Peterson, 11 N. Dak. 45; Cooke v. Cooper, 18 Oregon 142, 17 Am. St. Rep. 709; Sims v. Steadman, 62 S. Car. 300.

**2. Subrogation Denied—Purchasers Considered Volunteers.**—Branham v. San José, 24 Cal. 585; Boggs v. Fowler, 16 Cal. 559, 76 Am. Dec. 561; Richmond v. Marston, 15 Ind. 134; Laws v. Thompson, 4 Jones L. (49 N. Car.) 104; Salmond v. Price, 13 Ohio 368, 42 Am. Dec. 204; Nowler v. Coit, 1 Ohio 519, 13 Am. Dec. 640. And see Childress v. Allen, 3 La. 447; Finegan v. New York, 4 N. Y. App. Div. 15; Campbell v. Elliott, 52 Tex. 151.

**3. Subrogation Founded on Protection.**—Edinburgh American Land Mortg. Co. v. Latham, 88 Ind. 88; McDonald v. Quick, 139 Mo. 484.

**4. Purchaser Cognizant of Executor's Want of Authority.**—Bagley v. Castile, 42 Ark. 77; Creanor v. Creanor, 36 Ark. 91; Huse v. Den, 85 Cal. 390, 20 Am. St. Rep. 232; Murphy v. Adams, 71 Me. 113, 36 Am. Rep. 299; Gerber v. Upton, 123 Mich. 605; Peters v. Clements, 52 Tex. 140.

**5. Sale Void for Fraud of Purchaser.**—Sands v. Codwise, 4 Johns. (N. Y.) 597, 4 Am. Dec. 305; McCaskey v. Graff, 23 Pa. St. 321, 62 Am. Dec. 336; Jackson v. Summerville, 13 Pa. St. 359; Riddle v. Murphy, 7 S. & R. (Pa.) 230; Gilbert v. Hoffman, 2 Watts (Pa.) 66, 26 Am.

*d.* PURCHASER EXPRESSLY ASSUMING INCUMBRANCE. — If the purchaser expressly assumes to pay the incumbrance, he thereby becomes the principal debtor, primarily and absolutely liable for the debt, and may not be subrogated to the benefit of the incumbrance upon making payment according to his contract.<sup>1</sup>

*e.* INCUMBRANCE PAID AS PART OF PURCHASE PRICE. — A purchaser will not be entitled to subrogation where his payment of an incumbrance on the land constitutes a part of the consideration or purchase price.<sup>2</sup>

*f.* PURCHASER OF EQUITY OF REDEMPTION — (1) *In General.* — The purchaser of an equity of redemption of mortgaged premises on paying the amount due on the mortgage, or taking an assignment thereof, will be entitled to subrogation to the rights of the mortgagee as against intervening rights; in such a case equity will generally treat the incumbrance as still subsisting, and not as merged, so long as it is necessary to do so to protect the rights of the party paying the mortgage debt.<sup>3</sup> So it has been held that an assignee of the equity of redemption, who pays and takes up several notes secured by mortgage, under an agreement with the mortgagee that he may hold them in

Dec. 103; Greig *v.* Rice, 66 S. Car. 171; Elam *v.* Donald, 58 Tex. 316.

See also the following analogous cases: Milwaukee, etc., R. Co. *v.* Soutter, 13 Wall. (U. S.) 517; Bean *v.* Smith, 2 Mason (U. S.) 252; Tuska-loosa First Nat. Bank *v.* Kennedy, 91 Ala. 470; Pritchett *v.* Jones, 87 Ala. 317; Wiley *v.* Knight, 27 Ala. 336; Borland *v.* Walker, 7 Ala. 269; Seivers *v.* Dickover, 101 Ind. 495; Wallace *v.* McBride, 70 Mich. 596; Thompson *v.* Bickford, 19 Minn. 17; Stovall *v.* Farmers', etc., Bank, 8 Smed. & M. (Miss.) 305, 47 Am. Dec. 85; Allen *v.* Berry, 50 Mo. 90; Davis *v.* Leopold, 87 N. Y. 620; Williamson *v.* Goodwyn, 9 Gratt. (Va.) 503; Blow *v.* Maynard, 2 Leigh (Va.) 29; Burton *v.* Gibson, 32 W. Va. 406.

1. *Express Assumption of Incumbrance* — *Alabama.* — Faulk *v.* Calloway, 123 Ala. 333. *Illinois.* — Stiger *v.* Bent, 111 Ill. 328; Booker *v.* Anderson, 35 Ill. 66; Poole *v.* Kelsey, 95 Ill. App. 233.

*Indiana.* — Stuckman *v.* Roose, 147 Ind. 402; Shirk *v.* Whitten, 131 Ind. 455; Caley *v.* Morgan, 114 Ind. 350; Bunch *v.* Grave, 111 Ind. 351; Hancock *v.* Fleming, 103 Ind. 533; Birke *v.* Abbott, 103 Ind. 1 (*distinguishing* Peet *v.* Beers, 4 Ind. 46, and Ayers *v.* Adams, 82 Ind. 109); Atherton *v.* Toney, 43 Ind. 211. See also Semans *v.* Harvey, 52 Ind. 331.

*Iowa.* — Hubbard *v.* Le Barron, 110 Iowa 443; Witt *v.* Rice, 90 Iowa 451; Kellogg *v.* Colby, 83 Iowa 513; Fretland *v.* Mack, 76 Iowa 434; Goodyear *v.* Goodyear, 72 Iowa 329; Afton First Nat. Bank *v.* Thompson, 72 Iowa 417.

*Massachusetts.* — Carlton *v.* Jackson, 121 Mass. 592.

*Michigan.* — Winans *v.* Wilkie, 41 Mich. 264.

*Missouri.* — Heim *v.* Vogel, 69 Mo. 529.

*Nebraska.* — Birdsall *v.* Cropsey, 29 Neb. 679.

*Nevada.* — Gulling *v.* Washoe County Bank, 24 Nev. 477.

*New York.* — Schreyer *v.* Saunders, 39 N. Y. App. Div. 8.

*Tennessee.* — Aymett *v.* Citizens' Nat. Bank, (Tenn. Ch. 1901) 64 S. W. Rep. 302; Campbell *v.* Hamilton, (Tenn. Ch. 1897) 39 S. W. Rep. 895.

*Vermont.* — Willson *v.* Burton, 52 Vt. 394.

*Washington.* — De Roberts *v.* Stiles, 24 Wash. 611; Isensee *v.* Austin, 15 Wash. 352.

*Wisconsin.* — Martin *v.* Aultman, 80 Wis. 150.

*For Qualification of the Rule Stated in the Text, and exceptions thereto, see Matzen v. Shaeffer, 65 Cal. 81; Bressler v. Martin, 133 Ill. 278; Young v. Morgan, 89 Ill. 199; Cameron v. Holenshade, 1 Cinc. Super. Ct. 83; Bryson v. Myers, 1 W. & S. (Pa.) 420; C. M. Hapgood Shoe Co. v. Crockett First Nat. Bank, 23 Tex. Civ. App. 509.*

*Successive Grantees Assuming Proportionate Shares of Mortgage* — Last Grantee Not Subrogated. — Kentona Land Co. *v.* Wire, 35 N. Y. App. Div. 181.

2. *Payment of Incumbrance as Part of Purchase Price.* — Hardin *v.* Clark, 32 S. Car. 480; Perryman *v.* Smith, (Tex. Civ. App. 1895) 32 S. W. Rep. 349. And see Sturges *v.* Taylor, 15 La. Ann. 285. But compare C. M. Hapgood Shoe Co. *v.* Crockett First Nat. Bank, 23 Tex. Civ. App. 509.

3. *Subrogation of Purchaser of Equity of Redemption.* — Watson *v.* Gardner, 119 Ill. 312; Simonton *v.* Gray, 34 Me. 50; Thompson *v.* Chandler, 7 Me. 377; Gibson *v.* Crehore, 3 Pick. (Mass.) 475; Bell *v.* Woodward, 34 N. H. 90; Walker *v.* King, 45 Vt. 525; Gatewood *v.* Gatewood, 75 Va. 407. See also Richardson *v.* Hockenhull, 85 Ill. 124; Gleason *v.* Dyke, 22 Pick. (Mass.) 390; Dutton *v.* Ives, 5 Mich. 515; Duffy *v.* McGuinness, 13 R. I. 595; Slocum *v.* Catlin, 22 Vt. 137; Wheeler *v.* Willard, 44 Vt. 640; Hudson *v.* Dismukes, 77 Va. 242. Compare Wade *v.* Howard, 6 Pick. (Mass.) 492; Atherton *v.* Toney, 43 Ind. 211.

*Extent of Rights Acquired.* — As to how far a purchaser of the equity of redemption in a part of land subject to a vendor's lien will be subrogated to the benefit of such lien upon payment thereof, see Larson *v.* Oisefos, (Wis. 1903) 95 N. W. Rep. 399.

*Purchaser Entitled to Rate of Interest Named in Mortgage.* — Braden *v.* Graves, 85 Ind. 92.

*Purchaser of Equity at Administrator's Sale Not Subrogated as Against Widow.* — Cox *v.* Garst, 105 Ill. 342. See also Atkinson *v.* Stewart, 46 Mo. 510; Atkinson *v.* Angert, 46 Mo. 515.

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the same manner as the mortgagee held them, is entitled to the same priority of lien that a stranger would have who took an assignment thereof.<sup>1</sup> But it seems that if a mortgage is paid off by the purchaser of the equity of redemption, and by him canceled in fact and on the record, while under the misapprehension that his title is good, he may not, upon discovering the contrary, have the cancellation set aside and the mortgage declared in force on the ground that, had he then known of the defect in his title, he would have taken an assignment of the mortgage.<sup>2</sup> Nor will one who purchases a mere equity of redemption in terms subject to the payment of the mortgage debt be subrogated to the benefit of other securities held by the mortgagee for the payment of the debt.<sup>3</sup>

(2) *At Execution Sale for Other Debts.* — The sale of an equity of redemption under execution other than for the debt secured by the mortgage vests the estate sold in the purchaser subject to the payment of the mortgage debt, and such purchaser will not be entitled to subrogation where he pays the mortgage, or where the amount thereof is collected from other property of the mortgagor.<sup>4</sup> But in the latter case the mortgagor will be entitled to subrogation.<sup>5</sup>

(3) *Purchase by Mortgagee.* — The general rule that the purchase of the equity of redemption by the mortgagee will operate a merger of the mortgage is not inflexible; when it is the mortgagee's intention that there shall be no merger, it will not merge; and in the absence of evidence the mortgagee's intention will be presumed to accord with his interest.<sup>6</sup>

3. *Junior Mortgagees, Judgment Creditors, etc* — *a.* IN GENERAL. — A junior mortgagee,<sup>7</sup> judgment creditor, or other incumbrancer who pays off a prior

1. *Assignee of Equity Subrogated by Agreement.* — *Morrow v. U. S. Mortgage Co.*, 96 Ind. 21.

2. *Mortgage Canceled under Mistake of Law.* — *Bentley v. Whittemore*, 18 N. J. Eq. 366. See also *Garwood v. Eldridge*, 2 N. J. Eq. 145, 34 Am. Dec. 195; *Edinburg American Land Mortg. Co. v. Latham*, 88 Ind. 88. Compare *Ayers v. Adams*, 82 Ind. 109; *Lowman v. Lowman*, 118 Ill. 582.

3. *Purchaser of Equity Subject to Mortgage.* — *Stevens v. Church*, 41 Conn. 369; *Russell v. Pistor*, 7 N. Y. 171, 57 Am. Dec. 509. See also *Lovelace v. Webb*, 62 Ala. 271.

4. *Sale of Equity under Execution for Other Debts.* — *Hanger v. State*, 27 Ark. 673; *Bunch v. Grave*, 111 Ind. 351; *Myers v. Jones*, 61 Kan. 209; *Dauchy v. Bennett*, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 376; *Clift v. White*, 12 N. Y. 534; *McKinstry v. Curtis*, 10 Paige (N. Y.) 503. See also *Gray v. Denson*, 129 Ala. 406; *Lovelace v. Webb*, 62 Ala. 271; *Dodds v. Snyder*, 44 Ill. 53; *Tuttle v. Brown*, 14 Pick. (Mass.) 514; *Mathews v. Aikin*, 1 N. Y. 604; *Woods v. Spalding*, 45 Barb. (N. Y.) 607; *Russell v. Allen*, 10 Paige (N. Y.) 249; *Heyer v. Pruyn*, 7 Paige (N. Y.) 465, 34 Am. Dec. 355; *Tice v. Annin*, 2 Johns. Ch. (N. Y.) 125.

5. *Mortgagor Entitled to Subrogation.* — *Funk v. McReynolds*, 33 Ill. 482. And see *infra*, this section, 4. *Mortgagors.*

6. *Equity Purchased by Mortgagee.* — 2 Story Eq. Jur. (13th ed.), § 1035b.

*Alabama.* — *Gresham v. Ware*, 79 Ala. 192. *Arkansas.* — *Cohn v. Hoffman*, 45 Ark. 376. *California.* — *Rumpp v. Gerkens*, 59 Cal. 496. *Connecticut.* — *Boardman v. Larrabee*, 51 Conn. 39.

*Illinois.* — *Lowman v. Lowman*, 118 Ill. 582. *Indiana.* — *McClain v. Sullivan*, 85 Ind. 174.

*Iowa.* — *Patterson v. Mills*, 69 Iowa 755.

*Michigan.* — *Cooper v. Bigly*, 13 Mich. 463.

*New Jersey.* — *Lydecker v. Bogert*, 38 N. J. Eq. 136.

*New York.* — *Smith v. Roberts*, 91 N. Y. 470; *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475.

*Oregon.* — *Watson v. Dundee Mortg., etc., Co.*, 12 Oregon 474.

*South Carolina.* — *Agnew v. Charlotte, etc., R. Co.*, 24 S. Car. 18, 58 Am. Rep. 237.

*Texas.* — *Silliman v. Gammage*, 55 Tex. 365.

*Vermont.* — *Carpenter v. Gleason*, 58 Vt. 244.

7. *Subrogation of Junior Mortgagee Paying Off Prior Incumbrance* — *England.* — *Knight v. Knight*, 3 P. Wms. 331; *Stonehewer v. Thompson*, 2 Atk. 440.

*United States.* — *Memphis, etc., R. Co. v. Dow*, 120 U. S. 287; *Russell v. Howard*, 2 McLean (U. S.) 489; *U. S. Bank v. Peter*, 13 Pet. (U. S.) 123; *Searles v. Jacksonville, etc., R. Co.*, 2 Woods (U. S.) 621.

*Alabama.* — *Cowley v. Shelby*, 71 Ala. 122; *Davis v. Cook*, 65 Ala. 617; *Wiley v. Ewing*, 47 Ala. 418.

*California.* — *Ketchum v. Crippen*, 37 Cal. 223.

*District of Columbia.* — *Pleasants v. Fay*, 13 App. Cas. (D. C.) 237; *Utermehle v. McGreal*, 1 App. Cas. (D. C.) 359.

*Georgia.* — *Wilkins v. Gibson*, 113 Ga. 51, 84 Am. St. Rep. 204.

*Illinois.* — *Ebert v. Gerding*, 116 Ill. 219; *Chicago, etc., R. Land Co. v. Peck*, 112 Ill. 431; *Tyrrell v. Ward*, 102 Ill. 29; *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Flachs v. Kelly*, 30 Ill. 462; *Ball v. Callahan*, 95 Ill. App. 615, judgment affirmed 197 Ill. 318; *Smith v. Dinsmore*, 16 Ill. App. 115.

incumbrance in order to protect his own interest in the encumbered estate, will, as a general rule, be subrogated to all the rights of the senior incumbrancer, and if necessary for his protection may compel an assignment of the security.<sup>1</sup> But whether the junior incumbrancer takes a formal assignment or not, such a transaction makes him in equity an assignee, and he is entitled to

*Indiana*.—Roeder v. Keller, 135 Ind. 692; Spaulding v. Harvey, 129 Ind. 106; Abbott v. Union Mut. L. Ins. Co., 127 Ind. 70; Erwin v. Acker, 126 Ind. 133; Lowrey v. Byers, 80 Ind. 443; Rardin v. Walpole, 38 Ind. 146; Benton v. Shreeve, 4 Ind. 66.

*Iowa*.—Shimer v. Hammond, 51 Iowa 401; Marshall v. Ruddick, 28 Iowa 487.

*Kansas*.—Hagan v. Sheridan, 10 Kan. App. 22; Washburn v. Thomas, 8 Kan. App. 856, 56 Pac. Rep. 539.

*Maine*.—Frisbee v. Frisbee, 86 Me. 444; Cobb v. Dyer, 69 Me. 494.

*Maryland*.—Rappanier v. Bannon, (Md. 1887) 8 Atl. Rep. 555; State v. Brown, 73 Md. 484.

*Massachusetts*.—Green v. Tanner, 8 Met. (Mass.) 411; Davis v. Winn, 2 Allen (Mass.) 111.

*Michigan*.—Kitchell v. Mudgett, 37 Mich. 81; Sager v. Tupper, 35 Mich. 134; Baker v. Pierson, 6 Mich. 522.

*Minnesota*.—Gerdine v. Menage, 41 Minn. 417.

*Missouri*.—Long v. Long, 141 Mo. 352; Reyburn v. Mitchell, 106 Mo. 365, 27 Am. St. Rep. 350.

*New Hampshire*.—Moore v. Beasom, 44 N. H. 215; Weld v. Sabin, 20 N. H. 533, 51 Am. Dec. 240.

*New Jersey*.—Bigelow v. Cassidy, 26 N. J. Eq. 557; Hamilton v. Dobbs, 19 N. J. Eq. 227.

*New York*.—Quinlan v. Stratton, 128 N. Y. 659; Clark v. Mackin, 95 N. Y. 346; Ellsworth v. Lockwood, 42 N. Y. 96; Burnet v. Denniston, 5 Johns. Ch. (N. Y.) 35; Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370; Pardee v. Van Anken, 3 Barb. (N. Y.) 534; De Forest v. Peck, 84 Hun (N. Y.) 299; Sheldon v. Hoffnagle, 51 Hun (N. Y.) 478; Dings v. Parshall, 7 Hun (N. Y.) 522; Louis v. Bauer, 33 N. Y. App. Div. 287.

*Pennsylvania*.—Milligan's Appeal, 104 Pa. St. 503; Hogg v. Longstreth, 97 Pa. St. 259.

*Texas*.—Schneider v. Sellers, 25 Tex. Civ. App. 226; Southern Bldg., etc., Assoc. v. Skinner, (Tex. Civ. App. 1897) 42 S. W. Rep. 320; Land Mortg. Bank v. Quannah Hotel Co., (Tex. Civ. App. 1895) 32 S. W. Rep. 573; Tarver v. Land Mortg. Bank, 7 Tex. Civ. App. 425.

*Vermont*.—Ward v. Seymour, 51 Vt. 320; Wood v. Hubbard, 50 Vt. 82; Wheeler v. Willard, 44 Vt. 640; Downer v. Fox, 20 Vt. 388.

**Subrogation Refused.**—For cases in which subrogation has been refused to junior mortgagees, see *Etna L. Ins. Co. v. Buck*, 108 Ind. 174; *Gray v. Zellmer*, 66 Kan. 514; *Shattuck v. Belknap Sav. Bank*, 63 Kan. 443; *J. B. Watkins Land Mortg. Co. v. Williams*, 63 Kan. 30; *Campbell v. Foster Home Assoc.*, 163 Pa. St. 600, 43 Am. St. Rep. 818.

**The Mere Fact that a Party Is a Subsequent Mortgagee** does not constitute a sufficient equitable reason for subrogation. *Bigelow v. Cassidy*, 26 N. J. Eq. 557; *Vandercook v.*

*Cohoes Sav. Inst.*, 5 Hun (N. Y.) 641. But see *Twombly v. Cassidy*, 82 N. Y. 155.

**Assignee of First Mortgage Held Entitled to Subrogation to Lien of Second Mortgage.**—*Porter v. Ourada*, 51 Neb. 510.

**Subrogation Against Receiver of Third Mortgage.**

—Where the sum available for satisfaction of a second mortgage, after foreclosure of the first mortgage, is insufficient for that purpose, owing to the failure of a receiver, appointed at the instance of a third mortgagee, to pay taxes and water rents on the property, as ordered by the court, the second mortgagee will be entitled to subrogation against fraud in the hands of the receiver to the amount of such taxes and water rents. *Frankenstein v. Hamburger*, 73 N. Y. App. Div. 352.

**1. Judgment Creditor, etc., Subrogated on Payment of Prior Incumbrance.**—*United States*.—*U. S. Bank v. Peter*, 13 Pet. (U. S.) 123.

*Connecticut*.—*Quinnipiac Brewing Co. v. Fitzgibbons*, 73 Conn. 191.

*Dakota*.—*Kalscheuer v. Upton*, 6 Dak. 449.

*Georgia*.—*Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204.

*Illinois*.—*Magill v. De Witt County Sav. Bank*, 126 Ill. 244; *Lamb v. Richards*, 43 Ill. 312; *Blair v. Chamblin*, 39 Ill. 521, 89 Am. Dec. 322; *M'Lagan v. Brown*, 11 Ill. 519; *Swezey v. Chandler*, 11 Ill. 445.

*Massachusetts*.—*Davis v. Winn*, 2 Allen (Mass.) 111.

*Michigan*.—*Lucking v. Wesson*, 25 Mich. 445.

*Minnesota*.—*Gerdine v. Menage*, 41 Minn. 417.

*Missouri*.—*Reyburn v. Mitchell*, 106 Mo. 365, 27 Am. St. Rep. 350.

*Nebraska*.—*Aultman v. Bishop*, 53 Neb. 545; *Renard v. Brown*, 7 Neb. 449; *Miller v. Finn*, 1 Neb. 301.

*New Jersey*.—*Boice v. Conover*, 63 N. J. Eq. 273; *Hackensack Sav. Bank v. R. P. Terhune Mfg. Co.*, 45 N. J. Eq. 610; *Shinn v. Budd*, 14 N. J. Eq. 237.

*New York*.—*Twombly v. Cassidy*, 82 N. Y. 155; *Brainard v. Cooper*, 10 N. Y. 356; *Citizens' Sav. Bank v. Foster*, (Supm. Ct. Spec. T.) 22 Abb. N. Cas. (N. Y.) 425; *Dauchy v. Bennett*, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 375; *Pardee v. Van Anken*, 3 Barb. (N. Y.) 534.

*Oklahoma*.—*Moore v. Calvert*, 8 Okla. 358.

*Vermont*.—*Lamb v. Mason*, 50 Vt. 346; *Chandler v. Dyer*, 37 Vt. 345; *Warren v. Warren*, 30 Vt. 530.

*Virginia*.—*Gatewood v. Gatewood*, 75 Va. 407.

**Execution Creditor Redeeming from Chattel Mortgage.**—An execution creditor may, as soon as he has acquired a lien on chattels by a levy of his execution, redeem them from a chattel mortgage which constitutes a prior lien thereon, and on payment of the amount due on the mortgage is entitled to be subrogated to the rights of the mortgagee, and to that end may demand

all suitable remedies to enforce reimbursement;<sup>1</sup> and there are cases which hold that, though the prior mortgage may stand discharged of record, instead of having been assigned to the junior mortgagee, he is nevertheless entitled in equity to indemnify himself for such payment out of the mortgaged estate.<sup>2</sup>

**Co-mortgagees** who are compelled to redeem from a prior mortgage held and about to be foreclosed by one of themselves will be subrogated to his rights as prior mortgagee, so as to prevent his enjoyment of any interest under the junior mortgage until he shall have reimbursed them his proportion of the amount paid by them to redeem from his prior mortgage.<sup>3</sup>

**b. EXTENT OF RIGHTS ACQUIRED.** — A junior mortgagee, as to whose debt the homestead rights of a mortgagor have not been waived, will nevertheless be subrogated to the benefit of such waiver in a senior mortgage which he discharges for the protection of his title.<sup>4</sup> And where the prior incumbrance embraces property other than that of the junior incumbrance, the holder of the latter will, on paying off the former, be subrogated to the rights of the prior incumbrancer in such property.<sup>5</sup> He will be entitled to the rate of interest carried by the incumbrance from which he redeems,<sup>6</sup> and also to tack to his mortgage all necessary expenses incurred by him in removing the prior lien from the mortgaged premises.<sup>7</sup> And he may foreclose the lien to which he is subrogated before the maturity of his own mortgage.<sup>8</sup> He will, however, be entitled to subrogation only to the extent of the amount paid by him, and cannot have the benefit of payment from the funds of the debtor or third parties.<sup>9</sup>

**c. WHAT PAYMENT SUFFICIENT.** — In the absence of agreement a junior mortgagee will not be entitled to subrogation as against a prior mortgagee on payment of a part only of the prior mortgage debt, or of interest accumulated thereon; he must pay the whole debt before he can acquire that right<sup>10</sup> — not only the amount due on the mortgage, but the necessary expenses already

an assignment of the mortgage. *Lucking v. Weason*, 25 Mich. 443. See also *Hunt v. Sackett*, 31 Mich. 18; *Smith v. Coolbaugh*, 21 Wis. 427; *Hinman v. Judson*, 13 Barb. (N. Y.) 629; *Treat v. Gilmore*, 49 Me. 34.

**1. Formal Assignment Unnecessary.** — *Russell v. Howard*, 2 McLean (U. S.) 489; *Mattison v. Marks*, 31 Mich. 421, 18 Am. Rep. 197; *Ellsworth v. Lockwood*, 42 N. Y. 89; *McLean v. Towle*, 3 Sandf. Ch. (N. Y.) 117; *Dale v. M'Evers*, 2 Cow. (N. Y.) 118; *Downer v. Fox*, 20 Vt. 388.

**2. Prior Mortgage Discharged of Record.** — *Ebert v. Gerding*, 116 Ill. 217; *Tyrell v. Ward*, 102 Ill. 29; *Cobb v. Dyer*, 69 Me. 494; *Rap-panier v. Bannon*, (Md. 1887) 8 Atl. Rep. 555; *Moore v. Beasom*, 44 N. H. 215; *Robinson v. Leavitt*, 7 N. H. 99; *Patterson v. Birdsall*, 64 N. Y. 295, 21 Am. Rep. 609; *Milligan's Appeal*, 104 Pa. St. 510; *Ward v. Seymour*, 51 Vt. 320; *Wheeler v. Willard*, 44 Vt. 640.

**3. Co-mortgagees.** — *Saunders v. Frost*, 5 Pick. (Mass.) 259, 16 Am. Dec. 394. See also *Sanford v. Bulkley*, 30 Conn. 344; *Wyckoff v. Noyes*, 36 N. J. Eq. 227.

**4. Waiver of Mortgagor's Homestead Rights.** — *Ebert v. Gerding*, 116 Ill. 216.

**5. Prior Incumbrance Embracing Different Property.** — *Peter v. Smith*, 5 Cranch (C. C.) 383.

**6. Rate of Interest Allowed.** — *Dodge v. Fuller*, 2 Flipp. (U. S.) 603; *Mosier v. Norton*, 83 Ill. 519; *Harper v. Ely*, 70 Ill. 581; *Braden v. Graves*, 85 Ind. 92; *Walker v. King*, 45 Vt. 525.

**7. Expenses of Removing Prior Incumbrance.** — *Miller v. Whittier*, 36 Me. 577.

**8. Foreclosure by Party Subrogated.** — *Powers v. Golden Lumber Co.*, 43 Mich. 468.

**9. Subrogation Measured by Amount of Payment.** — *Hammond v. Barker*, 61 N. H. 53.

**10. Full Payment of Senior Mortgage.** — *Loeb v. Fleming*, 15 Ill. App. 503; *Stuckman v. Roose*, 147 Ind. 402; *Swan v. Patterson*, 7 Md. 164; *Gannett v. Blodgett*, 39 N. H. 150; *Penn v. Atlantic, etc., R. Co.*, (Ohio) 11 Am. L. Reg. N. S. 582.

The right of subrogation does not exist in favor of the holder of a second mortgage to the prejudice of the paramount lien. *Skinkle v. Huffman*, 52 Neb. 20.

**If Only Interest Is Due**, the junior mortgagee may redeem by tendering the amount of such interest. *Searles v. Jacksonville, etc., R. Co.*, 2 Woods (U. S.) 621.

**Conventional Subrogation.** — When the right of subrogation is the result of an express agreement, it is no objection that it extends only to a part of the mortgage or other security. *Loeb v. Fleming*, 15 Ill. App. 508; *Brice's Appeal*, 95 Pa. St. 145.

**Balance Paid by Debtor or Third Person.** — It seems that if the debt be actually discharged the junior incumbrancer will be entitled to subrogation to the extent of the amount he contributed, though the balance of the debt was paid by the debtor or by a third person. *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204.

incurred by the senior mortgagee in taking steps to enforce the security.<sup>1</sup> But a second mortgagee, who for the protection of his own security pays an instalment due on the first mortgage, will, to the extent of such advancement, as against the mortgagor, be subrogated to the rights of the holder of the first mortgage, and may, on payment by the mortgagor of the balance due on the prior mortgage, enforce by action his lien for the amount so advanced.<sup>2</sup>

**A Tender of Payment** by the junior mortgagee, if properly made, will be sufficient to entitle him to subrogation.<sup>3</sup>

**d. WHEN NOT ENTITLED TO SUBROGATION.** — Subrogation will be denied to a junior incumbrancer where his payment of the prior incumbrance was not necessary for his protection,<sup>4</sup> as where the incumbrance paid off does not cover the property embraced by his mortgage;<sup>5</sup> or where the enforcement of subrogation is not necessary for his protection;<sup>6</sup> or when to grant it would be clearly inequitable,<sup>7</sup> as when the right is asserted against intervening *bona fide* purchasers without notice of the rights of the junior mortgagee;<sup>8</sup> or where he might have protected himself by purchasing at a foreclosure sale under a prior mortgage, but did not.<sup>9</sup>

**4. Mortgagors.** — Where a mortgagor has conveyed the mortgaged premises, subject to the lien of the mortgage, the amount of the mortgage debt being deducted from the purchase price, the premises remain the primary fund for the payment of the debt, and if the mortgagor is compelled to pay the same he may be subrogated to the rights of the mortgagee under the mortgage.<sup>10</sup>

**1. Expenses Incurred by Senior Mortgagee.** — *Shutes v. Woodard*, 57 Mich. 213. But a junior mortgagee may redeem without paying costs of a foreclosure suit upon a prior mortgage to which he was not made a party. *Gage v. Brewster*, 31 N. Y. 218; *Peabody v. Roberts*, 47 Barb. (N. Y.) 91; *Vroom v. Ditmas*, 4 Paige (N. Y.) 526; *Benedict v. Gilman*, 4 Paige (N. Y.) 58. He will, however, be required to pay the costs of the action to redeem, unless improperly resisted by the defendant. *Belden v. Slade*, 26 Hun (N. Y.) 635; *Raynor v. Selmes*, 52 N. Y. 582.

**2. Second Mortgagee Subrogated as Against Mortgagor on Payment of Instalment.** — *Skinkle v. Huffman*, 52 Neb. 20; *New Jersey Bldg., etc., Co. v. Cumberland Land, etc., Co.*, 53 N. J. Eq. 644; *Penn v. Atlantic, etc., R. Co.*, (Ohio) 11 Am. L. Reg. N. S. 582.

**3. Tender Properly Made Sufficient.** — *Ketchum v. Crippen*, 37 Cal. 223; *Marshall v. Ruddick*, 28 Iowa 487; *Dings v. Parshall*, 7 Hun (N. Y.) 522. See also *Clark v. Mackin*, 95 N. Y. 351; *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553, 26 Am. Rep. 627.

**4. Payment of Incumbrance Unnecessary.** — *Bayard v. McGraw*, 1 Ill. App. 134; *Norton v. Highleyman*, 88 Mo. 624; *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553, 26 Am. Rep. 627; *Adams v. McPartlin*, (Supm. Ct. Spec. T.) 11 Abb. N. Cas. (N. Y.) 369; *Bloomington v. Barnard*, 7 Hun (N. Y.) 459; *Jenkins v. Continental Ins. Co.*, (C. Pl. Spec. T.) 12 How. Pr. (N. Y.) 66; *Mosier's Appeal*, 56 Pa. St. 76, 93 Am. Dec. 783. And see *Mansur, etc., Implement Co. v. Jones*, 143 Mo. 253.

**5. Smith v. Dinsmoor**, 119 Ill. 656.

**6. Subrogation Not Enforced Where Unnecessary.** — *Tillman v. Stewart*, 104 Ga. 687, 69 Am. St. Rep. 192.

**7. Subrogation Not Enforced Where Inequitable.** — *Coonrod v. Kelly*, 113 Fed. Rep. 378; *Tillman v. Stewart*, 104 Ga. 687, 69 Am. St. Rep.

192; *Thomas v. Stewart*, 117 Ind. 50; *Kelly v. Kelly*, 54 Mich. 30; *Wyckoff v. Noyes*, 36 N. J. Eq. 230; *Gring's Appeal*, 89 Pa. St. 339; *McGinnis's Appeal*, 16 Pa. St. 447; *Gerrish v. Bragg*, 55 Vt. 329.

**8. Subrogation Not Enforced Against Bona Fide Purchaser.** — *Richards v. Griffith*, 92 Cal. 493, 27 Am. St. Rep. 156; *Ahern v. Freeman*, 46 Minn. 156, 24 Am. St. Rep. 206; *Amick v. Woodworth*, 58 Ohio St. 86. See also *Persons v. Shaeffer*, 65 Cal. 79; *Guy v. Du Uprey*, 16 Cal. 196, 76 Am. Dec. 518; *Gerdine v. Menage*, 41 Minn. 417; *Bunn v. Lindsay*, 95 Mo. 250, 6 Am. St. Rep. 48. But see *Davis v. Winn*, 2 Allen (Mass.) 111.

**9. Subrogation Refused Where Claimant Might Have Purchased at Foreclosure Sale.** — *Bloomington v. Barnard*, 7 Hun (N. Y.) 459; *Gerdine v. Menage*, 41 Minn. 417. Nor can he stay the sale, by injunction, without showing that payment of the prior mortgage on his part or purchasing at the sale will work him an injustice. *Bloomington v. Barnard*, 7 Hun (N. Y.) 459. Compare *Ellsworth v. Lockwood*, 42 N. Y. 89.

**10. Land Conveyed Subject to Mortgage, — Mortgagor Subrogated on Payment — Indiana.** — *Todd v. Oglebay*, 158 Ind. 595.

*Iowa.* — *Wood v. Smith*, 51 Iowa 156.

*Maine.* — *Kinnear v. Lowell*, 34 Me. 299.

*Minnesota.* — *Rogers v. Hedemark*, 70 Minn. 441; *Gerdine v. Menage*, 41 Minn. 417; *Baker v. Terrell*, 8 Minn. 195.

*Missouri.* — *Greenwell v. Heritage*, 71 Mo. 459; *Welton v. Hull*, 50 Mo. 296.

*New Hampshire.* — *Woodbury v. Swan*, 58 N. H. 380.

*New York.* — *Jumel v. Jumel*, 7 Paige (N. Y.) 591; *Cox v. Wheeler*, 7 Paige (N. Y.) 248; *Tice v. Annin*, 2 Johns. Ch. (N. Y.) 128; *Brewer v. Staples*, 3 Sandf. Ch. (N. Y.) 584; *Weeks v. Garvey*, 56 N. Y. Super. Ct. 557. And see *Arnold v. Green*, 116 N. Y. 566.

*A fortiori* if the vendee assumes and agrees to pay the mortgage, thereby making the debt his own, the same rule applies.<sup>1</sup> And in such cases the mortgagor's right to subrogation will be enforced as against subsequent judgment creditors of the vendee, for the full amount of the principal and interest due on the mortgage.<sup>2</sup>

**A Joint Mortgagor** who pays the entire mortgage debt will be entitled to subrogation against his mortgagor for the latter's share of the debt.<sup>3</sup>

**Mortgage Pledged to Secure Debt of Mortgagee.**—Where a mortgage has been pledged to secure a debt of the mortgagee, the mortgagor, on payment of the debt to the pledgee, will be subrogated to the rights of the latter as against a subsequent assignee of the mortgage.<sup>4</sup>

**5. Persons Advancing Money to Pay Off Incumbrances**—*a.* **WHEN ENTITLED TO SUBROGATION IN GENERAL.**—One who advances money to pay off an incumbrance on realty at the instance of either the owner of the property or the holder of the incumbrance, either on the express understanding, or under circumstances from which an understanding will be implied, that the advance made is to be secured by a first lien on the property, is not a mere volunteer; and in the event the new security is for any reason not a first lien on the property, the holder of such security, if not chargeable with culpable and inexcusable neglect, will be subrogated to the rights of the prior incumbrancer under the security held by him, unless the superior or equal equities of others

*Pennsylvania.*—*Stanhope's Estate*, 6 Pa. Dist. 179.

*West Virginia.*—*Curry v. Hale*, 15 W. Va. 867.

And see *Barker v. Parker*, 4 Pick. (Mass.) 505. Compare *Halbert v. Paddleford*, (Tex. Civ. App. 1896) 33 S. W. Rep. 592.

**Mortgagor Entitled to Subrogation though Payment Is Voluntary.**—*Baker v. Terrell*, 8 Minn. 195.

**Purchase by Mortgagee or Comortgagor.**—The rule stated in the text applies where the sale is made to the mortgagee, *Shermer v. Merrill*, 33 Mich. 284; or to a co-mortgagor of the vendor, *Shinn v. Shinn*, 91 Ill. 477.

**One Who Sells Land with Warranty Against Incumbrances**, and afterwards pays off a judgment binding the land for which he was liable under his warranty, cannot claim to be subrogated to the lien of the judgment against the land. *Ex p. Hardin*, 34 S. Car. 377, 27 Am. St. Rep. 820.

**1. Mortgage Assumed by Vendee—England.**—*Kinnaird v. Trollope*, 39 Ch. D. 636.

*Connecticut.*—*Ely v. Stannard*, 44 Conn. 528.

*Illinois.*—*Flagg v. Geltmacher*, 98 Ill. 293; *Shinn v. Shinn*, 91 Ill. 477; *Kinney v. Wells*, 59 Ill. App. 271.

*Indiana.*—*Begein v. Brehm*, 123 Ind. 160; *Risk v. Hoffman*, 69 Ind. 137; *Smith v. Ostermeyer*, 68 Ind. 432.

*Iowa.*—*Corbett v. Waterman*, 11 Iowa 86.

*Louisiana.*—*Baldwin v. Thompson*, 6 La. 474.

*Missouri.*—*Orrick v. Durham*, 79 Mo. 174; *Wayman v. Jones*, 58 Mo. App. 313.

*Nebraska.*—*Hubbard v. Knight*, 52 Neb. 400.

*New Hampshire.*—*Hoysradt v. Holland*, 50 N. H. 433.

*New Jersey.*—*Stillman v. Stillman*, 21 N. J. Eq. 126.

*New York.*—*Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130; *Comstock v. Drohan*, 71 N. Y. 9; *Bentley v. Vanderheyden*, 35 N. Y. 677;

*Russell v. Pistor*, 7 N. Y. 171, 57 Am. Dec. 509; *Rubens v. Prindle*, 44 Barb. (N. Y.) 336; *Flagg v. Thurber*, 14 Barb. (N. Y.) 196; *Tripp v. Vincent*, 3 Barb. Ch. (N. Y.) 613; *Cherry v. Monroe*, 2 Barb. Ch. (N. Y.) 618; *Cornell v. Prescott*, 2 Barb. (N. Y.) 16; *Marsh v. Pike*, 10 Paige (N. Y.) 595; *McLean v. Towle*, 3 Sandf. Ch. (N. Y.) 117; *Laird v. Wittkowski*, 67 N. Y. App. Div. 476. But see *Binghamton Sav. Bank v. Binghamton Trust Co.*, 85 Hun (N. Y.) 75.

*Vermont.*—*Stevens v. Goodenough*, 26 Vt. 676.

*Virginia.*—*Francisco v. Shelton*, 85 Va. 779. See also *Laylin v. Knox*, 41 Mich. 40.

**Subsequent Vendee of Another Part of the Land.**—In *Wright v. Briggs*, 99 Ind. 563, it appeared that the owner of mortgaged premises sold a part thereof, the purchaser agreeing to pay the whole of the mortgage debt as a part of the consideration for the portion purchased. The owner then conveyed the rest of the land to C, who in turn conveyed it to D. Afterwards, D, to save his lot from sale, was obliged to pay the mortgage debt, and it was held that he was entitled to a decree of foreclosure against the part of the land first sold, as the purchaser thereof had by his agreement become liable for the debt.

**An Indorser of Notes Secured by a Mortgage**, on being compelled to pay the same, will be subrogated to the rights of his principal, the mortgagor, against a vendee of the land who has assumed payment of the mortgage; and the subrogation extends not merely to the mortgage security, but to the debt and the remedies to enforce the same. *Nettleton v. Ramsey County Land, etc., Co.*, 54 Minn. 395, 40 Am. St. Rep. 342.

**2. Morris v. Oakford**, 9 Pa. St. 498.

**3. Joint Mortgagor Paying Whole Mortgage.**—*Look v. Horn*, 97 Me. 283.

**4. Mortgage Pledged to Secure Debt of Mortgagee.**—*Kamena v. Huelbig*, 23 N. J. Eq. 78.

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would be prejudiced thereby, and to this end equity will set aside a cancellation of such security, and revive the same for his benefit.<sup>1</sup> Although this rule is most frequently applied in favor of persons who advance money to pay off

1. **Person Advancing Money to Pay Off Incumbrance** — *United States*. — *Rachal v. Smith*, (C. C. A.) 101 Fed. Rep. 159; *People's Nat. Bank v. Epstein*, 44 Fed. Rep. 403; *Edwards v. Davenport*, 20 Fed. Rep. 756.

*Alabama*. — *Bigelow v. Scott*, 135 Ala. 236; *Motes v. Robertson*, 133 Ala. 630; *Scott v. Land, etc., Co.*, 127 Ala. 161; *Bolman v. Lohman*, 74 Ala. 507; *McMillan v. Gordon*, 4 Ala. 716.

*Arkansas*. — *Trible v. Nichols*, 53 Ark. 273, 22 Am. St. Rep. 190; *Chaffe v. Oliver*, 39 Ark. 531. But see *Roe v. Kiser*, 62 Ark. 92, 54 Am. St. Rep. 288.

*California*. — *Carr v. Caldwell*, 10 Cal. 380, 70 Am. Dec. 740. See also *Swift v. Kraemer*, 13 Cal. 526, 73 Am. Dec. 603; *Dingman v. Randall*, 13 Cal. 512.

*Georgia*. — *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204; *Merchants, etc., Bank v. Tillman*, 106 Ga. 57.

*Illinois*. — *Home Sav. Bank v. Bierstadt*, 168 Ill. 618, 61 Am. St. Rep. 146, 68 Ill. App. 660; *White v. Cannon*, 125 Ill. 415; *Læwenthal v. McCormick*, 101 Ill. 143.

*Indiana*. — *Thompson v. Connecticut Mut. L. Ins. Co.*, 139 Ind. 325; *Shattuck v. Cox*, 128 Ind. 293; *Edinburg American Land Mortg. Co. v. Latham*, 88 Ind. 88; *Johnson v. Barrett*, 117 Ind. 551; *Sidener v. Pavey*, 77 Ind. 241; *Muir v. Berkshire*, 52 Ind. 149.

*Iowa*. — *Heuser v. Sharman*, 89 Iowa 355, 48 Am. St. Rep. 390; *Gilbert v. Gilbert*, 39 Iowa 657.

*Kansas*. — *Zinkeison v. Lewis*, 63 Kan. 590; *Gano v. Martin*, 10 Kan. App. 384; *Armstead v. Neptune*, 56 Kan. 750; *Traders' Bank v. Myers*, 3 Kan. App. 636; *Farm Land Mortg., etc., Co. v. Elsbree*, 55 Kan. 562; *Crippen v. Chappel*, 35 Kan. 500, 57 Am. Rep. 187; *Everston v. Central Bank*, 33 Kan. 353.

*Kentucky*. — *Barker v. Boyd*, 71 S. W. Rep. 528, 24 Ky. L. Rep. 1389; *State Nat. Bank v. Vicroy*, 70 S. W. Rep. 183, 24 Ky. L. Rep. 892; *Dillon v. Dillon*, 69 S. W. Rep. 1099, 24 Ky. L. Rep. 781; *Wilson v. Wilson*, (Ky. 1899) 50 S. W. Rep. 260; *Treadway v. Pharis*, (Ky. 1892) 18 S. W. Rep. 225.

*Maryland*. — *Reimler v. Pfingsten*, (Md. 1893) 28 Atl. Rep. 24; *Robertson v. Mowell*, 66 Md. 530; *Milholland v. Tiffany*, 64 Md. 465; *Donohue v. Daniel*, 58 Md. 595.

*Michigan*. — *Markillie v. Allen*, 120 Mich. 360; *Palmer v. Sharp*, 112 Mich. 420; *Draper v. Ashley*, 104 Mich. 527; *White v. Newhall*, 68 Mich. 641; *Kitchell v. Mudgett*, 37 Mich. 82; *Detroit F. & M. Ins. Co. v. Aspinall*, 48 Mich. 238.

*Minnesota*. — *Webber v. Hausler*, 77 Minn. 48; *London, etc., Mortg. Co. v. Tracy*, 58 Minn. 201; *Emmert v. Thompson*, 49 Minn. 386, 32 Am. St. Rep. 566.

*Mississippi*. — *Dorrah v. Hill*, 73 Miss. 787; *Union Mortg., etc., Co. v. Peters*, 72 Miss. 1058; *Clark v. Clark*, 58 Miss. 68.

*Missouri*. — *Cornwell v. Orton*, 126 Mo. 355. *Nebraska*. — *Boevink v. Christiaanse*, (Neb. 1903) 95 N. W. Rep. 652; *Veeder v. McKinley-*

*Lanning L. & T. Co.*, 61 Neb. 892; *Bohn Sash, etc., Co. v. Case*, 42 Neb. 281.

*New Jersey*. — *Gore v. Brian*, (N. J. 1896) 35 Atl. Rep. 897; *Seeley v. Bacon*, (N. J. 1896) 34 Atl. Rep. 139; *Homœopathic Mut. L. Ins. Co. v. Marshall*, 32 N. J. Eq. 103.

*New York*. — *Green v. Milbank*, (Supm. Ct. Spec. T.) 3 Abb. N. Cas. (N. Y.) 138; *King v. McVicker*, 3 Sandf. Ch. (N. Y.) 192; *Snelling v. McIntyre*, (Supm. Ct. Spec. T.) 6 Abb. N. Cas. (N. Y.) 469; *Connecticut Mut. L. Ins. Co. v. Cornwell*, 72 Hun (N. Y.) 199; *Gans v. Thieme*, 93 N. Y. 225; *Hill v. Beebe*, 13 N. Y. 556; *White v. Knapp*, 8 Paige (N. Y.) 173; *Sanier v. Hoadley*, 42 N. Y. App. Div. 6.

*North Carolina*. — *Byerly v. Humphrey*, 95 N. Car. 151.

*Ohio*. — *Miller v. Stark*, 61 Ohio St. 413; *Straman v. Rechtime*, 58 Ohio St. 443; *Amick v. Woodworth*, 58 Ohio St. 86, 9 Ohio Cir. Dec. 496, 9 Ohio Cir. Ct. 556, 3 Ohio Dec. 220.

*Pennsylvania*. — *Haverford Loan, etc., Assoc. v. Fire Assoc.*, 180 Pa. St. 522, 57 Am. St. Rep. 657.

*South Carolina*. — *Sutton v. Sutton*, 26 S. Car. 33.

*South Dakota*. — *Ipswich Bank v. Brock*, 13 S. Dak. 409; *Baker v. Baker*, 2 S. Dak. 261, 39 Am. St. Rep. 776.

*Texas*. — *Powers v. McKnight*, (Tex. Civ. App. 1903) 73 S. W. Rep. 549; *Park v. Kribs*, 24 Tex. Civ. App. 650; *Whiteselle v. Texas Loan Agency*, (Tex. Civ. App. 1896) 39 S. W. Rep. 194; *Whiteselle v. Texas Loan Agency*, (Tex. Civ. App. 1894) 27 S. W. Rep. 309; *Fears v. Albea*, 69 Tex. 437; *Dillon v. Kauffman*, 58 Tex. 696; *Focke v. Weishuhu*, 55 Tex. 33.

*Utah*. — *George v. Butler*, 16 Utah 111.

*Vermont*. — *Bourne v. Bourne*, 69 Vt. 251.

*Virginia*. — *Bankers' Loan, etc., Co. v. Hornish*, 94 Va. 608.

*West Virginia*. — *Southern Bldg., etc., Assoc. v. Page*, 46 W. Va. 302.

*Wisconsin*. — *Levy v. Martin*, 48 Wis. 198; *Downer v. Miller*, 15 Wis. 612.

And see *infra*, this title, VII. *Persons Paying or Advancing Money to Pay Debts of Others* — *In General* — *Conventional Subrogation*.

**The Rule Stated in the Text Applies to Chattel Mortgages** as well as to mortgages of real property; and a person advancing money to pay off a chattel mortgage under an agreement providing that he shall have a first lien on the mortgaged chattels is subrogated to the mortgage paid in case his own mortgage proves to be invalid. *Lashua v. Myhre*, (Wis. 1903) 93 N. W. Rep. 811; *Yaple v. Stephens*, 36 Kan. 680.

**The Subsequent Requirement of the Equity of Redemption** by the party entitled to be subrogated will not affect his rights unless the evidence shows that a merger was contemplated. *Gore v. Brian*, (N. J. 1896) 35 Atl. Rep. 897.

**When a Married Woman Who Is Also an Infant** obtains a loan of money on mortgage to discharge a lien upon her separate estate, the lender is not subrogated to the lien discharged,



mortgages, it is not confined to such cases, but is equally applicable in favor of persons other than volunteers who advance money for the payment of vendor's liens,<sup>1</sup> or who pay the purchase price of property at the request of the vendee.<sup>2</sup>

**b. RULE WHERE LOAN IS USURIOUS.**—It has been held that usury in a loan of money used to pay off an incumbrance will not deprive the lender of the right of subrogation to the extent of the principal of the loan and lawful interest thereon.<sup>3</sup>

**c. RIGHTS AS AGAINST INTERVENING INCUMBRANCERS AND PURCHASERS.**—A third person who advances money to pay off an incumbrance will not be subrogated thereto where such subrogation would work injustice to other parties, such as intervening incumbrancers or purchasers, whose equities are equal or superior to his own;<sup>4</sup> but he may be subrogated as against intervening incumbrancers where no substantial injury to their rights will result there-

even though his mortgage is void. *Carolina Interstate Bldg., etc., Assoc. v. Black*, 119 N. Car. 323. And see *Clifton v. Anderson*, 47 Mo. App. 35, holding that under the *Missouri* statute a married woman could not charge her separate estate by oral agreement.

**1. Persons Advancing Money to Pay Vendor's Lien.**—*United States.*—*Ivory v. Kennedy*, (C. C. A.) 57 Fed. Rep. 340; *Western Mortg., etc., Co. v. Ganzer*, (C. C. A.) 63 Fed. Rep. 647.

*Indiana.*—*Warford v. Hankins*, 150 Ind. 489.

*Kentucky.*—*Greishaber v. Farmer*, (Ky. 1897) 42 S. W. Rep. 742; *Ogden v. Totten*, (Ky. 1896) 34 S. W. Rep. 1081.

*Tennessee.*—*Aiken v. Taylor*, (Tenn. Ch. 1900) 62 S. W. Rep. 200.

*Texas.*—*Faires v. Cockerell*, 88 Tex. 428; *Ford v. Ford*, 22 Tex. Civ. App. 453; *Dixon v. National Loan, etc., Co.*, (Tex. Civ. App. 1897) 40 S. W. Rep. 541; *Mustain v. Stokes*, 90 Tex. 358; *Pioneer Sav., etc., Co. v. Paschall*, 12 Tex. Civ. App. 613; *Denecamp v. Townsend*, (Tex. Civ. App. 1895) 33 S. W. Rep. 254; *Brown v. Dennis*, (Tex. Civ. App. 1895) 30 S. W. Rep. 272.

*West Virginia.*—*Hulings v. Hulings Lumber Co.*, 38 W. Va. 351.

**For Cases in Which Subrogation Was Refused**, see *Austin v. Pulschen*, (Cal. 1895) 42 Pac. Rep. 306; *Boughner v. Laughlin*, 64 S. W. Rep. 856, 23 Ky. L. Rep. 1166; *Cornwell v. Orton*, 126 Mo. 355; *Shappard v. Cage*, 19 Tex. Civ. App. 206.

**Subrogation Against Homestead.**—In *Texas* a person loaning money to pay off a vendor's lien will be subrogated thereto even as against the homestead of the borrower. *Faires v. Cockerell*, 88 Tex. 428; *Dixon v. National Loan, etc., Co.*, (Tex. Civ. App. 1897) 40 S. W. Rep. 541; *Mustain v. Stokes*, 90 Tex. 358; *Pioneer Sav., etc., Co. v. Paschall*, 12 Tex. Civ. App. 613; *Denecamp v. Townsend*, (Tex. Civ. App. 1895) 33 S. W. Rep. 254; *Western Mortg., etc., Co. v. Ganzer*, (C. C. A.) 63 Fed. Rep. 647; *Ivory v. Kennedy*, (C. C. A.) 57 Fed. Rep. 340. And see generally the title **HOMESTEAD**, vol. 15, p. 516.

**2. Person Advancing Purchase Price of Land.**—*Alabama.*—*Scott v. Land, etc., Co.*, 127 Ala. 161; *Allen v. Caylor*, 120 Ala. 251, 74 Am. St. Rep. 31.

*Arkansas.*—*Rodman v. Sanders*, 44 Ark. 504.

*Illinois.*—*Austin v. Underwood*, 37 Ill. 439, 87 Am. Dec. 254. See also *Caudle v. Murphy*, 89 Ill. 352.

*Indiana.*—*Otis v. Gregory*, 111 Ind. 504; *Dwenger v. Branigan*, 95 Ind. 221; *Keith v. Hudson*, 74 Ind. 333. Compare *Brower v. Witmeyer*, 121 Ind. 83.

*Texas.*—*Johnson v. Portwood*, 89 Tex. 235. Compare *Texas Land, etc., Co. v. Blalock*, 76 Tex. 85; *Hicks v. Morris*, 57 Tex. 658.

*Virginia.*—*Price v. Davis*, 88 Va. 939. And see *Kline v. Triplett*, (Va. 1896) 25 S. E. Rep. 886.

*Wisconsin.*—*Carey v. Boyle*, 53 Wis. 574; *Jones v. Parker*, 51 Wis. 218. See also *Wolff v. Walter*, 56 Mo. 292. Compare *Durant v. Davis*, 10 Heisk. (Tenn.) 527.

**For Cases in Which Subrogation Was Refused**, see *Campan v. Molle*, 124 Cal. 415; *Hitt v. Applewhite*, (Miss. 1896) 20 So. Rep. 161; *Nottes's Appeal*, 45 Pa. St. 362; *Smith v. Morrison*, (Tex. Civ. App. 1895) 29 S. W. Rep. 1116; *Harris v. Elliott*, 45 W. Va. 245.

**A Third Person Who Is Really and Ultimately Liable** for the purchase price of land will not be subrogated to the vendor's lien on paying the same. *Clay v. Clay*, (Ky. 1903) 72 S. W. Rep. 810.

**3. Lender Subrogated though Loan Was Usurious.**—*Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204. But to the contrary see *Roe v. Kiser*, 62 Ark. 92. And see *supra*, this title, **I. Definition and General Principles—When Not Allowed—In General—Where Injustice Would Result.** As to the effect of usury in general, see the title **USURY**.

**4. Prejudice to Intervening Incumbrancers or Purchasers.**—*Coonrod v. Kelly*, (C. C. A.) 119 Fed. Rep. 841; *Draper v. Ashley*, 104 Mich. 527; *Hoagland v. Green*, 54 Neb. 164; *Rice v. Winters*, 45 Neb. 517; *Gaskill v. Wales*, 36 N. J. Eq. 527.

If, after the sale of mortgaged premises under a judgment, a stranger, in ignorance of the recorded judgment and sale thereunder, advances money to pay off the prior mortgage and takes a new mortgage for his security, he will not be subrogated to the lien of the old mortgage as against the purchaser under the judgment; his want or diligence being the occasion of his loss. *Mather v. Jenswold*, 72 Iowa 550, followed in *Ft. Dodge Bldg., etc., Assoc. v. Scott*, 86 Iowa 431.

from,<sup>1</sup> and against all parties who subsequently acquire an interest in the property with knowledge of his rights.<sup>2</sup>

*d. WHEN NOT ENTITLED TO SUBROGATION.* — A mere stranger who, without any request from or agreement with the parties, voluntarily pays a mortgage or other incumbrance, and allows it to be canceled and discharged, cannot afterwards come into equity and have it reinstated and be subrogated to the rights of the mortgagee, in the absence of fraud, accident, or mistake.<sup>3</sup> Nor will subrogation be enforced in cases of this nature where it would work injustice to the creditor,<sup>4</sup> or where it is unnecessary for the protection of the party claiming it,<sup>5</sup> or where the evidence shows that the loan was made entirely on the faith of new security executed by the borrower, and not on the faith of subrogation.<sup>6</sup>

*e. WAIVER OF RIGHT BY LACHES.* — The right here considered may be waived by the laches of the party claiming it.<sup>7</sup>

**V. BENEFICIARIES, HEIRS, DEVISEES, LEGATEES, AND WIDOWS — 1. Beneficiaries in General.** — Where a trust to pay or secure debts has failed, a beneficiary who has, under compulsion, paid such debts to protect his interest in the property, will be subrogated to the rights of the creditor paid.<sup>8</sup>

**Wards.** — Where notes given by a guardian for the purchase price of land are paid with money belonging to the ward, the latter will be entitled to the benefit of the vendor's lien on such land.<sup>9</sup> So a ward will be subrogated to the benefit of a mortgage executed by his guardian to a surety on the guardianship bond, where such mortgage is given to secure the proper performance of the guardian's duties, as well as to indemnify the surety;<sup>10</sup> but he will not be

1. *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204; *Draper v. Ashley*, 104 Mich. 527.

2. *Cumberland Bldg., etc., Assoc. v. Sparks*, (C. C. A.) 111 Fed. Rep. 647.

3. *Volunteer Paying Off Incumbrance Not Subrogated — United States.* — *Springs v. Brown*, 97 Fed. Rep. 405.

*California.* — *Brown v. Rouse*, 125 Cal. 645; *Guy v. Du Uprey*, 16 Cal. 196, 76 Am. Dec. 518.

*Illinois.* — *Martin v. Martin*, 164 Ill. 640, 56 Am. St. Rep. 219; *Bouton v. Cameron*, 99 Ill. App. 600.

*Kansas.* — *Mahanes v. Dartmouth Sav. Bank*, 4 Kan. App. 464.

*Mississippi.* — *Good v. Golden*, 73 Miss. 91, 55 Am. St. Rep. 486.

*Missouri.* — *Lemmon v. Lincoln*, 68 Mo. App. 76; *Brown v. Merchant's Bank*, 66 Mo. App. 427, 2 Mo. App. Rep. 1347.

*Nebraska.* — *Mavity v. Stover*, (Neb. 1903) 94 N. W. Rep. 834; *Meeker v. Larson*, (Neb. 1902) 90 N. W. Rep. 958; *Seieroe v. Homan*, 50 Neb. 601; *Bohn Sash, etc., Co. v. Case*, 42 Neb. 281.

*New Jersey.* — *Gore v. Brian*, (N. J. 1896) 35 Atl. Rep. 897; *Seeley v. Bacon*, (N. J. 1896) 34 Atl. Rep. 139.

*New York.* — *Corbin v. Dwyer*, (Supm. Ct. Tr. T.) 30 Misc. (N. Y.) 488.

*South Carolina.* — *Gunter v. Addy*, 58 S. Car. 178.

*South Dakota.* — *Pollock v. Wright*, 15 S. Dak. 134.

*Tennessee.* — *Bible v. Wisecarver*, (Tenn. Ch. 1898) 50 S. W. Rep. 670; *Bradshaw v. Van Valkenburg*, 97 Tenn. 316.

*Texas.* — *Southern Bldg., etc., Assoc. v. Skinner*, (Tex. Civ. App. 1897) 42 S. W. Rep. 320.

**What Agreement Insufficient to Entitle Lender to Subrogation.** — See *McCowan v. Brooks*, 113 Ga. 532; *Conser v. Coleman*, 31 Oregon 550.

**Where a Fraud Has Been Practiced** on a stranger, and his money has been fraudulently used by connivance between his agent and the mortgagor, he may be subrogated to the mortgage paid with such money. *Cotton v. Dacey*, 61 Fed. Rep. 481.

**4. Subrogation Not Allowed to Prejudice of Creditor.** — *Gaskill v. Huffaker*, (Ky. 1899) 49 S. W. Rep. 770.

**5. Subrogation Not Enforced Where Unnecessary.** — *Tait v. American Freehold Land Mortg. Co.*, 132 Ala. 193; *Edinburg American Land Mortg. Co. v. Latham*, 88 Ind. 88; *Kelsey v. Welch*, 8 S. Dak. 225.

**6. Loan on Faith of New Security Alone.** — *Berry v. Bullock*, 81 Miss. 463; *Weiser v. Weisel*, (Supm. Ct. Spec. T.) 5 N. Y. Annot. Cas. 196.

**Right Not Waived by Taking New Security.** — The taking of a new mortgage or other security by a junior incumbrancer from a debtor to secure advances made by him to pay off prior liens for the protection of his own security will not affect his right of subrogation. *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Patterson v. Birdsall*, 64 N. Y. 294, 21 Am. Rep. 609; *Louis v. Bauer*, 33 N. Y. App. Div. 287.

**7. Right Waived by Laches.** — *Atkins v. Nor-dyke, etc., Co.*, 6 Kan. App. 145, affirmed 8 Kan. App. 855, 54 Pac. Rep. 328. See also *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204. And see *infra*, this title, XII. *Waiver of Right*.

**8. Beneficiary Paying Debts.** — *Walsh v. Walsh*, (Neb. 1903) 95 N. W. Rep. 1025.

**9. Ward Subrogated to Vendor's Lien.** — *Oury v. Saunders*, 77 Tex. 278.

**10. Security Given to Surety on Guardian's Bond.** — *Daniel v. Hunt*, 77 Ala. 567; *Cooper v. Middleton*, 94 N. Car. 86.

entitled to the benefit of a mortgage given by the guardian or a third person simply for indemnity to the surety.<sup>1</sup>

**2. Heirs and Next of Kin.** — An heir who pays the debt of his ancestor, or more than his share thereof, will, as a rule, be subrogated to the rights of the creditor against the other heirs.<sup>2</sup> If he pays a judgment against his ancestor in order to protect his own interests, he may compel an assignment of the judgment that he may have the benefit of the lien thereof.<sup>3</sup> But he is entitled to no such right as against one who has purchased from the ancestor a portion of his land, the portion remaining a part of the estate being primarily applicable to the payment of such debts.<sup>4</sup> A lien debt against the land of a decedent which has been discharged by the administrator cannot be revived in favor of one heir against another who has received more than his share of the personalty.<sup>5</sup> Nor can an heir who pays the debts and funeral expenses of his ancestor out of his own funds, as a matter of bounty, be allowed repayment out of the personal estate.<sup>6</sup>

**Next of Kin.** — Where the committee of a lunatic pays a mortgage on his real estate out of his personal property, the next of kin of such lunatic, after his death, cannot be subrogated to the benefit of the mortgage as against the heirs.<sup>7</sup>

**3. Devisees.** — A specific devisee who pays a debt of the testator in order to protect his interest will be subrogated to the rights of the creditor against the personal estate of the testator,<sup>8</sup> and against other devisees who were liable to contribute to the payment of the debt.<sup>9</sup>

**4. Legatees.** — A legatee who discharges a claim against the estate of the testator in order to prevent the appropriation of his legacy to the payment of such claim, or whose legacy has been appropriated to the payment of the same, will be entitled to the benefit of any securities the creditor may hold against the estate, subject to the rules prescribing the order of liability of the different funds for the payment of debts.<sup>10</sup> This rule does not apply, however, where

**Creditor of Ward Subrogated to Fund in Hands of Surety.** — Where the appointment of a guardian is held to be void, a judgment creditor of the ward will be subrogated to the ward's rights as against a fund turned over by the *de facto* guardian to a surety on his bond, such guardian having failed to render an account. *Hazelton v. Douglas*, 97 Wis. 214, 65 Am. St. Rep. 122.

**1. Security Given Merely to Indemnify Surety.** — *Black v. Kaiser*, 91 Ky. 422; *Miller v. Wack*, 1 N. J. Eq. 204. But see *contra Morrill v. Morrill*, 53 Vt. 74, 38 Am. Rep. 659. And see *Ijames v. Gaither*, 93 N. Car. 358.

**2. Heir Paying Debts of Ancestor.** — *Winston v. McAlpine*, 65 Ala. 377; *Taylor v. Taylor*, 8 B. Mon. (Ky.) 419, 48 Am. Dec. 400; *Jenness v. Robinson*, 10 N. H. 215; *Boring v. Jobe*, (Tenn. Ch. 1899) 53 S. W. Rep. 763.

**Taxes Paid by Executor from Proceeds of Real Estate.** — If an executor pay the taxes on a decedent's estate out of the proceeds of the real estate when there is sufficient personal property to pay the same, but it is admitted that the unpreferred claims against the estate are in excess of the assets received by him, the heir at law will have no right as against the unpreferred creditors to claim a like amount from the proceeds of the personal property. *Smith v. Cornell*, 52 N. Y. Super. Ct. 499. Compare *Boring v. Jobe*, (Tenn. Ch. 1899) 53 S. W. Rep. 763.

**No Subrogation Where Estate Is Insolvent.** — Heirs of an insolvent estate who, supposing it

to be solvent, satisfy mortgages of the ancestor, will not be subrogated to the lien of the mortgages; nor, if they pay off judgments against the ancestor, after the liens of such judgments have expired, will they acquire any priority over general creditors. *Belcher v. Wickersham*, 9 Baxt. (Tenn.) 111.

**3.** *Cole v. Malcolm*, 66 N. Y. 363. But see the note immediately preceding.

**4. Estate Is Primarily Liable for Debt.** — *Clowes v. Dickenson*, 5 Johns. Ch. (N. Y.) 235, overruled on another point 9 Cow. (N. Y.) 403. And to the same effect see *Fairman v. Heath*, 19 Ind. 63.

**5. When One Heir Will Not Be Subrogated Against Another.** — *Cockrill v. Lindon*, (Ky. 1897) 43 S. W. Rep. 451.

**6.** *Coleby v. Coleby*, L. R. 2 Eq. 803.

**7.** *Adams v. Smith*, (Supm. Ct.) 20 Abb. N. Cas. (N. Y.) 60.

**8. Subrogation of Devisees.** — *Amory v. Lowell*, 1 Allen (Mass.) 504; *Suydam v. Voorhees*, 58 N. J. Eq. 157; *Redmond v. Burroughs*, 63 N. Car. 242. And see the title *MARSHALING DECEDENTS' ESTATES*, vol. 19, p. 1374.

**9.** *Brigden v. Cheever*, 10 Mass. 450; *Livingston v. Livingston*, 3 Johns. Ch. (N. Y.) 148; *Cutchin v. Johnston*, 120 N. Car. 51. And see *Lingsweiler v. Hart*, 159 N. Y. 543. Compare *Blaney v. Blaney*, 1 Cush. (Mass.) 107.

**10. Subrogation of Legatees.** — *Lilford v. Powys Keck*, L. R. 1 Eq. 347; *Durham v. Rhodes*, 23 Md. 233; *Schnebly v. Ragan*, 7 Gill & J. (Md.) 126, 28 Am. Dec. 195; *Lindsley v.*

the debt paid is really that of the legatee.<sup>1</sup> Nor will a residuary legatee, whose legacy is subject to the debts of his testator, be entitled to subrogation on paying such debts.<sup>2</sup>

**5. Widows.**—A widow who pays the debts of her deceased husband to protect her interest in the estate will be subrogated to the rights of the creditors paid.<sup>3</sup> If lands be sold clear of dower and the proceeds paid to the heirs or applied to the payment of debts without deducting the share to which the widow is entitled in lieu of dower, she will be substituted to the benefit of other funds arising from the sale of her husband's real estate.<sup>4</sup>

**VI. PERSONAL REPRESENTATIVES, FIDUCIARIES, AND OFFICERS**—**1. Personal Representatives.**—A personal representative who pays a debt of the estate out of his own means,<sup>5</sup> or makes advancements to creditors,<sup>6</sup> legatees, or distributees,<sup>7</sup> will in either case, to the extent of assets for which he is liable, be subrogated to all the rights of the creditors, legatees, or distributees against the estate,<sup>8</sup> including priority and dignity of claim.<sup>9</sup> So an administrator who pays debts of the estate out of a fund from which the widow is dowable,

McGrath, 62 N. J. Eq. 478; Mollan v. Griffith, 3 Paige (N. Y.) 403; Dean v. Rounds, 18 R. I. 436; Overton v. Lea, 108 Tenn. 505; Mitchell v. Mitchell, 8 Humph. (Tenn.) 359. And see the title MARSHALING DECEDENTS' ESTATES, vol. 19, p. 1374.

One of several specific legatees who has been compelled to pay the whole of a debt due by his testator will not be subrogated to the right of the creditor as against his co-legatees, who have received their legacies, where the estate is solvent independent of such legacies, or where it has been rendered insolvent by the devastavit of the executor. Peoples v. Horton, 39 Miss. 406.

**1. Legatee Paying His Own Debt.**—Dean v. Rounds, 18 R. I. 436.

**2. Residuary Legatee.**—Dean v. Rounds, 18 R. I. 436.

**3. Widow's Right to Subrogation.**—Matter of Plopper, (Surrogate Ct.) 15 Misc. (N. Y.) 202.

**Widow Discharging Incumbrance on Estate.**—See *supra*, this title, IV. *Persons Interested in Encumbered Estates*—*In General*.

**Insurance Money Used to Pay Debts.**—Where the personal estate of the decedent was not sufficient to pay his debts, and to save the real estate from being sold at a probable sacrifice the widow used funds derived from the decedent's life insurance, of which she and her children were beneficiaries, to pay the debts, it was held that she would be subrogated to the rights of the creditors paid. Kelley v. Ball, (Ky. 1892) 19 S. W. Rep. 581.

**A Widow Who Has Paid for a Monument to Her Husband** before the appointment of an administrator will be subrogated to the rights of the person furnishing the monument against the estate. Pease v. Christman, 158 Ind. 642.

**4. Dower Fund Diverted to Other Purposes.**—Maccubbin v. Cromwell, 2 Har. & G. (Md.) 460; Overton v. Lea, 108 Tenn. 505.

**5. Subrogation of Personal Representative**—

*Alabama.*—Hearrin v. Savage, 16 Ala. 286.  
*Illinois.*—Goodbody v. Goodbody, 95 Ill. 456; Chandler v. Green, 101 Ill. App. 409 [reversed on another point Bennett v. Chandler, 199 Ill. 97]; Pinneo v. Goodspeed, 22 Ill. App. 50.

*Iowa.*—Black v. Black, 42 Iowa 694.

*Kentucky.*—Taylor v. Taylor, 8 B. Mon.

(Ky.) 419, 48 Am. Dec. 400; Smith v. Hoskins, 7 J. J. Marsh. (Ky.) 502.

*Maryland.*—Billingslea v. Henry, 20 Md. 282.

*Massachusetts.*—Hancock v. Minot, 8 Pick. (Mass.) 38.

*Missouri.*—Hill v. Buford, 9 Mo. 869.

*New Jersey.*—Snydam v. Voorhees, 58 N. J. Eq. 157; Chamberlin v. McDowell, 42 N. J. Eq. 628; Woolley v. Pemberton, 41 N. J. Eq. 394.

*New York.*—Matter of O'Brien, 39 N. Y. App. Div. 321.

*North Carolina.*—Denton v. Tyson, 118 N. Car. 542; Turner v. Shuffler, 108 N. Car. 642; Sanders v. Sanders, 2 Dev. Eq. (17 N. Car.) 262.

*Pennsylvania.*—*In re Lentz*, 5 Pa. St. 103. But see Blank's Appeal, 3 Grant Cas. (Pa.) 192.

*Rhode Island.*—Pierce v. Allen, 12 R. I. 510.

*South Carolina.*—Feemster v. Good, 12 S. Car. 573; Johnson v. Henagan, 11 S. Car. 93.

*Texas.*—Lewis v. Nichols, 38 Tex. 54.

*Virginia.*—Gaw v. Huffman, 12 Gratt. (Va.) 628; Kinney v. Harvey, 2 Leigh (Va.) 70, 21 Am. Dec. 597.

**6. Advancements to Creditors.**—Chandler v. Green, 101 Ill. App. 409, reversed on another point Bennett v. Chandler, 199 Ill. 97.

**An Administrator Paying Unpreferred Debts of an Insolvent Estate** is not entitled to credit for the full amount of such payments, but can only claim to be subrogated to the rights of the creditors, and to receive their *pro rata* dividends. Breckenridge's Appeal, 127 Pa. St. 81; Byrd v. Jones, 84 Ala. 336; Pryor v. Davis, 109 Ala. 117; Hullett v. Hood, 109 Ala. 345.

**7. Advancements to Legatees or Distributees.**—Chandler v. Green, 101 Ill. App. 409, reversed on another point Bennett v. Chandler, 199 Ill. 97.

**8. Personal Representative Subrogated Against Estate.**—Chandler v. Green, 101 Ill. App. 409 [reversed on another point Bennett v. Chandler, 199 Ill. 97]; Hancock v. Minot, 8 Pick. (Mass.) 38; Buckingham v. Wesson, 54 Miss. 526; Chesson v. Chesson, 8 Ired. Eq. (43 N. Car.) 141.

**9. Chandler v. Green, 101 Ill. App. 409 [reversed on another point Bennett v. Chandler, 199 Ill. 97]; Willis v. Loan, 2 T. B. Mon. (Ky.) 141; Woods v. Ridley, 27 Miss. 119.**

and is compelled to reimburse her, will be subrogated to the rights of the creditors against the unadministered assets of the estate.<sup>1</sup>

**A Personal Representative Who Pays Taxes and Assessments** on property specifically devised by the testator will be subrogated to the lien thereof as against the devisee.<sup>2</sup>

**A Personal Representative Who Is Compelled to Make Good a Fraud** on the estate will be subrogated to the rights of the estate against the wrongdoers.<sup>3</sup>

**Personal Representative Charging Himself with Debt of Others.** — If a personal representative charge himself, in his accounts, with liabilities with which another is primarily chargeable, he will be subrogated to the rights of the estate against that person.<sup>4</sup>

**An Executor Who Has Been Compelled to Answer for the Default or Devastavit of his coexecutor** will be entitled to subrogation.<sup>5</sup>

**Subrogation in Behalf of Estate.** — An administrator will be entitled to subrogation in behalf of the estate where he discharges liabilities with which others are primarily chargeable out of the general assets of the estate.<sup>6</sup>

**Subrogation Will Not Be Enforced in Favor of the Personal Representative** where he pays debts out of the order of their priority,<sup>7</sup> or is otherwise guilty of maladministration of the estate,<sup>8</sup> or where he negligently fails to assert his right in a chancery suit for the administration of the estate to which he and the legatees are parties.<sup>9</sup> And an administrator who pays the funeral expenses of one of the infant heirs of his intestate's estate, and takes no assignment of the claim, is a mere volunteer and not entitled to be subrogated to the undertaker's claim against the interest of the deceased heir in the ancestor's estate.<sup>10</sup>

**2. Fiduciaries in General — Trustees and Guardians — a. FIDUCIARIES IN GENERAL.** — As a general rule, a fiduciary who removes a prior incumbency on the trust estate may be subrogated to the benefit thereof against the estate;<sup>11</sup> but he may not, by voluntarily discharging the claim secured by the

**Proof of Claim Required.** — The personal representative claiming subrogation must establish his claim by the same kind of testimony which would be required of creditors, and subject to the same defenses which would operate against them. *McNeill v. McNeill*, 36 Ala. 109, 76 Am. Dec. 320; *Gist v. Cockey*, 7 Har. & J. (Md.) 134; *Collinson v. Owens*, 6 Gill & J. (Md.) 4; *Watkins v. Dorsett*, 1 Bland (Md.) 530; *McCurdy's Appeal*, 5 W. & S. (Pa.) 397. See also *Loomis's Appeal*, 29 Pa. St. 237; *Allen's Petition*, 15 Mass. 58.

**1. Administrator Compelled to Reimburse Widow for Dower.** — *Crowley v. Mellon*, 52 Ark. 1. See also *McCullough v. Wise*, 57 Ala. 623; *Wheeler v. Wheeler*, 1 Conn. 51; *Terrell v. Rowland*, 86 Ky. 67; *Clayton v. Somers*, 27 N. J. Eq. 230; *Robb's Appeal*, 41 Pa. St. 45; *Pendergrass v. Pendergrass*, 26 S. Car. 19; *Graham v. Jones*, 24 S. Car. 241; *Franklin v. Armfield*, 2 Sneed (Tenn.) 305; *Gundry v. Henry*, 65 Wis. 559.

**2. See *infra*, this title, IX. Subrogation Arising from Payment of Taxes and Duties.**

**3. Personal Representatives Making Good Fraud upon Estate.** — *Thomas v. Bridges*, 73 Mo. 530. In this case a purchaser at an administrator's sale, falsely representing himself to be the owner of an allowance against the estate, was given credit for the amount thereof as part payment of the purchase money. The administrator was afterwards compelled to pay the allowance to the real owner out of his own pocket, and it was held that he was entitled to be subrogated to the rights of the estate, and

to have a vendor's lien enforced against the land in the hands of one who had received a voluntary conveyance from the purchaser, though without knowledge of the fraud.

**4. Personal Representative Charging Himself with Debts of Others.** — *Parker v. Smith*, (Tex. 1889), 11 S. W. Rep. 909.

**5. Default or Devastavit of Coexecutor.** — *Miller's Appeal*, 127 Pa. St. 95; *Johnson v. Corbett*, 11 Paige (N. Y.) 265; *Albro v. Robinson*, 93 Ky. 105.

**6. Subrogation in Behalf of Estate.** — *Greenwell v. Heritage*, 71 Mo. 459. See also *Greene v. Brown*, (Ind. 1894) 38 N. E. Rep. 519; *Weldon v. Hull*, 50 Mo. 296; *Galbraith v. Howard*, 11 Tex. Civ. App. 230; *Salinger v. Black*, 68 Ark. 449.

**7. Debts Paid Out of Order of Priority.** — *Moye v. Albritton*, 7 Ired. Eq. (42 N. Car.) 62; *Greiner's Estate*, 2 Watts (Pa.) 414; *Findlay v. Trigg*, 83 Va. 539. See also *Carson v. M'Farland*, 2 Rawle (Pa.) 118, 19 Am. Dec. 627.

**8. Maladministration.** — *Foster's Succession*, 4 La. Ann. 479.

**Proof of Proper Administration Required.** — *Frary v. Booth*, 37 Vt. 93. See also *Williams v. Stratton*, 10 Smed. & M. (Miss.) 418.

**9. Right Waived by Negligence.** — *Lambert v. Hobson*, 3 Jones Eq. (56 N. Car.) 424. And see *infra*, this title, XII. *Waiver of Right*.

**10. Funeral Expenses.** — *Fay v. Fay*, 43 N. J. Eq. 438.

**11. Fiduciary Removing Incumbrance.** — *Glide v. Dwyer*, 83 Cal. 477; *King v. Cushman*, 41

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trust, be subrogated to the rights of the original claimant against the estate.<sup>1</sup>

*b.* TRUSTEES. — The doctrine of subrogation is frequently applied in favor of trustees.<sup>2</sup> A court of equity, independent of any agreement, will consider money advanced by a trustee to purchase in an outstanding title as an advance for the benefit of his *cestui que trust*, and not for his own use, giving him a lien on the property until he is reimbursed for the advancement.<sup>3</sup>

*c.* GUARDIANS. — A guardian will be entitled to subrogation where he removes an incumbrance from his ward's estate,<sup>4</sup> or where he is compelled to make good the default of a former guardian.<sup>5</sup> But where he makes an illegal investment of his ward's money he cannot be subrogated to the benefit of such investment on being compelled to account.<sup>6</sup>

**3. Officers** — *a.* IN GENERAL. — A Collector of Internal Revenue cannot be regarded as surety for a bank in which his deputy has deposited government money contrary to law, and therefore he will not be subrogated to the rights of the government on being compelled to answer for the loss of such money.<sup>7</sup>

*b.* SHERIFFS AND CONSTABLES. — It has been held frequently that an officer who becomes liable for the amount of a judgment, by reason of his failure to discharge his official duty when an execution is placed in his hands, may, on payment of the judgment debt, be subrogated to the rights of the judgment creditor.<sup>8</sup> So the equity of subrogation may arise in favor of an

Ill. 31, 89 Am. Dec. 366; *Freeman v. Tompkins*, 1 Strobh. Eq. (S. Car.) 53; *Boyd v. Myers*, 12 Lea (Tenn.) 175. See also *In re Leslie*, 23 Ch. D. 552. And see *supra*, this title, IV. *Persons Interested in Encumbered Estates* — *In General*.

**Payments by Assignee for Benefit of Creditors.** — *Matter of Sutcliffe*, 83 Hun (N. Y.) 326.

**1. Voluntary Discharge of Trust.** — *Pearce v. Bryant Coal Co.*, 121 Ill. 590. And see *Bennett v. Chandler*, 199 Ill. 97.

**2. Trustee Entitled to Subrogation.** — *Ellicott v. Ellicott*, 6 Gill & J. (Md.) 35.

**Trustee of Bankrupt.** — *In re Howland*, 109 Fed. Rep. 869.

**Trustee in Void Trust Deed.** — Although a trust deed made by a failing debtor in contravention of statute is void at law, the trustees are entitled to protection in equity for an amount actually paid by them, in good faith, to the creditors of the assignor, out of money raised by them personally on their note in reliance on the assignment, and are equitably subrogated, as against the personalty assigned, to the claims of the creditors existing at the time, and paid by them; and they are also entitled to reimbursement of the amounts paid out by them in preserving and maintaining the trust estate assigned to them, such as for taxes and assessments levied against the real property. *New York Public Library v. Tilden*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 169.

**3. Trustee Advancing Money to Purchase Outstanding Title.** — *Chandler v. Green*, 101 Ill. App. 409; *reversed* on another point *Bennett v. Chandler*, 199 Ill. 97.

**4. Guardian Removing Incumbrance from Ward's Estate.** — *Donohue v. Daniel*, 58 Md. 595, in which case it was also held that a person from whom the guardian had borrowed money to remove the incumbrance was subrogated to the guardian's rights.

**5. Making Good Default of Former Guardian.** — *Smith v. Alexander*, 4 Sneed (Tenn.) 482. See also *Salter v. Salter*, 6 Bush (Ky.) 637; *Corcoran v. Allen*, 11 R. I. 567.

**Subrogation to Securities Given by Predecessor to Sureties on Bond.** — *Kelly v. Herrick*, 131 Mass. 373.

**6. No Subrogation to Benefit of Illegal Investment.** — *Rowley v. Towsley*, 53 Mich. 329.

**7. Revenue Collections Deposited in Bank.** — *Wilkinson v. Babbitt*, 4 Dill. (U. S.) 207.

**8. Officer Held Liable for Failure to Execute Process.** — *Chandler v. Green*, 101 Ill. App. 409 [*reversed* on another point *Bennett v. Chandler*, 199 Ill. 97]; *Rees v. Eames*, 20 Ill. 283. 71 Am. Dec. 267; *Gillette v. Hill*, 102 Ind. 531; *Bray v. Howard*, 7 B. Mon. (Ky.) 467; *Allen v. Holden*, 9 Mass. 133, 6 Am. Dec. 46; *People v. Onondaga C. Pl.*, 19 Wend. (N. Y.) 79; *Evarts v. Hyde*, 51 Vt. 183; *Downer v. South Royalton Bank*, 39 Vt. 25; *Bellows v. Allen*, 23 Vt. 169; *Neely v. Jones*, 16 W. Va. 625, 37 Am. Rep. 794; *Beard v. Arbuckle*, 19 W. Va. 135.

**Officer Entitled to Sue Out Execution for His Own Benefit.** — After payment of the judgment debt the officer may sue out execution in the name of the original plaintiff for his own benefit. *Burbank v. Slinkard*, 53 Ind. 493; *Bray v. Howard*, 7 B. Mon. (Ky.) 467; *Bruce v. Dyall*, 5 T. B. Mon. (Ky.) 125; *Finn v. Stratton*, 5 J. J. Marsh. (Ky.) 364; *Taylor v. Hardin*, 4 B. Mon. (Ky.) 363; *Dillon v. Cook*, 5 Smed. & M. (Miss.) 773; *People v. Onondaga C. Pl.*, 19 Wend. (N. Y.) 79; *Murphy v. Swadener*, 33 Ohio St. 85; *Evarts v. Hyde*, 51 Vt. 183. But see *Roundtree v. Weaver*, 8 Ala. 314; *Carpenter v. Stilwell*, 11 N. Y. 61.

**At Common Law** an officer cannot maintain an action for the recovery of money paid for another on account of his own breach of duty. *Pitcher v. Bailey*, 8 East 171; *Walker v. Bradbury*, 57 Mo. 66; *Bigelow v. Provost*, 5 Hill (N. Y.) 566; *Carpenter v. Fifield*, 14 R. I. 73.

**Assignment of Judgment Required.** — *Clevinger v. Miller*, 27 Gratt. (Va.) 740; *Sherman v. Shaver*, 75 Va. 1; *Feamster v. Withrow*, 12 W. Va. 611; *People v. Onondaga C. Pl.*, 19 Wend. (N. Y.) 79.

**A Constable Taking Worthless Notes** in payment of a claim placed in his hands for collec-

officer who has been compelled to compensate the execution plaintiff for the loss of property levied on, by reason of the insufficiency of the claim bond given by the defendant,<sup>1</sup> or in favor of an officer who has been held liable as special bail;<sup>2</sup> but not where the liability of the officer is for not applying the avails of property sold, as in such a case the rights of the judgment creditor are extinguished, and there is nothing to which he can be subrogated.<sup>3</sup>

**No Subrogation Where Payment Is Voluntary.** — Subrogation will not be enforced in favor of a sheriff or other officer where he voluntarily pays the judgment debt without being under any legal obligation to do so,<sup>4</sup> or where he pays money to the judgment plaintiff without any previous demand or request for its payment by the judgment debtor;<sup>5</sup> but if he is under legal obligation to make the payment, the fact that judgment has not been obtained against him will not render him a volunteer so as to deprive him of the right.<sup>6</sup>

## VII. PERSONS PAYING OR ADVANCING MONEY TO PAY DEBTS OF OTHERS —

**1. In General — a. VOLUNTEERS AND STRANGERS.** — One who advances money to pay the debt of another, in the absence of agreement, express or implied, for subrogation, will not be entitled to succeed to the rights and remedies of the creditor so paid unless there is some obligation, interest, or right, legal or equitable, on the part of such person in respect of the matter concerning which the advance is made, as otherwise he is a stranger, a volunteer, an intermeddler, to whom the equitable right of subrogation is never accorded.<sup>7</sup>

tion cannot recover in the name of the plaintiff the amount of the debt from the judgment debtor. *Rogers v. Nuttall*, 10 Ired. L. (32 N. Car.) 347.

**1. Subrogated Against Obligor in Defective Claim Bond.** — *Denson v. Horn*, 4 Tex. App. Civ. Cas., § 226.

**2. Special Bail.** — *Higgins v. Glass*, 2 Jones L. (47 N. Car.) 353; *Pool v. Hunter*, 4 Jones L. (49 N. Car.) 144.

**3. Bellows v. Allen**, 23 Vt. 169.

**4. Voluntary Payments.** — *Whittier v. Hem-inway*, 22 Me. 238, 38 Am. Dec. 309; *Morris v. Lake*, 9 Smed. & M. (Miss.) 521, 48 Am. Dec. 724; *Rollins v. Thompson*, 13 Smed. & M. (Miss.) 525; *Sherman v. Boyce*, 15 Johns. (N. Y.) 445; *Reed v. Pruyn*, 7 Johns. (N. Y.) 426, 5 Am. Dec. 287; *Martin v. Gowdy*, 1 Hill L. (S. Car.) 417; *Harwell v. Worsham*, 2 Humph. (Tenn.) 524, 37 Am. Dec. 572; *Smith v. Herman*, 1 Coldw. (Tenn.) 141; *Lintz v. Thompson*, 1 Head (Tenn.) 456, 73 Am. Dec. 182.

**5. Payment Made Without Request by Debtor.** — *Jones v. Wilson*, 3 Johns. (N. Y.) 434; *Menderback v. Hopkins*, 8 Johns. (N. Y.) 436.

**Judgment Purchased by Officer.** — But if an officer who is not delinquent purchases the judgment without making a levy, he may, by leave of court, have an execution issued thereon for his benefit. *Albany City Nat. Bank v. Kearney*, 9 Hun (N. Y.) 535.

**6. Judgment Against Officer Not a Condition Precedent.** — *Burbank v. Slinkard*, 53 Ind. 493; *Staples v. Fox*, 45 Miss. 667.

But in Tennessee it has been held that the liability of the officer must have been fixed by judgment of a court of competent jurisdiction, and that the judgment must have been satisfied before the officer will be entitled to subrogation. *Lintz v. Thompson*, 1 Head (Tenn.) 456, 73 Am. Dec. 182; *Beal v. Smithpeter*, 6 Baxt. (Tenn.) 356.

**7. Volunteers Not Entitled to Subrogation — Civil Law.** — Code Napoleon, bk. 3, tit. 3, art.

1251; 1 Pothier on Oblig., pt. 3, c. 1, art. 6, § 2.

*England.* — *Williams v. Aylesbury, etc.*, R. Co., L. R. 9 Ch. 684.

*Canada.* — *Reg. v. O'Bryan*, 7 Can. Exch. 24.

*United States.* — *Morgan's Louisiana, etc.*, R., etc., Co. v. Texas Cent. R. Co., 137 U. S. 172; *Wood v. Guarantee Trust, etc., Co.*, 128 U. S. 416; *Ætna L. Ins. Co. v. Middleport*, 124 U. S. 534; *Iowa Homestead Co. v. Des Moines Nav., etc., R. Co.*, 17 Wall. (U. S.) 153; *U. S. v. Keebler*, 9 Wall. (U. S.) 83; *U. S. Bank v. Winston*, 2 Brock. (U. S.) 252; *O'Brien v. Wheelock*, 78 Fed. Rep. 673; *Edwards v. Davenport*, 20 Fed. Rep. 756; *In re Cooke*, 19 Fed. Rep. 88.

*Alabama.* — *Simmons v. Walker*, 18 Ala. 664.

*Arkansas.* — *Kline v. Ragland*, 47 Ark. 111; *Rodman v. Sanders*, 44 Ark. 504; *Nichol v. Dunn*, 25 Ark. 129.

*California.* — *Brown v. Rouse*, 125 Cal. 651; *Moran v. Abbey*, 63 Cal. 56; *Carpentier v. Brenham*, 40 Cal. 222.

*District of Columbia.* — *Alfred Richards Brick Co. v. Rothwell*, 18 App. Cas. (D. C.) 516.

*Florida.* — *Griffin v. Orman*, 9 Fla. 22.

*Georgia.* — *Sackett v. Stone*, 115 Ga. 466; *Wilkins v. Gibson*, 113 Ga. 44, 84 Am. St. Rep. 204; *Merchants', etc., Bank v. Tillman*, 106 Ga. 55.

*Idaho.* — *Wilson v. Wilson*, 6 Idaho 597.

*Illinois.* — *Martin v. Martin*, 164 Ill. 640, 56 Am. St. Rep. 219; *Bennett v. Chandler*, 199 Ill. 97; *McCormick v. Bauer*, 122 Ill. 573; *Beaver v. Slanker*, 94 Ill. 175; *Young v. Morgan*, 89 Ill. 203; *Woods v. Gilson*, 17 Ill. 218; *Bouton v. Cameron*, 99 Ill. App. 600; *Beifeld v. International Cement Co.*, 79 Ill. App. 318; *Bayard v. McGraw*, 1 Ill. App. 124.

*Indiana.* — *Davis v. Schlemmer*, 150 Ind. 476; *Binford v. Adams*, 104 Ind. 41; *Nash v. Taylor*, 83 Ind. 347; *McClure v. Andrews*, 68 Ind. 97; *Richmond v. Marston*, 15 Ind. 134.

**Who Not Volunteers.** — One who may be compelled to pay a debt, or the protection of whose property or interest demands that he pay it, is not a stranger or a mere volunteer,<sup>1</sup> nor is a person who pays a debt, or advances money to pay it, at the request of the debtor.<sup>2</sup>

**b. CONVENTIONAL SUBROGATION** — (1) *In General.* — In order that one, having no interest to protect, who pays the debt of another, or advances money for the purpose, may be entitled to succeed to the rights and remedies of the creditor in respect of the debt so paid, there must be a convention or agreement to that effect.<sup>3</sup> This convention or agreement may be made with

*Iowa.* — *Ackley Bank v. Porter*, 116 Iowa 377; *Matteson v. Dent*, 112 Iowa 557; *Wormer v. Waterloo Agricultural Works*, 62 Iowa 699; *Johnston v. Belden*, 49 Iowa 301; *Barber v. Lyon*, 15 Iowa 37.

*Kentucky.* — *Flannery v. Utley*, (Ky. 1887) 3 S. W. Rep. 412; *White v. Curd*, 86 Ky. 191; *Griffin v. Proctor*, 14 Bush (Ky.) 571.

*Louisiana.* — Civ. Code La., art. 2157; *Hutchinson v. Rice*, 105 La. 474; *Coco v. Gumbel*, 47 La. Ann. 966; *Weil v. Enterprise Ginnery, etc.*, Co., 42 La. Ann. 492; *Brice v. Watkins*, 30 La. Ann. 21; *Roth v. Harkson*, 18 La. Ann. 705; *Shaw v. Grant*, 13 La. Ann. 52; *Nolte v. Their Creditors*, 7 Mart. N. S. (La.) 602; *Curtis v. Kitchen*, 8 Mart. (La.) 706; *Harrison v. Bislard*, 5 Rob. (La.) 204.

*Maryland.* — *Gardenville Permanent Loan Assoc. v. Walker*, 52 Md. 452; *Com. v. State*, 32 Md. 501; *Swan v. Patterson*, 7 Md. 164; *Winder v. Diffenderfer*, 2 Bland (Md.) 199.

*Massachusetts.* — *Langley v. Chapin*, 134 Mass. 82; *Eastman v. Crosby*, 8 Allen (Mass.) 206.

*Michigan.* — *Desot v. Ross*, 95 Mich. 81; *Smith v. Austin*, 9 Mich. 465.

*Minnesota.* — *Wadsworth v. Blake*, 43 Minn. 509.

*Mississippi.* — *Skaggs v. Nelson*, 25 Miss. 88; *Morris v. Lake*, 9 Smed. & M. (Miss.) 521, 48 Am. Dec. 724.

*Missouri.* — *Suddath v. Gallagher*, 126 Mo. 393; *Bunn v. Lindsay*, 95 Mo. 250, 6 Am. St. Rep. 49; *Norton v. Highleyman*, 88 Mo. 621; *Price v. Courtney*, 87 Mo. 387, 56 Am. Rep. 453; *St. Francis Mill Co. v. Sugg*, 83 Mo. 476; *Wooldridge v. Scott*, 69 Mo. 669; *Anglade v. St. Avit*, 67 Mo. 438; *Truesdell v. Callaway*, 6 Mo. 605; *Dunn v. Missouri Pac. R. Co.*, 45 Mo. App. 29; *Campbell Printing Press, etc., Co. v. Roeder*, 44 Mo. App. 324.

*Nebraska.* — *Rice v. Winters*, 45 Neb. 527.

*New Hampshire.* — *Contoocook Fire Precinct v. Hopkinton*, 71 N. H. 574.

*New Jersey.* — *Van Winkle v. Williams*, 38 N. J. Eq. 105; *Morris v. White*, 36 N. J. Eq. 324; *Allen v. Williams*, 33 N. J. Eq. 584; *Tradesmen's Bldg., etc., Assoc. v. Thompson*, 32 N. J. Eq. 133; *Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 105; *Shinn v. Budd*, 14 N. J. Eq. 235; *Wilson v. Brown*, 13 N. J. Eq. 277.

*New Mexico.* — *Lee v. Field*, 13 N. Mex. 439.

*New York.* — *Koehler v. Hughes*, 148 N. Y. 507; *Acer v. Hotchkiss*, 97 N. Y. 395; *Gans v. Thieme*, 93 N. Y. 225; *Cole v. Malcolm*, 66 N. Y. 366; *Boyd v. McDonough*, (C. Pl. Gen. T.) 39 How. Pr. (N. Y.) 389; *Clute v. Emmerich*, 26 Hun (N. Y.) 16; *Banta v. Garmo*, 1 Sandf. Ch. (N. Y.) 384; *Sanford v. McLean*, 3 Paige

(N. Y.) 117, 23 Am. Dec. 773. See also *Matter of Schaller*, 10 Daly (N. Y.) 57.

*Ohio.* — *Unger v. Leiter*, 32 Ohio St. 210; *In re Minor Fire Clay Co.*, 9 Ohio Dec. 630.

*Pennsylvania.* — *Campbell v. Foster Home Assoc.*, 163 Pa. St. 609, 43 Am. St. Rep. 818; *Webster's Appeal*, 86 Pa. St. 409; *Mosier's Appeal*, 56 Pa. St. 76, 93 Am. Dec. 783; *Kuhn v. North*, 10 S. & R. (Pa.) 399.

*South Carolina.* — *Gadsden v. Brown, Spears Eq. (S. Car.)* 37.

*Tennessee.* — *Mellon v. Morristown, etc., R. Co.*, (Tenn. Ch. 1895) 35 S. W. Rep. 464; *Durant v. Davis*, 10 Heisk. (Tenn.) 522.

*Texas.* — *Terry v. O'Neal*, 71 Tex. 592.

*Vermont.* — *National Bank v. Cushing*, 53 Vt. 326.

*Virginia.* — *Clark v. Moore*, 76 Va. 262; *Douglass v. Fagg*, 8 Leigh (Va.) 588.

*West Virginia.* — *McNeil v. Miller*, 29 W. Va. 480; *Conrad v. Buck*, 21 W. Va. 396.

*Wisconsin.* — *Watson v. Wilcox*, 39 Wis. 643, 20 Am. Rep. 63; *Hungerford v. Scott*, 37 Wis. 341; *Pelton v. Knapp*, 21 Wis. 63.

**1. Who Not Volunteers.** — *Davis v. Schlemmer*, 150 Ind. 477; *Warford v. Hankins*, 150 Ind. 493.

**Person under Moral Obligation to Pay Not a Volunteer.** — *Slack v. Kirk*, 67 Pa. St. 380, 5 Am. Rep. 438. And see *Dow v. Nason*, (Cal. 1894) 38 Pac. Rep. 54. But compare *Suppiger v. Garrels*, 20 Ill. App. 625; *Bennett v. Chandler*, 199 Ill. 97, holding that one who is under no legal obligation to pay is a stranger.

**2. Person Paying at Request of Debtor Not a Volunteer.** — *Home Sav. Bank v. Bierstadt*, 168 Ill. 626; *Warford v. Hankins*, 150 Ind. 493. And see *infra*, this section, *Conventional Subrogation*.

**3. Conventional Subrogation — Agreement Essential.** — *Allen v. Caylor*, 120 Ala. 251; *Fuller v. Hollis*, 57 Ala. 435; *Wilkins v. Gibson*, 113 Ga. 47, 84 Am. St. Rep. 204; *Mitchell v. Butt*, 45 Ga. 162; *Warford v. Hankins*, 150 Ind. 494; *Morrow v. U. S. Mortgage Co.*, 96 Ind. 21; *Bruce v. Bonney*, 12 Gray (Mass.) 107, 71 Am. Dec. 739; *Gore v. Brian*, (N. J. 1896) 35 Atl. Rep. 897; *New Jersey Midland R. Co. v. Wortendyke*, 27 N. J. Eq. 658; *Sandford v. McLean*, 3 Paige (N. Y.) 122, 23 Am. Dec. 773; *Carter v. Halifax*, 1 Hawks (8 N. Car.) 483; *In re Minor Fire Clay Co.*, 9 Ohio Dec. 630; *Texas, etc., R. Co. v. McCaughey*, 62 Tex. 271; *Morgan v. Hammett*, 23 Wis. 30. See also *Tradesmen's Bldg., etc., Assoc. v. Thompson*, 32 N. J. Eq. 134; *Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 105; *De Concilio v. Brownrigg*, 51 N. J. Eq. 532.

**Subrogation by Agreement a Recognized Doctrine of Equity.** — *Dillon v. Kauffman*, 58 Tex.



either the debtor or creditor.<sup>1</sup> But where the creditor is not a party to the agreement subrogation will not be enforced to his prejudice,<sup>2</sup> or to the prejudice of innocent third parties having equal equities.<sup>3</sup>

**Prior Agreement Inferred from Subsequent Acts.**—In some cases it has been held that a prior agreement for subrogation may be inferred from the subsequent acts and dealings of the parties.<sup>4</sup>

**Louisiana Statute.**—In *Louisiana*, by statute, subrogation by act of the debtor, independent of the creditor, can take place only by an express convention or agreement which must appear by an act declaring it, and a receipt for the money, executed by the debtor before a notary and witnesses.<sup>5</sup>

(2) **Payment of Entire Debt Not a Condition Precedent.**—Conventional subrogation differs from legal subrogation in that payment of the entire debt is not a condition precedent to its enforcement where there is an agreement that the party paying shall be subrogated upon part payment.<sup>6</sup>

**2. Persons Advancing Money to Infants or Married Women to Pay for Necessaries.**—In a number of cases it has been held that a person who advances money to an infant<sup>7</sup> or to a married woman for the purchase of necessities may, on proof that the money was so applied, be subrogated to the rights of the person furnishing the necessities.<sup>8</sup> But in a recent case in *Massachusetts* this right has been denied as regards advances to married women.<sup>9</sup>

**3. Persons Advancing Money to Pay Workmen.**—An officer of a corporation who, without any obligation on his part, and merely to befriend laborers employed by the company, advances the amount of their wages, without an assignment of their claims, or an agreement that he shall have the benefit of their statutory liens, may not, on the insolvency of the company, be subrogated to such liens.<sup>10</sup> Nor will a merchant who pays store orders given to workmen for their wages be subrogated to a preferred claim for wages conferred on such workmen by statute.<sup>11</sup>

**4. Persons Advancing Money to Pay Debts of Decedents or Legacies.**—Persons

696; *Flanagan v. Cushman*, 48 Tex. 241. And see *Ploeger v. Johnson*, (Tex. Civ. App. 1894) 26 S. W. Rep. 432; *Brien v. Smith*, 9 W. & S. (Pa.) 78.

**1. Agreement with Either Debtor or Creditor Sufficient.**—*Allen v. Caylor*, 120 Ala. 251; *Wilkins v. Gibson*, 113 Ga. 44, 84 Am. St. Rep. 204; *Merchants, etc., Bank v. Tillman*, 106 Ga. 56; *Brice v. Watkins*, 30 La. Ann. 21; *Virgin's Succession*, 18 La. Ann. 42; *Harrison v. Bisland*, 5 Rob. (La.) 204; *Gore v. Brian*, (N. J. 1896) 35 Atl. Rep. 897. But see *Hoyle v. Cazabat*, 25 La. Ann. 438; *Smith v. Morrison*, (Tex. Civ. App. 1895) 29 S. W. Rep. 1117; *Reg. v. O'Bryan*, 7 Can. Exch. 24, in which last-named case it is held that the creditor must be a party to the agreement.

**Agreement Between Stranger and Creditor Sufficient.**—*Bissett v. Grantham*, 67 Mo. App. 23; *Fievel v. Zuber*, 67 Tex. 275.

**Agreement with Attorney of Judgment Creditor Held Sufficient.**—*Nugent v. Potter*, 21 La. Ann. 746.

**3. Creditor Not a Party to Agreement.**—*Hutchinson v. Rice*, 105 La. 474.

**3. No Subrogation to Prejudice of Third Parties.**—*Bissett v. Grantham*, 67 Mo. App. 23.

**4. Prior Agreement Inferred from Subsequent Acts.**—*Rodman v. Sanders*, 44 Ark. 504; *Levy v. Baer*, 19 La. Ann. 468. See also *Carter v. Halifax*, 1 Hawks (8 N. Car.) 483.

**5. Louisiana Statute.**—La. Civ. Code, §§ 2159-2161. See *Brice v. Watkins*, 30 La. Ann. 21; *Virgin's Succession*, 18 La. Ann. 52; *Sewall*

*v. Howard*, 15 La. Ann. 400; *Harrison v. Bisland*, 5 Rob. (La.) 204.

**6. Payment of Entire Debt Not Required.**—*McMillan v. Gordon*, 4 Ala. 716; *Stuckman v. Roose*, 147 Ind. 406; *Morrow v. U. S. Mortgage Co.*, 96 Ind. 21; *Shreve v. Hankinson*, 34 N. J. Eq. 76. See also *Loeb v. Fleming*, 15 Ill. App. 508; *Brice's Appeal*, 95 Pa. St. 145.

**Qualification of Rule.**—Subrogation cannot be brought about by a contract between the debtor and a volunteer, to which the creditor is not a party, as to a part of the debt. *Smith v. Morrison*, (Tex. Civ. App. 1895) 29 S. W. Rep. 1117.

**7. Advances to Infants.**—*Marlow v. Pitfield*, 1 P. Wms. 558; *Darby v. Boucher*, 1 Salk. 279; *Price v. Sanders*, 60 Ind. 310; *Conn v. Coburn*, 7 N. H. 368, 26 Am. Dec. 746. See also *Martin v. Gale*, 4 Ch. D. 428; *Randall v. Sweet*, 1 Den. (N. Y.) 460.

**8. Advances to Married Women.**—*Harris v. Lee*, 1 P. Wms. 482; *Jenner v. Morris*, 3 De G. F. & J. 45; *Deare v. Soutten*, L. R. 9 Eq. 151; *Kenyon v. Farris*, 47 Conn. 510, 36 Am. Rep. 86; *Walker v. Simpson*, 7 W. & S. (Pa.) 83, 42 Am. Dec. 216.

**9. Skinner v. Tirrell**, 159 Mass. 474.

**10. Payment to Workmen.**—*Suddath v. Gallagher*, 126 Mo. 393; *Matter of North River Constr. Co.*, 38 N. J. Eq. 434, affirmed *Upper v. Green*, 40 N. J. Eq. 340. But see *In re Standard Wagon Co.*, 4 Ohio Dec. 188, 3 Ohio N. P. 168.

**11. Merchant Paying Store Orders.**—*Rheeling's Appeal*, 107 Pa. St. 161. But see *In re Minor Fire Clay Co.*, 9 Ohio Dec. 627.

who advance money to pay the debts of a decedent, or to discharge liens on the estate, at the request of parties interested therein, and with the understanding that they shall succeed to the rights of the creditors paid, will be subrogated to the claims of such creditors,<sup>1</sup> or to the claims of the personal representative for reimbursement;<sup>2</sup> especially where securities which they have taken for the repayment of the loan prove to be void.<sup>3</sup> But a person who lends money with which legacies charged on a devise of land are paid will not be subrogated to the rights of the legatees against the land devised, in the absence of any agreement to that effect.<sup>4</sup>

**5. Persons Advancing Money for Purchase of Railroad Right of Way.** — In the absence of contract no right of subrogation arises in favor of a person who has loaned money to a railroad company for the purchase of a right of way.<sup>5</sup>

**6. Persons Advancing Rent to Tenant.** — A person who advances the rent of land to a tenant will not be subrogated to the landlord's lien, in the absence of any agreement for subrogation.<sup>6</sup>

**7. Stranger Furnishing Maintenance to Cestui Que Trust.** — Where land is devised on condition that the devisee shall maintain a certain person during his life, a stranger who furnishes such maintenance, at the request of the beneficiary, will be subrogated to his rights against the devisee.<sup>7</sup>

**8. Stockholder Paying Corporate Debts.** — A stockholder has an interest in protecting the assets of the corporation, and a payment by him of corporate debts beyond his ratable share of liability will not be deemed voluntary, but will entitle him to be subrogated to the rights of the creditors paid.<sup>8</sup>

**9. Persons Paying Expenses and Fees of Public Officers.** — A person who pays the expenses of a public officer, and a certain amount agreed on for his services, is not subrogated to the officer's fees.<sup>9</sup>

**10. County or City Discharging Liability of Another.** — Where a county pays the expenses of a pauper lunatic in a state asylum it seems that it will be subrogated to the rights of the asylum against the district of the pauper's settle-

**1. Advancing Money to Pay Debts of Decedents.** — *Chaplin v. Sullivan*, 128 Ind. 50. But see *Freehold First Nat. Bank v. Thompson*, 61 N. J. Eq. 188.

**Loan on Void Mortgage.** — One who in good faith lends money to an administrator to pay off debts of the estate, under an agreement that he shall have a security upon the estate, and takes a mortgage for his security which proves invalid, will be subrogated to the benefit of the liens held by the creditors who were paid with his money. *Detroit F. & M. Ins. Co. v. Aspinall*, 48 Mich. 238; *Lockwood v. Bassett*, 49 Mich. 546; *De Concillio v. Brownrigg*, 51 N. J. Eq. 532.

**3. Subrogation to Rights of Personal Representative.** — *Hamlin v. Smith*, 72 N. Y. App. Div. 601.

**Administration Insolvent.** — In *Freehold First Nat. Bank v. Thompson*, 61 N. J. Eq. 188, it was held that a person who had loaned money to an administrator to pay debts of the estate was entitled upon the insolvency of the administrator to be subrogated to his claim against the estate for reimbursement.

**3. Void Securities.** — *Wyman v. Johnson*, 68 Ark. 369; *Arlington State Bank v. Paulsen*, 57 Neb. 717.

**4. Loan to Pay Legacies.** — *Sommers v. Schrader*, 59 N. Y. App. Div. 340.

**5. Money Advanced for Purchase of Railroad Right of Way.** — *McDonald v. Charleston, etc.*, R. Co., 93 Tenn. 281.

**6. Advancing Rent to Tenant.** — *Gerson v.*

*Norman*, 111 Ala. 433; *Bostick v. Ammons*, 63 S. Car. 302.

**7. Stranger Furnishing Maintenance to Cestui Que Trust.** — *Clark v. Marlow*, 149 Ind. 41; *Huffman v. Bence*, 128 Ind. 131. But to the contrary see *Halstead v. Westervelt*, 41 N. J. Eq. 100.

**8. Stockholder Paying Corporate Debts.** — *Redington v. Cornwell*, 90 Cal. 49; *City Bank v. Crossland*, 65 Ga. 734.

**Stockholder Redeeming from Execution Sale.** — If the property of a corporation is sold under execution, and the corporate authorities take no steps to redeem within the period prescribed by law, a stockholder may interpose and redeem for the benefit of the corporation, and hold the property liable for the money so advanced; and by so doing, he becomes the equitable assignee of the certificates of sale, and will be subrogated to all the rights of the original purchaser at the sale. *Wright v. Oroville Gold, etc.*, Min. Co., 40 Cal. 20.

**When Not Entitled to Subrogation.** — Money paid by a stockholder either directly to the corporation in the way of assessments, or on account of his personal liability as a stockholder directly to the creditor, and which he was bound to pay under the law, cannot be recovered back by subrogation. *Sacramento Bank v. Pacific Bank*, 124 Cal. 147, 71 Am. St. Rep. 36.

**9. Paying Expenses and Fees of Public Officer.** — *Williams v. Ford*, (Tex. Civ. App. 1894) 27 S. W. Rep. 723.

ment.<sup>1</sup> And if it pays the indebtedness, to the state, of its defaulting treasurer, to save itself from certain statutory pains and penalties, it will not be regarded as a volunteer, but will be entitled to succeed to the rights and remedies of the state against the treasurer.<sup>2</sup> But a municipality which voluntarily pays the fees of officers appointed by the legislature to determine the boundary line between it and another municipality, under a resolution of the legislature that such fees shall be paid by the municipalities, one-half by each, may not recover from the other municipality any part of the sum so paid.<sup>3</sup>

**11. Judgment Debtor Paying Judgment Which Has Been Satisfied.** — A judgment debtor who pays the amount of the judgment to the creditor, after his land has been sold under such judgment, is a volunteer, and will not be subrogated to the rights of the creditor against third persons.<sup>4</sup>

**12. Persons Paying Expense of Litigation in Behalf of Town.** — A person who, in good faith, advances money to pay the expenses of litigation on behalf of a town may be subrogated to the rights of the parties paid with the money thus advanced, where notes which he has received for the loan are held invalid in an action at law.<sup>5</sup>

**13. Persons Lending Money to Corporations.** — A person who lends money to a corporation will, if the loan be declared *ultra vires* on the part of the corporation, be subrogated to the rights of creditors whose claims are satisfied out of the loan.<sup>6</sup>

**VIII. INSURANCE COMPANIES — 1. Subrogation Against Carriers — a. IN GENERAL.** — When goods which are insured are lost or damaged through the fault or neglect of a carrier in whose possession they are for purposes of transportation, the insurer, on payment of the loss to the owner of the goods, will be subrogated to the rights of such owner against the carrier.<sup>7</sup> The insurer's right to be thus subrogated may, however, be defeated by an express contract between the owner and the carrier of the goods, that the carrier shall have the benefit of any insurance on them in case of loss.<sup>8</sup> But if the contract of

**1. County Paying Expenses of Lunatic in State Asylum.** — Danville, etc., Poor Dist. *v.* Montour County, 75 Pa. St. 35.

**2. County Making Good Default of Treasurer.** — Elder *v.* Com., 55 Pa. St. 485.

**3. South Scituate *v.* Hanover,** 9 Gray (Mass.) 420. See also Winsor *v.* Savage, 9 Met. (Mass.) 348; Truesdell *v.* Callaway, 6 Mo. 605; Webb *v.* Cole, 20 N. H. 490.

**4. Judgment Debtor Paying Satisfied Judgment.** — Washburn *v.* Osgood, 38 Neb. 804.

**5. Expense of Litigation in Behalf of Town.** — Wells *v.* Salina, 71 Hun (N. Y.) 559.

**6. Persons Lending Money to Corporations.** — Blackburn Bldg. Soc. *v.* Cunliffe, 22 Ch. D. 61; Cunliffe *v.* Blackburn, etc., Ben. Bldg. Soc., 9 App. Cas. 857; Wenlock *v.* River Dee Co., 19 Q. B. D. 155. But see *In re Wrexham*, etc., R. Co., (1898) 2 Ch. 663, 79 L. T. N. S. 463, 68 L. J. Ch. 28.

**Lender Not Entitled to Preference over Bondholders.** — Farmers L. & T. Co. *v.* Bankers, etc., Tel. Co., 148 N. Y. 315, 51 Am. St. Rep. 690.

**7. Insurer Subrogated Against Carrier — England.** — Bradburn *v.* Great Western R. Co., L. R. 10 Exch. 1; Coles *v.* Bulman, 6 C. B. 184, 60 E. C. L. 184; Brown *v.* Hodgson, 4 Taunt. 189.

**United States.** — Phenix Ins. Co. *v.* Liverpool, etc., Steamship Co., 22 Blatchf. (U. S.) 372; Sun Ins. Co. *v.* Kountz Line, 122 U. S. 583; Mobile, etc., R. Co. *v.* Jurey, 111 U. S. 584; Hall *v.* Nashville, etc., R. Co., 13 Wall. (U. S.) 367; Garrison *v.* Memphis Ins. Co., 19 How.

(U. S.) 312; The Propeller Monticello *v.* Molli-son, 17 How. (U. S.) 152; Commercial Ins. Co. *v.* The C. D. Jr., 1 Woods (U. S.) 72; Pacific Coast Steamship Co. *v.* Bancroft-Whitney Co., (C. C. A.) 94 Fed. Rep. 180; Over *v.* Lake Erie, etc., R. Co., 63 Fed. Rep. 34; The Sydney, 27 Fed. Rep. 119; The Montana, 17 Fed. Rep. 377; Hibernia Ins. Co. *v.* St. Louis, etc., Transp. Co., 10 Fed. Rep. 596; The Frank G. Fowler, 8 Fed. Rep. 360.

**Maryland.** — Georgia Ins., etc., Co. *v.* Dawson, 2 Gill (Md.) 365.

**Tennessee.** — Louisville, etc., R. Co. *v.* Manchester Mills, 88 Tenn. 653; Kentucky M. & F. Ins. Co. *v.* Western, etc., R. Co., 8 Baxt. (Tenn.) 268.

**Texas.** — Houston Direct Nav. Co. *v.* Insurance Co. of North America, (Tex. Civ. App. 1895) 31 S. W. Rep. 560.

See also the title CARRIERS OF GOODS, vol. 5, p. 422.

**No Subrogation in Absence of Stipulation in Policy.** — Carroll *v.* New Orleans, etc., R. Co., 26 La. Ann. 447.

**A Company Which Has Insured a Carrier Against Loss of Cargo** is not subrogated to the rights of the owner of the goods against the carrier upon payment of the loss to such owner by order of the carrier. Wager *v.* Providence Ins. Co., 150 U. S. 99.

**8. Right Defeated by Contract Giving Carrier Benefit of Insurance.** — Phenix Ins. Co. *v.* Erie, etc., Transp. Co., 117 U. S. 312; Rintoul *v.* New York Cent., etc., R. Co., 21 Blatchf.

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insurance contains an express stipulation that the insurer shall, in such case, be subrogated to the owner's rights against the carrier, the owner cannot defeat the insurer's right of subrogation by contract with the carrier without forfeiting his own rights under the contract of insurance.<sup>1</sup>

**b. DEFENSES IN ACTION TO ENFORCE.**—In an action for the benefit of an insurer who has become subrogated to the rights of the owner of goods, the carrier cannot avail himself of any defenses which the insurer might have interposed in an action on the contract of insurance.<sup>2</sup> But he may avail himself of any defense which would have been available to him in an action against him by the owner of the goods.<sup>3</sup>

**2. Subrogation Against Tortfeasors**—*a. IN GENERAL.*—If insured buildings or other property are destroyed through the fault or negligence of some person other than the owner, the insurance company, upon payment of the loss, will be subrogated to the right of the owner to recover from the wrongdoer.<sup>4</sup> This right of subrogation is frequently enforced against railroad companies which have become liable to the owners of property on account of fires caused by their locomotives.<sup>5</sup> And in some jurisdictions

(U. S.) 439; *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508, 52 Am. Rep. 728; *North British, etc., Ins. Co. v. Central Vermont R. Co.*, (N. Y. 1899) 53 N. E. Rep. 1128; *Platt v. Richmond, etc., R. Co.*, 108 N. Y. 358; *Mercantile Mut. Ins. Co. v. Calebs*, 20 N. Y. 173; *Roos v. Philadelphia, etc., R. Co.*, 13 Pa. Super. Ct. 563; *British, etc., Marine Ins. Co. v. Gulf, etc., R. Co.*, 63 Tex. 475, 51 Am. Rep. 661. But see *Cincinnati, etc., R. Co. v. Spratt*, 2 Duv. (Ky.) 4.

**1. Owner's Rights Against Insurer Defeated by Contract with Carrier.**—*Inman v. South Carolina R. Co.*, 129 U. S. 128; *Carstairs v. Mechanics, etc., Ins. Co.*, 18 Fed. Rep. 473; *Southard v. Minneapolis, etc., R. Co.*, 60 Minn. 382; *Insurance Co. of North America v. Easton*, 73 Tex. 167. See also *Gulf, etc., R. Co. v. Zimmerman*, 81 Tex. 605. But compare *Jackson Co. v. Boylston Mut. Ins. Co.*, 139 Mass. 508, 52 Am. Rep. 728.

**2. Defenses Open to Insurer Not Available to Carrier.**—*Commercial Ins. Co. v. The C. D. Jr.*, 1 Woods (U. S.) 72; *Amazon Ins. Co. v. The S. B. Iron Mountain*, 1 Flipp. (U. S.) 616; *Nord-Deutscher Lloyd v. Insurance Co. of North America*, (C. C. A.) 110 Fed. Rep. 420; *Pearse v. Quebec Steam-Ship Co.*, 24 Fed. Rep. 285; *The Sidney*, 23 Fed. Rep. 96; *Sun Mut. Ins. Co. v. Mississippi Valley Transp. Co.*, 17 Fed. Rep. 919.

**3. What Defenses Are Available to Carrier.**—*Germania F. Ins. Co. v. Memphis, etc., R. Co.*, 72 N. Y. 90, 28 Am. Rep. 113, citing *Hill v. Nashville, etc., R. Co.*, 13 Wall. (U. S.) 367.

In *Hibernia Ins. Co. v. St. Louis Transp. Co.*, 120 U. S. 166, the carrier set up the defense that the goods were lost by inevitable accident, and it was held to be a good defense against the insurance company's claim. See also *The Frederick E. Ives*, 25 Fed. Rep. 447; *The B. B. Saunders*, 25 Fed. Rep. 727.

**4. Insurer Subrogated Against Tortfeasors in General**—*England.*—*King v. Victoria Ins. Co.*, (1896) A. C. 250; *Burnand v. Rodocanachi*, 7 App. Cas. 339; *Clark v. Blything*, 2 B. & C. 254, 9 E. C. L. 77; *London Assur. Co. v. Sainsbury*, 3 Dougl. 245, 26 E. C. L. 97; *Mason v. Sainsbury*, 3 Dougl. 61, 26 E. C. L. 36; *Quebec*

*F. Assur. Co. v. St. Louis*, 7 Moo. P. C. 286; *North British, etc., Ins. Co. v. London, etc., Ins. Co.*, 5 Ch. D. 569; *Darrell v. Tibbetts*, 5 Q. B. D. 560.

*United States.*—*Chicago, etc., R. Co. v. Pullman Southern Car Co.*, 139 U. S. 79; *Hall v. Nashville, etc., R. Co.*, 13 Wall. (U. S.) 367.

*Arkansas.*—*St. Louis, etc., R. Co. v. Fire Assoc.*, 60 Ark. 325.

*California.*—*Liverpool, etc., Ins. Co. v. Southern Pac. Co.*, 125 Cal. 434.

*Illinois.*—*Chicago, etc., R. Co. v. Glenn*, 175 Ill. 238.

*Iowa.*—*Chickasaw County Farmers' Mut. F. Ins. Co. v. Veller*, 98 Iowa 734.

*Kansas.*—*Atchison, etc., R. Co. v. Neet*, 7 Kan. App. 495.

*Maine.*—*Leavitt v. Canadian Pac. R. Co.*, 90 Me. 153; *Rockingham Mut. F. Ins. Co. v. Boshier*, 39 Me. 253, 63 Am. Dec. 618.

*Maryland.*—*Svea Assur. Co. v. Packham*, 92 Md. 464.

*Oregon.*—*Home Mut. Ins. Co. v. Oregon R., etc., Co.*, 20 Oregon 569, 23 Am. St. Rep. 151.

*Tennessee.*—*Deming v. Merchants' Cotton-Press, etc., Co.*, 90 Tenn. 306.

*Wisconsin.*—*Allen v. Chicago, etc., R. Co.*, 94 Wis. 93; *Pratt v. Radford*, 52 Wis. 114.

**Contribution Between Different Insurers.**—*North British, etc., Ins. Co. v. London, etc., Ins. Co.*, 5 Ch. D. 569; *Deming v. Merchants' Cotton-Press, etc., Co.*, 90 Tenn. 306.

**Insurer's Rights Confined to Property Insured.**—*Svea Assur. Co. v. Packham*, 92 Md. 464.

**5. Fires Set by Locomotives**—*United States.*—*Ætna Ins. Co. v. Hannibal, etc., R. Co.*, 3 Dill. (U. S.) 1.

*Arkansas.*—*St. Louis, etc., R. Co. v. Fire Assoc.*, 55 Ark. 163.

*Georgia.*—*Holcombe v. Richmond, etc., R. Co.*, 78 Ga. 776.

*Illinois.*—*Peoria M. & F. Ins. Co. v. Frost*, 37 Ill. 333; *Hartford Ins. Co. v. Pennell*, 2 Ill. App. 609.

*Kansas.*—*Chicago, etc., R. Co. v. German Ins. Co.*, 2 Kan. App. 398.

*Massachusetts.*—*Hart v. Western R. Corp.*, 13 Met. (Mass.) 99, 46 Am. Dec. 719.

*Missouri.*—*Lumbermen's Mut. Ins. Co. v.*

the right is confirmed by statute.<sup>1</sup>

**b. EXTENT OF RIGHT.**—The rights of the insurer against the wrongdoer can be no greater than those of the insured;<sup>2</sup> and its recovery will be limited to the amount which it has paid on the loss.<sup>3</sup> If the underwriter refuses to contribute to the expenses of an action by the insured against the wrongdoer, he can recover from the insured only the surplus of the amount recovered by the latter from the wrongdoer after satisfying uncompensated losses and expenses incurred in the suit.<sup>4</sup>

**c. FULL PAYMENT OF LOSS A CONDITION PRECEDENT.**—The owner must be fully indemnified for the loss of his property, before subrogation will be allowed to the insurer.<sup>5</sup>

**d. ACTS OF INSURED AFFECTING RIGHT.**—The insured cannot bar the insurer's right of action by executing a release of damages to the wrongdoer,<sup>6</sup>

Kansas City, etc., R. Co., 149 Mo. 165; Hartford F. Ins. Co. v. Wabash R. Co., 74 Mo. App. 106.

*New Jersey.*—Weber v. Morris, etc., R. Co., 35 N. J. L. 409, 10 Am. Rep. 253; Monmouth County Mut. F. Ins. Co. v. Hutchinson, 21 N. J. Eq. 107.

*New York.*—Connecticut F. Ins. Co. v. Erie R. Co., 73 N. Y. 399, 29 Am. Rep. 171.

*Ohio.*—Lake Erie, etc., R. Co. v. Falk, 62 Ohio St. 297.

*Wisconsin.*—Swarthout v. Chicago, etc., R. Co., 49 Wis. 625.

A judgment against a railroad company for damages to a building by fire communicated from its engines, will bar a later action by the same plaintiff for the destruction of other buildings by fire communicated from the building which was ignited by sparks from the engines, though the second action was brought for the benefit of an insurance company which had paid the plaintiff insurance on the buildings last destroyed. Trask v. Hartford, etc., R. Co., 2 Allen (Mass.) 331.

**Where Railroad Is Liable Irrespective of Negligence.**—An insurance company may be subrogated to the rights of the owner of property destroyed by fire caused by a railroad locomotive even though the right of the owner to recover is based solely upon a statute making the railroad company liable irrespective of negligence. Crissey, etc., Lumber Co. v. Denver, etc., R. Co., (Colo. App. 1902) 68 Pac. Rep. 670, distinguishing Home Ins. Co. v. Atchison, etc., R. Co., 19 Colo. 48. But see Savannah F. & M. Ins. Co. v. Pelzer Mfg. Co., 60 Fed. Rep. 39.

**1. Right of Subrogation Confirmed by Statute.**—Hamburg-Bremen F. Ins. Co. v. Atlantic Coast Line R. Co., 132 N. Car. 75; Stoughton v. Manufacturers' Natural Gas Co., 165 Pa. St. 428.

**Formal Assignment of Right of Action Not Essential.**—Hamburg-Bremen F. Ins. Co. v. Atlantic Coast Line R. Co., 132 N. Car. 75.

**2. Rights of Insurer No Greater than Those of Insured.**—Midland Ins. Co. v. Smith, 6 Q. B. D. 561; St. Louis, etc., R. Co. v. Commercial Union Ins. Co., 139 U. S. 223; Phoenix Ins. Co. v. Erie, etc., Transp. Co., 117 U. S. 312.

Where a railroad company has, by covenant with the owner of property, been relieved from liability for the destruction of such property, unless caused by negligence, an insurance company paying a loss on the property is bound by the covenant, and cannot recover against the

railroad in the absence of negligence, notwithstanding a statute making railroad companies absolutely liable irrespective of negligence. Savannah F. & M. Ins. Co. v. Pelzer Mfg. Co., 60 Fed. Rep. 39; Pelzer Mfg. Co. v. Sun Fire Office, 36 S. Car. 213.

**3. Recovery Limited to Amount Paid on Loss.**—Atchison, etc., R. Co. v. Neet, 7 Kan. App. 495; Cumberland Tel., etc., Co. v. Dooley, (Tenn. 1903) 72 S. W. Rep. 457.

**4. Insurer Refusing to Contribute to Expenses of Action.**—Newcomb v. Cincinnati Ins. Co., 22 Ohio St. 382, 10 Am. Rep. 746. And see Svea Assur. Co. v. Packham, 92 Md. 464, holding that the insured was entitled to retain out of the amount recovered by him his costs and reasonable expenses of the litigation.

**5. Full Payment of Loss a Condition Precedent.**—Woodworth v. Corn Exch. Ins. Co., 5 Wall. (U. S.) 87; Kernochan v. New York Bowery F. Ins. Co., 17 N. Y. 436; Pentz v. Aetna F. Ins. Co., 9 Paige (N. Y.) 568; People's Ins. Co. v. Straehle, 2 Cinc. Super. Ct. 186; Newcomb v. Cincinnati Ins. Co., 22 Ohio St. 382, 10 Am. Rep. 746; Home Mut. Ins. Co. v. Oregon R., etc., Co., 20 Oregon 569, 23 Am. St. Rep. 151; National F. Ins. Co. v. McLaren, 12 Ont. 682.

**Right of Insurer to Demand Assignment of Cause of Action.**—See Niagara F. Ins. Co. v. Fidelity, etc., Co., 123 Pa. St. 523, 10 Am. St. Rep. 546.

**6. Release of Damages by Insured.**—Dufourcet v. Bishop, 18 Q. B. D. 378; Tate v. Hyslop, 15 Q. B. D. 368; Hart v. Western R. Corp., 13 Met. (Mass.) 99, 46 Am. Dec. 719; Hartford F. Ins. Co. v. Wabash R. Co., 74 Mo. App. 106; Monmouth County Mut. F. Ins. Co. v. Hutchinson, 21 N. J. Eq. 107; Connecticut F. Ins. Co. v. Erie R. Co., 73 N. Y. 399, 29 Am. Rep. 171; Phenix Ins. Co. v. Parsons, 56 N. Y. Super. Ct. 423; Aetna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 397, 30 Am. Dec. 90; Gracie v. New York Ins. Co., 8 Johns. (N. Y.) 245; Timan v. Leland, 6 Hill (N. Y.) 237; Fidelity Title, etc., Co. v. People Natural Gas Co., 150 Pa. St. 8; Niagara F. Ins. Co. v. Fidelity, etc., Co., 123 Pa. St. 516, 10 Am. St. Rep. 543; Brighthouse R. Co. v. Rogers, 76 Va. 443.

**Rights of Insured on Policy Destroyed by Release of Damages.**—Packham v. German F. Ins. Co., 91 Md. 515; Aetna F. Ins. Co. v. Tyler, 16 Wend. (N. Y.) 397, 30 Am. Dec. 90.

**Release of Damages Before Issuance of Policy Binding on Insurer.**—Pelzer Mfg. Co. v. Sun

though he may release the wrongdoer from all claim for injuries not covered by the policy, without impairing his rights against the underwriter.<sup>1</sup> On payment of the loss the insured becomes a trustee for the insurer,<sup>2</sup> and cannot afterwards settle or compromise his claim against the wrongdoer to the insurer's prejudice.<sup>3</sup> If he obtains satisfaction from the wrongdoer he must account therefor to the insurer.<sup>4</sup>

**e. DEFENSES IN ACTION TO ENFORCE.**—In an action by the insurer to enforce his right of subrogation it is no defense that the insurer was negligent in assuming the risk,<sup>5</sup> or that the loss paid was not within the risks covered by the policy.<sup>6</sup> Nor can the wrongdoer when sued by the insured for the benefit of the insurer set up payment of the loss by the insurer as a defense.<sup>7</sup>

**3. Subrogation Against Third Parties Bound to Indemnify Insured.**—An insurer who has paid a loss to the insured is subrogated to the rights of the latter, not only as against tortfeasors responsible for the destruction of the property, but also as against all persons bound by contract or otherwise to make good the amount of the loss.<sup>8</sup> Thus an insurance company which has paid the value of revenue stamps destroyed by fire is subrogated to the right of the owner of the stamps to recover their value from the government.<sup>9</sup>

**4. Marine Insurance—*a.* IN GENERAL.**—An underwriter who has paid a loss resulting from injury to, or destruction of, a ship or cargo, is entitled to be subrogated to any rights the owner may have to indemnity from those primarily liable for the loss;<sup>10</sup> including the right of the owner to enforce contri-

Fire Office, 36 S. Car. 213. And to the same effect see *Savannah F. & M. Ins. Co. v. Pelzer Mfg. Co.*, 60 Fed. Rep. 39.

**1. Release of Damages Not Covered by Policy Valid.**—*Insurance Co. of North America v. Fidelity, etc., Co.*, 123 Pa. St. 523, 10 Am. St. Rep. 546.

**2. Insured a Trustee for Insurer After Payment of Loss.**—*Yates v. Whyte*, 4 Bing. N. Cas. 272, 33 E. C. L. 349; *Hart v. Western R. Corp.*, 13 Met. (Mass.) 99, 46 Am. Dec. 719.

**3. Insured Cannot Settle or Compromise Claim to Prejudice of Insurer.**—*Hartford F. Ins. Co. v. Wabash R. Co.*, 74 Mo. App. 106; *Norwich Union F. Ins. Soc. v. Stang*, 9 Ohio Cir. Dec. 576. But see *Svea Assur. Co. v. Packham*, 92 Md. 464, in which case a compromise and settlement by the insured of his claim against the wrongdoer was upheld as justified by the peculiar circumstances of the case.

**4. Insured Required to Account to Insurer.**—*Commercial Union Assur. Co. v. Lister*, L. R. 9 Ch. 483; *Darrell v. Tibbitts*, 5 Q. B. D. 560; *North British, etc., Ins. Co. v. London, etc., Ins. Co.*, 5 Ch. D. 569; *Burnand v. Rodocanachi*, 7 App. Cas. 333; *Castellain v. Preston*, 11 Q. B. D. 380; *Randal v. Cockran*, 1 Ves. 98; *Yates v. Whyte*, 4 Bing. N. Cas. 272, 33 E. C. L. 349, 5 Scott 640; *Hart v. Western R. Corp.*, 13 Met. (Mass.) 107, 46 Am. Dec. 719 (*per Shaw, C. J.*); *Ætna F. Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 397, 30 Am. Dec. 90.

**Wrongdoer Exonerated by Payment of Judgment.**—Where the owner of the property destroyed has recovered judgment against the wrongdoer, and the latter has paid the judgment, he cannot be compelled to pay the amount a second time, to the insurer, in the absence of fraud. *Svea Assur. Co. v. Packham*, 92 Md. 464.

**5. Negligence in Assuming Risk No Defense.**—*U. S. Casualty Co. v. Bagley*, 129 Mich. 170, 95 Am. St. Rep. 424, 8 Detroit L. N. 843.

**6. Loss Not Within Policy.**—*King v. Victoria Ins. Co.*, (1896) A. C. 250.

**7. Payment of Loss by Insurer No Defense.**—*Mason v. Sainsbury*, 3 Dougl. 61, 26 E. C. L. 36; *Weber v. Morris, etc., R. Co.*, 35 N. J. L. 409, 10 Am. Rep. 253.

**8. Contract Rights of Insured Against Third Persons.**—*West of England F. Ins. Co. v. Isaacs*, (1896) 2 Q. B. 377, affirmed 66 L. J. Q. B. 36; *Monteleone v. Harding*, 50 La. Ann. 1147.

**Right of Action for False Representations.**—A right of action in favor of the insured for the recovery of damages for false representations in the sale of property does not pass to the insurer, by subrogation, where the latter is compelled to pay a loss upon the property. *Farmers F. Ins. Co. v. Johnston*, 113 Mich. 426.

**Rights under Pooling Contract.**—An insurance company which has paid a loss upon a grain elevator destroyed by fire will not be subrogated to the rights of the owner of the elevator in a fund set apart in accordance with a pooling contract between such owner and the owners of other elevators whereby the profits from the different elevators were to be divided equally between the owners, regardless of losses resulting from the destruction of any particular elevator. *Michael v. Prussian Nat. Ins. Co.*, 171 N. Y. 25.

**9. Revenue Stamps Destroyed by Fire.**—*U. S. v. American Tobacco Co.*, 166 U. S. 468.

**10. Marine Insurers Entitled to Subrogation in General—*England.***—*Simpson v. Thomson*, 3 App. Cas. 279; *Wilson v. Raffalovich*, 7 Q. B. D. 553; *North of England Iron Steamship Ins. Assoc. v. Armstrong*, L. R. 5 Q. B. 244; *Dickenson v. Jardine*, L. R. 3 C. P. 639; *Yates v. Whyte*, 4 Bing. N. Cas. 272, 33 E. C. L. 349, 5 Scott. 640; *The Thyatira*, 8 P. D. 155; *Quebec F. Assur. Co. v. St. Louis*, 7 Moo. P. C. 286; *White v. Dobinson*, 14 Sim. 273.

**United States.**—*Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 464; *Phoenix Ins. Co. v. Erie, etc., Transp. Co.*, 117 U. S. 312; *The Potomac*, 105 U. S. 630; *Fretz v. Bull*, 12

bution from third persons by way of general average.<sup>1</sup> So underwriters who have paid losses on vessels wrongfully taken or destroyed by the enemy in time of war will be subrogated to the rights of the owners in a fund subsequently awarded to them by the government by way of indemnity.<sup>2</sup>

*b. ABANDONMENT NOT ESSENTIAL.* — It is not necessary that there be an abandonment of the property insured on a marine policy in order that the underwriter may be subrogated to the rights of an owner who has been fully indemnified.<sup>3</sup> But in case there is no abandonment, the owner must be fully indemnified for his loss before the underwriter can claim the right of subrogation.<sup>4</sup>

*c. EXTENT OF RIGHT.* — The underwriter does not acquire by subrogation any rights which the assured himself could not enforce.<sup>5</sup> Under an ordinary policy the right of the underwriters who have paid a total loss to recover against third parties who caused the damage is limited, on equitable principles, to the amount paid;<sup>6</sup> but under a valued policy, where the agreed value of the vessel has been paid, all rights of action, irrespective of the amount which may be recovered, vest absolutely in the insurers.<sup>7</sup>

*5. Insurance of Mortgaged Property.* — It has been held repeatedly that where a mortgagee, at his own expense, procures the insurance on the mortgaged property for the better security of his debt, the insurer, if obliged to

How. (U. S.) 466; *Mason v. Marine Ins. Co.*, (C. C. A.) 110 Fed. Rep. 452; *The St. Johns*, 101 Fed. Rep. 469; *Fairgrieve v. Marine Ins. Co.*, (C. C. A.) 94 Fed. Rep. 686; *The Bristol*, 29 Fed. Rep. 867.

*Illinois.* — *Egan v. British, etc., Marine Ins. Co.*, 193 Ill. 295.

*Massachusetts.* — *Mercantile Marine Ins. Co. v. Clark*, 118 Mass. 288; *Lord v. Neptune Ins. Co.*, 10 Gray (Mass.) 126; *Mercantile Marine Ins. Co. v. Corcoran*, 1 Gray (Mass.) 75.

*New York.* — *Williams v. Hays*, 64 Hun (N. Y.) 202; *Atlantic Ins. Co. v. Storrow*, 5 Paige (N. Y.) 285; *Home Ins. Co. v. Western Transp. Co.*, 4 Robt. (N. Y.) 257.

*Ohio.* — *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50.

*Loss Caused by Negligence of Master and Part Owner.* — The fact that judgment has been recovered by the master as part owner, against the underwriter on a policy issued to him, does not affect the right of the underwriter or his assignee to maintain an action against the master through whose negligence the loss occurred, to recover insurance paid to other part owners on another policy. *Williams v. Hays*, 64 Hun (N. Y.) 202.

*Where the Assured Releases His Claim Against the Wrongdoer after he has obtained judgment against the underwriters, the court of chancery will relieve the latter against the judgment pro tanto.* *Atlantic Ins. Co. v. Storrow*, 5 Paige (N. Y.) 285.

*1. Subrogation to General Average Rights.* — *International Nav. Co. v. Atlantic Mut. Ins. Co.*, 100 Fed. Rep. 304.

*In Case Goods Insured upon a Marine Policy Are Jettisoned* it is not necessary that the owner claim general average contributions from the owners of the vessel and the rest of the cargo before proceeding against the underwriter. He may collect his insurance, and the underwriter will be subrogated to his right to claim contribution. *Dickenson v. Jardine*, L. R. 3 C. P. 639; *Potter v. Providence Washington Ins. Co.*, 4 Mason (U. S.) 298; *Lord v. Neptune Ins. Co.*,

10 Gray (Mass.) 109; *Magrath v. Church*, 1 Cai. (N. Y.) 196, 2 Am. Dec. 173. Compare *Lapsley v. Pleasants*, 4 Binn. (Pa.) 502.

*Rights Against Persons Liable for Bad Stowage and Dunnage.* — On the payment of the damages the insurer may be subrogated to all the rights of the insured against persons answerable for bad stowage and dunnage. *Georgia Ins., etc., Co. v. Dawson*, 2 Gill (Md.) 365.

*2. Indemnity Awarded by Government.* — *Randal v. Cockran*, 1 Ves. 98; *Blaauwpot v. Da Costa*, 1 Eden 130; *Comegys v. Vasse*, 1 Pet. (U. S.) 214; *Gracie v. New York Ins. Co.*, 8 Johns. (N. Y.) 237. But compare *Burnand v. Rodocanachi*, 6 Q. B. D. 633, 7 App. Cas. 333. And see *Mercantile Marine Ins. Co. v. Corcoran*, 1 Gray (Mass.) 75, in which case it was held that the insurer had waived his right by laches.

*3. Abandonment Not Essential to Subrogation.* — *Hall v. Nashville, etc., R. Co.*, 13 Wall. (U. S.) 367; *The St. Johns*, 101 Fed. Rep. 469; *Pearse v. Quebec Steam Ship Co.*, 24 Fed. Rep. 285; *The Frank G. Fowler*, 8 Fed. Rep. 360.

*4. Tunno v. Edwards*, 12 East 488.

*If There Is an Abandonment or a Payment as for a Total Loss*, which is equivalent to an abandonment, the underwriter will be entitled to the indemnity, even though the owner is not himself fully indemnified. *North of England Iron Steamship Ins. Assoc. Co. v. Armstrong*, L. R. 5 Q. B. 244.

*5. Rights of Underwriter No Greater than Those of Insured.* — *Simpson v. Thomson*, 3 App. Cas. 279; *Wilson v. Raffalovich*, 7 Q. B. D. 553; *The Livingstone*, 104 Fed. Rep. 918; *The St. Johns*, 101 Fed. Rep. 469; *The Catskill*, 95 Fed. Rep. 700; *The Bristol*, 29 Fed. Rep. 867; *Magdeburg Gen. Ins. Co. v. Paulson*, 29 Fed. Rep. 530; *Rice v. Cobb*, 9 Cush. (Mass.) 302; *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50.

*6. Measure of Recovery by Underwriter in Ordinary Policy.* — *The Livingstone*, 122 Fed. Rep. 278; *The St. Johns*, 101 Fed. Rep. 469.

*7. Measure of Recovery under Valued Policy.* — *The Livingstone*, 122 Fed. Rep. 278.

pay a loss occasioned by injury to such property, may be subrogated to the rights of the mortgagee under the mortgage.<sup>1</sup> But if the mortgagor pays the premiums, or is liable for the same, he is entitled to the benefit of the insurance, and the insurer will not be subrogated to the mortgagee's rights against him,<sup>2</sup> unless the policy of insurance contains an express stipulation that the insurer shall be so subrogated,<sup>3</sup> or the mortgagor has forfeited his rights and the policy has been kept alive for the benefit of the mortgagee on condition that the insurer shall be subrogated.<sup>4</sup>

**6. Life and Accident Insurance.**—A contract of life insurance is not a contract of indemnity, and therefore, where the death of the insured is caused by the wrongful act of another the insurer acquires no right of action against the wrongdoer by paying the loss.<sup>5</sup> Nor does the right of subrogation exist in favor of the insurer in an accident policy under similar circumstances.<sup>6</sup> But a life insurance company which has been induced by fraud to pay a policy to the wrong person may, on being compelled to pay the amount a second time, recover back the first payment.<sup>7</sup>

**7. In Whose Name Action Should Be Brought.**—As a general rule, and in the absence of statutory provisions on the subject, an action to enforce an insurer's right of subrogation should be brought in the name of the insured.<sup>8</sup> In juris-

**1. Property Insured by Mortgagee.**—*United States.*—*Carpenter v. Providence Washington Ins. Co.*, 16 Pet. (U. S.) 501.

*Illinois.*—*Norwich F. Ins. Co. v. Boomer*, 52 Ill. 442, 4 Am. Rep. 618; *Honore v. Lamar F. Ins. Co.*, 51 Ill. 409.

*Missouri.*—*Dick v. Franklin F. Ins. Co.*, 10 Mo. App. 376, *affirmed* 81 Mo. 103.

*New Jersey.*—*Bound Brook Mut. F. Ins. Assoc. v. Nelson*, 41 N. J. Eq. 485; *Sussex County Mut. Ins. Co. v. Woodruff*, 26 N. J. L. 555.

*New York.*—*Ulster County Sav. Inst. v. Leake*, 73 N. Y. 161, 29 Am. Rep. 115; *Foster v. Van Reed*, 70 N. Y. 19, 20 Am. Rep. 544; *Excelsior F. Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343, 14 Am. Rep. 271; *Kernochan v. New York Bowery F. Ins. Co.*, 17 N. Y. 428; *Thomas v. Montauk F. Ins. Co.*, 43 Hun (N. Y.) 218; *De Wolf v. Capitol City Ins. Co.*, 16 Hun (N. Y.) 116; *Ætna F. Ins. Co. v. Tyler*, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; *Kip v. Mutual F. Ins. Co.*, 4 Edw. (N. Y.) 86.

See also *Concord Union Mut. F. Ins. Co. v. Woodbury*, 45 Me. 447.

**Contra.**—*In Massachusetts* the insurer is not in such cases entitled to be subrogated to the rights of the insured under the mortgage. *International Trust Co. v. Boardman*, 149 Mass. 161; *Suffolk F. Ins. Co. v. Boyden*, 9 Allen (Mass.) 123; *King v. State Mut. F. Ins. Co.*, 7 Cush. (Mass.) 1, 54 Am. Dec. 683.

**Insurer's Right of Subrogation Assignable.**—*Hare v. Headley*, 54 N. J. Eq. 545.

**Payment of Entire Mortgage Debt Essential.**—*Phenix Ins. Co. v. Harrisburg First Nat. Bank*, 85 Va. 765, 17 Am. St. Rep. 101.

**9. Insurer Not Subrogated Where Mortgagor Pays Premiums.**—*Phenix Ins. Co. v. Chadbourne*, 31 Fed. Rep. 300; *Baker v. Fireman's Fund Ins. Co.*, 79 Cal. 34; *Ætna Ins. Co. v. Baker*, 71 Ind. 102; *Home Ins. Co. v. Marshall*, 48 Kan. 235; *Pendleton v. Elliott*, 67 Mich. 496; *Havens v. Germania Ins. Co.*, 135 Mo. 649; *Waring v. Loder*, 53 N. Y. 581; *Kernochan v. New York Bowery F. Ins. Co.*, 17 N. Y. 428; *Provincial Ins. Co. v. Reesor*, 21 Grant Ch.

(U. C.) 296. And see *Hare v. Headley*, 54 N. J. Eq. 545.

**3. Express Stipulation in Policy.**—*Dick v. Franklin F. Ins. Co.*, 10 Mo. App. 386, *affirmed* 81 Mo. 103; *Foster v. Van Reed*, 70 N. Y. 19, 20 Am. Rep. 544; *Alamo F. Ins. Co. v. Davis*, 25 Tex. Civ. App. 342.

**Provision in Policy Providing for Subrogation Construed.**—*New Hampshire F. Ins. Co. v. National L. Ins. Co.*, (C. C. A.) 112 Fed. Rep. 199.

**4. Mortgagor's Rights Forfeited.**—*Hare v. Headley*, 54 N. J. Eq. 545; *Ulster County Sav. Inst. v. Leake*, 73 N. Y. 161, 29 Am. Rep. 115; *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389, 3 Am. Rep. 711; *Utter v. Lewis*, 10 Pa. Dist. 50. Compare *Allen v. Watertown F. Ins. Co.*, 132 Mass. 482.

**5. Life Insurance—No Subrogation.**—*Mobile L. Ins. Co. v. Brame*, 95 U. S. 754; *Connecticut Mut. L. Ins. Co. v. New York, etc., R. Co.*, 25 Conn. 265, 65 Am. Dec. 571; *Chickasaw County Farmers' Mut. F. Ins. Co. v. Weller*, 98 Iowa 734.

**6. Accident Insurance.**—*Ætna L. Ins. Co. v. Parker*, (Tex. 1903) 72 S. W. Rep. 168.

**7. Insurer Compelled by Fraud to Pay Same Loss Twice.**—*Reynolds v. Ætna L. Ins. Co.*, 160 N. Y. 635.

**8. Suit to Be in Name of Insured—England.**—*Commercial Union Assur. Co. v. Lister*, L. R. 9 Ch. 483; *Clark v. Blything*, 2 B. & C. 254, 9 E. C. L. 77; *Yates v. Whyte*, 4 Bing. N. Cas. 272, 33 E. C. L. 349; *Mason v. Sainsbury*, 3 Dougl. 61, 26 E. C. L. 36; *London Assur. Co. v. Sainsbury*, 3 Dougl. 245, 26 E. C. L. 97.

*United States.*—*Hall v. Nashville, etc., R. Co.*, 13 Wall. (U. S.) 367.

*Connecticut.*—*Connecticut Mut. L. Ins. Co. v. New York, etc., R. Co.*, 25 Conn. 270, 65 Am. Dec. 571.

*Maine.*—*Rockingham Mut. F. Ins. Co. v. Boshier*, 39 Me. 254, 63 Am. Dec. 618.

*Massachusetts.*—*Hart v. Western R. Corp.*, 13 Met. (Mass.) 99, 46 Am. Dec. 719.

*Pennsylvania.*—*Gales v. Hallman*, 11 Pa. St. 515.



dictions, however, where it is provided by statute that actions shall be prosecuted by the real party in interest, the insurer may proceed in his own name.<sup>1</sup> In the admiralty courts of the *United States*, the underwriter may enforce his right of subrogation in his own name where the value of the property destroyed does not exceed the amount of insurance paid,<sup>2</sup> but in *England* he must pursue his remedy in the name of the assured.<sup>3</sup>

**IX. SUBROGATION ARISING FROM PAYMENT OF TAXES AND DUTIES — 1. Payment of Taxes — a. IN GENERAL.** — Although doubt has been expressed in some well-considered cases as to whether persons paying taxes for which others are primarily liable can be subrogated to the peculiar remedies of the state against the delinquents,<sup>4</sup> it seems, by the weight of authority, that subrogation to the lien of taxes may be enforced in favor of persons discharging them by compulsion or agreement.<sup>5</sup>

**b. TENANT IN COMMON.** — In accordance with the view that a party who is obliged to pay taxes on the land of another for his own protection will be subrogated to the lien thereof, it has been held that a tenant in common who pays taxes on the common property will be subrogated to the tax lien for reimbursement.<sup>6</sup>

**c. LESSOR.** — Where by the contract of lease the lessee engages to pay all subsequent taxes on the property, but fails to do so, the lessor having an interest as owner in discharging the debt will, on payment, be subrogated to the rights of the state or municipality against the lessee;<sup>7</sup> but as the rights of the claimant for subrogation cannot be higher than those of the party to whose position he succeeds, if the lessor fails to prosecute this right until the right of the state or municipality has been lost by lapse of time his right will likewise be lost.<sup>8</sup>

**d. VENDOR OR VENDEE OF LAND.** — Where a vendee of land fails to pay taxes for which he is liable under the contract of sale, the vendor, on payment thereof, will be subrogated to the lien of the state or municipality.<sup>9</sup> On the other hand, where by the terms of sale the taxes are to be paid by the vendor, the vendee, if compelled to discharge them, will be entitled to subrogation.<sup>10</sup>

**e. MORTGAGEE OR OTHER INCUMBRANCER.** — It has been held that a

*Tennessee.* — *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 58, 24 Am. St. Rep. 586; *Louisville, etc., R. Co. v. Manchester Mills*, 88 Tenn. 653.

**1. Suit in Name of Insured under Code Practice.** — *Marine Ins. Co. v. St. Louis, etc., R. Co.*, 41 Fed. Rep. 643; *St. Louis, etc., R. Co. v. Fire Assoc.*, 55 Ark. 163; *Code Civ. Pro. N. Y.*, §§ 144, 147; *Connecticut F. Ins. Co. v. Erie R. Co.*, 73 N. Y. 399, 29 Am. Rep. 171; *Hustisford Farmers' Mut. Ins. Co. v. Chicago, etc., R. Co.*, 66 Wis. 58; *Swarthout v. Chicago, etc., R. Co.*, 49 Wis. 625.

**2. Rule in Admiralty Courts of United States.** — *The Propeller Monticello v. Mollison*, 17 How. (U. S.) 153; *Commercial Ins. Co. v. The C. D. Jr., 1 Woods* (U. S.) 72; *Fairgrieve v. Marine Ins. Co.*, (C. C. A.) 94 Fed. Rep. 686; *Pacific Coast Steam Ship Co. v. Bancroft-Whitney Co.*, (C. C. A.) 94 Fed. Rep. 180; *The Sydney*, 27 Fed. Rep. 119.

**Suit in Name of Insured.** — Where an insurance company has become subrogated to the rights of a partnership during the lifetime of all the partners, the death of one of the partners, subsequent to the loss and its payment by the insurance company, does not prejudice the right of the latter or prevent it from recovering of the carrier by a suit in admiralty in the partnership name. *Pacific Coast Steam Ship Co. v.*

*Bancroft-Whitney Co.*, (C. C. A.) 94 Fed. Rep. 180.

**3. Rule in English Admiralty.** — *Simpson v. Thomson*, 3 App. Cas. 279.

**4. Sperry v. Butler**, 75 Conn. 369. And see *Griffing v. Pintard*, 25 Miss. 173; *Wallace's Estate*, 59 Pa. St. 401; *Furche v. Mayer*, (Tex. Civ. App. 1895) 29 S. W. Rep. 1099.

**5. Subrogation to Lien of Taxes.** — See the cases cited in the notes immediately following. And see *supra*, this title, IV. *Persons Interested in Encumbered Estates*.

**No Subrogation Where Tax Is Invalid.** — *Warfield-Pratt Howell Co. v. Averill Grocery Co.*, (Iowa 1903) 93 N. W. Rep. 80.

**6. Cotenant Paying Taxes on Common Property.** — *Oliver v. Montgomery*, 42 Iowa 36.

**7. Lessor Paying Taxes Subrogated Against Lessee.** — *Mathias's Succession*, 15 La. Ann. 381; *Dunlop v. James*, 174 N. Y. 411.

**8. Right Lost by Lapse of Time.** — *Mathias's Succession*, 15 La. Ann. 381. And see *infra*, this title, XII. *Waiver of Right*.

**9. Vendor of Land.** — *Lillie v. Case*, 54 Iowa 177; *Hebb v. Moore*, 66 Md. 167.

**10. Vendee of Land.** — *Taylor v. Wilcox*, 167 Mass. 572.

**Where Land Purchased at a Foreclosure Sale is afterwards sold for nonpayment of taxes on another tract of land originally owned by the**

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mortgagee or other incumbrancer who, for the protection of his interest, pays taxes assessed on the property, will be subrogated to the lien thereof for his reimbursement.<sup>1</sup> So a mortgagee of a term who has paid taxes and ground rent on the property leased will be subrogated to the rights of the lessor against the lessee to recover the amount paid.<sup>2</sup> Again, where a junior mortgagee pays assessments on the property after a sale to the municipality for their nonpayment, and takes an assignment of the certificates of sale, and the assessments are, by the city's charter, a lien prior to other incumbrances, he will be entitled by equitable subrogation to the benefit of the city's lien, in advance of the rights of a senior mortgagee.<sup>3</sup>

*f. PERSONAL REPRESENTATIVE.* — A personal representative who pays taxes and assessments on property specifically devised by the testator will be subrogated to the lien thereof as against the devisee.<sup>4</sup>

*g. VOLUNTEER NOT ENTITLED TO SUBROGATION.* — A person who voluntarily pays taxes assessed on the land of another in which he has no interest to protect will not be subrogated to the lien of the government, in the absence of an agreement for subrogation.<sup>5</sup> This rule has been held to apply to tax collectors who have voluntarily paid, or advanced funds to pay, the taxes of delinquents.<sup>6</sup> And in such cases subrogation is also refused on the ground of public policy.<sup>7</sup>

**2. Payment of Customs Duties.** — A surety on the bond of an importer for customs duties will be subrogated to the government's lien and priority on payment of the duties.<sup>8</sup> And the same equity will arise in favor of a purchaser of goods subject to duty who is compelled to pay the tax in order to obtain possession of the goods,<sup>9</sup> or a person who advances money to pay duties under an agreement for subrogation,<sup>10</sup> or a carrier paying duties on

mortgagor, the purchaser at the foreclosure sale will be subrogated to the state's lien against such other tract in the hands of a subsequent purchaser from the mortgagor. *Cockrum v. West*, 122 Ind. 372.

**1. Mortgagee or Other Incumbrancer — Georgia.** — *National Bank v. Danforth*, 80 Ga. 55; *Gwinn v. Smith*, 55 Ga. 145.

*Illinois.* — *Pratt v. Pratt*, 96 Ill. 184.

*Indiana.* — *O'Brien v. Bradely*, 28 Ind. App. 487; *Schissel v. Dickson*, 129 Ind. 139; *Semans v. Harvey*, 52 Ind. 333. But compare *Ætna L. Ins. Co. v. Buck*, 108 Ind. 174.

*Kansas.* — *Stancliff v. Norton*, 11 Kan. 219.

*New York.* — *Sidenberg v. Ely*, 90 N. Y. 257, 43 Am. Rep. 163; *Marshall v. Davies*, 78 N. Y. 414; *Silver Lake Bank v. North*, 4 Johns. Ch. (N. Y.) 370; *Weed v. Hornby*, 35 Hun (N. Y.) 580; *Kortright v. Cady*, 23 Barb. (N. Y.) 497; *Brevoort v. Randolph*, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 398.

*Pennsylvania.* — *Hogg v. Longstreth*, 97 Pa. St. 259; *Pittsburgh v. O'Reilly*, 7 Pa. Dist. 758.

*Washington.* — *Dunsmuir v. Port Angeles Gas, etc., Co.*, 30 Wash. 586.

And see *Windett v. Union Mut. L. Ins. Co.*, 144 U. S. 581. But compare *Sperry v. Butler*, 75 Conn. 369; *Allen v. Perrine*, 103 Ky. 516.

**Subrogation of Creditor of Mortgagee.** — *Whittaker v. Wright*, 35 Ark. 511.

**2. Mortgagee of Term Paying Ground Rent and Taxes.** — *Dunlop v. James*, 174 N. Y. 411. And see *Barron v. Whiteside*, 89 Md. 448.

**3. Junior Mortgagee Paying Assessments.** — *Fiacre v. Chapman*, 32 N. J. Eq. 463.

**4. Personal Representative.** — *Mogan's Estate*, Myr. Prob. (Cal.) 80; *Hudson v. Gray*, 58 Miss. 882; *Bowers v. Williams*, 34 Miss. 324. See

also *Millard v. Harris*, 119 Ill. 185; *Stetson v. Moulton*, 140 Mass. 597.

**5. Volunteers.** — *Montgomery v. Charleston*, (C. C. A.) 99 Fed. Rep. 825; *Mercantile Trust Co. v. Hart*, (C. C. A.) 76 Fed. Rep. 673; *Kocher v. Kocher*, 56 N. J. Eq. 547; *Furche v. Mayer*, (Tex. Civ. App. 1895) 29 S. W. Rep. 1009; *Repass v. Moore*, 98 Va. 377.

**Remainderman Paying Taxes During Lifetime of Life Tenant a Volunteer.** — *Ferguson v. Quinn*, 97 Tenn. 46.

**Person Paying Taxes Erroneously Assessed Not a Volunteer.** — *Ingersoll v. Jeffords*, 55 Miss. 37.

**6. Tax Collector Paying Taxes of Delinquents.** — *Mercantile Trust Co. v. Hart*, (C. C. A.) 76 Fed. Rep. 673; *Griffing v. Pintard*, 25 Miss. 173; *Wallace's Estate*, 59 Pa. St. 401; *Repass v. Moore*, 98 Va. 377; *Hinchman v. Morris*, 29 W. Va. 673. And see *Allen v. Perrine*, 103 Ky. 521. Compare *Meyer v. Burritt*, 60 Conn. 117; *Hart v. Tiernan*, 59 Conn. 521.

**Tax Collector Advancing Taxes under Agreement for Subrogation.** — *In re Grant*, 14 Am. L. Rev. 801.

**7. Subrogation Refused to Tax Collectors on Ground of Public Policy.** — *Mercantile Trust Co. v. Hart*, (C. C. A.) 76 Fed. Rep. 673. And see generally the cases cited in the preceding note.

**8. Subrogation of Surety for Customs Duties.** — *U. S. v. Ryder*, 110 U. S. 738; *Enders v. Brune*, 4 Rand. (Va.) 438. And see *U. S. v. Preston*, 4 Wash. (U. S.) 446.

**9. Duty Paid by Purchaser.** — *In re Kirkland*, 14 Nat. Bankr. Reg. 139.

**10. Duties Advanced under Agreement for Subrogation.** — *Sgobel v. Cappadonia*, 8 N. Y. App. Div. 303.

goods delivered for transportation.<sup>1</sup> So, in *England*, the sureties of a crown debtor for customs, excise, taxes, and other civil duties, on paying the debt of their principal, are entitled to have the benefit of prerogative process to aid them in coercing payment from the principal and compelling contribution from their cosureties.<sup>2</sup>

**X. SUBROGATION IN ADMIRALTY.**—The equity of subrogation is as fully recognized in courts of admiralty as in the chancery courts.<sup>3</sup> Thus one who advances money in good faith to enable the master of a foreign vessel to pay the wages of his crew and other claims will be subrogated to the rights of seamen and others whose claims are so paid.<sup>4</sup> And if a vessel is injured in collision by the joint fault of two other vessels and one of them pays the loss, it will be subrogated to the rights of the injured vessel against the other wrongdoer.<sup>5</sup> But as a bond given for the release of a vessel libeled in a court of admiralty operates to extinguish the lien of the libellant, and as all liens on a vessel are extinguished by a sale of the vessel pursuant to the decree of a court of admiralty in a suit *in rem*, it follows that a surety who pays such a bond, after the vessel has been sold, is not entitled by subrogation to any rights in the proceeds of the sale.<sup>6</sup> Nor will a guarantor who has contracted for a lien on freight alone be subrogated to other liens attaching to the vessel in a foreign port, on the ground that the money obtained on the strength of his guaranty went to pay and discharge such liens.<sup>7</sup>

**Rights of Subrogation Arising Out of Marine Insurance Contracts** are discussed in another section of the present article.<sup>8</sup>

**XI. VARIOUS OTHER INSTANCES OF SUBROGATION** — 1. **Subrogation to Enforce Marshaling of Assets.**—The doctrine of subrogation is very frequently invoked to enforce the equitable right of marshaling; the general rule being that when one creditor may obtain satisfaction out of either of two funds, and another out of only one of them, and the former resorts to the doubly charged

1. *Carrier Paying Duties Subrogated.*—*Guesnard v. Louisville, etc., R. Co.*, 76 Ala. 453.

2. *Sureties of Crown Debtor.*—*Manning Exch. Pr.* 563; *Rex v. Bennett, Wightw.* 1. See also *Reg. v. Salter*, 1 H. & N. 274.

3. *Subrogation Recognized in Admiralty.*—*The Evangel*, 94 Fed. Rep. 680; *The Tangier*, 2 Lowell (U. S.) 7, 23 Fed. Cas. No. 13,744; *The J. A. Brown*, 2 Lowell (U. S.) 464, 13 Fed. Cas. No. 7,118; *Carroll v. The Steamboat T. P. Leathers*, Newb. Adm. 432, 5 Fed. Cas. No. 2,455. See also *Roberts v. The Steamship Huntsville*, 3 Woods (U. S.) 386; *The J. R. Hoyle*, 4 Biss. (U. S.) 234; *The Lime Rock*, 49 Fed. Rep. 383; *Nippert v. The J. B. Williams*, 42 Fed. Rep. 533; *The Augustine Kobbe*, 37 Fed. Rep. 701; *The Wyoming*, 36 Fed. Rep. 493; *The Dora*, 34 Fed. Rep. 343; *The Menominee*, 36 Fed. Rep. 197; *The City of Salem*, 31 Fed. Rep. 616; *The Cumberland*, 30 Fed. Rep. 453; *The Thomas Sherlock*, 22 Fed. Rep. 254; *The Isaac May*, 21 Fed. Rep. 687; *The General Tompkins*, 9 Fed. Rep. 620; *The Guiding Star*, 9 Fed. Rep. 521. And see the title SHIPS AND SHIPPING, vol. 25, p. 1027.

4. *Money Advanced for Wages of Crew.*—*The Tangier*, 2 Lowell (U. S.) 7; *The J. A. Brown*, 2 Lowell (U. S.) 464; *Abbott v. Baltimore, etc., Steam Packet Co.*, 4 Md. Ch. 311. Compare *The Larch*, 2 Curt. (U. S.) 427; *Steamboat P. H. White v. Levy*, 10 Ark. 412; *Hays v. Steamboat Columbus*, 23 Mo. 232.

5. *A Part Owner May Have Subrogation as against the mortgagee of the share of another part owner.* *The J. A. Brown*, 2 Lowell (U. S.) 464.

*Subrogation Refused.*—In the *Sarah J. Weed*, 2 Lowell (U. S.) 555, it was held that the general agent of a ship at the home port was not entitled to subrogation to the lien of seamen whose wages he had paid in the regular course of his employment. The court in this case felt itself bound by the decision in *The Larch*, 2 Curt. (U. S.) 427, but took occasion to disapprove of much of the reasoning of the court in that case.

6. *Subrogation to Right of Action for Collision.*—*The Hattie M. Spraker*, 29 Fed. Rep. 457. See also *Owen v. McGehee*, 61 Ala. 440; *Martin v. Baldwin*, 7 Ala. 923; *Chipman v. Morrill*, 20 Cal. 130; *Moore v. State*, 49 Ind. 558; *Prichard v. State*, 34 Ind. 137; *Braxton v. State*, 25 Ind. 82; *Collins v. Carlisle*, 7 B. Mon. (Ky.) 13; *Ames v. Armstrong*, 106 Mass. 15; *Crafts v. Crafts*, 13 Gray (Mass.) 360; *Cook v. Hinsdale*, 4 Cush. (Mass.) 134; *Brazer v. Clark*, 5 Pick. (Mass.) 96; *Crafts v. Mott*, 4 N. Y. 604; *Seward v. Huntington*, 26 Hun (N. Y.) 217; *Baltimore, etc., R. Co. v. Walker*, 45 Ohio St. 577; *Durbin v. Kuney*, 19 Oregon 71; *Sterling v. Stewart*, 74 Pa. St. 445, 15 Am. Rep. 559; *Morrow v. Peyton*, 8 Leigh (Va.) 54.

7. *Surety upon Bond for Release of Vessel.*—*The Evangel*, 94 Fed. Rep. 680; *Carroll v. The Steamboat T. P. Leathers*, Newb. Adm. 432. And see *The Robertson*, 8 Biss. (U. S.) 180.

8. *Guarantor — When Not Subrogated in Admiralty.*—*The Advance*, 72 Fed. Rep. 793.

9. *Right of Marine Insurer to Subrogation.*—See *supra*, this title, VIII. *Insurance Companies.*—*Marine Insurance.*

fund, the latter will be subrogated to his rights against the other fund, to the extent to which his own may have been exhausted.<sup>1</sup>

**2. Subrogation Arising from Contracts for Public Works.**—A surety on the bond of a contractor for the construction of public works who is obliged to complete the work on the failure of his principal to do so, or who is held liable to subcontractors or materialmen, will be subrogated to all the rights of the government against the contractor, including the right to apply a percentage of the contract price retained by the government to the satisfaction of his claim.<sup>2</sup> And an indemnitor of a surety will be entitled to the same right under similar circumstances.<sup>3</sup> But a party furnishing materials to be used by a contractor in constructing or repairing a public building, simply on the contractor's promise to pay, in the absence of statute or agreement, will not be substituted to the contractor's rights in a fund provided by the government for the work, though the contractor is insolvent;<sup>4</sup> nor will he be subrogated to the rights of the government in a bond given by the contractor conditioned to protect the obligee against all damages from failure to complete the contract, and to turn over the work free from liens, where such conditions have been complied with.<sup>5</sup>

**3. Subrogation of Agents and Attorneys**—*a. IN GENERAL.*—As a general rule an agent who is bound by the terms of his contract with his principal to make good all losses resulting from dealings with third persons will, on satisfying such a loss, be subrogated to the rights of the principal against the party whose default has been made good.<sup>6</sup> So, an agent who uses his own private means to protect the estate of his principal, with which he is intrusted, is not a volunteer, but is entitled to be subrogated to the position and rights of the principal.<sup>7</sup>

**1. Subrogation to Enforce Right of Marshaling.**—*Aldrich v. Cooper*, 2 Hare & W. Lead. Cas. 266, note; *Van Pelt v. Strickland*, 60 Kan. 584; *Wall v. Mason*, 102 Mass. 313; *Antnes v. Schroeder*, (Neb. 1903) 94 N. W. Rep. 611; *Union Bank v. Conroy*, 42 N. Y. App. Div. 576; *Hunt v. Townsend*, 4 Sandf. Ch. (N. Y.) 510; *Selinger v. Myers*, 24 Pa. Co. Ct. 71; *Ohio Cultivator Co. v. People's Nat. Bank*, 22 Tex. Civ. App. 643; *Dahlman v. Greenwood*, 99 Wis. 163. And see the title **MARSHALING ASSETS**, vol. 19, p. 1255.

**For Cases in Which Subrogation to Enforce Marshaling Was Refused**, see *Talladega First Nat. Bank v. Browne*, 128 Ala. 557, 86 Am. St. Rep. 156; *Hutchinson v. Crutcher*, 98 Tenn. 421; *City Bank v. Warrick*, (Tex. Civ. App. 1894) 28 S. W. Rep. 366.

**General Creditors Subrogated to Rights of Preferred Creditors.**—Where an insolvent corporation has lawfully preferred the note of a creditor, the fact that directors are indorsers thereon does not defeat such creditor's preference. The result is to subrogate the general creditors to the rights of the preferred creditor, against the indorsing directors, to the extent of the preference. *Savage v. Miller*, 56 N. J. Eq. 432.

**Right Waived by Laches.**—The right to subrogation to enforce marshaling may be lost by the laches of the party having a lien on one fund only, in failing to notify the other creditor that he will be required to collect his claim from the other fund. *Ocobock v. Baker*, 52 Neb. 447, 66 Am. St. Rep. 519.

**2. Surety on Bond of Contractor.**—*Prairie State Nat. Bank v. U. S.*, 164 U. S. 227; *Reid v. Pauly*, (C. C. A.) 121 Fed. Rep. 652; *Seattle First Nat. Bank v. City Trust, etc., Co.*, (C. C. A.) 114 Fed. Rep. 529. And see *Sasscer v.*

*Young*, 6 Gill & J. (Md.) 243. Compare *Dowling v. Seattle*, 22 Wash. 592.

**Creditors of Subcontractor.**—In *Falmouth Nat. Bank v. Cape Cod Ship Canal Co.*, 166 Mass. 550, it was held that the holders of debenture bonds issued by a subcontractor would not be subrogated to the benefit of a fund deposited with the state by the principal contractor as security for the completion of the contract, even though the proceeds of such bonds had been used in the payment of claims which would have been a lien on the fund.

**3. Indemnitor of Surety.**—*Reid v. Pauly*, (C. C. A.) 121 Fed. Rep. 652.

**4. Furnishing Materials to Contractor.**—*Rigin v. Hillard*, 56 Ark. 476, 35 Am. St. Rep. 113.

**5. Townsend v. Cleveland Fire Proofing Co.**, 18 Ind. App. 568. And see *M. T. Jones Lumber Co. v. Villegas*, 8 Tex. Civ. App. 669.

**6. Agent Subrogated to Rights of Principal.**—*Murrell v. Henry*, 70 Ark. 161.

**Money Lost Through Insolvency of Bank.**—One who as agent for another deposits money in a bank and is compelled to make good the loss thereof through the bank's insolvency, will be subrogated to the rights of his principal against the bank. *Stroller v. Coates*, 88 Mo. 514.

**Agent Liable for Goods Sold to Insolvent.**—An agent who, under the terms of his contract with his principal, becomes liable for goods sold to an insolvent person, will be subrogated to the rights of his principal against such person. *Nichols v. Wadsworth*, 40 Minn. 547.

**General Insurance Agent Compelled to Make Good Default of Local Agent.**—*Hough v. Aetna L. Ins. Co.*, 57 Ill. 318, 11 Am. Rep. 18.

**7. Agent Using Private Funds to Protect Principal.**—*Curry v. Curry*, 87 Ky. 667, 12 Am. St. Rep. 504. But see *Bennett v. Chandler*, 199 Ill.

**b. INSURANCE AGENT ADVANCING PREMIUMS.** — According to some authorities an insurance agent who advances premiums on behalf of the insured will be subrogated to the rights of the company to collect such premiums.<sup>1</sup>

**c. ATTORNEYS.** — An attorney who has become liable to his client by failing to collect such client's money from a sheriff, who has made the money on execution, may be subrogated to the client's rights against the sheriff.<sup>2</sup>

**4. Subrogation of Carriers.** — As a general rule a carrier who satisfies losses<sup>3</sup> or pays charges for which others are primarily liable will be subrogated to the rights of the party paid.<sup>4</sup> But where his negligence has resulted in loss to innocent third parties he will be required to place such parties *in statu quo* before subrogation will be enforced in his favor.<sup>5</sup>

**5. Subrogation of Holders of Void Obligations — County Bonds, Receivers' Certificates, etc.** — A purchaser of county or municipal bonds which are subsequently declared void will not be subrogated to the rights of creditors paid from the proceeds of such bonds, against the county or town issuing them.<sup>6</sup> But it has been held that where a receiver of a railroad company issues certificates in excess of the amount authorized by the court, purchasers of such certificates may be subrogated to the rights of holders of mortgage bonds of the company who have received payments of interest from the proceeds.<sup>7</sup>

**6. Subrogation to Equitable Lien for Improvements on Land.** — Where a tenant in common, with the knowledge of his cotenant, borrows money, and uses the same in improving the common property, the lender will be subrogated to his equitable lien against his cotenants for their share of the improvements.<sup>8</sup> So mechanics and materialmen making improvements on leased premises may

97, holding that an agent of a mortgagee who paid the interest due on the mortgage without the knowledge of either the mortgagor or the mortgagee, was a volunteer not entitled to subrogation.

**1. Insurance Agent Advancing Premiums.** — *Gillett v. Insurance Co. of North America*, 39 Ill. App. 284; *Boston Safe Deposit, etc., Co. v. Thomas*, 59 Kan. 470. But to the contrary see *Parsons v. John Hancock Mut. L. Ins. Co.*, 20 App. Cas. (D. C.) 263, in which case it was held that the agent was a mere volunteer.

**2. Attorney Subrogated Against Sheriff.** — *Governor v. Raley*, 34 Ga. 173.

**3. Subrogation of Carrier Making Up Deficiency in Quantity of Goods.** — *Vega Steamship Co. v. Consolidated Elevator Co.*, 75 Minn. 308, 74 Am. St. Rep. 484.

**Carrier Held Liable for Theft of Agent.** — Where notes issued by a bank were sent to it through an express company, and, while in transit, a part were stolen by an agent of the company, it was held that, upon making good the loss, the company became the owner of the notes, and upon proof that such notes had been destroyed by the defaulting agent, might recover their value from the bank. *Hagerstown Bank v. Adams Express Co.*, 45 Pa. St. 419, 84 Am. Dec. 499.

**Carrier Liable for Failure to Deliver Goods.** — If a carrier, failing to deliver goods by reason of a wrongful attachment, is held liable to the consignee, he will be subrogated to the rights of the consignee against the attaching officers. *Holmes v. Balcom*, 84 Me. 226.

**4. A Carrier of Goods Who Advances to Forwarding Agents charges on goods for freight and storage, will be subrogated to the rights of the agents against the consignee and owner of the goods.** *Briggs v. Boston, etc., R. Co.*, 6 Allen (Mass.) 246, 83 Am. Dec. 626; *Wells v.*

*Thomas*, 27 Mo. 20, 72 Am. Dec. 228; *Steamboat Virginia v. Kraft*, 25 Mo. 76, limiting the right to subrogation to lawful and proper charges for transportation only; *Western Transp. Co. v. Hoyt*, 69 N. Y. 230, 25 Am. Rep. 175; *White v. Vann*, 6 Humph. (Tenn.) 70, 44 Am. Dec. 294.

**Carrier Advancing Money to Pay Levy Taxes on Cotton.** — *Wolfe v. Crawford*, 54 Miss. 514. And see *supra*, this title, IX. 2. *Payment of Customs Duties.*

**5. Placing Third Persons in Statu Quo.** — *Atchison, etc., R. Co. v. Eaton*, 9 Kan. App. 678.

**6. Holders of Void Bonds Not Entitled to Subrogation.** — *Ætna L. Ins. Co. v. Middleport*, 124 U. S. 534; *Ætna L. Ins. Co. v. Lyon County*, 95 Fed. Rep. 325; *Lyon County v. Ashuelot Nat. Bank*, (C. C. A.) 87 Fed. Rep. 137.

**A Purchaser of Void County Bonds Issued in Exchange for Valid Warrants will be subrogated to the rights of the original warrant holders, and entitled to recover the amount of the warrants from the county.** *Coffin v. Kearney County*, 114 Fed. Rep. 518, following *Irvine v. Kearney County*, 75 Fed. Rep. 765, and distinguishing *Ætna L. Ins. Co. v. Middleport*, 124 U. S. 534.

**The Assignee of an Imperfect and Irregular School Warrant issued in lieu of a valid warrant, will be subrogated to all the rights of his assignor in the original security, and will be entitled to demand and receive possession thereof, and to have the same reformed by the proper authorities.** *Goldsmith v. Stewart*, 45 Ark. 149.

**7. Purchaser of Invalid Receivers' Certificates.** — *Newbold v. Peoria, etc., R. Co.*, 5 Ill. App. 367.

**8. Loan to Tenant in Common to Make Improvements.** — *Williams v. Harlan*, 88 Md. 1, 71 Am. St. Rep. 394.

be subrogated to the landlord's lien against the tenant by virtue of an agreement with the parties to the lease.<sup>1</sup>

**7. Subrogation of Purchasers to Rights of Vendors.** — As a general rule a purchaser of land or chattels will succeed to all the rights and remedies of his vendor in respect to the property purchased.<sup>2</sup> But it seems that he will not be subrogated to the benefit of his vendor's claim against a prior vendor for a deficiency in the quantity of the land, in the absence of an express agreement permitting such subrogation.<sup>3</sup>

**8. Subrogation of Persons Paying for Damage Done by Servants.** — A person who has satisfied a claim for damages caused by the negligence of his servant may be subrogated to the rights of the person injured against the servant.<sup>4</sup>

**9. Subrogation to Defenses and Estoppels.** — The right of subrogation or substitution extends to defenses<sup>5</sup> and estoppels as well as to rights of action.<sup>6</sup>

**XII. WAIVER OF RIGHT.** — The right of subrogation may be expressly waived,<sup>7</sup> or a waiver may be implied from the acts of the claimant.<sup>8</sup>

**Negligence and Laches** in the enforcement of a claim to subrogation will sometimes be held a waiver;<sup>9</sup> especially where such enforcement would result in injury to the rights of others.<sup>10</sup>

**1. Mechanics and Materialmen Subrogated to Landlord's Lien.** — *Rubel v. Avritt*, (Ky. 1898) 47 S. W. Rep. 460. And see generally the title *MECHANICS' LIENS*, vol. 20, p. 255.

**2. Purchaser Subrogated to Rights of Vendor.** — *Fisher v. Johnson*, 5 Ind. 492; *Logan v. Taylor*, 20 Iowa 297; *O. S. Kelly Co. v. Lobenthal*, 8 Ohio Cir. Dec. 300, 15 Ohio Cir. Ct. 343; *Polk v. Kyser*, 21 Tex. Civ. App. 676. See also *City Bank v. Smisson*, 73 Ga. 422; *Bonds v. Strickland*, 60 Ga. 624.

**When Not Subrogated.** — A person who purchases lands at a private sale will not be subrogated to the benefit of a mortgage paid by his vendors, the heirs of the mortgagor, as against a third person who is not liable for any part of the mortgage debt. *Demourelle v. Piazza*, 77 Miss. 433.

**3. Chambliss v. Miller**, 15 La. Ann. 713; *Davis v. Clark*, 33 N. J. Eq. 579. See also *Powell v. Hayes*, 31 La. Ann. 789.

**4. Person Paying Damages Caused by Servant.** — *Smith v. Foran*, 43 Conn. 244, 21 Am. Rep. 647.

**5. Bank Subrogated to Defense of Depositor.** — *A. T. Albro Co. v. Fountain*, 162 N. Y. 498.

**Subrogation to Defenses Against Mortgage Refused.** — If a stranger procures an injunction to a foreclosure and gives an injunction bond conditioned to pay the mortgage debt, and the injunction is dissolved, he cannot claim to be subrogated to defenses which the mortgagor might make against the mortgage, nor any other defense except performance of the covenants or such legal defense as would overthrow the bond itself. *Lewis v. City Nat. Bank*, 72 Ill. 543.

**6. Grantee in Deed of Trust Subrogated to Grantor's Right to Claim Estoppel.** — *Colonial, etc., Mortg. Co. v. Tubbs*, (Tex. Civ. App. 1898) 45 S. W. Rep. 623.

**7. Subrogation Expressly Waived.** — *Midland Banking Co. v. Chambers*, L. R. 7 Eq. 179; *Ex p. Hope*, 3 Mont. D. & De G. 720; *Ex p. Miles*, 1 De G. 623; *U. S. Bank v. Peter*, 13 Pet. (U. S.) 123.

**8. Waiver Implied from Acts of Claimant.** — *Neff v. Miller*, 8 Pa. St. 347. And see *Hughes*

*v. Miller*, 7 Pa. Dist. 686; *Leydon v. Malloy*, 6 Ohio Cir. Dec. 820, 10 Ohio Cir. Ct. 442.

**A Surety Who Refuses to Take Control of a Judgment** and execution offered him by the creditor thereby waives his right of subrogation. *Hubbell v. Carpenter*, 5 N. Y. 173.

**Waiver of Subrogation to Tax Lien.** — A senior mortgagee who pays a tax lien on the mortgaged premises under an agreement with the junior mortgagee for reimbursement, and joins in a conveyance to the junior mortgagee under a foreclosure sale, thereby waives his right of subrogation to the tax lien. *Manning v. Tutthill*, 30 N. J. Eq. 29.

**Waiver of Right to Security Given by Joint Debtor.** — Where one of two principal debtors binds himself to the other to pay the whole debt and gives security therefor, a surety of the two principal debtors, if compelled to pay the debt, is entitled to the benefit of the security so given. But, if he takes a bond or other security from one of the principal debtors, he thereby waives his right to claim the benefit of security given by the other in pursuance of the agreement between the principals. *Cornwell's Appeal*, 7 W. & S. (Pa.) 305.

**9. Right Waived by Negligence and Laches.** — *Wilkins v. Gibson*, 113 Ga. 53, 84 Am. St. Rep. 204; *Noble v. Turner*, 69 Md. 519; *Ocobock v. Baker*, 52 Neb. 447, 66 Am. St. Rep. 519; *Hutcheson v. Reash*, 15 Pa. Super. Ct. 96.

**Subrogation Has Been Refused** after a delay of one year; *Gring's Appeal*, 89 Pa. St. 336. Of eight years; *Matter of Goswiler*, 3 P. & W. (Pa.) 200. Of eleven years; *Buffington v. Bernard*, 90 Pa. St. 63. Of twenty years; *Smith v. Thompson*, 7 Gratt. (Va.) 112, 54 Am. Dec. 126.

**The Right Has Been Enforced** notwithstanding a delay of over four years; *Darrow v. Summerhill*, 24 Tex. Civ. App. 208. Of seven years; *Kincaid v. Ryan*, 64 N. J. Eq. 454. Of ten years, where no one was injured by the delay; *Home Invest. Co. v. Clarson*, 15 S. Dak. 513.

**10. Right Waived by Laches Prejudicial to Third Persons.** — *Wilkins v. Gibson*, 113 Ga. 31, 84 Am. St. Rep. 204; *Thomas v. Stewart*, 117 Ind.

Payment by a Surety Without Compulsion will not be held a waiver if payment by him might have been compelled.<sup>1</sup>

The Acceptance of New Security by a Junior Incumbrancer will not operate as a waiver on his part of any right which he may have to subrogation.<sup>2</sup>

Acceptance of Indemnity from a Stranger will not destroy a surety's right to subrogation.<sup>3</sup>

Taking Other Security from Principal. — As a general rule a surety does not waive his right of subrogation by taking other security from his principal,<sup>4</sup> unless the rights of third parties have intervened.<sup>5</sup>

Renewal of Note with Principal. — A surety does not waive his right of subrogation by renewing the note, on which he is bound, with his principal.<sup>6</sup>

The Doctrine of Estoppel in Pais Is Not Applicable to a claim of subrogation, unless the claimant has made false representations or has fraudulently concealed facts to the injury of him against whom the claim is asserted.<sup>7</sup>

**XIII. ASSIGNMENT OF RIGHT.** — The right of subrogation may be assigned by the party entitled thereto.<sup>8</sup>

**XIV. ENFORCEMENT OF RIGHT — 1. Equitable Jurisdiction.** — The right of subrogation is equitable in its nature, and can only be enforced by a proceeding in equity in those jurisdictions where a separate equitable procedure is maintained.<sup>9</sup> Thus it has been held that relief of this nature will not be granted in an action of ejectment,<sup>10</sup> or other action to try title.<sup>11</sup> In some of the states,

50; *Atkins v. Nordyke, etc., Co.*, 6 Kan. App. 145, affirmed on rehearing, 8 Kan. App. 855, 54 Pac. Rep. 328; *Willcox v. Foster*, 132 Mass. 320; *Gring's Appeal*, 89 Pa. St. 336; *Conner v. Welch*, 51 Wis. 431. And see the cases cited in the notes immediately preceding.

**1. Voluntary Payment by Surety.** — *McNeilly v. Cooksey*, 2 Lea (Tenn.) 39, citing *Winchester v. Beardin*, 10 Humph. (Tenn.) 247, 51 Am. Dec. 702; *State v. Blakemore*, 7 Heisk. (Tenn.) 638.

A Surety Who Pays a Debt Barred by the Statute of Limitations will have no right of subrogation against his principal. *Hatchett v. Pegram*, 21 La. Ann. 722; *Randolph v. Randolph*, 3 Rand. (Va.) 490.

If the Debt Has Been Reduced to Judgment payment cannot be said to be voluntary as long as the judgment can be enforced in any way, by scire facias, action of debt, or otherwise. *Randolph v. Randolph*, 3 Rand. (Va.) 490.

**2. Acceptance of New Security by Junior Incumbrancer.** — *Smith v. Dinsmoor*, 119 Ill. 656; *Worcester Nat. Bank v. Cheeney*, 87 Ill. 602; *Patterson v. Birdsall*, 64 N. Y. 294, 21 Am. Rep. 609; *Eagle F. Ins. Co. v. Pell*, 2 Edw. (N. Y.) 631; *Burchard v. Phillips*, 11 Paige (N. Y.) 66; *Louis v. Bauer*, 33 N. Y. App. Div. 287.

**3. Acceptance of Indemnity from Stranger.** — *Wesley Church v. Moore*, 10 Pa. St. 273.

**4. Taking Other Security from Principal.** — *Crawford v. Richeson*, 101 Ill. 351; *Gossin v. Brown*, 11 Pa. St. 527. But see *Sioux Nat. Bank v. Cudahy Packing Co.*, 58 Fed. Rep. 20; *Watts v. Eufaula Nat. Bank*, 76 Ala. 474.

Attempted Enforcement of Other Remedies Not a Waiver. — *Wilkins v. Gibson*, 113 Ga. 31.

**5. Subrogation Refused as Against Third Parties.** — *Watts v. Eufaula Nat. Bank*, 76 Ala. 474; *Henley v. Stemmons*, 4 B. Mon. (Ky.) 131.

**6. Renewal of Note Not a Waiver.** — *Pond v. Clarke*, 14 Conn. 335, overruling *Peters v. Good-*

*rich*, 3 Conn. 146; *Pomroy v. Rice*, 16 Pick. (Mass.) 22; *Chapman v. Jenkins*, 31 Barb. (N. Y.) 164; *Brinckerhoff v. Lansing*, 5 Johns. Ch. (N. Y.) 65, 8 Am. Dec. 538.

**7. Estoppel to Claim Subrogation.** — *Hurt v. Riffle*, 11 Fed. Rep. 790; *Anthes v. Schroeder*, (Neb. 1903) 94 N. W. Rep. 611; *Motley v. Harris*, 1 Lea (Tenn.) 577.

**8. Right of Subrogation Assignable.** — *San Francisco Sav. Union v. Long*, (Cal. 1898) 53 Pac. Rep. 907; *Peirce v. Garrett*, 65 Ill. App. 682; *Hare v. Headley*, 54 N. J. Eq. 545; *York v. Landis*, 65 N. Car. 535; *Harrisburg Bank v. German*, 3 Pa. St. 300.

**9. Right Enforceable in Court of Equity Only.** — *Hodgson v. Shaw*, 3 Myl. & K. 183; *Smith v. Harrison*, 33 Ala. 706; *Miller v. Woodward*, 8 Mo. 169; *Allen v. Wood*, 3 Ired. Eq. (38 N. Car.) 386; *Moore v. Watson*, 20 R. I. 495; *Wilder v. Wilder*, (Vt. 1903) 53 Atl. Rep. 1072. And see *Fulerton v. Bailey*, 17 Utah 85.

Ordinarily, to secure the benefit of a judgment lien against a co-security or co-accommodation indorser, the one paying the amount of the judgment should proceed by bill, suit, petition, or some proceeding in equity, wherein the equitable rights of the respective parties may be adjudicated and enforced. *Lidderdale v. Robinson*, 12 Wheat. (U. S.) 594; *Smith v. Rumsey*, 33 Mich. 183; *Furnold v. State Bank*, 44 Mo. 336; *Townsend v. Whitney*, 75 N. Y. 425; *Goodyear v. Watson*, 14 Barb. (N. Y.) 481; *Speiglemyer v. Crawford*, 6 Paige (N. Y.) 254; *Cuyler v. Ensforth*, 6 Paige (N. Y.) 32; *German American Sav. Bank v. Fritz*, 68 Wis. 390.

Subrogation Does Not Extend to the Form or Forum of the Remedy where the extent of the remedy is not affected by the form or forum. *McDonald v. Asay*, 37 Ill. App. 469, affirmed 130 Ill. 123.

**10. Subrogation Not Enforced in Action of Ejectment.** — *Meyer v. Mintonye*, 106 Ill. 414.

**11. Subrogation Not Enforceable in Action to Try Title.** — *Allison v. Pattison*, 96 Ala. 159.

however, the right is now held to be enforceable in courts of law by virtue of code provisions.<sup>1</sup>

**A Surety Who Has Failed to Establish His Claim at Law** cannot enforce a right of subrogation in equity.<sup>2</sup>

**2. Limitations.** — The general rule is, that a surety must take steps to enforce his right of subrogation within the period prescribed as a limitation to the enforcement of simple contracts, for this merely equitable right will not be enforced at the expense of a legal one.<sup>3</sup> In some of the states, if a surety pays a judgment against himself and his principal, and the fact of his suretyship appears in the record of the judgment, he may enforce the judgment at any time in which the plaintiff might enforce it; but if the fact of his suretyship does not so affirmatively appear, he must assert his right of subrogation within the period applicable to simple contracts.<sup>4</sup>

**The Statute Begins to Run** against a surety's right of subrogation from the time he pays the debt of his principal.<sup>5</sup>

**1. Right Enforceable at Law under Georgia Code.** — *Oellrich v. Georgia R. Co.*, 73 Ga. 389.

**In New York.** — In *Dunlop v. James*, 174 N. Y. 411, it is said: "In modern times courts of law have dealt with subrogation as they would with assignments, and, when the right of action to which the plaintiff asks to be subrogated is a legal right of action, a court of law may treat a plaintiff who is entitled in equity to subrogation as an assignee, and allow him to maintain an action of a legal nature upon the right to which he claims to be subrogated." And see *Boyd v. McDonough*, (C. Pl. Gen. T.) 39 How. Pa. (N. Y.) 389.

**In North Carolina**, since the adoption of the code, the right to subrogation must be asserted by a civil action commenced by service of a summons. *Calvert v. Peebles*, 82 N. Car. 334.

For the rule before the adoption of the code, see *Allen v. Wood*, 3 Ired. Eq. (38 N. Car.) 386.

**Where a Court of Law Has Acquired Jurisdiction** of the subject-matter, it will retain it and enforce full justice between the parties. *German American Sav. Bank v. Fritz*, 68 Wis. 390. And so of a court of equity. *McDaniel v. Lee*, 37 Mo. 204. See also *Brown v. Hodgson*, 4 Taunt. 189, where it is held that the principles of subrogation may be applied as well in an action at law as in equity.

**2. Not Granted to Claimant Who Has Failed at Law.** — *Fink v. Mahaffy*, 8 Watts (Pa.) 384; *Hutcheson v. Reash*, 15 Pa. Super. Ct. 96.

**A Defendant Who Pleads Title by Purchase** will not be allowed, after judgment rendered against him, to set up title by subrogation. *Weil v. Enterprise Ginnery, etc., Co.*, 42 La. Ann. 192.

**3. Statute Governing Action on Simple Contract Debts Applicable** — *Illinois*. — *Junker v. Rush*, 136 Ill. 179; *Simpson v. McPhail*, 17 Ill. App. 499.

*Indiana*. — *Roeder v. Keller*, 135 Ind. 692; *Arbogast v. Hays*, 98 Ind. 26.

*Iowa*. — *Johnston v. Belden*, 49 Iowa 301.

*Kentucky*. — *Duke v. Pigman*, (Ky. 1901) 62 S. W. Rep. 867; *Morrison v. Page*, 9 Dana (Ky.) 428; *Joyce v. Joyce*, 1 Bush (Ky.) 474.

*North Carolina*. — *Bledsoe v. Nixon*, 68 N. Car. 521.

*Ohio*. — *Neilson v. Fry*, 16 Ohio St. 552, 91 Am. Dec. 119.

*Pennsylvania*. — *State Bank v. Potius*, 10 Watts (Pa.) 148; *Fink v. Mahaffy*, 8 Watts (Pa.) 384; *Rittenhouse v. Levering*, 6 W. & S. (Pa.) 190; *Hutcheson v. Reash*, 15 Pa. Super. Ct. 96.

**Qualification of Rule.** — In *Boevink v. Christiaanse*, (Neb. 1903) 95 N. W. Rep. 652, it is said that the rule stated in the text applies only to sureties, or persons occupying the position of sureties.

**Claimant in Same Position as Person from Whom Right Is Derived.** — A person seeking subrogation to the rights of a vendor stands, with respect to the statute of limitations, in exactly the same position as the vendor would have occupied. *Rodman v. Sanders*, 44 Ark. 504.

**The Period of Limitation May Be Extended** by the death of the principal debtor after payment by the surety. *Roeder v. Keller*, 135 Ind. 692.

**Statute Governing Suits in Equity Applicable.**

— A suit in equity by a surety to enforce his right of subrogation is governed by the ten years statute applicable to suits in equity generally. *Zuellig v. Hemerlie*, 60 Ohio St. 27, 71 Am. St. Rep. 707; *Neal v. Nash*, 23 Ohio St. 483. And see *Boevink v. Christiaanse*, (Neb. 1903) 95 N. W. Rep. 652; *Pollock v. Wright*, 15 S. Dak. 134.

**4. When Statute Applicable to Judgments Governs.** — *Dewitt v. Boring*, 123 Ind. 4; *Kreider v. Isenbice*, 123 Ind. 10; *Hutcheson v. Reash*, 15 Pa. Super. Ct. 100.

**5. Statute Runs from Payment of Debt.** — *Junker v. Rush*, 136 Ill. 179; *Thayer v. Daniels*, 110 Mass. 345; *Rucks v. Taylor*, 49 Miss. 552; *Scott v. Nichols*, 27 Miss. 94, 61 Am. Dec. 503; *Bushong v. Taylor*, 82 Mo. 660; *Hearne v. Keath*, 63 Mo. 84; *Bauer v. Gray*, 18 Mo. App. 164; *Wesley Church v. Moore*, 10 Pa. St. 273; *Bennett v. Cook*, 45 N. Y. 276; *Marshall v. Hudson*, 9 Yerg. (Tenn.) 57; *Maxey v. Carter*, 10 Yerg. (Tenn.) 521; *Hammond v. Myers*, 30 Tex. 375, 94 Am. Dec. 322; *Darrow v. Summerhill*, 24 Tex. Civ. App. 208.

**In Cases of Fraud** the statute does not begin to run until the fraud is discovered. *Gano v. Martin*, 10 Kan. App. 384; *Zinkeison v. Lewis*, 63 Kan. 590.

**Where the Debt Is a Judgment**, the statute begins to run from the time of payment and not from the date of the judgment. *Maxey v.*



**3. Claimant Required to Do Equity.**—The right of subrogation being a creature of equity, the party claiming such right will be required to do equity before it will be enforced in his favor.<sup>1</sup>

**SUBSCRIBE.** (See also the titles SIGN—SIGNATURE, vol. 25, p. 1064; WILLS; and see SUBSCRIBER, *post*; SUBSCRIPTION, *post*; VERBAL AGREEMENTS (STATUTE OF FRAUDS).—To subscribe is defined to be to set one's hand to a writing.<sup>2</sup> To subscribe is literally to "write under;" and is sometimes opposed to "sign," which does not necessarily imply that the signature is to be placed at the end of the instrument.<sup>3</sup> The term also means to give consent to something written; to assent; to agree.<sup>4</sup>

Carter, 10 Yerg. (Tenn.) 521; Reeves v. Puliam, 9 Baxt. (Tenn.) 153.

**Where the Debt Paid Is a Mortgage,** the statute begins to run from the maturity thereof and not from the date of payment. Fullerton v. Bailey, 17 Utah 85; Boevink v. Christiaanse, (Neb. 1903) 95 N. W. Rep. 652.

**1. Claimant Required to Do Equity.**—Swarts v. Siegel, (C. C. A.) 117 Fed. Rep. 13; Atchison, etc., R. Co. v. Eaton, 9 Kan. App. 678; Arnold v. Green, 116 N. Y. 566.

**2. Subscribe.**—Riley v. Riley, 36 Ala. 502, quoting Pridgen v. Pridgen, 13 Ired. (35 N. Car.) 260.

**"Subscribe" and "Acknowledge" Distinguished.** In Riley v. Riley, 36 Ala. 502, it was said: "So it has been held that the acknowledgment by a witness of a signature previously made is not a subscription within the meaning of the statute. Playne v. Scriven, 1 Rob. Ecc. 775. In that case an attesting witness, on the re-execution of the will, traced over his previous signature with a dry pen, and he was held not to have *subscribed* but only to have acknowledged his signature, which was not sufficient."

**"Subscribe" and "Attest" Distinguished.**—See ATTEST—ATTESTATION, vol. 3, p. 275, and see Smith v. Crotty, 112 Ga. 905; Matter of Downie, 42 Wis. 74. See also Chase v. Kitzredge, 11 Allen (Mass.) 49.

**Printed Signature.**—The word *subscribe* includes a printed signature. Herrick v. Morrill, 37 Minn. 250. Compare Ames v. Schurmeier, 9 Minn. 221; Vielie v. Osgood, 8 Barb. (N. Y.) 130.

**3. To Write Under.**—American Surety Co. v. Worcester Cycle Mfg. Co., 100 Fed. Rep. 42; Coons v. Rigdon, 4 Colo. 282; Walker's Estate, 110 Cal. 387; Ashton v. Stoy, 96 Iowa 201; Davis v. Shields, 26 Wend. (N. Y.) 357, *reversing* 24 Wend. (N. Y.) 327; James v. Paten, 6 N. Y. 13; Matter of Strong, 2 Connolly (N. Y.) 574; Wade v. State, 22 Tex. App. 257. See also Atty.-Gen. v. Bradlaugh, 14 Q. B. D. 667.

Thus, the requirement of a statute that certain instruments shall be *subscribed* by the parties is not complied with where their names appear, though written by themselves, only in the body of the instrument. Wild Cat Branch v. Ball, 45 Ind. 213 (a bond; see the title BONDS, vol. 4, p. 621); Stone v. Marvel, 45 N. H. 481 (an affidavit to a mortgage of personal property).

**Same—Complaint for Larceny.**—In Com. v. Barhight, 9 Gray (Mass.) 113, it was held that a complaint for larceny signed by the plaintiff below the description of the goods stolen and

above the charge of larceny was not *subscribed* by the plaintiff.

**Same—Execution or Attestation.**—"To *subscribe* a writing, either as obligor or as attesting witness, is to sign the writing beneath or at the end or foot thereof." Soward v. Soward, 1 Duv. (Ky.) 129.

**Same—Schedule Annexed to Instrument.**—Where a statute required an instrument to be *subscribed*, it has been held that a schedule or other paper annexed to the instrument and referred to by the instrument to which it was annexed formed a part of such instrument, although such annexed paper was not itself *subscribed*. American Surety Co. v. Worcester Cycle Mfg. Co., 100 Fed. Rep. 41; Phelps v. Robbins, 40 Conn. 250; Newton v. Seaman's Friend Soc., 130 Mass. 91; Brown v. Clark, 77 N. Y. 369; Tonnele v. Hall, 4 N. Y. 140; Baker's Appeal, 107 Pa. St. 390. See also Weeks v. Maillardet, 14 East 568; Belknap v. Wendell, 21 N. H. 175.

**Same—Contra.**—Under the English Statute of Wills and the statute of frauds, c. 3, § 5, which require the attesting witnesses to a will to *subscribe* the will, it has been held that the word *subscribe* is not to be taken "in its primary and strict sense" as meaning "to write under;" but that the statute is sufficiently complied with "by the witnesses who saw it executed by the testator immediately signing their names on any part of it at his request, with the intention of attesting it," this being in accordance with the secondary meaning of the word, as given by Johnson, "to attest by writing the name," and by Richardson, "to sign it (in witness or attestation); to assent or consent; to witness or attest." Roberts v. Phillips, 4 El. & Bl. 450, 82 E. C. L. 450.

**4. Subscribe.**—Ashton v. Stoy, 96 Iowa 201.

To *subscribe* is "to agree in writing to furnish a sum of money or its equivalent for a designated purpose." Strong v. Eldridge, 8 Wash. 600.

**Agreement to Subscribe.**—As to an agreement to *subscribe* held to be equivalent to a subscription, see Henderson v. Lacon, L. R. 5 Eq. 249.

**To Common Fund.**—In Murray v. McHugh, 9 Cush. (Mass.) 166, it was said: "It is quite clear that these plaintiffs, with many other persons, put in their respective sums as contributions to a common fund for a designated purpose. The terms import this—'they *subscribed*,' 'they contributed'—all implying that the donations of each were parts, the whole of which were to form a common fund."

**Payment and Promise to Pay.**—In Burke v.

**SUBSCRIBER.** — A subscriber is defined to be one who subscribes; one who contributes to an undertaking by subscribing; one who enters his name for a paper, book, map, or the like.<sup>1</sup>

**SUBSCRIBING WITNESS.** (See also ATTEST — ATTESTATION, vol. 3, p. 273, and see the titles WILLS; WITNESSES.) — See note 2.

Lechmere, L. R. 6 Q. B. 304, it was said: "No doubt the word *subscribed* is used in two senses. Originally it meant only those who put their names to an agreement to pay money; but it has come to be used in the more popular sense of those who have paid the money."

In *Thames Tunnel Co. v. Sheldon*, 6 B. & C. 341, 13 E. C. L. 194, the word in an act of Parliament was held to be used in its original sense, and therefore to apply only to persons who had stipulated for a future advance of money.

A statement in the prospectus of a company inviting subscriptions to stock declared that two hundred thousand pounds thereof "have been already *subscribed*," whereas this amount had merely been allotted in payment to contractors. It was held that this was a fraudulent misrepresentation, as the use of the word *subscribed* implied an agreement under which there would be a liability to pay, and so was a representation that there was a responsibility behind a large portion of the capital. *Arnison v. Smith*, 41 Ch. D. 348.

**To subscribe for stock.** — The word *subscribe*, in contracts for subscription to the capital stock of a corporation, "has a definite technical sense, including in it the idea of a promise to pay the amount *subscribed* in the manner agreed upon." *Cheraw, etc., R. Co. v. White*, 14 S. Car. 62. See also *Busey v. Hooper*, 35 Md. 15; *Strong v. Eldridge*, 8 Wash. 600. In *Sagory v. Dubois*, 3 Sandf. Ch. (N. Y.) 493, it was said: "To '*subscribe* for' shares in one of the ordinary significations of the word *subscribe* is to promise to give the thing *subscribed* for, or to contribute to the undertaking accordingly." See also the title STOCK AND STOCKHOLDERS, vol. 26, p. 902 *et seq.*

**Power to subscribe to Railroad Stock.** — In *English v. Chicot County*, 26 Ark. 454, it was held that an act authorizing a county to *subscribe* for railroad stock did not authorize the county to issue bonds of the county in payment thereof, that is, to pledge the municipal credit. See also the titles COUNTRIES, vol. 7, p. 938; MUNICIPAL AID, vol. 20, p. 1102.

But in *Seybert v. Pittsburg*, 1 Wall. (U. S.) 272, where the authority was to *subscribe* to the capital stock of a railroad company "as fully as any individual," the court held that as an individual could have given his bond for the subscription by agreement with the company, so could the city.

**Subscribed Capital Stock.** — Civ. Code Cal., § 309, provides that directors shall create no debts beyond the *subscribed* capital stock of the corporations. In construing this provision in *Smith v. Ferries, etc., R. Co.*, (Cal. 1897) 51 Pac. Rep. 714, the court said: "We think that any stock issued for a valuable consideration, at least for any of those valuable considerations named in section 359 of the Civil Code, is '*subscribed* capital stock,' as the phrase is

used in this chapter of the code." See also the title STOCK AND STOCKHOLDERS, vol. 26, p. 825.

**Levy on Capital Stock instead of on Subscribed Capital Stock.** — In *San Joaquin Land, etc., Co. v. Beecher*, 101 Cal. 81, it was said: "Our Civil Code, section 335, prescribes the form of a notice to be given to stockholders of the levy of an assessment, which form was followed in the present case. In describing the assessment it describes it as being 'levied upon the capital stock of the corporation,' instead of upon the *subscribed* capital stock. The legislature had authority to designate the form of notice to be given, and having done so, and the secretary having given the notice thus provided, it was sufficient." See also the title STOCK AND STOCKHOLDERS, vol. 26, p. 920.

1. **Subscriber.** — *Ashton v. Stoy*, 96 Iowa 201, quoting Webst. Dict.

**Same — Meaning One Who Has Promised to Advance Money as Distinguished from One Who Has Already Paid.** — See *Thames Tunnel Co. v. Sheldon*, 9 Dowl. & R. 278, 6 B. & C. 341, 13 E. C. L. 194, and the title STOCK AND STOCKHOLDERS, vol. 26, p. 893, note 3. And see SUBSCRIBE, *ante*.

**Newspaper.** — In *Ashton v. Stoy*, 96 Iowa 201, it was said: "A person to whom a paper is sent without his knowledge or consent, either express or implied, is not a *subscriber*, within the meaning of the statute."

**Articles of Incorporation.** — A statute provided that "the persons who have subscribed and all persons who shall from time to time become stockholders" should be a body corporate. It was held that the word *subscriber* included the parties to a preliminary subscription and the *subscribers* to the articles of incorporation. It was further held that it was not contemplated that the original *subscribers* would fail to subscribe the articles, therefore no distinction was made between these different classes of *subscribers* and no provision was expressly made for such an exceptional case. *Peninsular R. Co. v. Duncan*, 28 Mich. 130. See also *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389.

**Subscriber and Stockholder.** — That something more than a mere subscription to stock is necessary to render the *subscriber* a stockholder, see *McComb v. Barcelona Apartment Assoc.*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 549, and see the title STOCK AND STOCKHOLDERS, vol. 26, p. 808, especially p. 894 *et seq.* See also this title generally for a full discussion of the relation between subscribers and stockholders and the rights and liabilities of each.

2. **Subscribing Witness.** — A *subscribing witness* has been defined to be "one who was present when the instrument was executed, and who at that time, at the request or with the assent of the party, subscribed his name to it as a witness of the execution." *Tate v. Lawrence*, 11 Heisk. (Tenn.) 510, quoting 1 Greenleaf on

**SUBSCRIPTION.** (See also SUBSCRIBE, *ante*; SUBSCRIBER, *ante*, — See note 1.

Evidence, § 569a. But see as to the English doctrine as to witnesses of wills, SUBSCRIBE, *ante*.

In *Smith v. Crotty*, 112 Ga. 906, it was said: "What is a *subscribing witness*? Clearly, one who writes his name under an attesting clause."

**1. Subscription.** (See also the title STOCK AND STOCKHOLDERS, vol. 26, p. 808.) — A stockholder's *subscription* is his obligation to contribute to the capital stock. *Patterson v. Lynde*, 106 U. S. 521; *Hardy v. Norfolk Mfg. Co.*, 80 Va. 416; *Lewis v. Glenn*, 84 Va. 979.

**Agreement to Subscribe.** — A *subscription* to the capital of a company by certain persons has been defined as "the putting down their names to a contract, by which they bind themselves to contribute to the extent of the number of

shares for which they put down their names." *Burke v. Lechmere*, L. R. 6 Q. B. 303, *citing* *Thames Tunnel Co. v. Sheldon*, 6 B. & C. 348, 13 E. C. L. 194.

**Particular Mann r.** — If by statute a *subscription* is required to be made in a particular manner, the prescribed manner must be observed. *Atty-Gen. v. Bradlaugh*, 14 Q. B. D. 667, 54 L. J. Q. B. 205.

**Mark.** (See also MARK, vol. 19, p. 1137, and see the title SIGN — SIGNATURE, vol. 25, p. 1064.) — *Subscription* includes mark. *Breene v. McCrary*, 52 Ala. 154; *Harrison v. Simons*, 55 Ala. 515; *Alabama Warehouse Co. v. Lewis*, 56 Ala. 516; *Elston v. Roap*, 133 Ala. 336; *Bickley v. Keenan*, 60 Ala. 295; *Matter of Guilfoyle*, 96 Cal. 600; *Meazels v. Martin*, 93 Ky. 51.

# SUBSCRIPTIONS.

By WILLIAM HOWARD BUCHANAN.

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## CROSS-REFERENCES.

For matters of *PROCEDURE*, see the title *SUBSCRIPTIONS*, 20 *ENCYCLOPEDIA OF PLEADING AND PRACTICE* 1003.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *MUNICIPAL SECURITIES*, vol. 21, p. 13; *REWARDS*, vol. 24, p. 940; *STOCK AND STOCKHOLDERS*, vol. 26, p. 808; *SUNDAYS AND HOLIDAYS*, *post*.

**I. DEFINITION.** — A subscription is a written contract by which one engages to contribute a sum of money for a designated purpose.<sup>1</sup>

**II. FORM AND REQUISITES.** — The Subscription Paper Must Contain a Promise to give a specified sum of money for a designated purpose<sup>2</sup> authorized by law.<sup>3</sup>

**Date.** — The absence of the date on a subscription paper does not render a subscription invalid.<sup>4</sup>

**Payee.** — The person to whom the offer is made need not be named in the

1. **Definition.**—Bouv. L. Dict.; Heller v. Elwood Board of Trade, 18 Ind. App. 188.

To **Subscribe** is to agree in writing to furnish a sum of money, or its equivalent, for a designated purpose. Anderson L. Dict.; Heller v. Elwood Board of Trade, 18 Ind. App. 188;

Strong v. Eldridge, 8 Wash. 595. See also *ante*, **SUBSCRIBE**.

2. **Contents of Subscription Paper.** — Strong v. Eldridge, 8 Wash. 595.

3. Underwood v. Waldron, 12 Mich. 73.

4. **Date Not Essential.** — Allen v. Clinton  
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subscription paper.<sup>1</sup> A subscription payable to whoever performs the acts named in the subscription paper is like a note payable to bearer, and whoever performs the work in accordance with the subscription is the payee.<sup>2</sup>

**Expression of Consideration.** — The consideration on which the subscription is made need not be expressed in the instrument.<sup>3</sup>

**Delivery.** — To give a subscription effect it has been said that it must be delivered to some party who is willing to and does accept the proposition, and who will perform or secure the performance of the conditions therein imposed;<sup>4</sup> but this would appear to be true only in case the offer contained in it is intended not for any person who shall perform the conditions, but is addressed only to the particular person to whom it shall be delivered.

**III. CONSIDERATION — 1. In General.** — A subscription, like any other promise or offer, requires a consideration to support it, either of profit to the party promising or of loss to the other party.<sup>5</sup>

**2. Moral Obligation.** — A voluntary subscription will not be sustained by the moral obligation alone which underlies it. Unless there is a legal consideration the question of its performance rests wholly with the conscience.<sup>6</sup>

**3. Subsequent Consideration.** — A subscription invalid when signed for want of consideration may be made valid and binding by a consideration arising subsequently between the subscribers and the beneficiary.<sup>7</sup>

**4. Bestowing Labor and Incurring Liability.** — The consideration is sufficient where, before notice of the withdrawal of the subscription,<sup>8</sup> and on the faith of the subscriber's promise, money or labor is expended and liability incurred.<sup>9</sup>

County, 101 Ind. 553. See also the title *DATE*, vol. 8, p. 728.

**1. Payee Need Not Be Named.** — *Farmington Academy v. Allen*, 14 Mass. 172, 7 Am. Dec. 201; *First Universalist Church v. Pungs*, 126 Mich. 670; *Egan v. Bonocum*, 38 Neb. 577. See also *infra*, this title, *Parties to Subscription*.

**2. Cooper v. McCrimmin**, 33 Tex. 383, 7 Am. Rep. 268. See the title *REWARDS*, vol. 24, p. 940.

**3. Consideration.** — *Barnes v. Perine*, 15 Barb. (N. Y.) 249; *Troy Conference Academy v. Nelson*, 24 Vt. 189.

**4. Delivery.** — *Heller v. Elwood Board of Trade*, 18 Ind. App. 188; *White v. Crosby*, (Tex. Civ. App. 1899) 51 S. W. Rep. 350.

**5. Consideration Necessary** — *Arkansas*. — *Rogers v. Galloway Female College*, 64 Ark. 627.

*Illinois*. — *Thompson v. Mercer County*, 40 Ill. 379.

*Massachusetts*. — *Phillips Limerick Academy v. Davis*, 11 Mass. 113, 6 Am. Dec. 162; *Boutell v. Cowdin*, 9 Mass. 254.

*Missouri*. — *Methodist Orphans' Home Assoc. v. Sharp*, 6 Mo. App. 150.

*New York*. — *Stewart v. Hamilton College*, 2 Den. (N. Y.) 403; *Stoddard v. Cleveland*, (Supm. Ct. Gen. T.) 4 How. Pr. (N. Y.) 148; *Hull v. Pearson*, 38 N. Y. App. Div. 588.

*Ohio*. — *Sutton v. Otterbein University*, 4 Ohio Cir. Dec. 627, 7 Ohio Cir. Ct. 343.

*Pennsylvania*. — *Stokes's Estate*, 14 Phila. (Pa.) 251, 38 Leg. Int. (Pa.) 12.

*Virginia*. — *Galt v. Swain*, 9 Gratt. (Va.) 633, 60 Am. Dec. 311.

*Vermont*. — *Troy Conference Academy v. Nelson*, 24 Vt. 189.

See also the title *CONSIDERATION*, vol. 6, p. 667.

**Not Essential that the Subscriber Derive Any Benefit from the Promise.** — *School Dist. v.*

*Sheidley*, 138 Mo. 672, 60 Am. St. Rep. 576; *Miller v. Preston*, 4 N. Mex. 314.

**Subscription to Pay Pre-existing Indebtedness Not Enforceable.** — *Des Moines University v. Livingston*, 65 Iowa 202; *Kane First Cong. Church v. Griffith*, 17 Pa. Co. Ct. 614.

**Preaching the Gospel** has been held sufficient consideration. *Somer v. Miner*, 9 Conn. 458; *Whitestown First Religious Soc. v. Stone*, 7 Johns. (N. Y.) 112; *Dieffendorf v. Reformed Calvinist Church*, 20 Johns. (N. Y.) 12.

**Diffusion of Knowledge and Advancement of Science** are not, it has been held, in themselves a sufficient consideration to uphold a subscription. *Bridgewater Academy v. Gilbert*, 2 Pick. (Mass.) 579, 13 Am. Dec. 457. See also *Hamilton College v. Stewart*, 1 N. Y. 581.

**6. Moral Obligation.** — *Stokes's Estate*, 14 Phila. (Pa.) 251, 38 Leg. Int. (Pa.) 12.

But see *Caul v. Gibson*, 3 Pa. St. 416, wherein it is held that a moral obligation has ever been held sufficient to support an express promise but not an implied one.

**7. Subsequent Consideration.** — *Amherst Academy v. Cows*, 6 Pick. (Mass.) 427, 17 Am. Dec. 387; *Phillips Limerick Academy v. Davis*, 11 Mass. 113, 6 Am. Dec. 162; *Presbyterian Church v. Cooper*, 112 N. Y. 517, 8 Am. St. Rep. 767. See also *Keuka College v. Ray*, 41 N. Y. App. Div. 200, *affirmed* 167 N. Y. 96.

**8. Before Rescission of Subscription.** — *Thompson v. Mercer County*, 40 Ill. 379; *Irwin v. Webster*, 4 Ohio Cir. Dec. 590, 7 Ohio Cir. Ct. 269. See *infra*, this title, *Rescission*.

**9. Expenditures on Faith of Subscription** — *United States*. — *Sturges v. Colby*, 2 Flipp. (U. S.) 163.

*Connecticut*. — *Berkeley Divinity School v. Jarvis*, 32 Conn. 412; *North Ecclesiastical Soc. v. Matson*, 36 Conn. 26.

*Georgia*. — *Wilson v. Savannah First Presb. Church*, 56 Ga. 554.

**5. Compliance with Terms of Subscription.** — Where the subscription is made on condition that something be done or that a certain amount of money in the aggregate be subscribed, the performance of the condition by the payee or by the party accepting the terms of the offer constitutes a consideration sufficient to support the subscriber's promise.<sup>1</sup>

*Illinois.* — Pryor v. Cain, 25 Ill. 292; Griswold v. Peoria University, 26 Ill. 41, 79 Am. Dec. 361; Thompson v. Mercer County, 40 Ill. 379; McClure v. Wilson, 43 Ill. 356; M. E. Church v. Garvey, 53 Ill. 401, 5 Am. Rep. 51; Snell v. M. E. Church Soc., 58 Ill. 290; Kentucky Baptist Education Soc. v. Carter, 72 Ill. 247; Hall v. Virginia, 91 Ill. 535; Beach v. First M. E. Church, 96 Ill. 177; Whitsitt v. Preemption Presb. Church, 110 Ill. 125; Hudson v. Green Hill Seminary Corp., 113 Ill. 618; Richelieu Hotel Co. v. International Military Encampment Co., 140 Ill. 248, 23 Am. St. Rep. 234; Friedline v. Carthage College, 23 Ill. App. 494; Lincoln University v. Hepley, 28 Ill. App. 629; Kinsley v. International Military Encampment Co., 41 Ill. App. 259; Robertson v. March, 4 Ill. 198.

*Indiana.* — Peirce v. Ruley, 5 Ind. 69; Northwestern Conference v. Myers, 36 Ind. 375.

*Iowa.* — Simpson Centenary College v. Bryan, 50 Iowa 293; United Presb. Church v. Baird, 60 Iowa 237; Des Moines University v. Livingston, 65 Iowa 202; Ft. Madison First M. E. Church v. Donnell, 110 Iowa 5.

*Kansas.* — White v. Scott, 26 Kan. 476.

*Kentucky.* — Collier v. Baptist Education Soc., 8 B. Mon. (Ky.) 68.

*Maine.* — Foxcroft Academy v. Favor, 4 Me. 382; Carr v. Bartlett, 72 Me. 120; Maine Cent. Institute v. Haskell, 73 Me. 140; Haskell v. Oak, 75 Me. 519.

*Maryland.* — Gittings v. Mayhew, 6 Md. 113.

*Massachusetts.* — Watkins v. Eames, 9 Cush. (Mass.) 537; Bryant v. Goodnow, 5 Pick. (Mass.) 228; Church Trustees v. Stetson, 5 Pick. (Mass.) 506; Mirick v. French, 2 Gray (Mass.) 420; Ives v. Sterling, 6 Met. (Mass.) 310; Homes v. Dana, 12 Mass. 190, 7 Am. Dec. 55; Farmington Academy v. Allen, 14 Mass. 172, 7 Am. Dec. 201; Cottage St. M. E. Church v. Kendall, 121 Mass. 528, 23 Am. Rep. 286.

*Michigan.* — Wesleyan Seminary v. Fisher, 4 Mich. 515; Underwood v. Waldron, 12 Mich. 73; Comstock v. Howd, 15 Mich. 237; Baker v. Johnston, 21 Mich. 319; Stevens v. Corbitt, 33 Mich. 458; Michigan Midland, etc., R. Co. v. Bacon, 33 Mich. 466; Tower v. Detroit, etc., R. Co., 34 Mich. 329.

*Minnesota.* — Bohn Mfg. Co. v. Lewis, 45 Minn. 164; Albert Lea College v. Brown, 88 Minn. 524.

*Missouri.* — Koch v. Lay, 38 Mo. 147; School Dist. v. Sheidley, 138 Mo. 672, 60 Am. St. Rep. 576; Davis v. Johnson, 49 Mo. App. 240; Conn. v. McCollough, 12 Mo. App. 356; James v. Clough, 25 Mo. App. 147; Swain v. Hill, 30 Mo. App. 436; McClanahan v. Payne, 86 Mo. App. 284; Christian University v. Hoffman, 95 Mo. App. 488.

*Nebraska.* — Homan v. Steele, 18 Neb. 652.

*New Hampshire.* — George v. Harris, 4 N. H. 533, 17 Am. Dec. 446; Osborn v. Crosby, 63 N. H. 583.

*New Mexico.* — Miller v. Preston, 4 N. Mex. 314.

*New York.* — Barnes v. Perine, 15 Barb. (N. Y.) 249, affirmed 12 N. Y. 18; Reformed Protestant Dutch Church v. Brown, 29 Barb. (N. Y.) 335; Wayne, etc., Collegiate Institute v. Smith, 36 Barb. (N. Y.) 576; Van Rensselaer v. Aikin, 44 Barb. (N. Y.) 547; M'Auley v. Billenger, 20 Johns. (N. Y.) 89; Presbyterian Soc. v. Beach, 74 N. Y. 72; Keuka College v. Ray, 41 N. Y. App. Div. 200, affirmed 167 N. Y. 96.

*Ohio.* — Ohio Wesleyan Female College v. Higgins, 16 Ohio St. 20; Irwin v. Webster, 4 Ohio Cir. Dec. 590, 7 Ohio Cir. Ct. 269.

*Pennsylvania.* — Stokes's Estate, 14 Phila. (Pa.) 251, 38 Leg. Int. (Pa.) 12; Caul v. Gibson, 3 Pa. St. 416; Ryerss v. Presbyterian Congregation, 33 Pa. St. 114.

*Texas.* — Hopkins v. Upshur, 20 Tex. 89, cited in Williams v. Rogan, 59 Tex. 440; Doyle v. Glasscock, 24 Tex. 200; Cooper v. McCrimmin, 33 Tex. 383, 7 Am. Rep. 268; Gulf, etc., R. Co. v. Neely, 64 Tex. 344.

*Vermont.* — State University v. Buell, 2 Vt. 48; State Treasurer v. Cross, 9 Vt. 289, 31 Am. Dec. 626.

*Virginia.* — Galt v. Swain, 9 Gratt. (Va.) 633, 60 Am. Dec. 311.

*Wisconsin.* — Eycleshimer v. Van Antwerp, 13 Wis. 546; Superior Consol. Land Co. v. Bickford, 93 Wis. 220, citing with approval 24 AM. AND ENG. ENCYC. OF LAW (1st ed.) 331.

But see Bridgewater Academy v. Gilbert, 2 Pick. (Mass.) 579, 13 Am. Dec. 457, wherein it is held that the beginning to provide materials on the faith of the subscription paper alone is not sufficient to show that expenses have been incurred at the implied request of the subscriber.

**Where Nothing Is Done or Attempted** upon the invitation or request of the subscribers or otherwise than as individuals interested in promoting the general object in view, and no liability is incurred on the strength of the subscriptions upon request of the subscribers, there is no consideration. Presbyterian Church v. Cooper, 112 N. Y. 517, 8 Am. St. Rep. 767.

**Borrowing Money** on the faith of the subscriptions is a sufficient consideration. M. E. Church v. Garvey, 53 Ill. 401, 5 Am. Rep. 51; United Presb. Church v. Baird, 60 Iowa 237.

**Expense Incurred on Faith of Any Particular Subscription** is not necessary. Capelle v. Trinity M. E. Church, 11 Nat. Bankr. Reg. 536, 5 Fed. Cas. No. 2,392.

**1. Compliance with Terms of Subscription.** — *Illinois.* — Thompson v. Mercer County, 40 Ill. 379; Miller v. Ballard, 46 Ill. 377; Kentucky Baptist Education Soc. v. Carter, 72 Ill. 247.

*Indiana.* — Johnson v. Wabash College, 2 Ind. 555; Roch v. Roanoke Classical Seminary, 56 Ind. 198.

An Obligation Imposed by Law on the Payee to apply a fund to carrying out the charitable and benevolent purpose of an institution and the intention of the subscriber furnishes sufficient consideration.<sup>1</sup>

**6. Mutual Promises.** — It has been held that when several persons promise to contribute to a common object desired by all, the promise of each may be a good consideration for the promise of others;<sup>2</sup> but this holding has been severely criticised by some courts, wherein it has been held that the doctrine is unsound, and that the subscription cannot be enforced unless the promisee has, in reliance on the promise, done something, and it is not enough that some one has been led to subscribe by the subscription of others.<sup>3</sup>

*Iowa.* — McDonald v. Gray, 11 Iowa 508, 79 Am. Dec. 509.

*Massachusetts.* — Williams College v. Danforth, 12 Pick. (Mass.) 541; Thompson v. Page, 1 Met. (Mass.) 565.

*New York.* — Marie v. Garrison, 83 N. Y. 14; Keuka College v. Ray, 41 N. Y. App. Div. 200, affirmed 167 N. Y. 96; Van Rensselaer v. Aikin, 44 Barb. (N. Y.) 547; Stewart v. Hamilton College, 2 Den. (N. Y.) 403; Reformed Protestant Dutch Church v. Brown, (Supm. Ct. Gen. T.) 17 How. Pr. (N. Y.) 287, 29 Barb. (N. Y.) 335, affirmed 4 Abb. App. Dec. (N. Y.) 31, 24 How. Pr. (N. Y.) 76; Hammond v. Shepard, (Supm. Ct. Gen. T.) 29 How. Pr. (N. Y.) 188; Reformed Protestant Dutch Church v. Hardenberg, (Supm. Ct. Gen. T.) 48 How. Pr. (N. Y.) 414; Bort v. Snell, 39 Hun (N. Y.) 388.

*Ohio.* — Irwin v. Lombard University, 56 Ohio St. 9, 60 Am. St. Rep. 727; Farmers' College v. McMicken, 2 Disney (Ohio) 495.

*Oregon.* — Philmath College v. Hartless, 6 Oregon 158, 25 Am. Rep. 510.

*Tennessee.* — Macon v. Sheppard, 2 Humph. (Tenn.) 335.

*Texas.* — Cooper v. McCrimmin, 33 Tex. 383, 7 Am. Rep. 268; Darnall v. Lyon, (Tex. App. 1892) 19 S. W. Rep. 506.

*Vermont.* — Troy Conference Academy v. Nelson, 24 Vt. 189.

*Wisconsin.* — La Fayette County Monument Corp. v. Magoon, 73 Wis. 627; La Fayette County Monument Corp. v. Ryland, 80 Wis. 29.

Where the Conditions of a Subscription Are Not Complied with, the agreement of the subscriber to pay the amount of his subscription notwithstanding the failure to comply with such conditions is without consideration. Schuler v. Myton, 48 Kan. 282.

**1. Legal Obligation Sufficient Consideration.** — Collier v. Baptist Education Soc., 8 B. Mon. (Ky.) 68; Kentucky Female Orphan School v. Fleming, 10 Bush (Ky.) 234.

**2. Mutual Promises Good Consideration.** — California. — Christian College v. Hendley, 49 Cal. 347.

*Connecticut.* — Berkeley Divinity School v. Jarvis, 32 Conn. 412.

*Delaware.* — Norton v. Janvier, 5 Harr. (Del.) 346.

*Georgia.* — Wilson v. Savannah First Presb. Church, 56 Ga. 554.

*Indiana.* — Peirce v. Ruley, 5 Ind. 60; Higert v. Indiana Asbury University, 53 Ind. 326; Petty v. Church of Christ, 95 Ind. 278; Rothenberger v. Glick, 22 Ind. App. 288.

*Massachusetts.* — Williams College v. Dan-

forth, 12 Pick. (Mass.) 541; Thompson v. Page, 1 Met. (Mass.) 565; Ives v. Sterling, 6 Met. (Mass.) 310. See dicta in Church Trustees v. Stetson, 5 Pick. (Mass.) 508; Watkins v. Eames, 9 Cush. (Mass.) 537.

*Minnesota.* — Culver v. Banning, 19 Minn. 303.

*Michigan.* — Underwood v. Waldron, 12 Mich. 73; Comstock v. Howd, 15 Mich. 237; First Universalist Church v. Pungs, 126 Mich. 670. Waters v. Union Trust Co., 129 Mich. 640.

*Missouri.* — New Lindell Hotel Co. v. Smith, 13 Mo. App. 7.

*Nebraska.* — Fremont Ferry, etc., Co. v. Fuhrman, 8 Neb. 99; Homan v. Steele, 18 Neb. 652; Armann v. Buel, 40 Neb. 803.

*New Hampshire.* — George v. Harris, 4 N. H. 533, 17 Am. Dec. 446; Congregational Soc. v. Perry, 6 N. H. 164, 25 Am. Dec. 455; Osborn v. Crosby, 63 N. H. 583, citing George v. Harris, 4 N. H. 533, 17 Am. Dec. 446, and Moore v. Chesley, 17 N. H. 151.

*New York.* — Eastern Plank Road Co. v. Vaughan, 20 Barb. (N. Y.) 157; Poughkeepsie, etc., Plank Road Co. v. Griffin, 21 Barb. (N. Y.) 454; Stewart v. Hamilton College, 2 Den. (N. Y.) 403; McAuley v. Billenger, 20 Johns. (N. Y.) 89.

*Wisconsin.* — Lathrop v. Knapp, 27 Wis. 214.

**Subscription an Inducement to Others.** — A subscription made for the purpose of being shown to third persons, as an inducement for subscriptions by them, which is so shown and presumptively accomplishes such purpose, is based upon a sufficient consideration. Pierson's Estate, 6 Pa. Dist. 23.

**3. Mutual Promises Not Sufficient Consideration.** — Maine. — Carr v. Bartlett, 72 Me. 120; Foxcroft Academy v. Favor, 4 Me. 382.

*Massachusetts.* — Cottage St. M. E. Church v. Kendall, 121 Mass. 528, 23 Am. Rep. 286, criticising Bryant v. Goodnow, 5 Pick. (Mass.) 228, and overruling the dicta in Church Trustees, etc., v. Stetson, 5 Pick. (Mass.) 508, and Watkins v. Eames, 9 Cush. (Mass.) 538.

*Minnesota.* — Culver v. Banning, 19 Minn. 303.

*Missouri.* — Methodist Orphans' Home Assoc. v. Sharp, 6 Mo. App. 150; McClanahan v. Payne, 86 Mo. App. 284.

*New York.* — Presbyterian Church v. Cooper, 112 N. Y. 517, 8 Am. St. Rep. 767; Hamilton College v. Stewart, 1 N. Y. 581 [overruling the doctrine of the chancellor in that case when it was before the court of error, 2 Den. (N. Y.) 417]; Barnes v. Perine, 12 N. Y. 18.

*North Carolina.* — Kelly v. Oliver, 113 N. Car. 442.

Acceptance of a Subscription implies a promise to hold and appropriate funds subscribed in conformity with the terms and objects of the subscription, and thus mutual and independent promises are made, which constitute a legal and sufficient consideration for each other.<sup>1</sup>

**IV. ACCEPTANCE — 1. In General.** — To make a subscription binding it must be accepted, as any other promise or offer, and if this is not done within a reasonable time the subscription is a mere offer and cannot be enforced.<sup>2</sup>

After the Death of a Subscriber the proposal is not open to acceptance.<sup>3</sup>

**2. Express Acceptance.** — Where the terms of the subscription stipulate that an express acceptance is required, such acceptance is a prerequisite to the validity of the contract.<sup>4</sup>

**3. Implied Acceptance.** — In the absence of a stipulation in the subscription requiring an acceptance in express terms, no formal acceptance is necessary. The assumption of a liability or obligation, or the doing of some unrequired act such as the expending of money or labor in accordance with and upon the faith of the subscription, is a sufficient acceptance.<sup>5</sup>

**1. Acceptance of Subscription Good Consideration.**

— *Barnett v. Franklin College*, 10 Ind. App. 103; *Fryeburg Parsonage Fund v. Ripley*, 6 Me. 552; *Maine Cent. Institute v. Haskell*, 73 Me. 140; *Amherst Academy v. Cowles*, 6 Pick. (Mass.) 427, 17 Am. Dec. 387; *Williams College v. Danforth*, 12 Pick. (Mass.) 541; *Thompson v. Paige*, 1 Met. (Mass.) 565; *Ladies' Collegiate Institute v. French*, 16 Gray (Mass.) 196. See *contra*, *Johnson v. Otterbein University*, 41 Ohio St. 527.

**2. Subscription Must Be Accepted — Arkansas.** — *Turner v. Baker*, 30 Ark. 186.

*Idaho.* — *Broadbent v. Johnson*, 2 Idaho 325.

*Maine.* — *Wiswell v. Bresnahan*, 84 Me. 397.

*Massachusetts.* — *Cottage St. M. E. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286.

*New York.* — *Utica, etc., R. Co. v. Brinckerhoff*, 21 Wend. (N. Y.) 139, 34 Am. Dec. 220.

*Texas.* — *Ft. Worth, etc., R. Co. v. Linsey*, 11 Tex. Civ. App. 244.

*Virginia.* — *Gault v. Swain*, 9 Gratt. (Va.) 633, 60 Am. Dec. 311.

*Wisconsin.* — *M. E. Church v. Sherman*, 36 Wis. 404; *Leonard v. Lent*, 43 Wis. 83.

**3. No Acceptance After Death of Subscriber.** —

*Phipps v. Jones*, 20 Pa. St. 260, 59 Am. Dec. 708. See *infra*, this title, *Rescission*.

**4. Express Acceptance.** — *Wiswell v. Bresnahan*, 84 Me. 397.

**5. Acceptance Implied — United States.** — *Sturges v. Colby*, 2 Flipp. (U. S.) 163.

*California.* — *Grand Lodge, etc., v. Farnham*, 70 Cal. 158.

*Connecticut.* — *Berkeley Divinity School v. Jarvis*, 32 Conn. 412; *North Ecclesiastical Soc. v. Matson*, 36 Conn. 26.

*Georgia.* — *Wilson v. Savannah First Presb. Church*, 56 Ga. 554.

*Illinois.* — *Robertson v. March*, 4 Ill. 198; *Friedline v. Carthage College*, 23 Ill. App. 494; *Lincoln University v. Hepley*, 28 Ill. App. 629; *Kinsley v. International Military Encampment Co.*, 41 Ill. App. 259; *Pryor v. Cain*, 25 Ill. 292; *Griswold v. Peoria University*, 26 Ill. 41, 79 Am. Dec. 361; *Thompson v. Mercer County*, 40 Ill. 379; *McClure v. Wilson*, 43 Ill. 356; *Miller v. Ballard*, 46 Ill. 377; *M. E. Church v. Garvey*, 53 Ill. 401, 5 Am. Rep. 51; *Snell v. M. E. Church Soc.*, 58 Ill. 290; *Ken-*

*tucky Baptist Education Soc. v. Carter*, 72 Ill. 247; *Hall v. Virginia*, 91 Ill. 535; *Beach v. First M. E. Church*, 96 Ill. 177; *Witsitt v. Pre-emption Presb. Church*, 110 Ill. 125; *Hudson v. Green Hill Seminary Corp.*, 113 Ill. 618; *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 33 Am. St. Rep. 234.

*Indiana.* — *Johnson v. Wabash College*, 2 Ind. 555; *Peirce v. Ruley*, 5 Ind. 69; *Northwestern Conference v. Myers*, 36 Ind. 375; *Roche v. Roanoke Classical Seminary*, 56 Ind. 198.

*Iowa.* — *McDonald v. Gray*, 11 Iowa 508, 79 Am. Dec. 509; *Simpson Centenary College v. Bryan*, 50 Iowa 293; *United Presb. Church v. Baird*, 60 Iowa 237; *Des Moines University v. Livingston*, 65 Iowa 202; *McCabe v. O'Connor*, 69 Iowa 134; *Cottage Hospital v. Merrill*, 92 Iowa 649; *Ft. Madison First M. E. Church v. Donnell*, 110 Iowa 5.

*Kansas.* — *White v. Scott*, 26 Kan. 476.

*Kentucky.* — *Collier v. Baptist Education Soc.*, 8 B. Mon. (Ky.) 68.

*Maine.* — *Foxcroft Academy v. Favor*, 4 Me. 382; *Carr v. Bartlett*, 72 Me. 120; *Maine Cent. Institute v. Haskell*, 73 Me. 140; *Haskell v. Oak*, 75 Me. 519.

*Maryland.* — *Gittings v. Mayhew*, 6 Md. 113.

*Massachusetts.* — *Watkins v. Eames*, 9 Cush. (Mass.) 537; *Bryant v. Goodnow*, 5 Pick. (Mass.) 228; *Church Trustees v. Stetson*, 5 Pick. (Mass.) 506; *Williams College v. Danforth*, 12 Pick. (Mass.) 541; *Mirick v. French*, 2 Gray (Mass.) 420; *Thompson v. Page*, 1 Met. (Mass.) 565; *Ives v. Sterling*, 6 Met. (Mass.) 310; *Homes v. Dane*, 12 Mass. 190, 7 Am. Dec. 55; *Farmington Academy v. Allen*, 14 Mass. 172, 7 Am. Dec. 201; *Cottage St. M. E. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286.

*Michigan.* — *Wesleyan Seminary v. Fisher*, 4 Mich. 515; *Underwood v. Waldron*, 12 Mich. 73; *Comstock v. Howd*, 15 Mich. 237; *Baker v. Johnston*, 21 Mich. 319; *Stevens v. Corbitt*, 33 Mich. 458; *Michigan Midland, etc., R. Co. v. Bacon*, 33 Mich. 466; *Tower v. Detroit, etc., R. Co.*, 34 Mich. 329.

*Minnesota.* — *Bohn Mfg. Co. v. Lewis*, 45 Minn. 164; *Albert Lea College v. Brown*, 88 Minn. 524.

*Missouri.* — *Koch v. Lay*, 38 Mo. 147; *School*



**V. CONDITIONS — 1. In General.** — A subscription may be conditional. If particular terms are prescribed, these terms in themselves are conditions precedent, and the subscriber is bound upon compliance therewith and not otherwise.<sup>1</sup>

A Substantial Rather than a Literal Compliance with the conditions is usually sufficient. But at least a substantial performance is essential.<sup>2</sup>

*Dist. v. Sheidley*, 138 Mo. 672, 60 Am. St. Rep. 576; *Davis v. Johnson*, 49 Mo. App. 240; *Conn v. McCollough*, 12 Mo. App. 356; *James v. Clough*, 25 Mo. App. 147; *Swain v. Hill*, 30 Mo. App. 436; *McClanahan v. Payne*, 86 Mo. App. 284; *Christian University v. Hoffman*, 95 Mo. App. 488.

*Nebraska*. — *Homan v. Steele*, 18 Neb. 652. *New Hampshire*. — *George v. Harris*, 4 N. H. 533, 17 Am. Dec. 446; *Osborn v. Crosby*, 63 N. H. 583.

*New Mexico*. — *Miller v. Preston*, 4 N. Mex. 314.

*New York*. — *Presbyterian Soc. v. Beach*, 74 N. Y. 72; *Marie v. Garrison*, 83 N. Y. 14; *Keuka College v. Ray*, 41 N. Y. App. Div. 200, affirmed 167 N. Y. 96; *Barnes v. Perine*, 15 Barb. (N. Y.) 249, affirmed 12 N. Y. 18; *Reformed Protestant Dutch Church v. Brown*, 29 Barb. (N. Y.) 335; *Wayne, etc., Collegiate Institute v. Smith*, 36 Barb. (N. Y.) 576; *Van Rensselaer v. Ailkin*, 44 Barb. (N. Y.) 547; *Stewart v. Hamilton College*, 2 Den. (N. Y.) 403; *Reformed Protestant Dutch Church v. Brown*, (Supm. Ct. Gen. T.) 17 How. Pr. 287, 29 Barb. (N. Y.) 335, affirmed 4 Abb. App. Dec. (N. Y.) 31, 24 How. Pr. (N. Y.) 76; *Hammond v. Shepard*, (Supm. Ct. Gen. T.) 29 How. Pr. (N. Y.) 188; *Reformed Protestant Dutch Church v. Hardenbergh*, (Supm. Ct. Gen. T.) 48 How. Pr. (N. Y.) 414; *Bort v. Snell*, 39 Hun (N. Y.) 388; *M'Auley v. Billenger*, 20 Johns. (N. Y.) 89; *Keuka College v. Ray*, 41 N. Y. App. Div. 200, affirmed 167 N. Y. 96.

*Ohio*. — *Ohio Wesleyan Female College v. Higgins*, 16 Ohio St. 20; *Irwin v. Lombard University*, 56 Ohio St. 9, 60 Am. St. Rep. 727; *Farmers' College v. McMicken*, 2 Disney (Ohio) 495; *Irwin v. Webster*, 4 Ohio Cir. Dec. 590, 7 Ohio Cir. Ct. 269.

*Oregon*. — *Philomath College v. Hartless*, 6 Oregon 158, 25 Am. Rep. 510.

*Pennsylvania*. — *Ryerss v. Presbyterian Congregation*, 33 Pa. St. 114; *Stokes's Estate*, 14 Phila. (Pa.) 251, 38 Leg. Int. (Pa.) 12; *Caul v. Gibson*, 3 Pa. St. 416.

*Tennessee*. — *Macon v. Sheppard*, 2 Humph. (Tenn.) 335.

*Texas*. — *Hopkins v. Upshur*, 20 Tex. 89, 70 Am. Dec. 375; *Cooper v. McCrimmin*, 33 Tex. 383, 7 Am. Rep. 268; *Williams v. Rogan*, 59 Tex. 438; *Gulf, etc., R. Co. v. Neely*, 64 Tex. 344; *Darnall v. Lyon* (Tex. App. 1892) 19 S. W. Rep. 506.

*Vermont*. — *State University v. Buell*, 2 Vt. 48; *State Treasurer v. Gross*, 9 Vt. 289, 31 Am. Dec. 626; *Troy Conference Academy v. Nelson*, 24 Vt. 189.

*Virginia*. — *Galt v. Swain*, 9 Gratt. (Va.) 633, 60 Am. Dec. 311.

*Wisconsin*. — *Eycleshimer v. Van Antwerp*, 13 Wis. 546; *La Fayette County Monument Corp. v. Magoon*, 73 Wis. 627; *La Fayette*

*County Monument Corp. v. Ryland*, 80 Wis. 29; *Superior Consol. Land Co. v. Bickford*, 93 Wis. 220, citing with approval 24 AM. AND ENCYC. OF LAW (1st ed.) 331.

**1. Conditions Must Be Performed** — *United States*. — *Cincinnati, etc., R. Co. v. Bensley*, 51 Fed. Rep. 738, 6 U. S. App. 115.

*Illinois*. — *Thompson v. Mercer County*, 40 Ill. 379.

*Indiana*. — *Sult v. Warren School Tp.*, 8 Ind. App. 655.

*Iowa*. — *Wrought Iron Bridge Co. v. Greene*, 53 Iowa 562; *Burlington First M. E. Church v. Sweny*, 85 Iowa 627; *Keys v. Weaver*, 95 Iowa 13.

*Maine*. — *Wiswell v. Bresnahan*, 84 Me. 397.

*Michigan*. — *Sickles v. Anderson*, 63 Mich. 421.

*Mississippi*. — *Pratt v. Canton Cotton Co.*, 51 Miss. 470.

*Missouri*. — *Martin v. Creech*, 58 Mo. App. 391.

*Nebraska*. — *Fremont Ferry, etc., Co. v. Fuhrman*, 8 Neb. 99.

*New Hampshire*. — *Porter v. Raymond*, 53 N. H. 519.

*New York*. — *Giles v. Crosby*, 5 Bosw. (N. Y.) 389; *M'Auley v. Billenger*, 20 Johns. (N. Y.) 89.

*Ohio*. — *Johnson v. College Hill Narrow Gauge R. Co.*, 7 Ohio Dec. (Reprint) 466, 3 Cinc. L. Bul. 410.

*Pennsylvania*. — *Garard v. Monongahela College*, 114 Pa. St. 337.

*Vermont*. — *Felt v. Davis*, 48 Vt. 506.

*Virginia*. — *Galt v. Swain*, 9 Gratt. (Va.) 633, 60 Am. Dec. 311.

*Wisconsin*. — *La Fayette County Monument Corp. v. Ryland*, 80 Wis. 29.

Where a subscription for the location of a school stipulates that it be erected within the state and be under the patronage of a certain church, the location of the school does not constitute a condition precedent to the enforcement of the promise. *Northwestern Conference v. Myers*, 36 Ind. 375.

**The Burden Is on the Payee** to prove that the conditions upon which the subscription became payable have been performed. *Highland University Co. v. Long*, 7 Kan. App. 173.

**2. Substantial Performance.** — *Sult v. Warren School Tp.*, 8 Ind. App. 655; *M'Auley v. Billenger*, 20 Johns. (N. Y.) 89. But see *Bohn Mfg. Co. v. Lewis*, 45 Minn. 164.

**Performance by Transferee.** — If the beneficiary abandons the purposes for which the subscription was made, the subscription cannot be transferred to other parties for the purpose of fulfilling the agreement. *Mann v. O'Neil*, 29 Wash. 115.

**Illustrations — Sufficient Compliance.** — The condition of a subscription that a certain amount should be subscribed and "well secured" by a

• **Time for Performance.** — Unless the time within which the condition must be complied with is stipulated, the rule is that performance must be within a reasonable time.<sup>1</sup> But where it is expressly stipulated that performance must be complete on a stated day, then time is essential and there must be a compliance at the time specified.<sup>2</sup>

**2. Condition that Certain Amount Be Subscribed.** — Where the condition is that a certain amount be subscribed, the subscriber's liability is fixed when the condition is performed, and it is immaterial that the requisite amount is secured on different papers,<sup>3</sup> that the fund is afterwards misapplied,<sup>4</sup> or that some of the subscriptions are on various conditions acceded to by the payee.<sup>5</sup>

**Bona Fide Subscriptions Are Essential,** and the requisite amount cannot be obtained on subscriptions which cannot be collected or which the payee agrees not to collect.<sup>6</sup>

**3. Waiver of Conditions.** — The subscriber may waive the conditions in his subscription, either expressly or by acts from which the law will imply a waiver.<sup>7</sup>

**VI. PARTIES TO SUBSCRIPTION — Subscriber.** — The party making the subscription must be a person or an association capable of entering into a binding contract.<sup>8</sup>

stated time, is substantially complied with where the proper amount is subscribed and secured only by the signatures of responsible subscribers. *Somers v. Miner*, 9 Conn. 458.

A condition that a building shall be erected within eighteen months is complied with if within the required time the walls of the building are up and the material on the ground to complete it. *Johnston v. Ewing Female University*, 35 Ill. 518.

A subscription for the erection of a court house on the condition that the same shall be donated to the county is sufficiently complied with when the building is leased to the county for ninety-nine years without payment of rent. *Hall v. Virginia*, 91 Ill. 535.

A subscription for the support of beds in a hospital for the use of soldiers, "but always for use when there are no soldier applicants," is complied with when a ward is set apart with the requisite number of beds to which an application in behalf of a soldier is never refused. *Cottage Hospital v. Merrill*, 92 Iowa 649.

Where a subscription is payable in part when the walls of a building shall be completed there is a sufficient completion when such walls are so far completed as to receive the roof. *Worcester Medical Inst. v. Harding*, 11 Cush. (Mass.) 285.

A stipulation that the subscription shall be paid to the treasurer of a board of trustees to be elected by a convention at a given time and place, is sufficiently complied with if the convention elects the trustees at another place, on a subsequent day, to which such convention has been adjourned. *Wayne, etc., Collegiate Institute v. Greenwood*, 40 Barb. (N. Y.) 72.

**Insufficient Compliance.** — A condition that a school building be a certain size is not complied with where a building materially less in size and capacity is erected. *Sult v. Warren School Tp.*, 8 Ind. App. 655.

A condition that a church be erected on a particular tract of land is not complied with by the erection of the church on a different tract. *Rothenberger v. Glick*, 22 Ind. App. 288.

A subscription on condition that a designated corporation locate at a certain place is not ful-

filled where the officers of the corporation having acquired the stock change the business to a partnership and remove to such place. *Keys v. Weaver*, 95 Iowa 13.

**1. Performance Within Reasonable Time.** — *Paddock v. Bartlett*, 68 Iowa 16; *Waters v. Union Trust Co.*, 129 Mich. 640; *Bohn Mfg. Co. v. Lewis*, 45 Minn. 164.

**2. Time Essential.** — *Cincinnati, etc., R. Co. v. Bensley*, 51 Fed. Rep. 738, 6 U. S. App. 115.

**3. Certain Amount to Be Subscribed.** — *North Ecclesiastical Soc. v. Matson*, 36 Conn. 26.

**4. Franklin College v. Hurlburt**, 28 Ind. 344.

**5. North Ecclesiastical Soc. v. Matson**, 36 Conn. 26.

**6. Subscriptions Must Be Bona Fide.** — *New-London Literary, etc., Inst. v. Prescott*, 40 N. H. 330; *Presbyterian Church v. Cooper*, 45 Hun (N. Y.) 453, *affirmed* 112 N. Y. 517, 8 Am. St. Rep. 767.

**Evidence that Payee Reduced Available Subscriptions to an amount less than that required by the conditions of a subscriber's promise is admissible.** *Middlebury College v. Williamson*, 1 Vt. 212.

**7. Waiver of Conditions.** — *Ex p. Booker*, 18 Ark. 338; *Petty v. Church of Christ*, 95 Ind. 278; *Rothenberger v. Glick*, 22 Ind. App. 288; *Hutchins v. Smith*, 46 Barb. (N. Y.) 235; *Holbrook v. Wilson*, 4 Bosw. (N. Y.) 64; *Reformed Protestant Dutch Church v. Brown*, (Supm. Ct. Gen. T.) 17 How. Pr. (N. Y.) 287, *affirmed* 29 Barb. (N. Y.) 335, 4 Abb. App. Dec. (N. Y.) 31; *Mirick v. French*, 2 Gray (Mass.) 420; *First Universalist Church v. Pungs*, 126 Mich. 670; *Doane v. Treasurer, Wright (Ohio)* 752.

**Part Payment Before Death of the Subscriber** does not waive a failure to perform the conditions of a subscription so that the estate of the deceased is liable for the balance. *Presbyterian Church v. Cooper*, 45 Hun (N. Y.) 453, *affirmed* 112 N. Y. 517, 8 Am. St. Rep. 767.

**Part Payment in Ignorance of the Noncompliance with Conditions** does not constitute a waiver of such conditions. *Felt v. Davis*, 48 Vt. 506. See also *supra*, this title, *Form and Requisites*.

**8. Subscriber.** — *Presbyterian Church v. Cooper*, 45 Hun (N. Y.) 453, *affirmed* 112 N. Y. 517, 8

**Payee.** — As a general rule the payee need not be designated in the subscription paper or known at the time the subscription is made.<sup>1</sup> It is not even necessary that the payee be in existence when the subscription paper is signed.<sup>2</sup> Where the payee is an institution it must be authorized by statute to receive subscriptions.<sup>3</sup>

**VII. NATURE AND EXTENT OF LIABILITY.** — The liability of the subscribers on an ordinary subscription paper is several, and neither is liable beyond the terms of his own subscription.<sup>4</sup>

**VIII. CONSTRUCTION OF CONTRACT.** — The contract evidenced by the subscription, not being essentially different from contracts in general, is to be construed by the same rules of interpretation.<sup>5</sup>

**IX. ACTIONS** — 1. **Enforcement of Contract.** — As soon as the payee has completed his contract in accordance with the terms of the subscription paper, his right of action against each of the subscribers for the respective amounts subscribed becomes complete.<sup>6</sup> And where the time fixed for payment is to

Am. St. Rep. 767; Twenty-third St. Baptist Church v. Cornwell, 56 N. Y. Super. Ct. 260, affirmed 117 N. Y. 601.

1. **Payee.** — Landwerlen v. Wheeler, 106 Ind. 523; Thompson v. Page, 1 Met. (Mass.) 565; Comstock v. Howd, 15 Mich. 237; Swain v. Hill, 30 Mo. App. 436; Strong v. Eldridge, 8 Wash. 595; Methodist Episcopal Soc. v. Lake, 51 Vt. 353. See also *supra*, this title, *Form and Requisites*.

2. **Existence of Payee.** — Griswold v. Peoria University, 26 Ill. 41, 79 Am. Dec. 361; Johnston v. Ewing Female University, 35 Ill. 518; Willard v. M. E. Church, 66 Ill. 55; Thompson v. Page, 1 Met. (Mass.) 565; New Lindell Hotel Co. v. Smith, 13 Mo. App. 7; Reformed Protestant Dutch Church v. Brown, 4 Abb. App. Dec. (N. Y.) 31, 24 How. Pr. (N. Y.) 76, affirming 29 Barb. (N. Y.) 335, 17 How. Pr. (N. Y.) 287.

3. **Institution.** — Sutton v. Otterbein University, 4 Ohio Cir. Dec. 627, 7 Ohio Cir. Ct. 343.

4. **Nature and Extent of Liability** — *Georgia*. — Beck v. Pounds, 20 Ga. 36.

*Illinois*. — Robertson v. March, 4 Ill. 198.

*Indiana*. — Landwerlen v. Wheeler, 106 Ind. 523; Price v. Grand Rapids, etc., R. Co., 18 Ind. 137; Current v. Fulton, 10 Ind. App. 617.

*Michigan*. — Davis v. Belford, 70 Mich. 120.

*Minnesota*. — Laramie v. Tanner, 69 Minn. 156; Gibbons v. Bente, 51 Minn. 499.

*New York*. — Erie, etc., R. Co. v. Patrick, 2 Abb. App. Dec. (N. Y.) 72; Bort v. Snell, 39 Hun (N. Y.) 388.

*Pennsylvania*. — Nellis v. Coleman, 98 Pa. St. 465.

*Texas*. — Darnell v. Lyon, 85 Tex. 455; Batsell v. St. Louis, etc., R. Co., 4 Tex. Civ. App. 580; McFarland v. Lyon, 4 Tex. Civ. App. 586.

**Payment in Advance.** — The liability of a subscriber is not affected by the fact that the other subscribers paid the respective amounts subscribed by them in advance of the time designated. Gulf, etc., R. Co. v. Neely, 64 Tex. 344.

**Liability for Acts of Co-signors.** — Where a person signs a subscription paper agreeing to pay a certain amount toward the attainment of a certain purpose, he is not bound by the action of his co-signors who subsequently held a meeting without notice to him, without his attendance, and without his subsequent recognition of their acts. Curry v. Rogers, 21 N. H. 255.

**Where a Building Is Completed for a Very Different Purpose** from that named in the subscription paper the subscribers are not liable. Worcester Medical Inst. v. Bigelow, 6 Gray (Mass.) 498.

**Liability for Acts Not Contemplated.** — Where a committee appointed by the subscribers does acts not contemplated by the parties to the subscription list the subscribers are not bound. Darnell v. Lyon, 85 Tex. 455; McFarland v. Lyon, 4 Tex. Civ. App. 586.

**Failure of an Agreement Among the Subscribers** does not affect their liability to third persons. Davis v. Johnson, 49 Mo. App. 240.

5. **Condition Construed** — **When Building Inclosed.** — Snell v. M. E. Church Soc., 58 Ill. 290 (stated under INCLOSE, vol. 16, p. 145).

**Construction of Contract.** — See the title INTERPRETATION AND CONSTRUCTION, vol. 17, p. 1.

**Condition or Mere Recital.** — A subscription on condition that the trustees permanently locate the buildings of a university, "which are to cost not less than \$100,000," expresses but a single condition — the location. The stipulation as to cost is a mere statement. Judson University v. Kinkaid, 50 Kan. 369.

**Amount Determined Indirectly.** — A subscription reading, "I agree to give a lease of my house on Genesee street, for three years, \* \* \* which at present rent is \$516," is in substance a cash subscription to that amount, or at least to the full rent of the premises for three years. Syracuse First Baptist Soc. v. Robinson, 21 N. Y. 234.

"I Agree to Subscribe" Construed to Mean "I Agree to Pay." — Strong v. Eldridge, 8 Wash. 595.

**Additional Moneys** paid to the object of the subscription by one of the subscribers should be regarded as a gratuity. Whitsitt v. Preemption Presb. Church, 110 Ill. 125.

6. **When Right of Action Accrues.** — Workman v. Campbell, 46 Mo. 305; James v. Clough, 25 Mo. App. 147; Davis v. Johnson, 49 Mo. App. 240.

**Refusal of Subscriber to Carry Out Agreement Does Not Exonate Performance.** — Patrick v. Barker, 35 Iowa 451.

**That Performance Prevented by Subscriber Is Valid Exonate.** — Williams v. Rogan, 59 Tex. 438.

arrive or may arrive before the time fixed for performance, an action may be brought for the money or other consideration before the performance.<sup>1</sup>

**Notice and Demand** are not prerequisites to enforcement of the subscription unless it is so stipulated in the contract of subscription.<sup>2</sup>

**Where Money or Labor Is Expended.** — Where money is expended or work done on the faith of a subscription the amount of such subscription, or such portion of it as will be equal to the subscriber's portion of the expense incurred, may be recovered.<sup>3</sup> But if no money has been expended and no act done as a consideration or upon the faith of the promise, there can be no recovery.<sup>4</sup>

**Who May Bring Action.** — The Payee named in the subscription paper, or the party subsequently selected to receive the money, may bring an action to enforce the contract of subscription.<sup>5</sup>

The Party Complying with the Terms of the subscription paper becomes the real party in interest and may maintain an action against the subscribers.<sup>6</sup>

The Assignee of the subscription paper who receives such paper as payment for work done in carrying out the terms of the subscription may maintain an action in his own name.<sup>7</sup>

The Co-subscribers may maintain the action where the subscribers have agreed

**Where the Subscription Is Conditional** there must be a full compliance with the conditions of the subscription. *Norton v. Janvier*, 5 Harr. (Del.) 346; *Martin v. Creech*, 58 Mo. App. 391.

1. **Payment Before Performance.** — *Peirce v. Ruley*, 5 Ind. 69.

2. **Notice and Demand Not Necessary.** — *McDonald v. Gray*, 11 Iowa 508, 79 Am. Dec. 509; *Cottage Hospital v. Merrill*, 92 Iowa 649.

3. **Money or Labor Expended** — *Illinois*. — *Cross v. Pinckneyville Mill Co.*, 17 Ill. 54; *Tonica, etc., R. Co. v. McNeely*, 21 Ill. 71; *Pryor v. Cain*, 25 Ill. 292; *Griswold v. Peoria University*, 26 Ill. 41, 79 Am. Dec. 361; *Thompson v. Mercer County*, 40 Ill. 379; *McClure v. Wilson*, 43 Ill. 356; *Kentucky Baptist Education Soc. v. Carter*, 72 Ill. 247; *Pratt v. Baptist Soc.*, 93 Ill. 475, 34 Am. Rep. 187; *Robertson v. March*, 4 Ill. 198.

*Iowa*. — *McDonald v. Gray*, 11 Iowa 508, 79 Am. Dec. 509.

*Massachusetts*. — *Homes v. Dana*, 12 Mass. 190, 7 Am. Dec. 55; *Farmington Academy v. Allen*, 14 Mass. 172, 7 Am. Dec. 201; *Bryant v. Goodnow*, 5 Pick. (Mass.) 228.

*Missouri*. — *Swain v. Hill*, 30 Mo. App. 436.

*New Hampshire*. — *George v. Harris*, 4 N. H. 533, 17 Am. Dec. 446; *Norris v. Leavitt*, 61 N. H. 109.

*Texas*. — *Doyle v. Glasscock*, 24 Tex. 200, cited in *Cooper v. McCrimmin*, 33 Tex. 389; *Williams v. Rogan*, 59 Tex. 440.

4. **Acts Necessary to Enforcement.** — *Pratt v. Baptist Soc.*, 93 Ill. 475, 34 Am. Rep. 187; *Patrick v. Barker*, 35 Iowa 451; *Foxcroft Academy v. Favor*, 4 Me. 382; *Brimhall v. Van Campen*, 8 Minn. 13, 82 Am. Dec. 118; *Norris v. Leavitt*, 61 N. H. 109; *Presbyterian Soc. v. Beach*, 74 N. Y. 72; *Lippincott's Estate*, 21 Pa. Super. Ct. 214.

**Part Payment on an Unenforceable Subscription** does not affect the subscriber's liability unless the beneficiary has done something on the faith of the subscription. *Hull v. Pearson*, 38 N. Y. App. Div. 588.

5. **Payee May Bring Action** — *Illinois*. — *Robertson v. March*, 4 Ill. 198.

*Indiana*. — *Landwerlen v. Wheeler*, 106 Ind. 523.

*Iowa*. — *McDonald v. Gray*, 11 Iowa 508, 79 Am. Dec. 509.

*Maine*. — *Carr v. Bartlett*, 72 Me. 120.

*Massachusetts*. — *Homes v. Dana*, 12 Mass. 190, 7 Am. Dec. 55; *Farmington Academy v. Allen*, 14 Mass. 172, 7 Am. Dec. 201; *Hall v. Thayer*, 12 Met. (Mass.) 130.

*Michigan*. — *Comstock v. Howd*, 15 Mich. 237.

*Missouri*. — *Stilwell v. Glascock*, 47 Mo. App. 554; *Davis v. Johnson*, 49 Mo. App. 240.

*Nebraska*. — *Armstrong v. Buel*, 40 Neb. 803.

*New York*. — *Presbyterian Soc. v. Beach*, 74 N. Y. 72; *Bort v. Snell*, 39 Hun (N. Y.) 388.

*Pennsylvania*. — *Chambers v. Calhoun*, 18 Pa. St. 13, 55 Am. Dec. 583; *Caul v. Gibson*, 3 Pa. St. 416.

*Vermont*. — *Blodgett v. Morrill*, 20 Vt. 509.

**A Subscription Payable to the State Treasurer** has been held enforceable in an action brought in the name of either the state or the state treasurer. *Carpenter v. Mather*, 4 Ill. 376; *State Treasurer v. Cross*, 9 Vt. 289, 31 Am. Dec. 626.

**Where Subscriptions Are Made in Anticipation of the Formation of a corporation** and the corporation is afterward formed, payment of such subscriptions is enforceable in the name of the corporate body. *Whitsitt v. Preëmption Presb. Church*, 110 Ill. 125.

**Not Necessary that the Payee Do the Work** or incur any obligation on account of it. *Presbyterian Soc. v. Beach*, 74 N. Y. 72.

6. **Party Performing Terms of Subscription.** — *Heller v. Elwood Board of Trade*, 18 Ind. App. 188; *Hodges v. Nalty*, 104 Wis. 464.

**A Person Advancing Money on the Strength of a Subscription** becomes a promisee and therefore may maintain an action against the subscriber. *McClure v. Wilson*, 43 Ill. 356; *Bryant v. Goodnow*, 5 Pick. (Mass.) 228; *Swain v. Hill*, 30 Mo. App. 436.

7. **Assignee.** — *Hopkins v. Upshur*, 20 Tex. 89, 70 Am. Dec. 375, cited in *Williams v. Rogan*, 59 Tex. 440.

to make up a specified sum and where the withdrawal of one would increase the amount to be paid by the others.<sup>1</sup>

**Extent of Recovery.** — If all the money subscribed is necessarily used in securing the thing designed, the recovery will be limited by the amount subscribed. But if the amount necessarily expended was less than the whole amount subscribed, the recovery will then be limited to the amount so expended and will be divided among the subscribers *pro rata*.<sup>2</sup>

**2. Recovery of Money Paid on Subscription.** — If the subscriber pays the amount of his subscription and the payee fails to comply with the terms of the contract the sum paid may be recovered.<sup>3</sup>

**3. Evidence.** — Evidence is properly admitted for the purpose of showing what was the general understanding among the persons who signed the subscription paper,<sup>4</sup> and where the paper does not state the consideration or states it incorrectly the real consideration may be shown by evidence *aliunde*.<sup>5</sup>

**The Burden Is on the Payee** to establish under the terms of the subscription that he has substantially complied with the conditions precedent. It is not necessary for the payee to prove a literal compliance in the performance of the conditions precedent, but it is incumbent upon him to show a substantial compliance with such terms.<sup>6</sup>

**X. RESCISSION.** — A gratuitous subscription, being a mere offer, is susceptible of revocation at any time until it is acted upon.<sup>7</sup> But after acceptance of and compliance with the terms of the subscription or after liabilities and expenses have been incurred on the faith of the promise there can be no revocation.<sup>8</sup>

**Death or Insanity of Subscriber.** — If the subscriber dies or becomes insane before his offer is accepted it is thereby revoked and cannot by any subsequent act showing acceptance be made good as against his estate.<sup>9</sup> Conversely, where

**1. Co-subscribers May Bring Action.** — Grand Lodge, etc., *v. Farnham*, 70 Cal. 158; *George v. Harris*, 4 N. H. 533, 17 Am. Dec. 446; *Curry v. Rogers*, 21 N. H. 247; 1 Wharton on Contracts, 719.

**2. Extent of Recovery.** — *Miller v. Ballard*, 46 Ill. 377; *McFarland v. Lyon*, 4 Tex. Civ. App. 586; *Hodges v. Nalty*, 104 Wis. 464.

**3. Recovery of Amount Paid.** — *Carter v. Carter*, 14 Pick. (Mass.) 424; *Batsell v. St. Louis*, etc., R. Co., 4 Tex. Civ. App. 580; *Troy Conference Academy v. Nelson*, 24 Vt. 189.

**Damage for Breach of Contract** may be recovered. *Brimhall v. Van Campen*, 8 Minn. 13, 82 Am. Dec. 118.

**4. Evidence to Show General Understanding.** — *Burlington First M. E. Church v. Sweny*, 85 Iowa 627; *Presbyterian Soc. v. Beach*, 74 N. Y. 72; *Keuka College v. Ray*, 41 N. Y. App. Div. 200, affirmed 167 N. Y. 96; *Mann v. O'Neil*, 29 Wash. 115.

**5. Consideration May Be Shown.** — *Barnes v. Perine*, 15 Barb. (N. Y.) 249.

**6. Burden Is on Payee.** — *Sult v. Warren School Tp.*, 8 Ind. App. 655.

**7. Offer May Be Rescinded Until Acted Upon** — *Arkansas*. — *Rogers v. Galloway Female College*, 64 Ark. 627.

*California*. — *Grand Lodge, etc., v. Farnham*, 70 Cal. 158.

*Illinois*. — *McClure v. Wilson*, 43 Ill. 356; *M. E. Church v. Garvey*, 53 Ill. 401, 5 Am. Rep. 51; *Kentucky Baptist Education Soc. v. Carter*, 72 Ill. 247; *Pratt v. Baptist Soc.*, 93 Ill. 475, 34 Am. Rep. 187; *Beach v. First M. E. Church*, 96 Ill. 177; *Richelieu Hotel Co. v. International Military Encampment Co.*, 140 Ill. 248, 33 Am.

St. Rep. 234; *Augustine v. Methodist Episcopal Soc.*, 79 Ill. App. 452.

*Massachusetts*. — *Cottage St. M. E. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286; *Williams College v. Danforth*, 12 Pick. (Mass.) 541.

*Missouri*. — *Workman v. Campbell*, 46 Mo. 305; *Corrigan v. Detsch*, 61 Mo. 290; *Lapsley v. Howard*, 119 Mo. 489; *Egger v. Nesbitt*, 122 Mo. 668, 43 Am. St. Rep. 596; *McClanahan v. Payne*, 86 Mo. App. 284.

*New York*. — *Twenty-third St. Baptist Church v. Cornell*, 117 N. Y. 601.

*Pennsylvania*. — *Stokes's Estate*, 14 Phila. (Pa.) 251, 38 Leg. Int. (Pa.) 12.

*Texas*. — *Williams v. Rogan*, 59 Tex. 438.

*Wisconsin*. — *La Fayette County Monument Corp. v. Magoon*, 73 Wis. 627.

**8. No Rescission After Acceptance.** — *Amherst Academy v. Cows*, 6 Pick. (Mass.) 433, 17 Am. Dec. 387; *Barnes v. Perine*, 9 Barb. (N. Y.) 202; *Hopkins v. Upshur*, 20 Tex. 89, 70 Am. Dec. 375; *Gulf, etc., R. Co. v. Neely*, 64 Tex. 344; *La Fayette County Monument Corp. v. Ryland*, 80 Wis. 29; *Superior Consol. Land Co. v. Bickford*, 93 Wis. 220; *Hodges v. O'Brien*, 113 Wis. 97.

**9. Rescission by Death or Insanity of Subscriber.** — *Grand Lodge, etc., v. Farnham*, 70 Cal. 158; *Pratt v. Baptist Soc.*, 93 Ill. 475, 34 Am. Rep. 187; *Beach v. First M. E. Church*, 96 Ill. 179; *Cottage St. M. E. Church v. Kendall*, 121 Mass. 528, 23 Am. Rep. 286; *Twenty-third St. Baptist Church v. Cornell*, 117 N. Y. 601; *Phipps v. Jones*, 20 Pa. St. 260, 59 Am. Dec. 708; *Helfenstein's Estate*, 77 Pa. St. 331; *Reimensnyder v. Gans*, 110 Pa. St. 17; *Stokes's Estate*, 14 Phila. (Pa.) 251, 38 Leg. Int. (Pa.) 12.

the subscription is supported by a sufficient consideration the death of the subscriber does not operate as a revocation thereof.<sup>1</sup>

**SUBSEQUENT.**—See note 2.

**SUBSEQUENTLY.**—See note 3.

1. **Subscription Supported by Consideration.**—*Waters v. Union Trust Co.*, 129 Mich. 640.

2. **Subsequent Action.**—The English Married Woman's Property Act of 1874 enacted that when a husband after marriage had a judgment *bona fide* recovered against him in any action brought under the act to recover a debt of the wife contracted before marriage, then to the extent of such judgment "the husband shall not in any *subsequent* action be liable." It was held that the words "any *subsequent* action" meant any action commenced *subsequently* to the time of bringing the action in which judgment had been recovered, and not merely any action commenced *subsequently* to the recovery of the judgment. *Fear v. Castle*, 8 Q. B. D. 380.

**Subsequent Conditions.**—See the title **CONDITIONS**, vol. 6, p. 499.

**Subsequent Creditors.** (See also the titles **FRAUDULENT SALES AND CONVEYANCES**, vol. 14, p. 210; **RECORDING ACTS**, vol. 24, p. 73; and see **CREDITOR**, vol. 8, p. 242, note.)—In *McGhee v. Wells*, 57 S. Car. 280, it was said: "The term '*subsequent* creditors' means creditors whose debts were contracted *subsequent* to the deed in question. *King v. Fraser*, 23 S. Car. 543; *Carraway v. Carraway*, 27 S. Car. 576; *Armstrong v. Carwile*, 56 S. Car. 471. It follows, of course, that the entry of judgment *subsequent* to the deed and its record will not constitute the judgment creditor a *subsequent* creditor, unless the debt upon which the judgment is based arose *subsequent* to the deed in question."

**Subsequent Negligence.**—In *Holwerson v. St. Louis, etc., R. Co.*, 157 Mo. 234, it was said: "'Prior' and *subsequent* are very nearly, and often exactly, equivalent to 'proximate' and 'remote.' \* \* \* '*Subsequent* negligence' means ordinarily, in the judge's opinion, the negligence that did the mischief, which is more usually known as negligence which is a proximate cause."

**Subsequent Purchaser.** (See also the titles **FRAUDULENT SALES AND CONVEYANCES**, vol. 14, p. 210; **PURCHASERS FOR VALUE AND WITHOUT NOTICE**, vol. 23, p. 472; **RECORDING ACTS**, vol. 24, p. 73.)—A *subsequent* purchaser in good faith is one who buys without notice and without intent to defraud creditors or other persons of their demands. *Westheimer v. Goodkind*, 24 Mont. 90.

So "a *subsequent* purchaser" has been held to mean *subsequent bona fide* purchaser for a valuable consideration. *Van Rensselaer v. Clark*, 17 Wend. (N. Y.) 25, 31 Am. Dec. 280.

**Same—Chattel Mortgage.** (See also the title **CHATTEL MORTGAGES**, vol. 5, p. 1013.)—A statute provided that mortgages of personal property not followed by a change of possession should be void as against *subsequent* purchasers and mortgagees in good faith unless

recorded. In construing this provision the court said: "It seems that a '*subsequent* purchaser in good faith' \* \* \* is one who acquires title to mortgaged property by contract with the mortgagor, or his vendee, after the execution of the mortgage, and without notice thereof." *Farmers, etc., Bank v. Anthony*, 39 Neb. 343.

In *Sylvester v. The Ship Gordon Gauthier*, 4 Can. Exch. 354, it was held that the mortgagee of a ship who took possession under his mortgage before the institution of an action *in rem* for the recovery of a claim which constituted a maritime lien did not thereby become a *subsequent* purchaser within the meaning of the Maritime Court Act, § 14, subsec. 5, as against the lienholder, although the lien might have arisen since the date of the mortgage.

**Same—Recording Acts—Purchaser from Grantor Only.**—Under a recording act providing that deeds of trust or mortgage should be effective as to *subsequent* purchasers from the time of delivery to the clerk to be recorded, the phrase "*subsequent* purchasers" was held to mean purchasers from the grantor directly, and not purchasers at execution sale. *Henson v. Downing*, 24 Miss. 115.

Under an act which provided that conveyances of real estate should be void as against a "*subsequent* purchaser" in good faith and for valuable consideration whose conveyance should be first recorded, it was held that "*subsequent* purchaser" meant a *subsequent* purchaser from the same grantor. *Smith v. Williams*, 44 Mich. 244.

**Time.**—The word *subsequent* in a recording act has been held to refer to the time of recording, and not to the date of the instrument. *Doyle v. Teas*, 5 Ill. 252.

3. **Subsequently.**—Under the United States Bankruptcy Act of 1867, it was provided that a discharge should be invalid if the bankrupt, being a merchant or tradesman, had not "*subsequently* to the passage of this act" kept proper books of account. In *In re Rosenfield*, 20 Fed. Cas. No. 12,058, it was said that the word *subsequently* in this provision meant "at a later time" or "afterwards," in distinction from "since," which "includes the whole period between an event and the present time," and consequently that it was sufficient to show that a bankrupt within the clause had at any time after the passage of the act neglected to keep such books. But in *In re Cretiew*, 6 Fed. Cas. No. 3,390, the distinction between the words "since" and *subsequently*, while admitted in the abstract was not considered applicable to the construction of a legislative enactment, where "most words not technical in their character are used in their general and popular sense, without nice discrimination." See also **SINCE**, vol. 25, p. 1068.

**SUBSERVIENT.**—"Subservient" is defined to mean useful, as an instrument to promote a purpose; serving to promote some end.<sup>1</sup>

**SUBSISTING.**—See note 2.

**SUBSTANCE.** (See also **PURPORT**, vol. 23, p. 527.)—That which is essential; used in opposition to "form."<sup>2</sup> The term has also the meaning of estate, property, etc.<sup>3</sup>

**SUBSTANTIAL.** (See also **ILLUSIVE**, vol. 15, p. 1019.)—See note 5.

1. **Subservient.**—*People v. Graceland Cemetery Co.*, 86 Ill. 338, in which case a charter exempting from taxation property "*subservient* to burial uses" was construed. See the case stated under the title **EXEMPTIONS (FROM TAXATION)**, vol. 12, p. 344.

2. **Subsisting**—**Set-off.**—In construing the statute now embodied in Civ. Code Ala. (1896) § 3732 (stated in the title **SET-OFF, RECOUPMENT, AND COUNTERCLAIM**, vol. 25, p. 515, note 3), the court said: "It is thus shown that a debt against which the statutory bar has run is in one sense a *subsisting* demand. We hold, however, that the word *subsisting*, as employed in the statute we are construing, has a more confined meaning, and that the precise object the legislature had in view was that demands held by defendants when the adversary plaintiff's right of action accrued, if then free from the infirmity of age, should not afterwards lose their availability as a defense by mere lapse of time." *Washington v. Timberlake*, 74 Ala. 263.

3. **Substance.**—*Bouv. L. Dict.*, followed in *Douglass v. Beasley*, 40 Ala. 142; *Com. v. Borden*, 61 Pa. St. 276. See also *Briggs v. Greenlee*, Minor (Ala.) 124, and see **FORM**, vol. 13, p. 1115; **MATTER**, vol. 20, p. 234.

**Substance of Testimony.**—In *Com. v. Borden*, 61 Pa. St. 276, in construing the rule that upon certiorari the *substance* of the testimony is to be recorded and returned with the writ, the court said: "Had the justice merely set forth what he considered was the effect or the result of the evidence, it would have been insufficient according to some of the authorities. \* \* \* But he gives the *substance* of the testimony itself. '*Substance*,' says Webster in his unabridged dictionary, is the 'essential part, the main or material part.'"

**Plea in Short.**—In *Pollard v. Stanton*, 5 Ala. 453, it was held that an agreement to take a plea in short "must be understood as a mere waiver of form, and not of *substance*; it must convey some precise and definite idea of the matter of defense, and must be sufficient in *substance*."

**Substance in Sense of Substance in Pleading.**—*Wells v. Woodley*, 5 How. (Miss.) 493.

**"Substance and Effect."**—See **EFFECT**, vol. 10, p. 445.

4. **Property or Estate.**—Thus, upon the construction of a will, it was said by Lord Mansfield, C. J., in *Hogan v. Jackson*, 1 Cowp. 307: "What is *substance*? It is every property a man has. So, in the statute 4 & 5 P. & M., c. 8, for the punishment of such as shall take away maidens that be inheritors, the word *substance* is made use of, and means worldly wealth."

**All Articles Composed of Mineral Substances—Revenue Law.**—See *Dingelstedt v. U. S.*, (C. C. A.) 91 Fed. Rep. 113.

5. **Substantial Damages.**—See the title **DAMAGES**, vol. 8, p. 542.

**Substantial Right.**—A *substantial* right has been defined as one involving a legal right, such a right as may be enforced and protected by law. *Fox v. Keister*, 8 Ohio Dec. 638; *Armstrong v. Herancourt Brewing Co.*, 53 Ohio St. 467. See also *Missionary Soc. v. Ely*, 56 Ohio St. 405; *Cincinnati, etc., R. Co. v. Sloan*, 31 Ohio St. 1.

**Statutes Regulating Appeals** frequently require that, to be appealable, an order must affect a *substantial* right. This means only that the order "must affect a *substantial* interest—a matter of substance and not of mere form." *Martin v. Windsor Hotel Co.*, 70 N. Y. 103. See also *Rathbun v. Ingersoll*, 34 N. Y. Super. Ct. 213; *Morehouse v. Yeager*, 38 N. Y. Super. Ct. 50; *People v. New York Cent. R. Co.*, 29 N. Y. 421; *Livermore v. Bainbridge*, 56 N. Y. 72, 15 Abb. Pr. N. S. (N. Y.) 436.

"By *substantial* right," in this connection, "is to be understood such rights only as are to be determined as pure questions of law; such only as can be demanded as the strict legal right of the party." *Foote v. Lathrop*, 41 N. Y. 361.

"The phrases 'involving the merits' and 'affecting a *substantial* right' relate only to the subject-matter of the litigation, and not to mere matters of practice which cannot affect that, whether regulated by statute or not." *Rahn v. Gunnison*, 12 Wis. 531, holding that the attestation of the summons in an action did not affect a *substantial* right.

**Substantial and Vested Rights.** (See also the title **VESTED RIGHTS**.)—In *Day v. Madden*, 9 Colo. App. 475, it was held that "the right to a writ of attachment, when it accrued and was exercised while the statute was in force permitting it, gave to the attachment plaintiff a right which may be called 'vested' or *substantial*, at pleasure, but nevertheless a right which could be neither taken away nor destroyed by the repeal of the statute under which it had been regularly acquired."

**Substantial Wrong—Ground for New Trial.**—In *Reg. v. Hamilton*, 2 Can. Crim. Cas. (Manitoba) 390, it was held, where a deposition of a witness, afterwards deceased, taken at an inquiry before a magistrate had been improperly admitted in evidence at the trial, and was of such a nature that it must have influenced the jury in the verdict, that its improper admission was a "*substantial* wrong" (Crim. Code, § 746) entitling the accused to a new trial.

In an action for libel the judge misdirected the jury in favor of the plaintiff upon a material part of the libel, and the jury gave a verdict for large damages. It was held that since the assessment of damages was a peculiar province of the jury, and since the jury had not the defendant's real case submitted to it and might, in assessing the damages, have been

**SUBSTANTIALLY.**—The term “substantially” means really; truly; essentially; competently;<sup>1</sup> in a substantial manner; in substance.<sup>2</sup>

**SUBSTANTIVE.**—“An accurate definition of the word ‘substantive’ is ‘depending upon itself.’”<sup>3</sup>

influenced by the misdirection, there had been “a *substantial* wrong and miscarriage” (order xxxix, rule 6, Supreme Ct.) entitling the defendant to a new trial. *Bray v. Ford*, (1896) A. C. 44.

**Substantial Compliance—Iron-safe Clause in Fire-insurance Policy.**—See the title FIRE INSURANCE, vol. 13, p. 356.

**Substantial and Workmanlike.**—A building contract provided that the work was to be done in a *substantial* and workmanlike manner. It was held that what amounted to doing the work in a plain, *substantial*, and workmanlike manner was a question exclusively for the jury. The court said: “To do a thing in a plain, *substantial*, and workmanlike manner would imply that it should be perfectly done for the character of the job contemplated.” *Smith v. Clark*, 58 Mo. 146. See also *Leeds v. Little*, 42 Minn. 414; *Elliott v. Caldwell*, 43 Minn. 357; and see the title WORKING CONTRACTS.

1. **Substantially.**—*Cheesman v. Hart*, 42 Fed. Rep. 90.

2. *Hardin County v. Wells*, 108 Iowa 174.

**Substantially and Fully.**—In *Hardin County v. Wells*, 108 Iowa 174, it is said: “To say that a given sum is ‘*substantially*, if not wholly,’ paid is not the equivalent of a statement that it is fully paid.”

**Substantially Built Dwelling House.**—See *Johnson v. Smart*, 6 Jur. N. S. 815. This was a suit for specific performance, the defense being a misrepresentation as to the house being *substantially* built.

**Substantially Changing Claim.**—In *Dougan v. Turner*, 51 Minn. 330, it was said: “No error is assigned or shown in receiving the evidence going to establish the fact as found by the court, and it is conceded that the evidence tended to establish that fact. Hence, in allowing the amendment ‘conforming the pleading \* \* \* to the fact proved’ (Gen. Stat. 1878, c. 66, § 124) there was no error. The change thus made cannot be deemed to have substantially changed the claim, within the meaning of that word in the statute cited.” See generally the title AMENDMENTS, 1 ENCYC. OF PL. AND PR. 578 *et seq.*

**Substantially Completed.**—The term “*substantially* completed” when used in reference to a railroad has been held to apply to a railroad the roadbed of which is in such condition that it lacks but twenty per cent. of completion. *Louisiana, etc., R. Co. v. State Board of Appraisers*, 108 La. 14.

**Substantially Described—Substantially as Set Forth.** (See also the title PATENTS, vol. 22, p. 352.)—In *Hobbs v. Beach*, 180 U. S. 399, it was held that the words “*substantially* as described or set forth,” in a claim for a patent, “do not limit the patentee to the exact mechanism described in his specification or prevent recovery against infringers who have adapted mechanical equivalents for such mechanism.” As to the meaning of these words when used in this connection, see also *Seymour v. Osborne*,

11 Wall. (U. S.) 516; *Mitchell v. Tilghman*, 19 Wall. (U. S.) 287; *Corn Planter Patent*, 23 Wall. (U. S.) 181; *Lee v. Pillsbury*, 49 Fed. Rep. 747; *Morley Sewing Mach. Co. v. Lancaster*, 129 U. S. 263; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 537; *Boyden Power-Brake Co. v. Westinghouse Air-Brake Co.*, (C. C. A.) 70 Fed. Rep. 826, wherein it was said: “The phrase ‘*substantially* as set forth’ is technical, and is equivalent to saying ‘by the means described in the text of the inventor’s application for letters patent, as illustrated by the drawings, diagrams, and models which accompany the application.’ These words limit the general terms of the specification which set out the function performed by the invention, and confine the inventor’s rights to his own special means of performing the function.”

**Substantially Identical.**—In *Com. v. Stone*, 103 Mass. 421, it was held, where the jury in a criminal case found that the name of the person upon whom the offense was committed was *substantially* identical with the name charged in the indictment, that this was sufficient.

**Substantially in the Same Condition** means that there is no material change. *In re Boone*, 83 Fed. Rep. 962.

**Substantially Naphtha.**—Upon the trial of one charged under a *Massachusetts* statute with keeping naphtha and offering it for sale, the trial judge instructed the jurors that they were to decide whether the article alleged to have been offered for sale “was *substantially* naphtha.” The court said: “The instruction excepted to was correct, the word *substantially* being clearly used as meaning ‘really or essentially.’” *Com. v. Wentworth*, 118 Mass. 442.

**Privy Examination of Married Women.** (See also the title ACKNOWLEDGMENTS, vol. 1, p. 483.)—A statute provided that the certificates of privy examination of married women should be “*substantially* as follows,” giving a form. It was said that “the word *substantially* is used in this connection, as it often is, in the sense of comprehending all of the form given that is necessary or essential.” *Lineberger v. Tidwell*, 104 N. Car. 513.

**Substantially True Copy.**—In *Thomas v. State*, 103 Ind. 426, it was said: “‘*Substantially* a true copy’ does not mean a full and exact copy, but rather a copy of the material and essential parts, or an abstract of them.”

3. **Substantive Felony.**—*State v. Ricker*, 29 Me. 89, following *Webst. Dict.* In this case, decided under the *Maine* statute allowing an accessory before the fact to be indicted and convicted of *substantive* felony, the court said: “A *substantive* felony is that which depends upon itself, and is not dependent upon another felony, which is established by the conviction of the one who committed it alone.” And it was held that the accessory may be indicted and convicted without reference to the conviction of the principal, although the guilt of the principal must be shown. See also the title ACCESSORY, vol. 1, p. 263.



**SUBSTANTIVE REQUIREMENT.** — See FORM—FORMAL—FORMALITIES, vol. 13, p. 1117.

**SUBSTITUTE — SUBSTITUTION.** (See also DEVICE, vol. 9, p. 448.) — A substitute is a person or thing put in the place of another person or thing.<sup>1</sup>

**SUBSTITUTED COMPLAINT.** — “A ‘substituted complaint’ *ex vi termini* imports a complaint filed to take the place of that previously filed, and excludes such previous complaint from the record as an operative pleading in the cause.”<sup>2</sup>

**SUBSTITUTIONAL REQUESTS AND DEVISES.** — See the titles LEGACIES AND DEVISES, vol. 18, p. 731; WILLS.

**SUBTERRANEAN WATERS.** — See the title WATERS AND WATERCOURSES.

**SUBURBAN.** — See the title RESIDENCE, RESIDENT, ETC., vol. 24, p. 694.

**SUBVERT.** — See note 3.

**SUCCEEDING.** — See note 4.

**SUCCESSFUL.** — See note 5.

1. *Substitute.*—Henderson v. State, 59 Ala. 91.  
*Substitutes in Military Law.*—See the title MILITARY LAW, vol. 20, p. 628.

*Substitution of Attorneys.*—See the title SUBSTITUTION OF ATTORNEYS, 20 ENCYC. OF PL. AND PR. 1008.

*Substitution of Parties.*—See the title SUBSTITUTION OF PARTIES, 20 ENCYC. OF PL. AND PR. 1019.

*Substitution in Sense of Subrogation.*—See the title SUBROGATION, ante, p. 199, and see Orem v. Wrightson, 51 Md. 34.

*Substitution of Records.*—See the title LOST PAPERS AND RECORDS, vol. 19, p. 555 *et seq.*

*Substituted Security.*—See City of London Brewery Co. v. Inland Revenue Com'rs, (1899) 1 Q. B. 121.

2. *Substituted Complaint.*—Britz v. Johnson, 65 Ind. 562.

3. *Subvert.*—Where the plaintiff alleged that the defendant had *subverted* the water of a spring, it was held that the allegation did not “give the defendant any notice that he would be called upon to answer any charge of corrupting the water in the spring. *Subvert* has no such natural signification as applied to material objects like a vein or stream of water.” Chesley v. King, 74 Me. 170, 43 Am. Rep. 569.

4. *Succeeding.*—The word *succeeding* is susceptible of different significations, and is used in different senses, with an exclusive or inclusive meaning, according to the subject to which it is applied. Sands v. Lyon, 18 Conn. 29. See also Webster v. French, 12 Ill. 304.

5. *Successful Party.* (See also PREVAILING PARTY, vol. 22, p. 1292, and see the title COSTS, 5 ENCYC. OF PL. AND PR. 100.) — A Wisconsin statute provided that in case of a new trial on appeal, costs should be allowed the *successful party*. It was held that the words *successful*

*party* had reference to the party finally recovering judgment, without reference to the question whether it was more or less than that rendered by the justice. Smithbeck v. Larson, 18 Wis. 183; Norwegian Evangelical Lutheran Church v. Thorson, 21 Wis. 35; Schoeffel v. Hinze, 47 Wis. 648.

In Cole v. Richmond Min. Co., 18 Nev. 124, it was said: “A party, however, may be *successful* in a suit without winning everything that is asked for. The question whether a party is *successful* or not depends upon the particular facts of each case; upon the issues raised; upon the contest made.”

*Successful Claimant.*—In Smith v. Laumeier, 12 Mo. App. 546, affirmed 84 Mo. 673, it was held that the *successful* claimant mentioned in the Missouri Revenue Law of 1872, § 220, was one who claimed adversely to the demands of the revenue law, and not one claiming under a subsequent tax sale.

*Successful Vaccination.*—In Sovereign Camp Woodmen of the World v. Woodruff, 80 Miss. 554, it was said: “We think it plainly inferable from the terms of the application for insurance in this case that the association did not use the phrase ‘*successful* vaccination’ in the sense of an entire immunity from smallpox. \* \* \* ‘*Successful* vaccination’ carries the idea merely of the production upon the person vaccinated of such symptoms or manifestations as are usually produced by such operation when considered effective. The eruption produced by the inoculation, with its accompanying characteristics, is the only certain evidence that vaccination has taken or is *successful*. That ‘*successful* vaccination’ only means that the virus has taken upon the person inoculated, is supported by the Century Dictionary (word ‘*Vaccination*’).”

# SUCCESSION.

BY THEODOR MEGAARDEN.

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*the rights and liabilities of heirs and distributees, see the title DEBTS OF DECEDENTS*, vol. 8, p. 1003; *in connection with which, see also, as to matters of Pleading and Practice, the title HEIRS AND DEVISEES*, 10 ENCYC. PL. & PR. 20.  
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*inheritance and succession taxes, see the title SUCCESSION TAXES.*

*property undisposed of by will, and the rights of pretermitted children, see the title WILLS.*

**I. DEFINITIONS — Succession.** — Succession, in the civil law, denotes the transmission of the rights and obligations of a deceased person to his heir or heirs.<sup>1</sup> The term is employed in the statutes of some of the states to denote the devolution of title to property under the statutes of descents and distributions. It is proposed in this title to deal with what is frequently called the Law of Descent and Distribution, and to use the term "succession" as synonymous with descent and distribution. Succession, as the term is here used, may be defined as "the coming in of another to take the property of one who dies without disposing of it by will."<sup>2</sup>

**Descent.** — Descent, in its technical meaning, is hereditary succession to an estate in realty; it is the succession to the ownership of an estate by inheritance, or by an act of law, as distinguished from purchase.<sup>3</sup>

**Distribution.** — The term "distribution" is commonly used to express the division of the personal estate of an intestate, according to the rules prescribed by law.<sup>4</sup>

**Distinction Between Descent and Distribution.** — Thus it will be seen that the term "descent" is usually applied to the devolution of real estate, and "distribution" to that of personalty.<sup>5</sup>

**Inheritance.** — The term "inheritance" is often used as synonymous with descent to denote the fact of receiving an estate as heir. It therefore refers to the devolution of real property. But, while this is its strict legal significance, in its popular acceptance the word "inheritance" includes the devolution of both real and personal property, and is coextensive in meaning with succession.<sup>6</sup>

**II. NATURE AND THEORY OF SUCCESSION.** — A person may, subject only to certain restrictions imposed by law for the protection of the wife and surviving minor children,<sup>7</sup> freely alien any of his property during his lifetime, or dispose of the same by last will. But, upon the death of a person, the law, in the absence of testamentary disposition by him, disposes of his property as it might be presumed that he himself would do if acting rationally and without motives or influences outside of the family relation.<sup>8</sup> It would seem hardly necessary to say that, whatever may be the rules governing the devolution of

1. **Definition of Succession.** — See Domat Civ. L., pt. 2, pref.; Pothier, Des Successions; Toullier, 1, 3, tit. 1; Hal. Civ. L. 47; Adams v. Akerlund, 168 Ill. 640.

**Louisiana — Kinds of Succession.** — In Louisiana, succession is the transmission of the rights, estate, obligations, and charges of a deceased person to his heir or heirs; legal succession is that which is established in favor of the nearest relations of the deceased; irregular succession is that which is established by law in favor of certain persons or of the state in default of heirs either legal or instituted by testament; testamentary succession is that which results from the constitution of the heir, contained in a testament executed in the form prescribed by law. Bouv. L. Dict. See Simmons v. Saul, 138 U. S. 449; Davenport v. Adler, 52 La. Ann. 263.

2. **Definition Adopted.** — Deering's Ann. Civ. Code of California, § 1383; Matter of Headen, 52 Cal. 298; In re Burdick, (Cal. 1895) 40 Pac.

Rep. 36; Matter of Burdick, 112 Cal. 387; Dakota Civ. Code, § 776; Idaho Stat. 1887, § 5700. See Blake v. McCartney, 4 Cliff. (U. S.) 103; Hunt v. Hunt, 37 Me. 344.

3. **Definition of Descent.** — See the title DESCENT, vol. 9, p. 400; Hudnall v. Ham, 172 Ill. 76.

4. **Definition of Distribution.** — See DISTRIBUTION, vol. 9, p. 660.

5. **Descent and Distribution Distinguished.** — See Beard v. Lofton, 102 Ind. 408; Horner v. Webster, 33 N. J. L. 413.

6. **Definition of Inheritance.** — Adams v. Akerlund, 168 Ill. 640; Horner v. Webster, 33 N. J. L. 413; Swanson v. Swanson, 2 Swan (Tenn.) 460.

7. See DOWER, vol. 10, p. 124; HOMESTEAD, vol. 15, p. 516.

8. **Theory of Intestate Succession.** — See Edwards v. Freeman, 2 P. Wms. 442; Hunt v. Hunt, 37 Me. 344; Garland v. Harrison, 8 Leigh (Va.) 368.

property in any country, they must of necessity be more or less arbitrary and artificial, "creatures of the civil polity, and *juris positivi* merely."<sup>1</sup> What these rules shall be, must, therefore, in the nature of things, depend upon the condition and genius of the people among whom they prevail.<sup>2</sup>

**III. ORIGIN OF LAW OF SUCCESSION — 1. Succession to Personal Property — By Common Law.** — The right of succession to the personal property of one who died without making any disposition thereof by will, or otherwise, can hardly be said to have been recognized by the common law. By the common law, the personal property of an intestate went to the bishop, or ordinary,<sup>3</sup> who, after paying the debts of the decedent as far as his goods extended, in compliance with an early statute,<sup>4</sup> himself appropriated the residue, to be devoted to pious uses, or, in other words, to the purchase of masses to be said for the repose of the soul of the deceased. Later statutes compelled administrator to be granted to the next relatives of the deceased.<sup>5</sup> And when, at the time of the Protestant Reformation, the saying of masses was declared, by Parliament, to be superstitious, and was no longer allowed by the courts, the administrator, after the payment of the debts and funeral expenses of the deceased, took what remained.<sup>6</sup>

**By Statute.** — The hardships of allowing the administrator to enjoy the surplus property to the exclusion of the intestate's kin of equal degree with the administrator, led to the enactment of the Statute of Distributions,<sup>7</sup> providing for distribution among the widow and next of kin. This statute may, therefore, be said to have first given the right of distribution. Each of the United States has its own statute of distribution. The American statutes, while differing from one another in detail, are but modifications of the English statute.

**2. Succession to Real Property — By Common Law.** — The growth of the common law produced a number of rules or canons of inheritance, which have long regulated the transmission of real property from the ancestor to the heir in so clear and decided a manner as to preclude all uncertainty as to the course which the descent is to take.

**By Statute.** — But these rules having grown up under, and being founded upon, the feudal system of the middle ages, were found incompatible with the institutions of the present age. A departure from the common law was first begun in the United States. At an early period in the history of the colonies, important departures from these canons were made in the progress of legislation.<sup>8</sup> And when the colonies became states, each had its own system of rules for the government of property within its limits, all departing more or less from the common law, and some varying materially from others. At the present time, the common law has been universally rejected in the United States, and each state has established a law of descent for itself. In England material modifications have been ingrafted upon the ancient canons.<sup>9</sup>

**3. Source and Construction of Succession Statutes.** — The English statute of distributions, which was to a great extent founded upon the civil law, being

1. 2 Bl. Com. 211.

2. 3 Washb. R. P., § 9; *Jones v. Barnett*, 30 Tex. 637.

3. *Common-law Disposition of Intestate's Personal Property.* — Dwight L. of Pers. & Pers. Prop. 638, wherein it is said, in effect, that the theory advocated by Coke, in *Hensloe's Case*, 9 Coke 37 (which is also Blackstone's theory; see 2 Bl. Com. 494), that this power did not belong to the ordinary from any intrinsic right, but that he enjoyed it only by the concession of the king, is no longer tenable. See also *Manning v. Napp*, 1 Salk. 37.

4. 13 Edw. I., c. 19.

5. See the title *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 741.

6. 2 Bl. Com. 515; *Edwards v. Freeman*, 2 P. Wms. 442.

7. *Statute of Distributions.* — 22 & 23 Car. II., c. 10.

8. *Statutes Regulating Descent.* — For instance, it was provided in *Massachusetts* as early as 1641, that estates should be divided equally among children, except that the eldest son should have a double share. *Massachusetts Col. Laws* 205.

9. The statute 3 & 4 Wm. IV., c. 106, amending the law of inheritance, was applicable to

borrowed mainly from the 118th Novel of Justinian,<sup>1</sup> has always been construed by the courts according to the rules of the civil law.<sup>2</sup> And it should be remembered, as aiding in the construction of American statutes, that when the rules for the descent and distribution of an intestate's property which have been adopted in the United States are examined, it will be found that the American law of succession has borrowed much more from the civil than from the common law. This is largely due to the fact that the English statute of distributions has, with various modifications, been extensively adopted in the United States, and, in general, extended to real property.<sup>3</sup> Statutes of descent and distribution are subject and to be construed with reference to the law concerning dower, tenancy by the curtesy, partnership, homesteads, and exemption, and particularly to provisions in favor of the widow and minor children for their immediate support.<sup>4</sup>

**4. Survival of Common-law Rules — a. IN GENERAL.** — But enough of the common-law system has been preserved to render a general statement of its provisions necessary to the clear comprehension of the modern law of succession.

**b. COURSE OF SUCCESSION.** — For example, while the common law as to descent has been so far supplied or departed from in the United States as to be practically of little force, it has been so far recognized as the foundation of American law that, when the statute does not provide otherwise for a given case of descent, he who would have been heir at common law in England is declared to take, and the common-law rules for ascertaining kinship to prevail.<sup>5</sup>

**c. DISTINCTION BETWEEN SUCCESSION TO REAL AND TO PERSONAL PROPERTY.** — Another illustration of the fact that the modern law of succession has retained some features of the common law which had their origin in the

all descents subsequent to January 1, 1834. It was amended by 22 & 23 Vict., c. 35.

**1. Source of the English Statute of Distributions.** — See *Carter v. Crawley*, T. Raym. 496.

**2. Construction of the English Statute of Distributions.** — In the construction of the English statute of distributions, the courts have always regarded the fact that it was for the purpose of regulating the matter which was the proper subject of the jurisdiction of the ecclesiastical courts, which proceeded in matters of property according to the rules of the civil law. *Rex v. Raines*, 1 Ld. Raym. 571, 1 P. Wms. 25; *Carter v. Crawley*, T. Raym. 496; *Maw v. Harding*, 2 Vern. 233; *Walsh v. Walsh*, Prec. Ch. 54; *Bowers v. Littlewood*, 1 P. Wms. 594; *Wallis v. Hodson*, 2 Atk. 117.

**3. Source of American Succession Statutes** — *Kelsey v. Hardy*, 20 N. H. 479. This was done by the provincial act of 4 Wm. & M., c. 2. *Sheffield v. Lovering*, 12 Mass. 489. So it has been said that the *Maine* statutes were substantially derived (through the provincial statutes of 4 Wm. & M., c. 2; 9 Anne, c. 2, and the early statutes of the mother commonwealth) from the English statutes of distributions, 22 and 23 Car. II., c. 10, and 1 Jac. II. *Decoster v. Wing*, 76 Me. 450. And the *New Hampshire* statute of descents (Act of Feb. 3, 1789, 1 N. H. Laws 207) was in substance copied from the English statute. *Parker v. Nims*, 2 N. H. 460; *Prescott v. Carr*, 29 N. H. 453, 61 Am. Dec. 652.

We are told by Carr, J., in *Davis v. Rowe*, 6 Rand. (Va.) 364, that the framers of the Virginia act regulating descents "looked at the

common-law canons of descent to avoid, not to imitate; to pull down, not to build up. All its principles are violated, its landmarks removed, its fences broken down, its traces obliterated." And see *Garland v. Harrison*, 8 Leigh (Va.) 368; *Stones v. Keeling*, 5 Call (Va.) 143.

In *Texas*, it was said that the laws of descent of real property in that state are more in harmony with the civil law of *Spain* than with the common law of *England*. *McKinney v. Abbott*, 49 Tex. 371.

Until the law of *California* regulated the administration, descent, and distribution of estates, the Mexican law was applicable. *McNeil v. First Congregational Soc.*, 66 Cal. 105.

**4.** 1 Woern. Am. L. Adm., § 64.

**5. Effect of Common-law Rules on Course of Succession.** — *Barnitz v. Casey*, 7 Cranch (U. S.) 456; *Matter of Clark*, 17 Nev. 124; *Fidler v. Higgins*, 21 N. J. Eq. 138; *Johnson v. Haines*, 4 Dall. (Pa.) 64; *Cresoe v. Laidley*, 2 Binn. (Pa.) 279; *Bevan v. Taylor*, 7 S. & R. (Pa.) 397. So it was held that a naked trust estate descends to the eldest son, according to the law of primogeniture; such estates not being within the provisions of the *New Jersey* statute of descents. *Wills v. Cooper*, 25 N. J. L. 137.

In *New York*, the statute, after laying down the rules of descent, expressly provides that "in all cases not provided for by the preceding rules, the inheritance shall descend according to the course of the common law." 3 New York Rev. Stat. (7th ed.) p. 2213, § 16. And there is a similar provision in *Arkansas*.

But it has been said that the common law

feudal system is found in the distinction preserved between the descent of realty and the distribution of personalty by the rule under which real property goes, when its owner dies intestate, to the heir, while personal property is, under the same circumstances, distributed among the next of kin of the intestate by an administrator appointed for that purpose by the proper court.<sup>1</sup> While legislation has not obliterated this and certain other distinctions, such as the difference which sometimes obtains between the estates given in different kinds of property,<sup>2</sup> it has shown a steady tendency toward effecting a homogeneity in the devolution of real and personal property. Under the intestate acts, the same persons in general succeed to both realty and personalty, whether as heirs or distributees.<sup>3</sup>

**IV. INHERITANCE AND DISTRIBUTIVE SHARE** — 1. **Definitions.** — An inheritance is an estate which descends or may descend to an heir upon the death of an ancestor.<sup>4</sup> Each portion of the intestate's effects of which division is made, and which goes to the persons entitled thereto under the statutes of distributions, may be termed a distributive share.<sup>5</sup>

2. **Difference Between Succession to Personalty and to Realty.** — It may be said generally that realty descends directly to the heir without the intervention of the administrator, except so far as under statutes he is empowered to deal with it in behalf of creditors; while personalty is transmitted to the distributees through the administrator, in whom, pending such transmission, the legal ownership is vested. The distinction has its origin in the incidents of the feudal system, and, although not of so much importance as formerly, still exists.<sup>6</sup>

3. **What Property Descends and What Is Distributed.** — A general treatment of the questions which frequently arise in consequence of the difference in mode between the devolution of personalty and that of realty, as to whether the property under consideration descends to the heir of the intestate under the statutes of descents, or is to be distributed by the administrator under the statutes of distributions, may be found elsewhere.<sup>7</sup>

**V. ANCESTOR OR PROPOSITUS** — 1. **Definitions** — **Definition of Ancestor.** — The term "ancestor," in its technical meaning, and as used in the statutes of descents, means any one from whom an estate is inherited; its meaning is not confined to the lineal progenitors, as has sometimes been insisted.<sup>8</sup> It thus appears that the term is often employed in the statutes as the correlative of heir,<sup>9</sup> but it does not always have that meaning. As sometimes employed it

can be resorted to for a rule only where the statute has manifestly left a case unprovided for. *Peacock v. Smart*, 17 Mo. 402.

1. **Survival of Difference Between Successor to Real and Personal Property.** — See *infra*, this section, *Difference Between Succession to Personalty and to Realty*.

2. To illustrate: In *Pennsylvania*, the real estate of an intestate without issue goes to the parents for life and then to his brothers and sisters in fee, while his personalty goes to the parents absolutely. And so in most cases where the statutory law of succession gives a life estate in realty, an absolute title is given to personalty.

3. See *Kelsey v. Hardy*, 20 N. H. 479; *Parkman v. McCarthy*, 149 Mass. 502.

4. **Inheritance Defined.** — Matter of *Donahue*, 36 Cal. 332. See *INHERITANCE*, vol. 16, p. 335.

5. **Distributive Share Defined.** — See *infra*, this title, *Heirs and Distributees* — *Definition*.

6. **Distinction Between Succession to Real and to Personal Property.** — *Williams Real Prop.* 18; *Woerner Adm.*, § 13; 2 Bl. Com. 55. See also

the title *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 720.

It has been argued that the distinction should be abolished, and realty and personalty, in their transmission, be treated as one and governed by the same rules. See article in 15 Am. L. Rev. 512, for a summary of the argument. See also *Woerner Adm.*, §§ 16, 337; remarks of Hon. John F. Dillon in 22 Am. L. Rev. 30; and remarks of Hon. David Dudley Field in 22 Am. L. Rev. 57.

7. See the title *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 720. See also the titles *CONVERSION AND RECONVERSION*, vol. 7, p. 475 *et seq.*; *CROPS*, vol. 8, p. 310; *EASEMENTS*, vol. 10, p. 404; *PEWS AND PEW RIGHTS*, vol. 22, p. 769.

As to succession to the shares of a deceased partner in partnership lands, see the title *CONVERSION AND RECONVERSION*, vol. 7, p. 473; *PARTNERSHIP*, vol. 22, p. 98, and p. 107 *et seq.*

8. **Ancestor Defined.** — See *ANCESTOR*, vol. 2, p. 319, note 5.

9. See *infra*, this title, *Heirs and Distributees* — *Definitions*.



is synonymous with kindred, and embraces all from whom a title could be derived by descent.<sup>1</sup>

**Definition of Propositus.** — The person from whom a succession is to be traced is sometimes called the propositus, *i. e.*, the person proposed.<sup>2</sup>

**2. Common-law Rules Determining Ancestor** — *a.* **DESCENT TRACED FROM FIRST PURCHASER.** — It is a rule of the common law that descent must be traced from the first purchaser. While this rule is necessarily of no practical importance in lineal descent, it lies at the foundation of the law of collateral inheritance. With reference to its practical application the rule may be more specifically stated thus: Upon a failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or, in other words, it shall result back to the heirs of the body of that ancestor from whom it either really has or is supposed by fiction of law to have originally descended.

**Definition of First Purchaser.** — By first purchaser is meant the person who acquired an estate to his family, or brought it into the family which at present owns it, whether the same was transferred to him by sale, or by gift, or by any other method, except only that of descent.<sup>3</sup> Therefore, such person might, with reference to his relation to the land, also be denoted by the term "last purchaser," meaning the last person who acquired the land otherwise than by descent.<sup>4</sup>

*b.* **MODE OF DETERMINING FIRST PURCHASER; SEISINA FACIT STIPITEM.** — In connection with the rule that descent must be traced from the first purchaser, a doctrine which is its auxiliary in an evidentiary sense, in that it supplies a simpler mode of proving heirship to the first purchaser than by tracing pedigree in a direct line from such root of descent, demands consideration. The doctrine referred to is that expressed in the maxim *seisina facit stipitem*. As supplementary of the doctrine of the feudal law, which required that whoever claimed by descent should make himself to be the heir of the first purchaser, it was considered that the seizin of the last possessor from whom he claimed as his heir of the whole blood should be presumptive evidence of his being of the blood of the first purchaser.<sup>5</sup> This supplies the difficulty of investigating a descent from a distant stock through a line of succession become dim by the lapse of ages.<sup>6</sup>

*c.* **DESCENT TRACED FROM PERSON WHO LAST DIED SEIZED** — (1) *In General.* — The effect of the common-law rule that descent must be traced from the first purchaser, together with its auxiliary doctrine expressed in the maxim *seisina facit stipitem*, is, then, that the claimant must show kinship to the person who last died seized in deed. Though the law passes an inheritance upon the heir immediately upon the ancestor's death, he thereby only acquires a seizin in law, and this alone would not enable him to transmit the inheritance to his heirs; for, at common law, no one could be a *stirps* from whom a descent could be derived, unless he had been actually seized. The maxim of the common law was *non jus sed seisina facit stipitem*. He could not be accounted an ancestor who had only a bare right or title to enter or be otherwise seized; for the law required this notoriety of possession as evidence that the ancestor had that property in himself which was to be transmitted to his heir. It may, then, be stated as the clear result of all the authorities that, wherever a person succeeded to an inheritance by descent, he must have obtained an actual seizin or possession, or seizin in deed, as contradistinguished from seizin in law, in order to make himself the root or stock from which the

1. See the title ANCESTOR, vol. 2, p. 320, note 1.

2. **Propositus Defined.** — 1 Brett Com. on Present Law of Eng. 50.

3. **First Purchaser Defined.** — See the title PURCHASE — PURCHASER, vol. 23, p. 461.

4. See *West v. Williams*, 15 Ark. 682; *Gardner v. Collins*, 2 Pet. (U. S.) 58.

5. *Seisina Facit Stipitem*. — 4 Kent Com. 386.

6. 2 Reeves Hist. Eng. L. 318; 2 Bl. Com. 229.

future inheritance by right of blood must have been derived; that is, in other words, in order to make the estate transmissible to his heirs. If, therefore, the heir on whom the inheritance has been cast by descent, dies before he has acquired the requisite seizin, his ancestor, and not himself, becomes the person last seized of the inheritance and to whom the claimants must make themselves heirs.<sup>1</sup>

(2) *Descent of Reversions and Remainders.* — A notable application of this doctrine is found in the descent of estates in reversion and remainder. If the person owning the remainder or reversion expectant upon the determination of a freehold estate dies during the continuance of the particular estate, the remainder or reversion does not descend to his heir, because he has never had seizin, but will, in general, descend to the person who is heir to him who created the freehold estate.<sup>2</sup>

**3. Statutory Rules Determining Ancestor** — *a. IN ENGLAND.* — In *England*, it is now provided by statute that descent shall be traced from the last purchaser of the property, and for this purpose the person last entitled to the property shall be deemed to be the purchaser, unless it be proved that he inherited it.<sup>3</sup> But where there is a total failure of heirs of the purchaser, or where the land shall be descendible as if an ancestor had been the purchaser, and there should be a total failure of the heirs of such ancestor, then the descent shall henceforth be traced from the person last entitled to the property as if he had been the purchaser.<sup>4</sup>

*b. IN UNITED STATES* — (1) *Abrogation of Common-law Rules.* — In the United States the common law of descent is so completely superseded by statute that the source whence the intestate's realty was derived will not be looked to, except in compliance with the demands of some statutory provision.<sup>5</sup> Hence, under statutes which do not in any case recognize any distinction in the descent or distribution of the property of a deceased person in consequence of the source from which it came, it has been uniformly held that the rule of the common law that the heir must be of the blood of the first purchaser is wholly abrogated.<sup>6</sup> The ownership of or title to property is

1. **Rule Requiring Ancestor to Have Been Seized.** — Burt R. P., § 303; 4 Kent Com. 386; Broom Max. 525; Goodtitle v. Newman, 3 Wils. C. Pl. 516; Hawkins v. Shewen, 1 Sim. & St. 260.

**Origin of Rule.** — 2 Bl. Com. 309.

**Exceptions to Rule.** — There are some reasonable qualifications in the English law to the universality of the rule. If the ancestor acquired the land by purchase, he might, in some cases, transmit it to his heirs, though he never had actual seizin of it himself. Shelley's Case, 1 Coke 98a; Burt R. P., § 304; 2 Greenl. Cruise 149. So if, upon the exchange of lands, one party had entered and the other died before entry, his heir would still take by descent, for he could not take in any other capacity. Shelley's Case, 1 Coke 98a; 4 Kent Com. 386. But, as to the validity of an exchange without entry, see the title EXCHANGE OF PROPERTY, vol. 11, p. 572, note 2.

It is the rule in equity, that if a person is entitled to real estate by a contract, and dies before it is conveyed, his equitable title descends to his heir. Potter v. Potter, 1 Ves. 437. And see Roup v. Bradner, 19 Hun (N. Y.) 513.

**2. Reversions and Remainders — Descent of by Common Law.** — Co. Litt. 15a; Doe v. Hutton, 3 B. & P. 643; Ratcliffe's Case, 3 Coke 42a; Kellow v. Rowden, 3 Mod. 253; Cook v. Hammond, 4 Mason (U. S.) 485; Jackson v.

Hilton, 16 Johns. (N. Y.) 96; Bates v. Shraeder, 13 Johns. (N. Y.) 260; Jackson v. Hendricks, 3 Johns. Cas. (N. Y.) 214; Seabrook v. Seabrook, McMull. Eq. (S. Car.) 201.

**3. Modern English Rule.** — 3 & 4 Wm. IV., c. 106, § 2.

**4. 22 & 23 Vict., c. 35, § 19.** For a discussion of these provisions see 2 Broom & Had. Bl. 374.

**5. Status of First Purchaser — Rule in the United States.** — See Gardner v. Collins, 2 Pet. (U. S.) 58; Doe v. Gilbert, 1 How. (Miss.) 32; Peacock v. Smart, 17 Mo. 402; Prescott v. Carr, 29 N. H. 453, 61 Am. Dec. 652; Kelsey v. Hardy, 20 N. H. 479; Bell v. Scammon, 15 N. H. 381, 41 Am. Dec. 706; Parker v. Nims, 2 N. H. 460.

**6. Kean v. Roe, 2 Harr. (Del.) 103, 29 Am. Dec. 336; Peacock v. Smart, 17 Mo. 402; Hatch v. Hatch, 21 Vt. 450.** So formerly in *Alabama*, Deloney v. Walker, 9 Port. (Ala.) 497; Hitchcock v. Smith, 3 Stew. & P. (Ala.) 29.

In *Texas*, it is specially enacted that there is no distinction between property derived by descent, etc., from the father, and that which may have been derived by descent from the mother; and all the estate vests at death of the intestate as if he had been the original purchaser thereof. Sayle's Civil Stat., § 1647. And see Jones v. Barnett, 30 Tex. 638; Chandler v. Copeland, 31 Tex. 151; McKinney v. Abbott, 49 Tex. 371.

substituted for seizin, and the heir takes all the real estate owned by the ancestor at the time of his death.<sup>1</sup>

(2) *Succession to Reversions and Remainders.* — In consequence of the abolition of the common-law rules requiring a claimant to show kinship to the person who last died seized in deed, the heirs of a reversioner or remainderman take as absolutely as if their ancestor were actually seized as of a freehold in possession; the word "seized," when applied to such an interest, being equivalent to owning, and "seizin" to ownership. A remainderman or reversioner, therefore, becomes a proper stock of descent, and the remainder or reversion of one dying intestate will go among his heirs in the same manner as estate in possession.<sup>2</sup>

(3) *Partial Recognition of Common-law Rules.* — While the common-law rules for determining the ancestor or propositus have been generally rejected throughout the United States, statutes which give a partial recognition to the first purchaser in tracing the course of succession have been enacted in many of the states. These statutes will be treated in the two next succeeding sections, the first of which treats of succession to ancestral estates, and the second of succession to estates of unmarried infants.

(4) *Ancestral and Non-ancestral Estates* — (a) *Statutory Provisions.* — In pursuance of a policy of keeping real property in the line of the ancestor by whom it was brought into the family, statutes have been enacted in many of the United States which, generally speaking, recognize a distinction between estates which were acquired by the intestate's own industry and estates which were derived from some ancestor, and direct that the latter shall go to the intestate's next of kin who are of the blood of the person from whom they were derived. These statutes vary in their phraseology. In some of the statutes the distinction made is between "ancestral" and "non-ancestral" estates. In others, the distinction is between "ancestral estates" and "new acquisitions" or "acquired estates." In yet other statutes ancestral estates are referred to as estates "come by" or "on the part of" the father or mother. Many of the statutes are more explicit, and, instead of speaking of ancestral estates as above, refer to them in express terms as inheritances which come to the intestate by descent, devise, or gift from some one of his ancestors.<sup>3</sup>

1. *Kelly v. McGuire*, 15 Ark. 555; *Hillhouse v. Chester*, 3 Day (Conn.) 166, 3 Am. Dec. 265; *Kean v. Roe*, 2 Harr. (Del.) 103, 29 Am. Dec. 336; *Thompson v. Sandford*, 13 Ga. 238; *Oliver v. Powell*, 114 Ga. 600; *Hicks v. Pegues*, 4 Rich. Eq. (S. Car.) 413; *Guion v. Burton*, Meigs (Tenn.) 565. And see *Guion v. Anderson*, 8 Humph. (Tenn.) 298.

Under the rule of the *North Carolina Revised Code*, c. 38, that "every inheritance shall lineally descend forever to the issue of the person who died last seized, entitled or having any interest therein," it was held that neither actual nor legal seizin was necessary to make the stock in the devolution of estates. *Sears v. McBride*, 70 N. Car. 152.

But as to the law in *Maryland*, see *Chirac v. Reinecker*, 2 Pet. (U. S.) 625. It was held in this case that by the law of descent a person claiming as heir must prove himself heir of the person last seized of the estate; and if an intestate leaves a brother of the whole blood, who dies without issue, and without being actually seized of the estate, the estate will descend to the half blood of the person so seized.

2. *Reversions and Remainders—Succession to, by Statute.* — *Oliver v. Powell*, 114 Ga. 600; *Moore v. Rake*, 26 N. J. L. 574. For the

*Massachusetts* cases see the title *REMAINDERS, REVISIONS, AND EXECUTORY INTERESTS*, vol. 24, p. 423, note 5.

But see *Lawrence v. Pitt*, 1 Jones (46 N. Car.) 344, in which case it was held that where, by the death of her grandfather (the person last seized), a child was entitled to a reversion in land, expectant on the termination of a life estate, and such child died before the expiration of the life estate, the inheritance did not vest for life in the parent of the deceased child, under the sixth canon of descent, on the expiration of the life estate. The person entitled to take must make himself heir to the person last seized. As to the common-law rule, see *supra*, this subdivision, *Succession to Reversions and Remainders*.

3. *Statutes Relating to Ancestral Estates.* — See 1 Stim. Am. Stat. L., §§ 3107, 3134. In many states, this distinction is effected by provisions abolishing the distinction between the whole and the half blood, except when the estate of the intestate came to him by devise, descent, or gift of an ancestor. See 1 Stim. Am. Stat. L., § 3133 (E). Under these statutes the intestate's kindred of the whole blood, if next of kin, share in all of the estate of the decedent, no matter from what source it came. *Matter of Pearsons*, 110 Cal. 524.

(b) **What Constitute Ancestral Estates — Definition.** — Ancestral estates, as the term is employed in these statutes, may be defined to be estates which come to the intestate in the regular course of descent, and estates which may have been devised to him, or which may have been conveyed to him by deed of gift, but which, or at least part of which, he might have inherited<sup>1</sup> had there been no such devise or deed of gift.

**Estates "Come by" or "on the Part of" the Father or Mother.** — The expressions "come by" the father or mother and "on the part of" the father or mother have the same meaning.<sup>2</sup> They have been defined to include every case where the inheritance shall have come to the intestate by gift, devise, or descent from the parent referred to, or from any relative of the blood of such parent.<sup>3</sup>

(c) **What Constitute Non-ancestral Estates — Definition.** — On the other hand non-ancestral estates may be defined to be estates which the intestate acquired by his own industry, or by the devise or deed of gift of a person from whom he could not have inherited, either lineally or collaterally.

**Distinguished from "Purchased" Estates.** — The expression "purchased estates" does not correctly describe the estates of this class, because many estates which, by the common law, would have been held to come by purchase are, within the purview of these statutes, ancestral estates. By the common law, all who took in any way except by descent were regarded as purchasers.<sup>4</sup> Even the devisee of his father, or other ancestor, was regarded as the purchaser, within the meaning of the rule which required descent to be traced from the person who acquired or first brought the estate into the family — the first purchaser.<sup>5</sup> But, within the meaning of these statutes, one who takes gratuitously by devise from his ancestor will not thereby become the person to whose blood regard must, in compliance with the provisions of these statutes, be had in tracing the descent of the property.<sup>6</sup> To become such fountain of inheritable blood, the devisee must be a purchaser for value in the popular sense of the term, or at least derive the estate by gift from some one other than an ancestor.

1. **"Ancestor" as Used in Statutes Distinguishing Between Ancestral and Non-ancestral Estates.** — It seems that by the term "ancestor," as used in these statutes, is not meant one from whom the intestate would necessarily have inherited, but one from whom he would have inherited, under circumstances which, though not existent, might have taken place. *A. B.*, though he had a sister, *H. D.*, living, devised land to his nephew, *R. D.*, who was a son of such sister. It was held that the deviser was the ancestor of his nephew, *R. D.*, the intestate, within the meaning of the term "ancestor" as used in the provision of the statute regulating the descent of ancestral estates. *Greenlee v. Davis*, 19 Ind. 62.

And it has been held that a husband who conveys land to his wife by a deed of gift is the wife's "ancestor" within the meaning of the statute. *Cornett v. Hough*, 136 Ind. 387.

But it has been held differently in *North Carolina*. Where land was devised by a father to a second son, who as the law stood was not the heir, and the son afterwards died intestate and without issue, it was held that the land descended as a new acquisition. *Burgwyn v. Devereux*, 1 Ired. L. (23 N. Car.) 583. A case where a grandfather devised land to his grandson, who died in the lifetime of his father, the devisee not being an heir or one of the heirs of the deviser, is to the same effect. *Osborne v. Widenhouse*, 3 Jones Eq. (56 N. Car.) 238.

And see *infra*, this subdivision, *Instances of Ancestral and Non-ancestral Estates*.

2. **Estates "Come by" or "on the Part of" Parents Defined.** — *Kelly v. McGuire*, 15 Ark. 555, citing *Maffit v. Clark*, 6 W. & S. (Pa.) 260.

3. The expression "on the part of the mother" or "father," employed in the statute of *Arkansas*, was so defined by the same statute. Dig. Stat., § 2543. See *Kelly v. McGuire*, 15 Ark. 555; *Galloway v. Robinson*, 19 Ark. 396. It is defined likewise in *New York*. 3 N. Y. Rev. Stat. (7th ed.) p. 2214, § 29; Heyd. Gen. L. & Rev. Stat. N. Y., p. 3864. See *Oliver v. Vance*, 34 Ark. 564; *Garner v. Wood*, 71 Md. 37; *Banta v. Demarest*, 24 N. J. L. 431; *Torrey v. Shaw*, 3 Edw. (N. Y.) 356; *Shippen v. Izard*, 1 S. & R. (Pa.) 223.

But it was held in *Maryland*, that the words in the Act of 1786, chapter 45, "and not derived from or through either of his ancestors" meant "and not by descent." *Hall v. Jacobs*, 4 Har. & J. (Md.) 245, approved in *Roe v. Doe*, 21 Md. 487.

4. **Acquisition and Purchase Distinguished.** — See *Lewis v. Gorman*, 5 Pa. St. 164; *Latrobe v. Carter*, 83 Md. 279.

5. *Matter of Donahue*, 36 Cal. 329; *Ramsey v. Ramsey*, 7 Ind. 607; *Hall v. Jacobs*, 4 Har. & J. (Md.) 245.

6. *Lewis v. Gorman*, 5 Pa. St. 164; *Hart's Appeal*, 8 Pa. St. 32; *Kinney v. Glasgow*, 53 Pa. St. 141.

**"New Acquisitions" and "Acquired Estates."** — By new acquisition is meant an estate which the intestate acquired by his own exertion or industry, or by will or deed from a stranger to his blood. In other words, it is an estate obtained by any means other than by descent, gift, or gratuitous devise from an ancestor.<sup>1</sup>

(d) **Instances of Ancestral and Non-ancestral Estates — Lands Acquired by Devise.** — If the intestate became entitled to the estate by devise or gift from some person from whom he could not, in the absence of such gift or devise, have inherited it, this is a new acquisition.<sup>2</sup> And if he acquired the estate by his own exertion or industry, it is immaterial that the title was conveyed to him by means of a devise from his ancestor.<sup>3</sup> It may be that if the testator plainly indicates his intention to treat his devisee as a purchaser, and to increase the burden, because he has increased the quantity devised above that which the devisee would have taken by descent, this will be a new acquisition.<sup>4</sup> But in the absence of evidence of any intention to treat the devisee as a vendee, the charge of a legacy on a devise greater than the devisee would take in the absence of a will, does not, of itself, make the devisee a purchaser.<sup>5</sup>

**Estates Come to Intestate by Deed of Gift.** — If the intestate's title to land was based upon a deed of gift the land must, of course, be deemed to be ancestral.<sup>6</sup> But it has sometimes been difficult, in cases of this kind, to determine whether a particular instrument is a deed of gift or a deed of purchase.<sup>7</sup>

1. **Definition of "New Acquisitions" and Ancestral Estates.** — See *West v. Williams*, 15 Ark. 682; *Brewster v. Benedict*, 14 Ohio 368; *Frick Coke Co. v. Laughhead*, 203 Pa. St. 172.

2. **Intestate's Title Acquired by Devise from a Stranger to His Blood.** — *Barnes v. Loyd*, 37 Ind. 523; *Walker v. Dunshee*, 38 Pa. St. 430.

Where a person devised land to his sister-in-law, it was held that the devisee did not take an ancestral estate. *Penn v. Cox*, 16 Ohio 30.

Where a husband devised land to his wife, she being a stranger to his blood, both paternal and maternal, this was held to constitute a new acquisition. *West v. Williams*, 15 Ark. 682. So where a husband made a devise to his wife of an estate of inheritance, which would not have descended to her had he died intestate, it was held that she did not take an ancestral estate, as it was not one which "came to her from any ancestor." *Birney v. Wilson*, 11 Ohio St. 426. To the same general effect is *Culbertson v. Duly*, 7 W. & S. (Pa.) 195; *Opdyke's Appeal*, 49 Pa. St. 373.

But see *supra*, this subdivision, *What Constitute Ancestral Estates*.

3. **Devise to Intestate of Land Acquired by His Own Industry.** — See *Walker v. Dunshee*, 38 Pa. St. 430.

In *Kelly v. McGuire*, 15 Ark. 555, the court, by Hempstead, J., said: "If the son should purchase land from the father or mother for a valuable consideration, it would be a new acquisition, and descend as such."

So in *Hartman's Case*, 4 Rawle (Pa.) 39, where an intestate had taken certain land at an appraised value, under the will of his father, paying to his brothers and sisters their share of the valuation, he was deemed as to such land a purchaser for value, and therefore the founder of a new stock.

4. **Devise Charged with Legacy.** — See *Kinney v. Glasgow*, 53 Pa. St. 141.

5. *Kinney v. Glasgow*, 53 Pa. St. 141.

Where lands and personal estate were both devised charged with legacies, it was held that the legacy did not so change the nature of the real estate as to make it, in the hands of the intestate, a new acquisition within the meaning of the statute of descents. *West v. Williams*, 15 Ark. 682.

6. **Gift — Land Come to Intestate by Deed of.** — *Galloway v. Robinson*, 19 Ark. 396.

7. **Illustrations.** — A consideration of "love and affection" and "one dollar" has been held to be formal merely and not to affect the character of the conveyance as a gift. *Morris v. Ward*, 36 N. Y. 587. But compare *Brown v. Whaley*, 58 Ohio St. 654, 65 Am. St. Rep. 793.

In *Patterson v. Lamson*, 45 Ohio St. 77, it appeared that a father, desiring to make a daughter a wedding gift, bargained for a tract of land, paid the agreed price in money, and caused the vendor to convey it to the daughter just prior to her marriage. The deed recited payment by the grantee, the daughter. It was held that it was not a deed of gift, parol evidence not being admissible to show the facts in contradiction of the recital.

**Trust Estate Held to Be Ancestral.** — The intestate's grandfather executed a declaration of trust by which he declared that he held his real and personal property, with the exception of two pieces of property therein specified, in trust for his children and grandchildren. His three children took three-fifths of the estate, two grandchildren took a fifth, and the intestate, another grandchild, took the remaining fifth: but the shares of the grandchildren were subject to the deduction of a sum which was to be added to the children's share. The sum which the instrument required to be paid to the children was ascertained after the death of the grandfather and paid. It was held that the land which the intestate took under the deed of trust came to him by gift and that it descended as an ancestral estate. *Whipple v. Latrobe*, 20 R. I. 508.

**Effect of Alienating Inheritance.** — There can, of course, be no doubt that an inheritance may be converted into funds, and the proceeds invested in other property without giving to the property so acquired an ancestral character.<sup>1</sup> Where an intestate has mortgaged an ancestral estate and purchased a parcel of land with the proceeds, the land so purchased is to be regarded as having come to the intestate by purchase.<sup>2</sup> And the same result may be accomplished by an exchange of estates.<sup>3</sup> It even seems that the owner of an ancestral estate may destroy the ancestral character of the estate by conveying it away and then taking a reconveyance.<sup>4</sup>

**Effect of Exchange of Lands by Heirs.** — It has been held in *Ohio* that if heirs exchange lands the estate ceases to be ancestral.<sup>5</sup>

**Effect of Partition by Heirs.** — And it has been held in the same state that after a division by tenants in common of an estate acquired by descent, each giving the other a quitclaim deed, the property is no longer ancestral.<sup>6</sup> But it has, on the other hand, been held that a voluntary partition of an inheritance by the heirs does not change the character of the estate.<sup>7</sup>

**Surrender of Mortgage by Devisee for Deed to Land.** — It has been held that a devisee of a mortgage upon a parcel of land, who exchanges the mortgage for a deed to the land, takes the land by purchase within the meaning of the statutes.<sup>8</sup>

**Foreclosure of Mortgage by Devisee.** — And it has been held that a devisee of a mortgage on a parcel of land who forecloses the mortgage and purchases the land at the sheriff's sale takes the land by purchase within the meaning of the statute.<sup>9</sup>

**Payment of Balance of Purchase Money by Heirs After Succession.** — Where the purchaser of land at an orphan's-court sale paid part of the purchase money and entered into possession of the land and resided thereon until his death, it was held that he, rather than his heirs, was to be regarded as the purchaser of the land, although the balance of the purchase money was not paid until after his death by his administrators, who took a deed to themselves "for the use of the heirs."<sup>10</sup>

**Estate Allotted to Widow Out of Husband's Insolvent Estate.** — The preference given to the blood of the ancestor from whom an inheritance has come to the intestate by descent, devise, or gift, has no application, it has been held, to an estate allotted to a widow out of the insolvent estate of her husband, for such an estate is acquired by the widow, not by inheritance from an ancestor, but by statutory right, the statute carving it out of the estate of the husband and devolving the title on her.<sup>11</sup>

**Estate Coming to Intestate by Lapse of Devise.** — A statute providing, among other things, that when the estate comes to the intestate by descent, devise, or gift of some one of his ancestors, all who are not of the blood of the ancestor shall be excluded, it was held that land which came to the intestate by forfeiture incurred by his mother by a second marriage, she having inherited it from

1. Divesting of Ancestral Character by Alienation. — *Watson v. Thompson*, 12 R. I. 466.

2. *Adams v. Anderson*, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 705.

3. Where A received land in Decatur county from his maternal grandfather, and A's father took up land in Tipton county in A's name, in consideration whereof A conveyed his Decatur lands to his father, it was held that Tipton lands would not be considered as maternal ancestral. *Armington v. Armington*, 28 Ind. 74.

4. *Holme v. Shinn*, 62 N. J. Eq. 1; *Kihlken v. Kihlken*, 59 Ohio St. 106.

5. Ancestral Character of Land Lost by Exchange Among Heirs. — *Brower v. Hunt*, 18 Ohio St. 311.

6. Partition by Heirs as Affecting Ancestral Character of Property. — *Wilson v. Hall*, 3 Ohio Cir. Dec. 589, 6 Ohio Cir. Ct. 570.

7. *Conkling v. Brown*, (Supm. Ct. Gen. T.) 8 Abb. Pr. N. S. (N. Y.) 345; *Day v. Carter*, 1 Ohio Dec. 293.

8. Exchange of Mortgage for Deed to Land. — *Cornett v. Hough*, 136 Ind. 387.

9. Purchase of Land by Devisee at Mortgage Foreclosure Sale. — *Cornett v. Hough*, 136 Ind. 387.

10. Payment by Administrator of Balance of Purchase Money Owed by Intestate. — *Frick Coke Co. v. Laughead*, 203 Pa. St. 172.

11. Widow's Homestead Exemption. — *Eatman v. Eatman*, 83 Ala. 478.

the intestate's brother, who inherited it from his father, was not within the provision.<sup>1</sup>

(e) **Character of Estate Determined by Legal Title.** — Where the legal and the equitable estate in the land come through different channels and in different modes, it has been held that it is the course of the legal rather than the equitable estate which determines whether it be an ancestral estate in the holder.<sup>2</sup>

(f) **Person from Whom Succession Traced** — *aa. GENERAL RULE.* — The rule prescribed by these statutes for regulating the succession to an ancestral estate may be said, speaking generally, to be that it shall descend only to those collaterals or ascendants who are of the blood of the person from whom the estate came.<sup>3</sup>

*bb. RULE NOT APPLICABLE TO NON-ANCESTRAL ESTATES.* — The rule prescribed by these statutes does not, of course, affect the devolution of non-ancestral estates, new acquisitions, or acquired estates; if an estate belongs to this class, there is no opportunity for the operation of the rule requiring ancestral blood,<sup>4</sup> and the succession will be traced with regard to the blood of the intestate only.<sup>5</sup>

*cc. RULE NOT APPLICABLE TO SUCCESSION IN DESCENDING LINE.* — As the common-law rule requiring descent to be traced from the first purchaser did not affect the lineal descent of an estate, so, under these statutes, the distinction which is founded upon the mode in which, and the source whence, the intestate became entitled, does not affect the order of succession in the descending line; it is only applied to succession in the collateral and ascending lines.<sup>6</sup>

*dd. RULE MERELY PREFERS INTESTATE'S KINDRED WHO ARE OF ANCESTOR'S BLOOD.* — The recognition given, by the statutes under consideration, to the blood of the ancestor from whom an ancestral estate has come, is not a preference of the blood of the ancestor, to the exclusion of the blood of the intestate.<sup>7</sup> The inheritance is cast upon the next of kin to the intestate.<sup>8</sup> But these statutes give a preference to those of the kindred of the intestate who are of the blood of the ancestor. While the person last seized, or last having ownership or title to the property, remains the propositus whose nearest kindred must be traced, such kindred must, however, be of the blood of the person from whom the estate came.<sup>9</sup>

*ee. EXTENT OF PREFERENCE.* — There is considerable conflict of opinion as to the extent to which the kindred of the intestate who are of the blood of the ancestor shall be preferred to the kindred who are not of such blood.

1. **Lands Forfeited to Intestate by Mother's Marriage.** — *Cutter v. Waddingham*, 22 Mo. 206.

2. **Source of Legal Title Determines Character of Estate** — *England.* — *Wade v. Paget*, 1 Bro. C. C. 363, 1 Cox Ch. 74; *Selby v. Alston*, 3 Ves. Jr. 339.

*Kentucky.* — See *Wells v. Head*, 12 B. Mon. (Ky.) 166.

*New York.* — *Nicholson v. Halsey*, 1 Johns. Ch. (N. Y.) 417.

*Ohio.* — *Russell v. Bruer*, 64 Ohio St. 1; *Kihlken v. Kihlken*, 59 Ohio St. 106; *Higgins v. Higgins*, 57 Ohio St. 239; *Stembel v. Martin*, 50 Ohio St. 495; *Patterson v. Lamson*, 45 Ohio St. 77; *Olmstead v. Douglas*, 8 Ohio Cir. Dec. 465, 16 Ohio Cir. Ct. 171.

*Rhode Island.* — *Shepard v. Taylor*, 15 R. I. 204, citing *Goodright v. Wells*, 2 Dougl. 771.

3. *Oliver v. Vance*, 34 Ark. 564; *Wheeler v. Clutterbuck*, 52 N. Y. 68; *Felton v. Billups*, 2 Dev. & B. L. (19 N. Car.) 308; *Harris v. Hayes*, 6 Binn. (Pa.) 422; *Butler v. King*, 2 Yerg. (Tenn.) 115; *Prichitt v. Kirkman*, 2 Tenn. Ch. 390.

4. **Succession to Non-ancestral Estates.** — *Hall v. Jacobs*, 4 Har. & J. (Md.) 254; *Van Sickle v. Gibson*, 40 Mich. 170,

5. *Shellenberger v. Ransom*, 31 Neb. 61; *Brewster v. Benedict*, 14 Ohio 369.

6. **Collateral Succession** — **Survivor of First Purchaser Rule.** — See *Smith v. Smith*, 23 Ind. 202; *Coffman v. Bartsch*, 25 Ind. 201; *McClanahan v. Trafford*, 46 Ind. 410; *Heavenridge v. Nelson*, 56 Ind. 90; *Brower v. Hunt*, 18 Ohio St. 312.

7. **Intestate Kindred of Blood of Purchaser Merely Preferred.** — *Oliver v. Vance*, 34 Ark. 564; *Brower v. Hunt*, 18 Ohio St. 312.

8. *Matter of Pearsons*, 110 Cal. 524; *Speer v. Miller*, 37 N. J. Eq. 492; *Miller v. Speer*, 38 N. J. Eq. 567; *Brower v. Hunt*, 18 Ohio St. 312; *Montgomery v. Petriken*, 29 Pa. St. 118; *Ranck's Appeal*, 113 Pa. St. 98.

9. To the effect that the person who last died seized remains the propositus, see discussion in *Den v. Jones*, 8 N. J. L. 340.

**Succession to Estate Coming to Intestate by Gift.** — But in *Indiana* it was provided by section 2473 of Rev. Stat. 1881 (sec. 2628, Rev. Stat. 1894), that an estate which shall have come to the intestate, who dies without issue, by gift, shall revert to the donor, saving to the widower or widow his or her rights therein. See *Dolin v. Leonard*, 144 Ind. 410.

**Preference of All Kindred of Testator's Blood.** — Under some of the statutes, the courts go so far as to hold that the intestate's whole line of kindred, who are not on the side of the ancestor, will be postponed to the remotest kinsmen in that line which is of the blood of the person from whom the ancestral estate came — that is to say, the line of succession must be traced in that ancestral line, leaving off the side which has none of the blood of such person.<sup>1</sup> But the preference which is thus given to those next of kin to the intestate who are of the blood of the ancestor does not operate to the exclusion of the next of kin of the intestate who are not of the blood of such ancestor, if there are no kindred of such blood. It is usually provided, in terms or by implication, that if there are no kin of such blood, then the kindred of the intestate without common blood with such ancestor shall take the estate rather than that it shall escheat.<sup>2</sup>

**Preference of Blood of Ancestor Within Certain Degrees.** — The distance which may be gone into the ancestral line from which the estate came, in search of an heir, is limited in some states, and if an heir is not found within a certain degree, the estate will go to other kindred of the intestate, who are nearer related, though not of the blood of the ancestor.<sup>3</sup>

**Preference of Blood of Ancestor Among Kindred of Equal Degree.** — According to the doctrine established by other courts, if there are several kinsmen of the intestate in the same degree, some of whom are of the blood of the ancestor while the others are not, then only those will take who are of such blood. But this is as far as the statutes go; they are not in any case to be so construed as to divert the descent of an ancestral estate from the nearest of kin; a remote relative of the blood of the ancestor does not exclude a nearer relative not of such blood.<sup>4</sup>

**Agreement Between the Different Rules.** — It is clear that, under each of these rules, those kindred of the intestate who are of the blood of the ancestor will exclude his kindred in the same degree who are not of such blood.<sup>5</sup>

**1. Preference of All Kindred of Ancestor's Blood.** — *Coolidge v. Burke*, 69 Ark. 237; *Beard v. Mosely*, 30 Ark. 517; *Campbell v. Ware*, 27 Ark. 65; *Scully v. Vaugine*, 15 Ark. 695; *Kelly v. McGuire*, 15 Ark. 555; *Cornett v. Hough*, 136 Ind. 387; *Ramsey v. Ramsey*, 7 Ind. 607; *Cutter v. Waddingham*, 22 Mo. 206; *Conkling v. Brown*, 57 Barb. (N. Y.) 265; *Valentine v. Wetherill*, 31 Barb. (N. Y.) 655; *Lindley's Appeal*, 102 Pa. St. 235; *Lucas v. Malone*, 106 Tenn. 380; *Perkins v. Simonds*, 28 Wis. 90.

Though some early *North Carolina* cases, under statutes not now in force, gave a preference to the half blood not of the blood of the ancestor to more remote kindred of such blood, in later cases the remote collaterals of the blood of the ancestor were preferred. *Caldwell v. Black*, 5 Ired. L. (27 N. Car.) 463; *Bell v. Dozier*, 1 Dev. L. (12 N. Car.) 333; *Felton v. Billups*, 2 Dev. & B. L. (19 N. Car.) 308; *Dozier v. Grandy*, 66 N. Car. 484.

In *Pennsylvania*, where a father died seized leaving two children, one of whom afterwards died leaving the other his heir, who also died, it was held that a paternal uncle would take before the mother of the person last seized, for while she was of the blood of her child she was not of the blood of her husband. *Maffit v. Clark*, 6 W. & S. (Pa.) 258. And see *Hart's Appeal*, 8 Pa. St. 32; *Roberts's Appeal*, 39 Pa. St. 417; *McWilliams v. Ross*, 46 Pa. St. 369.

An estate which was inherited by the intestate from his father passes to his aunt who is of the whole blood of the father to the exclusion of his half brother who is not of the

blood of the father. *Henszey v. Gross*, 185 Pa. St. 353.

It has been held that the half brothers and sisters of the intestate, who are not of the blood of his mother, from whom he inherited an estate, are excluded in favor of his wife. *Matter of Amy*, 12 Utah 333.

**2. Succession by Kindred Not of Ancestor's Blood.** — *State University v. Brown*, 1 Ired. L. (23 N. Car.) 387; *Parr v. Bankhart*, 22 Pa. St. 291; *Dowell v. Thomas*, 13 Pa. St. 41.

**3. Limited Preference of Kindred of Blood of Ancestor.** — *Pond v. Irwin*, 113 Ind. 243.

**4. Matter of Smith, 131 Cal. 433; *Ryan v. Andrews*, 21 Mich. 229, affirmed in *Rowley v. Stray*, 32 Mich. 70; *Chaney v. Barker*, 3 Baxt. (Tenn.) 424; *Nesbit v. Bryan*, 1 Swan (Tenn.) 468. See *Clay v. Cousins*, 1 T. B. Mon. (Ky.) 75.**

In *Alabama* this rule is established by the terms of the statute, which in directing the descent of ancestral estates, excludes from the inheritance all kindred who are not of the ancestor's blood "as against those of the same degree." Ala. Code (1886), § 1919. See *Cox v. Clark*, 93 Ala. 400; *Coleman v. Foster*, 112 Ala. 506.

This view prevailed in *North Carolina* under the construction of the earlier statutes of that state. *Ballard v. Hill*, 3 Murph. (7 N. Car.) 410; *Den v. Whedbee*, 1 Dev. L. (12 N. Car.) 160. And see *Pritchard v. Turner*, 2 Hawks (9 N. Car.) 435.

**5. Blood of Ancestor Preferred Among Kindred of Equal Degree.** — *Murphy v. Henry*, 35 Ind.



*ff.* WHETHER REGARD IS HAD TO BLOOD OF IMMEDIATE OR OF REMOTE ANCESTOR. — In the construction of these statutes, the question has arisen how far back in the chain of title by descent, or by gift or gratuitous devise from an ancestor, it is necessary to go in fixing upon the person to whose blood regard is to be had in tracing the course of succession. It has been held that the heir must be of the blood of the ancestor who last acquired the estate by purchase other than by gift or gratuitous devise from an ancestor, no matter how many intervening transfers of the title by descent or by gift or gratuitous devise from an ancestor there may have been.<sup>1</sup> On the other hand, by the construction placed upon these statutes in other states it is only necessary to look to the intestate's immediate ancestor, and no inquiry will be made as to the mode in which such ancestor obtained his title; the person referred to in these provisions as the new fountain of inheritable blood is the ancestor from whom the property came to the intestate by immediate descent, gift, or devise.<sup>2</sup>

(5) *Estates of Unmarried Infants* — (a) *Statutory Provisions*. — By the statutes of a number of the United States regard is to be had to the source whence the deceased derived his estate if he was an infant and unmarried, or, according to some of the statutes, without issue. These statutes are by no means uniform. In some of the states it is provided that on the death of an infant without issue an estate which came to him from either parent shall go to the other children of the same parent or to their issue, while in other states it is provided

442; *Stannard v. Case*, 40 Ohio St. 211; *Eby's Appeal*, 50 Pa. St. 311; *McWilliams v. Ross*, 46 Pa. St. 369; *Parr v. Bankhart*, 22 Pa. St. 291; *Maffit v. Clark*, 6 W. & S. (Pa.) 258; *Bevan v. Taylor*, 7 S. & R. (Pa.) 397; *Beaumont v. Irwin*, 2 Sneed (Tenn.) 291.

Where lands came to the intestate by descent, his brothers and sisters of the whole blood take in exclusion of brothers and sisters of the half blood who are not of the blood of the ancestor. *Aldridge v. Montgomery*, 9 Ind. 302; *Den v. Urison*, 2 N. J. L. 197; *Den v. Coor*, 2 Murph. (6 N. Car.) 231; *Deadrick v. Armour*, 10 Humph. (Tenn.) 588. See *Cliver v. Sanders*, 8 Ohio St. 501; *Kelly v. McGuire*, 15 Ark. 555.

And where the issue represents the parent, if an estate descended to the intestate from his mother, a niece of the whole blood will take in exclusion of a sister of the half blood of the intestate on the paternal side. *Doe v. Martin*, 1 Hawks (8 N. Car.) 423.

1. *View that Regard Must Be Had to Blood of First Purchaser*. — *Bevan v. Taylor*, 7 S. & R. (Pa.) 397; *Lewis v. Gorman*, 5 Pa. St. 164; *Hart's Appeal*, 8 Pa. St. 32; *Dowell v. Thomas*, 13 Pa. St. 41. See also *Stewart v. Evans*, 3 Har. & J. (Md.) 287; *Stewart v. Jones*, 8 Gill & J. (Md.) 1. In *Wilkerson v. Bracken*, 2 Ired. L. (24 N. Car.) 315, it was said that the descent to be looked to is not the immediate one, but that to find it it is necessary to go back to the person who originally brought the estate into the family.

2. *View that Regard Is to Be Had to Blood of Intestate's Immediate Ancestor* — *Connecticut*. — *Buckingham v. Jacques*, 37 Conn. 402.

*Florida*. — *Smith v. Croom*, 7 Fla. 81.

*Indiana*. — *Barnes v. Loyd*, 37 Ind. 523; *Murphy v. Henry*, 35 Ind. 442, *overruling Johnson v. Lybrook*, 16 Ind. 473.

*Missouri*. — *Cutter v. Waddingham*, 22 Mo. 206.

*New Jersey*. — *Den v. Stretch*, 4 N. J. L. 207.

*New York*. — *Wheeler v. Clutterbuck*, 52 N. Y. 67; *Hyatt v. Pugaley*, 33 Barb. (N. Y.) 373; *Valentine v. Wetherill*, 31 Barb. (N. Y.) 655; *Adams v. Anderson*, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 705. And see *Emanuel v. Ennis*, 48 N. Y. Super. Ct. 431.

*Ohio*. — *Cliver v. Sanders*, 8 Ohio St. 501. See *Curran v. Taylor*, 19 Ohio 36; *Prickett v. Parker*, 3 Ohio St. 394.

*Rhode Island*. — *Morris v. Potter*, 10 R. I. 58.

See *Matter of Amy*, 12 Utah 334.

Real estate was devised by A to his daughter B. On her death it descended to her son C. C died intestate without issue and without brothers and sisters or their representatives. It was said that the "ancestor" intended by the statute with regard to the distribution of an ancestral estate, is the one from whom the estate immediately and not the one from whom it remotely descended, and held that the estate descended to C's next of kin, though not of the blood of A, from whom the estate originally came. *Clark v. Shailer*, 46 Conn. 119. So, it was held that property which was inherited by a son from his father and descended to the son's daughter, passed, on her death without issue, to her father's half brothers and sisters, though not of the blood of the grandfather. *White v. White*, 19 Ohio St. 531.

In construing the *Rhode Island* statute of 1822, which was worded the same as the Public Statutes of 1882, c. 187, § 6, the court in *Gardner v. Collins*, 2 Pet. (U. S.) 58, by Story, J., said: "As to descents, as well as gifts and devises from a parent, it is plain that the act looks only to the immediate descent or title. A descent from a parent to a child cannot be construed to mean a descent through and not from a parent. So a gift or devise from a parent must be construed to mean a gift or devise by the act of that parent, and not by that of some other ancestor more remote, passing through the parent."

that such estate shall go to the parent, if alive, otherwise to the parent's kindred.<sup>1</sup>

(b) **When Statutes Applicable.** — Under these statutes, the source from which the estate was derived will be looked to only in the cases which they specify.<sup>2</sup> Thus, the statutes can have no application if the intestate was not under twenty-one years of age.<sup>3</sup> And they can have no application if the intestate did not take in the specified manner.<sup>4</sup> Furthermore, the statutes are only applicable to estates derived from the specified source; statutes which refer only to estates derived by the infant from one of his parents do not affect successions to estates derived from a brother or sister,<sup>5</sup> or a grandparent.<sup>6</sup> And if the infant took an estate by inheritance, through a parent, by right of representation, from a more remote ancestor, he cannot be regarded as having taken it by inheritance from the former.<sup>7</sup> These statutes look only to the immediate descent; it is immaterial how the parent from whom the decedent derived title acquired the estate.<sup>8</sup>

(c) **Person from Whom Succession Traced.** — As to the nature of the succession under these provisions, it has been held that the estate to which an infant, who died unmarried and without issue, derived title by gift, devise, or descent (in some statutes it is only by descent) from one of his parents, will devolve as if such infant had died in the lifetime of the parent, and the estate is to be considered as coming from the parent.<sup>9</sup>

1. **Succession to Estates of Unmarried Infants.** — As to the construction of these statutes, see generally the following cases:

*California.* — *De Castro v. Barry*, 18 Cal. 96.  
*Kentucky.* — *Driskell v. Hanks*, 18 B. Mon. (Ky.) 855; *Renfroe v. Taylor*, 12 B. Mon. (Ky.) 402.

*Maine.* — *Decoster v. Wing*, 76 Me. 450.  
*New Hampshire.* — *Crowell v. Clough*, 23 N. H. 207; *Clark v. Pickering*, 16 N. H. 284.

*Virginia.* — *Liggon v. Fuqua*, 6 Munf. (Va.) 281; *Addison v. Core*, 2 Munf. (Va.) 279; *Templeman v. Steptoe*, 1 Munf. (Va.) 339; *Dilliard v. Tomlinson*, 1 Munf. (Va.) 183; *Tomlinson v. Dillard*, 3 Call (Va.) 105; *Browne v. Turberville*, 2 Call (Va.) 398; *Bailey v. Teackle*, Wythe (Va.) 8; *Vaughan v. Jones*, 23 Gratt. (Va.) 444.

2. **Cases to Which Statutes Applicable.** — See *Stitt v. Bush*, 22 Oregon 239.

An early *New Hampshire* statute which directed that, under the specified circumstances, the estate should go among the surviving brothers and sisters, was held to have no application where the deceased infant did not leave any brothers or sisters. It was held that, in their absence, the statute did not make any distinction in the descent founded upon the source from which the property was derived. *Kelsey v. Hardy*, 20 N. H. 479. And see *Benson v. Swan*, 60 Me. 161; *Decoster v. Wing*, 76 Me. 450; *Albee v. Vose*, 76 Me. 448; *Kirkendall's Estate*, 43 Wis. 167.

3. *Prescott v. Carr*, 29 N. H. 453, 61 Am. Dec. 652.

4. **A Provision as to Lands Descending from a Father** does not apply to lands devised by the father. *Nash v. Cutler*, 16 Pick. (Mass.) 491. And see *M'Affee v. Gilmore*, 4 N. H. 391; *Bell v. Scammon*, 15 N. H. 383, 41 Am. Dec. 706.

5. **Estates Derived from Brother.** — *Driskell v. Hanks*, 18 B. Mon. (Ky.) 863.

But a different construction was given to a statute which provided that "when any of the

children of the intestate die before his arrival at the age of twenty-one years, and unmarried, such deceased child's share shall descend equally among the surviving brothers and sisters, and such as legally represent them." *J. P. died intestate, leaving surviving him his widow and their two minor sons, D. and P. J. D. died, and his share of the estate went to P. J. The widow afterwards married, and had issue thereby two daughters. On the death of P. J. the question arose as to whether that part of his estate which had been his brother D.'s should descend to his half-sisters, who were of the blood of D., or should go to those of his kin who were of the blood of J. P., which would exclude the half-sisters from the inheritance. It was held that the latter was the true rule, it being considered that the estate did not descend from his brother D., but from his father. Perkins v. Simonds, 28 Wis. 90. This case is affirmed in Wiesner v. Zaun, 39 Wis. 188, although it is questioned, in an opinion by Cole, J., whether the rule there established is supportable on principle.*

6. **Estates Derived from Grandparents.** — *Walden v. Phillips*, 86 Ky. 302; *Wells v. Head*, 12 B. Mon. (Ky.) 166; *Turner v. Patterson*, 5 Dana (Ky.) 292; *Smith v. Smith*, 2 Bush (Ky.) 522; *Duncan v. Lafferty*, 6 J. J. Marsh. (Ky.) 47; *Goodrich v. Adams*, 138 Mass. 552; *Whitten v. Davis*, 18 N. H. 88. See *Case v. Wildridge*, 4 Ind. 51.

7. **Estate Inherited by Right of Representation.** — *Sedgwick v. Minot*, 6 Allen (Mass.) 171.

8. **Immediate Source of Title Only Considered.** — *Power v. Dougherty*, 83 Ky. 187. See *Cooksey v. Hill*, 106 Ky. 297.

9. **Succession Traced from Parent.** — *In re North*, 48 Conn. 583; *Matter of Fort*, 14 Wash. 15; *Wiesner v. Zaun*, 39 Wis. 188; *Perkins v. Simonds*, 28 Wis. 90. See also *Sheffield v. Lovering*, 12 Mass. 489; *Runey v. Edmonds*, 15 Mass. 291; *Nash v. Cutler*, 16 Pick. (Mass.) 491; *Goodrich v. Adams*, 138 Mass. 552.

(d) *Nature of Intestate's Title.* — But, though this is the general purpose of these statutes, it does not thereby follow that the title of such infant is defeasible upon his death. It seems that it is his absolute property while he lives; and that it can be taken for such debts as he was bound to pay, or be used for his support.<sup>1</sup>

(e) *Succession to Estate of Illegitimate Child.* — A statute providing, in effect, that if an infant dies without issue, having title to real estate derived by gift, devise, or descent from one of his parents, the property shall descend to the parent, has been held to apply alone to a person born in lawful wedlock.<sup>2</sup>

(6) *Distribution of Personalty.* — In the construction of statutes which prescribe the course of descent of realty and distribution of personalty in the same provisions, it is considered that though the statute contains a provision which gives to the common-law rule that descent must be traced from the first purchaser a partial recognition, such provision has no application to the distribution of personal property which is distributed without reference to the source from whence it came to the intestate.<sup>3</sup> And, according to the express provisions of some of the statutes, the distribution of personal property is the same as that of non-ancestral real estate.<sup>4</sup> Where the proceeds of realty are devised, *i. e.*, when land is directed to be sold and converted into money and the proceeds turned over by the executor to the devisee, it has been held that this is a devise of money.<sup>5</sup> If, therefore, a devisee elects to take the fund as land, as he may well do if of age,<sup>6</sup> this is a new acquisition of title.<sup>7</sup> So, where a person purchases land with money bequeathed to him by, or inherited from, his ancestor, it is an original purchase.<sup>8</sup>

**VI. HEIRS AND DISTRIBUTEES — 1. Definitions — Heir.** — An heir is one upon whom the law casts an estate of inheritance immediately upon the death of the owner.<sup>9</sup> At common law, the heir succeeds to and acquires by operation

1. *Intestate's Title.* — See *Goodrich v. Adams*, 138 Mass. 552.

It seems that if the estate of such deceased minor should, under a statute, have been sold for his maintenance or education, the purchaser would acquire a perfect title, which would not be divested on the minor's death. *Wiesner v. Zaun*, 39 Wis. 188.

2. *Bastards — Statutes Inapplicable to Estate of.* — *Blankenship v. Ross*, 95 Ky. 306.

3. *Distribution of Personalty Unaffected by Intestate's Source of Title.* — *Deloney v. Walker*, 9 Port. (Ala.) 497; *Oliver v. Vance*, 34 Ark. 564; *Moss v. Ashbrooks*, 20 Ark. 128; *Byrd v. Lipscomb*, 20 Ark. 19; *Kelly v. McGuire*, 15 Ark. 555; *Jones v. Dexter*, 8 Fla. 276; *Henson v. Ott*, 7 Ind. 512; *Jenks v. Trowbridge*, 48 Mich. 94; *Kyle v. Moore*, 3 Sneed (Tenn.) 183; *Shuman v. Shuman*, 80 Wis. 479; *Kirkendall's Estate*, 43 Wis. 167.

*Contra.* — *Bushnell v. Dennison*, 13 Fla. 77; *Westcott, J., dissenting*; *Clark's Appeal*, 58 Conn. 207, *followed in Welles's Estate*, 161 Pa. St. 218; *Matter of Fort*, 14 Wash. 10. See also *Kelsey v. Hardy*, 20 N. H. 479.

4. See *Stembel v. Martin*, 50 Ohio St. 495.

5. *Devise of Proceeds of Realty.* — *Parkinson's Appeal*, 32 Pa. St. 458; *Simpson v. Kelso*, 8 Watts (Pa.) 252; *Burr v. Sim*, 1 Whart. (Pa.) 252, 29 Am. Dec. 48. See *Lindley's Appeal*, 102 Pa. St. 235.

6. *Burr v. Sim*, 1 Whart. (Pa.) 252, 29 Am. Dec. 48; *Smith v. Starr*, 3 Whart. (Pa.) 65, 31 Am. Dec. 498; *Com. v. Forney*, 3 W. & S. (Pa.) 357; *Stuck v. Mackey*, 4 W. & S. (Pa.) 197.

7. *Burr v. Sim*, 1 Whart. (Pa.) 252, 29 Am. Dec. 48; *Neely v. Grantham*, 58 Pa. St. 443;

*Meily v. Wood*, 71 Pa. St. 493, 10 Am. Rep. 719; *Foster's Appeal*, 74 Pa. St. 399, 15 Am. Rep. 553; *Simpson v. Kelso*, 8 Watts (Pa.) 252.

8. *Land Purchased with Money Bequeathed to Intestate by Ancestor.* — *Champlin v. Baldwin*, 1 Paige (N. Y.) 562; *Russell v. Bruer*, 64 Ohio St. 1; *Ellis v. Ellis*, 2 Ohio Cir. Dec. 105.

Where lands were purchased for a daughter, after the death of her father, from the funds of her father's estate, it was held that the estate did not come to the daughter *ex parte paterna*, by the *Pennsylvania* law, and would descend, on her death, to her brother of the half blood on the mother's side, in preference to more remote kindred of the whole blood. *Simpson v. Hall*, 4 S. & R. (Pa.) 337.

9. *Heir Defined.* — 2 Bl. Com. 201; Co. Litt. 191a; 1 Reeves Hist. Eng. Law; *Proctor v. Clark*, 154 Mass. 45; *Lavery v. Egan*, 143 Mass. 391; *Richardson v. Martin*, 55 N. H. 45; *State v. Engle*, 21 N. J. L. 347; *Leach v. Cooper*, *Cooke* (Tenn.) 249. See also the title HEIR, HEIRS, AND THE LIKE, vol. 15, p. 318.

**One Who Takes a Life Estate** by common law or by statute on the owner's death, such as dower, curtesy, or homestead, is not an heir. *Proctor v. Clark*, 154 Mass. 45. See *Gauch v. St. Louis Mut. L. Ins. Co.*, 88 Ill. 251, 30 Am. Rep. 554; *Dodge's Appeal*, 106 Pa. St. 216, 51 Am. Rep. 519.

**Heir Distinguished from Purchaser and Devisee.** — A purchaser from a tenant in fee simple in his lifetime, and a devisee under his will, are alike assigns in law, claiming in opposition to and in exclusion of the heir who would otherwise have become entitled. *Wms. R. P.* 64, *citing Hogan v. Jackson*, 1 Cowp. 306; Co. Litt.

of law the estate of his ancestor in lands and tenements only; the term, therefore, is not applicable to one to whom the personal estate of the decedent goes.<sup>1</sup> The heir is called into existence by his ancestor's decease, for no man during his lifetime can have an heir; *nemo est hæres viventis*.<sup>2</sup>

**Heir Apparent and Heir Presumptive.** — Before the ancestor's death the person who is next in the line of succession is called an heir apparent or heir presumptive. An heir apparent is the person who, if he survives his ancestor, must certainly be his heir. The heir presumptive is the person who, though not certain to be heir at all events, should he survive, would yet be the heir in case of the ancestor's immediate decease.<sup>3</sup>

**Distributees.** — The persons who are entitled under the statutes of distribution to the personal estate of one who is dead intestate, may be denoted by the term "distributees."<sup>4</sup>

**Next of Kin.** — The phrase "next of kin" is sometimes also employed to denote such relations of a person who has died intestate as take his estate under the statute of distributions.<sup>5</sup>

**2. Who May Be Heirs and Distributees — a. GENERAL RULE.** — In the absence of certain disabilities which will be discussed presently, the intestate's real estate will devolve upon the persons pointed out by the statutes; all persons, even minors and lunatics, may transmit their estates as intestates, and succeed to the property of others.<sup>6</sup>

**b. EXCEPTIONS TO RULE — (1) Monsters.** — By the common law, monsters, not having the shape of mankind, but in any part bearing the resemblance of the brute creation, are said to be incapable of inheriting; but, although deformed, if they have human shape, they may be heirs.<sup>7</sup>

**(2) Murderer of Intestate.** — It has recently been provided by statute in some of the *United States* that a person who murders another cannot succeed to the latter's property.<sup>8</sup> The rule which obtains in the absence of any statute to this effect has been discussed in another title.<sup>9</sup>

**(3) Aliens.** — By the common law aliens are incapable of taking by descent, or inheriting.<sup>10</sup>

**(4) Bastards.** — By the common law, bastards are incapable of being heirs, but this rule has been extensively modified by statute.<sup>11</sup>

1912, n. (1) VI. 10. And see PURCHASE — PURCHASER, vol. 23, p. 462 *et seq.*

1. **Heir Distinguished from Distributee.** — *Tillman v. Davis*, 95 N. Y. 17, 47 Am. Rep. 1. See the title HEIR, HEIRS, AND THE LIKE, vol. 15, p. 327.

2. See the title HEIR, HEIRS, AND THE LIKE, vol. 15, p. 326.

**Conveyances on Gambling Consideration.** — By a peculiar statutory act of the *Ohio* territorial government it was provided that all conveyances, etc., made for a gambling consideration, should inure to the use of the heir of the bargainer, and vest the estate in such heir the same as if the bargainer had died intestate. See *Bond v. Swearingen*, 1 Ohio 395.

**Civil Death.** — At common law the estate of a person civilly dead would, in certain cases, vest in his heirs as if he were actually dead. See the title CIVIL DEATH, vol. 6, p. 64. But there seems to be no doubt that, in the *United States*, even in those states where there is a statutory provision that one imprisoned for life shall be deemed civilly dead, the property of such felon does not thereby devolve upon his successors or heirs because of the disability of imprisonment. *Smith v. Becker*, 62 Kan. 541; *Avery v. Everett*, 110 N. Y. 317, 6 Am. St. Rep. 369, and note.

And in *Texas*, where there was no such provision, it was expressly decided that the estate of one sentenced to imprisonment for life did not descend to his heirs as in the case of death. *Davis v. Laning*, (Tex. 1892) 19 S. W. Rep. 846. See the title CIVIL DEATH, vol. 6, p. 66, notes 3 and 4.

3. 2 Bl. Com. 208; *Wms. R. P.* 96. See the title HEIR, HEIRS, AND THE LIKE, vol. 15, p. 320.

4. See DISTRIBUTE, vol. 9, p. 660.

5. See NEXT OF KIN, vol. 21, p. 537.

6. **Capacity to Inherit.** — 1 Bouv. Inst., § 1957.

7. **Monsters.** — Co. Litt. 7, 8; 2 Bl. Com. 246.

It has been said that the reason for this rule "is too obvious, and too shocking, to bear a minute discussion, which, moreover, is unnecessary, since such *lusus nature* can rarely occur." 2 *Broom v. Had.* Bl. 397.

8. **Murder of Intestate.** — For example, see the following statutes: Civ. Code Cal., § 1409; Annot. Code Miss., § 1554.

9. See the title MURDER AND MANSLAUGHTER, vol. 21, p. 238.

10. **Aliens.** — For a discussion of the common law and statutory rights of aliens to inherit property, see the title ALIENS, vol. 2, p. 73 *et seq.*

11. **Bastards.** — See *infra*, this title, *Succession by and from Bastards*.

c. **RELATIVES SPECIALLY DESIGNATED.** — In directing the course of succession, the statutes of descents and distributions adopted in the states of the Union commonly refer to the nearer relatives by their designation of relationship. The statutes are in this respect explicit.<sup>1</sup>

d. **KINDRED** — (1) *In General.* — The statutes, after providing specifically for the succession to decedents' estates in case of the survival of the near relatives just referred to, very largely indicate the further order of succession by a general reference to the kindred of the intestate.<sup>2</sup>

(2) *Who Are Kindred.* — It is considered that, in speaking of kin or kindred, the statute thereby, unless its language clearly shows that relations by affinity are included,<sup>3</sup> means relationship by consanguinity only.<sup>4</sup> Thus, kin may be defined as a relation or relationship by blood or consanguinity.<sup>5</sup> As intestate succession, then, depends not a little on the nature of kindred and the several degrees of consanguinity, it will be necessary to state the true notion of this kindred or alliance in blood.

(3) *Consanguinity.* — Consanguinity is the connection or relation existing among all the different persons descended from the same stock or common ancestor,<sup>6</sup> as distinguished from affinity, which is a relationship established by marriage.<sup>7</sup> Consanguinity is either lineal or collateral.

*Lineal Consanguinity* is that which subsists between persons of whom one is descended in a direct line from the other, as between the intestate and his son, grandson, great-grandson, and so downward in the direct descending line, or, between the intestate and his father, grandfather, great-grandfather, and so upward in the ascending line.<sup>8</sup>

*Collateral Consanguinity* is that which exists between persons who are descended from the same common ancestor, but not from each other; as between two brothers descended from the same father, or between two cousins descended from the same grandfather.<sup>9</sup>

(4) *Classes of Kindred* — *Descendants, Ascendants, and Collaterals.* — Kindred are naturally classified into, first, one's children and their descendants; second, his father, mother, and other ascendants; third, his collateral relations, which include, in the first place, his brothers and sisters and their descendants, and secondly, his uncles, cousins, and other relations of either sex who have not descended from a brother or sister of the deceased. All kindred, then,

1. See *infra*, this title, *Course of Succession* — *Specially Designated Relatives*.

2. See *infra*, this title, *Course of Succession* — *Next of Kin*.

3. *Kindred Defined.* — In *Ohio*, the wife is, for certain purposes, designated as her husband's next of kin. *Gardner v. Gardner*, 13 Ohio St. 426.

4. *Green v. Hudson River R. Co.*, 32 Barb. (N. Y.) 25, (Ct. App.) 30 How. Pr. (N. Y.) 593. See also *Kearney v. Turner*, 28 Md. 425; *Jones v. Barnett*, 30 Tex. 638. See the titles *KIN*, vol. 18, p. 63, and *KINDRED*, vol. 18, p. 24.

A husband is not the next of kin of his wife, within the meaning of the statute of distributions. The words "next of kin" embrace blood relatives only. *Peterson v. Webb*, 4 Ired. Eq. (39 N. Car.) 56. And see *Townsend v. Radcliffe*, 44 Ill. 446. So, the surviving husband or wife cannot ordinarily inherit as the next of kin nor as the descendant of the decedent. *Prather v. Prather*, 58 Ind. 141. See *Garrick v. Camden*, 14 Ves. Jr. 372; *Haraden v. Larrabee*, 113 Mass. 431.

And it was held that first cousins inherited in preference to second cousins by consanguinity, though such second cousins were also

uncles and aunts by affinity. *Speer v. Miller*, 37 N. J. Eq. 492.

It has been held that a woman who married one of two brothers, and survived them both, she being of no blood kin to either, and her husband dying first, is in no event an heir at law of the other. *Green v. Grant*, 108 Ga. 751.

5. *Burr. L. Dict.* Kindred are descendants from the same stock or ancestor. *Birney v. Wilson*, 11 Ohio St. 426.

Kindred and kin are, in several states, declared to mean kindred by blood. *Delaware Rev. Code* 1874, c. 5, § 1; *New Mexico Comp. L.* 1884, § 973; *Ohio Rev. Stat.* 1880, §§ 4158-9; *Stim. Am. Stat. L.*, § 3139.

6. *Consanguinity Defined.* — 2 Bl. Com. 202; *Toll. Ex.* 87; *Swezey v. Willis*, 1 Bradf. (N. Y.) 495; *Blodget v. Brinsmaid*, 9 Vt. 27. See *CONSANGUINITY*, vol. 6, p. 662.

7. See *AFFINITY*, vol. 1, p. 911.

8. *Lineal Consanguinity Defined.* — 2 Bl. Com. 202; *Bouv. L. Dict.*, title *Consanguinity*; *McDowell v. Addams*, 45 Pa. St. 430. See *Stim. Am. Stat. L.*, § 3139.

9. *Collateral Consanguinity Defined.* — 2 Bl. Com. 204; *Bouv. L. Dict.*, title *Consanguinity*; *Burr. L. Dict.*, title *Collateral Consanguinity*;

are descendants, ascendants, or collaterals. Ascendants and descendants are lineal kindred; other kindred are collateral.<sup>1</sup>

(5) *Degrees of Kinship*. — In speaking of degrees of relationship, the word "degree" is a metaphorical expression borrowed from the steps of a ladder or of stairs; the kindred descending from their common ancestor from generation to generation are as so many steps in a stair or so many rounds in a ladder. The degree of kindred is established by the number of generations.<sup>2</sup>

(6) *Mode of Reckoning Degrees of Kinship* — (a) *In Direct Line*. — In the direct line — line being understood to be the series of persons who have descended from a common ancestor, placed one under the other in the order of their birth — any one of the persons there represented may be taken as a propositus, in order to class the other persons in the line above and below. This line is then severed into two — namely, the ascending line and the descending line.<sup>3</sup> In computing the degrees of kinship of descendants or ascendants to the propositus, every generation, either upward or downward, constitutes a different degree.<sup>4</sup> This is the only natural way of reckoning the degrees in the direct line, and is common to the civil, canon, and common law.<sup>5</sup>

(b) *In Collateral Line* — aa. *IN GENERAL*. — The collateral line, considered of itself and relatively to the common ancestor, is a direct line; it takes the name of collateral when it is placed alongside of another line below the common ancestor, in whom both lines unite. These two lines are independent of each other; they have no connection, except by uniting in the person of the common ancestor, and it is this union which forms the kindred between the persons in these two lines.<sup>6</sup> There are two modes of computing the degrees of collateral kindred; the one is that of the canon law, and the other is that of the civil law. The computation of degrees of kinship, by the common law and under the succession statutes, is made according to one or the other of these methods.

bb. *BY CANON LAW*. — The mode of computation by the canon law is to begin with the common ancestor and reckon downward, and the degree in which the two persons, or the more remote of them, is distant from the ancestor, is the degree of kindred subsisting between them; in whatever degree the claimant is distant from the ancestor common to him and the intestate, that is the degree in which they are related; but if there are more degrees between the ancestor and the intestate than between the ancestor and the claimant, then the degrees are reckoned between the ancestor and the intestate.<sup>7</sup>

cc. *BY CIVIL LAW*. — The civil-law rule is to begin with the intestate, and ascend from him to a common ancestor, and descend from that ancestor to the heir, reckoning a degree each generation, as well in the ascending as in the descending line.<sup>8</sup>

dd. *BY COMMON LAW*. — It has been stated by an eminent writer that the canon-law method of computing the degrees of consanguinity has been adopted

McDowell v. Addams, 45 Pa. St. 430. See Stim. Am. Stat. L., § 3139.

1. *Kindred — Classification of*. — 1 Bouv. Inst., § 1961; Bouv. L. Dict. See Wood Inst. 50; Ayliffe, Parerg. 325; Dane Abr.; Toulrier Ex. 382; 2 Sharsw. Bl. Com. 516, n.; Pothier, Des Successions, c. 1, art. 3.

2. *Kinship — Degrees of*. — 1 Bouv. Inst. 1962. See Stim. Am. Stat. L., § 3139.

3. *Reckoning Degree of Kinship in the Direct Line*. — See Stim. Am. Stat. L., § 3139.

4. See Stim. Am. Stat. L., § 3139.

5. 2 Bl. Com. 203 and authorities there cited.

6. *Collateral Line Described*. — 1 Bouv. Inst., § 1965.

7. *Canon-law Mode of Reckoning Kinship*. — 2 Bl. Com. 206; 1 Bouv. Inst., § 1966; 1 Woern. Am. L. Adm. 151, 152.

8. *Civil-law Mode of Reckoning Kinship*. — 4 Kent's Com. 412; 3 Cruise Dig. 339.

According to this rule of computation, the father of the intestate stands in the first degree, his brother in the second, and his brother's children in the third. Or, the grandfather stands in the second degree, the uncle in the third, the cousins in the fourth, and so on in a series of genealogical order. See Stim. Am. Stat. L., § 3139, citing statutes of California, Dakota, Louisiana, Montana, New Mexico, and Utah.

by the common law.<sup>1</sup> But it is doubtful if there is any authority for the statement.<sup>2</sup> By the common law it is immaterial which method of computation is adopted; for, under the efficacy of the principle of indefinite representation, both rules lead to the same result—both will establish the same person to be the heir.<sup>3</sup> Hence it has been declared that “it can hardly be said that a dogma, which has no practical efficiency, exists as a part of any system of laws.”<sup>4</sup> It may be added that it would be more reasonable to adopt the rule of the civil law, rather than that of the canon law, as the common-law rule.<sup>5</sup>

22. UNDER SUCCESSION STATUTES. — In England it has been declared that the English statute of distributions must be construed according to the so-called rule of the common law.<sup>6</sup> But the rule which has finally prevailed for reckoning the degrees of kindred under that statute is that of civil law.<sup>7</sup>

In the United States. — As has been stated, it is immaterial whether the common law has adopted the rule of the canon law or that of the civil law; by the operation of the common-law doctrine of indefinite representation, the employment of either rule leads to the same result. But under the American succession statutes, which give to the right of representation only a limited effect, very different results are often arrived at by the employment of the one or the other of these several rules. And since these systems of intestate succession were largely derived from the civil law, which ignored the right of representation, the natural result is that, while the canon-law rule has sometimes been recognized,<sup>8</sup> the rule generally adopted, either by express statutory enactment or judicial construction, is that of the civil law.<sup>9</sup> To avoid the division of an inheritance into unduly small fractions, and to simplify the rules of descent, statutes frequently provide that, where two or more of the same degree of consanguinity claim as next of kin, those who trace their blood through the nearest lineal ancestor shall be preferred to those whose ancestor is more remote from the intestate.<sup>10</sup> It will be noticed that, where representation is allowed, the same general result is reached by that means.<sup>11</sup>

1. Common-law Mode of Reckoning Kinship. —

2 Bl. Com. 206, citing Co. Litt. 23.

2. See *Schenck v. Vail*, 24 N. J. Eq. 538.

3. 1 Bouv. Inst., § 1966; *Schenck v. Vail*, 24 N. J. Eq. 538.

4. Beasley, C. J., in *Schenck v. Vail*, 24 N. J. Eq. 538.

5. See 2 Min. Inst. 518.

6. Mode of Reckoning Kinship under the English Statute of Distributions. — *Blackborough v. Davis*, 1 P. Wms. 41, where it was said by Holt, C. J., that a prohibition would issue to prevent the ecclesiastical courts from proceeding under the statute of Car. II. contrary to the rules of the common law.

7. It was so held by Sir Joseph Jekyll, M. R., in 1722, in *Mentney v. Petty*, Prec. Ch. 593; by Lord Hardwicke in 1749, in *Thomas v. Ketteriche*, 1 Ves. 334; and by Sir John Strange in 1750, in *Lloyd v. Tench*, 2 Ves. 215; and has been ever since acquiesced in. See *Wallis v. Hodson*, 2 Atk. 116, 1 Wms. Exrs. 365.

8. Mode of Reckoning Kinship under the American Succession Statutes. — In *Georgia*, the statute, after fixing the order in which certain relatives of the intestate are entitled to the inheritance *nominatim*, then provides “that the more remote degrees of kindred shall be determined by the rules of the canon law, as adopted and enforced in the English courts prior to the 4th day of July, 1776.” *Georgia Code* 1882, § 2484; *Wetter v. Habersham*, 60 Ga. 193;

*Ector v. Grant*, 112 Ga. 568. The canon law is adhered to in *North Carolina*. N. Car. Code 1883, § 1281 (6); *Gillespie v. Foy*, 5 Ired. Eq. (40 N. Car.) 280.

9. See the statutes of the various states. See also *Martindale v. Kendrick*, 4 Greene (Iowa) 307; *Mayo v. Boyd*, 3 Mass. 13; *McCracken v. Rogers*, 6 Wis. 278; *People v. De La Guerra*, 24 Cal. 73.

It has been held that, in the absence of statute, the civil-law rule for the computation of degrees of kindred prevails as to personalty. *Sweezy v. Willis*, 1 Bradf. (N. Y.) 495; *Hurtin v. Proal*, 3 Bradf. (N. Y.) 414. And it may be said that the civil-law method of computation has been recognized in construing statutes which do not in terms expressly recognize it. *Hillhouse v. Chester*, 3 Day (Conn.) 166, 3 Am. Dec. 265; *Hays v. Thomas*, 1 Ill. 180; *Clark v. Sprague*, 5 Blackf. (Ind.) 412; *Cloud v. Bruce*, 61 Ind. 171; *Schenck v. Vail*, 24 N. J. Eq. 538; *Taylor v. Bray*, 32 N. J. L. 182; *Smith v. Gaines*, 36 N. J. Eq. 297; *Clayton v. Drake*, 17 Ohio St. 368; *McDowell v. Addams*, 45 Pa. St. 430; *Shaffer v. Nail*, 2 Brev. (S. Car.) 160.

Under the law of the *District of Columbia* a paternal grandfather is nearer of kin than a maternal uncle. *Matter of Afflick*, 3 MacArthur (D. C.) 95.

10. See various state statutes.

11. See 1 Woern. Am. L. Adm. 153.

*c. KINSMEN OF HALF BLOOD* — (1) *In General*. — It is substantially stated above that the heir is, by the common law always, and under the modern scheme of succession with rare exceptions, selected from the intestate's relations by blood.<sup>1</sup> But blood is, at common law, recognized to be of two kinds; the whole or full blood and the half blood. A person is of the whole blood to another when they are both descended not only from the same ancestor but from the same couple of ancestors.<sup>2</sup> Two persons are said to be of the half blood to one another when they are descended from one common ancestor only.<sup>3</sup>

(2) *By Common Law*. — At common law the intestate's next collateral kinsman<sup>4</sup> must, in order to be his heir, be his kinsman of the whole blood; a kinsman of the half blood could not inherit. Though there is a near kinsman of the half blood, not only will a more distant kinsman of the whole blood be admitted and the other wholly excluded, but, there being no kindred of the full blood, rather than go to the half blood, the estate escheats to the lord.<sup>5</sup> This total exclusion of the half blood from the inheritance is not so much to be considered in the light of a rule of descent as of a rule of evidence — an auxiliary rule to carry into execution the common-law requirement that the inheritance shall continue in the blood of the first purchaser.<sup>6</sup>

(3) *Under Succession Statutes* — (a) *In England*. — The common-law rule has been altered to a considerable extent by the English statute amending the law of inheritance,<sup>7</sup> under which a relation of the whole blood and his or her issue shall be preferred to a relation of the same degree of the half blood, and his or her issue, but the relations of the half blood are not excluded.<sup>8</sup>

(b) *In United States* — *aa. ABOGATION OF COMMON-LAW RULE*. — Since the common-law doctrine excluding the half blood is dependent upon and only useful in connection with the common-law rule or canon of descent that its course must be traced from the first purchaser, it can have no general application under a scheme of succession such as is established in the United States, in which the first-purchaser rule has been in some states wholly, and in all states largely, abrogated.<sup>9</sup> It follows accordingly, as a general doctrine, that, independent of express statutory enactments, no distinction is admitted in the United States between the whole and the half blood.<sup>10</sup> And looking to the

1. *Kinsmen Selected from Blood Relations*. — See *supra*, this section, *d.* (2) *Who Are Kindred* and (3) *Consanguinity*.

2. *Whole Blood Defined*. — As two brothers, who have the same father and mother. 2 Bl. Com. 227; Rap. & L. L. Dict., tit. *Blood*, citing Co. Litt. 14a. See *Matter of Pearsons*, 110 Cal. 524.

3. *Half Blood Defined*. — Two brothers who have the same father but different mothers are kindred of the half blood. 2 Bl. Com. 227.

4. *Distinction Between Whole and Half Blood Affects Only Collateral Descent*. — It is evident that questions of the whole blood and half blood can only arise in respect to collateral heirs. A man cannot be of the half blood to his ancestor. This is the reason why there was no *possessio fratris* of an estate tail; the descent of the estate being always under the statute *de donis* traced from the donee, the issue in tail taking as heir to him *per formam doni*, and not as heir to the last actual tenant in tail. *Challis R. P.* 190, citing *Doe v. Whichelo*, 8 T. R. 211.

5. *Common-law Exclusion of Half Blood*. — Litt., § 6; Bl. Com. 224, 227; *Brown v. Brown*, 1 D. Chip. (Vt.) 360.

*Doctrine of Possessio Fratris*. — One consequence of this doctrine, together with the rule

*seisina facit stipitem*, is the doctrine of *possessio fratris*, which was this: If a man, being seized of land, had issue a son and a daughter by one woman, and a younger son by another woman, and the father died, and then the elder son entered and died, the daughter would have inherited the land as heir to her brother, who was the person last actually seized. The maxim in such cases is that the *seizin* or *possessio fratris facit sororem esse haeredum*. 2 Bl. Com. 227; *Broom's Max.* 532. But had the elder son died without entry, then the younger son might have inherited, not as heir to his half-brother, but as heir to their common father, who was the person last actually seized. 2 Bl. Com. 227, citing 2 Hale Hist. C. L. 238.

6. *Exclusion of Half Blood a Rule of Evidence*. — 2 Bl. Com. 228. See comments in 2 Min. Inst. 464.

7. *Modern English Rule*. — 3 & 4 Wm. IV., ch. 106, § 9.

8. 2 *Broom & Had. Bl.* 386.

9. *Abrogation of Distinction Between Whole and Half Blood in the United States*. — See *Cliver v. Sanders*, 8 Ohio St. 506.

10. See *Gardner v. Collins*, 2 Pet. (U. S.) 58; *Clark v. Russell*, 2 Day (Conn.) 112; *Ector v. Grant*, 112 Ga. 568; *Neeley v. Wise*, 44 Iowa



express legislation on the subject, we find that in no state is the half blood wholly excluded; we even find that in some states the distinction between the whole and the half blood is completely abolished. In certain states the statutes declare collaterals of the half blood to be entitled equally with those of the full blood in equal degree.<sup>1</sup> There can be no doubt that, under these statutes, no preference will be shown, in the case of inheritance by half brothers and sisters, to those brothers and sisters who are related to the intestate on the side of one parent over those who are of his blood on the side of the other.<sup>2</sup>

*bb. SUCCESSION TO ESTATES OF UNMARRIED INFANTS.* — But in some of the United States it is provided that the estate which a minor, who died unmarried and without issue, derived from one of his parents, passes to the other children of the same parent.<sup>3</sup> Here the estate of the deceased will not always go to his half brothers and sisters. If, for instance, he derived the estate from his father, the surviving children of the deceased father will take the deceased child's share in their father's estate to the exclusion of brothers and sisters of the half blood by the same mother but by a different father.<sup>4</sup> This provision,

544; *Pearson v. Grice*, 6 La. Ann. 233; *Brown v. Brown*, 1 D. Chip. (Vt.) 360. And see the titles *NEXT OF KIN*, vol. 21, p. 537; and *BLOOD*, vol. 4, p. 585.

The general doctrine that, independent of express statutory enactment, no distinction is admitted between the whole and the half blood was asserted in *Prescott v. Carr*, 29 N. H. 453, 61 Am. Dec. 652, and distinctly recognized in *Crowell v. Clough*, 23 N. H. 207.

**"Brothers and Sisters" Held to Include the Half Blood.** — So where a statute directed that the estate should in certain cases descend to the brothers and sisters of the deceased person dying intestate, it was held that the term "brothers and sisters" included those of the half blood.

*California.* — *Matter of Lynch*, 132 Cal. 214.

*Indiana.* — *Anderson v. Bell*, 148 Ind. 375; *Aldridge v. Montgomery*, 9 Ind. 302; *Doe v. Abernathy*, 7 Blackf. (Ind.) 442; *Clark v. Sprague*, 5 Blackf. (Ind.) 412.

*Kentucky.* — *Clay v. Cousins*, 1 T. B. Mon. (Ky.) 75.

*Massachusetts.* — *Sheffield v. Lovering*, 12 Mass. 490.

*Michigan.* — *Rowley v. Stray*, 32 Mich. 70.

*New York.* — *In re Bell*, (Surrogate Ct.) 34 N. Y. Supp. 191.

*Rhode Island.* — *Gardner v. Collins*, 3 Mason (U. S.) 398, 2 Pet. (U. S.) 58, construing the *Rhode Island* statute of 1789 (quoted under *BLOOD*, vol. 4, p. 585).

*Texas.* — *Marlow v. King*, 17 Tex. 177.

But see *Wren v. Carnes*, 4 Desaus. (S. Car.) 405; *Lawson v. Perdriaux*, 1 McCord L. (S. Car.) 456.

**Next of Kin Held to Include the Half Blood.** — And the term "next of kin" in other statutes has been construed to include the half blood. *Hillhouse v. Chester*, 3 Day (Conn.) 166, 3 Am. Dec. 265; *McKinney v. Mellon*, 3 Houst. (Del.) 277. So, under the *South Carolina* statute of 1791, which provided that "if the intestate shall leave no lineal descendant — father, mother, brother, or sister of the whole blood, or their children, or brother or sister of the half blood, or lineal ancestor — then the

widow shall take two-thirds of the estate, and the remainder shall descend to the next of kin," it was held, where the nearest relations of the intestate were an uncle or aunt of the half blood and first cousins of the whole blood, that the former were entitled to take the whole personal and real estate in exclusion of the latter, since they were the next of kin. *Karwon v. Lowdes*, 2 Desaus. (S. Car.) 210; *Perry v. Logan*, 5 Rich. Eq. (S. Car.) 202. First cousins of the whole and the half blood take equally as next of kin. *Edwards v. Barksdale*, 2 Hill Eq. (S. Car.) 416; *Riley Eq. (S. Car.)* 16. And an uncle of the half blood shares equally with an uncle of the whole blood. *Guerard v. Guerard*, 4 Desaus. (S. Car.) 405, note. In an elaborate discussion, in *Edwards v. Barksdale*, 2 Hill Eq. (S. Car.) 416, *Riley Eq. (S. Car.)* 16, of the true construction of the statute under consideration, Chancellor Harper, in effect, said that the conclusion there reached was not at all inconsistent with the determination in the above-cited cases of *Wren v. Carnes*, 4 Desaus. (S. Car.) 405, and *Lawson v. Perdriaux*, 1 McCord L. (S. Car.) 456, that by the act of 1797, amending that of 1791, and providing that where there are a father or mother and brother and sister, they shall take equally, brother and sister of the whole blood only were meant. The chancellor said that upon the particular provisions of both acts construed together, he would certainly have arrived at the same conclusion.

**1. Statutes Abolishing Distinction Between Whole and Half Blood** — See the statutes of *Illinois*, *Maine*, *Massachusetts*, *North Carolina*, *Oregon*, and *Vermont*. And see *Larrabee v. Tucker*, 116 Mass. 562; *Hatch v. Hatch*, 21 Vt. 450.

**2.** See *Edwards v. Barksdale*, 2 Hill Eq. (S. Car.) 416; *Oglesby Coal Co. v. Pasco*, 79 Ill. 164 (stated and quoted under *BLOOD*, vol. 4, pp. 585, 586); *Marshall v. King*, 24 Miss. 85; *Bates v. Cotton*, 32 Miss. 266.

**3.** See *supra*, this title *Ancestor of Propositus* — *Estates of Unmarried Infants*.

**4.** *Clark v. Pickering*, 16 N. H. 284; *Crowell v. Clough*, 23 N. H. 207.

however, is rather a restriction of the descent to the line of the parent from whom the estate came than an exclusion of the half blood; if the estate came from the father, the half brothers and sisters on the paternal side will probably inherit from the deceased infant.<sup>1</sup>

cc. SUCCESSION TO ANCESTRAL ESTATES. — A somewhat analogous provision is found in a number of states in the proviso or exception contained in an enactment which may be stated substantially as follows: that kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise, or gift from some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded from such inheritance.<sup>2</sup> Here again the course of descent is restricted to the line through which the estate came, and the intestate's kindred of the half blood, who have none of the blood of the ancestor from whom it came in the manner indicated, are excluded from the inheritance.<sup>3</sup> But the effect of these provisions is not necessarily a preference of the whole to the half blood;<sup>4</sup> for here also the kindred of the half blood will inherit if they are in the line of succession — that is, if they are of the blood of the ancestor from whom the intestate's property came as an ancestral estate.<sup>5</sup> If a person has any of the blood of the ancestor, however small the fractional part, he may, under these provisions, inherit as the intestate's next of kin equally with the whole blood.<sup>6</sup> It is clear that, both under the statutes last referred to and those relating to the descent of the estate of a deceased minor, if the estate did not come to the deceased in the manner indicated, *i. e.*, is not an ancestral estate, but is a new acquisition — that is, if it cannot be traced to some ancestor not common to the full and the half blood relation — no distinction whatever is allowed.<sup>7</sup>

1. **Nature of the Exclusion.** — See Talbott v. Talbott, 17 B. Mon. (Ky.) 1. The statutes have accordingly been discussed, *supra*, under the division *Ancestor or Propositus*.

2. See *supra*, this title, *Ancestor or Propositus* — *Ancestral and Non-ancestral Estates*.

3. Brothers and sisters of the half blood cannot inherit from each other, unless the estate is derived from their common ancestor, or has been acquired by the intestate by purchase. Cutter v. Waddingham, 22 Mo. 206; Den v. Urison, 2 N. J. L. 212; Den v. De Hart, 3 N. J. L. 73; Den v. Jones, 8 N. J. L. 340.

But if there are no kindred of the blood of the ancestor from whom the estate came, it will, as a general rule, go to the kindred of the intestate without common blood with such ancestor. Nesbit v. Bryan, 1 Swan (Tenn.) 468 (decided under Tenn. Act of 1784).

4. **Nature of the Exclusion.** — Bing. Desc. 324.

5. Stallworth v. Stallworth, 29 Ala. 76; Kelly v. McGuire, 15 Ark. 555; Anderson v. Bell, 140 Ind. 375; *In re Bell*, (Surrogate Ct.) 34 N. Y. Supp. 191; Doe v. Sheppard, 3 Murph. (7 N. Car.) 333; Pritchard v. Turner, 2 Hawks (9 N. Car.) 435; Ross v. Toms, 2 Hawks (9 N. Car.) 9; Osborne v. Widenhouse, 3 Jones Eq. (56 N. Car.) 238; Lynch v. Lynch, 132 Pa. St. 422; Nichol v. Dupree, 7 Yerg. (Tenn.) 415.

It is held that an ancestral estate which was derived from one of the decedent's parents will go to the decedent's brothers and sisters on the side of that parent, although they are not the issue of the decedent's other parent. Gardner v. Collins, 3 Mason (U. S.) 398, 2 Pet. (U. S.) 58; Clark v. Russell, 2 Day (Conn.) 112; Aldridge v. Montgomery, 9 Ind. 302; Lowe v. Maccubbin, 1 Har. & J. (Md.) 550; Beebee v.

Griffing, 14 N. Y. 235; Freeman v. Allen, 17 Ohio St. 527; Baker v. Chalfant, 5 Whart. (Pa.) 477. See also Wheeler v. Clutterbusk, 52 N. Y. 68; Cliver v. Sanders, 8 Ohio St. 501.

**Preference of Whole Blood in Succession by Brothers and Sisters.** — In Pennsylvania there is an express postponement of brothers and sisters of the half blood to brothers and sisters of the whole blood and to parents, even when the half blood is that of the ancestor. Stark v. Stark, 55 Pa. St. 62. But the half brothers and sisters of the blood of the ancestor from whom the estate came will inherit before relatives of the whole blood of more remote degree. Baker v. Chalfant, 5 Whart. (Pa.) 477; Simpson v. Hall, 4 S. & R. (Pa.) 337. See also Hart's Appeal, 8 Pa. St. 32. There is, however, no distinction between the half and the whole blood in the case of inheritance by relatives more remote than brothers and sisters. Danner v. Shissler, 31 Pa. St. 289; May v. Espenshade, 3 Luz. Leg. Obs. (Pa.) 142; Dorsey v. Van Horn, 9 W. N. C. (Pa.) 95; Davis' Estate, 9 W. N. C. (Pa.) 479; Kiegel's Appeal, 12 W. N. C. (Pa.) 179. And see Graham's Estate, 6 W. N. C. (Pa.) 402.

6. Den v. Jones, 8 N. J. L. 340. See also Gardner v. Collins, 3 Mason (U. S.) 398, 2 Pet. (U. S.) 58 (*quoted under Blood*, vol. 4, p. 585).

7. **Exclusion Limited to Estates Devised in the Specific Manner.** — Johnson v. Copeland, 35 Ala. 525; Armington v. Armington, 28 Ind. 71; Van Sickle v. Gibson, 40 Mich. 170; Cutter v. Waddingham, 22 Mo. 206; Brown v. Burlingham, 5 Sandf. (N. Y.) 418; McCracken v. Rogers, 6 Wis. 278. See also Burgwyn v. Devereux, 1 Ired. L. (23 N. Car.) 583.

See also as to early North Carolina and Ten-

*dd.* SUCCESSION BETWEEN BROTHERS AND SISTERS. — It is occasionally found that statutes which, either expressly or by implication, contain a general abolition of all distinction between the half and the whole blood, except the case of inheritance by the intestate's brothers and sisters, in which case a preference is given to the brothers and sisters of the whole blood. But this rule has received the approval of but very limited adoption,<sup>1</sup> and it does not effect any distinction between the half blood and the whole blood in the case of inheritance by collateral relatives more remote than brothers and sisters.<sup>2</sup> Under the statutes which give a preference to kindred of the whole blood in equal degree, brothers and sisters of the whole blood of course exclude those of the half blood.<sup>3</sup> And, if the right of representation is in force, the children of a deceased brother or sister of the whole blood, since they occupy precisely the situation which their parents did, will take, to the exclusion of brothers and sisters of the half blood.<sup>4</sup> But if there are only brothers and sisters of the half blood surviving, they will inherit rather than more remote relations.<sup>5</sup>

*ee.* STATUTES GIVING LARGER SHARE TO WHOLE BLOOD. — In a number of states, the collaterals of the half blood take only half as much as those of the whole blood, or (this is found in most though not all of these statutes) as ascendants.<sup>6</sup>

(4) *Distribution of Personalty.* — Coming to the question as to application of the common-law rule in exclusion of the half blood to the case of succession to personal property, it would seem that, since the rule is but an outgrowth of the feudal doctrine that descent must be traced from the first purchaser, and that doctrine has probably never had any application to the distribution of personalty, there can be little question but that the half will take equally with the whole blood if the statutes are silent upon the subject.<sup>7</sup>

*nessee* statutes, *M'Kay v. Hendon*, 3 Murph. (7 N. Car.) 209; *Ross v. Toms*, 2 Hawks (9 N. Car.) 9; *Doe v. Sheppard*, 3 Murph. (7 N. Car.) 333; *Nichol v. Dupree*, 7 Yerg. (Tenn.) 415. As to early *New Jersey* statutes, see *Arnold v. Den*, 5 N. J. L. 997; *Den v. McKnight*, 11 N. J. L. 385; *Banta v. Demarest*, 24 N. J. L. 431.

The objection that a half-sister cannot inherit land of her deceased half-brother because she is not of the blood of the first purchaser, does not apply where the half-brother is himself the first purchaser; in which case she may inherit whether she is half-sister on the part of the father or mother. *Vattier v. Hinde*, 7 Pet. (U. S.) 252.

1. *Preference of Whole Blood in Succession Between Brothers and Sisters.* — In the *Louisiana* Code there is an express provision preferring the brothers and sisters of the whole blood. See *Pearson v. Grice*, 6 La. Ann. 233.

2. *Pearson v. Grice*, 6 La. Ann. 233.

3. *McLemore v. McLemore*, 8 Ala. 687; *Hulme v. Montgomery*, 31 Miss. 105; *Scott v. Terry*, 37 Miss. 65. See *Ex p. Mays*, 2 Rich. L. (S. Car.) 61.

4. *Hitchcock v. Smith*, 3 Stew. & P. (Ala.) 29; *King v. Neely*, 14 La. Ann. 160; *Hulme v. Montgomery*, 31 Miss. 105; *Scott v. Terry*, 37 Miss. 65.

By the *South Carolina* act of 1819, a sister of the half blood was excluded in distribution by sisters and children of a predeceased sister of the whole blood. *Charleston v. Hagermeyer*, *Riley Eq.* (S. Car.) 117. And the children of a predeceased brother of the whole blood took a share equal to a brother of the half blood under the act of 1791. *Felder v. Felder*, 5 Rich. Eq. (S. Car.) 509.

5. *Fatheree v. Fatheree*, Walk. (Miss.) 311. A brother of the half blood is preferred to the brothers and sisters of the father. *Clay v. Cousins*, 1 T. B. Mon. (Ky.) 75. See *Kean v. Roe*, 2 Harr. (Del.) 103, 29 Am. Dec. 336.

It was held that a statute enabling the half blood to inherit extended only to brothers and sisters and not to their issue. *Den v. Stretch*, 4 N. J. L. 207. See *Ex p. Mays*, 2 Rich. L. (S. Car.) 61.

6. *Whole Blood Entitled to Double Share.* — See various state statutes: for example those of *Colorado*, *Florida*, *Kentucky*, *Missouri*, *Virginia*, *Wyoming*, and *West Virginia*. And see for applications of these statutes, *Estes v. Nicholson*, 39 Fla. 759; *King v. Middlesborough Town, etc., Co.*, 106 Ky. 73; *Berg v. Berg*, 105 Ky. 80; *Milner v. Calvert*, 1 Met. (Ky.) 472; *Talbott v. Talbott*, 17 B. Mon. (Ky.) 1; *Petty v. Malier*, 15 B. Mon. (Ky.) 591; *Sharp v. Kleinpeter*, 7 La. Ann. 263; *Ravenscroft v. Shelby*, 1 Mo. 694; *Lee v. Smith*, 18 Tex. 141. See also *Browne v. Turberville*, 2 Call (Va.) 390; *Bluht v. Gee*, 3 Call (Va.) 481.

Where a decedent leaves no child, and no brother nor sister of the whole blood, but does leave brothers and sisters of the half blood, they are entitled to the entire portion which by law descended to the brothers and sisters of the deceased. *Marlow v. King*, 17 Tex. 177.

7. *No Distinction Between Whole and Half Blood in the Distribution of Personalty.* — Under the English statute of distributions, which simply directed distribution to be made among the next of kin of equal degree to the intestate, it was, after some contradictory decisions on the subject, finally settled in *Crooke v. Watt*, 2 Vern. 124, *Show. P. C.* 108, decided in 1690, that brothers and sisters of the half blood have

**f. POSTHUMOUS CHILDREN.** — Posthumous children inherit and take under statutes of succession in the same manner as if they had been born in the lifetime of the father, and were surviving heirs; the child in its mother's womb is considered as born for all purposes of its own interest, and takes by descent since its conception, provided it be capable of inheriting at the moment of its birth.<sup>1</sup>

**Must Be Born Alive.** — But it is necessary that the child be born alive, for it is presumed when it is still-born that it never had life.<sup>2</sup>

**Time of Birth.** — And it is also necessary that the child should be born after such a period of foetal existence that its continuance in life might be reasonably expected.<sup>3</sup> In some states, the time within which the posthumous child must be born is by statute fixed at ten months.<sup>4</sup>

**VII. COURSE OF SUCCESSION — 1. General Outline — a. SPECIALLY DESIGNATED RELATIVES — (1) In General.** — The state statutes generally prescribe the order in which the nearer relatives of the decedent shall take his property, by a designation of relationship instead of by computation of the degrees of kinship. Most of the statutes fix the order of succession by children and their descendants, the widow and husband, the father and mother, and the brothers and sisters, *nominatim*. Consequently, it is only where the decedent's property goes to kindred outside this series of especially designated relatives, that the method adopted for reckoning degrees of kinship is resorted to in determining the order of succession.<sup>5</sup>

an equal claim with those of the whole blood. 4 Burns Ecc. L. 422; Moor v. Barham, cited in Blackborough v. Davis, 1 P. Wms. 53; Burnet v. Mann, 1 Ves. 156, 1 Myl. & K. 672, note; Smith v. Tracy, 1 Mod. 209; Jessopp v. Watson, 1 Myl. & K. 665. See also Ector v. Grant, 112 Ga. 568.

So under statutes in the *United States*. Kelly v. McGuire, 15 Ark. 555; Preston v. Hoskins, 2 Yeates, (Pa.) 545; Deadrick v. Armour, 10 Humph. (Tenn.) 588. But see Lawson v. Perdriau, 1 McCord L. (S. Car.) 456.

Some statutes expressly provide that there shall be no distinction between the half and the whole blood in the distribution of personal property. See the statutes of *Maryland*, *New York*, and *Pennsylvania*. See Seekamp v. Hammer, 2 Har. & G. (Md.) 9; Matter of Southworth, 6 Dem. (N. Y.) 216; Hallett v. Hare, 5 Paige (N. Y.) 315.

**1. Succession by Posthumous Children.** — Bishop v. Hampton, 11 Ala. 254; Morrow v. Scott, 7 Ga. 535; Botsford v. O'Conner, 57 Ill. 72; Catholic Mut. Ben. Assoc. v. Firnane, 50 Mich. 82; Harper v. Archer, 4 Smed. & M. (Miss.) 99, 43 Am. Dec. 473; Watkins v. Flora, 8 Ired. L. (30 N. Car.) 374; Hill v. Moore, 1 Murph. (5 N. Car.) 233; Laird's Appeal, 85 Pa. St. 339; Pearson v. Carlton, 18 S. Car. 47.

**Statutes Relating to Succession by Posthumous Children.** — In a number of the *United States* it is expressly provided by statute that persons not *in esse*, but conceived at the time of the testator's death, inherit as if born at the time. Stim. Am. Stat. L., § 3135. Posthumous children of the intestate inherit as if living at his death in all states. Stim. Am. Stat. L., § 3136; Detrick v. Migatt, 19 Ill. 146, 68 Am. Dec. 584. And so in many states of all posthumous descendants of the intestate. See Stim. Am. Stat. L., § 3136. And in many states there is a general rule that, in all cases of succession, direct or collateral, posthumous children take

both realty and personalty as if living at the death of the parent whom they represent. See designation of these states in Stim. Am. Stat. L., § 3136.

**Posthumous Children of Half Blood** may take where the half blood who are born before the intestate dies are permitted by law to take. See Burnet v. Mann, 1 Ves. 156, more fully and correctly reported in 1 Myl. & K. 672, note.

**2. Still-born Children.** — Marsellis v. Thalhimer, 2 Paige (N. Y.) 35, 21 Am. Dec. 66. See Domat Liv. L., pt. 2, b. 2, tit. 1, § 1, art. 7. A person cannot claim an inheritance, therefore, through a child who was conceived but was still-born. 1 Bouv. Inst., § 1957.

**3. Time of Birth.** — See Harper v. Archer, 4 Smed. & M. (Miss.) 99, 43 Am. Dec. 472; Marsellis v. Thalhimer, 2 Paige (N. Y.) 35, 21 Am. Dec. 66.

Children born within the first six months after conception are considered by the civil law as incapable of living. Code Napoleon, art. 312, 725, 906; Code Louisiana, art. 205; Dig. lib. 1, tit. 5, l. 12; Domat Prel. B., tit. 2, § 1, art. 5.

**4. Virginia Code 1887, § 2555.** See statutes of *Kentucky* (Gen. Stat., c. 31, § 7); *Massie v. Hiatt*, 82 Ky. 314; of *North Carolina* (Code, § 1281); *Rutherford v. Green*, 2 Ired. Eq. (37 N. Car.) 121; of *Tennessee*, Melton v. Davidson, 86 Tenn. 129; and *West Virginia*.

**Pretermitted Children.** — See WILLS.

**5. Course of Succession to Ancestral Estates.** — The *Rhode Island* statute (Rev. of 1822, pp. 222, 223) provided that "when the title to any real estate of inheritance as to which the person having such title shall die intestate, came by descent, gift, or devise from the parent or other kindred of the intestate, and such intestate die without children, such estate shall go to the kin next to the intestate, of the blood of the person from whom such estate came or descended." It was considered that this last clause, directing the descent of ancestral es-

(2) *Descendants*.—The general rule in the *United States* is that all the children take in equal shares, both as to realty and to personalty, and that the issue of deceased children take the share of the parent by right of representation.<sup>1</sup>

(3) *Ascendants and Collaterals*.—Besides providing specially for the succession by descendants, the statutes generally regulate the order in which the nearer ascendants and collaterals, as parents, husband, or wife, and brothers and sisters, shall stand in the course of succession. But the provisions which prescribe the order of succession by such relatives vary so radically in the different states that it would serve no practical purpose to set these provisions out here. Reference must be had to the statutes of the different states.<sup>2</sup>

b. NEXT OF KIN.—If there are none of the series of specially named relatives, which generally consists of the decedent's descendants, parents, husband or wife, brothers and sisters, surviving him, his estate goes to his next of kin,<sup>3</sup> it being sometimes provided that those who claim through the

tates to "next of kin," etc., did not direct the descent of such estate to "next of kin" in the strict sense of those terms as understood by the civilians, but that the course of descent of such estates, as well as estates acquired by the intestate, was directed and controlled by the first and subsequent clauses prior to the last, which by the terms of the first clause extended to "any estate of inheritance." It was held that where A died without issue, leaving an estate which came to her by descent from a deceased brother, such estate passed in equal shares to her mother, brothers, and sisters, they being, by the rule established by the statute, of the same degree of kindred to the intestate. *Smith v. Smith*, 4 R. I. 1, affirmed in *Pierce v. Pierce*, 14 R. I. 514.

1. *Succession by Children*.—The deceased left grandchildren and also a wife surviving. Although the *Indiana* statute concerning descents provided "that if a husband or wife die intestate, leaving no child and no father or mother, the whole of his property, real and personal, shall go to the survivor," it was held that the widow could not under this provision inherit the whole of the estate to the exclusion of the grandchildren. *Kyle v. Kyle*, 18 Ind. 108. See also *Scott v. Silvers*, 64 Ind. 76.

In *Indiana* the meaning of "child" was held controlled by the context. But in *Texas*, under a statute containing similar provisions, it was held that "child" or "children" did not include grandchildren or remoter descendants. *Burgess v. Hargrove*, 64 Tex. 110; *Cartwright v. Moore*, 66 Tex. 55; *McKinney v. Moore*, 73 Tex. 470. See also the title CHILD—CHILDREN, vol. 5, p. 1085 *et seq.*

*Death of Minor Children Before Administration*.—The statutes sometimes provide, in effect, that if any minor child shall die, unmarried, before any legal disposition of the estate, the portion of such deceased child shall be equally divided among the surviving children and their legal representatives. See *Hale's Appeal*, 69 Conn. 611.

*Succession by Descendants*.—See the title DESCENDANT, vol. 9, p. 390.

2. *Succession by Specially Designated Ascendants and Collaterals*.—See 1 Stim. Am. Stat. L., art. 310; *Thatcher v. Thatcher*, 17 Colo. 404; *Estes v. Nicholson*, 39 Fla. 759. See also *Matter of Parker*, 97 Iowa 593; *In re Foley*, 24

Nev. 197; *Barber v. Brundage*, 169 N. Y. 368, affirming 50 N. Y. App. Div. 124; *Wright v. Wright*, 100 Tenn. 313.

In *England* it is a rule controlling the descent of real property that on failure of issue the inheritance shall go to the intestate's lineal ancestors or their issue, each of the ancestors taking in preference to his issue, but so that a nearer lineal ancestor and his issue are to be preferred to a more remote lineal ancestor and his issue other than such nearer ancestor and his issue. 2 Broom & Had. Bl. 377. But the course of distribution prescribed by the English statute of distributions is more in accordance with the order of succession in the *United States*. See R. & L. L. Dict., tit. *Next of Kin*.

In the *Indian Territory* it is held that the mother of an intestate inherits his estate subject to the wife's dower interest in the real estate and one-third interest in the personalty. *Nivens v. Nivens*, (*Indian Ter.* 1901) 64 S. W. Rep. 604.

3. *Succession by Next of Kin*.—See various state statutes. A *Rhode Island* statute (Rev. Stat. 1844, 237) provided that if there be no child, nor father, nor mother, nor sister, nor descendants of either, "the inheritance shall go in equal moieties to the paternal and maternal kindred." It was held, under the provision of the same statute that when "the inheritance is directed to go by moieties to the paternal and maternal kindred, if there be no such kindred on the one part, the whole estate shall go to the other part," that so long as there are any kindred, however remote, on the part of the paternal line, they take one moiety of the estate, and the inheritance, after once being divided, cannot be again united, and descend in one line until there ceases to be a representative of the other line. *Cozzens v. Joslin*, 1 R. I. 122.

*Succession by Parents*.—Under a statute providing that on the death of an intestate without children his lands "shall descend equally to the next of kin in equal degree, and those who represent them, computing by the rules of the civil law," the father and mother of the intestate are his next of kin, and they take the land equally as tenants in common. *Brown v. Baraboo*, 90 Wis. 151.

*Succession by Grandparents*.—Where none of the series of specially designated relatives sur-

nearest ancestor shall be preferred.<sup>1</sup>

c. **ESCHEAT.** — Provisions to the effect that when a person dies intestate, leaving real property and no heirs or person entitled to succeed under the law of descents, or when a person dies intestate leaving personal estate not required for debts and there is no person entitled thereto under the statutes of distributions, the property escheats either to the state, county, town, or otherwise, are commonly found in the statutes of the different states.<sup>2</sup>

**2. As Affected by Common-law Canons of Descent** — a. **IN GENERAL.** — Although the law of succession established in the *United States* by the various statutes of descent and distribution is generally considered as having wholly supplanted the common law, the common-law rules or canons of descent, notwithstanding that they all savor more or less of feudal policy, and that some of them are warranted by no other than feudal considerations, have yet had sufficient influence upon the law to demand consideration. There are seven of these rules or canons, as follows: *first*, the rule that inheritances shall not lineally ascend; *second*, the rule preferring the male to the female issue and stock; *third*, the rule of primogeniture among males; *fourth*, the rule giving the right of representation; *fifth*, the rule that descent must be traced from the first purchaser; *sixth*, the rule excluding collateral kinsmen of the half blood from the inheritance; *seventh*, the rule that, in all collateral inheritance, the male stocks shall be preferred to the female, unless where the lands have in fact descended from a female.<sup>3</sup> The fifth and sixth of these rules have already been considered,<sup>4</sup> and only the others will be here dwelt upon.

vive the intestate — i. e., where he leaves no descendants, husband or wife, parents or brothers and sisters — the next in the line of succession must be the grandparents. Grandparents take precedence of uncles and aunts unless the statutes provide otherwise.

*United States.* — *Cole v. Batley*, 2 Curt. (U. S.) 562.

*Alabama.* — *Phillips v. Peteet*, 35 Ala. 696.

*District of Columbia.* — *Matter of Afflick*, 3 MacArthur (D. C.) 95.

*Illinois.* — *Barger v. Hobbs*, 67 Ill. 592.

*Iowa.* — *Bassil v. Loffer*, 38 Iowa 451; *Martindale v. Kendrick*, 4 Greene (Iowa) 307.

*Kentucky.* — *Power v. Dougherty*, 83 Ky. 187.

*Maine.* — *Decoster v. Wing*, 76 Me. 450; *Cables v. Prescott*, 67 Me. 582.

*Michigan.* — *Ryan v. Andrews*, 21 Mich. 229.

*New Hampshire.* — *Kelsey v. Hardy*, 20 N. H. 479.

*New York.* — *Sweezy v. Willis*, 1 Bradf. (N. Y.) 495.

*Pennsylvania.* — *McDowell v. Addams*, 45 Pa. St. 430.

*Wisconsin.* — *Kirkendall's Estate*, 43 Wis. 167.

But see *Bray v. Taylor*, 36 N. J. L. 415; *Gillespie v. Foy*, 5 Ired. Eq. (40 N. Car.) 280; *Curren v. Taylor*, 19 Ohio 36; *Liggon v. Fuqua*, 6 Munf. (Va.) 281.

The *New York* statutes have been construed to give the brothers and sisters of an intestate preference over his grandparents. *Matter of Marsh*, (Surrogate Ct.) 5 Misc. (N. Y.) 428.

**Succession by Next of Kin After Grandparents.** — Next after grandparents in the order of succession are the decedent's nephews and nieces, uncles and aunts and great-grandparents, for all are related to him in the third degree. And it has been held that uncles and aunts and nephews and nieces, being in equal degree, share

equally on distribution in default of nearer kindred. *Durant v. Prestwood*, 1 Atk. 454; *Hurtin v. Proal*, 3 Bradf. (N. Y.) 414; *Matter of Healy*, (Surrogate Ct.) 27 Misc. (N. Y.) 352.

Uncles and aunts usually take to the exclusion of cousins. *Dodge v. Lewis*, 71 N. H. 324.

Great-grandparents have precedence over great uncles and aunts. *Cloud v. Bruce*, 61 Ind. 171; *Sturgeon v. Hustead*, 196 Pa. St. 148.

Next in the order of succession stand first cousins, great uncles and aunts, and great-great-grandparents; all these stand in the fourth degree. Hence it has been held that a great-uncle and a first cousin, both being related in equal degree to the person last seized, and being his nearest surviving kindred, are entitled to succeed to his land in equal moieties. *Smith v. Gaines*, 35 N. J. Eq. 65.

In *Pennsylvania* first cousins are preferred to the entire exclusion of second cousins. *Byers v. McAuley*, 149 U. S. 608; *Rogers's Estate*, 131 Pa. St. 382; *Hayes's Appeal*, 89 Pa. St. 256; *Brenneman's Appeal*, 40 Pa. St. 115.

**1. Preference of Kindred Claiming Through Nearest Ancestor.** — *Douglas v. Cameron*, 47 Neb. 358; *Clary v. Watkins*, 64 Neb. 386.

**2. Escheat.** — See the title **ESCHEAT**, vol. 11, p. 315. See also *Berens v. Dupre*, 6 La. Ann. 495; *Patapsco Female Institute v. Rock Hill College*, 51 Md. 470; *Rock Hill College v. Jones*, 47 Md. 1; *Thomas v. Frederick County School*, 7 Gill & J. (Md.) 369.

The state in a case of escheat of property is not to be deemed an heir, within a statute directing notice of probate of a will to be given to presumptive heirs of the deceased. The state takes not as heir but because there are no heirs. *State v. Ames*, 23 La. Ann. 69.

3. 2 Bl. Com. 208-234.

4. See *supra*, this title, *Ancestor or Propositus; Heirs and Distributees*.

**b. RULE THAT INHERITANCE SHALL NOT LINEALLY ASCEND.** — The common-law rule that inheritances shall never lineally ascend<sup>1</sup> has been done away with in *England*.<sup>2</sup> And no vestige of it seems to remain in any, save one,<sup>3</sup> of the United States.<sup>4</sup>

**c. PREFERENCE OF MALE TO FEMALE ISSUE AND STOCK** — In *England*. — The second common-law rule, by which the male issue shall be admitted before the female, is still preserved as a part of the English law of descent.<sup>5</sup> The seventh common-law rule, which requires that, in collateral inheritances, the male stocks shall always be preferred to the female, has been recognized by the English law in a provision which provides, in effect, that each male ancestor and his ancestors, whether male or female, and his and their issue, shall be preferred to all other female ancestors and their ancestors, whether male or female, and their issue.<sup>6</sup> But by the English statute of distributions, which was based upon the 118th Novel of Justinian, by which all distinction between the sexes in the Roman law of succession was destroyed, and males and females were admitted to an equality in the right of succession,<sup>7</sup> no preference is given to the male over the female issue or stock.<sup>8</sup>

In the United States all the children, females as well as males, inherit, in general, equally together, subject in some instances to the right of the eldest to the family mansion or homestead, on his paying to the others their respective shares of its value.<sup>9</sup> Neither does the common-law preference of the male to the female stock obtain in the United States,<sup>10</sup> except to

**1. Statement of Rule Against Inheritance by Ascendants.** — The rule is thus stated and illustrated by Littleton: If there be father and son, and the father has a brother, who is therefore uncle to the son, and the son purchase land in fee simple, and die without issue, living his father, the uncle shall have the land as heir to the son, and not the father, although the latter is nearer in blood, because it is a maxim in law that the inheritance may lineally descend but not ascend. Yet, if the son in this case die without issue, and his uncle enter into the land as heir to the son, and afterwards the uncle die without issue, living the father, the father shall have the land as heir to the uncle, and not as heir to the son, for he should rather come to the land by collateral descent than by lineal ascent. It was, moreover, a necessary consequence of this rule, coupled with the maxim, *seisina facit stipitem*, that if, in the instance above put, the uncle did not enter into the land, the father could not inherit it, because a man claiming as heir in fee simple by descent must make himself heir to him who was last seized of the actual freehold and inheritance; and if the uncle, therefore, did not enter, he would have had but a freehold in law, and no actual freehold, and the last person seized of the actual freehold was the son, to whom the father could not make himself heir. Broom's Leg. Max. 527, citing Co. Litt. 11b.

But, even at common law, if the father happened to be also cousin to the son, and as such, his heir, he would, in that remoter capacity, inherit immediately from the son. Eastwood v. Vinke, 2 P. Wms. 614.

**2. Abrogation of the Rule in England.** — 2 Broom & Had. Bl. 371.

**3. Status of the Rule in the United States.** — In *New Jersey*, the rule of the common law that inheritances shall not lineally ascend, although modified so as to let in the father and to some extent the mother, has not been

abolished. Taylor v. Bray, 32 N. J. L. 182, affirmed in Bray v. Taylor, 36 N. J. L. 415. And see Smith v. Gaines, 35 N. J. Eq. 65.

**4.** It has been held that a mother inherits the estate of her child, though not specially named in the statute of descents and distributions, when she is the next of kin, and no person is living to whom the statute gives precedence over her. Loftis v. Glass, 15 Ark. 680; Macomb v. Miller, 9 Paige (N. Y.) 265; Miller v. Maccomb, 26 Wend. (N. Y.) 229; McCullough v. Lee, 7 Ohio (pt. i) 15; Owen v. Cogbill, 4 Hen. & M. (Va.) 487.

**5. Preference of Male to Female Issue in England.** — 2 Broom & Had. Bl. 382; Wms. Real Prop. 102.

**6. Preference of Male to Female Stock in England.** — 3 & 4 Wm. IV., c. 106, § 7; Wms. Real Prop. 107; 2 Broom & Had. Bl. 387.

**7.** 2 Bl. Com. 234; 4 Kent's Com. 378.

**8. Male Not Preferred to Female Issue and Stock by the Statute of Distributions.** — This was established as early as 1723. Moor v. Barham, cited in Blackborough v. Davis, 1 P. Wms. 53.

**9. Abrogation of the Preference of Male to Female Issue.** — For a collation of the various statutes upon this head, see Stimson's Am. Stat. Law, §§ 3101 and 3102. In some states the rule has been abolished formally; as, for example, in *New Jersey*, *North Carolina*, and *Virginia*. See Bray v. Taylor, 36 N. J. L. 415; Fidler v. Higgins, 21 N. J. Eq. 138; Bell v. Dozier, 1 Dev. L. (12 N. Car.) 333; Davis v. Rowe, 6 Rand. (Va.) 355.

**10. Abrogation of Preference of Male to Female Stock.** — See Bassil v. Loffer, 38 Iowa 451; Albee v. Vose, 76 Me. 448; Brown v. Burlingham, 5 Sandf. (N. Y.) 418; McCracken v. Rogers, 6 Wis. 278.

But in Hunt v. Kingston, (C. Pl. Spec. T.) 3 Misc. (N. Y.) 309, it was held, by the Court of Common Pleas, where an intestate left a great-uncle and great-aunts and the descendants of

a very limited extent.<sup>1</sup>

**d. PRIMOGENITURE AMONG MALES.** — The rule that where there are two or more males in equal degree, the eldest only shall inherit, but the females altogether,<sup>2</sup> is still the law in *England*,<sup>3</sup> but not in any of the *United States*, primogeniture having been abolished, sometimes expressly and sometimes by the establishment of another course of descent.<sup>4</sup>

**e. RIGHT OF REPRESENTATION** — (1) *Definition.* — Representation is that rule of law by which the children, or their descendants, of a deceased person who, if he had lived, would have taken property by virtue of an intestacy, stand in his place so as to take the property which he would have taken had he lived. These representatives take neither more nor less than, but just so much as, their principals would have done. As, if there be two sisters and one of them dies leaving six daughters, and then the father of the two sisters dies without other issue, these six daughters take among them exactly the same as their mother would have taken had she been living.<sup>5</sup>

**Per Stirpes and Per Capita.** — This taking by representation is called succession *in stirpes*, according to the roots; all the branches of each root taking the share which the root it represents would have taken; the term is used in distinction from taking *per capita*, where each takes as next of kin to the deceased in his own right.

(2) *Common-law Rule* — **Statement of the Rule.** — It is a rule or canon of descent of the common law that the lineal descendants of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living.<sup>6</sup>

**Representation in Lineal Descent.** — Thus, in lineal descent, the child, or great-grandchild, either male or female, of the eldest son will, by the common law, succeed before the younger son, and so *in infinitum*.<sup>7</sup>

**Representation in Collateral Descent.** — By the common law this rule is of great importance in collateral descent, for the effect of the doctrine is that, on failure of issue of the person last seized, the inheritance will descend to the other subsisting issue of his next immediate ancestor. Thus, the issue of the intestate's brother will succeed to the inheritance before those of his uncle, and the latter before those of his great-uncle.<sup>8</sup>

**Reason for the Rule.** — The common-law mode of representation is the necessary consequence of the double preference which that law gives first to the male issue and next to the first-born among the males; for if all the children of three sisters were to claim *per capita*, in their own right as next of kin to the ancestor, without any respect to the stock whence they sprung, and those children were partly male and partly female, then the eldest male among

great-aunts, that, as the New York statute of descents included no collateral relation more distant than uncles and aunts, the common-law rule preferring the male to the female stock still obtained, and that the uncle inherited to the exclusion of the females of the same degree and their descendants. Compare *Brown v. Burlingham*, 5 andf. (N. Y.) 418.

**1. Limited Preference of Male to Female Stock.** — Statutes frequently prefer the father to the mother. See the various state statutes; and see in reference thereto *Kelly v. McGuire*, 15 Ark. 555; *Magness v. Arnold*, 31 Ark. 103; *Shadden v. Hembree*, 17 Oregon 14; *De Vault v. De Vault*, (Tenn. Ch. 1808) 48 S. W. Rep. 361; *Jones v. Barnett*, 30 Tex. 637.

See *Auger v. Taylor*, 2 Tyler (Vt.) 260, construing an early *Vermont* statute, and holding that the intestate's brothers took double the proportion of his sisters.

**2. Primogeniture.** — 2 Bl. Com. 214.

**3.** Wms. Real Prop. 102; 2 Broom & Had. Bl. 383.

**4.** *Brewer v. Blougher*, 14 Pet. (U. S.) 178; *Eslava v. Doe*, 7 Ala. 543; *Davis v. Rowe*, 6 Rand. (Va.) 355. But see *Walton v. Willis*, 1 Dall. (Pa.) 351.

**5. Representation Defined.** — *Stallworth v. Stallworth*, 29 Ala. 79.

**6. Representation by the Common Law.** — 2 Bl. Com. 217.

**7.** Hale Hist. C. L. 236, 237.

**8.** 4 Bl. Com. 225.

The rule that when the estate descended upon collaterals the lineal descendants *in infinitum* of any of such collaterals as were deceased should represent such deceased is an admitted principle of the common law. *Fidler v. Higgins*, 21 N. J. Eq. 138; *Schenck v. Vail*, 24 N. J. Eq. 538.



them would exclude not only his own brethren and sisters, but all the issue of the other two daughters.<sup>1</sup>

(3) *Civil-law Rule*. — Since the Roman law did not prefer either the male to the female issue or the male to the female stock, it differed somewhat from the common law. By the Roman law, the right of representation continued *in infinitum* in the descending line, and, in all cases, the inheritance always descended *in stirpes*.<sup>2</sup> But in collateral succession the rule of the Roman law differed from the common law; for, according to the former, the division of the estate among collaterals *per stirpes* took place only where the persons succeeding to the inheritance were of unequal degree; representation had no place where such persons stood in equal degree.<sup>3</sup>

(4) *Statutory Rules* — (a) *In General*. — It is to be expected that in the *United States*, where neither the common-law preference of males nor the doctrine of primogeniture is in force, the right of representation will be found to depart considerably from that of the common law.<sup>4</sup> The statutes of the different states are, touching this subject, at considerable variance with each other. Those of a large number of the states contain provisions securing the right of representation among certain specified relatives. Other provisions which limit the right of representation within certain degrees of relationship are frequently met with. But while the common-law doctrine has been extensively modified, the question as to whether the right to take by representation exists may still have an important bearing in ascertaining the persons entitled to share in the succession and may also make a material difference in the shares which the respective heirs take.<sup>5</sup>

(b) *In Lineal Descent*. — The right to take by representation is secured to the descendants of the intestate's children in probably all the states.<sup>6</sup> Some of the statutes which secure the right of representation in the intestate's descending line, enact, in substance, that the "heirs" of a deceased child of the intestate shall stand in the place of that child. While the word "heir" is not technically limited to children, it would yet seem that the term, as here employed, does not confer the right on other than the descendants of such child.<sup>7</sup>

1. 2 Bl. Com. 218.

2. *Representation by the Civil Law*. — 4 Kent's Com. 379. Thus, if one of three daughters died leaving ten children, and then the father died, the two surviving daughters had each one-third of his effects, and the ten grandchildren had the remaining third divided between them; and so, if all the daughters had died before the father leaving, respectively, ten, six, and two children, the estate would have been divided into three parts, going *in stirpes* to the offspring of each daughter.

3. 2 Bl. Com. 217, 517; Just. Inst. III. i. 6.

4. *Statutory Limitation of the Right*. — In *Schenck v. Vail*, 24 N. J. Eq. 538, *overruling Fidler v. Higgins*, 21 N. J. Eq. 138, it was decided that the common-law right of indefinite representation was abrogated by the *New Jersey* statute, though there was no express provision to that effect. In this case the ill effects of admitting the right indefinitely were illustrated by the number of claimants, one hundred and thirty-nine. The court pointed out that "an illimitable dispersion of the title to inheritable land" might result from the recognition of the right, a result checked in England by the principles of primogeniture and the preference of males.

5. *Effect of Representation*. — In *Wetter v. Habersham*, 60 Ga. 193, the facts were as follows: The intestate left surviving grand-

children of an aunt, and also great-grandchildren of a deceased brother, who were the children of a deceased grandchild of such brother. In *Georgia*, the estate would, in this case, go to the kindred of the intestate according to the computation of the canon law. And, according to this method of reckoning degrees of kindred, the grandchildren of the aunt were in the third, and the great-grandchildren of the brother in the fourth degree. But it was also provided that there should be representation as far as grandchildren of brothers and sisters. It was held that under these provisions the grandchildren of the aunt were entitled to the inheritance.

6. *Representation in Lineal Descent*. — 1 Woern. Am. L. Adm. 146. See *Healey v. Cole*, 95 Me. 272; *Payne v. Harris*, 3 Strobb. Eq. (S. Car.) 39.

The provision of the *Massachusetts* statute (Pub. Stat. 1882, c. 125, § 1) declaring that the estate of an intestate shall be distributed "in equal shares to his children and to the issue of any deceased child by right of representation," was declared to affirm the rule that all lineal descendants, in whatever degree, shall share in the estate. *Bigelow v. Morong*, 103 Mass. 287.

7. "Heirs of Such Child" as used in an *Iowa* statute has been held not to include the widowed mother of a child who died before his

(c) **In Collateral Succession — In General.** — It is with regard to the right of representation among collaterals that the lack of harmony in these statutory provisions is presented.

**Representation by Descendants of Intestate's Brothers and Sisters.** — The statutes frequently provide for succession, in certain cases, of the "children," "issue," "descendants," or "representatives" of deceased brothers and sisters of the intestate. These phrases convey the right of representation unless it is specially limited by other provisions. The right to take by representation is, either by statutes of this kind or by others of a more specific character, secured, in some states, to the children of the brothers and sisters of the intestate;<sup>1</sup> in other states, to the grandchildren of his brothers and sisters;<sup>2</sup> and in others, to the lineal descendants of brothers and sisters, through all descending generations.<sup>3</sup> The provision of the statutes commonly is that, where certain relatives survive, the estate shall go to brothers and sisters and "children" or "issue," etc., of deceased brothers and sisters. If the surviving relatives are those specified, so that the course of succession will be controlled by such provision, the right of representation will be as above stated. But if

father. *McMenomy v. McMenomy*, 22 Iowa 148; *Journell v. Leighton*, 49 Iowa 601; *Overdieck's Will*, 50 Iowa 244. See *Leonard v. Lining*, 57 Iowa 648. The provision of the statute under which these cases arose was afterwards changed so as to establish expressly a rule in conformity with these decisions. See *Blackman v. Wadsworth*, 65 Iowa 80.

In Louisiana, by express provisions of the statutes, representation takes place *ad infinitum* in the direct descending line, but does not take place in favor of ascendants, the nearest in degree always excluding those of a degree superior or more remote. Louisiana Rev. Code 1875.

1. **Representation of Children of Deceased Brothers and Sisters.** — It is provided in *California*, *Michigan*, and *Nebraska* that an intestate's estate shall in certain cases go to children of deceased brothers and sisters by right of representation. *Deering's Civ. Code Cal.*, 1885, § 1386; *How. Annot. Stat. Mich.*, 1882, § 5772a; *Comp. Stat. Neb.*, c. 23. In *South Carolina*, in certain cases, it will go to brothers and sisters, children of a deceased brother or sister to take the share which their parent would have had. *Gen. Stat. S. Car.*, 1882, § 1845.

In *Maryland*, it is provided that in certain cases the estate shall go to brothers and sisters and their descendants. *Pub. Gen. Laws Md.*, art. 46, §§ 19, 20, 27. But this is limited by the provision that no representation is admitted among collaterals after brothers' and sisters' children.

**Right of Representation Given to Brothers' and Sisters' "Children,"** has been held not to include grandchildren. *Matter of Curry*, 39 Cal. 529. To the same effect, see *Poang v. Gadsden*, 2 Bay (S. Car.) 293.

Under the *Massachusetts* statute of distributions (*Gen. Stat.*, c. 91, § 1; c. 94, § 16), which provided that if a person died intestate, leaving no issue, and no father nor mother, his estate went in equal shares to his "brothers and sisters, and to the children of any deceased brother or sister by right of representation;" and "if he leaves no issue, and no father, mother, brother, nor sister, then to his next of kin in equal degree," it was held that where an intestate left no issue, father nor mother,

but left one sister, children of another sister, and children of deceased children of a third sister, these grand-nephews or grand-nieces could not share in the distribution. The court, by Gray, J., said: "The distinction between the words 'children' and 'issue' is carefully preserved throughout. 'Issue' necessarily includes children; but 'children' does not include more remote issue." *Bigelow v. Morong*, 103 Mass. 287. But, under the statute passed in 1876, which re-enacted the first clause above quoted, with the substitution of the word "issue" for the word "children," it would seem that in a case like the above, the grandchildren of a deceased sister would take a share of the estate. See *Conant v. Kent*, 130 Mass. 178.

2. **Representation by Grandchildren of Deceased Brothers and Sisters.** — As in *Maine*, *Pennsylvania*, and *Georgia*. See *Quinby v. Higgins*, 14 Me. 309; *Davis v. Stinson*, 53 Me. 493; *Reynolds, Appellant*, 57 Me. 350; *Lane's Appeal*, 28 Pa. St. 487; *Brenneman's Appeal*, 40 Pa. St. 115; *Hayes's Appeal*, 89 Pa. St. 256; *Lindley's Appeal*, 102 Pa. St. 258.

Under such a statute, a surviving brother has been held to exclude the great-grandchildren of a deceased sister. *Stetson v. Eastman*, 84 Me. 366.

3. **Representation by Descendants of Deceased Brothers and Sisters.** — See the statutes of *Illinois*, *Texas*, *Mississippi*, *Connecticut*, *Ohio*, *Louisiana*, *Tennessee*, *Massachusetts*, *Minnesota*, *Nevada*, *New York*. See *Hannan v. Osborn*, 4 Paige (N. Y.) 336.

As to the construction of the *Alabama* statute, see *Hitchcock v. Smith*, 3 Stew. & P. (Ala.) 29; *Stallworth v. Stallworth*, 29 Ala. 76.

At to the *Missouri* statute, see *Copenhaver v. Copenhaver*, 78 Mo. 55, 9 Mo. App. 200.

As to the *New Jersey* statute of 1780, see *Rodman v. Smith*, 2 N. J. L. 3. Here the statute gave the right to succeed by representation to the "issue" of deceased brothers and sisters, and the court said: "The word 'issue,' in legal as well as common acceptance, comprehends all the descendants of an ancestor, however remote." See also *ISSUE (DESCENDANTS)*, vol. 17, p. 542.

such provision is not to be applied, as where the facts of the case are such that the course of descent is directed by a clause in the statute which provides that, given a certain state of facts, the estate shall go to the intestate's next of kin, it has been held that there is no representation; so that, in cases where the children or issue of deceased brothers and sisters take merely as next of kin, and not by special mention in the statute, only those of equal degree take, the more remote being excluded.<sup>1</sup>

**Restriction of the Right.** — Except in a very few of the *United States*,<sup>2</sup> the right of representation in collateral succession is restricted to near kindred by the use of express words to that effect. In some states, by the express provisions of the statutes, no representation is admitted among collaterals after brothers' and sisters' children.<sup>3</sup> And in other states this right is restricted to the descendants of brothers and sisters.<sup>4</sup> And even though the statutes do not restrict the right of representation to near kindred by the use of express words to that effect, the same general result may be effected by the necessary implication of the general spirit and purpose of the statutes.<sup>5</sup>

**Effect of Statutes Restricting the Right.** — The effect of these provisions is to limit or qualify the right of representation among collaterals, so that, in the case of succession by relatives farther removed from the intestate than those in the cases excepted, they can take only in their own right as next of kin *per capita*.<sup>6</sup> So, under those provisions which deny the right of representation to collaterals after brothers' and sisters' children, or give the right to the children of deceased brothers and sisters, the intestate's grand nephews and nieces cannot represent their deceased parents so as to take with surviving nephews and nieces.<sup>7</sup> Under a statute which limits representation to the children of the intestate's brothers and sisters, the intestate's grandparent takes to the exclusion of his uncles and aunts.<sup>8</sup> And where one dies intestate, leaving uncles and aunts and the children of other deceased uncles and aunts, the former take to the exclusion of the latter.<sup>9</sup> And if the intestate leaves

1. **Effect of Representation.** — *Davis v. Stinson*, 53 Me. 493, construing Rev. Stat. Me. 1857, c. 75, § 1, and *distinguishing* *Doane v. Freeman*, 45 Me. 113, which was decided under a statute since repealed. See also *Van Cleve v. Van Fossen*, 73 Mich. 342; *Hatch v. Hatch*, 21 Vt. 450.

As to the *Massachusetts* statute of 1876, c. 222, see *Conant v. Kent*, 130 Mass. 178. See also *Bigelow v. Morong*, 103 Mass. 287.

2. **Statutes Giving the Right.** — In some of the states there is a general provision to the effect that the descendants of any person deceased shall inherit (*per stirpes*) the estate which such person would have inherited had he survived the intestate. 1 *Stim. Am. Stat. L.*, § 3138. See *Neville v. Bradley*, 126 N. Car. 72; *Dexter v. Dexter*, 4 *Mason* (U. S.) 302; *Fisk v. Fisk*, 60 N. J. Eq. 195; *Daboll v. Field*, 9 R. I. 289.

3. **Statutes Restricting the Right.** — See 1 *Stim. Am. Stat. L.*, § 3138.

4. See 1 *Stim. Am. Stat. L.*, § 3138.

5. *Schenck v. Vail*, 24 N. J. Eq. 538, *overruling* *Fidler v. Higgins*, 21 N. J. Eq. 138. This case construed a *New Jersey* statute (*Nix. Dig.* 4th ed. 236) providing, in default of survivors of specified classes, for descent "in equal parts" to "several persons all of equal degree of consanguinity." See also *Van Cleve v. Van Fossen*, 73 Mich. 342; *Taylor v. Bray*, 32 N. J. L. 182.

6. **General Effect of Statutes Restricting the Right.** — *Bedle, J.*, in *Davis v. Vanderveer*, 23

N. J. Eq. 558. See *Campbell's Appeal*, 64 Conn. 277.

7. **Grand-nephews and Grand-nieces.** — *Iglehart v. Holt*, 12 App. Cas. (D. C.) 68; *Matter of Chapoton*, 104 Mich. 11, 53 Am. St. Rep. 454; *Van Cleve v. Van Fossen*, 73 Mich. 342; *Selby v. Hollingsworth*, 13 Lea (Tenn.) 145; *Penniman v. Francisco*, 1 Heisk. (Tenn.) 511.

By the *Pennsylvania* Act of 1833, representation among collaterals went no further than brothers' and sisters' children, but by Act of 1855, it was extended to the grandchildren of brothers and sisters and the children of uncles and aunts. *Lane's Appeal*, 28 Pa. St. 487.

8. **Uncles and Aunts.** — *McDowell v. Addams*, 45 Pa. St. 430. But by the Act of May 25, 1887 (P. L. 260) it was provided that children and descendants of deceased grandparents shall represent such deceased grandparents whenever grandparents are entitled as next of kin. *Whitaker's Estate*, 17 Pa. Co. Ct. 387, 5 Pa. Dist. 83.

9. **Children of Uncles and Aunts.** — *Clary v. Watkins*, 64 Neb. 386; *Matter of Davenport*, 67 N. Y. App. Div. 191; *Johnston v. Chesson*, 6 Jones Eq. (59 N. Car.) 146; *Shaffer v. Nail*, 2 Brev. (S. Car.) 160. But see *Matter of Healy*, (Surrogate Ct.) 27 Misc. (N. Y.) 352.

So under the *Maryland* Act of 1820. *Porter v. Askew*, 11 Gill & J. (Md.) 346; *Elwood v. Lannon*, 27 Md. 200; *Levering v. Heighe*, 2 Md. Ch. 81; *Levering v. Heighe*, 3 Md. Ch. 365; *Ellicott v. Ellicott*, 2 Md. Ch. 468. And under

first and second cousins, the latter cannot take by representation.<sup>1</sup> Grand-uncles and grand-aunts, when next of kin, will take the inheritance, to the exclusion of the children and grandchildren of grand-uncles who have died before the intestate.<sup>2</sup> Children of a deceased great-great-uncle take to the exclusion of grandchildren of the same uncle.<sup>3</sup> When the statutes extend the right of representation to brothers' and sisters' "children," "descendants," "issue," or "representatives," or when they so restrict the right, they invariably refer to the brothers and sisters of the intestate, even though they do not make use of the phrase "of the intestate" or its equivalent.<sup>4</sup>

(d) **When Heirs Are of Equal Degree** — *aa.* IN LINEAL DESCENT. — There can, of course, be no question but that in the case of distribution to or descent cast upon children where some of the children are living, and others dead, leaving issue, the share to which each of the deceased children would, if living, have been entitled, goes to the issue of each respectively; such issue, in this case, take *per stirpes*.<sup>5</sup> But, in case all the surviving descendants are related to the intestate in the same degree, there is, in the absence of statutory regulations,<sup>6</sup> some conflict of opinion as to whether they take *per stirpes* or *per capita*.

**View that Succession Must Be Per Stirpes.** — It is the law in some of the *United States* that the succession must invariably be *per stirpes*, where the estate descends or is to be distributed among the kindred in the intestate's direct descending line; although all such heirs stand in the same degree of consanguinity to the intestate, they, nevertheless, take *per stirpes*.<sup>7</sup> This has been held to be the rule under the English statute of distributions,<sup>8</sup> and is in conformity with the rule of the Roman law.<sup>9</sup>

the *New Hampshire* Act of 1789. *Parker v. Nims*, 2 N. H. 460.

This was the rule under the *Pennsylvania* Act of 1833. *Good v. Herr*, 7 W. & S. (Pa.) 253, 42 Am. Dec. 236; *Herr v. Herr*, 5 Pa. St. 428, 47 Am. Dec. 416; *Parr v. Bankhart*, 22 Pa. St. 291; *Montgomery v. Petriken*, 29 Pa. St. 118. But this was changed by the Act of April 27, 1855, under which such children take the share which their parents would have had if living. *Hayes's Appeal*, 89 Pa. St. 256; *Haines's Estate*, 12 Pa. Co. Ct. 401.

And it has been held that this provision of the Act of 1855 was not repealed by the Act of June, 1885 (P. L. 251), providing for a *per capita* distribution where the distributees stand in the same degree of consanguinity to the intestate. *McConnell's Estate*, 5 Pa. Super. Ct. 120. See also *Smith's Estate*, 10 Pa. Dist. 92.

But grandchildren of uncles and aunts do not participate with children of uncles and aunts, when there is no grandparent living, even under the Act of May 25, 1887 (P. L. 260), providing that children and descendants of grandparents represent such grandparents. *White's Estate*, 17 Pa. Co. Ct. 395, 5 Pa. Dist. 103; *Bamber's Estate*, 2 Pa. Dist. 536.

Under a state of things such as is described in the text, the facts as fixed at the death of an intestate have been held in *New Jersey* to determine the right of his uncles and aunts to his inheritance, though the statute gives a life estate to his surviving mother. *Bailey v. Ross*, 32 N. J. Eq. 544.

1. **Second Cousins.** — *Clary v. Watkins*, 64 Neb. 386; *Schenck v. Vail*, 24 N. J. Eq. 538; *Adee v. Campbell*, 79 N. Y. 52, 14 Hun (N. Y.) 551 (personal estate).

So under the *Pennsylvania* Act of 1833. *Clen-daniel's Estate*, 12 Phila. (Pa.) 54, 35 Leg. Int. (Pa.) 90; *Brenneman's Appeal*, 40 Pa. St. 115;

*Shields v. McAuley*, 37 Fed. Rep. 302; and to the same effect, *Rogers's Estate*, 131 Pa. St. 382; *Byers v. McAuley*, 149 U. S. 608; *Smith's Estate*, 10 Pa. Dist. 92.

In *Louisiana* it was held that representation for the purpose of inheritance does not extend to children of first cousins of the deceased. *Ratcliffe v. Ratcliffe*, 7 Mart. N. S. (La.) 335.

When the nearest relations were children and grandchildren of deceased uncles and aunts, it was held that the children of the deceased uncles and aunts took *per capita*. *Stewart v. Collier*, 3 Har. & J. (Md.) 289.

2. **Children of Grand-uncles and Grand-aunts.** — *Clayton v. Drake*, 17 Ohio St. 367. See *Cresoe v. Laidley*, 2 Binn. (Pa.) 279.

3. *Lindley's Appeal*, 102 Pa. St. 235.

4. *Page v. Parker*, 61 N. H. 65; *Lindley's Appeal*, 102 Pa. St. 235.

5. **Representation Between Heirs of Different Degrees of Relationship.** — *Brown v. Taylor*, 62 Ind. 295; *Dutoit v. Doyle*, 16 Ohio St. 400. See *Williams's Estate*, 62 Mo. App. 339.

6. **Statute Providing that Heirs of Same Degree Shall Take Per Capita.** — In *Pennsylvania*, it is provided, in effect, by section 1 of the Act of June 30, 1885 (P. L. 251), that kindred, whether lineal or collateral, who stand in the same degree of consanguinity to the intestate, shall take in equal shares. See *Cremer's Estate*, 156 P. St. 40; *Smith's Estate*, 10 Pa. Dist. 92. As to the rule in *Virginia*, see *Moore v. Conner*, (Va. 1890) 20 S. E. Rep. 936.

7. **Representation in the Descending Line — Per Stirpes Rule.** — *Odum v. Caruthers*, 6 Ga. 39; *Crumph v. Faucett*, 70 N. Car. 215. But see *Skinner v. Wynne*, 2 Jones Eq. (55 N. Car.) 41.

8. *In re Natt*, 37 Ch. D. 517. See also *In re Ross*, L. R. 13 Eq. 286; *Lockyer v. Vade, Barn.* Ch. 444.

9. See *supra*, this section, *Civil-law Rule*,

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**View that Succession Must Be Per Capita.** — But it has been asserted by eminent authority that "the rule of representation applies only from necessity, or where there are lineal heirs in different degrees, as children and the children of a deceased child, or brothers and sisters and the children of a deceased brother or sister."<sup>1</sup> And it is provided by statute in a number of states that, where all the lineal descendants of the intestate are in equal degree, they shall take *per capita*, but otherwise *per stirpes*.<sup>2</sup> Where this is the law, if grandchildren alone survive the intestate, they take equally, or *per capita*, as next in degree or nearest in kin.<sup>3</sup> In harmony with this theory, it has been held that, if a person dies intestate, without leaving any child surviving, but leaving grandchildren and great-grandchildren, the latter being the descendants of a deceased grandchild, the grandchildren are entitled *per capita*, taking share and share alike without regard to the number of the children of the intestate, and the great-grandchildren are entitled *per stirpes*, taking together the share which the deceased grandchild would have taken.<sup>4</sup>

**66. IN COLLATERAL SUCCESSION — General Rule.** — In collateral succession, the right of representation exists, as has been shown above, to a limited extent. And, in the case of succession by relatives within the limits prescribed for representation, it seems to be a general rule that where such relatives are in equal degree they will take *per capita*, but where they stand in unequal degree, or claim by representation, then they will take *per stirpes*.<sup>5</sup>

**Reason for the Rule.** — Where the claimants stand in unequal degree, then the doctrine of representation is necessary, to prevent the exclusion of those in the remoter degree. So, in the case of the survival of a brother or sister, and children of deceased brothers and sisters, such children take *per stirpes*.<sup>6</sup> But when the claimants all stand in equal degree, as three nephews, three grand-nephews, etc., they take *per capita*, or each an equal share; because in this case representation, or taking *per stirpes*, is not necessary to prevent the exclusion of those in a remoter degree, and a more just and equal division of the intestate's property is effected without it.<sup>7</sup>

**Illustrations of the Rule.** — It has been held accordingly that when the intestate leaves, as his next of kin, nephews and nieces, the children of different brothers or sisters, such nephews and nieces take in equal shares, or *per capita*.<sup>8</sup> This

1. Same — **Per Capita Rule.** — This was said by Shaw, C. J., in *Knapp v. Windsor*, 6 Cush. (Mass.) 156. See also *Cox v. Cox*, 44 Ind. 368.

2. See 1 Stim. Am. Stat. L., § 3136.

3. *Skinner v. Wynne*, 2 Jones Eq. (55 N. Car.) 41 (but see *Crump v. Faucett*, 70 N. Car. 345); *Earnest v. Earnest*, 5 Rawle (Pa.) 219; *Person's Appeal*, 74 Pa. St. 121. See *Eshleman's Appeal*, 74 Pa. St. 42.

4. *Cox v. Cox*, 44 Ind. 368.

5. **Representation in Collateral Succession.** — See 1 Stim. Am. Stat. L., § 3137. See also *Kelly v. McGuire*, 15 Ark. 555; *Blake v. Blake*, 85 Ind. 65.

6. *Ernst v. Freeman*, 129 Mich. 271.

Under the English statute of distributions, if a person dies without children, leaving a widow and mother, brother and sister, and two nieces by a deceased brother, the widow would, according to the established doctrine, take a moiety, and the mother, brother, and sister would each take one-fourth and the nieces the other one-fourth of the remaining moiety. This point was ruled in *Keylway v. Keylway*, 2 P. Wms. 347; and the doctrine was declared to be correct by Lord Hardwicke in *Stanley v. Stanley*, 1 Atk. 457.

7. See 2 Kent's Com. 425, 3 L. C. Am. L. R. P. 416; *Houston v. Davidson*, 45 Ga. 574.

In *Bamber's Estate*, 2 Pa. Dist. 536, it was held that the descendants of an intestate's grandparents could not take by representation unless one or more grandparents survived the intestate.

**Per Capita or Per Stirpes.** — A Pennsylvania statute (Act of June, 1885) directs that persons "shall take in equal shares" whenever the persons upon whom the law casts the descent or who take as distributees are of the same degree of consanguinity to the decedent. In *Cremer's Estate*, 156 Pa. St. 40, it was held that where the persons entitled were all first cousins of the intestate, they took *per capita* and not *per stirpes*.

8. **When Heirs Are All Related in Same Degree.** — *Houston v. Davidson*, 45 Ga. 574; *Baker v. Bourne*, 127 Ind. 466; *Snow v. Snow*, 111 Mass. 389; *Staubitz v. Lambert*, 71 Minn. 13; *Nichols v. Shepard*, 63 N. H. 301; *Fisk v. Fisk*, 60 N. J. Eq. 195; *Wagner v. Sharp*, 33 N. J. Eq. 520; *Miller's Appeal*, 40 Pa. St. 387; *White v. Williamson*, 2 Grant Cas. (Pa.) 249; *De Haven's Estate*, 1 Pa. L. J. Rep. 336, 2 Pa. L. J. 323; *Stent v. McLeod*, 2 McCord Eq. (S. Car.) 354. And see *McKinney v. Mellon*, 3 Houst. (Del.) 277.

In Connecticut nephews and nieces have been held to take *per stirpes*. *Kennedy v. Kennedy*,

is the construction of the English statute of distributions,<sup>1</sup> viz., that claimants standing in equal degree take *per capita* and not *per stirpes*. The brothers and sisters of the intestate all being dead, their representatives in equal degree, to wit, their children, become themselves principals, as standing next in degree of relationship to the intestate, and take in their own right. By the operation of the general rule stated above, if one or more collaterals claim in their own right, that is, by reason of propinquity to the intestate, and the claim of the others rests upon the representation of a deceased parent or ancestor, who, if living, would be in the same degree of relationship with the former, then the latter take *per stirpes*, that is, they collectively take as much as the deceased parent or ancestor would have taken, while the former take *per capita*.<sup>2</sup>

**VIII. DOCTRINE OF SHIFTING INHERITANCE — Common Law.** — It is a doctrine of the common law that, although lands may, by the operation of the feudal rule that the freehold should not be in abeyance, descend to him who is heir at the intestate's death, this inheritance may be divested at any time if there should come into existence another person whose degree of consanguinity to the ancestor is such that, had he been alive at the time of the descent cast, he would have excluded the person who has actually taken.<sup>3</sup>

**Modern English Rule.** — The rule of the modern English law that on failure of lineal descendants, or issue of the purchaser, the inheritance shall descend to his nearest lineal ancestor, has put an end to the possibility of a shifting inheritance, except in the single case of the birth of a posthumous child.<sup>4</sup>

**Status of the Doctrine in the United States.** — The rule of shifting inheritance has been recognized in some of the United States,<sup>5</sup> but in others it has, by judicial decision, been rejected as being an inconvenient rule which was grounded on feudal reasons and was merely an incident to the now universally superseded common-law canons of descent, and which is inconsistent with the modern theory of intestate succession.<sup>6</sup> And to prevent the evil of a shifting inher-

1 Swift's System (Conn.) 286. See Pruden v. Paxton, 79 N. Car. 446, 28 Am. Rep. 333.

In Kentucky the statutory provision is that if any or all of the class first entitled to inherit are dead, leaving descendants, such descendants shall take *per stirpes*. Gen. Stat. (Bul. & Fel. 1888, c. 31, § 2.)

**Maryland — District of Columbia.** — It is held in Maryland that nephews and nieces will take *per stirpes*. McComas v. Amos, 29 Md. 132. And the Court of Appeals for the District of Columbia has reached the same conclusion. Iglehart v. Holt, 12 App. Cas. (D. C.) 68.

In New York this was formerly not the law. In Jackson v. Thurman, 6 Johns. (N. Y.) 322, it was held that where the intestate's nearest heirs were a nephew by a brother deceased, and two nephews by another brother deceased, such nephews would inherit *per stirpes*. The statute under which this case was decided has been abrogated, and the law is now in accord with the text. Pond v. Bergh, 10 Paige (N. Y.) 140.

In North Carolina, it has been decided that collateral heirs, even if of equal degree, take *per stirpes*. Clement v. Cauble, 2 Jones Eq. (55 N. Car.) 82; Haynes v. Johnson, 5 Jones Eq. (58 N. Car.) 124; Cromartie v. Kemp, 66 N. Car. 382.

In Pennsylvania, under the Act of 1833, the *per stirpes* rule obtains among collaterals. Davis's Estate, 14 Phila. (Pa.) 256, 38 Leg. Int. (Pa.) 34; Brenneman's Appeal, 40 Pa. St. 115; Hayes's Appeal, 89 Pa. St. 256.

1. Walsh v. Walsh, 1 Eq. Cas. Abr. 249, par. 7; Janson v. Bury, Bunb. 157; Durant v. Prest-

wood, 1 Atk. 454; Stanley v. Stanley, 1 Atk. 455; Lloyd v. Trench, 2 Ves. 215.

2. If a person dies, leaving nephews and nieces and grand nephews and nieces surviving, the former take *per capita*, while the latter take *per stirpes*. Garrett v. Bean, 51 Ark. 52; Houston v. Davidson, 45 Ga. 574; Blake v. Blake, 85 Ind. 65; Balch v. Stone, 149 Mass. 39; Copenhaver v. Copenhaver, 9 Mo. App. 200, affirmed in 78 Mo. 55; Preston v. Cole, 64 N. H. 459; Fisk v. Fisk, 60 N. J. Eq. 195; Ewers v. Follin, 9 Ohio St. 327; Lebo's Appeal, 3 Luz. Leg. Obs. (Pa.) 103; Illig's Estate, 3 Luz. Leg. Obs. (Pa.) 102; Davis v. Rowe, 6 Rand. (Va.) 355. See Doane v. Freeman, 45 Me. 113.

3. Common-law Doctrine. — 2 Bl. Com. 208; 2 Greenl. Cru. R. P. 145; Co. Litt. 2, 6; 3 Cru. Dig. 230.

4. Doctrine Obsolete in England. — 2 Broom & Had. Bl. 378.

5. Recognition of the Doctrine in the United States. — Cutlar v. Cutlar, 2 Hawks (9 N. Car.) 324; Den v. Whedbee, 1 Dev. L. (12 N. Car.) 160; Caldwell v. Black, 5 Ired. L. (27 N. Car.) 463. But in Grant v. Bustin, 1 Dev. & B. Eq. (21 N. Car.) 77, it was held that under the statute for the distribution of intestate estates, no person could take as next of kin who was not *in esse* or *en ventre sa mere* at the time of the intestate's death.

6. Abrogation of the Doctrine in the United States. — Bates v. Brown, 5 Wall. (U. S.) 711, construing the statutes of Illinois; Cox v. Matthews, 17 Ind. 367; Drake v. Rogers, 13 Ohio St. 21, overruling Dunn v. Evans, 7 Ohio (pt. 1)

ance, the statutes now sometimes require from the heir the capacity of taking at the intestate's death,<sup>1</sup> or limit the right of succession to persons born within a prescribed time, viz., ten months, after the death of the intestate.<sup>2</sup> In this connection it is important to remember that this doctrine of shifting inheritance should not be confused with the right of posthumous children to succeed to an estate.<sup>3</sup>

**IX. SUCCESSION BY AND FROM BASTARDS**—1. **By Common Law.**—With respect to the right of inheritance, a bastard is, by the common law, considered *quasi nullius filius*.<sup>4</sup> And, being nobody's son, he is incapable of becoming heir to either his ascendants or collaterals. Moreover, as a bastard cannot become heir himself, so neither can he have any ancestral or collateral heirs—he can have no heirs but those of his own body.<sup>5</sup> The common-law disabilities of bastards still obtain in the United States, except so far as they are expressly removed by statutory provision.<sup>6</sup> Where, therefore, a statute makes use of the word "children," it must of necessity be construed to mean such as the law recognizes as children; its meaning cannot be so extended as to include illegitimate children, except so far as they are recognized by other provisions of the statute.<sup>7</sup> And it is so where a statute employs the word "kindred" or the phrase "next of kin,"<sup>8</sup> or the word "descendants."<sup>9</sup>

2. **By Civil Law.**—The civil law differed from the common law with regard to the status of bastards and allowed a bastard to succeed to an inheritance, if after its birth the mother was married to the father; and also if the father had no lawful wife or child, then, even if the concubine was never married to the father, yet she and her bastard son were admitted each to one-twelfth of the inheritance; and a bastard was likewise capable of succeeding to the whole of his mother's estate, although she was never married.<sup>10</sup>

3. **By Statute**—a. **IN GENERAL.**—But this matter is now, throughout the

169, and *Springer v. Fortune*, 2 Handy (Ohio) 52.

1. This rule was at an early day incorporated in the statutes of *Virginia*. See statute of Jan. 1, 1787, limiting the case to the children of a decedent. *Blunt v. Gee*, 5 Call (Va.) 481. Since 1840, this policy has been extended to all persons. See 2 Min. Inst. 455.

2. So in *North Carolina* under *Battle's Rev.*, c. 36, § 7.

And in *Tennessee* under Act 1842, p. 193, § 2. See *Grimes v. Orrand*, 2 Heisk. (Tenn.) 298, and *Melton v. Davidson*, 86 Tenn. 129, both overruling *Baker v. Heiskell*, 1 Coldw. (Tenn.) 642. See *supra*, this title, VI. 2. f. *Posthumous Children*.

3. **Posthumous Child.**—The rule established by the cases which reject the doctrine of shifting inheritance is simply that when descent is cast, and the estate vested in him who is heir at the death of the ancestor, the estate cannot be divested by the subsequent birth of nearer heirs. This, obviously, does not interfere with the rule that a child *en ventre sa mere* is considered *in esse* for the purpose of inheriting. See *Cox v. Matthews*, 17 Ind. 367. It has been said that "the example suggested by Blackstone, of the divestiture of the estate of a collateral by the birth of a posthumous child is hardly a case of a shifting inheritance in the strict sense; since at the time of the father's death the infant *en ventre* was *in esse* and had the [inchoate] right of inheritance, \* \* \* and it is questionable how far, in such case where the doctrine of shifting inheritance is acknowledged, the first heir would be per-

mitted to deal with the inheritance as his own." 3 L. C. Am. L. R. P. 461. See *supra*, this title, *Posthumous Children*.

4. **Common-law Status of Bastards.**—Co. Litt. 123; 1 Bl. Com. 458; *Rex v. Hodnett*, 1 T. R. 101; *Hains v. Jeffell*, 1 Ld. Raym. 68. And see title BASTARDY, vol. 3, p. 891.

5. *McCool v. Smith*, 1 Black (U. S.) 459. See also the title BASTARDY, vol. 3, p. 892, note 3.

6. **Recognition of Common Law in United States.**—*Stevenson v. Sullivant*, 5 Wheat. (U. S.) 207; *Hicks v. Smith*, 94 Ga. 809; *Blacklaws v. Milne*, 82 Ill. 505, 25 Am. Rep. 339; *Doe v. Bates*, 6 Blackf. (Ind.) 533.

In *Connecticut* alone it seems that the common law has been departed from without the aid of legislation. See opinion by Hosmer, C. J., in *Heath v. White*, 5 Conn. 228. And see next note *infra*. See also *infra*, the subdivisions *Succession to Estate of Mother*, and *Succession Between Illegitimate Brothers and Sisters*.

7. See the title CHILD—CHILDREN, vol. 5, p. 1095, note 1, and p. 1097, note 2.

In *Connecticut*, however, the term "children" as used in a statute by which the property of an intestate was made to descend "to and among the children, and such as legally represent them" has been held to include illegitimate children. *Heath v. White*, 5 Conn. 228.

8. See the title KINDRED, vol. 18, p. 65, note 2.

9. *Giles v. Wilhoit*, (Tenn. Ch. 1898) 48 S. W. Rep. 268.

10. **Civil-law Status of Bastards.**—2 Bl. Com. 247. See *Pettus v. Dawson*, 82 Tex. 18.

United States, largely regulated by statute.<sup>1</sup> While the statutes of the different states show a considerable variance in their provisions, they are all in the line of a more liberal and generous public policy than that of the common law, and to some extent adopt the rules of the Roman law.

*b. CONSTRUCTION OF STATUTES.* — And it has, under the statutes of the different states, frequently been contended that, since these statutes were borrowed from the civil law, they should be so construed as to place the bastard in the position which he occupied in that system. But this view has been generally rejected;<sup>2</sup> the courts have frequently said that legislation giving to illegitimate children the right of succession is undoubtedly in derogation of the common law, and should be strictly construed.<sup>3</sup> But it has been held that a statute endowing bastards with heritable blood applied to even such as were the offspring of an incestuous connection.<sup>4</sup> And it has been held that a statute of legitimation enabling the legitimated to "inherit," by necessary implication gave them the right to take as distributees.<sup>5</sup>

*c. SUCCESSION TO ESTATE OF MOTHER.* — While an illegitimate child does not inherit from the mother by the common law,<sup>6</sup> the statutes of probably all the United States now recognize the right of a bastard to succeed to the estate of his mother; in most of these states he inherits the mother's estate with the legitimate children share and share alike, though in a few he is constituted the heir of his mother only in default of lawful issue.<sup>7</sup> Where a statute gives an illegitimate child the capacity to take from the mother, the bastard will take equally with legitimate children; his right to inherit from the mother is not restricted to cases where no lawful children exist,<sup>8</sup> except where the bastard is, by the terms of the statute, made the heir and distributee of his mother only if she has no legitimate child.<sup>9</sup>

*d. SUCCESSION TO ESTATE OF MOTHER'S ANCESTORS AND COLLATERAL KINDRED.* — The right of succession given by a statute which makes a bastard the heir of his mother is usually confined to the mother and her illegitimate children. Thus, a bastard ordinarily cannot take by descent, or share in the distribution of, the estate of his mother's ancestors or collateral relations.<sup>10</sup> Even under statutes which provide that illegitimate children may take or transmit an inheritance "on the part of the mother" in like manner as if they had been lawfully begotten of such mother, or like manner as if they had been born in lawful wedlock, the words "on the part of the mother" seem to have been regarded as no more than "from the mother," and it has been held that a bastard cannot inherit from the mother's collateral kindred,<sup>11</sup> nor even from

1. *Statutory Changes of the Common Law.* — See 1 Stim. Am. Stat. L., §§ 3150-3155.

2. *Construction of the Statutes.* — *McCool v. Smith*, 1 Black (U. S.) 459; *Cooley v. Dewey*, 4 Pick. (Mass.) 93, 16 Am. Dec. 326; *Barwick v. Miller*, 4 Desaus. (S. Car.) 434; *Jones v. Burden*, 4 Desaus. (S. Car.) 439.

3. See *Cope v. Cope*, 137 U. S. 682; *Brewer v. Hamor*, 83 Me. 251; *Pratt v. Atwood*, 108 Mass. 40.

4. *Application of Statutes to Incestuous Offspring.* — *Brewer v. Blougher*, 14 Pet. (U. S.) 178.

5. *Statutes Extended to Distribution.* — *Swanson v. Swanson*, 2 Swan (Tenn.) 446.

6. *Common-law Rule.* — *Porter v. Porter*, 7 How. (Miss.) 106, 40 Am. Dec. 55.

In *Connecticut* it has been held, independently of any statute expressly making a bastard the heir of his mother, that a bastard inherits from his mother. *Heath v. White*, 5 Conn. 228.

7. *Statutory Rules.* — See 1 Stim. Am. Stat. L., § 3151.

8. *Alexander v. Alexander*, 31 Ala. 241;

*Earle v. Dawes*, 3 Md. Ch. 230; *Opdyke's Appeal*, 49 Pa. St. 373.

9. *Flintham v. Holder*, 1 Dev. Eq. (16 N. Car.) 349; *Sawyer v. Sawyer*, 6 Ired. L. (28 N. Car.) 407; *Brown v. Kerby*, 9 Humph. (Tenn.) 460.

10. *Succession Limited to Mother's Estate.* — *Williams v. Kimball*, 35 Fla. 49, 48 Am. St. Rep. 238; *Berry v. Owens*, 5 Bush (Ky.) 452; *Matter of Mericlo*, (County Ct.) 63 How. Pr. (N. Y.) 62; *Waggoner v. Miller*, 4 Ired. L. (26 N. Car.) 480; *Rees's Estate*, 166 Pa. St. 498; *Brown v. Kerby*, 9 Humph. (Tenn.) 460.

11. *Allen v. Ramsey*, 1 Met. (Ky.) 635; *Gibson v. McNeely*, 11 Ohio St. 131.

By the *Massachusetts* statute of 1851, it was provided that every illegitimate child should be considered as heir of his mother and of any maternal ancestor, and that his issue might take by descent from such ancestor. Still, it was held that a bastard could not take from his mother's collateral kindred. *Pratt v. Atwood*, 108 Mass. 40. So, it was held that a



her ancestors or descendants.<sup>1</sup> There is at least one decision to the effect that the object of the legislature seems to have been to remove the common-law impediment to the descent of the mother's property and of the property of her ancestors, either to her own illegitimate children or their legitimate offspring, and to give them capacity to inherit in the ascending line and through their mother.<sup>2</sup> And there are a number of dicta to the same effect.<sup>3</sup> And, in a number of the United States, the statutes put illegitimates upon the same footing with legitimates and they inherit from the mother's ancestral and collateral relatives.<sup>4</sup>

c. SUCCESSION BETWEEN ILLEGITIMATE BROTHERS AND SISTERS. — By the common law, since bastards can have no heirs except those of their own bodies, illegitimate children of the same mother do not inherit from each other.<sup>5</sup> And even statutes which give illegitimate children the right to inherit from the mother, and the mother from her illegitimate children, do not necessarily enable the illegitimate children of the same mother to inherit from each other.<sup>6</sup> It has been held that under a statute making bastards capable of inheriting or transmitting inheritance on the part of the mother, in like manner as if they had been lawfully begotten, illegitimate children of the same mother do not inherit from each other.<sup>7</sup> But the weight of authority seems to sustain the contrary rule.<sup>8</sup> The question has been settled in some of the

bastard could not claim through his sister any part of her son's estate. *Haraden v. Larrabee*, 113 Mass. 430. As to the earlier *Massachusetts* statute of 1828, see 4 Kent's Com. 413, note, and Rev. Stat. Mass., c. 61, § 2, commissioners' note.

1. *Flora v. Anderson*, 75 Fed. Rep. 217; *Jackson v. Jackson*, 78 Ky. 390, 39 Am. Rep. 246; *Hogan v. Hogan*, (Ky. 1898) 44 S. W. Rep. 953.

2. *Inheritance from Mother's Ancestors and Collateral Kindred*. — *Moore v. Moore*, 169 Mo. 432.

3. See *Stevenson v. Sullivan*, 5 Wheat. (U. S.) 207. There are some expressions in *Scroggin v. Allan*, 2 Dana (Ky.) 363; *Remington v. Lewis*, 8 B. Mon. (Ky.) 606, and *Allen v. Ramsey*, 1 Met. (Ky.) 635, which seem to indicate that a bastard may inherit through his mother from her ancestors; but in *Jackson v. Jackson*, 78 Ky. 390, 39 Am. Rep. 246, these dicta were disapproved, and it was held that a bastard could not inherit through his mother from her ancestors.

4. *Arkansas*. — *Gregley v. Jackson*, 38 Ark. 487.

*Florida*. — *Keech v. Enriquez*, 28 Fla. 597.

*Illinois*. — *Bales v. Elder*, 118 Ill. 436; *Jenkins v. Drane*, 121 Ill. 217; *Elder v. Bales*, 127 Ill. 425.

*Indiana*. — *Parks v. Kimes*, 100 Ind. 148.

*Iowa*. — *McGuire v. Brown*, 41 Iowa 650.

*Maine*. — *Messer v. Jones*, 88 Me. 349; *Lawton v. Lane*, 92 Me. 170.

*Rhode Island*. — *Briggs v. Greene*, 10 R. I. 495.

*Tennessee*. — *Dennis v. Dennis*, 105 Tenn. 86.

*Vermont*. — *Burlington v. Fosby*, 6 Vt. 83, 27 Am. Dec. 535.

*Virginia*. — *Garland v. Harrison*, 8 Leigh (Va.) 368.

5. *Common-law Rule*. — *Woltemate's Appeal*, 86 Pa. St. 219, affirming *Ditsche's Estate*, 11 Phila. (Pa.) 15, 32 Leg. Int. (Pa.) 50.

In *Connecticut*, however, independently of

any express statute provisions to that effect, it has been held that natural children to the same mother inherit from each other. *Brown v. Dye*, 2 Root (Conn.) 280. See *supra*, this section, *By Common Law; Succession to Estate of Mother*.

6. *Statutes Making Mother and Bastard Each Other's Heir*. — *Bent v. St. Vrain*, 30 Mo. 268; *Woltemate's Appeal*, 86 Pa. St. 219.

7. *Statutes Making Bastard Capable of Inheriting and Transmitting Inheritance on Part of Mother*. — *Hawkins v. Jones*, 19 Ohio St. 22.

8. *Vermont*. — In an early Vermont case it was held that one illegitimate child can inherit from another illegitimate child of the same mother. *Burlington v. Fosby*, 6 Vt. 83, 27 Am. Dec. 535. But this decision was doubted in *Bacon v. McBride*, 32 Vt. 585. See *infra*, this section, *Succession Between Legitimate and Illegitimate Children of Same Mother*.

*Virginia*. — In *Garland v. Harrison*, 8 Leigh (Va.) 368, a case construing the Virginia statute, the whole court vigorously repudiated the soundness of the decision of the United States Supreme Court in the case of *Stevenson v. Sullivan*, 5 Wheat. (U. S.) 207, and held that, under that statute, where a bastard dies intestate, leaving no children or descendants, but leaving his mother living, and two bastard brothers by other fathers, his estate will pass to his mother and bastard brothers. But in such case the brothers will be considered as of the half blood only, and will each inherit only half as much as their mother. See also *Hepburn v. Dundas*, 13 Gratt. (Va.) 219; *Bennett v. Toler*, 15 Gratt. (Va.) 588, 78 Am. Dec. 638; *Butler v. Elyton Land Co.*, 84 Ala. 384.

In *Rhode Island*, it was held in a decision based upon the statutory provision under consideration, that where a bastard dies intestate leaving a bastard sister of the same mother, her estate will pass to that sister. *Briggs v. Greene*, 10 R. I. 495, citing *Garland v. Harrison*, 8 Leigh (Va.) 368, and referring to the earlier of the above cited *Vermont* cases.

United States by statutes which expressly provide that illegitimate children of the same mother may inherit or share in the distribution of each other's estate,<sup>1</sup> and in one state the statute also applies to the illegitimate children of the father.<sup>2</sup> Statutes of this nature have been held to embrace the issue of an incestuous connection.<sup>3</sup> And under some of the statutes the brothers and sisters of the bastard inherit to the exclusion of the mother,<sup>4</sup> though, under other statutes, the mother takes half of the estate and the rest goes to the brothers and sisters.<sup>5</sup>

*f.* SUCCESSION BETWEEN LEGITIMATE AND ILLEGITIMATE CHILDREN OF SAME MOTHER. — Since bastards cannot, by the common law, be heirs themselves, or have any heirs but those of their own bodies, legitimate brothers or sisters of a bastard cannot inherit from him,<sup>6</sup> nor he from them.<sup>7</sup> A statute which provides that illegitimate children of the same mother may inherit or share in the distribution of each other's estate, does not, it has been held, establish the right of succession between the legitimate and illegitimate children of the same mother.<sup>8</sup> And it has been held that statutes making bastards capable of inheriting or transmitting inheritance on the part of the mother do not have that effect.<sup>9</sup> But in some of the states, this right of succession is expressly established as well between illegitimate as legitimate children of the same mother.<sup>10</sup> And where a statute provided, in the case of a bastard dying intestate and without issue, that his brothers and sisters by the same mother should take his estate, it was held that this could not be limited to any particular description of brothers and sisters, but that it referred alike to those lawfully and unlawfully begotten.<sup>11</sup> Under a statute providing that legitimate and illegitimate children shall share equally in the mother's estate, and that "should either of such children die intestate, without child, his or her brothers or sisters shall, in like manner, take his or her estate," illegitimate children

1. *Statutes Expressly Providing for Inheritance Between Illegitimate Children of Same Parent.* — *Rogers v. Weller*, 5 Biss. (U. S.) 166, *construing the Illinois statute of 1853*; *Brown v. Dye*, 2 Root (Conn.) 280; *Houston v. Davidson*, 45 Ga. 574; *Lacotte v. Labarre*, 11 La. 181; *Flintham v. Holder*, 1 Dev. Eq. (16 N. Car.) 349; *Briggs v. Greene*, 10 R. I. 495.

2. *Layre v. Pasco*, 5 Rob. (La.) 9; *Dupre v. Caruthers*, 6 La. Ann. 156.

3. *Brewer v. Blougher*, 14 Pet. (U. S.) 178.

4. *Butler v. Elyton Land Co.*, 84 Ala. 384.

5. *Ward v. Mathews*, 122 Ala. 188.

6. *Common-law Rule.* — *Jones v. Burden*, 4 Desaus. (S. Car.) 439; *McCormick v. Cantrell*, 7 Yerg. (Tenn.) 615.

7. *Woodward v. Duncan*, 1 Coldw. (Tenn.) 562; *Bacon v. McBride*, 32 Vt. 585, *questioning Burlington v. Fosby*, 6 Vt. 83, 27 Am. Dec. 535 (see *supra*, this section, *Succession Between Illegitimate Brothers and Sisters*).

8. *Statutes Making Illegitimate Brothers and Sisters Heirs to Each Other.* — *Allen v. Donaldson*, 12 Ga. 332; *Remington v. Lewis*, 8 B. Mon. (Ky.) 606; *Edwards v. Gaulding*, 38 Miss. 118; *Irvine v. Newlin*, 63 Miss. 192; *McCully's Estate*, 12 Pa. Super. Ct. 78; *Kennedy's Estate*, 9 Pa. Co. Ct. 230.

The *North Carolina Act of 1799* was construed to provide that when there are both legitimate and illegitimate children of the same mother, the legitimate may inherit from the illegitimate children, and the illegitimate children may inherit from each other but not from the legitimate children. *Flintham v. Holder*, 1 Dev. Eq. (16 N. Car.) 349; *Ehringhaus v.*

*Cartwright*, 8 Ired. L. (30 N. Car.) 39; *Sawyer v. Sawyer*, 6 Ired. L. (28 N. Car.) 407; *McBryde v. Patterson*, 78 N. Car. 412; *Powers v. Kite*, 83 N. Car. 156.

9. *Statutes Making Bastards Capable of Inheriting and Transmitting Inheritance on Part of Mother.* — In *Stevenson v. Sullivant*, 5 Wheat. (U. S.) 207, *construing the early Virginia statute*, it was held that bastard children could not inherit from legitimate children of the same mother. But see *Garland v. Harrison*, 8 Leigh (Va.) 368.

10. *Statutes Making Legitimate and Illegitimate Children of Same Mother Heirs to Each Other.* — See *Webb v. Webb*, 3 Head (Tenn.) 68; *Riley v. Byrd*, 3 Head (Tenn.) 20.

Under the *Ohio Act of 1853*, which provided that "if the mother be dead, the estate of such bastard shall descend to relatives on the part of the mother as if the intestate had been legitimate," it was held that legitimate children succeeded to the estate of their mother's illegitimate child. *Lewis v. Eutsler*, 4 Ohio St. 355.

11. It was so held under the provision of the *Tennessee statute* that when a bastard having property dies intestate and without children, "his brothers and sisters shall take his estate." *Riley v. Byrd*, 3 Head (Tenn.) 20. But it was held in a later case that, while legitimate children could inherit from the illegitimate, the latter could not inherit from the former. *Woodward v. Duncan*, 1 Coldw. (Tenn.) 562. To remedy this the *Act of 1866-67* was passed. See *Tennessee Code (M. & V. 1884)*, § 3274. *Scoggins v. Barnes*, 8 Baxt. (Tenn.) 560.

share the estate of a legitimate child, who dies intestate without child, equally with the legitimate children.<sup>1</sup> It has been held that when an illegitimate child is fully legitimated by a special act, passed at the instance of the putative father, the legitimated child and the children born in wedlock inherit from each other.<sup>2</sup>

g. SUCCESSION TO ESTATE OF FATHER. — By the common law an illegitimate child could not be the heir of his father.<sup>3</sup> But statutes are occasionally met with by which a bastard may inherit from his father, if recognized or acknowledged by him,<sup>4</sup> though, by some statutes, only when the intestate leaves no legitimate children or other legal heirs resident in the United States.<sup>5</sup> But the inheritable qualities given a bastard by these statutes are not general; he succeeds to the estate of his father only.<sup>6</sup> An illegitimate child can, of course, be made capable of inheriting from the father by a special legislative act.<sup>7</sup> Antenuptial children who become legitimated by the father's and mother's marriage and recognition, are regarded as heirs of the father, and are, it has been held, even entitled to inherit from the father's collateral relatives through him.<sup>8</sup>

h. SUCCESSION TO ESTATE OF FATHER'S KIN. — By the statutes of some of the United States illegitimate children, under certain conditions, inherit even from the lineal and collateral kindred of the father.<sup>9</sup> But the adoption of a child by the putative father under a statute which provides that after the adoption the child shall be considered legitimate as respects the father, does not render the child capable of inheriting as the representative of the father.<sup>10</sup> And it has been held that a bastard who is made heir-at-law of his father by a special legislative act does not inherit from the father's collateral kindred.<sup>11</sup>

i. SUCCESSION TO ESTATE OF BASTARD — In General. — By the common

1. Laughlin v. Johnson, 102 Tenn. 455.

2. Shelton v. Wright, 25 Ga. 636.

3. Common-law Rule. — Harrison's Estate, Myr. Prob. (Cal.) 121; Brown v. Belmarde, 3 Kan. 41; Sneed v. Ewing, 5 J. J. Marsh (Ky.) 460, 22 Am. Dec. 41; Willoughby v. Motley, 83 Ky. 297.

4. Statutory Modifications of Common-law Rule. — Van Horn v. Van Horn, 107 Iowa 247; Alston v. Alston, 114 Iowa 29; Britt v. Hall, 116 Iowa 564; Caldwell v. Miller, 44 Kan. 12; Matter of Gorkow, 20 Wash. 563; *In re Matthias*, 63 Fed. Rep. 523, applying the *Washington* statute. See also title BASTARDY, vol. 3, p. 897.

In *Louisiana*, an acknowledged bastard may take from his father who leaves no descendants, ascendants, or collateral relatives (Code, § 918); but if unacknowledged he cannot so take, although his paternity may have been judicially ascertained. Dupre v. Caruthers, 6 La. Ann. 156.

A statute of *Utah* providing that illegitimate children shall inherit from the father, whether acknowledged by him or not, if the paternity is made to appear to the satisfaction of the court, has been held to be a valid enactment. Cope v. Cope, 137 U. S. 682.

In *California* the requisite declaration must be by writing executed for the express purpose of changing the status of the child. Sandford's Estate, 4 Cal. 112; Pina v. Peck, 31 Cal. 359. See also Blythe v. Ayres, 96 Cal. 532, and Civ. Code Cal., § 1387, commissioners' note.

In *Iowa*, though the recognition must be written or notorious, the writing need not be

formal, and a series of letters written by a father to and about his natural son at school, has been held sufficient. Crane v. Crane, 31 Iowa 296.

It was held in *Willoughby v. Motley*, 83 Ky. 297, that an agreement by the father of a bastard with the mother to make the bastard his heir does not enable the child, though brought up by the father and acknowledged as his child, to inherit the father's estate, where the provisions of the *Kentucky* General Statutes, c. 3, § 17, are not complied with.

5. In *Indiana*, if a man dies without legitimate heirs resident in the United States, or children capable of inheritance without the United States, his illegitimate children who have been acknowledged by him in his lifetime may take. Rev. Stat. Ind., 1881, § 2475; *Borroughs v. Adams*, 78 Ind. 160; *Cox v. Rash*, 82 Ind. 519. It has been held that under this statute the word "heirs" is not to be taken in the sense of lineal heirs, and brothers and sisters resident in the United States will exclude an illegitimate child from the inheritance. *Borroughs v. Adams*, 78 Ind. 160.

6. *Hicks v. Smith*, 94 Ga. 809.

7. *Drain v. Violet*, 2 Bush (Ky.) 155; *Perry v. Newson*, 1 Ired. Eq. (36 N. Car. 28; *Lee v. Shankle*, 6 Jones L. (51 N. Car.) 313; *McGunnigle v. McKee*, 77 Pa. St. 81, 18 Am. Rep. 428.

8. *Jackson v. Moore*, 8 Dana (Ky.) 170.

9. *Inheritance by Legitimate Child from Father's Kindred*. — See *Messer v. Jones*, 88 Me. 349; *McKamie v. Baskerville*, 86 Tenn. 459.

10. *Safford v. Houghton*, 48 Vt. 236.

11. *Moore v. Moore*, 35 Vt. 98.

law a bastard can have no heir save of his own body, and if he dies intestate, without issue, his estate escheats.<sup>1</sup> But the common-law rule has been very generally modified by statute.

**By Husband or Wife.** — Thus, by statutes very generally enacted throughout the United States, the husband or wife of a bastard dying intestate is allowed to claim inheritance from the deceased.<sup>2</sup>

**By the Mother.** — The common-law rule that the estate of an illegitimate child cannot be inherited by the mother<sup>3</sup> is not abrogated by a statute which merely enables an illegitimate child to inherit from the mother, and does not provide that the mother shall inherit from her illegitimate child.<sup>4</sup> Statutes sometimes provide that the illegitimate children may inherit or transmit an inheritance "on the part of the mother" in like manner as if they had been lawfully begotten of such mother, or, in one state, in like manner as if they had been born in lawful wedlock. Courts in their expositions of these expressions have questioned whether they establish the right of a mother to succeed to the estate of her illegitimate child,<sup>5</sup> but it has been held that she does.<sup>6</sup> The right of a mother to succeed to the estate of her illegitimate child is now generally recognized by express statutory provisions,<sup>7</sup> though sometimes only when the bastard does not leave a surviving spouse or issue.<sup>8</sup>

**By the Mother's Heirs.** — Although it is provided by statute that bastards shall be capable of inheriting and transmitting an inheritance on the part of the mother as if born in lawful wedlock, the collateral heirs of the mother of a bastard do not, it has been held, succeed to his estate.<sup>9</sup> And it has been held that a statute which simply constitutes the mother heir to an illegitimate child who dies intestate, unmarried, and without issue, does not enable the heirs of the mother, she being dead, to inherit from the bastard.<sup>10</sup> Nor does a statute which makes bastards capable of inheriting from and through the

1. **Common-law Rule.** — See the title *ESCHEAT*, vol. 9, p. 321.

2. **Succession to Bastard — Statutes — District of Columbia.** — *Brooks v. Francis*, 3 MacArthur (D. C.) 109.

*Illinois.* — *Evans v. Price*, 118 Ill. 595; *Hudnall v. Ham*, 183 Ill. 486, 75 Am. St. Rep. 124.

*Indiana.* — *Doe v. Bates*, 6 Blackf. (Ind.) 533.

*Louisiana.* — *Briscoe's Succession*, 2 La. Ann. 268; *Miller's Succession*, 27 La. Ann. 574.

*Maryland.* — *Southgate v. Annan*, 31 Md. 113.

*Michigan.* — *Keeler v. Dawson*, 73 Mich. 600.

*Ohio.* — *Hawkins v. Jones*, 19 Ohio St. 22.

*Tennessee.* — *Scoggins v. Barnes*, 8 Baxt. (Tenn.) 560; *Lewis v. Mynatt*, 105 Tenn. 508.

*North Carolina.* — In *Coor v. Starling*, 1 Jones Eq. (54 N. Car.) 243, it was held that the widow of a bastard inherits one-third, and a daughter of his bastard brother two-thirds, of his estate. But under a later North Carolina statute it was held that upon the death of a bastard son, intestate, married, and without issue, a legitimate half-sister, born of the body of the same mother, inherits his real estate to the exclusion of the widow of such son. *Powers v. Kite*, 83 N. Car. 156.

3. **Mother Not Heir of Illegitimate Child by Common Law.** — *Cooley v. Dewey*, 4 Pick. (Mass.) 93, 16 Am. Dec. 326; *Flintham v. Holder*, 1 Dev. Eq. (16 N. Car.) 349; *Woltemate's Appeal*, 86 Pa. St. 219; *Barwick v. Miller*, 4 Desaus. (S. Car.) 434.

4. **Statutes Enabling Illegitimate Child to Inherit from Mother.** — *Doe v. Bates*, 6 Blackf.

(Ind.) 533; *Miller v. Public Schools*, 8 Gill (Md.) 128; *Bent v. St. Vrain*, 30 Mo. 268.

5. **Statutes Enabling Bastards to Inherit or Transmit Inheritance on Part of Mother.** — See *Remington v. Lewis*, 8 B. Mon. (Ky.) 607. It has been held that a bastard is not, by a provision of this kind, rendered capable of transmitting an estate by descent of his mother or to his illegitimate brothers. *Bent v. St. Vrain*, 30 Mo. 268.

6. *Garland v. Harrison*, 8 Leigh (Va.) 368. And see *Stover v. Boswell*, 3 Dana (Ky.) 234.

7. **Statutory Recognition of Right of Mother to Inherit from Illegitimate Child.** — See *Stim. Am. Stat. L.*, § 3154; *Langmade v. Tuggle*, 78 Ga. 770; *Miller v. Williams*, 66 Ill. 91; *Krug v. Davis*, 87 Ind. 590; *Neil's Appeal*, 92 Pa. St. 193; *Kennedy's Estate*, 9 Pa. Co. Ct. 230; *Webb v. Webb*, 3 Head (Tenn.) 68; *Murphy v. Portrum*, 95 Tenn. 605.

In *Louisiana*, it was held that the mother of a natural child, deceased without posterity, is entitled to the inheritance, to the exclusion of natural brothers and sisters. *Nolasco v. Lurty*, 13 La. Ann. 100.

8. *Webb v. Webb*, 3 Head (Tenn.) 68.

9. **Succession to Estate of Bastard by Mother's Heirs.** — *Croan v. Phelps*, 94 Ky. 213; *Little v. Lake*, 8 Ohio 289. For analogous cases see *supra*, this section, *Succession to Estate of Mother's Ancestors and Collateral Kindred*. As to the right of lineal descendants of the mother to succeed to the bastard's estate see *supra*, this section, *Succession Between Legitimate and Illegitimate Children of Same Mother*.

10. *McCully v. Warrick*, 61 N. J. Eq. 606.

mother, make the brothers and sisters of the mother capable of inheriting from her illegitimate children.<sup>1</sup> But, by some statutes, the estate of an illegitimate child who dies intestate, unmarried, and without issue, goes to the mother's heirs at law, in case she dies before the bastard.<sup>2</sup>

**By the Father.** — The bastard's father is usually excluded from the succession,<sup>3</sup> though in one of the United States the father succeeds to the estate of a natural child whom he has acknowledged.<sup>4</sup> But it seems doubtful whether a father who procures the enactment of a special legislative act legitimizing his bastard child can inherit from the child.<sup>5</sup>

**j. SUCCESSION TO ESTATE OF BASTARD'S CHILDREN.** — In construing a statute providing for the inheritance of the estate of an illegitimate child by the mother and her representatives, it was held that the statute had no application to determine the course of succession to the estate of a legitimate descendant of a bastard who died before the intestate.<sup>6</sup>

**k. SUCCESSION BY DECEASED BASTARD'S CHILDREN.** — According to the construction placed upon some of the statutes which confer inheritable qualities upon illegitimate children, the lawful issue of a deceased illegitimate parent does not inherit the estate of a paternal or maternal ancestor of the parent to which the bastard would have been entitled if living.<sup>7</sup> But the statutes of some of the United States are given a different construction, and the children of a deceased illegitimate child succeed to any estate which the illegitimate would have inherited if alive.<sup>8</sup> A view seems to have been taken with regard to the effect of certain of these statutes (provisions declaring that bastards by the same mother shall be capable of inheriting and transmitting an inheritance on the part of each other) in accordance with which they have the effect not only of establishing the right of succession between bastard brothers and sisters as if they were legitimate,<sup>9</sup> but also between their legitimate descendants; at least, it has been held that the legitimate children of a bastard inherit from the bastard brother of their parent who dies after the death of such parent.<sup>10</sup>

**X. SUCCESSION BY AND FROM ADOPTED CHILDREN** — 1. **Origin of Adoption Statutes.** — Though the adoption of children is unknown to the common law,<sup>11</sup> the civil law recognized the practice.<sup>12</sup> And it has, to a large extent, been thence adopted into the law of the United States. Statutes which prescribe the formalities and declare the results of adoption have been enacted in most, if not all, of the states.<sup>13</sup>

2. **Effect of Adoption Statutes on Succession** — *a. SUCCESSION BY ADOPTED CHILD* — (1) *General Rule.* — The general effect of the usual adoption statutes

1. Blair v. Adams, 59 Fed. Rep. 243.

2. Matter of Magee, 63 Cal. 414; Miller v. Williams, 66 Ill. 91; Lewis v. Eutsier, 4 Ohio St. 354. See Keeler v. Dawson, 73 Mich. 600.

3. Succession to Estate of Bastard by Father. — Ellis v. Hatfield, 20 Ind. 101.

4. Pigeau v. Duvenay, 4 Mart. (La.) 265.

5. M'Cormick v. Cantrell, 7 Yerg. (Tenn.) 615.

6. Sanford v. Marsh, 180 Mass. 210.

7. Succession by Legitimate Children of Deceased Bastard. — Curtis v. Hewins, 11 Met. (Mass.) 294; Edwards v. Gaulding, 38 Miss. 118; Voorhees v. Sharp, 63 N. J. Eq. 216; Steckel's Appeal, 64 Pa. St. 493.

8. Houston v. Davidson, 45 Ga. 574; Bales v. Elder, 118 Ill. 436; Jenkins v. Drane, 121 Ill. 217; McGuire v. Brown, 41 Iowa 650; Brewer v. Hamor, 83 Me. 251; Coor v. Starling, 1 Jones Eq. (54 N. Car.) 243; McBryde v. Patterson, 78 N. Car. 412; Powers v. Kite, 83 N. Car. 156; Grundy v. Hadfield, 16 R. I. 579; Ash v. Way, 2 Gratt. (Va.) 203.

In Connecticut, it has been held, even in the absence of any statute defining the rights of bastards, that the estate of A was inheritable by B, as heir at law, through C his grandmother, a sister of A, and D his mother, the illegitimate daughter of C. Dickinson's Appeal, 42 Conn. 491, 19 Am. Rep. 553.

9. See *supra*, this section, Succession Between Illegitimate Brothers and Sisters.

10. Sutton v. Sutton, 87 Ky. 216, 12 Am. St. Rep. 476.

In Tennessee, it has been held that, under the statutes of that state, a bastard nephew born of a bastard sister does not inherit from a bastard uncle, who has a bastard sister living. Giles v. Wilhoit, (Tenn. Ch. 1898) 48 S. W. Rep. 268.

11. See the title ADOPTION OF CHILDREN, vol. 1, p. 726, note 2.

12. See the title ADOPTION OF CHILDREN, vol. 1, p. 726, notes 3 and 4.

13. See the title ADOPTION OF CHILDREN, vol. 1, p. 727, notes 1, 2, and 3.

is that the adopted child becomes entitled to succeed to the estate of the adopting parent in the same manner as if it had been a child of the blood of such parent.<sup>1</sup> And it has been held that if an adopted child dies before its adopting parents, its children will take by right of representation in the same manner as if it had been a natural child.<sup>2</sup> But the adoption statutes which confer upon adopted children the right of inheritance, give them merely the rights possessed by natural born children in case of intestacy, and, in the absence of a valid contract to the contrary, do not restrict the adopting parent's right to alienate his property.<sup>3</sup>

(2) *Succession Limited to Estate of Adopting Parent.*—But the adopted child becomes heir to the adopting parent only; if the law permits adoption by the husband without the assent of his wife, the child so adopted becomes the heir of the husband alone, and sustains no relation to, and is not heir of, the wife.<sup>4</sup> And, indeed, the general effect of the decisions is to deny the right of the adopted child to succeed to the estate of any member of the adopting family other than the adopting parents. So, it has been held that an adopted child does not succeed to the estate of the adopting parents' ancestors,<sup>5</sup> or collateral kin,<sup>6</sup> nor to the estate of children born to the adopting parents.<sup>7</sup> But, under a statute providing that "if a man marry a second

1. *Succession to Estate of Adopting Parent—United States.*—Tirrell v. Bacon, 3 Fed. Rep. 62.

*California.*—Matter of Newman, 75 Cal. 213, 7 Am. St. Rep. 146; Matter of Williams, 102 Cal. 70, 41 Am. St. Rep. 163.

*Indiana.*—Bray v. Miles, 23 Ind. App. 432; Barnes v. Allen, 25 Ind. 222; Krug v. Davis, 87 Ind. 590; Patterson v. Browning, 146 Ind. 160.

*Iowa.*—Wagner v. Varner, 50 Iowa 532.

*Kansas.*—Gray v. Holmes, 57 Kan. 217.

*Kentucky.*—Atchison v. Atchison, 89 Ky. 488.

*Louisiana.*—Vidal v. Commagere, 13 La. Ann. 517.

*Massachusetts.*—Sewall v. Roberts, 115 Mass. 262; Buckley v. Frasier, 153 Mass. 525.

*Missouri.*—Fosburgh v. Rogers, 114 Mo. 122; Moran v. Stewart, 122 Mo. 295; Moran v. Stewart, 132 Mo. 73; Moran v. Moran, 151 Mo. 558. See Clarkson v. Hatton, 143 Mo. 47, 65 Am. St. Rep. 635.

*New York.*—Dodin v. Dodin, 16 N. Y. App. Div. 42, affirming 17 Misc. (N. Y.) 35, and affirmed, without opinion, in 162 N. Y. 635; Von Beck v. Thomsen, 44 N. Y. App. Div. 373, affirmed, without opinion, in 167 N. Y. 601; Simmons v. Burrell, (Supm. Ct. Spec. T.) 8 Misc. (N. Y.) 388.

*Pennsylvania.*—Schafer v. Eneu, 54 Pa. St. 304; Johnson's Appeal, 88 Pa. St. 346; Rowan's Estate, 132 Pa. St. 299, affirming 6 Pa. Co. Ct. 461.

But the *Texas* Revised Statutes provide, in effect, that the adopted child shall inherit only one-fourth of the adopting parent's estate, if there are natural children. See Eckford v. Knox, 67 Tex. 200.

An *Indiana* statute provided that if an intestate who had married twice had no children by his second wife, but left children by his first wife, such children would inherit his realty subject to a life estate in the widow. It was held that a child adopted by a decedent and his first wife was within this statute and took the realty sub-

ject to a life estate of the second wife. Markover v. Krauss, 132 Ind. 294.

So in *Massachusetts*, where it was provided that an adopted child should inherit from his adopting parents as if born to such parents in lawful wedlock, it was held that an adopted child was "issue" within the meaning of a statute providing that when a husband dies intestate and "leaves no issue living," his widow shall receive a certain portion of his land. Buckley v. Frasier, 153 Mass. 525. See the title *ISSUE (DESCENDANTS)*, vol. 17, p. 544, note 6.

But in *Mississippi* and *Nebraska* the statutes regulating the adoption of children departed materially from the typical adoption statutes, and the adopted child does not succeed to the property of the adopting parents, unless the benefit of heirship is conferred by the proceedings for adoption. Beaver v. Crump, 76 Miss. 34; Ferguson v. Herr, 64 Neb. 649. See Martin v. Long, 53 Neb. 694.

And in an early case arising in the *District of Columbia* it was held that an adopted child could not inherit property from the adopting parents, except by will. Moore v. Hoffman, 2 Hayw. & H. (D. C.) 173, 17 Fed. Cas. No. 9,764a.

2. *Succession by Representatives of Adopted Child.*—Pace v. Klink, 51 Ga. 223; Gray v. Holmes, 57 Kan. 217; Power v. Hafley, 85 Ky. 671.

3. *Wright's Estate*, 11 Pa. Co. Ct. 492, affirmed in 155 Pa. St. 64. Compare Quinn v. Quinn, 5 S. Dak. 328.

4. *Limitation of Succession to Estate of Adopting Parent.*—Webb v. Jackson, 6 Colo. App. 211; Barnhizel v. Ferrell, 47 Ind. 335; Sharkey v. McDermott, 16 Mo. App. 80. See also Barnard v. Allen, 25 Ind. 222; Reinders v. Koppelman, 68 Mo. 496, 30 Am. Rep. 802.

5. *Sunderland's Estate*, 60 Iowa 732; Meader v. Archer, 65 N. H. 214; Quigley v. Mitchell, 41 Ohio St. 375; Phillips v. McConica, 59 Ohio St. 1, 69 Am. St. Rep. 753.

6. Moore v. Moore, 35 Vt. 98.

7. Keegan v. Geraghty, 101 Ill. 26; Helms v.

or subsequent wife, and has by her no children, but has children alive by a previous wife, the land which, at his death, descends to such wife, shall, at her death, descend to his children," it has been held that a child adopted during the former marriage inherits the same as the natural children.<sup>1</sup> However, a child adopted during the time intervening between two marriages does not inherit from the second wife as a child of her husband by a previous wife.<sup>2</sup>

(3) *Succession to Estate of Natural Parents.* — It has been held that though the child acquires certain additional rights because of the adoption, there is nothing in the act of adoption which takes away other existing rights, and, on becoming entitled to inherit from its adopting parents, the adopted child does not thereby lose its right to inherit from its natural parents.<sup>3</sup> But it has been held that a grandchild who is adopted by his grandfather cannot succeed to his property as his son and also as his grandson, even though it is provided by statute that "no person shall, by being adopted, lose his right to inherit from his natural parents or kindred."<sup>4</sup>

(4) *Succession to Estate of First of Two Adopting Parents.* — As a child may succeed to the estate of both its natural and adopting parents, so a child which has been adopted more than once may, it has been held, inherit from each of its adopting parents.<sup>5</sup>

b. SUCCESSION FROM ADOPTED CHILD — *Lineal Descent.* — Naturally the lineal descendants of an adopted child succeed to his property even though it was inherited from his adopting parents; for they, like the adopted child, must be regarded as of the stock of the adopting parents.<sup>6</sup>

*Succession by Ascendants and Collaterals.* — But there is considerable conflict of authority as to the course of succession when the adopted child leaves no descendants. Some authorities have laid down the broad general rule that the adopting parents are not entitled to succeed to the estate of the adopted child, but that, upon the death of an adopted child, unmarried and without descendants, its estate, in the absence of statutes to the contrary, vests in its natural parents to the exclusion of its adopting parents.<sup>7</sup> Other authorities go no farther than to hold that the natural parents and kindred of an adopted child succeed to property which was not derived from the adopting parents,<sup>8</sup> or which was derived from the natural parents.<sup>9</sup> It has been held that the natural parents and kindred of an adopted child succeed to his estate, even though it was derived from the adopting parents.<sup>10</sup> But the *Indiana* courts, at least, have rejected this view, and hold that when a child, who has been adopted by a husband and wife jointly, dies intestate, leaving neither wife nor descendants surviving him, property derived by the child from one of the adopting parents goes to the other adopting parent, if living,<sup>11</sup> or, if dead, to the heirs of the adopting father or mother,<sup>12</sup> to the exclusion of the natural parents or their heirs. And it has sometimes been declared by statute that, on the decease of the person adopting a child, and the subsequent decease of the child, without issue, the property of the adopting parent shall descend to

Elliott, 89 Tenn. 446. But the statutes sometimes provide otherwise. See *Com. v. Powel*, 16 W. N. C. (Pa.) 297; *Daisey's Estate*, 15 W. N. C. (Pa.) 403.

1. *Patterson v. Browning*, 146 Ind. 160, following *Markover v. Krauss*, 132 Ind. 294.

2. *Isenhour v. Isenhour*, 52 Ind. 328.

3. *Succession to Estate of Natural Parents.* — *Wagner v. Varner*, 50 Iowa 532.

4. *Delano v. Bruerton*, 148 Mass. 619.

5. *Patterson v. Browning*, 146 Ind. 160.

6. *Succession by Descendants of Adopted Child.* — See *Paul v. Davis*, 100 Ind. 422.

7. *Succession by Natural Parents and Kindred.*

— *In re Namaau*, 3 Hawaii 484; *Com. v. Powel*, 16 W. N. C. (Pa.) 297, 20 Cent. L. J. 343.

8. *Upson v. Noble*, 35 Ohio St. 655.

9. *Hole v. Robbins*, 53 Wis. 514.

10. *Reinders v. Koppelman*, 68 Mo. 482, 30 Am. Rep. 802. *Barnhizel v. Ferrell*, 47 Ind. 335, which is to this effect, was overruled in *Davis v. Krug*, 95 Ind. 1.

11. *Succession by Adopting Parents.* — *Davis v. Krug*, 95 Ind. 1, overruling *Barnhizel v. Ferrell*, 47 Ind. 335; *Humphries v. Davis*, 100 Ind. 274, 50 Am. Rep. 788; *Humphries v. Davis*, 100 Ind. 369; *Paul v. Davis*, 100 Ind. 422.

12. See *Davis v. Krug*, 95 Ind. 1.

his or her next of kin, and not to the next of kin of the adopted child.<sup>1</sup>

**XI. PROOF OF HEIRSHIP.**—In order to establish the right of heirship it is first necessary to show that the ancestor is dead.<sup>2</sup> But, since testacy is the affirmative and intestacy the negative of a fact, it will, upon proof of the ancestor's death, be presumed that he died intestate, and that the title to his land has passed to his heirs by descent, in the absence of proof to the contrary.<sup>3</sup> It is necessary for one claiming as heir not only to show his relationship with the deceased,<sup>4</sup> but also that no other relatives exist to impede the descent to him, *i. e.* the exhaustion of any line entitled to claim before him.<sup>5</sup> It has been said that unreasonable delay in asserting a claim to an intestate's estate serves to cast a cloud upon the right of the claimant.<sup>6</sup>

1. See *Spangenberg v. Guiney*, 3 Ohio Dec. 163, 2 Ohio N. P. 39, wherein it was held that the statute determined the course of succession to such property only as the adopted child owned at the time of his death, and had no application to property which he might have conveyed away.

2. **Proof of Death of Ancestor.**—*Taylor v. Whiting*, 4 T. B. Mon. (Ky.) 364; *Hayward v. Ormsbee*, 7 Wis. 111.

Inferred from Grant of Letters of Administration.—*Hamblin's Succession*, 3 Rob. (La.) 130. See generally *PRESUMPTIONS*, vol. 22, p. 1250.

3. **Presumption of Intestacy.**—*Lyon v. Kain*, 36 Ill. 362; *Baxter v. Bradbury*, 20 Me. 260, 37 Am. Dec. 49.

A man resident in the state of *New York* died there leaving a will, but there was no evidence as to the contents of the will or how it was executed. In *Stephenson v. Doe*, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489, it was held that under those circumstances a jury might find that the land of the deceased in *Indiana*, if he had any, descended to his legitimate children.

4. **Proof of Claimant's Relation to Intestate.**—As to the necessity and sufficiency of proof of the claimant's relationship to the intestate, see: *United States*.—*McClaskey v. Barr*, 47 Fed. Rep. 154.

*Illinois*.—*Cuddy v. Brown*, 78 Ill. 415.

*Kentucky*.—*Taylor v. Whiting*, 4 T. B. Mon. (Ky.) 364; *Birney v. Hann*, 3 A. K. Marsh. (Ky.) 322, 13 Am. Dec. 167.

*Louisiana*.—*Crouzeilles's Succession*, 106 La. 442.

*Maine*.—*Pratt v. Pierce*, 36 Me. 448, 58 Am. Dec. 758.

*Michigan*.—*Compo v. Jackson Iron Co.*, 50 Mich. 578.

*New Hampshire*.—*Mooers v. Bunker*, 29 N. H. 420; *Morrill v. Otis*, 12 N. H. 466.

*New York*.—*Jackson v. Hilton*, 16 Johns. (N. Y.) 96; *Matter of O'Brien*, 1 N. Y. App. Div. 632.

*Pennsylvania*.—*Yung's Estate*, 199 Pa. St. 35; *Bryant's Estate*, 176 Pa. St. 309.

*Tennessee*.—*Rogers v. Park*, 4 Humph. (Tenn.) 480.

*Texas*.—*Kaise v. Lawson*, 38 Tex. 160.

Where upon a petition for partition, certain of the respondents claimed title, not as legitimate children of the decedent, but as illegitimate, adopted, and made his heirs, by virtue of *Maine Rev. Stat.*, c. 75, § 3, it was held that it must first appear that they were illegitimate, and the question was one for the jury. *Grant v. Mitchell*, 83 Me. 23.

5. **Proof of Nonexistence of Intermediate Relatives.**—*Gardner v. Kelso*, 80 Ala. 497; *Scotch*

*Lumber Co. v. Sage*, 132 Ala. 598, 90 Am. St. Rep. 932; *Anson v. Stein*, 6 Iowa 150; *Matter of White*, (Surrogate Ct.) 31 Misc. (N. Y.) 484; *Bates v. Shrader*, 13 Johns. (N. Y.) 261; *Clement's Estate*, 13 Pa. Co. Ct. 129; *Hunt v. Payne*, 29 Vt. 172, 70 Am. Dec. 402. See *Posey v. Hanson*, 10 App. Cas. (D. C.) 496; *Chandler v. Bailey*, 89 Mo. 641.

**To Prove Heirship in a Collateral Line**, a party must show the descent of himself and of the person last seized from a common ancestor, and the exhaustion of all the lines of descent which would have a right to claim before him. *Emerson v. White*, 29 N. H. 482.

**Where Title Is Claimed to Be in the Father Because of the Son's Death**, it must be shown that the son died without issue. *Stinchfield v. Emerson*, 52 Me. 465, 83 Am. Dec. 524.

**Surviving Children as Heirs.**—Proof that certain children are the only ones that survive their father does not establish their claim to be his only heirs, unless it is also shown that none of those who died before their father left children or husbands or wives. *Skinner v. Fulton*, 39 Ill. 484.

**Proof Must Account for Widow's Rights.**—Where one sues as heir he must show that the widow of the ancestor, if she is by law a co-heir, has either received the share to which she is entitled or has waived her right to it. *Schneider v. Piessner*, 54 Ind. 525.

**Bastard as Heir—Proof Must Conform to Statutory Requirements.**—It was held that where the statute enabled an illegitimate child to inherit in cases where the father dies intestate without heirs in the United States, such child claiming title to real estate of his father must prove that he died intestate without heirs resident in the United States. *Cox v. Rash*, 82 Ind. 519.

**Statement in Agreed Case Held Evidence.**—A statement that the lineal and collateral relatives of the deceased are extinct "so far as the parties hereto know" in a case stated by agreement to be considered in effect as a special verdict, was held sufficient proof that there were no heirs. *Dowell v. Thomas*, 13 Pa. St. 41.

**Presumption of Death of Possible Heirs.**—See the title *PRESUMPTIONS*, vol. 22, p. 1291.

But where the death of one entitled to a prior right only is proved in such a case without some negative proof of the existence of issue, it is not sufficient; the plaintiff being bound to remove every possibility of title in another before he can recover against the person in possession. *Richards v. Richards*, 15 East 293, note.

6. *Bryce v. Patterson*, 102 Iowa 184.



# SUCCESSION TAXES.

By H. H. NOYES GREENE.

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## CROSS-REFERENCES.

*For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the title TAXATION, post, and the cross-references there given.*

**I. DEFINITION AND HISTORY** — *Definition.* — A succession tax may be defined as a governmental impost, duty, or excise upon the privilege secured by law

to devisees, legatees, grantees, heirs, and personal representatives, of taking, holding, and enjoying all property, real and personal, or any interest therein, passing by will, by intestate law, or by any grant or gift made *inter vivos* and intended to take effect at or after the death of the grantor.<sup>1</sup> The succession tax is also variously called a succession duty, a legacy tax, a collateral inheritance tax, and a transfer tax.

**History.** — Succession duties or taxes have been in existence for centuries. They were well known in Roman jurisprudence, and were imposed upon all successions except those to the nearest relatives and to the poor. The practice has long been resorted to in European countries. It was introduced in England in 1780, and has been much enlarged from time to time. In the United States, an inheritance tax was first adopted in Pennsylvania in 1826, since which date similar statutes have been enacted by many of the states, and also by the federal government as a means of war revenue.<sup>2</sup> Such taxes have been approved generally by writers upon political economy and systems of taxation,<sup>3</sup> and it has been said that no tax can be less burdensome and interfere less with the productive and industrial agencies of society.<sup>4</sup>

**II. NATURE AND CONSTITUTIONALITY.** — The theory on which taxation on the devolution of estates at the death of their owners is based and its validity upheld is clearly established. This theory is founded on two principles: first, an inheritance tax is not one on property, but one on the right of succession thereto;<sup>5</sup> and second, the right to take property by devise or descent is the

**1. Definition of Tax.** — Bayly, Succession Duty in Canada; Dos Passos, Inheritance Tax Law; Ely, Taxation in American States and Cities. See also *Blake v. McCartney*, 4 Cliff. (U. S.) 101; *Strode v. Com.*, 52 Pa. St. 182; *Eyre v. Jacob*, 14 Gratt. (Va.) 430, 73 Am. Dec. 367.

A succession tax is an excise or duty on the right of a person or corporation to receive property by devise or inheritance from another. *State v. Switzler*, 143 Mo. 287, 65 Am. St. Rep. 653.

**2. History of Tax — England.** — *Green v. Croft*, 2 H. Bl. 30; *Hill v. Atkinson*, 2 Meriv. 45.

**United States.** — *South Ottawa v. Perkins*, 94 U. S. 260; *Magoun v. Illinois Trust, etc.*, Bank, 170 U. S. 283; *Knowlton v. Moore*, 178 U. S. 41.

**Maine.** — *State v. Hamlin*, 86 Me. 495, 41 Am. St. Rep. 569.

**Maryland.** — *Tyson v. State*, 28 Md. 587; *State v. Dorsey*, 6 Gill (Md.) 388; *Williams's Case*, 3 Bland (Md.) 259.

**New Hampshire.** — *Curry v. Spencer*, 61 N. H. 624, 60 Am. Rep. 337.

**New York.** — *Matter of McPherson*, 104 N. Y. 306, 58 Am. Rep. 502.

**Oregon.** — *Stingle v. Nevel*, 9 Oregon 62.

**Pennsylvania.** — *Del Busto's Estate*, 23 W. N. C. (Pa.) 111.

**Tennessee.** — *State v. Alston*, 94 Tenn. 674.

**3. Tax Approved by Political Economists.** — *Smith's Wealth of Nations*, p. 683; *Mill's Polit. Econ.*, bk. 5, c. 2, § 3; *Matter of McPherson*, 104 N. Y. 317, 58 Am. Rep. 502.

**4. Tax Not Oppressive.** — *Matter of McPherson*, 104 N. Y. 306, 58 Am. Rep. 502.

**5. Tax Is on Succession, Not on Property — England.** — *Wilcox v. Smith*, 4 Drew. 49; *Blythe v. Granville*, 13 Sim. 195; *Atty.-Gen. v. Middleton*, 3 H. & N. 136; *Atty.-Gen. v. Fitzjohn*, 2 H. & N. 472; *Atty.-Gen. v. Gardner*, 1 H. & C. 649; *Atty.-Gen. v. Gell*, 3 H. & C. 629;

*Braybrooke v. Atty.-Gen.*, 9 H. L. Cas. 165; *Lyall v. Lyall*, L. R. 15 Eq. 11; *Wallace v. Atty.-Gen.*, L. R. 1 Ch. 1; *In re Badart*, L. R. 10 Eq. 296.

**Canada.** — *In re Botsford*, 33 N. Bruns. 55.

**United States.** — *U. S. v. Perkins*, 163 U. S. 625; *Magoun v. Illinois Trust, etc.*, Bank, 170 U. S. 283; *Knowlton v. Moore*, 178 U. S. 41; *Plummer v. Coler*, 178 U. S. 115; *Murdock v. Ward*, 178 U. S. 139; *Moore v. Ruckgaber*, 184 U. S. 593; *Blackstone v. Miller*, 188 U. S. 189; *Mager v. Grima*, 8 How. (U. S.) 493; *Carpenter v. Com.*, 17 How. (U. S.) 457; *Frederickson v. Louisiana*, 23 How. (U. S.) 447; *Scholey v. Rew*, 23 Wall. (U. S.) 331; *Wallace v. Myers*, 38 Fed. Rep. 184.

**California.** — *Matter of Stanford*, 126 Cal. 112; *Matter of Wilmerding*, 117 Cal. 281.

**Colorado.** — *In re Inheritance Tax*, 23 Colo. 492.

**Illinois.** — *Kochersperger v. Drake*, 167 Ill. 122.

**Maine.** — *State v. Hamlin*, 86 Me. 495, 41 Am. St. Rep. 569.

**Maryland.** — *Tyson v. State*, 28 Md. 577; *State v. Dalrymple*, 70 Md. 294.

**Massachusetts.** — *Minot v. Winthrop*, 162 Mass. 113; *Frothingham v. Shaw*, 175 Mass. 59, 78 Am. St. Rep. 475.

**Michigan.** — *Union Trust Co. v. Wayne Probate Judge*, 125 Mich. 487.

**Missouri.** — *State v. Switzler*, 143 Mo. 287, 65 Am. St. Rep. 653; *State v. Henderson*, 160 Mo. 190.

**Montana.** — *Gelsthorpe v. Furnell*, 20 Mont. 299.

**New York.** — *Matter of McPherson*, 104 N. Y. 318, 58 Am. Rep. 502; *Matter of Swift*, 137 N. Y. 77; *Matter of Merriam*, 141 N. Y. 479; *Matter of Hoffman*, 143 N. Y. 327; *Matter of Seaman*, 147 N. Y. 69; *Matter of Western*, 152 N. Y. 93; *Matter of Sherman*, 153 N. Y. 1; *Matter of Sloane*, 154 N. Y. 109; *Matter of*

creature of the law, and not a natural right; it is a privilege, and therefore the authority which confers it may impose conditions on it.<sup>1</sup> From these principles it is deduced that the states may tax the privilege, discriminate between relatives and between these and strangers, and grant exemptions, and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation,<sup>2</sup> nor because the constitutions may fail to contain a specific delegation of power to the

Dows, 167 N. Y. 227, 88 Am. St. Rep. 508; Matter of Bishop, 82 N. Y. App. Div. 112; Matter of Wolfe, 89 N. Y. App. Div. 349; Matter of Vanderbilt, 2 Connoly (N. Y.) 319; Matter of Howard, 5 Dem. (N. Y.) 483; Talmadge v. Seaman, 85 Hun (N. Y.) 242; Matter of Thomas, (Surrogate Ct.) 3 Misc. (N. Y.) 392; Matter of Irish, (Surrogate Ct.) 28 Misc. (N. Y.) 647.

*North Carolina.* — Pullen v. Wake County, 66 N. Car. 361.

*Ohio.* — State v. Ferris, 53 Ohio St. 314.

*Pennsylvania.* — Mixer's Estate, 10 Pa. Co. Ct. 409; Strode v. Com., 52 Pa. St. 189; Orcutt's Appeal, 97 Pa. St. 185; Com. v. Herman, 16 W. N. C. (Pa.) 210.

*Tennessee.* — State v. Alston, 94 Tenn. 674.

*Utah.* — Dixon v. Ricketts, (Utah 1903) 72 Pac. Rep. 947.

*Virginia.* — Peters v. Lynchburg, 76 Va. 927; Schoolfield v. Lynchburg, 78 Va. 366, 8 Am. & Eng. Corp. Cas. 488; Eyre v. Jacob, 14 Gratt. (Va.) 422, 73 Am. Dec. 367; Miller v. Com., 27 Gratt. (Va.) 110.

*Washington.* — State v. Clark, 30 Wash. 439.

*Wisconsin.* — Black v. State, 113 Wis. 205, 90 Am. St. Rep. 853.

**The Tax Is an Excise Tax.** — Scholey v. Rew, 23 Wall. (U. S.) 346; State v. Hamlin, 86 Me. 495, 41 Am. St. Rep. 569.

**When Tax Is Property Tax.** — Where the tax is levied on the appraised value of the whole estate and is to be paid not by the heirs but by the personal representatives, it is a property tax and unconstitutional, as it subjects estates to a tax additional to all other property and is not in proportion to its value. State v. Switzler, 143 Mo. 287, 65 Am. St. Rep. 653.

**1. Tax Is Valid Exercise of Sovereign Power — United States.** — Mager v. Grima, 8 How. (U. S.) 490; Savings Soc. v. Coite, 6 Wall. (U. S.) 594; Provident Inst. v. Massachusetts, 6 Wall. (U. S.) 631; Scholey v. Rew, 23 Wall. (U. S.) 331; Plummer v. Coler, 178 U. S. 115; Wallace v. Myers, 38 Fed. Rep. 184.

*California.* — Matter of Wilmerding, 117 Cal. 281; Matter of Stanford, 126 Cal. 112.

*Colorado.* — *In re* Inheritance Tax, 23 Colo. 492.

*Maryland.* — State v. Dalrymple, 70 Md. 294.

*Massachusetts.* — Minot v. Winthrop, 162 Mass. 113.

*Missouri.* — State v. Henderson, 160 Mo. 190.

*Montana.* — Gelsthorpe v. Furnell, 20 Mont. 299.

*New York.* — Matter of Hoffman, 143 N. Y. 327.

*North Carolina.* — Pullen v. Wake County, 66 N. Car. 361.

*Ohio.* — State v. Ferris, 53 Ohio St. 314.

*Pennsylvania.* — Strode v. Com., 52 Pa. St. 187.

*Tennessee.* — State v. Alston, 94 Tenn. 674.

*Virginia.* — Eyre v. Jacob, 14 Gratt. (Va.) 422, 73 Am. Dec. 367; Miller v. Com., 27 Gratt. (Va.) 110; Schoolfield v. Lynchburg, 78 Va. 366.

**2. Statutes Imposing Tax, Constitutional — United States.** — Mager v. Grima, 8 How. (U. S.) 490; Carpenter v. Com., 17 How. (U. S.) 456; Blake v. McCartney, 4 Cliff. (U. S.) 101; Scholey v. Rew, 23 Wall. (U. S.) 331; Blackstone v. Miller, 188 U. S. 189; Wallace v. Myers, 38 Fed. Rep. 184.

*California.* — Matter of Wilmerding, 117 Cal. 281; Matter of Stanford, 126 Cal. 112.

*Colorado.* — *In re* Inheritance Tax, 23 Colo. 492.

*Illinois.* — Kochersperger v. Drake, 167 Ill. 122.

*Louisiana.* — Mager's Succession, 12 Rob. (La.) 584.

*Maine.* — State v. Hamlin, 86 Me. 495, 41 Am. St. Rep. 569.

*Maryland.* — Reynolds v. Furlong, 10 Md. 318; Atwell v. Grant, 11 Md. 101; State v. Norwood, 12 Md. 195; Tyson v. State, 28 Md. 577; Montague v. State, 54 Md. 487; State v. Dalrymple, 70 Md. 294.

*Massachusetts.* — Crocker v. Shaw, 174 Mass. 266.

*Michigan.* — Union Trust Co. v. Wayne Probate Judge, 125 Mich. 487.

*Minnesota.* — Drew v. Tift, 79 Minn. 175, 79 Am. St. Rep. 446.

*Missouri.* — State v. Henderson, 160 Mo. 190.

*Montana.* — Gelsthorpe v. Farnell, 20 Mont. 299.

*New York.* — Matter of McPherson, 104 N. Y. 306, 58 Am. Rep. 502, affirming 5 Dem. (N. Y.) 166; Matter of Van Kleeck, 121 N. Y. 701; Matter of Swift, 137 N. Y. 83; Matter of Dows, 167 N. Y. 227, 88 Am. St. Rep. 509; Matter of Delano, 176 N. Y. 486; Matter of Vanderbilt, 50 N. Y. App. Div. 246; Matter of Potter, 51 N. Y. App. Div. 212.

*North Carolina.* — Pullen v. Wake County, 66 N. Car. 361.

*Ohio.* — Hagerty v. State, 55 Ohio St. 613.

*Pennsylvania.* — Strode v. Com., 52 Pa. St. 181; Orcutt's Appeal, 97 Pa. St. 179; Bittinger's Estate, 129 Pa. St. 338.

*Tennessee.* — State v. Alston, 94 Tenn. 674.

*Utah.* — Dixon v. Ricketts, (Utah 1903) 72 Pac. Rep. 947.

*Virginia.* — Eyre v. Jacob, 14 Gratt. (Va.) 436, 73 Am. Dec. 367; Miller v. Com., 27 Gratt. (Va.) 110; Peters v. Lynchburg, 76 Va. 927; Schoolfield v. Lynchburg, 78 Va. 366, 8 Am. & Eng. Corp. Cas. 488.

**Discriminating Provisions Not Class Legislation.** — Billings v. People, 189 Ill. 472; Minot v. Winthrop, 162 Mass. 113; State v. Henderson, 160 Mo. 190; Gelsthorpe v. Furnell, 20 Mont.

legislatures to enact statutes taxing successions.<sup>1</sup> Furthermore, no rule of constitutional law is infringed by the fact that taxes may be imposed on the succession to the same property by several distinct jurisdictions claiming the power to tax on more or less inconsistent principles.<sup>2</sup>

**III. CONSTRUCTION AND OPERATION OF STATUTES—Rule of Construction.**—The succession tax is a special tax, and the rule is that special tax laws are to be construed strictly against the government and favorably to the taxpayer, so that the citizen cannot be subjected to special burdens without clear warrant of law.<sup>3</sup> But where a particular subject is within the scope of the statute,

299; *Hagerty v. State*, 55 Ohio St. 613, *affirming* 5 Ohio Cir. Dec. 701; *State v. Alston*, 94 Tenn. 674; *State v. Clark*, 30 Wash. 439.

**Exemption Clauses No Objection to Statutes.**—*Matter of Wilmerding*, 117 Cal. 281; *State v. Hamlin*, 86 Me. 495, 41 Am. St. Rep. 569; *Minot v. Winthrop*, 162 Mass. 113; *State v. Henderson*, 160 Mo. 190; *Gelsthorpe v. Furnell*, 20 Mont. 299; *Hagerty v. State*, 55 Ohio St. 613, *affirming* 5 Ohio Cir. Dec. 701; *State v. Alston*, 94 Tenn. 674; *State v. Clark*, 30 Wash. 439; *Black v. State*, 113 Wis. 205, 90 Am. St. Rep. 853.

**Act Imposing Tax at Progressive Rate Valid.**—*Magoun v. Illinois Trust, etc.*, Bank, 170 U. S. 293; *Knowlton v. Moore*, 178 U. S. 109.

**Act Not Objectionable as Conferring Unauthorized Powers upon Probate Courts.**—*Union Trust Co. v. Wayne Probate Judge*, 125 Mich. 487; *Matter of McPherson*, 104 N. Y. 306, 58 Am. Rep. 502.

**Act Not Objectionable as Failing to State Object of Tax.**—*Matter of McPherson*, 104 N. Y. 306, 58 Am. Rep. 502.

**Tax Not a "Direct Tax" under Federal Constitution.**—*Scholey v. Rew*, 23 Wall. (U. S.) 331.

**Tax Not Invalid as to Aliens.**—*Mager v. Grima*, 8 How. (U. S.) 490. See also *Prevost v. Greneaux*, 19 How. (U. S.) 1; *Quessart v. Canonge*, 3 La. 560.

**Constitutional Provision Requiring Property to Be Taxed According to Its Value Inapplicable.**—*Matter of Wilmerding*, 117 Cal. 281; *Matter of Stanford*, 126 Cal. 112.

**Acts Held Invalid Because Discriminating, Not Uniform in Operation, etc.**—*Michigan*.—*Chambers v. Durfee*, 100 Mich. 112 (Act of 1893); *Union Trust Co. v. Wayne Probate Judge*, 125 Mich. 487 (Act of 1899).

*Minnesota*.—*Drew v. Tift*, 79 Minn. 175, 79 Am. St. Rep. 446 (Act of 1897); *State v. Bazille*, 87 Minn. 500, 94 Am. St. Rep. 718 (Act of 1901). See also *State v. Gorman*, 40 Minn. 232.

*Missouri*.—*State v. Switzler*, 143 Mo. 287, 65 Am. St. Rep. 653.

*New Hampshire*.—*Curry v. Spencer*, 61 N. H. 624, 60 Am. Rep. 337.

*New York*.—*Matter of Pell*, 171 N. Y. 48, 89 Am. St. Rep. 791, *reversing* 60 N. Y. App. Div. 286.

*Ohio*.—*State v. Ferris*, 53 Ohio St. 314.

*Pennsylvania*.—*Cope's Estate*, 191 Pa. St. 1, 71 Am. St. Rep. 749; *Blight's Estate*, 6 Pa. Dist. 459; *Portuondo's Estate*, 20 Pa. Co. Ct. 200, *affirmed* 191 Pa. St. 28; *Commonwealth's Appeal*, 24 W. N. C. (Pa.) 273. But compare *Lacey's Estate*, 6 Pa. Dist. 499, 19 Pa. Co. Ct. 431.

*Wisconsin*.—*Black v. State*, 113 Wis. 205, 90 Am. St. Rep. 853. See also *State v. Mann*, 76 Wis. 469.

**Act Unconstitutional Unless Giving Notice and Opportunity to Be Heard.**—*Railroad Tax Case*, 8 Sawy. (U. S.) 238; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701; *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Wallace v. Myers*, 38 Fed. Rep. 184; *Ferry v. Campbell*, 110 Iowa 290; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Matter of McPherson*, 104 N. Y. 321, 58 Am. Rep. 502. Compare *Union Trust Co. v. Wayne Probate Judge*, 125 Mich. 487.

**1. Absence of Specific Power to Tax Successions Immaterial.**—*Kochersperger v. Drake*, 167 Ill. 122; *State v. Clark*, 30 Wash. 439.

In *Minnesota* it is provided by the constitution that a tax upon inheritances, devises, etc., may be levied, but it is required that the tax should be uniform and graded. *State v. Harvey*, (Minn. 1903) 95 N. W. Rep. 764.

**2. Matter of Burr**, (Surrogate Ct.) 16 Misc. (N. Y.) 89; *Matter of Kennedy*, (Surrogate Ct.) 20 Misc. (N. Y.) 531; *Blackstone v. Miller*, 188 U. S. 189.

**3. Strict Construction of Statutes—United States.**—*U. S. v. Watts*, 1 Bond (U. S.) 580; *U. S. v. New York L. Ins., etc., Co.*, 9 Ben. (U. S.) 413; *Clapp v. Mason*, 94 U. S. 589; *Mason v. Sargent*, 104 U. S. 693; *Eidman v. Martinez*, 184 U. S. 578; *U. S. v. Hazard*, 8 Fed. Rep. 380; *U. S. v. Townsend*, 8 Fed. Rep. 306; *U. S. v. Leverich*, 9 Fed. Rep. 586; *U. S. v. Hunnewell*, 13 Fed. Rep. 617; *Dallinger v. Rapello*, 14 Fed. Rep. 32; *Folsom v. U. S.*, 21 Fed. Rep. 37; *U. S. v. Trucks*, 27 Fed. Rep. 541; *U. S. v. Pennsylvania L. Ins. Co.*, 27 Fed. Rep. 539; *U. S. v. Kelley*, 28 Fed. Rep. 845; *U. S. v. Morris*, 27 Fed. Rep. 341.

*Maine*.—*Lambard, Appellant*, 88 Me. 587.

*Maryland*.—*Citizens' Nat. Bank v. Sharp*, 53 Md. 521.

*Massachusetts*.—*Hooper v. Bradford*, 178 Mass. 95.

*New York*.—*Matter of McPherson*, 104 N. Y. 306, 58 Am. Rep. 502; *Matter of Enston*, 113 N. Y. 174; *Matter of Vassar*, 127 N. Y. 1; *Matter of Swift*, 137 N. Y. 77; *Matter of Fayerweather*, 143 N. Y. 114; *Matter of Harbeck*, 161 N. Y. 211.

**Amending Act to Be Construed According to Its Title.**—*Cooper v. Com.*, 5 Pa. Co. Ct. 271.

**Construction of Act Increasing Tax.**—The Act of 1846 increasing the tax to five per centum was not intended to impose a tax of five per centum in addition to the tax of two and one-half per cent. which was fixed by the Act of 1834. *King's Estate*, 11 Phila. (Pa.) 26, 32 Leg. Int. (Pa.) 74.

and exemption from taxation is claimed on the ground that the legislature has not provided proper machinery for accomplishing the legislative purpose in the particular instance, a liberal rather than a strict construction should be applied, and if by fair and reasonable construction of its provisions the purpose of the statute can be carried out, that interpretation ought to be given to effectuate the legislative intent.<sup>1</sup>

**Operation.** — The law in force at the time of the death of the decedent governs the imposition of the tax. Neither an original, nor an amending, nor a repealing act can operate retroactively, so as to affect rights vested at the time of its passage,<sup>2</sup> unless the act itself expressly so

**Tennessee Act a Complete System of Taxation.**

— The Inheritance Tax Law of 1893 was designed to furnish a complete system of taxation on the subject of collateral inheritance tax; i. e. a system, in and of itself, to be executed according to the provisions of that act. *Shelton v. Campbell*, 109 Tenn. 690; *Zickler v. Union Bank, etc., Co.*, 104 Tenn. 281.

**Missouri Act Not an Appropriation Act.** — The Act of 1899 is not an appropriation act, because part of the fund raised is devoted to the state university. *State v. Henderson*, 160 Mo. 190.

1. *Matter of Stewart*, 131 N. Y. 274.

**2. Acts Not Retroactive in Effect.** — *Nova Scotia*. — *Atty.-Gen. v. Parker*, 31 Nova Scotia 202.

*United States*. — *U. S. v. New York L. Ins., etc., Co.*, 9 Ben. (U. S.) 413; *Folsom v. U. S.*, 21 Fed. Rep. 37.

*Illinois*. — *Provident Hospital, etc., Assoc. v. People*, 198 Ill. 495.

*Louisiana*. — *Oyon's Succession*, 6 Rob. (La.) 504, 41 Am. Dec. 274; *Deyraud's Succession*, 9 Rob. (La.) 357; *Arnaud v. His Executor*, 3 La. 336; *Quessart v. Canonge*, 3 La. 560.

*Maine*. — *Lambard, Appellant*, 88 Me. 587.

*New York*. — *Matter of Miller*, 110 N. Y. 216; *Matter of Cager*, 111 N. Y. 343; *Matter of Van Kleeck*, 121 N. Y. 701; *Matter of Prime*, 136 N. Y. 347; *Matter of Fayerweather*, 143 N. Y. 114; *Matter of Roosevelt*, 143 N. Y. 120; *Matter of Seaman*, 147 N. Y. 69; *Matter of Langdon*, 153 N. Y. 6; *Matter of Harbeck*, 161 N. Y. 211, reversing 43 N. Y. App. Div. 188; *Matter of Graves*, 171 N. Y. 40; *Matter of Brundage*, 31 N. Y. App. Div. 348; *Matter of Howe*, 86 N. Y. App. Div. 286, affirmed 176 N. Y. 570; *Matter of Kemeys*, 56 Hun (N. Y.) 117; *Matter of Brooks*, 6 Dem. (N. Y.) 165; *Warrimer v. People*, 6 Dem. (N. Y.) 211; *Butler v. Palmer*, 1 Hill (N. Y.) 335; *Matter of Milne*, 76 Hun (N. Y.) 328; *Matter of Moore*, 90 Hun (N. Y.) 162; *Matter of Sterling*, (Surrogate Ct.) 9 Misc. (N. Y.) 224; *Matter of Travis*, (Surrogate Ct.) 19 Misc. (N. Y.) 393; *Ryan's Estate*, (Surrogate Ct.) 18 N. Y. St. Rep. 992; *Matter of Hendricks*, 1 Connolly (N. Y.) 301; *Peck's Estate*, (Surrogate Ct.) 24 Abb. N. Cas. (N. Y.) 365; *Matter of Van Kleeck*, 121 N. Y. 701; *Matter of Wolfe*, 2 Connolly (N. Y.) 600. (Supm. Ct. Gen. T.) affirmed 29 Abb. N. Cas. (N. Y.) 340; *In re Goelet*, (Surrogate Ct.) 78 N. Y. Supp. 47.

*North Carolina*. — *Pullen v. Wake County*, 66 N. Car. 361.

**Act Does Not Apply to Will Filed After Passage.** — *Lambard, Appellant*, 88 Me. 587. But a will made before the act, and coming into operation

by testator's death after the act, is within the effect of the statute. *Matter of Lovelace*, 4 De G. & J. 340.

**Act Does Not Apply to Estate Distributed After Passage.** — *McClain v. Pennsylvania L. Ins. Co.*, (C. C. A.) 108 Fed. Rep. 618, affirming 105 Fed. Rep. 367; *Howe v. Howe*, 179 Mass. 546; *Matter of Cogswell*, 4 Dem. (N. Y.) 248; *Ryan's Estate*, 9 Pa. Dist. 339.

**Act Does Not Apply to Appointment under Will Taking Effect Before Passage.** — *Atty.-Gen. v. Parker*, 31 Nova Scotia 202; *Matter of Stewart*, 131 N. Y. 274; *Matter of Harbeck*, 161 N. Y. 211, reversing 43 N. Y. App. Div. 188. Compare *Matter of Dows*, 167 N. Y. 227, 88 Am. St. Rep. 509, sub nom. affirmed *Orr v. Gilman*, 183 U. S. 278; *Matter of Delano*, 176 N. Y. 486, reversing 82 N. Y. App. Div. 147; *Matter of Vanderbilt*, 50 N. Y. App. Div. 246, affirmed 163 N. Y. 597; *Matter of Seaver*, 63 N. Y. App. Div. 283; *Matter of Walworth*, 66 N. Y. App. Div. 171; *Matter of Rogers*, 71 N. Y. App. Div. 461, affirmed 172 N. Y. 617.

**Act Does Not Apply to Reversion Taking Effect After Passage.** — *Matter of Seaman*, 147 N. Y. 69; *Matter of Meyer*, 83 N. Y. App. Div. 381; *Matter of Forsyth*, (Surrogate Ct.) 10 Misc. (N. Y.) 477; *Matter of Travis*, (Surrogate Ct.) 19 Misc. (N. Y.) 393; *Matter of Hendricks*, 1 Connolly (N. Y.) 301; *Peck's Estate*, (Surrogate Ct.) 24 Abb. N. Cas. (N. Y.) 365; *Com. v. Eckert*, 53 Pa. St. 102. But see *Matter of Connolly*, (Surrogate Ct.) 38 Misc. (N. Y.) 533, holding that where under the law in force at the time of a testator's death the tax was computed upon the value of the life estate, but the remainder was held not presently taxable, and at the time of the life tenant's death a different statute was in force, the tax upon the remainder must be computed under the latter statute. See also *Wright v. Blakeslee*, 101 U. S. 174.

**Repeal of Act Relieves Untaxed Remainder.** — *Mason v. Clapp, Holmes* (U. S.) 417.

**Amendment of Act Does Not Affect Taxes Accrued.** — *Matter of Miller*, 110 N. Y. 216, affirming 47 Hun (N. Y.) 394; *Matter of Prime*, 136 N. Y. 347, affirming 64 Hun (N. Y.) 50; *Matter of Arnett*, 49 Hun (N. Y.) 599; *Matter of Kemeys*, 56 Hun (N. Y.) 118; *Matter of Thomas*, (Surrogate Ct.) 3 Misc. (N. Y.) 391; *Warrimer v. People*, 6 Dem. (N. Y.) 211.

**Where Decedent Died on Day Act Took Effect.** — *Matter of Dreyfous*, (Surrogate Ct.) 28 Abb. N. Cas. (N. Y.) 27.

**Death Between Passage and Taking Effect.** — The Act of 1885 must be construed to mean that the estate of one dying after the passage of the act was taxable although such death oc-

provides.<sup>1</sup> But the method of procedure for the ascertainment and determination of the liability of a succession to pay the tax is controlled by the statute on the subject in force at the time of the institution of the proceeding.<sup>2</sup>

**Effect of Foreign Treaties.** — Succession-tax laws in conflict with any treaty between the United States and a foreign nation are to that extent void.<sup>3</sup>

**IV. SUCCESSIONS TAXABLE—1. In General.** — The intent of the statutes is to impose a tax on the succession to each and every interest derived from a testator or intestate,<sup>4</sup> within certain limits and under certain circumstances hereinafter noted.

**Bequest in Satisfaction of Debt.** — Where a legacy is given in payment of a debt which is of legal obligation in the lifetime of the testator and at the time of his death, and the legacy does not exceed the amount due, such legacy, if accepted in full satisfaction, is regarded as a payment and not as a mere bounty, and is not subject to the succession tax.<sup>5</sup> But this principle cannot

curried before the act actually took effect, the opening clause of the first section being "after the passing of this act." *Matter of Chardavoyne*, 5 Dem. (N. Y.) 466. But see *Matter of Howe*, 112 N. Y. 100.

**New York — When Acts Took Effect.** — The Act of 1885; *Matter of Howe*, 112 N. Y. 100, *affirming* 48 Hun (N. Y.) 235. The Act of 1892; *Matter of Milne*, 76 Hun (N. Y.) 328; *Matter of Fayerweather*, 143 N. Y. 114. The Act of 1896; *Matter of Sloane*, 154 N. Y. 109.

**Tennessee — Repeal and Revival of Acts.** — *Bailey v. Drane*, 96 Tenn. 16; *Zickler v. Union Bank, etc., Co.*, 104 Tenn. 277.

**Virginia — Repeal and Re-enactment of Acts.** — *Fox v. Com.*, 16 Gratt. (Va.) 1; *Miller v. Com.*, 27 Gratt. (Va.) 110.

**Trust Deed to Be Executed According to Will.** — Where a testator makes his will and then deeds his property in trust for his own benefit during his life, the same to pass upon his death according to the terms of the will, the interest of the legatees vests only at the time of the testator's death and not at the date of the deed of trust, and the statute in force at the former date controls the imposition of the tax. *In re Johnson*, (Surrogate Ct.) 19 N. Y. Supp. 963.

**1. Retrospective Laws.** — *Ferry v. Campbell*, 110 Iowa 290; *Gelsthorpe v. Furnell*, 20 Mont. 299; *Lines's Estate*, 155 Pa. St. 378. See also *In re Short*, 16 Pa. St. 63; *Carpenter v. Com.*, 17 How. (U. S.) 456; *Orcutt's Appeal*, 97 Pa. St. 184; *Herriott v. Potter*, 115 Iowa 648. And see generally the title STATUTES, vol. 26, p. 692 *et seq.*

**New York.** — The amending Act of 1889 extends the exemption of adopted children, or those sustaining the relation of child to parent, to all estates of deceased persons where no assessment of taxes had been made at the time of the passage of such amendment. *Matter of Thomas*, (Surrogate Ct.) 3 Misc. (N. Y.) 388. But the Act of 1889 could have no effect where a final order assessing the tax had been made before its passage. *Matter of Kemeys*, 56 Hun (N. Y.) 117. Compare *Ryan's Estate*, (Surrogate Ct.) 18 N. Y. St. Rep. 992. The Act of 1892 imposes a tax upon successions to property transferred by will before the passage of the act whenever any beneficial interest therein vests subsequently to its passage. *Talmadge v. Seaman*, 85 Hun (N. Y.) 242. The Act of 1897 imposes a tax upon the execution of a power of

appointment derived from any disposition of property made before or after the passage of such amendment. *Matter of Delano*, 176 N. Y. 486; *Matter of Vanderbilt*, 50 N. Y. App. Div. 246, *affirmed* 163 N. Y. 597; *Matter of Potter*, 51 N. Y. App. Div. 212; *Matter of Dows*, 167 N. Y. 227, 88 Am. St. Rep. 509, *affirmed sub nom. Orr v. Gilman*, 183 U. S. 278.

**North Carolina.** — Retrospective legislation is forbidden by the state constitution. *Pullen v. Wake County*, 66 N. Car. 362.

**2. Matter of Davis**, 149 N. Y. 539; *Matter of Sloane*, 154 N. Y. 109.

**3. Effect of Foreign Treaties — Bavarian Treaty of 1845.** — *Cruisius's Succession*, 19 La. Ann. 369.

**French Treaty of 1853.** — *Dufour's Succession*, 10 La. Ann. 391; *Amat's Succession*, 18 La. Ann. 403.

**Spanish Treaty of 1795.** — *Sala's Succession*, 50 La. Ann. 1009.

**Württemberg Treaty of 1844.** — *Matter of Strobel*, 5 N. Y. App. Div. 621; *Frederickson v. Louisiana*, 23 How. (U. S.) 445.

**Treaties Not Retrospective in Effect.** — *Prevost v. Greeneaux*, 19 How. (U. S.) 1, *affirming* 12 La. Ann. 577.

**Succession Arising After Signing but Before Ratification of Treaty.** — *Schaffer's Succession*, 13 La. Ann. 113.

**4. Matter of Stewart**, 131 N. Y. 274; *Com. v. Gilpin*, 3 Pa. Dist. 711. See also the various statutes.

**Legacy Not Taking Effect.** — A legacy given by will to a corporation which the testator desires to be created cannot be taxed, as such legacy cannot pass. *Matter of Chesebrough*, (Surrogate Ct.) 34 Misc. (N. Y.) 365.

**The Federal Act of 1898** does not make the duty payable when the person possessed of such property died testate, if it would not be payable if such person died intestate; and where if the deceased died intestate the heirs would not take under the intestate laws of any state or territory, their rights are the same under a will and the tax is not payable. *Eidman v. Martinez*, 184 U. S. 578; *Moore v. Ruckgaber*, 184 U. S. 593.

**5. Bequest in Satisfaction of Debt.** — *Williamson v. Naylor*, 3 Y. & C. Exch. 208; *Matter of Rogers*, 2 Connolly (N. Y.) 198; *Matter of Underhill*, 2 Connolly (N. Y.) 262; *In re Hulse*, (Surrogate Ct.) 15 N. Y. Supp. 770; *Gibbons's*

apply where no claim such as could have been enforced by suit exists,<sup>1</sup> as where the legacy is a pure gratuity based on a faithful performance of services rendered without expectation of reward and without liability on the part of the person receiving them.<sup>2</sup> So an obligation created by the will of a testator where none existed before, such as a legacy to a church in consideration that it shall keep in order the graves of the testator and his family,<sup>3</sup> or that it shall cause the church bell to be rung at specified times,<sup>4</sup> does not exempt the legacy given to discharge the same from the payment of the tax. In *England*, bequests to executors or testamentary trustees in compensation for their services under the will of the testator are subject to the legacy duty.<sup>5</sup> In the *United States*, however, commissions are allowed to personal representatives by statute, and a legacy in lieu thereof is not taxable.<sup>6</sup>

**2. Nature of Property Transferred.** — The right to impose the tax does not depend on the nature or kind of property transferred.<sup>7</sup> But in the case of a transfer by will or by the intestate laws, the property contemplated by the statute is only that of which the decedent was actually seized or possessed at the time of his death,<sup>8</sup> and does not include the increase or income thereafter

Estate, 16 Phila. (Pa.) 218, 40 Leg. Int. (Pa.) 101; Walters's Estate, 3 Pa. Co. Ct. 447.

**Contra under New York Act.** — The word "transfer" in the Act of 1892 is used in its ordinary legal signification, which is that the owner of a thing delivers it to another person with the intent of passing the rights which he has in it to the latter. It matters not what the motive of a transfer by will may be, whether to pay a debt, discharge some moral obligation, or to benefit a relative for whom the testator entertains a strong affection; if the devise or bequest be accepted by the beneficiary, the transfer is made by will, and the state by the statute in question makes a tax to impinge upon that performance. Matter of Gould, 156 N. Y. 423, modifying 19 N. Y. App. Div. 352. As to the rule under the earlier New York statute, see the New York cases cited *supra*, this note.

**Request in Payment of Debt Discharged in Bankruptcy Is Taxable.** — Turner v. Martin, 7 De G. M. & G. 429.

**Legacy to Pay Debt of Third Person Is Taxable.** — Foster v. Ley, 2 Bing. N. Cas. 269, 29 E. C. L. 331.

**Legacy by Wife to Pay Husband's Debt Is Taxable.** — Foster v. Ley, 2 Scott 438.

**An Antenuptial Agreement** by which the testator agreed to leave his wife in his will a certain amount of money in lieu of dower, where he failed to make a will, creates a debt against the estate and is not subject to tax under the law of 1896. Matter of Baker, 83 N. Y. App. Div. 530, affirming (Surrogate Ct.) 38 Misc. (N. Y.) 151. Compare Atty.-Gen. v. Robertson, (1893) 1 Q. B. 293.

1. Matter of Doty, (Surrogate Ct.) 7 Misc. (N. Y.) 193; Gibbon's Estate, 13 W. N. C. (Pa.) 99; Stinger v. Com., 26 Pa. St. 422; Quinn's Estate, 8 W. N. C. (Pa.) 312.

2. Gibbon's Estate, 13 W. N. C. (Pa.) 99; Walters's Estate, 3 Pa. Co. Ct. 447.

3. Walters's Estate, 3 Pa. Co. Ct. 447.  
4. Com. v. Gilpin, 3 Pa. Dist. 711, 14 Pa. Co. Ct. 122.

5. *In re Thorley*, (1891) 2 Ch. 613. See also *Willis v. Kibble*, 1 Beav. 559.

6. Matter of Underhill, 2 Connolly (N. Y.) 262. See also Matter of Huber, 86 N. Y. App.

Div. 458. And see *infra*, this title, VII. *Appraisal and Assessment*.

**7. Life Insurance Policy Is Taxable.** — Matter of Knoedler, 140 N. Y. 377, affirming 68 Hun (N. Y.) 150.

**Interest in Joint Stock Association Is Taxable.** — Matter of Jones, 172 N. Y. 573, reversing 69 N. Y. App. Div. 237.

**Stock Exchange Seat Is Taxable.** — Matter of Hellman, 174 N. Y. 254, 95 Am. St. Rep. 582, reversing 77 N. Y. App. Div. 355; Matter of Curtis, (Surrogate Ct.) 31 Misc. (N. Y.) 83.

**Note of Residuary Legatee Is Taxable.** — Matter of Tuigg, 2 Connolly (N. Y.) 633.

**Release of Outlawed Debt Not Taxable.** — Stinger v. Com., 26 Pa. St. 429.

**Partnership Profits Are Taxable.** — Matter of Probst, (Surrogate Ct.) 40 Misc. (N. Y.) 431.

**Loan to Partnership by Partner Is Taxable.** — Matter of Probst, (Surrogate Ct.) 40 Misc. (N. Y.) 431.

**Transfer of Goodwill of Business Not Taxable.** — Matter of Dun, (Surrogate Ct.) 39 Misc. (N. Y.) 616.

**Chattels Accepted by Legatee in Lieu of Cash.** — The fact that legatees or distributees accept certain goods and chattels instead of cash in the settlement of the estate, does not destroy the right of the state to tax such legacies or distributions. *Strode v. Com.*, 52 Pa. St. 181.

**Release of Debt to Legatee Is Taxable.** — Atty.-Gen. v. Holbrook, 3 Y. & J. 114; Matter of Wood, (Surrogate Ct.) 40 Misc. (N. Y.) 155; Tyson's Appeal, 10 Pa. St. 220; Stinger v. Com., 26 Pa. St. 429.

**Bequest of Freedom to Slave Held Taxable.** — State v. Dorsey, 6 Gill (Md.) 388.

**8. Ownership at Time of Death.** — Matter of Weed, (Surrogate Ct.) 10 Misc. (N. Y.) 628; Stinger v. Com., 26 Pa. St. 422; Morris's Estate, 1 Pa. Dist. 818; U. S. v. Leverich, 9 Fed. Rep. 586.

**Pledged Stock Not Part of Estate.** — Matter of Havemeyer, (Surrogate Ct.) 32 Misc. (N. Y.) 416.

**Widow's Exemptions Not Part of Estate.** — Matter of Page, (Surrogate Ct.) 39 Misc. (N. Y.) 220.

obtained from the property of which the decedent was so seized or possessed.<sup>1</sup>

**Exempt Property — Government Bonds.** — The tax, not being upon the property, may be imposed upon the succession to property otherwise exempt from taxation, such as United States securities,<sup>2</sup> the certificate of a state loan,<sup>3</sup> or trust funds invested in incorporated companies liable to taxation under their own capital.<sup>4</sup>

**3. Nature of Transfer.** — A transfer need not be effected by will or by the intestate laws in order to be subject to the tax. The right of the state to a tax is not defeated by the conveyance or transfer of the title to the property during the lifetime of the owner, nor by possession taken under such conveyance, if the transfer is by gift *causa mortis*,<sup>5</sup> or if the enjoyment of the property conveyed is not intended to take effect until the death of the grantor.<sup>6</sup>

**Inchoate Right to Property Not Part of Estate.** — Swann's Estate, 12 Pa. Co. Ct. 135.

**Funds Paid by Benefit Society Not Part of Estate.** — Vogel's Estate, 1 Pa. Co. Ct. 352.

**French Spoliation Fund Not Part of Estate.** — Kingston's Estate, 28 W. N. C. (Pa.) 284. See also Clement's Estate, 150 Pa. St. 85.

**Profits of a Husband** allowed by him to remain upon deposit with his firm on special account in the name of his wife, he having expressed an intention that such moneys should be hers, form part of her estate and are subject to the tax upon her death. Matter of Anthony, (Surrogate Ct.) 40 Misc. (N. Y.) 497.

**Failure to Exercise Power of Appointment.** — Where the power of disposition given by the will to the life tenant is absolute, but she dies without exercising such power, she acquires an absolute fee in the lands, and they cannot be said to have descended upon her death to her husband's heirs at law, so as to be subject to the tax. Matter of Lynn, (Surrogate Ct.) 34 Misc. (N. Y.) 681.

**1. Increase or Income of Estate Not Within Statute.** — Matter of Vassar, 127 N. Y. 1, reversing 58 Hun (N. Y.) 378; Miller's Estate, 22 W. N. C. (Pa.) 11; Williamson's Estate, 153 Pa. St. 508, reversing 11 Pa. Co. Ct. 235; Com. v. Friedley, 21 Pa. St. 33.

**2. Government Bonds.** — Plummer v. Coler, 178 U. S. 115, affirming (Surrogate Ct.) 30 Misc. (N. Y.) 19, 47 N. Y. App. Div. 625, 161 N. Y. 631; Wallace v. Myers, 38 Fed. Rep. 184; Matter of Tuigg, 2 Connolly (N. Y.) 633; Matter of Howard, 5 Dem. (N. Y.) 483; Matter of Purdy, (Surrogate Ct.) 24 Misc. (N. Y.) 301; Matter of Merriam, 141 N. Y. 479; Strode v. Com., 52 Pa. St. 181.

**Contra.** — Under earlier New York statutes, it was declared that the state could not tax the transfer of government bonds. Carver's Estate, (Surrogate Ct.) 4 Misc. (N. Y.) 592, affirmed 75 Hun (N. Y.) 612; Matter of Coogan, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 563; Matter of Whiting, 150 N. Y. 27, 55 Am. St. Rep. 640, modifying 2 N. Y. App. Div. 590; Matter of Sherman, 153 N. Y. 1, affirming 15 N. Y. App. Div. 628. See also Tyson v. State, 28 Md. 578.

**Debentures of the Province of Nova Scotia.** — Atty.-Gen. v. Lovitt, 35 Nova Scotia 223.

**3. Com. v. Herman,** 16 W. N. C. (Pa.) 210.

**4. Matter of Dows,** 167 N. Y. 227, 88 Am. St. Rep. 509, affirmed 60 N. Y. App. Div. 630.

**5. Gifts Causa Mortis.** — Farquharson v. Cave, 2 Coll. Ch. Cas. 356; Matter of Masury, 28 N. Y. App. Div. 580, affirmed 159 N. Y. 532; Mat-

ter of Spaulding, 49 N. Y. App. Div. 541, affirming (Surrogate Ct.) 22 Misc. (N. Y.) 420, affirmed 163 N. Y. 607; Matter of Mahlstedt, 67 N. Y. App. Div. 176, appeal dismissed 171 N. Y. 652; Matter of Bullard, 76 N. Y. App. Div. 207, (Surrogate Ct.) affirming 37 Misc. (N. Y.) 663; Matter of Crosby, (Surrogate Ct.) 46 N. Y. St. Rep. 442; Matter of Birdsall, (Surrogate Ct.) 22 Misc. (N. Y.) 180; Matter of Crary, (Surrogate Ct.) 31 Misc. (N. Y.) 72; Stinger v. Com., 26 Pa. St. 422.

**The Words "in Contemplation of Death"** do not refer to the general expectation which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril. Matter of Baker, 83 N. Y. App. Div. 530.

**Gift Without Valuable Consideration.** — Under Act Cong. June 30, 1864, § 132, which imposes a tax upon any "deed of gift or other assurance of title made without valuable or adequate consideration," where the testator provides in his will that advances which shall be made by him shall be charged as such, and subsequently he gives land to his son in execution of his intention to make an advance, the tax is leviable. U. S. v. Banks, 17 Fed. Rep. 322. The tax cannot be defeated by the recital of a nominal consideration which would be deemed valuable only in the technical sense of that term, because the statute says the consideration must not only be valuable but adequate. U. S. v. Hart, 4 Fed. Rep. 292.

**6. Transfers to Take Effect at Death — New York.** — Matter of Edwards, 85 Hun (N. Y.) 436; Matter of Green, 153 N. Y. 223, reversing 7 N. Y. App. Div. 339; Matter of Bostwick, 160 N. Y. 489, affirming 38 N. Y. App. Div. 223; Matter of Brandreth, 169 N. Y. 437, reversing 58 N. Y. App. Div. 575; Matter of Cornell, 170 N. Y. 423, modifying 66 N. Y. App. Div. 162; Matter of Ogsbury, 7 N. Y. App. Div. 71; Matter of Masury, 28 N. Y. App. Div. 580, affirmed 159 N. Y. 532; Matter of Edgerton, 35 N. Y. App. Div. 125, affirmed 158 N. Y. 671; Matter of Thorne, 44 N. Y. App. Div. 8, reversing (Surrogate Ct.) 27 Misc. (N. Y.) 624, appeal dismissed 162 N. Y. 238; Matter of Cruger, 54 N. Y. App. Div. 405, affirmed 166 N. Y. 602; Matter of Miller, 77 N. Y. App. Div. 473, reversing (Surrogate Ct.) 37 Misc. (N. Y.) 449; Matter of Sharer, (Surrogate Ct.) 36 Misc. (N. Y.) 502.

**Pennsylvania.** — Wright's Appeal, 38 Pa. St. 507; Waugh's Appeal, 78 Pa. St. 436; Reish v. Com., 106 Pa. St. 521; Seibert's Appeal, 110



**Power of Appointment.** — The transfer of property by virtue of a power of appointment contained in a will or deed is taxable, but in the absence of legislative provision otherwise, if the beneficiaries would have been exempt if the transmission had been directly to them without the interposition of a power, they are exempt as appointees.<sup>1</sup>

**4. Nature of Estate Created.** — The right of the state to tax successions does not depend upon the nature of the estate which the transferee receives. Estates in possession or expectancy, gifts of the corpus or of the income, and estates in trust are alike embraced within the language of the statutes.<sup>2</sup>

**5. Amount of Estate Transferred.** — Where a statute imposes the tax upon the transfer of property in excess of a certain amount, the aggregate amount passing to persons not specifically exempted determines the imposition of the tax, and not the specific share passing to the individual.<sup>3</sup> And the statute should not be construed as exempting a certain fixed amount out of all tax-

Pa. St. 329; Dubois's Appeal, 121 Pa. St. 368; Lines's Estate, 155 Pa. St. 378; *Com. v. Kuhn*, 2 Pa. Co. Ct. 248; Maris's Estate, 3 Pa. Dist. 33, 14 Pa. Co. Ct. 171; Garman's Estate, 3 Pa. Co. Ct. 550; McCormick's Estate, 15 Pa. Co. Ct. 621; Riddle's Estate, 45 Leg. Int. (Pa.) 394.

**Where Property Is Transferred in Trust** to defeat the collateral inheritance tax, the trust will be held valid and the funds transferred will be held liable to the tax. *Baker v. Williamson*, 4 Pa. St. 456; *Tritt v. Crotzer*, 13 Pa. St. 451.

**Unfulfilled Covenant for Payment During Life.** — A covenant by a settlor for payment of money during his life or after his death, being unfulfilled in his lifetime, is a "disposition at death," within a succession-tax act. *Atty.-Gen. v. Montefiore*, 21 Q. B. D. 461. See also *In re Higgins*, 29 Ch. D. 697.

**If the Transfer Be Actually Made in the Lifetime** of the grantor, it is valid, though the intention may have been to avoid the payment of the duty. *Lord Advocate v. Galloway*, (1884) 11 R. (Sc.) 541.

**1. Power of Appointment.** — *Matter of Cholmondeley*, 1 Crompt. & M. 149; *Platt v. Routh*, 3 Beav. 257; *Matter of Lovelace*, 4 De G. & J. 340; *Matter of Wallop*, 1 De G. J. & S. 656; *Matter of Stewart*, 2 Connolly (N. Y.) 281; *Alexander's Estate*, 3 Pa. L. J. Rep. 87, 4 Pa. L. J. 448; *Com. v. Duffield*, 12 Pa. St. 277; *Com. v. Williams*, 13 Pa. St. 29. See also *Wallace's Estate*, (Surrogate Ct.) 18 N. Y. St. Rep. 387; *Matter of Clark*, 1 Connolly (N. Y.) 431; *Matter of Enston*, 113 N. Y. 174.

**2. Nature of Estate Created Immaterial.** — *Ayres v. Chicago Title, etc., Co.*, 187 Ill. 42; *Billings v. People*, 189 Ill. 472; *Matter of Stewart*, 131 N. Y. 274; *Matter of Bushnell*, 73 N. Y. App. Div. 325, *affirmed* 172 N. Y. 649; *In re Vinot*, (Surrogate Ct.) 7 N. Y. Supp. 517; *Atty.-Gen. v. Pierce*, 6 Jones Eq. (59 N. Car.) 240; *Thomson's Estate*, 5 W. N. C. (Pa.) 14; *Williamson's Estate*, 153 Pa. St. 514; *Christian's Estate*, 2 Pa. Co. Ct. 91; *Matter of Johnson*, 6 Dem. (N. Y.) 146; *Commonwealth's Appeal*, 127 Pa. St. 438; *Wharton's Estate*, 10 W. N. C. (Pa.) 105; *Bailey v. Drane*, 96 Tenn. 16. See also *infra*, this title, *V. When Tax Accrues*.

**An Estate for Life** is taxable although the will provides that such estate may be ended if the life tenant marries. *Matter of Plum*, (Surrogate Ct.) 37 Misc. (N. Y.) 466.

**Legacy Subsequently Impressed with Trust.** — A legacy absolute in its terms, but which is subsequently impressed with a trust as the result of extrinsic evidence, is nevertheless subject to the tax. *Matter of Edson*, 38 N. Y. App. Div. 19, *affirmed* 159 N. Y. 568.

**3. Aggregate Amount of Estate Determines Liability to Tax.** — *Matter of McGhee*, 105 Iowa 9; *Matter of Miller*, 5 Dem. (N. Y.) 132; *Matter of Bliss*, 6 N. Y. App. Div. 192; *Matter of Hall*, 88 Hun (N. Y.) 68; *Taylor's Estate*, (Surrogate Ct.) 6 Misc. (N. Y.) 277; *Matter of Weed*, (Surrogate Ct.) 10 Misc. (N. Y.) 628; *Matter of De Graaf*, (Surrogate Ct.) 24 Misc. (N. Y.) 147; *Matter of Curtis*, (Surrogate Ct.) 31 Misc. (N. Y.) 83; *Matter of Rosendahl*, (Surrogate Ct.) 40 Misc. (N. Y.) 542; *Matter of Garland*, (Surrogate Ct.) 40 Misc. (N. Y.) 579; *Matter of Hoffman*, 143 N. Y. 327, *modifying* 76 Hun (N. Y.) 399; *Matter of Corbett*, 171 N. Y. 516, *affirming* 55 N. Y. App. Div. 124, *reversing* (Surrogate Ct.) 32 Misc. (N. Y.) 120; *Matter of Conklin*, (Surrogate Ct.) 39 Misc. (N. Y.) 771; *In re Inheritance Tax*, 5 Ohio Dec. 555; *Howell's Estate*, 10 Pa. Co. Ct. 232, 147 Pa. St. 164; *Mixer's Estate*, 10 Pa. Co. Ct. 409; *Dixon v. Ricketts*, (Utah 1903) 72 Pac. Rep. 947; *Black v. State*, 113 Wis. 205, 90 Am. St. Rep. 853.

**Contra Decisions.** — *Ayres v. Chicago Title, etc., Co.*, 187 Ill. 42; *Matter of Smith*, 5 Dem. (N. Y.) 90; *Matter of Hopkins*, 6 Dem. (N. Y.) 1; *Matter of McCready*, 6 Dem. (N. Y.) 292; *Matter of Sterling*, (Surrogate Ct.) 9 Misc. (N. Y.) 224; *Matter of Skillman*, (Surrogate Ct.) 10 Misc. (N. Y.) 642; *McVean v. Sheldon*, 48 Hun (N. Y.) 163; *Matter of Cager*, 111 N. Y. 343, *affirming* 46 Hun (N. Y.) 657; *Matter of Howe*, 112 N. Y. 100, *affirming* 48 Hun (N. Y.) 235; *Com. v. Kerchner*, 24 W. N. C. (Pa.) 260. See also *Atty.-Gen. v. Aberdare*, (1892) 2 Q. B. 685.

**The Federal Act of 1898** imposing a progressive tax on legacies above \$10,000 in value is to be construed as imposing the tax on the particular legacies and not on the whole personal estate, and therefore the progressive rate depends upon the amount of each individual legacy and not upon the amount of the whole estate devised. *Knowlton v. Moore*, 178 U. S. 41.

**A Legacy of an Even Five Hundred Dollars** payable at the end of one year does not bear

able estates, but merely as exempting estates of a less amount in total value from any tax whatever.<sup>1</sup>

**6. Situs of Property Transferred — a. REAL PROPERTY.** — The uniform rule is, that a tax can be assessed upon the succession to real estate only when such realty is situate within the borders of the taxing state.<sup>2</sup> And if the property be so situated, it is immaterial whether the person dying seized or possessed thereof,<sup>3</sup> or the person to whom it is transferred,<sup>4</sup> be a resident or nonresident of the state. If the realty be situate without the state, the conversion of the same into personalty after the death of the decedent will not alter the rule.<sup>5</sup>

**b. PERSONAL PROPERTY.** — In *England* the situs of personal property has been deemed immaterial, the question of liability being determined by the regulation of the succession. If the English law governed the succession, duty was payable; where the succession was not governed by that law, then no duty was payable, even though the property was situate in England.<sup>6</sup>

interest until after one year from the death of the testator, and therefore is not subject to the tax, as its fair market value is not equal to five hundred dollars. *Peck's Estate*, (Surrogate Ct.) 24 Abb. N. Cas. (N. Y.) 365, 2 Connolly (N. Y.) 201; *Matter of Underhill*, 2 Connolly (N. Y.) 262. *Contra*, *Matter of Bird*, 2 Connolly (N. Y.) 376.

**Value of Equity of Redemption.** — Where land devised to a collateral relative is subject to a mortgage, and the value of the equity in the premises is found to be less than five hundred dollars, the tax cannot be assessed. *Matter of Kene*, (Surrogate Ct.) 8 Misc. (N. Y.) 102.

In *Ontario*, the word "property" used in the statute in connection with the "aggregate value" of the estate refers only to property situate within that province. *Re Renfrew*, 29 Ont. 566.

**1. Minimum Amount Not to Be Exempted from All Estates.** — *Herriott v. Bacon*, 110 Iowa 342; *Gilbertson v. McAuley*, 117 Iowa 522; *Matter of Sherwell*, 125 N. Y. 376, reversing (Surrogate Ct.) 11 N. Y. Supp. 897; *State v. Alston*, 94 Tenn. 674. Compare *In re Inheritance Tax*, 5 Ohio Dec. 555; *Atty.-Gen. v. Sears*, 32 N. Bruns. 412.

**2. Realty Must Be Within Taxing State.** — *In re Weaver*, 110 Iowa 328; *Lorillard v. People*, 6 Dem. (N. Y.) 268; *Stanton's Estate*, 3 Pa. Dist. 371; *Hood's Estate*, 21 Pa. St. 106; *Com. v. Coleman*, 52 Pa. St. 468; *Drayton's Appeal*, 61 Pa. St. 172; *Bittinger's Estate*, 129 Pa. St. 338; *Del Busto's Estate*, 23 W. N. C. (Pa.) 111; *Commonwealth's Appeal*, 24 W. N. C. (Pa.) 273.

**A Legacy Charged on Land** is regarded as locally situate in the country where the land is, and is subject to succession duty there. *Thomson v. Advocate Gen.*, 12 Cl. & F. 22.

**3. Domicil of Transferer Immaterial.** — *Stanton's Estate*, 3 Pa. Dist. 371; *Williamson's Estate*, 11 Pa. Co. Ct. 235; *Miller v. Com.*, 111 Pa. St. 321; *Com. v. Coleman*, 52 Pa. St. 468; *Drayton's Appeal*, 61 Pa. St. 172; *Orcutt's Appeal*, 97 Pa. St. 179; *Hale's Estate*, 161 Pa. St. 181; *In re Handley*, 181 Pa. St. 339; *Matter of Clark*, 2 Connolly (N. Y.) 183; *Matter of Enston*, 5 Dem. (N. Y.) 93, 46 Hun (N. Y.) 506; *In re Vinot*, (Surrogate Ct.) 7 N. Y. Supp. 517; *Matter of Swift*, 137 N. Y. 77; *In re Speers*, 6 Ohio Dec. 398, 4 Ohio N. P. 238.

**A Rent Charge** is real estate, and therefore within the operation of a succession tax statute, notwithstanding the deceased owner had a foreign domicil. *Chatfield v. Berchtoldt*, L. R. 7 Ch. 192.

**4. Domicil of Transferee Immaterial.** — *Bittinger's Estate*, 129 Pa. St. 338.

**5. Conversion of Realty Does Not Change Rule.** — *Custance v. Bradshaw*, 4 Hare 315; *In re Weaver*, 110 Iowa 328; *Matter of Swift*, 137 N. Y. 77, modifying 2 Connolly (N. Y.) 644. See also *Matson v. Swift*, 8 Beav. 368; *Matter of De Lancey*, L. R. 4 Exch. 345.

**Later English Decisions**, while apparently to the contrary, are not in point, as the lands in question were not actually foreign to the British Empire. *Atty.-Gen. v. Holford*, 1 Price 426; *Williamson v. Advocate Gen.*, 10 Cl. & F. 1; *Atty.-Gen. v. Lomas*, L. R. 9 Exch. 29; *Forbes v. Steven*, L. R. 10 Eq. 178; *Stokes v. Ducroz*, 62 L. T. N. S. 176; *Atty.-Gen. v. Hubbuck*, 10 Q. B. D. 488; *Atty.-Gen. v. Brunning*, 8 H. L. Cas. 243; *Atty.-Gen. v. Ailesbury*, 12 App. Cas. 672.

In *Pennsylvania* the rule is somewhat modified. Where the testator peremptorily directs a sale of the land and the distribution of the proceeds, the conversion dates from the instant of death, and the proceeds are subject to the tax. *Miller v. Com.*, 111 Pa. St. 321; *Williamson's Estate*, 153 Pa. St. 508, 11 Pa. Co. Ct. 235; *Coleman's Estate*, 159 Pa. St. 231.

Where, however, the conversion is not imperative, but only permissive, and rests in the discretion of the executors or others, it does not become operative until the exercise of the discretion, and in the meantime the land retains its normal character. *Drayton's Appeal*, 61 Pa. St. 172; *Miller v. Com.*, 111 Pa. St. 321.

**A Fortiori**, where the conversion though imperative is not *in presenti* but *in futuro*, it goes into effect only from the happening of the stipulated contingency. *In re Handley*, 181 Pa. St. 339; *Hale's Estate*, 161 Pa. St. 181, 3 Pa. Dist. 84.

**6. Personal Property — English Rule.** — *Wallace v. Atty.-Gen.*, L. R. 1 Ch. 1; *Thomson v. Advocate Gen.*, 12 Cl. & F. 1. See also *Atty.-Gen. v. Cockerell*, 1 Price 165; *Atty.-Gen. v. Beatson*, 7 Price 560; *Logan v. Fairlie*, 2 Sim. & St. 284, 1 Myl. & C. 59; *Horne v. Jackson*, 8 Bligh N. S. 15; *Jackson v. Forbes*, 2 Crompt. &

In the *United States* this rule seems to have been followed only by the federal courts in construing the war revenue acts of 1864 and 1898.<sup>1</sup> In the state courts, the doctrine is adhered to that the situs of personal property, as well as of real property, governs the liability to tax of the succession thereto.<sup>2</sup> But the decisions are by no means harmonious as to the principles by which the situs of personalty is to be determined. In the case of a resident decedent leaving personal property without the state, it is agreed that such property follows the domicile of the owner and that the succession to the same is taxable in the latter state.<sup>3</sup> In the case, however, of a nonresident decedent leaving personal property within the state, the maxim *mobilia sequuntur personam* does not prevail, and the situs of the personalty depends upon whether, from its nature, the property can be said to be actually "within" the state.<sup>4</sup>

J. 382; *Arnold v. Arnold*, 2 Myl. & C. 256; *Atty.-Gen. v. Forbes*, 2 Cl. & F. 48; *Forbes v. Steven*, L. R. 10 Eq. 178; *Matter of Lovelace*, 4 De G. & J. 340; *In re Smith*, 12 W. R. 933; *In re Badart*, L. R. 10 Eq. 288; *Lyall v. Lyall*, L. R. 15 Eq. 1; *Atty.-Gen. v. Campbell*, L. R. 5 H. L. 524; *In re Cigala*, 7 Ch. D. 351; *In re Capdevielle*, 2 H. & C. 985; *Matter of Wallop*, 1 De G. J. & S. 656, 12 W. R. 587; *Hamilton v. Dallas*, 1 Ch. D. 257; *Harding v. Stamp Com'rs*, (1808) A. C. 769.

**Departure from England** with intent to acquire a new domicile will not relieve from legacy duty, unless the new domicile is actually obtained. *Atty.-Gen. v. Dunn*, 6 M. & W. 526; *Atty.-Gen. v. Napier*, 6 Exch. 217; *Hodgson v. De Beauchesne*, 12 Moo. P. C. 285; *Atty.-Gen. v. Blucher de Wahlstatt*, 3 H. & C. 374; *In re Tootal*, 23 Ch. D. 532; *In re Capdevielle*, 2 H. & C. 985.

**1. Federal Act of 1864.** — *U. S. v. Morris*, 27 Fed. Rep. 341; *U. S. v. Hunnewell*, 13 Fed. Rep. 617.

**Federal Act of 1898.** — *Moore v. Ruckgaber*, 184 U. S. 593, 114 Fed. Rep. 1020, 104 Fed. Rep. 947.

**2. Situs of Personalty Determines Liability to Tax.** — *In re Weaver*, 110 Iowa 328; *State v. Dalrymple*, 70 Md. 294; *Alvany v. Powell*, 2 Jones Eq. (55 N. Car.) 51; *State v. Brim*, 4 Jones Eq. (57 N. Car.) 300; *In re Speers*, 6 Ohio Dec. 398, 4 Ohio N. P. 238; *Hood's Estate*, 21 Pa. St. 106; *Del Busto's Estate*, 23 W. N. C. (Pa.) 111; *Orcutt's Appeal*, 97 Pa. St. 179.

"**Being in This State**," when used in a statute, refers to the property and not to the decedent. *State v. Dalrymple*, 70 Md. 294; *Com. v. Smith*, 5 Pa. St. 142; *In re Short*, 16 Pa. St. 63.

**Residence of Transferee Immaterial.** — *Matter of Green*, 153 N. Y. 223.

**3. Personalty of Resident Decedent Without State.** — *Thomson v. Advocate Gen.*, 12 Cl. & F. 1; *State v. Dalrymple*, 70 Md. 298; *Matter of Corning*, (Surrogate Ct.) 3 Misc. (N. Y.) 160; *Matter of Dingman*, 66 N. Y. App. Div. 228; *Matter of Swift*, 137 N. Y. 77; *In re Short*, 16 Pa. St. 63; *Orcutt's Appeal*, 97 Pa. St. 184; *Bittinger's Estate*, 129 Pa. St. 338; *Lines's Estate*, 155 Pa. St. 378; *Miller's Estate*, 182 Pa. St. 157.

**When Personalty Exceeded by Debts.** — A decedent's personal estate in another state is not liable to be taxed when his debts there exceed

the amount thereof. *Com. v. Coleman*, 52 Pa. St. 468.

**4. Property "Within" the State — Maryland.** — *State v. Dalrymple*, 70 Md. 297. See also *Baltimore v. Stirling*, 29 Md. 48; *Citizens' Nat. Bank v. Sharp*, 53 Md. 521.

**Massachusetts.** — *Callahan v. Woodbridge*, 171 Mass. 595.

**New York.** — *In re Vinot*, (Surrogate Ct.) 7 N. Y. Supp. 517; *Matter of Bishop*, 82 N. Y. App. Div. 112; *Matter of Romaine*, 127 N. Y. 80, affirming 58 Hun (N. Y.) 109; *Matter of James*, 144 N. Y. 6, affirming 77 Hun (N. Y.) 211; *Matter of Phipps*, 77 Hun (N. Y.) 325, affirmed 143 N. Y. 641; *Matter of Burr*, (Surrogate Ct.) 16 Misc. (N. Y.) 89; *Matter of King*, (Surrogate Ct.) 30 Misc. (N. Y.) 575; *Matter of Thomas*, (Surrogate Ct.) 39 Misc. (N. Y.) 136.

**Under the New York Act of 1885** property of a nonresident decedent left in this state at his death was not taxable. *Matter of Enston*, 113 N. Y. 174, reversing 46 Hun (N. Y.) 506, 5 Dem. (N. Y.) 93; *In re Hall*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 556, 55 Hun (N. Y.) 609. *Compare Matter of Tulane*, 51 Hun (N. Y.) 213. *The Act of 1887* was intended to subject the succession to the personal property of a nonresident decedent to taxation. But such latter act did not operate to confer jurisdiction on the surrogate's court to proceed to tax such property. Its jurisdiction was limited to cases in which a nonresident decedent left real estate within the county. Thus the effect was that no tax could be imposed, as there was no method for assessing and collecting the same. As to personal property within this state belonging to nonresident decedents, the succession is under the law of a foreign state and that succession cannot be taxed by this state. In such case the right of the state to impose a tax is based on its dominion over the property situate within its territory. *The Act of 1896* confers jurisdiction on the surrogate's court over property of nonresident decedents within its territory, and in a case where the property of a nonresident was taken from the state before the enactment of the Act of 1896, there was no authority to impose the tax. *Matter of Embury*, 19 N. Y. App. Div. 214, affirmed 154 N. Y. 746. See also *Matter of Pettit*, 65 N. Y. App. Div. 30, affirmed 171 N. Y. 654.

**North Carolina.** — *State v. Brevard*, Phil. Eq. (62 N. Car.) 141.

In *Pennsylvania* a distinction has been made

**Debts.** — Thus, the situs of a debt being the domicile of the creditor, debts due to a nonresident decedent from resident debtors cannot be said to be within the state,<sup>1</sup> while debts due to a resident decedent from a nonresident debtor are regarded as so situated.<sup>2</sup> And the rule in either case is not affected by the fact that the debts are secured by mortgages upon realty.<sup>3</sup>

**Deposits.** — A deposit, though strictly a debt, is nevertheless considered to be a tangible chattel for the purpose of imposing a succession tax, and its situs is regarded as being the place where it is actually found, irrespective of the domicile of the depositor.<sup>4</sup>

**Corporate Stock.** — In legal contemplation, the property of the shareholder, as represented by certificates of stock, is where the corporation exists, and therefore the capital stock of a domestic corporation is considered as having a situs within the home state, even though the owner be a nonresident and the stock be in his possession without the state at the time of his death.<sup>5</sup> As to stock of foreign corporations, however, its physical presence within a state apparently gives it a situs there for the purpose of this tax.<sup>6</sup>

**Corporate Bonds.** — The situs of bonds, either of domestic or foreign corporations, is the place where they are physically located at the time of the owner's death.<sup>7</sup>

between tangible and intangible property, and the general rule is that intangible personal property of a nonresident, such as bonds, mortgages, and other choses in action, is governed as to its situs by the domicile of the owner, and hence such property is not subject to collateral inheritance tax because it is not situate within the state. *Small's Estate*, 151 Pa. St. 1, *affirming* 11 Pa. Co. Ct. 1; *Orcutt's Appeal*, 97 Pa. St. 179; *Del Busto's Estate*, 23 W. N. C. (Pa.) 111. But if such property is in the state not merely for temporary safekeeping, but is in the hands of agents for the purpose of transacting business with it to the extent of investment and reinvestment, and it has never actually been out of the commonwealth, this is sufficient to give the property an actual situs independent of and contrary to its constructive and fictional situs at the domicile of the owner. *Lewis's Estate*, 203 Pa. St. 211. See also *Weaver's Estate*, 4 Pa. Dist. 260; *Stanton's Estate*, 3 Pa. Dist. 371.

In *Quebec* the doctrine prevails that property of a movable nature accompanies the person of the owner, and property consisting of bank shares and money loaned, though actually within the province at the time of the death of the nonresident owner, is not chargeable with duty. *Lambe v. Manual*, 18 Quebec Super. Ct. 184.

In *British Columbia* property must be actually situated within the province. A situs existing merely by legal fiction is not contemplated by the statute. *Re Templeton*, 6 British Columbia, 180.

1. **Debts Due to Nonresident Decedent.** — *Blackstone v. Miller*, 188 U. S. 189; *Matter of Phipps*, 77 Hun (N. Y.) 325, *affirmed* 143 N. Y. 641. *Compare Matter of Thomas*, (Surrogate Ct.) 3 Misc. (N. Y.) 388; *Atty.-Gen. v. Newman*, 31 Ont. 340.

2. **Debts Due from Nonresident Decedent.** — *Stanton's Estate*, 15 Pa. Co. Ct. 17; *Matter of Corning*, (Surrogate Ct.) 3 Misc. (N. Y.) 160.

3. **Rule Obtains Where Debt Secured by Mortgage.** — *Matter of Preston*, 75 N. Y. App. Div. 250, *affirming* (Surrogate Ct.) 37 Misc. (N. Y.) 236; *Matter of Corning*, (Surrogate Ct.) 3 Misc. (N. Y.) 160; *Stanton's Estate*, 15 Pa. Co. Ct.

17. But see *Matter of Clark*, 2 Connoly (N. Y.) 183.

4. **Situs of Deposits.** — *Atty.-Gen. v. Newman*, 31 Ont. 340, 1 Ont. L. Rep. 511; *Blackstone v. Miller*, 188 U. S. 189; *Matter of Clark*, 2 Connoly (N. Y.) 183; *Matter of Burr* (Surrogate Ct.) 16 Misc. (N. Y.) 89; *Matter of Blackstone*, 69 N. Y. App. Div. 127 *reversing* (Surrogate Ct.) 35 Misc. (N. Y.) 585, *affirmed* 171 N. Y. 682; *Matter of Houdayer*, 150 N. Y. 37, 55 Am. St. Rep. 642, *reversing* 3 N. Y. App. Div. 474.

**Rule Does Not Obtain When Deposit Is Temporary.** — *Matter of Leopold*, (Surrogate Ct.) 35 Misc. (N. Y.) 369.

**Rule Does Not Obtain When Both Depositor and Banker Are Nonresidents.** — *Matter of Bentley*, (Surrogate Ct.) 31 Misc. (N. Y.) 656.

5. **Stock of Domestic Corporation Owned by Nonresident.** — *Matter of Bronson*, 150 N. Y. 1, 55 Am. St. Rep. 632, *modifying* 1 N. Y. App. Div. 546; *Matter of Fitch*, 160 N. Y. 87, *affirming* 39 N. Y. App. Div. 609, (Surrogate Ct.) 26 Misc. (N. Y.) 353; *In re Leavitt*, (Surrogate Ct.) 4 N. Y. Supp. 179; *Matter of Pullman*, 46 N. Y. App. Div. 574; *Matter of Newcomb*, 71 N. Y. App. Div. 606, *affirmed* 172 N. Y. 608; *Matter of Bushnell*, 73 N. Y. App. Div. 325, *affirmed* 172 N. Y. 649.

**Rule Obtains as to National Bank Located in State.** — *Greves v. Shaw*, 173 Mass. 205; *Matter of Cushing*, (Surrogate Ct.) 40 Misc. (N. Y.) 505.

**A Life Insurance Policy** taken out by a nonresident in a New York company is not subject to the tax. *Matter of Abbett*, (Surrogate Ct.) 29 Misc. (N. Y.) 567.

6. **Stock of Foreign Corporation Within State.** — *Matter of Whiting*, 150 N. Y. 27, 55 Am. St. Rep. 640, *affirming* 2 N. Y. App. Div. 590; *Matter of Morgan*, 150 N. Y. 35, *affirming* 2 N. Y. App. Div. 619. *Compare Matter of Bishop*, 82 N. Y. App. Div. 112; *Matter of Thomas*, (Surrogate Ct.) 3 Misc. (N. Y.) 388.

7. **Corporate Bonds.** — *Matter of Whiting*, 150 N. Y. 27, 55 Am. St. Rep. 640, *affirming* 2 N. Y. App. Div. 590; *Matter of Morgan*, 150 N.

**7. Exempt Successions — a. RELATIVES AND CONNECTIONS.** — The statutes generally exempt from the tax the transfer of personal property under a certain amount in value and of real property of any value when made to the father, mother, husband, wife, child, brother, sister, wife or widow of a son or the husband of a daughter, adopted or acknowledged child, or lineal descendant of the decedent or grantor.<sup>1</sup>

**Wife.** — The transfer to a wife of a certain sum in satisfaction of her right of dower is not taxable, whether such transfer be made by virtue of a bequest in lieu of dower<sup>2</sup> or in settlement of the wife's claims in opposition to the will.<sup>3</sup> Where a wife is given an estate upon the express condition that she pay therefrom certain legacies, such legacies are in fact direct and are subject to the tax.<sup>4</sup>

**Widow of Son.** — Under a statute exempting legacies to the widow of the son, a legatee who once stood in that relation to the testator, but who remarried before receiving the legacy, is no longer within the description and is subject to the tax.<sup>5</sup>

**Husband of Daughter.** — Under the exemption of the husband of a daughter from the tax, it is immaterial that the daughter died before her parent,<sup>6</sup> or that the husband has remarried.<sup>7</sup>

**Lineal Descendants.** — The words "lineal descendants" are restricted to the descendants of the decedent or grantor, and do not include the descendants of brothers and sisters or other persons exempted from the tax.<sup>8</sup>

Y. 35, *affirming* 2 N. Y. App. Div. 619; Matter of Pullman, 46 N. Y. App. Div. 574; Matter of Bronson, 150 N. Y. 1, 55 Am. St. Rep. 632. See also Matter of Gibbs, 84 N. Y. App. Div. 510, *affirmed* 176 N. Y. 565. *Contra*, Orcutt's Appeal, 97 Pa. St. 179.

1. See the various statutes.

**The Montana Statute** of 1897 does not subject to the tax a devise of real estate to the widow. *Hinds v. Wilcox*, 22 Mont. 4.

**The Ohio Statute** exempts nieces and nephews of the decedent, but such exemption does not extend beyond the children of the testator's brothers and sisters, and therefore does not include nieces of the consort or grandnieces. *Bates's Estate*, 5 Ohio Dec. 547.

**Trust in Favor of Exempt Person.** — Where a bequest was made to an executor individually on his promise to hold the same for the testatrix's brother, the trust being an enforceable one will be recognized as for the said brother, and the partial exemption allowed him under the *New York* laws will be allowed. *Matter of Farley*, (Surrogate Ct.) 15 N. Y. St. Rep. 727.

**3. Bequest in Lieu of Dower.** — *Matter of Daniell*, (Surrogate Ct.) 40 Misc. (N. Y.) 329. *Compare* *Atty.-Gen. v. Henniker*, 7 Exch. 331; *Sweeting v. Sweeting*, 1 Drew 331. See also *Matter of De Graaf*, (Surrogate Ct.) 24 Misc. (N. Y.) 147, holding that a gift of personal property to the wife as a consideration for a release of her dower in real estate is taxable, as such interest in real estate not subject to the tax, or to the testator's disposition, cannot be discharged from the personal property and the state thereby lose the benefit of the tax upon the latter.

**3. Commonwealth's Appeal**, 34 Pa. St. 204. *Compare* *Billings v. People*, 189 Ill. 472.

**4. Nieman's Estate**, 131 Pa. St. 346.

**5. Com. v. Powell**, 51 Pa. St. 438.

**6. Matter of Woolsey**, (Surrogate Ct.) 19

Abb. N. Cas. (N. Y.) 232; *Matter of McGarvey*, 6 Dem. (N. Y.) 145.

**7. Matter of Ray**, (Surrogate Ct.) 13 Misc. (N. Y.) 480.

**An Annuity to the Son-in-Law, for the Use of His Children** and not for his individual use, is not taxable. *Morris's Estate*, 1 Pa. Dist. 818.

**8. Matter of Miller**, 45 Hun (N. Y.) 244, *affirming* 5 Dem. (N. Y.) 132; *Matter of Jones*, 5 Dem. (N. Y.) 30; *Matter of Smith*, 5 Dem. (N. Y.) 90.

**Grandmother Not Exempt.** — *McDowell v. Addams*, 45 Pa. St. 430.

**Effect of Bequest to Leave Devised Property to Lineals.** — *Lisle's Estate*, 22 Pa. Super. Ct. 262.

**A Leasehold Interest in Land** is personal property within the meaning of the Transfer Tax Act which taxes personal property descending to a lineal descendant when of the value of ten thousand dollars and over; and it is immaterial that there may be buildings upon such land reserved to the tenant by the lease and assessable against him as land. *Matter of Althause*, 63 N. Y. App. Div. 252, *affirmed* 168 N. Y. 670.

**Where a Devise to a Lineal Descendant** is charged with an annuity to a collateral relative the latter is subject to the tax. *In re Lea*, 194 Pa. St. 524.

**Appointment of Lineal Descendants.** — Where a testator devises his estate in trust to his daughter with a power of appointment to her by will of those who shall receive the same after her death, and she appoints lineal descendants of her father, such descendants are considered to take under the first will, and being lineal descendants are not subject to the tax. *Com. v. Williams*, 13 Pa. St. 29.

**Appropriation of Resident Property to Lineals.** — Where a testator dies in a foreign country leaving property within New York, the executors may appropriate that property situated abroad to the payment of legacies to collaterals, and may leave the property situated in the

**Adopted Child.** — The word "children" in a statute does not include adopted children, and devises to the latter are not exempt unless the statute expressly so enacts.<sup>1</sup> Nor does a special act conferring upon an adopted child the right of inheritance release his estate from the tax.<sup>2</sup> Where adopted children are expressly embraced within the exempt class, it is sufficient if the proceedings for adoption have been taken under the laws of any state.<sup>3</sup> Children of an adopted child are not included within the exemption.<sup>4</sup>

**"Acknowledged" Child.** — The *New York* statute exempts from the tax any person to whom the decedent or grantor, for not less than ten years prior to the transfer, stood in the mutually acknowledged relation of a parent. The phrase "mutually acknowledged relation" is not limited to a person formally adopted by the decedent,<sup>5</sup> or to illegitimate children,<sup>6</sup> nor was it considered necessary, under early statutes, that the relationship should originate during the minority of the child.<sup>7</sup> Whether the relation has actually existed is a question of evidence, depending upon the particular circumstances of each case.<sup>8</sup>

**Illegitimate Child.** — A bequest to an illegitimate child is subject to the tax,<sup>9</sup> and a statute of legitimation will not exempt the one legitimated unless such purpose is expressed openly and clearly therein.<sup>10</sup> But the tax cannot be collected upon the estate passing to children legitimated by marriage between their parents followed by cohabitation.<sup>11</sup>

**b. CORPORATIONS.** — Express exemptions are found in the statutes of some jurisdictions in favor of religious, charitable, or educational institutions,<sup>12</sup>

United States for the payment of legacies to lineal descendants, thus saving the estate from the payment of the succession tax imposed by the laws of *New York*. *Matter of James*, 144 N. Y. 6, *affirming* 77 Hun (N. Y.) 211.

1. *Matter of Miller*, 110 N. Y. 216, *affirming* 47 Hun (N. Y.) 394.

2. **Act Conferring Right of Inheritance.** — *For-dyce v. Bridges*, 1 H. L. Cas. 1; *Com. v. Nancrede*, 32 Pa. St. 389; *Schafer v. Eneu*, 54 Pa. St. 304; *Tharp v. Com.*, 58 Pa. St. 500; *Packard's Appeal*, 37 Leg. Int. (Pa.) 135; *Matter of Miller*, 110 N. Y. 216, *affirming* 47 Hun (N. Y.) 394, 6 Dem. (N. Y.) 119.

3. *Matter of Butler*, 58 Hun (N. Y.) 400, *affirmed* 136 N. Y. 649. *Compare Matter of Spencer*, 1 Connolly (N. Y.) 208.

**A Mere Allegation in a Will** that a child is an adopted child is not sufficient. The appraiser must take proof of the fact. *Matter of Fisch*, (Surrogate Ct.) 34 Misc. (N. Y.) 146.

4. **Children of Adopted Child.** — *Matter of Fisch*, (Surrogate Ct.) 34 Misc. (N. Y.) 146; *Matter of Bird*, 2 Connolly (N. Y.) 376; *Matter of Moore*, 90 Hun (N. Y.) 162.

5. *In re Stilwell*, (Surrogate Ct.) 34 N. Y. Supp. 1123.

6. *Matter of Nichols*, 91 Hun (N. Y.) 134; *Matter of Beach*, 154 N. Y. 242, *reversing* 19 N. Y. App. Div. 630. *Compare Matter of Hunt*, 86 Hun (N. Y.) 232.

7. *Matter of Beach*, 154 N. Y. 242; *Matter of Spencer*, 1 Connolly (N. Y.) 208.

8. **Existence of Relation Depends upon Circumstances.** — *Matter of Wheeler*, (Surrogate Ct.) 1 Misc. (N. Y.) 450; *Matter of Moulton*, (Surrogate Ct.) 11 Misc. (N. Y.) 694; *Matter of Moore*, 90 Hun (N. Y.) 162; *Matter of Butler*, 58 Hun (N. Y.) 400; *Matter of Birdsall*, (Surrogate Ct.) 22 Misc. (N. Y.) 180, *affirmed* 43 N. Y. App. Div. 624; *In re Sweetland*, (Surro-

gate Ct.) 20 N. Y. Supp. 310; *Matter of Spencer*, 1 Connolly (N. Y.) 208.

**A Step-parent** does not necessarily stand in the relation of a parent. *In re Capron*, (Surrogate Ct.) 10 N. Y. Supp. 23.

9. *Wharton's Estate*, 10 W. N. C. (Pa.) 105.

10. *Physick's Estate*, 2 Brews. (Pa.) 179; *Com. v. Henderson*, 172 Pa. St. 135.

**Legitimizing Act Not Retroactive.** — If an act legitimizing children is passed before the devise to them takes effect, the devisees are exempt from the collateral inheritance tax; but if such an act is passed after the death of the testator, when their estate has vested and the right of the commonwealth to the tax has vested also, the legitimating act has no retroactive effect. *Com. v. Stump*, 53 Pa. St. 132, 91 Am. Dec. 198. See also *Galbraith v. Com.*, 14 Pa. St. 258.

**Adoption of Illegitimate Child.** — Where an illegitimate child is adopted by his parents pursuant to an act of legislature, he becomes merely an adopted and not a legitimate child, and as such is subject to a collateral inheritance tax. *Com. v. Ferguson*, 137 Pa. St. 595; *Province's Estate*, 4 Pa. Dist. 591.

11. *Skottowe v. Young*, L. R. 11 Eq. 474; *Com. v. Gilkeson*, 9 Pa. Dist. 679, 24 Pa. Co. Ct. 289. *Compare Collateral Inheritance Tax*, 9 Pa. Dist. 466.

12. **Express Statutory Exemptions.** — *Balch v. Shaw*, 174 Mass. 144; *State v. New York Yearly Meeting of Friends*, 61 N. J. Eq. 620; *Alfred University v. Hancock*, (N. J. 1900) 46 Atl. Rep. 178.

**"Charitable Purposes" Defined.** — *Reg. v. Income Tax Com'rs*, 22 Q. B. D. 296, *affirmed* (1891) A. C. 531.

**The Charitable Purpose** must be expressed in the will. Proof of a secret charitable trust will not avail to secure the exemption. *Cullen v.*

incorporated under the laws of the taxing state.<sup>1</sup> In the absence of such express provision, however, a bequest cannot escape taxation because for a charitable use.<sup>2</sup> The earlier *New York* acts excepted from the imposition of the tax corporations exempt by general or special laws from taxation on their real or personal property.<sup>3</sup> The later statutes enumerate the particular corporations, to the exclusion of all others, which may receive a legacy free from the transfer tax.<sup>4</sup> A bequest to a bishop is also declared to be exempt.<sup>5</sup>

#### V. WHEN TAX ACCRUES — 1. Present Estates — As to estates of present

Atty.-Gen., L. R. 1 H. L. 190. *Compare* Matter of Farley, (Surrogate Ct.) 15 N. Y. St. Rep. 727.

A Free Public Library is an educational or charitable institution within the exemption clause of the statute. *Essex v. Brooks*, 164 Mass. 79.

In England the decisions have been conflicting as to whether a gift to a charitable object is within the exempt amount, where the recipients of the charity receive each a sum so within, but the total fund bequeathed or given is in excess of, the exempt limit. *Matter of Franklin's Charity*, 3 Sim. 147; *Atty.-Gen. v. Fitzgerald*, 13 Sim. 89; *Matter of Wilkinson*, 1 C. M. & R. 142; *Atty.-Gen. v. Nash*, 1 M. & W. 237; *Matter of Griffiths*, 14 M. & W. 510; *In re Pearce*, 24 Beav. 491; *Harris v. Howe*, 29 Beav. 261. Under a later statute, property becoming subject to a trust for a charitable or public purpose is subject to a legacy duty. *In re Parker*, 4 H. & N. 666; *Nash v. Morley*, 5 Beav. 177; *Vezev v. Jamson*, 1 Sim. & St. 69; *Ellis v. Selby*, 7 Sim. 352; *Rickard v. Robson*, 31 Beav. 246; *Fowler v. Fowler*, 33 Beav. 616. A statute providing that a deed with two witnesses, enrolled within six months, and void if the grantor should die within twelve months, is necessary either to a gift of land or a charge upon land, or money to be laid out in land, where the gift is for charity, cannot be evaded in a partial manner by direction that the legacy duty upon personalty given for charity shall be paid out of proceeds of realty. *Wilkinson v. Barber*, L. R. 14 Eq. 96; *Page v. Leapingwell*, 18 Ves. Jr. 463; *British Museum v. White*, 2 Sim. & St. 595; *Thorner v. Wilson*, 3 Drew 245; *Arnold v. Chapman*, 1 Ves. 108.

1. *Foreign Corporations Not Within Exemption.* — *Minot v. Winthrop*, 162 Mass. 113; *Alfred University v. Hancock*, (N. J. 1900) 46 Atl. Rep. 178; *Matter of Wolfe*, (Surrogate Ct.) 23 Misc. (N. Y.) 439; *Matter of Balleis*, 144 N. Y. 132, *affirming* 78 Hun (N. Y.) 275; *Matter of Prime*, 136 N. Y. 347, *affirming* 64 Hun (N. Y.) 50; *Catlin v. Trinity College*, 113 N. Y. 133, *affirming* 49 Hun (N. Y.) 278; *Matter of Tuigg*, 2 Connolly (N. Y.) 633; *Matter of McCoskey*, 6 Dem. (N. Y.) 438; *Matter of Taylor*, 80 Hun (N. Y.) 589; *Matter of Smith*, 77 Hun (N. Y.) 134. *Compare* *Balch v. Shaw*, 174 Mass. 144.

*Legacy to United States Not Exempt.* — *U. S. v. Perkins*, 163 U. S. 625; *Cullom's Estate*, (Surrogate Ct.) 5 Misc. (N. Y.) 173, *affirmed* 76 Hun (N. Y.) 610; *Matter of Merriam*, 141 N. Y. 479.

2. *Bequest to Charitable Use Not Exempt.* — *Matter of Griffiths*, 14 M. & W. 516; *Barringer v. Cowan*, 2 Jones Eq. (55 N. Car.) 436; *Bates's*

*Estate*, 5 Ohio Dec. 547; *Finnen's Estate*, 196 Pa. St. 72; *Orcutt's Appeal*, 97 Pa. St. 179; *Strode v. Com.*, 52 Pa. St. 181; *Miller v. Com.*, 27 Gratt. (Va.) 110.

3. *Corporations Exempt under Early New York Acts.* — *Matter of Fay*, (Surrogate Ct.) 37 Misc. (N. Y.) 532; *Matter of Howell*, (Surrogate Ct.) 34 Misc. (N. Y.) 40; *Murphy's Estate*, (Surrogate Ct.) 4 Misc. (N. Y.) 230; *Matter of Graves*, 171 N. Y. 40, *reversing* 66 N. Y. App. Div. 267; *Matter of Vassar*, 127 N. Y. 1; *Young Men's Christian Assoc. v. New York*, 113 N. Y. 187, *reversing* 44 Hun (N. Y.) 102; *Catlin v. Trinity College*, 113 N. Y. 133, *affirming* 49 Hun (N. Y.) 278; *Matter of Foreign Missions*, 58 Hun (N. Y.) 116; *In re Neale*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 713, 57 Hun (N. Y.) 591; *In re Lenox*, (Surrogate Ct.) 9 N. Y. Supp. 895; *Matter of Keech*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 227, *affirming* (Surrogate Ct.) 26 N. Y. St. Rep. 433; *Matter of Curtiss*, 1 Connolly (N. Y.) 471; *In re Kavanagh*, (Surrogate Ct.) 6 N. Y. Supp. 669; *Matter of Keith*, 1 Connolly (N. Y.) 370; *Matter of Jones*, 1 Connolly (N. Y.) 125, 22 Abb. N. Cas. (N. Y.) 50; *Matter of Kimberly*, 27 N. Y. App. Div. 470; *Matter of Underhill*, 2 Connolly (N. Y.) 262; *Matter of Vanderbilt*, 2 Connolly (N. Y.) 319; *Church Charity Foundation v. People*, 6 Dem. (N. Y.) 154; *Matter of Wolfe*, 66 Hun (N. Y.) 389; *Matter of Forrester*, 58 Hun (N. Y.) 611, 12 N. Y. Supp. 774; *Matter of Herr*, 55 Hun (N. Y.) 167; *Matter of Miller*, 45 Hun (N. Y.) 244, *affirmed* 5 Dem. (N. Y.) 132.

*Legacy for Church Building.* — A legacy of a certain sum to be used towards the erection of a new church or the renovation of an old one cannot be treated as real estate so as to be exempt from the legacy tax under the Revised Statutes exempting from taxation buildings for public worship. *Matter of Van Kleeck*, 121 N. Y. 701, *reversing* 55 Hun (N. Y.) 472.

4. *Corporations Exempt under Late New York Acts.* — *Matter of Crouse*, (Surrogate Ct.) 34 Misc. (N. Y.) 670; *Matter of Howell*, (Surrogate Ct.) 34 Misc. (N. Y.) 40; *Matter of Prall*, 78 N. Y. App. Div. 301; *Matter of Watson*, 171 N. Y. 256, *reversing* 70 N. Y. App. Div. 623; *Matter of Huntington*, 168 N. Y. 399, *modifying* 62 N. Y. App. Div. 96.

*Municipal Corporations* are expressly exempted by the Act of 1896. *Matter of Thrall*, 157 N. Y. 46, *reversing* 30 N. Y. App. Div. 271. But prior to that act, no such exemption existed. *Matter of Hamilton*, 148 N. Y. 310.

5. *Bequest to Bishop Exempt.* — *Matter of Kelly*, (Surrogate Ct.) 29 Misc. (N. Y.) 169; *Matter of Palmer*, 33 N. Y. App. Div. 307, *affirmed* 158 N. Y. 669.

enjoyment, whether absolute or for a term of years, the tax accrues immediately upon the death of the testator or intestate.<sup>1</sup> And after an estate has once vested and the commonwealth becomes entitled to the tax, payment thereof cannot be evaded by a release or conveyance of the property to one whose right of succession is not taxable.<sup>2</sup>

**2. Future Estates.** — The authorities are not unanimous as to the time of accrual of the tax upon remainders. In the absence of any express statutory direction, the better rule would seem to be that the tax is due when the property bequeathed or devised actually vests.<sup>3</sup> Thus, a vested remainder given by a will is taxable at the time of the testator's death,<sup>4</sup> but a contingent remainder does not become taxable until it vests in right by the happening of the contingency.<sup>5</sup>

**VI LIABILITY FOR TAX — 1. Transfers of Personalty.** — The tax upon a transfer of personalty is payable out of the specific legacy or property trans-

**1. Tax Accrues upon Death of Decedent.** — *Hellman v. U. S.*, 15 Blatchf. (U. S.) 13; *Matter of Vassar*, 127 N. Y. 1; *Frank's Estate*, 9 Pa. Co. Ct. 662; *Christian's Estate*, 2 Pa. Co. Ct. 91; *Lines's Estate*, 155 Pa. St. 378; *Mellon's Appeal*, 114 Pa. St. 564; *Atty.-Gen. v. Cameron*, 27 Ont. 385.

*2. Frank's Estate*, 9 Pa. Co. Ct. 662; *Harrison v. Johnston*, 109 Tenn. 245. See also *Matter of Wolfe*, 89 N. Y. App. Div. 349.

**3. New York.** — Prior to 1899 it was repeatedly held that future contingent estates were not taxable until they vested in possession and the beneficial owner could be ascertained. The Act of 1899 changed the law upon the subject and made the tax payable forthwith "out of the property transferred." So that whoever may ultimately take the property takes that which remains after the payment of the tax. This amendment makes provision for property transferred in trust and contemplates defeasible transfers as well as absolute transfers. Each trust estate created is to be separately appraised and the tax determined according to the percentage fixed by the statute for those who are contingently entitled to the estate; and when fixed the tax is forthwith payable out of the trust estate. *Matter of Vanderbilt*, 172 N. Y. 69, *modifying* 68 N. Y. App. Div. 27; *Matter of Brez*, 172 N. Y. 609, *reversing* 69 N. Y. App. Div. 619. See also *Matter of Post*, 85 N. Y. App. Div. 611; *Matter of Le Brun*, (Surrogate Ct.) 39 Misc. (N. Y.) 516.

Under the Federal Act of 1864, taxes did not accrue upon a remainder until the termination of the life estate. *Mason v. Clapp*, *Holmes* (U. S.) 417; *U. S. v. Kelley*, 28 Fed. Rep. 845; *U. S. v. Hazard*, 8 Fed. Rep. 380; *U. S. v. Rankin*, 8 Fed. Rep. 872; *Hellman v. U. S.*, 15 Blatchf. (U. S.) 13.

**4. Vested Remainder Presently Taxable.** — *Ayers v. Chicago Title, etc., Co.*, 187 Ill. 42; *Matter of Runcie*, (Surrogate Ct.) 36 Misc. (N. Y.) 607; *Matter of Sherman*, (Surrogate Ct.) 30 Misc. (N. Y.) 547; *Matter of Huber*, 86 N. Y. App. Div. 458; *Matter of Bushnell*, 73 N. Y. App. Div. 325, *affirmed* 172 N. Y. 649; *Matter of Dows*, 167 N. Y. 227, 88 Am. St. Rep. 509, *affirming* 60 N. Y. App. Div. 630; *Matter of Lefever*, 5 Dem. (N. Y.) 184; *Atty.-Gen. v. Pierce*, 6 Jones Eq. (59 N. Car.) 240; *Com. v. Smith*, 20 Pa. St. 100.

But if it is not practicable to ascertain the

value of the remainderman's interest at the time of the testator's death, the assessment and collection of the tax may be postponed until the estate vests in possession. *Matter of Wheeler*, (Surrogate Ct.) 1 Misc. (N. Y.) 450.

**Rule Applicable to Tenancy in Common with Cross-Remainders.** — *Matter of Eldridge*, (Surrogate Ct.) 29 Misc. (N. Y.) 734.

**Payment Postponed to Vesting in Possession.** — *Mellon's Appeal*, 114 Pa. St. 564. See also *Lines's Estate*, 155 Pa. St. 378; *Commonwealth's Appeal*, 128 Pa. St. 603; *Commonwealth's Appeal*, 127 Pa. St. 438; *Com. v. Eckert*, 53 Pa. St. 102; *Com. v. Smith*, 20 Pa. St. 100; *Wharton's Estate*, 10 W. N. C. (Pa.) 105; *Willing's Estate*, 2 W. N. C. (Pa.) 307; *Bailey v. Drane*, 96 Tenn. 16; *Harrison v. Johnston*, 109 Tenn. 245; *Atty.-Gen. v. Cameron*, 27 Ont. 385.

**Legacy Payable in Instalments — Tax Imposed as Instalments Fall Due.** — *Crompton's Estate*, 10 Pa. Co. Ct. 443. See also *Minot v. Winthrop*, 162 Mass. 113; *King's Estate*, 11 Phila. (Pa.) 26, 32 Leg. Int. (Pa.) 74.

**5. Contingent Remainder Not Presently Taxable.** — *Howe v. Howe*, 179 Mass. 546; *Matter of Plum*, (Surrogate Ct.) 37 Misc. (N. Y.) 466; *Matter of Wescott*, (Surrogate Ct.) 11 Misc. (N. Y.) 589; *Wallace's Estate*, (Surrogate Ct.) 18 N. Y. St. Rep. 387; *Matter of Roosevelt*, 143 N. Y. 120, *affirming* 76 Hun (N. Y.) 257; *Matter of Curtis*, 142 N. Y. 219, *affirming* 73 Hun (N. Y.) 185; *Matter of Stewart*, 131 N. Y. 274, *reversing* 61 Hun (N. Y.) 544; *Matter of Cager*, 111 N. Y. 343, *affirming* 46 Hun (N. Y.) 657; *Matter of Lefever*, 5 Dem. (N. Y.) 184; *Talmadge v. Seaman*, 85 Hun (N. Y.) 242, *reversing* (Supm. Ct. Spec. T.) 9 Misc. (N. Y.) 303.

**When Identity of Remainderman Not Ascertainable, Remainder Not Presently Taxable.** — *Billings v. People*, 189 Ill. 472; *In re Wallace*, (Surrogate Ct.) 4 N. Y. Supp. 465; *Matter of Clarke*, (Surrogate Ct.) 39 Misc. (N. Y.) 73; *Matter of Plum*, (Surrogate Ct.) 37 Misc. (N. Y.) 466; *Matter of Howell*, (Surrogate Ct.) 34 Misc. (N. Y.) 432; *Matter of Eldridge*, (Surrogate Ct.) 29 Misc. (N. Y.) 734; *Matter of Clark*, 1 Connolly (N. Y.) 431; *Coxe's Estate*, 103 Pa. St. 100.

**Where Life Tenant Has Power of Disposition, Remainder Not Presently Taxable.** — *Matter of Babcock*, (Surrogate Ct.) 37 Misc. (N. Y.) 445.



ferred, and cannot be satisfied from the residuary estate in the absence of an express provision to that effect in the instrument of transfer.<sup>1</sup> An intention in the will to relieve the legatee from the payment of the tax must be clear and unequivocal.<sup>2</sup> The statutes generally require the executor or administrator to deduct the tax from each individual bequest or share before distribution of the same, and hold him liable personally for failure to comply with such requirement.<sup>3</sup>

*affirmed* 81 N. Y. App. Div. 645; *Matter of Hopkins*, 6 Dem. (N. Y.) 1; *Nieman's Estate*, 131 Pa. St. 346.

**Interest of Second Life Tenant Not Presently Taxable.** — *Matter of Wescott*, (Surrogate Ct.) 11 Misc. (N. Y.) 589; *Matter of Hoffman*, 143 N. Y. 327.

**Transfer under Power of Appointment Not Presently Taxable.** — *Matter of Howe*, 86 N. Y. App. Div. 286, *affirmed* 176 N. Y. 570.

**1. Tax Payable from Specific Legacy — England.** — See *Foster v. Ley*, 2 Scott 438.

*Canada.* — *In re Botsford*, 33 N. Bruns. 55; *Manning v. Robinson*, 29 Ont. 484; *Kennedy v. Protestant Orphans' Home*, 25 Ont. 235.

*United States.* — *U. S. v. Tappan*, 10 Ben. (U. S.) 284.

*Louisiana.* — *Pargoud's Succession*, 13 La. Ann. 367.

*North Carolina.* — *Hunter v. Husted*, Busb. Eq. (45 N. Car.) 141; *Atty.-Gen. v. Allen*, 6 Jones Eq. (59 N. Car.) 144. See also *State v. Brevard*, Phil. Eq. (62 N. Car.) 141.

*Pennsylvania.* — *In re Handley*, 181 Pa. St. 339; *Matter of Horter*, 1 Pearson (Pa.) 424; *King's Estate*, 11 Phila. (Pa.) 26, 32 Leg. Int. (Pa.) 74; *Thomson's Estate*, 5 W. N. C. (Pa.) 19.

If the legatee renounces his legacy no tax can be imposed as to him, but only as the legacy renounced may ultimately devolve. *Matter of Wolfe*, 89 N. Y. App. Div. 349. See also *Atty.-Gen. v. Munby*, 3 H. & N. 826.

**The Donor of a Power of Appointment and not the donee must be regarded as the "decendent"** under a statute providing that the property of a decedent passing by will shall pay the tax. *Emmres v. Shaw*, 171 Mass. 410. See also *Greeves's Estate*, 8 Pa. Dist. 287.

**Property Not Reduced to Possession of Testator.** — Where a part of the property bequeathed consists of an interest in the estate of the testator's father which the testator had not received in actual possession, the tax upon such interest is to be paid out of the property transferred. *Matter of Huber*, 86 N. Y. App. Div. 458.

**Trust Estate Passing by Virtue of Power.** — Where a will created a trust with a power to the beneficiary to dispose of the property by will, and such power was exercised under a will providing that all legacies thereby given should be free from the payment of the inheritance tax, the property of the trust estate passing by virtue of the power was held to be a legacy within this provision of the will. *Isham v. New York Assoc., etc.*, 177 N. Y. 218.

**2. Expression of Intent to Charge Residuary Fund.** — *Pridie v. Field*, 19 Beav. 497; *Haynes v. Haynes*, 3 De G. M. & G. 590; *In re Coles*, L. R. 8 Eq. 271; *Banks v. Baithwaite*, 32 L. J. Ch. 35; *In re Currie*, 57 L. J. Ch. 743; *Marris v. Burton*, 11 Sim. 151; *Sanders v. Kiddell*, 7

*Sim*, 536; *Gude v. Mumford*, 2 Y. & C. Exch. 448; *In re Botsford*, 33 N. Bruns. 55; *Isham v. New York Assoc., etc.*, 177 N. Y. 218; *In re Lea*, 194 Pa. St. 524.

**Words Held Not Sufficient to Relieve Legatee from Payment** — "*Without Any Rebate or Deduction.*" — *Jackson v. Tailor*, (Supm. Ct. Spec. T.) 41 Misc. (N. Y.) 36.

"*Not Less Than.*" — *Holbrook's Estate*, 3 Pa. Co. Ct. 265, 20 W. N. C. (Pa.) 79.

"*In Full*" in *Bequest of Shares of Stock.* — *Murphey's Estate*, 4 Pa. Co. Ct. 336.

"*Free and Clear.*" — *Forbes's Estate*, 16 Phila. (Pa.) 356, 41 Leg. Int. (Pa.) 175.

"*All Legitimate Charges*" to Be Paid by Executors. — *Shippen v. Burd*, 42 Pa. St. 461.

"*Other Legal Demands*" to Be Paid Out of General Estate. — *Matter of Horter*, 1 Pearson (Pa.) 424.

**A Will Giving a Specific Sum to a legatee and directing that the executors pay her a certain sum per year until the legacy is paid in full cannot be construed to intend that the tax is to be paid out of the residuary estate.** *In re Botsford*, 33 N. Bruns. 55.

**Legacies Given Free from Deduction, or free from expense, or free from charge or liability, are free from duty as against the residuary estate.** *Barksdale v. Gilliat*, 1 Swanst. 562.

**A Codicil does not, by simple alteration of amounts of legacies given by the will, destroy their right to be relieved.** *Fisher v. Brierley*, 30 Beav. 267. See also *Duncan v. Duncan*, 27 Beav. 392; *Johnstone v. Harrowby*, 1 De G. F. & J. 183; *Cooper v. Day*, 3 Meriv. 154. And where a will provides that all the legacies therein given shall be free from the tax, such provision is applicable to legacies given by a subsequent codicil. *Cummings's Appeal*, 12 Pa. Co. Ct. 45.

**3. Duty of Executor to Deduct Tax — England.** — *Foster v. Ley*, 2 Bing. N. Cas. 269, 29 E. C. L. 331; *Hales v. Freeman*, 1 Brod. & B. 391, 5 E. C. L. 131; *Atty.-Gen. v. Munby*, 3 H. & N. 826; *Matter of Sammon*, 3 M. & W. 381; *Bate v. Payne*, 13 Q. B. 900, 66 E. C. L. 900.

*Canada.* — *Manning v. Robinson*, 29 Ont. 484; *Kennedy v. Protestant Orphans' Home*, 25 Ont. 235.

*United States.* — *U. S. v. Trucks*, 27 Fed. Rep. 541; *U. S. v. Pennsylvania L. Ins. Co.*, 27 Fed. Rep. 539; *U. S. v. Allen*, 9 Ben. (U. S.) 154.

*Maryland.* — *State v. Dalrymple*, 70 Md. 294; *Montague v. State*, 54 Md. 481.

*New York.* — *Matter of Weed*, (Surrogate Ct.) 10 Misc. (N. Y.) 628; *Matter of Jones*, 5 Dem. (N. Y.) 30; *Matter of Hackett*, (Surrogate Ct.) 14 Misc. (N. Y.) 282; *Matter of Vanderbilt*, 2 Connolly (N. Y.) 319; *Matter of Wolfe*, 66 Hun (N. Y.) 389.

*North Carolina.* — *Atty.-Gen. v. Allen*, 6

**Life Estates and Remainders.** — The tax on a life estate should be taken out of the income.<sup>1</sup> Whether the tax upon a remainder should be deducted from the principal sum,<sup>2</sup> or borne by the beneficiary personally,<sup>3</sup> depends largely upon the language of the taxing statutes.

**2. Transfers of Realty.** — The devisee only, and not the executor, is liable for the tax on real estate passing directly to the former.<sup>4</sup>

**Lien of Tax.** — By most of the statutes, the tax is made a lien upon the realty until paid,<sup>5</sup> or until discharged by the running of a statutory period of limitation.<sup>6</sup> The lien is not such as to take precedence over a prior mortgage,<sup>7</sup> but will effectually break a covenant against incumbrances.<sup>8</sup>

**VII APPRAISAL AND ASSESSMENT** — **1. Appraisal** — *a.* **APPOINTMENT OF APPRAISER.** — Proceedings to determine the liability of an estate to succession duty are usually instituted by the appointment of an appraiser, whose duty it is to ascertain the value of the estate in question. Such appointment may be made either upon the application of an interested party, or by the surrogate who first acquires jurisdiction by the issuing of letters,<sup>9</sup> upon his own motion.<sup>10</sup> An appraiser should be appointed as soon after the death of

Jones Eq. (59 N. Car.) 144; State v. Brevard, Phil. Eq. (62 N. Car.) 141.

*Pennsylvania.* — Wright's Appeal, 38 Pa. St. 507; Commonwealth's Appeal, 34 Pa. St. 204; Com. v. Freedley, 21 Pa. St. 33; Com. v. Smith, 5 Pa. St. 142; Matter of Coleman, 2 Pearson (Pa.) 525; Cullen's Estate, 26 W. N. C. (Pa.) 216.

**The Executor Need Not Deliver the Legacy** to the legatee until he has been furnished with the tax money. Matter of Howe, 112 N. Y. 103; Matter of Vanderbilt, 2 Connolly (N. Y.) 319; Atty.-Gen. v. Allen, 6 Jones Eq. (59 N. Car.) 144. But if he does so deliver it, he may recover the tax from the legatee as for money paid to the latter's use. Bate v. Payne, 13 Q. B. 900, 66 E. C. L. 900. See also Hales v. Freeman, 1 Brod. & B. 391, 5 E. C. L. 131; Montague v. State, 54 Md. 483; Sohler v. Eldredge, 103 Mass. 349; Hathaway v. Fish, 13 Allen (Mass.) 267; Matter of Underhill, 117 N. Y. 471; Com. v. Coleman, 52 Pa. St. 473.

**Liability for Erroneous Payment.** — Where the tax was assessed and fixed by the surrogate and paid by the executor with the consent of all persons interested, including the guardian of an infant, the legatee, the executor is not liable for the amount so paid upon the ground that the interest of the infant was exempt. Farquharson v. Nugent, 6 Dem. (N. Y.) 296.

1. Matter of Hoyt, (Surrogate Ct.) 37 Misc. (N. Y.) 720; Matter of Johnson, 6 Dem. (N. Y.) 146.

2. **Tax on Remainder Payable from Principal Sum.** — Minot v. Winthrop, 162 Mass. 113.

3. **Tax on Remainder Borne by Beneficiary.** — Matter of Hoyt, (Surrogate Ct.) 37 Misc. (N. Y.) 720; Matter of McMahon, (Surrogate Ct.) 28 Misc. (N. Y.) 697; Cooper v. Com., 5 Pa. Co. Ct. 271; Cox's Estate, 181 Pa. St. 369. See Matter of Bushnell, 73 N. Y. App. Div. 325, affirmed 172 N. Y. 649; Matter of Johnson, 6 Dem. (N. Y.) 146; Christian's Estate, 2 Pa. Co. Ct. 91; Harrison v. Johnston, 109 Tenn. 245.

4. **Devisee Liable for Tax on Realty.** — Com. v. Coleman, 52 Pa. St. 468; Forbes's Estate, 16 Phila. (Pa.) 356, 41 Leg. Int. (Pa.) 175; Boyd's Estate, 4 W. N. C. (Pa.) 510.

**Purchasers from the Heirs** are not personally liable for the federal succession tax. *Wilhelmi v. Wade*, 65 Mo. 39.

5. **Tax a Lien upon Realty.** — *Wilhelmi v. Wade*, 65 Mo. 39; *Kitching v. Shear*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 436; *Stinger v. Com.*, 26 Pa. St. 429. See also *infra*, the title TAXATION.

**Lien Constructively Paid When Land Sold by Sheriff.** — *Mellon's Appeal*, 114 Pa. St. 564.

6. **Lien Discharged by Statute of Limitations.** — *Mellon's Appeal*, 114 Pa. St. 564.

**The Personal Liability of the Devisee** continues after the lien is discharged by the lapse of time. *Cullen's Estate*, 142 Pa. St. 18, affirming 8 Pa. Co. Ct. 234.

7. *Kitching v. Shear*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 436, holding that if the property is sold under foreclosure and the tax is not paid, the purchaser would take the property subject to the lien of the transfer tax as it existed prior to the sale.

8. *Large v. McClain*, (Pa. 1886) 7 Atl. Rep. 101.

9. **Surrogate First Acquiring Jurisdiction.** — *Matter of Hathway*, (Surrogate Ct.) 27 Misc. (N. Y.) 474; *Matter of Keenan*, 1 Connolly (N. Y.) 226; *Stinger v. Com.*, 26 Pa. St. 429.

**Residence of Donee of Power of Appointment.** — The surrogate of the county in which the donee of a power of appointment resides has jurisdiction to impose the tax upon such transfer. *Matter of Seaver*, 63 N. Y. App. Div. 283.

10. **Appraiser Appointed upon Application or Motion of Surrogate.** — *Matter of Wolfe*, 137 N. Y. 205; *Matter of Astor*, 6 Dem. (N. Y.) 402; *Frazer v. People*, 6 Dem. (N. Y.) 174. Compare *Matter of Farley*, (Surrogate Ct.) 15 N. Y. St. Rep. 727.

**When Money Legacies Only Are Given**, it is not necessary to appoint an appraiser. *Matter of Jones*, 5 Dem. (N. Y.) 30.

**The Object of the Appraisement**, as well as the duty of the appraiser, is not to determine whether the estate is subject to the tax, but simply to ascertain the value of the estate. *Stinger v. Com.*, 26 Pa. St. 422.

**New York — Who May Be Appointed Appraiser.** Since the passage of the Act of 1900 the surro-

the decedent as is practicable,<sup>1</sup> but the time when the surrogate shall proceed must be left to his sound judgment.<sup>2</sup> He is not bound to wait for a final accounting<sup>3</sup> nor until it shall be ascertained whether there are claims against the estate.<sup>4</sup> The power of the surrogate to appoint an appraiser does not depend upon proof being furnished to him of the condition and situation of the decedent's property at the time of his death. He may exercise the power upon the filing of a petition based upon information and belief.<sup>5</sup>

*b. NOTICE OF APPRAISAL.* — The appraiser must give notice by mail of the time of appraisement to all persons interested in the estate.<sup>6</sup>

*c. ASCERTAINING VALUE OF ESTATE* — (1) *Value of Estate at Time of Death.* — For the purpose of assessing a succession tax, the value of the estate at the time of the transfer of title is to be determined, and not its value at the time of transfer of possession.<sup>7</sup> The possible appreciation or depreciation of such property after the death of the decedent is not to be considered.<sup>8</sup>

*Future Estates.* — Whenever a future or contingent interest is appraised, whether at the time the contingency occurs, or immediately upon the decedent's death, its value is to be fixed as of the latter date.<sup>9</sup>

(2) *Form of Estate at Time of Death.* — It is equally true that the appraiser must determine the value of the property transferred in the form in which it stood at the time of the decedent's death.<sup>10</sup> Thus, mortgage debts should not be deducted by the appraiser from the amount of the personal property, even where a testator has directed such debts to be so paid, as the real estate is the primary fund out of which the mortgages are to be satisfied.<sup>11</sup> And so the doctrine of equitable conversion is inapplicable, and if the testator

gate of the county of New York cannot appoint as appraiser a person other than one appointed by the state comptroller pursuant to the provisions of said act. *Matter of Sondheim*, 69 N. Y. App. Div. 5, *affirming* (Surrogate Ct.) 32 Misc. (N. Y.) 296.

1. *Time of Appointment.* — *Matter of Vassar*, 127 N. Y. 1.

2. *Matter of Westurn*, 152 N. Y. 93.

3. *Matter of Vassar*, 127 N. Y. 1. But see *Matter of Zefita*, 167 N. Y. 280, wherein it was said that until the residuary estate is ascertained by an accounting of the executors, there is nothing upon which to base a transfer tax.

4. *Proof of Condition of Estate Not Necessary.* — *Matter of Westurn*, 152 N. Y. 93.

5. *Matter of O'Donohue*, 44 N. Y. App. Div. 186.

6. *Notice.* — *Matter of Vanderbilt*, 2 Connolly (N. Y.) 319; *Matter of Astor*, 6 Dem. (N. Y.) 402, 20 Abb. N. Cas. (N. Y.) 405.

7. *Value of Estate at Time of Death.* — *Hooper v. Bradford*, 178 Mass. 95; *Matter of Davis*, 149 N. Y. 539; *Matter of Sloane*, 154 N. Y. 109; *Cooper v. Com.*, 5 Pa. Co. Ct. 271; *Reish v. Com.*, 106 Pa. St. 521; *Lines's Estate*, 155 Pa. St. 378.

*The Tax Is Not Computed on the Aggregate Value of the whole estate of the decedent considered as the unit for taxation, but on the value of the separate interests into which it is divided by the will or by the statute laws of this state, and as a charge against each share or interest according to its value, and against the person entitled thereto.* *Matter of Westurn*, 152 N. Y. 93.

8. *In re Leavitt*, (Surrogate Ct.) 4 N. Y. Supp. 179. *Compare State v. Brevard*, Phfl. Eq. (62 N. Car.) 141, holding that property which becomes valueless in the hands of the

executors is not taxable unless the executors have to pay good money in settlement with the legatees.

A *Worthless Account* is not property transferred or disposed of by the will and should not be included in the estate for the purpose of taxation. *Matter of Manning*, 169 N. Y. 449.

*Where Litigation Is Pending Undetermined* in reference to a note owned by the estate, such claim shall be excluded from valuation at the time, reserving it for future assessment in case the administrators succeeded in collecting it. *Matter of Westurn*, 152 N. Y. 93, *reversing* 8 N. Y. App. Div. 59.

9. *Appraisal of Future Estate.* — *Howe v. Howe*, 179 Mass. 546; *Matter of Meyer*, 83 N. Y. App. Div. 381; *In re Lange*, (Surrogate Ct.) 55 N. Y. Supp. 750; *Matter of Sloane*, 154 N. Y. 109, *affirming* 19 N. Y. App. Div. 411.

*Duties on Annuities* payable immediately are to be assessed on the cash value at the date of the testator's death. The duties on deferred annuities are to be assessed upon their value at the time the right of possession accrues. *Atty.-Gen. v. Cameron*, 27 Ont. 385.

10. *Form of Estate at Time of Death.* — *Matter of Dows*, 167 N. Y. 227, 88 Am. St. Rep. 509; *Matter of Livingston*, 1 N. Y. App. Div. 568; *Matter of Sutton*, 3 N. Y. App. Div. 208; *Matter of Offerman*, 25 N. Y. App. Div. 94. *Compare Orcutt's Appeal*, 97 Pa. St. 179.

11. *Mortgage Debts Not to Be Deducted from Personalty.* — *Matter of Livingston*, 1 N. Y. App. Div. 568; *Matter of Sutton*, 3 N. Y. App. Div. 208, *affirming* (Surrogate Ct.) 15 Misc. (N. Y.) 659; *Matter of Offerman*, 25 N. Y. App. Div. 94; *Matter of Maresi*, 74 N. Y. App. Div. 76; *Matter of Berry*, (Surrogate Ct.) 23 Misc. (N. Y.) 230; *Matter of De Graaf*, (Surrogate Ct.) 24 Misc. (N. Y.) 147.

directs that his real estate be sold and the proceeds distributed, the property should be appraised as realty and not as personalty.<sup>1</sup>

(3) *Market Value of Property*. — All property is to be appraised at its fair cash value in the market, that is, what it should sell for if sold at a *bona fide* sale after full public notice.<sup>2</sup> Notes<sup>3</sup> and corporate stocks<sup>4</sup> should be appraised at their market value and not at their face value.

(4) *Annuities, Life Estates, and Remainders*. — Life estates and annuities are to be appraised at their cash value according to the annuity tables.<sup>5</sup> The value of a remainder is ascertained by deducting the value of the preceding life estate from the value of the whole estate.<sup>6</sup>

(5) *Deduction of Debts*. — In ascertaining the value of the estate and the taxable interests, debts owing by the decedent are to be deducted,<sup>7</sup> but only such debts as could be enforced against the estate if payment thereof were resisted.<sup>8</sup>

**Funeral Expenses** are to be deducted upon appraisal,<sup>9</sup> including items for a

1. *Doctrine of Equitable Conversion Inapplicable* — *United States*. — *U. S. v. Watts*, 1 Bond (U. S.) 580; *Scholey v. Rew*, 23 Wall. (U. S.) 331.

*New York*. — *Matter of Sutton*, 3 N. Y. App. Div. 208, *affirmed* 149 N. Y. 618; *Matter of Cobb*, (Surrogate Ct.) 14 Misc. (N. Y.) 409; *Matter of Sutton*, (Surrogate Ct.) 15 Misc. (N. Y.) 659; *Matter of Bartow*, (Surrogate Ct.) 30 Misc. (N. Y.) 27; *Matter of Mills*, (Surrogate Ct.) 32 Misc. (N. Y.) 493.

*Pennsylvania*. — *Coleman's Estate*, 159 Pa. St. 231. Compare *Matter of Wheeler*, (Surrogate Ct.) 1 Misc. (N. Y.) 450.

**An Interest in a Fund Arising from a Partition Suit** to which the testator was a party cannot be considered real property for the purposes of exemption from taxation. *Matter of Stiger*, (Surrogate Ct.) 7 Misc. (N. Y.) 268.

2. *Market Value of Property*. — *Matter of Coleman*, 2 Pearson (Pa.) 525; *Cullen's Estate*, 142 Pa. St. 18.

"**Value**" means fair market value. *Matter of McGhee*, 105 Iowa 9.

3. *Market Value of Notes*. — *Morgan v. Warner*, 45 N. Y. App. Div. 424, 162 N. Y. 612.

4. *Market Value of Stocks*. — *Walker v. People*, 192 Ill. 106; *Matter of Proctor*, (Surrogate Ct.) 41 Misc. (N. Y.) 79; *Matter of Smith*, 71 N. Y. App. Div. 602; *Matter of Crary*, (Surrogate Ct.) 31 Misc. (N. Y.) 72; *Matter of Bishop*, 82 N. Y. App. Div. 112; *Matter of Jones*, 172 N. Y. 575.

5. *Annuity Tables to Be Used*. — *Matter of Robertson*, 5 Dem. (N. Y.) 92; *Von Storch's Estate*, 7 Pa. Dist. 204. See *Goldstein's Estate*, 14 W. N. C. (Pa.) 176.

**The Value of a Life Interest Subject to Annuities** is ascertained by finding the present value of the life estate in the entire fund, less the present values of the annuities which are charged upon such fund, instead of deducting from the life estate the actual amount of principal necessary to produce the annuities at the rate of five per cent. per annum. *Matter of Maresi*, 74 N. Y. App. Div. 76.

6. *Valuation of Remainder*. — *Matter of Sloane*, 154 N. Y. 109; *Matter of Dows*, 167 N. Y. 227, 88 Am. St. Rep. 509, *affirmed* 60 N. Y. App. Div. 630; *In re Lange*, (Surrogate Ct.) 55 N. Y. Supp. 750.

7. *Debts to Be Deducted*. — *Callahan v. Wood-*

*bridge*, 171 Mass. 595; *Matter of Western*, 152 N. Y. 93; *Matter of King*, 71 N. Y. App. Div. 581, *affirmed* 172 N. Y. 616; *Millward's Estate*, (Surrogate Ct.) 6 Misc. (N. Y.) 425; *Matter of King*, (Surrogate Ct.) 30 Misc. (N. Y.) 575; *Commonwealth's Appeal*, 127 Pa. St. 435; *Cullen's Estate*, 8 Pa. Co. Ct. 234, *affirmed* 142 Pa. St. 18; *Shelton v. Campbell*, 109 Tenn. 690.

In Ontario, debts are not to be deducted in determining the aggregate value of the estate. (1 Edw. VII., c. 8.) Before this amendment, the courts had decided differently. *Ross v. Reg.*, Ont. L. Rep. 487.

**The Amount of the Tax** is not to be deducted from the legacy in ascertaining its value. *In re Hooper*, 6 Ohio Dec. 560, 4 Ohio N. P. 186. Nor from the residuary estate, when payable therefrom. *Matter of Swift*, 137 N. Y. 77.

**The Amount of the Federal Inheritance Tax** imposed under the War Revenue Act of 1898 should not be deducted. *Matter of Gihon*, 169 N. Y. 443, *modifying* 64 N. Y. App. Div. 504; *Matter of Becker*, (Surrogate Ct.) 26 Misc. (N. Y.) 633; *Matter of Irish*, (Surrogate Ct.) 28 Misc. (N. Y.) 647; *Matter of Curtis*, (Surrogate Ct.) 31 Misc. (N. Y.) 83.

**Where an Estate Consists Partly of Property Exempt** from the tax and partly of property taxable, the amount of debts, expenses of administration, and commissions, should be apportioned ratably between the exempt and nonexempt property in arriving at the value of the taxable succession. *Matter of Purdy*, (Surrogate Ct.) 24 Misc. (N. Y.) 301.

**When Debtor Holds Non-taxable Security**. — Where domestic creditors have in their hands the legal title and the right to resort for the payment of their debts to securities belonging to a nonresident decedent which were not taxable under the laws of the home state, the indebtedness due such creditors is not to be offset against the value of property of such decedent otherwise taxable under the Transfer Tax Act. *Matter of Pullman*, 46 N. Y. App. Div. 574.

8. *Matter of Wormser*, (Surrogate Ct.) 36 Misc. (N. Y.) 434.

9. *Funeral Expenses*. — *Millward's Estate*, (Surrogate Ct.) 6 Misc. (N. Y.) 425.

**Bereavement for Marriages Not Deducted**. — *Matter of Black*, 1 Connolly (N. Y.) 477. See also *Seibert's Appeal*, 18 W. N. C. (Pa.) 278.

burial plot and the improvement and maintenance thereof.<sup>1</sup>

**Expenses of Administration**, consisting of the commissions of executors, administrators, and trustees, are properly deducted.<sup>2</sup>

**Costs of Litigation** brought in good faith to construe the will of a testator may be allowed as a deduction,<sup>3</sup> as also the expenses incurred by the executor in resisting a contest.<sup>4</sup> But the sums expended by contesting litigants, even though the litigation be successful, are not properly charged against the estate.<sup>5</sup>

**Taxes** actually levied and due at the time of the decedent's death should be deducted from the value of the estate.<sup>6</sup>

**Disputed Claims** against the estate should be temporarily deducted from the total valuation.<sup>7</sup>

**Payments in Compromise** of litigation instituted by persons claiming adversely to the will form no part of the estate transferred and should be deducted upon appraisal.<sup>8</sup>

**d. REPORT OF APPRAISER.** — The appraiser must report, for the purpose of taxation, the value of the interests passing under the will, and should state the basis of his opinion as to such value.<sup>9</sup> Property as to which the appraiser is in doubt should be included in the report as subject to the tax.<sup>10</sup> It is within the discretion of the court to remit the report back to the appraiser before acting upon it for the introduction of additional proof.<sup>11</sup>

**e. REAPPRAISAL.** — A reappraisal may be ordered only for the purpose of appraising property omitted from the first appraisement, because of its existence being unknown to the appraiser<sup>12</sup> or because of its value not being then ascertainable.<sup>13</sup> There is no authority for ordering a reappraisal or a reconsideration of matters already passed upon,<sup>14</sup> such as the actual market value of the assets,<sup>15</sup> or the amount deducted for debts and other

1. *Matter of Liss*, (Surrogate Ct.) 39 Misc. (N. Y.) 123; *In re Vinot*, (Surrogate Ct.) 7 N. Y. Supp. 517. See also *Long's Estate*, 22 Pa. Super. Ct. 370.

2. **Expenses of Administration.** — *Callahan v. Woodbridge*, 171 Mass. 595; *Millward's Estate*, (Surrogate Ct.) 6 Misc. (N. Y.) 425; *In re Gould*, (Surrogate Ct.) 48 N. Y. Supp. 872; *Matter of Westurn*, 152 N. Y. 93; *Matter of Gihon*, 169 N. Y. 443; *Matter of Silliman*, 79 N. Y. App. Div. 98, *affirmed* 175 N. Y. 513; *Shelton v. Campbell*, 109 Tenn. 690.

**Where It Does Not Appear What the Law of Another State Is** as to the amount of executors' commissions, the appraiser should calculate the commissions allowed there at the rate allowed by the statute of the home state and deduct a proportionate amount therefor. *Matter of Kennedy*, (Surrogate Ct.) 20 Misc. (N. Y.) 531.

**Commissions of Trustees Not Expenses of Administration.** — *Matter of Becker*, (Surrogate Ct.) 26 Misc. (N. Y.) 633.

3. **Costs of Litigation.** — *Matter of Maresi*, 74 N. Y. App. Div. 76.

4. *Shelton v. Campbell*, 109 Tenn. 690.

5. *Matter of Westurn*, 152 N. Y. 93. See also *Lines's Estate*, 155 Pa. St. 378.

6. **Taxes.** — *Matter of Liss*, (Surrogate Ct.) 39 Misc. (N. Y.) 123; *Matter of Hoffman*, 42 Misc. (N. Y.) 90; *Matter of Brundage*, 31 N. Y. App. Div. 348; *Matter of Maresi*, 74 N. Y. App. Div. 76.

7. **Disputed Claims.** — *Matter of Wormser*, (Surrogate Ct.) 28 Misc. (N. Y.) 608; *Matter of Dimon*, 82 N. Y. App. Div. 107. See also *Commonwealth's Appeal*, 34 Pa. St. 204.

8. **Payments in Compromise.** — *Page v. Rives*, 1 Hughes (U. S.) 297; *Matter of Wormser*, (Surrogate Ct.) 28 Misc. (N. Y.) 608, *affirmed* 51 N. Y. App. Div. 441; *Kerr's Estate*, 2 Pa. Dist. 535, *affirmed* 159 Pa. St. 512; *Pepper's Estate*, 159 Pa. St. 508, *affirming* 2 Pa. Dist. 611. See also *Atty.-Gen. v. Holford*, 1 Price 426; *Ex p. Sitwell*, 21 Q. B. D. 466, 59 L. T. N. S. 539.

**Rule Contra as to Money Paid Widow Omitted from Will.** — *Small's Estate*, 151 Pa. St. 1, *affirming* 11 Pa. Co. Ct. 1.

9. *Matter of Bolton*, (Surrogate Ct.) 35 Misc. (N. Y.) 688. See also *Millward's Estate*, (Surrogate Ct.) 6 Misc. (N. Y.) 425.

10. *Matter of Hendricks*, 1 Connolly (N. Y.) 301; *Peck's Estate*, (Surrogate Ct.) 24 Abb. N. Cas. (N. Y.) 365.

11. *Matter of Kelly*, (Surrogate Ct.) 29 Misc. (N. Y.) 169.

12. **Reappraisal of Property Subsequently Discovered.** — *In re Smith*, (Surrogate Ct.) 23 N. Y. Supp. 762; *Matter of Crerar*, 56 N. Y. App. Div. 479; *Matter of Earle*, 74 N. Y. App. Div. 458. See also *Matter of Lansing*, (Surrogate Ct.) 31 Misc. (N. Y.) 148.

13. **Reappraisal of Property Reported Not Presently Taxable.** — *Matter of Irwin*, (Surrogate Ct.) 36 Misc. (N. Y.) 277; *Matter of Crerar*, 56 N. Y. App. Div. 479; *Fosselman's Appeal*, 2 Penny. (Pa.) 238.

14. **No Reappraisal of Matters Passed Upon.** — *Matter of Crerar*, 56 N. Y. App. Div. 479; *Money Penny's Estate*, 181 Pa. St. 309.

15. **No Reappraisal as to Value of Assets.** — *In re Bruce*, (Surrogate Ct.) 59 N. Y. Supp.

expenses.<sup>1</sup> The only remedy in case of an error of law is by appeal from the decree made on the appraisal.<sup>2</sup>

**2. Assessment** — *a. DETERMINATION OF LIABILITY TO TAX.* — The estate having been appraised, it is for the surrogate or probate court to determine as to the liability thereof to the tax,<sup>3</sup> and, as necessarily incident to such duty, the court has jurisdiction to determine every question that may arise in the tax proceedings.<sup>4</sup> The determination of the surrogate is final, unless appealed from.<sup>5</sup>

**Notice.** — The court must immediately give notice, upon the determination by it as to the liability of an estate to the tax, to all parties known to be interested therein.<sup>6</sup>

*b. CORRECTION OF DECREE.* — As to purely legal errors, the only remedy by which the determination of the court assessing the tax can be reviewed is by appeal. But the power to modify a decree for any cause extrinsic of the record is an inherent one and may be exercised even after the time to appeal has expired.<sup>7</sup>

*c. APPEAL FROM DECREE.* — It is usually provided by the statute, that the state, through the proper official,<sup>8</sup> or any person dissatisfied with the assessment and determination of the tax, may take an appeal therefrom.<sup>9</sup>

1083; *Matter of Fulton*, (Surrogate Ct.) 30 Misc. (N. Y.) 70; *Com. v. Freedley*, 21 Pa. St. 33. *Compare Atty.-Gen. v. Dardier*, 11 Q. B. D. 16.

**1. No Reappraisal as to Amount of Debts.** — *Matter of Rice*, (Surrogate Ct.) 29 Misc. (N. Y.) 404, *affirmed* 56 N. Y. App. Div. 253.

**2.** *Matter of Niven*, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 550.

**Where the State Had No Notice of the Appraisal.** it may apply for and have a reappraisal. *Matter of McGhee*, 105 Iowa 9.

**3. Determination of Liability to Tax.** — *Re Renfrew*, 29 Ont. 566; *Callahan v. Woodbridge*, 171 Mass. 595; *Weston v. Goodrich*, 86 Hun (N. Y.) 194. See also *Atty.-Gen. v. Cameron*, 26 Ont. App. 104; *Matter of Smith*, 40 N. Y. App. Div. 480; *Maris's Estate*, 3 Pa. Dist. 33.

**The Superior Court of Massachusetts** may hear and determine the question whether or not a legacy is subject to the tax, the provision of the act giving the Probate Court jurisdiction of matters connected with said tax not being exclusive. *Essex v. Brooks*, 164 Mass. 79.

**The Supreme Court of New York State** has no jurisdiction to determine the liability of a succession to the transfer tax. *Weston v. Goodrich*, 86 Hun (N. Y.) 194.

**Foreign Executors of a Nonresident** who have failed to pay the tax or request the imposition thereof in this state before removing the property cannot oust the surrogate's court in this state of such jurisdiction by filing their account in the foreign state and securing a decree directing a distribution of the estate. *Matter of Hubbard*, (Surrogate Ct.) 21 Misc. (N. Y.) 566.

**4.** *Matter of Ullmann*, 137 N. Y. 403.

**Court May Determine Whether Legatee Exempt.** — *Provident Hospital, etc., Assoc. v. People*, 198 Ill. 495.

**Court May Determine Whether Property Passes by Will or Intestate Laws.** — *Matter of Ullmann*, 137 N. Y. 403, *reversing* 67 Hun (N. Y.) 5.

**Court Cannot Determine Disputed Claim.** — *Millward's Estate*, (Surrogate Ct.) 6 Misc. (N. Y.) 425.

**5.** *Matter of Wolfe*, 137 N. Y. 205, *reversing* (Supm. Ct. Gen. T.) 29 Abb. N. Cas. (N. Y.) 340; *Matter of Lansing*, (Surrogate Ct.) 31 Misc. (N. Y.) 148. See also *Matter of Hackett*, (Surrogate Ct.) 14 Misc. (N. Y.) 282; *Stinger v. Com.*, 26 Pa. St. 429, 422.

**6. Notice.** — *Matter of Miller*, 110 N. Y. 216, *affirmed* 47 Hun (N. Y.) 394. See also *Astor's Estate*, (Surrogate Ct.) 20 Abb. N. Cas. (N. Y.) 405; *Matter of Winters*, (Surrogate Ct.) 21 Misc. (N. Y.) 552.

**7. Correction of Decree.** — *Matter of Schermerhorn*, 38 N. Y. App. Div. 350; *Morgan v. Cowie*, 49 N. Y. App. Div. 612; *Matter of Crerar*, 56 N. Y. App. Div. 479, *reversing* (Surrogate Ct.) 31 Misc. (N. Y.) 481; *Matter of Earle*, 74 N. Y. App. Div. 458; *Matter of Silliman*, 79 N. Y. App. Div. 98, *affirmed* 175 N. Y. 513; *Matter of Scrimgeour*, 80 N. Y. App. Div. 388, *affirmed* 175 N. Y. 507; *Matter of Lowry*, 89 N. Y. App. Div. 226; *Matter of Sherar*, (Surrogate Ct.) 25 Misc. (N. Y.) 138; *Matter of Wallace*, (Surrogate Ct.) 28 Misc. (N. Y.) 603; *Matter of Von Post*, (Surrogate Ct.) 35 Misc. (N. Y.) 367; *Matter of Connelly*, (Surrogate Ct.) 38 Misc. (N. Y.) 466.

**8. State May Appeal.** — *Matter of Bogert*, (Surrogate Ct.) 25 Misc. (N. Y.) 466; *Morgan v. Warner*, 45 N. Y. App. Div. 424, 162 N. Y. 612; *Commonwealth's Appeal*, 128 Pa. St. 603. *Compare Matter of Coleman*, 2 Pearson (Pa.) 525.

**9.** See the statutes of the various states.

**When Limitation of Time to Appeal Begins to Run.** — *Matter of Connelly*, (Surrogate Ct.) 38 Misc. (N. Y.) 466.

**When Executors or Administrators Cannot Appeal.** — Where the tax is payable by the devisees and legatees and not by the executors, the latter have no interest in the question whether the tax is presently due and payable, and an appeal by them upon that point raises no question for consideration. *In re Handley*, 181 Pa. St. 339. See also *Com. v. Coleman*, 52 Pa. St. 468.

**Where the Comptroller of the City of New York** was authorized to institute a proceeding to col-

**VIII. COLLECTION OF TAX.** — Provisions are found in the statutes for the institution of proceedings to collect the tax upon the refusal or neglect of the person liable therefor to pay the same.<sup>1</sup> In *New York*, at least, such remedy would seem to be merely cumulative, as it has been held that the surrogate has power to compel the payment of the tax by such proceedings as are provided generally for the enforcement of the decrees of the surrogate's court, as, for instance, by contempt proceedings.<sup>2</sup> The time within which the proceeding may or must be commenced is prescribed by the statute,<sup>3</sup> and the costs thereof may be taxed against the party liable for the tax.<sup>4</sup>

**IX. PENALTY FOR NONPAYMENT.** — A common statutory provision is to the effect that unless the tax be paid within a prescribed time, interest shall be charged and collected thereon at a rate in excess of the legal rate, by way of penalty;<sup>5</sup> except that when, by reason of claims made upon the estate, necessary litigation, or other unavoidable cause of delay, the tax cannot be determined and paid when due, interest at the legal rate shall be charged thereon from the accrual thereof until the cause of delay is removed.<sup>6</sup> One who claims exemption from the penalty has the burden of showing a sufficient ground for delay in the settlement of the estate,<sup>7</sup> and neither ignorance of the law nor hardship resulting to the legatee will relieve the estate from the exaction of the extra interest.<sup>8</sup> The interest should be computed at the rate provided by the law in force at the time of the accrual of the tax,<sup>9</sup> and should be computed only from such latter date.<sup>10</sup>

lect the tax, he had authority to prosecute an appeal from the decision of the surrogate, although the powers and duties in respect thereto had devolved upon the comptroller of the state. *Matter of Blackstone*, 69 N. Y. App. Div. 127.

1. See the statutes of the various states. See generally the title *TAXATION*, *post*.

**Act of Congress of 1864.** — See *U. S. v. Truck*, 28 Fed. Rep. 846.

*Louisiana.* — See *New Orleans v. Stewart*, 28 La. Ann. 180.

*North Carolina.* — Under the Act of 1846 an information in the name of the attorney-general is the most approved form of proceeding to collect the tax. *Atty.-Gen. v. Pierce*, 6 Jones Eq. (59 N. Car.) 240.

*Tennessee.* — A suit for the collection of the tax should be brought in the county court, but if brought in the chancery court and there is no demurrer or plea to the jurisdiction, the suit can be maintained. But it must be conducted and treated as though it had been brought in the county court. *Shelton v. Campbell*, 109 Tenn. 690. See also *Harrison v. Johnston*, 109 Tenn. 245.

**The Duty of the Court** to see that the tax is paid before allowing for payment of any legacy does not prevent a suit for the collection of the same by the proper official. *Matter of Sammon*, 3 M. & W. 381.

**2. Surrogate May Enforce Payment.** — *Matter of Vanderbilt*, 2 Connolly (N. Y.) 319; *In re Prout*, (Surrogate Ct.) 3 N. Y. Supp. 831.

**3. Frazer v. People**, 6 Dem. (N. Y.) 174.

**Provisions of Statute Merely Directory.** — *Howe v. Howe*, 179 Mass. 546.

**The New York Act of 1899** provided that the defense of the statute of limitations could not be interposed in a proceeding to collect the tax. *Matter of Moench*, (Surrogate Ct.) 39 Misc. (N. Y.) 480.

**4. Costs of Proceeding to Collect.** — *Frazer v. People*, 6 Dem. (N. Y.) 174; *McCarthy's Estate*, (Surrogate Ct.) 5 Misc. (N. Y.) 276; *Shelton v. Campbell*, 109 Tenn. 690; *Harrison v. Johnston*, 109 Tenn. 245.

**5. Penalty for Nonpayment of Tax.** — *Wright v. Blakeslee*, 101 U. S. 174; *Matter of Stewart*, 131 N. Y. 274; *Bank's Estate*, 5 Pa. Co. Ct. 614; *Commonwealth's Appeal*, 128 Pa. St. 603; *Miller's Estate*, 182 Pa. St. 157. See also the statutes of the various states.

**6. Unavoidable Cause for Delay.** — *New York.* — *Matter of Bolton*, (Surrogate Ct.) 35 Misc. (N. Y.) 688; *Matter of Stewart*, 131 N. Y. 274; *Matter of Moore*, 90 Hun (N. Y.) 162; *People v. Prout*, 53 Hun (N. Y.) 541, *affirmed* 117 N. Y. 651.

*Pennsylvania.* — *Maris's Estate*, 3 Pa. Dist. 33; *Bank's Estate*, 5 Pa. Co. Ct. 614; *Miller's Estate*, 182 Pa. St. 157; *Commonwealth's Appeal*, 128 Pa. St. 603; *Reish v. Com.*, 106 Pa. St. 521; *Commonwealth's Appeal*, 34 Pa. St. 204; *Com. v. Smith*, 20 Pa. St. 100.

*Tennessee.* — *Shelton v. Campbell*, 109 Tenn. 690.

**The Penalty Will Not Be Imposed** where there has been no effort made to enforce the law on account of pending litigation as to its constitutionality. *Bates's Estate*, 5 Ohio Dec. 547.

**7. People v. Prout**, 53 Hun (N. Y.) 541.

**An Application to Remit Penalty** can be made to the court upon motion and is not to be the subject of an appeal from the decree fixing the tax. *Matter of De Graaf*, (Surrogate Ct.) 24 Misc. (N. Y.) 147.

**8. Matter of Platt**, (Surrogate Ct.) 8 Misc. (N. Y.) 144.

**9. Matter of Milne**, 76 Hun (N. Y.) 328; *Matter of Moore*, 90 Hun (N. Y.) 162; *Matter of Fayerweather*, 143 N. Y. 114.

**10. Matter of Davis**, 149 N. Y. 539; *Bank's Estate*, 5 Pa. Co. Ct. 614.

**X. REFUNDING TAX.** — Where the statute provides for the refunding of a tax erroneously paid, the prescribed procedure must be strictly followed, and none other can be resorted to.<sup>1</sup>

**SUCCESSIVELY.** — See note 2.

**SUCCESSOR.** — The term "successor" implies one who takes a place that another has left.<sup>2</sup>

1. *In re Hall*, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 595, 54 Hun (N. Y.) 637; *Matter of Howard*, 54 Hun (N. Y.) 305.

The Surrogate May Order the refunding of a tax erroneously assessed and paid, and an application for such order may be made at any time within five years. *Matter of Sherar*, (Surrogate Ct.) 25 Misc. (N. Y.) 138.

And where the surrogate has so ordered, a writ of mandamus may issue from the Supreme Court directing the state comptroller to refund. *Matter of Coogan*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 563, *affirmed* 45 N. Y. App. Div. 628, 162 N. Y. 613.

**Ontario.** — Where *bona fide* claims against the estate are discharged by the executors after payment of the tax, a proper *pro rata* portion thereof will be refunded. *Ross v. Reg.*, 32 Ont. 143.

2. **Successively.** — In *Frisk v. Reigelman*, 75 Wis. 499, it was held that proof of the publication of a summons in a daily newspaper "six weeks *successively*, commencing," etc., does not show compliance with a statute requiring the publication to be made "not less than once a week for six weeks." See also the title TIME, COMPUTATION OF.

**Successively and Dissimultaneously.** — See *Brush Electric Co. v. Western Electric Co.*, 69 Fed. Rep. 243, *affirmed* (C. C. A.) 76 Fed. Rep. 761. This was a patent case.

3. **Successor.** — *Davis v. Garr*, 6 N. Y. 133.

In *State v. Andrews*, 64 Kan. 496, it was said: "According to all the lexicographers, a *successor* is merely one who succeeds or takes the place of another."

**Public Officer.** — The term applies to any future occupant of an office held by a public officer, just as he is the *successor* of any incumbents who preceded him, no matter when. *State v. O'Leary*, 64 Minn. 207.

**Immediate Successor.** — A clause in the constitution of *New York* provides that the *successors* of county judges "shall be chosen by the electors of the counties for the term of six years." It was held that the term *successors* applies to all of the indefinite line following the original incumbents, and furnishes a controlling rule on the subject, except in the special cases where the constitution provides for the filling of vacancies. *People v. Townsend*, 102 N. Y. 438. See also *People v. Carr*, 86 N. Y. 514.

In *Phillips v. Governor*, 2 Ark. 382, it was held that under a statute authorizing administrator's bonds payable to "the governor and his *successors* in office," the right of action was not restricted to immediate *successors* of the governor in whose name such bonds might have been taken out.

**English Succession Duty Act.** — See Atty.-Gen. v. *Littledale*, L. R. 5 H. L. 290.

**Heirs — Estate of Inheritance.** — In *Sedgwick v. Laffin*, 10 Allen (Mass.) 430, it was held that a mortgage of land to an individual, his *successors* and assigns forever, conveyed only a life estate. The court said: "Littleton and Coke declare that the very words '*successors* and assigns,' used in the instrument before us, are not sufficient to make an estate of inheritance. Litt., § 1; Co. Litt. 1a, 8b."

**Limiting Estate.** — The granting clause of a deed was as follows: "Do grant, bargain, sell, alien, release, convey, and confirm unto the said parties of the third part and to their *successors* and assigns." In construing this provision the court said: "There is nothing in any of these words which limits their estate. The authority is to hold to their *successors* and assigns. There is no particular significance attaching to the word *successors* in the absence of anything in the other part of the deed showing that a limited estate was granted, and the grant is to the assigns as well as the *successors*." *Kanenbley v. Volkenberg*, 70 N. Y. App. Div. 97.

**Successor in Interest.** — The assignee of a note in action becomes a *successor* in interest of the assignor or plaintiff. *Hallett v. Hallett*, (C. Pl. Spec. T.) 10 Misc. (N. Y.) 304. See also *Higgins v. New York*, 136 N. Y. 214.

**Same — Tax Collector.** — In *Sheehan v. Osborne*, (Cal. 1902) 69 Pac. Rep. 843, it was said: "The tax collector is not a corporation sole, whose *successors* constitute the same fictitious person, and are, therefore, bound by a judgment against a predecessor, but a mere agent of a corporation aggregate — that is, of the county. There is no direct privity, therefore, between a tax collector and his *successors* in office; nor can the latter be regarded as '*successors* in interest' to their predecessors, for neither have any interest in the tax, nor, except as personally affected, in the question of its validity." See also *Bailey v. Johnson*, 121 Cal. 562.

**One Entitled to Succeed.** — In construing a statute which provided that certain officers should hold office until their *successors* were elected or appointed and qualified, the court said: "The word *successor* is used in our statutes, as in the books, in the twofold sense of the one entitled to succeed and the one who has in fact succeeded. It is here employed in the former acceptation." *People v. Ward*, 107 Cal. 236.

**Railroad Company.** — A contract between a municipality and certain railroad companies provided that in a certain event rights granted to the public should revert to such railroad companies and their *successors*. Upon the happening of the contingency the railroad companies conveyed the reserved strip to an individual. In holding that such individual was



**SUCCINCT.** — “The word ‘succinct’ means brief, precise, exact. It is derived from the two Latin words *sub*, under, below, and *cingere*, to gird, and literally means girded below, or from below; tucked up; hence, compressed into narrow shape; concise.”<sup>1</sup>

**SUCH.** — “Such” in its ordinary sense signifies something previously mentioned or specified; not other or different;<sup>2</sup> of a like kind; the same

not comprehended by the term *successors*, the court said: “We do not understand that the word *successors* here refers to grantees, but to such railroad companies as might be *successors* to the railroad companies who made the contract with the town of Lake; the word *successors* referring to succession in their capacity as railroads.” *Huff v. Hastings Express Co.*, 195 Ill. 257.

**Same — Exemption from Taxation.** — A statute exempted a railroad and its *successors* from taxation. In construing this provision in *International, etc., R. Co. v. Smith County*, 65 Tex. 25, the court said: “The word *successors* is evidently used to designate such corporations or persons as may, in any lawful manner, acquire the proprietorship of the corporate rights and property through which they are to be exercised, which had the corporation to which the exemption was given.”

**Successors in Trust.** — An assignment for the benefit of creditors purported to convey all the property of the assignor to the assignee “to have and to hold the same unto the said party of the second part, his *successors* in trust and assigns.” In construing this provision the court said: “The use of the words ‘*successors* in trust,’ in the granting and *habendum* clauses of the assignment, is equally unobjectionable. Such phrase referred to such persons as might lawfully succeed the assignee, in case of resignation, removal, or death, but it gave to the assignee no power to select his *successor*.” *Langdon v. Thompson*, 25 Minn. 509.

**Trustees and Successors.** — In *Davis v. Garr*, 6 N. Y. 133, it was held that in an action on a promissory note, where the declaration alleged that such note was payable to three persons as trustees of an unincorporated association or their *successors* in office, the words “their *successors*” might be rejected as surplusage.

**1. Succinct.** — *Wolfe v. Wilsey*, 2 Ind. App. 558, citing *Webst. Dict.* The court further said: “If the pleading here contemplated is to derive any character from the word *succinct*, it can be only that of brevity, compression, terseness.”

**2. Such Refers to Something Previously Mentioned.** — *U. S. v. Gooding*, 12 Wheat. (U. S.) 477; *Oquawka v. Graves*, (C. C. A.) 82 Fed. Rep. 572; *Ventura County v. Clay*, 112 Cal. 65; *Hunt v. Jordan*, 4 Blackf. (Ind.) 534; *Evans v. State*, 150 Ind. 651; *Kansas City v. Hescher*, 4 Kan. App. 782; *Tillson v. State*, 29 Kan. 452; *Valentine v. Borden*, 100 Mass. 280; *Willis v. Standard Oil Co.*, 50 Minn. 290; *Vaughn v. Haden*, 37 Mo. 179; *State v. Second Judicial Dist. Ct.*, 26 Mont. 396; *State v. Brannen*, 8 Jones L. (53 N. Car.) 210; *Garvin v. State*, 13 Lea (Tenn.) 172. See also *State v. Beasley*, 5 Mo. 92, where the word was rejected as a typographical or clerical inaccuracy.

**Refers to Last Antecedent.** — In *Summerman v. Knowles*, 33 N. J. L. 205, it was said: “The

word is descriptive, and is a relative word, and as such must be referred to the last antecedent, unless the meaning of the sentence would thereby be impaired.” See also *Wellman v. Bergmann*, 44 N. J. L. 615; *Laidley v. Kline*, 23 W. Va. 376, wherein the words “*such* action or scire facias,” in a statute, were held to apply to the action or scire facias specified in the provision just preceding.

**Same — Such Judge — Two Judges Previously Mentioned.** — See *In re Remington*, 7 Wis. 653.

**Such Preceding Noun in Singular Number.** — In *People v. Union High School Dist.*, 101 Cal. 658, it was said: “When the word *such* precedes a noun in the singular number, as in this case — ‘*such* school district’ — it partakes of the nature of a pronoun as well as that of an adjective (pronominal adjective), and properly relates to the same noun in the same number as antecedently expressed and qualified, and especially to the antecedent qualification of that noun; and denotes that the noun which it precedes is to be understood as antecedently qualified.”

**Such Used in Sense of Said.** — See *Evans v. State*, 150 Ind. 651.

**Such Not Used in the Sense of Said.** — A will gave a homestead to the testator's three daughters for life, “and when said homestead shall be no longer used or occupied as aforesaid by either or any of my beloved daughters above named, then I give and devise the same to *such* child or children at that time living, and their heirs and assigns forever; and the representative of any deceased child to have the share of his or her parent.” It was held that by the expression “child or children,” all of the testator's children were referred to, and the word *such* was not used in the sense of “said,” but with reference to the subsequent qualification of survivorship. The provision was meant to give the property to those of his children who should be alive at the termination of the homestead estate, and the issue of those who should then be dead, *such* issue to take *per stirpes*. *Endicott v. Endicott*, 41 N. J. Eq. 98.

**Such and Some.** — A statute provided that upon affidavit that a witness resided out of the territory, a commission might issue to take the testimony of *such* witness. It was held that an affidavit that “some” of the witnesses of plaintiff resided out of the limits of the territory was not sufficient. *Lesne v. Pomphrey*, 4 Ala. 79.

**As Such.** — Where a fiduciary was claimed to hold a fund “as *such* against the plaintiff,” the court said: “The context plainly shows that the words ‘as *such*’ refer to him as such administrator of Baker.” *Gilmore v. Baker*, 24 W. Va. 86.

**Such Appropriation.** — See *Collins v. Water Com'rs*, 42 U. C. Q. B. 378.

**Such Assignee.** — A statute providing that the

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that, with reference to something already mentioned.<sup>1</sup>

**SUDDENLY.** — See note 2.

Circuit Court judge might remove any assignee for cause was amended as follows: "and shall also remove *such* assignee upon the application of a majority of the creditors of *such* assignor who shall also represent a majority in value of the debts allowed against said estate." It was held that the word *such* in the clause "and shall also remove any *such* assignee" was used in the same sense as the word *such* in the connection 'creditors of *such* assignor,' meaning the assignee of a voluntary assignment, spoken of in the previous sections. *Burt v. Barnes*, 87 Wis. 519. See also *Batten v. Smith*, 62 Wis. 92.

**Such Contracts.** — In *Floyd v. Harding*, 28 Gratt. (Va.) 404, it was said: "Having provided for the recordation of written contracts in the fourth section, the framers of the statute, by the use of the words '*such* contracts' in the fifth, evinced a deliberate purpose to confine the operation of that section to contracts in writing." See also *Pack v. Hansbarger*, 17 W. Va. 341.

**Such Insufficiency.** — A statute provided that whenever any person liable to the payment of toll should sustain any injury by reason of the turnpike being out of repair, "the corporation owning said road shall be answerable for such injury, and also liable to indictment for *such* insufficiency and want of repair." In construing this provision the court said: "The word *such* does not limit the case to the insufficiency and want of repair which has actually occasioned injury to an individual, but to insufficiency and want of repair which renders it dangerous." *Com. v. Hancock Free Bridge Corp.*, 2 Gray (Mass.) 68.

**Such Inventory.** — A statute after providing that the assignor should file a correct inventory of his assets and a list of his creditors verified by oath and having affixed a certificate of the assignee that the same was correct, etc., proceeded: "And a failure to make and file *such* inventory and list shall render such assignment void; but no mistake therein shall invalidate such assignment or affect the right of any creditor." It was held that *such*, qualifying "inventory," referred only to a correct inventory of assets and list of creditors, without any reference whatever to the oath of the assignor or the certificate of the assignee. *Steinlien v. Halstad*, 52 Wis. 291.

**Such Killing.** — See *Com. v. Johnes*, 1 Leigh (Va.) 609; *People v. Bealoba*, 17 Cal. 397; *Bivens v. State*, 11 Ark. 455.

**Such Marriage—Revocation of Will.** — See *Ingersoll v. Hopkins*, 170 Mass. 404.

**Such Petitioners.** — Under a statute providing that on the petition of not less than twenty of the freehold owners of lots in any section lying adjacent to a borough, the section on which *such* petitioners and others resided might be admitted as a part of the borough, it was held that the twenty petitioners for extension must be owners of the lots to be included and residents thereon, the court saying that the word *such* in the phrase "*such* petitioners" was intended as demonstrative, pointing directly

to the twenty petitioners previously mentioned. *Devore's Appeal*, 56 Pa. St. 165.

**Such Suit.** — See *Appleton v. Turnbull*, 84 Me. 76.

**Such Ticket.** — A statute provided that it should not be lawful for any person within the state to have in possession any ticket of any lottery, not granted or permitted by the state, with intent to sell, negotiate, or dispose of the same, or "to sell, negotiate, or advertise, in any way whatever, any *such* ticket or part of a ticket." It was held that the word *such* did not refer to the possession of the seller. The court said: "By the use of the word *such* it was intended to refer to that which had been previously described—a ticket in a lottery not granted or permitted. That it should be in possession of the seller is no part of the description of the ticket." *State v. Scribner*, 2 Gill & J. (Md.) 251.

**Such Time.** — A statute provided that a mortgage should be valid from the time it was filed for record until the maturity of the entire debt or obligation, provided *such* time should not exceed two years. It was held that "the words '*such* time,' as used in the proviso, refer to the period between the time of filing the mortgage for record and the maturity of the entire debt, or of all the notes secured by the mortgage." *Silvis v. Aultman*, 141 Ill. 632.

**1. Of That Kind—of Like Kind.** — *Ventura County v. Clay*, 112 Cal. 65; *Evans v. State*, 150 Ind. 651; *Travers v. Wallace*, 93 Md. 507; *State v. Second Judicial Dist. Ct.*, 26 Mont. 396; *State v. Brannen*, 8 Jones L. (53 N. Car.) 210; *Garvin v. State*, 13 Lea (Tenn.) 172; *Chesapeake, etc., R. Co. v. Patton*, 9 W. Va. 656; *Ogden v. Glidden*, 9 Wis. 52.

**Such Parsonages.** — A statute exempted from taxation parsonages, whether of local churches or districts, and whether occupied by the pastor permanently or rented for his benefit, and provided that the leasing of *such* parsonages should not render them liable to taxation. The court said: "Stress was laid in the argument upon the use of the word *such* in the last clause of the section—'the leasing of *such* parsonages,' etc. It was claimed that the word limited that clause to the same parsonages mentioned in the first clause. The objection to that construction is, as has just been stated, that it renders one or the other of these clauses superfluous, and gives to it no force or significance whatever. We may find an office and use for the word by interpreting it to signify parsonages 'of local churches or districts,' by which we suppose is meant local or district churches." *Gray v. La Fayette County*, 65 Wis. 570.

**2. Suddenly Assaulted.** — A statute provided that any person might kill any dog that *suddenly* assaulted him. It was held that one bitten while attempting to separate two fighting dogs was not *suddenly* assaulted. *Spaight v. McGovern*, 16 R. I. 658. See also the title ANIMALS. vol. 2, p. 373.

**Suddenly Dead.** — In *Reg. v. Stephenson*, 13 Q. B. D. 333, it was said: "The office of the

**SUE.** (See also *SURT*, *post.*) — To sue means to prosecute; to make legal claim; to seek for in law.<sup>1</sup>

**SUE OUT — SUING OUT.** — To sue out means to obtain judicially; to issue. To sue out a writ is to obtain and issue it.<sup>2</sup> The legal signification of the term "suing out process" is to petition for and take out, or to apply for and obtain; as, to sue out a writ in chancery, or a pardon.<sup>3</sup>

**SUFFER.** — To suffer an act to be done, by a person who can prevent it, is to permit or consent to it; to approve of it, and not to hinder it. It implies a willingness of the mind.<sup>4</sup> Every definition of "suffer" includes knowledge

coroner existed before the statute *De Officio Coronatoris* (4 Edw. I., stat. 2 A. D. 1276). In that statute the phrase used is '*suddenly* dead,' but the expression has received a recognized meaning, and does not include cases of death without violence and from ordinary natural causes." See also *Rex v. Justices*, 11 East 229. And see the title *CORONERS*, vol. 7, p. 603.

1. **Sue — Civil Suit or Criminal Prosecution.** — *U. S. v. Moore*, 11 Fed. Rep. 251, citing *Webst. Dict.* and holding that a statute providing that all fines, penalties, etc., might be *sued* for and recovered in the name of the United States did not limit the action to a civil suit, but included a prosecution by indictment.

**Final Process.** — In *Vocht v. Kuklence*, 119 Pa. St. 365, the trial court said: "To *sue*, according to Webster, 'is to seek justice or right from, by legal process.' This definition is broad enough to include final process." But on writ of error it was held that the statute authorizing a married woman to *sue* and be *sued* as if she were a *feme sole* did not authorize her arrest in satisfaction of a judgment for a tort committed by her during coverture.

**Judgment by Confession.** — A judgment by confession entered upon a promissory note providing for a "reasonable attorney's fee if *sued*" has been held not to authorize the taxation of an attorney's fee. *Dullard v. Phelan*, 83 Iowa 476.

2. **Sue Out.** — *Waxahachie v. Coler*, (C. C. A.) 92 Fed. Rep. 286.

3. **Suing Out.** — *Kansas City Hydraulic Press Brick Co. v. Barker*, 50 Mo. App. 64; *South Missouri Lumber Co. v. Wright*, 114 Mo. 333.

**Suing Out a Writ** is the commencement of the action. *Cox v. Cooper*, 3 Ala. 256.

**Delivery to Officer — Suing Out.** — *Suing out* process means the delivery thereof to the sheriff or other officer authorized to execute it. *Kansas City Hydraulic Press Brick Co. v. Barker*, 50 Mo. App. 65. See also *West v. Engel*, 101 Ala. 509, holding that a summons cannot be said to be *sued out* until it passes from the hands of the clerk to the sheriff, or other proper officer, to be executed, or sent by mail or otherwise, with a *bona fide*, unequivocal intention to have it served. And see *Alabama*, etc., *R. Co. v. Harris*, 25 Ala. 235; *Ex p. Locke*, 46 Ala. 77.

**Sued Out and Brought.** — In *Waxahachie v. Coler*, (C. C. A.) 92 Fed. Rep. 286, it was said: "We find that the terms 'brought' and '*sued out*,' as applied to writs of error, and meaning the issuance of the writ by proper authority and the filing of the same in the proper court, appear to be used synonymously in the statutes

of the United States, in the decisions of the courts, and in the text books."

4. **Suffer.** — *Selleck v. Selleck*, 19 Conn. 505.

To *suffer* is to allow; to permit; not to forbid or hinder; to tolerate. *Duncan v. Landis*, (C. C. A.) 106 Fed. Rep. 849. See also *Gregory v. U. S.*, 17 Blatchf. (U. S.) 330.

**Suffer and Permit Synonymous.** — See *PERMIT*, vol. 22, p. 700, and see *Duncan v. Landis*, (C. C. A.) 106 Fed. Rep. 849; *Ft. Wayne v. De Witt*, 47 Ind. 394; *Philadelphia*, etc., *R. Co. v. Long*, 75 Pa. St. 257.

**Suffer and Procure.** (See also *PROCURE*, vol. 23, p. 163.) — In *Campbell v. Traders' Nat. Bank*, 2 Biss. (U. S.) 431, 4 Fed. Cas. No. 2,370, it was said: "I entirely agree with those courts which declare that the word *suffer* is different from the word 'procure;' *suffer* implies a passive condition, so to speak — as to allow, to permit — not a demonstrative, active course, like the word 'procure.' It is the very definition, I think, to apply to the case of pressure and powerful motives brought to bear upon a party. Under the influence of this pressure and the operation of these motives, he *suffers* a thing to be done — that is, allows or permits it — and the law intended to prevent this."

**Suffer Incumbrance.** (See also the title *COVENANTS*, vol. 8, p. 122.) — An incumbrance upon property at the time when the grantor acquired the title is not within a covenant against incumbrances done or *suffered* by him. *Suffer*, in such case, implies responsible control. *Smith v. Eigerman*, 5 Ind. App. 271, 51 Am. St. Rep. 283. See also *Parker v. Parker*, 93 Ala. 80; *Brown v. Young*, 69 Iowa 625; *Comstock v. Smith*, 13 Pick. (Mass.) 116.

In *Hobson v. Middleton*, 6 B. & C. 295, 13 E. C. L. 175, Bayley, J., said: "The words 'permitting and *suffering*' do not bear the same meaning as 'knowing of and being privy to;' the meaning of them is that the defendant should not concur in any act over which he had a control." See also *Townson v. Green*, 2 C. & P. 110, 12 E. C. L. 49; *Stannard v. Forbes*, 6 Ad. & El. 572, 33 E. C. L. 149.

**Same — Assessment.** — A title-insurance company excepted "defects and incumbrances arising after the date of this policy, or created or *suffered* by the insured." It was held that this exception did not include the incumbrance of a confirmed assessment existing upon the date of the execution or delivery of the policy. The court said: "It is not within the fair purport of the language to hold that an assessment which the insured was or might be powerless to prevent could be said to be *suffered* or voluntarily created by him." *Trenton Potteries Co.*

of what is done under the sufferance.<sup>1</sup>

**SUFFERANCE.** — See TENANCY BY SUFFERANCE.

**SUFFICIENT.** — Sufficient means adequate to suffice; equal to the end proposed; competent.<sup>2</sup>

**SUFFICIENT CONSIDERATION.** — See the title CONSIDERATION, vol. 6, p. 667.

*v.* Title Guarantee, etc., Co., 50 N. Y. App. Div. 490.

**Suffer Preference — Involuntary Act.** (See also the title INSOLVENCY AND BANKRUPTCY, vol. 16, pp. 661, 734.) — In *Wilson v. Nelson*, 183 U. S. 198, it was said: "In the case at bar, the warrant of attorney to confess judgment was indeed given by the debtor nearly thirteen years before. But being irrevocable and continuing in force, the debtor thereby, without any further act of his, 'suffered or permitted' a judgment to be entered against him, within four months before the filing of the petition in bankruptcy, the effect of the enforcement of which judgment would be to enable the creditor to whom it was given to obtain a greater percentage of his debt than other creditors; and the lien obtained by which, in a proceeding begun within the four months, would be dissolved by the adjudication in bankruptcy, because 'its existence and enforcement will work a preference.' And the debtor did not, within five days before the sale of the property on execution, vacate or discharge such preference, or file a petition in bankruptcy. By failing to do so, he confessed that he was hopelessly insolvent, and consented to the preference that he failed to vacate."

As to the meaning of *suffering* a judgment or preference, see also *In re Metzger Toy, etc.*, Co., 114 Fed. Rep. 958; *Pirie v. Chicago Title, etc., Co.*, 182 U. S. 438.

**Same — Nonresistance.** — In *New York Tenth Nat. Bank v. Warren*, 96 U. S. 539, it was held that the mere nonresistance of a debtor to judicial proceedings against him, when the debt is due and there is no valid defense to it, is not *suffering* and giving a preference under the Bankrupt Act. See also *In re Ogles*, 93 Fed. Rep. 434; *Wilson v. City Bank*, 17 Wall. (U. S.) 473.

**Same — Co-operation Necessary.** — And in *Duncan v. Landis*, (C. C. A.) 106 Fed. Rep. 849, it was said: "The debtor must by this act consciously and voluntarily in some degree co-operate with the creditor in 'obtaining' the preference. He cannot *suffer* or permit what he cannot hinder."

**Same — Intent.** — In *Scheuer v. Smith, etc.*, Book, etc., Co., (C. C. A.) 112 Fed. Rep. 410, it was said: "We consider that under said clause it is practically immaterial whether the insolvent debtor consents to and facilitates the obtaining of a preference through legal proceedings or actively opposes the same. In either event, the result is the same to creditors, and the words used in the statute, 'suffered or permitted,' do not involve any intent on the part of the insolvent." See also *In re Moyer*, 93 Fed. Rep. 188; *In re Reichman*, 91 Fed. Rep. 624.

**Same — Splitting Up Cause of Action.** — Splitting up a cause of action with the consent of the president of a corporation, so that the

creditor might obtain a speedier judgment than otherwise, keeping silent as to the service of the summons, and refraining from putting the company into the hands of a receiver until after judgment was obtained, has been held to be *suffering* judgment with preferential intent. *Rossman v. Seaver*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 661, *affirmed* 41 N. Y. App. Div. 603. Compare *French v. Andrews*, 145 N. Y. 441; *Varnum v. Hart*, 119 N. Y. 101.

1. **Knowledge.** — *Bosley v. Davies*, 1 Q. B. D. 84; *Redgate v. Haynes*, 1 Q. B. D. 89; *Gregory v. U. S.*, 17 Blatchf. (U. S.) 325; *Wilson v. State*, 19 Ind. App. 389.

**Negligence.** — But a man may be said to *suffer* a thing to be done if it is done through his negligence. *Bosley v. Davies*, 1 Q. B. D. 87; *Hipkins v. Birmingham, etc., Gas Light Co.*, 6 H. & N. 250.

**Suffer Cattle to Run at Large.** (See also the titles ANIMALS, vol. 2, p. 354; FENCES, vol. 12, p. 1039.) — Where a statute provided that the owner of domestic animals should not *suffer* them to run at large, it was held that the word *suffer* implied a permission on the part of the owner. *Selleck v. Selleck*, 19 Conn. 505; *Collinsville v. Scanland*, 58 Ill. 221; *Ohio, etc., R. Co. v. Jones*, 63 Ill. 472; *Com. v. Fourteen Hogs*, 10 S. & R. (Pa.) 393.

But in *Adams v. Nichols*, 1 Aik. (Vt.) 319, it was said: "The word *suffer*, in the statute, correctly interpreted, as well as in its ordinary acceptation, means to allow, or permit; but whether it implies a negligent as well as a voluntary permission, it is unnecessary at this time to determine, though in my judgment it implies both, and is not to be restricted to a mere voluntary or wilful permission."

**Gaming.** — Under an *English* statute forbidding innkeepers, etc., to *suffer* gaming upon their premises, it has been held that a person *suffers* gaming if he or his servant in charge knows or ought to know that gaming is going on. *Bond v. Evans*, 21 Q. B. D. 249; *Bosley v. Davies*, 1 Q. B. D. 84; *Redgate v. Haynes*, 1 Q. B. D. 89; *Crabtree v. Hole*, 43 J. P. 799. See generally the titles GAMING, vol. 14, p. 664; GAMING HOUSES, vol. 14, p. 692.

2. **Sufficient.** — *Pensacola, etc., R. Co. v. State*, 25 Fla. 334.

**Sufficient in Sense of Prima Facie.** — Where a statute provided that a deed should be taken and considered by the court as *sufficient* evidence of the authority under which a sale was made, it was held that *sufficient* was used in the sense of *prima facie*. *Parker v. Overman*, 18 How. (U. S.) 137; *Turner v. Smith*, 18 Gratt. (Va.) 838.

**Sufficient Distinguished from Conclusive.** — *Pensacola, etc., R. Co. v. State*, 25 Fla. 335.

**Sufficient Ability — Poor and Poor Laws.** — As to what constitutes a *sufficient* ability to support pauper relatives see the title POOR AND POOR LAWS, vol. 22, p. 1016, and see *Newton v.*

**SUFFICIENT EVIDENCE.** (See also the titles EVIDENCE, vol. 11, p. 484; REASONABLE DOUBT, vol. 23, p. 948; SATISFY, SATISFACTION, ETC., vol. 24, p. 1234.) — See note 1.

Feeley, 130 Mass. 12; Hillsborough v. Deering, 4 N. H. 86.

**Sufficient Barrier — Excavation of Public Way.** — In *Myers v. Springfield*, 112 Mass. 491, it was said: "As we understand the instructions given by the court to the jury, the 'sufficient barrier' therein spoken of does not mean one which should be absolutely safe under all contingencies, but one which would be *sufficient* if not thrown down or removed." See also *Doherty v. Waltham*, 4 Gray (Mass.) 596.

**Sufficient Cause — Adjournment.** — A statute provided that "when the pleadings of the parties shall have taken place, the justice shall, on the application of either party, if *sufficient* cause be shown upon oath, adjourn the cause for any time not exceeding thirty days." In construing this provision the court said: "The '*sufficient* cause' here referred to means some good and *sufficient* legal cause or excuse for the delay asked, and not any pretext which in the arbitrary discretion of the party or justice might be deemed *sufficient*." *School Dist. No. 7 v. Thompson*, 5 Minn. 280. See also the title ADJOURNMENTS, 1 ENCYC. OF PL. AND PR. 238.

**Same — Change of Venue.** (See also the title CHANGE OF VENUE, 4 ENCYC. OF PL. AND PR. 373.) — In *Ex p. Banks*, 28 Ala. 40, it was said: "The code declares that 'the application must set forth specifically the reasons why,' etc. 'Good and *sufficient* cause,' '*sufficient* cause,' and 'reasons why' are, to my comprehension, almost synonyms, when found in the statutes above quoted. Each of them supposes a ground, a cause, a reason, why the action of the court is invoked; but neither expression conveys the remotest idea of what the cause or reason shall consist of."

**Same — English Bankruptcy Act of 1863.** — See *In re Jubb*, (1897) 1 Q. B. 641; *Ex p. Oram*, 15 Q. B. D. 399.

**Same — Opening of Probate.** — See the title PROBATE AND LETTERS OF ADMINISTRATION, vol. 23, p. 137.

**Same — Removal of Public Officers.** — See the title PUBLIC OFFICERS, vol. 23, p. 442.

**Same — Revocation of Teacher's Certificate.** — In *Browne v. Gear*, 21 Wash. 147, it was held that slight impropriety of conduct and inconsiderate language of a teacher, not involving moral turpitude, in endeavoring to secure a first-grade certificate, was not such *sufficient* cause as would warrant the revocation of a valid certificate held by her. See generally the title SCHOOLS, vol. 25, p. 8 *et seq.*

**Same — Setting Aside Assessment for Damages.** — In *Chapman v. Groves*, 8 Blackf. (Ind.) 308, it was held that proof that an assessment of damages on a writ of *ad quod damnum* was either too high or too low furnished *sufficient* cause under the statute for setting it aside.

**Good and Sufficient Cause.** — See *Goon*, vol. 14, p. 1074.

**Sufficient to Constitute Cause of Defense.** — In *Angaletos v. Meridian Nat. Bank*, 4 Ind. App. 573, it was said: "The code provides but one cause of demurrer to an answer, viz., that it

does not state facts '*sufficient* to constitute a cause of defense.' Section 346, Rev. Stat. 1881; *Harrison School Tp. v. McGregor*, 96 Ind. 189. It has been repeatedly held that a demurrer must substantially fulfil the statutory requirements, or it will not be error to overrule it. *Lane v. State*, 7 Ind. 426; *Gordon v. Swift*, 39 Ind. 212; *Thomas v. Goodwine*, 88 Ind. 458; *State v. Younts*, 89 Ind. 314; *Hildebrand v. McCrum*, 101 Ind. 61. In the case last cited a demurrer alleging that the answer did 'not state facts *sufficient* to constitute a bar to the plaintiff's complaint' was adjudged insufficient."

**Sufficient Bond.** — A bond given by a contractor employed to erect a county bridge, and, being for three years, not good under Code Ga. 1882, § 671 (Code 1895, § 603), which requires a bond to run for at least seven years, has been held to be a *sufficient* bond and good security under Code Ga. 1882, § 670 (Code 1895, § 602), so as to exempt the county from liability for damages sustained within three years by one injured in consequence of want of repair. *Mappin v. Washington County*, 92 Ga. 130.

**Sufficient Fence.** — See the title FENCES, vol. 12, p. 1038.

**Sufficient Provocation.** — See PROVOCATION, vol. 23, p. 293.

**Sufficient Railing.** — In *Lyman v. Amherst*, 107 Mass. 339, it was held that a railing along a highway was *sufficient*, within Gen. Stat. Mass., c. 44, § 22, if it was suitable for the ordinary exigencies of travel upon such road at such place.

**Sufficient Security.** — Where a lease required that the lessee should give *sufficient* security for the rent, it was held that it made no difference whether the security was personal or real. Either might be *sufficient*, and the fact that the real estate had a previous mortgage upon it was no legal objection to its sufficiency. *Hard v. Brown*, 18 Vt. 97.

**Sufficient Sureties.** (See also the title SURETSHIP, *post*.) — The phrase "*sufficient* sureties" has been construed to mean two or more sureties. *Blake v. Sherman*, 12 Minn. 420; *State v. Fitch*, 30 Minn. 532.

"Three *sufficient* sureties" has been held to mean sureties each of whom was *sufficient* for the whole amount. *Re Assiniboia Election*, 4 Manitoba 328.

Upon the meaning of this phrase in an eminent-domain statute, the court said: "The words '*sufficient* sureties' in the act must be construed to mean such sureties as at the time they are taken make it reasonably certain that the owner of the property taken can collect from them a just compensation." *Wallace v. New Castle Northern R. Co.*, 138 Pa. St. 172.

"*Sufficient* time" in a clause in a contract of sale, providing that the purchaser should "allow *sufficient* time" for the vendor of the article (a harvester) to put it in order, has been held to be equivalent to "reasonable time under the circumstances." *Sandwich Mfg. Co. v. Feary*, 22 Neb. 53.

1. **Sufficient Evidence** is defined as that which

**SUFFICIENTLY.**— See note 1.

**SUFFOCATED.**— See DROWNED, vol. 10, p. 265.

**SUFFRAGE.**— See the title ELECTIONS, vol. 10, p. 552.

**SUGAR.**— See note 2.

**SUGGEST—SUGGESTION.**— In practice, a suggestion is a statement or entry made on a record by way of information to the court; a statement made incidentally, or out of the course of pleading; a statement on record of some fact which has occurred in the progress of a cause, such as the death of a complainant.<sup>3</sup>

**SUGGESTIO FALSI.**— See the title FRAUD AND DECEIT, vol. 14, p. 76.

**SUICIDE.**— See the titles ACCIDENT INSURANCE, vol. 1, p. 284; ATTEMPTS TO COMMIT CRIME, vol. 3, p. 252; BENEFICIARIES (IN INSURANCE), vol. 3, p. 1016; BENEVOLENT OR BENEFICIAL ASSOCIATIONS, vol. 3, pp. 1087, 1088; LIFE INSURANCE, vol. 19, p. 39; MURDER AND MANSLAUGHTER, vol. 21, p. 83.

**SUI JURIS.**— A person who can validly contract and bind himself by a legal obligation, uncontrolled by any other person, is said to be *sui juris*; in other words, one subject to no incapacity such as nonage, coverture, or insanity is said to be *sui juris*.<sup>4</sup>

**SUIT.** (See also ACTION, vol. 1, p. 577; CAUSE, vol. 5, p. 772; PENDING, vol. 22, p. 655; PROCEEDING, vol. 23, p. 155; SUE, *ante*, p. 363; and see the title REMOVAL OF CAUSES, 18 ENCYC. OF PL. AND PR. 150.)—"Suit," in its most comprehensive sense, applies to any proceeding in a court of justice in which the plaintiff pursues, in such court, the remedy which the law affords to him for the redress of an injury or the recovery of a right.<sup>5</sup>

is satisfactory for the purpose. *Richmond, etc., R. Co. v. Trammel*, 53 Fed. Rep. 196. See also *Com. v. Lawless*, 103 Mass. 431.

**Evidence Which Ought to Satisfy.**— A statute provided that a mistake in names of parties might be shown by any *sufficient* evidence. It was held that evidence which ought to satisfy was *sufficient*. *Wood v. Philadelphia*, 27 Pa. St. 503.

**Criminal Case—Charge Sustained.**— See *Jones v. State*, 65 Ga. 510.

**1. Sufficiently Feed and Water.**— A statute provided that a carrier of live stock which should fail to feed and water live stock carried by it *sufficiently* should be liable to a penalty. It was held that the statute was not invalid in that it was too vague, indefinite, and uncertain to enable the court or jury to fix the penalty. *Gulf, etc., R. Co. v. Gray*, (Tex. Civ. App. 1894) 24 S. W. Rep. 837. See also the title CARRIERS OF LIVE STOCK, vol. 5, p. 436.

**Sufficiently Proved.**— The phrase "well and *sufficiently* proved" has been held to mean proved according to law. *Beall v. Lynn*, 6 Har. & J. (Md.) 350.

**Sufficiently and Securely.**— See SECURE, SECURITY, ETC., vol. 25, p. 178.

**2. Sugar-cane Seed.**— See GRAIN, vol. 14, p. 110.

**Sugar Refiners.**— In *Zimmerling v. Harding*, 95 Fed. Rep. 130, it was held that persons engaged in boiling molasses, producing by the process several products, with the result of advancing the quality and value of the molasses which they boiled, were *sugar* refiners.

**3. Suggestion.**— Burr. L. Dict. In this sense are used the terms, *suggestion* of and to *suggest* the death of a party, that his representative may be substituted; to *suggest*

diminution of record; to *suggest* freehold as security for costs, or in stay of execution. And. L. Dict. See also *Garey v. Edwards*, 15 Ala. 106, and see the title BONDS, 3 ENCYC. OF PL. AND PR. 635.

**Suggestion and Captation.**— See CAPTATION, vol. 5, p. 142, and see the title UNDUE INFLUENCE.

**4. Sui Juris—Age.**— In *Schreiner v. New York Cent., etc., R. Co.*, 12 N. Y. App. Div. 555, *sui juris* is defined in an instruction as meaning "of sufficient age and discretion and physical ability to know danger and exercise reasonable care for himself." See also *Muller v. Brooklyn Heights R. Co.*, 18 N. Y. App. Div. 179; *Penny v. Rochester R. Co.*, 7 N. Y. App. Div. 599.

In *Ellick v. Metropolitan St. R. Co.*, 15 N. Y. App. Div. 560, it was said: "But this boy was not an adult. True, he was *sui juris*. But that alone does not suffice to adjudge him guilty of a negligent act. His conduct must be measured by the obligation to exercise due care proportioned to the danger to be encountered."

**Coverture.**— In *Hackett v. Moxley*, 68 Vt. 210, it was said: "At the time of the sale, the defendant's wife was under coverture, and therefore not *sui juris*." 2 Rap. & L. Dict., tit. Sui Juris.

**5. Suit.**— *Claffin v. Robbins*, 1 Flipp. (U. S.) 603, 5 Fed. Cas. No. 2,776; *McPike v. McPike*, 10 Ill. App. 333.

**Suit "Is Undoubtedly Derived"** originally from the *secta* or suit of witnesses which every plaintiff was required to produce or offer to produce when he preferred his claim in court. *Inde producit sectam*—thereupon he brings suit—a form of words still continued." Ul-

shafer v. Stewart, 71 Pa. St. 174, citing 3 Black. Com. 295.

**Chief Justice Marshall's Definitions.**—In *Weston v. Charleston*, 2 Pet. (U. S.) 464, Marshall, C. J., thus defined *suit*: "The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between the parties in a court of justice, the proceeding by which the decision of the court is sought is a *suit*." This definition has been approved in the following cases: *Upshur County v. Rich*, 135 U. S. 474; *Holmes v. Jennison*, 14 Pet. (U. S.) 566; *Kohl v. U. S.*, 91 U. S. 367; *Sewing Mach. Co.'s Case*, 18 Wall. (U. S.) 553; *Kendall v. U. S.*, 12 Pet. (U. S.) 645; *Miller v. Rapp*, 7 Ind. App. 91; *State v. Newell*, 13 Mont. 304; *Webb v. Allen*, 15 Tex. Civ. App. 605.

And in *Cohen v. Virginia*, 6 Wheat. (U. S.) 407, the same eminent authority declared a *suit* to be "a prosecution or pursuit of some claim, demand, or request. In law language, it is the prosecution of some demand in a court of justice." See also *Wayman v. Southard*, 10 Wheat. (U. S.) 30; *Ex p. Munford*, 57 Mo. 605; *Callen v. Ellison*, 13 Ohio St. 453; *Ex p. Towles*, 48 Tex. 433.

**Other Definitions.**—A *suit* is a lawful demand of one's right. 3 Black. Com. 116; *Magill v. Parsons*, 4 Conn. 322; *McPike v. McPike*, 10 Ill. App. 333; *People v. Clarke*, 10 Barb. (N. Y.) 150, affirmed 9 N. Y. 349; *McBride's Appeal*, 72 Pa. St. 483; *In re Grape St.*, 103 Pa. St. 124.

Bracton, lib. 3, c. 1, fol. 98, defines *suit* as follows: "*Actio nihil aliud est quam jus prosequendi in iudicio, quod alicui debetur.*" See also *Magill v. Parsons*, 4 Conn. 322; *McPike v. McPike*, 10 Ill. App. 333; *Peeler v. Norris*, 4 Yerg. (Tenn.) 339.

*Suit* imports a legal demand of a civil right. *Cannon v. Phillips*, 2 Sneed (Tenn.) 190; *Peeler v. Norris*, 4 Yerg. (Tenn.) 339.

*Suit* is a proceeding in a court of justice for the enforcement of a right. *Drake v. Gilmore*, 52 N. Y. 394.

*Suit* means any proceeding in a court for the purpose of obtaining such remedy as the law allows under the circumstances. *Harris v. Phoenix Ins. Co.*, 35 Conn. 312; *State v. Newell*, 13 Mont. 304.

A *suit* is defined to be an action or process for the recovery of a right or claim; a legal application to a court for justice; the prosecution of a right before any tribunal. *Hendrix v. Kellogg*, 32 Ga. 437.

*Suit* extends to any proceeding in a court of justice seeking a remedy which the law affords and to any legal application to a court of justice. *Marion v. Ganby*, 68 Iowa 142.

**Term of Very Broad Signification.**—*Gaines v. Fuentes*, 92 U. S. 24. And see the definitions given above.

**Suit and Case Synonymous.**—See *CASE*, vol. 5, p. 752, and see *Magill v. Parsons*, 4 Conn. 322.

**Suit and Cause Used Synonymously.**—See *CAUSE*, vol. 5, p. 772, and see *Kendall v. U. S.*, 12 Pet. (U. S.) 634.

**Suit and Cause of Action Distinguished.**—See *CAUSE*, vol. 5, p. 774, and see *Fish v. Farwell*, 160 Ill. 236.

**Controversy and Suit Synonymous.**—See *Briggs v. French*, 2 Sumn. (U. S.) 259; *Nichols v. Bingham*, 70 Vt. 320; and see *CONTROVERSY*, vol. 7, p. 459.

But it has been said that *suit* is not so broad as "controversy." See *King v. McLean Asylum*, (C. C. A.) 64 Fed. Rep. 336; *Cohen v. Virginia*, 6 Wheat. (U. S.) 264.

**Not Restricted to Suit for Money.**—The Constitution of *Washington* provided that "the legislature shall direct by law in what manner and in what courts *suits* may be brought against the state." In construing this provision in *Northwestern*, etc., *Hypothek Bank v. State*, 18 Wash. 73, the court said: "The word *suits*, as used in the constitution, \* \* \* is not used in a restricted sense, nor limited to *suits* for the recovery of money only. Nothing in the provision warrants any such interpretation. We think the word was used in a more comprehensive sense."

**Suit in Sense of Remedy.**—*Wisconsin Cent. R. Co. v. Cornell University*, 49 Wis. 164.

**Two Parties Necessary—Claim Against County for Right of Way.**—In *Fuller v. Colfax County*, 4 McCrary (U. S.) 537, it was held that a mere claim against a county for right of way for a public road, pending before the county board, did not constitute a *suit*. The court said: "Two parties to a suit seem to be almost indispensable: one who seeks redress, and the other who commits a wrong or withholds what is justly due another. The parties must stand in such relation to each other that the machinery of the court will operate on them when their powers and their aid are invoked. No such a condition of things existed so long as the claim remained before the county board. But when the appeal was taken, and docketed in the District Court, we then for the first time find a *suit* pending in the court, where none of the elements of either are wanting." See also *Hunter's Will*, 6 Ohio 502.

**Violation of Duty.**—In *Horner v. Coffey*, 25 Miss. 442, it was said: "A *suit* is but a remedy given by law to enable a party who has been injured by the act or violation of duty by another to recover damages equal to the injury or loss sustained. If the duty never existed, it could not be violated; and without both its existence and violation, there was no ground for a *suit*."

**Judiciary Act.**—As to the meaning of the term *suit* in the Judiciary Act, see *Weston v. Charleston*, 2 Pet. (U. S.) 449; *Kendall v. U. S.*, 12 Pet. (U. S.) 524; *Holmes v. Jennison*, 14 Pet. (U. S.) 540; *Ex p. Milligan*, 4 Wall. (U. S.) 112; *Kohl v. U. S.*, 91 U. S. 375; *Gaines v. Fuentes*, 92 U. S. 22; *Mississippi*, etc., *Boom Co. v. Patterson*, 98 U. S. 406; *Ellis v. Davis*, 109 U. S. 485; *Hess v. Reynolds*, 113 U. S. 78; *Pacific R. Removal Cases*, 115 U. S. 18; *Searl v. School Dist. No. 2*, 124 U. S. 197; *Delaware County v. Diebold Safe, etc., Co.*, 133 U. S. 486; *Upshur County v. Rich*, 135 U. S. 474.

**Commence Suit.**—See *COMMENCE*, vol. 6, p. 217.

**Local and Transitory.**—See *LOCAL AND TRANSITORY ACTIONS*, vol. 19, p. 483.

**Illustrations.** — In the note will be found cases holding different proceedings to be or not to be within the term "suit." <sup>1</sup>

**1. Action of Account.**—The term *suit*, it is said, is not a proper designation for an action of account. *Mahar v. O'Hara*, 9 Ill. 429.

**Administrator's Sale.**—In *Ludlow v. Wade*, 5 Ohio 494, it was held that an unexecuted order of court authorizing an administrator to sell the land of his intestate, was not a *suit* depending within the meaning of the saving clause of an act which provided that "nothing in this act contained shall be so construed as to affect in any manner any *suit* or prosecution now depending and undetermined, but the same shall be carried on to final judgment and execution, agreeably to the provisions of any of the said laws."

**An Admiralty Proceeding in personam** against the master or owner of a vessel has been held to be a *suit*. *The L. B. X.*, 88 Fed. Rep. 290.

**Alimony.**—In *McPike v. McPike*, 10 Ill. App. 332, it was held that a petition filed after a decree of divorce to reduce alimony formerly allowed was a *suit* within a statute relating to change of venue.

**Assignee for Benefit of Creditors.**—In *Clafflin v. Robbins*, 1 Flipp. (U. S.) 603, 5 Fed. Cas. No. 2,776, it was held that a proceeding under a statute against an assignee for the benefit of creditors by claimants whose claims had been rejected by the assignee was a *suit* within a removal act.

**Attachment Held to Be Suit.**—See *Comer v. Heidelbach*, 109 Ala. 224.

**Proceedings of Boards, Commissioners, Etc.**—In *Dunn v. Pownall*, 65 Vt. 116, it was said: "The rule adopted by the Supreme Court of the United States in respect of the removal of *suits* from the state courts to the federal courts is that a proceeding not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in its character, and cannot in any just sense be called a *suit*; and that an appeal in such a case to a board of assessors or commissioners having no jurisdictional powers, and authorized to determine only questions of quantity, proportion, and value, is not a *suit*, but that such an appeal becomes a *suit* if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on the one side and the other." Citing *Upshur County v. Rich*, 135 U. S. 467, in which case an appeal under a state law from an assessment of taxation to a "County Court," which, in respect to such proceedings, acts as a board of commissioners, without judicial powers, was held not to be a *suit*. See also *Burlington v. Burlington Traction Co.*, 70 Vt. 491.

In *Delaware County v. Diebold Safe, etc., Co.*, 133 U. S. 473, it was held that where a claim against a county was heard before county commissioners the proceedings were not a *suit*, but that an appeal from the decision of the commissioners, tried and determined by the Circuit Court of the county, was a *suit*. See also *Gurnee v. Brunswick County*, 1 Hughes (U. S.) 270.

In *Calderwood v. Calderwood*, 38 Vt. 171, it was held that a proceeding before commissioners appointed by the probate court to receive, examine, and adjust claims and demands against the estate was a *suit* within the meaning of a statute declaring that interest in the *suit* should not disqualify witnesses.

And in *Massachusetts* it has been held that proceedings before county commissioners upon a petition for the opening of a highway, in which counsel appear, witnesses are examined, and arguments are made as in other courts, are *suits*. *Hyde Park v. Wiggin*, 157 Mass. 94.

**Collection of Taxes.**—In *In re Stutsman County*, 88 Fed. Rep. 339, it was held that a statutory proceeding for the collection of delinquent taxes was a *suit*. See also *Chauncey v. Wass*, 35 Minn. 1; *Wells County v. McHenry*, 7 N. Dak. 246.

**A Caveat** was held to be a *suit* in *Tennessee*, where a statute had legalized it as the method of trying title to lands in certain cases. *Peeler v. Norris*, 4 Yerg. (Tenn.) 331.

**Certiorari.**—A petition for a writ of certiorari has been held to be a *suit*. *Hendrix v. Kellogg*, 32 Ga. 437.

**Contest of Election.**—It has been held that there is a distinction between a mere contest of the result of an election and a *suit* for the office—i. e., a *suit* to try the right to the office. Thus, within a statute conferring jurisdiction upon a court over *suits*, complaints, and pleas, whenever the matter in controversy is of a certain value, it has been held that the mere contest of the result of an election was not a *suit*. *Williamson v. Lane*, 52 Tex. 344. See also *Wright v. Fawcett*, 42 Tex. 203; *Banton v. Wilson*, 4 Tex. 402; *Bradley v. McCrabb*, Dall. (Tex.) 504.

**Defense.**—That the term *suit* is not applicable to a defense, see the strong dissenting opinion of Miller, J., in *New Orleans, etc., R. Co. v. Mississippi*, 102 U. S. 143. See also *Cohen v. Virginia*, 6 Wheat. (U. S.) 409.

**Divorce Proceedings.**—See *Ewing v. Ewing*, 24 Ind. 468.

**Eminent Domain.**—A proceeding to take land for public uses by condemnation is a *suit*. *Kohl v. U. S.*, 91 U. S. 367, wherein the court distinguished this case and that of the assessment of property for the purpose of taxation. See also *Upshur County v. Rich*, 135 U. S. 477, cited *supra*, this note; *Searl v. School Dist. No. 2*, 124 U. S. 197; *Mississippi, etc., Boom Co. v. Patterson*, 98 U. S. 406; *Colorado Midland R. Co. v. Jones*, 29 Fed. Rep. 193; *Mineral Range R. Co. v. Detroit, etc., Copper Co.*, 25 Fed. Rep. 515; *Garrison v. New York*, 21 Wall. (U. S.) 196; *Wisconsin Cent. R. Co. v. Cornell University*, 49 Wis. 164.

In *Marion v. Ganby*, 68 Iowa 142, it was held that a proceeding begun in the Circuit Court, under Code Iowa, § 476, in force in 1885, to condemn land for the extension of a street was a *suit*.

So a proceeding upon a petition to a court to appoint a jury of view to report on the petitioner's claim for damages caused by the alter-



**Suit and Action.** — Although the terms "suit" and "action" are frequently

ation of the grade of a street has been held to be a *suit*. *In re Grape St.*, 103 Pa. St. 124.

**Same — Civil Suit.** — In *Kennebec Water Dist. v. Waterville*, 96 Me. 249, it was said: "A proceeding for assessing the amount of just compensation for private property taken for public uses is not 'a civil *suit*.' It is a special proceeding, provided and authorized by the sovereign power by whose authority the property is taken, to determine a specific fact."

**Estate of Decedents.** — A claim filed in court against the estate of a decedent has been held to be a *suit*. *Reynolds v. Crook*, 95 Ala. 570.

**Execution.** — In *Vanderveer v. Conover*, 16 N. J. L. 496, it was said: "A doubt was flung out whether an execution may not lie, as the statute bars only 'an action or *suit*;' but though an execution be perhaps strictly no action, it is technically a *suit* at law, awardable only on the *suit* of the party. 1 Inst. 291." And that an execution is a *suit*, see *Ex p. Muller*, 129 Ala. 137; *Ulshafer v. St wart*, 71 Pa. St. 174. See also *Vocht v. Kuklence*, 119 Pa. St. 365, and see *ACTION*, vol. 1, p. 578.

So a motion for an execution against the stockholders after a return *nulla bona* of an execution against a corporation has been held to be a *suit*. *Lackawanna Coal, etc., Co. v. Bates*, 56 Fed. Rep. 738.

**Flowing Lands.** — In *Henderson v. Adams*, 5 Cush. (Mass.) 610, it was held that a complaint for flowing lands was not a demand which could be the subject of a *suit* in equity, but was a particular statutory mode of redress.

**A Proceeding to Foreclose a Mortgage** by advertisement was held not to be a *suit* in *Hall v. Bartlett*, 9 Barb. (N. Y.) 300.

**Foreign Attachment — Garnishment.** — A proceeding by a creditor of the insured by foreign attachment against the insurer has been held to be a *suit* within a clause in an insurance policy requiring *suits* to be begun within a year after loss. *Harris v. Phoenix Ins. Co.*, 35 Conn. 310; *Matter of Aycinena*, 1 Sandf. (N. Y.) 690. See also *ACTION*, vol. 1, p. 580, and the title *FIRE INSURANCE*, vol. 13, p. 392.

So garnishment proceedings have been held to be *suits*. *Tunstal v. Worthington, Hempst.* (U. S.) 662; *Moore v. Stainton*, 22 Ala. 831. See also *Witherspoon v. Barber*, 3 Stew. (Ala.) 335; *Thomas v. Hopper*, 5 Ala. 442; *Travis v. Tartt*, 8 Ala. 574.

**Habeas Corpus.** — A proceeding for a writ of habeas corpus has been held to be a *suit*. *Holmes v. Jennison*, 14 Pet. (U. S.) 540; *Ex p. Milligan*, 4 Wall. (U. S.) 113; *Coston v. Coston*, 25 Md. 507; *State v. Newell*, 13 Mont. 304.

**Highway.** — A proceeding for the laying out of a highway has been held to be a *suit*. *Hyde Park v. Wiggan*, 157 Mass. 94; *Dunn v. Pownal*, 65 Vt. 116. Compare *Fuller v. Colfax County*, 4 McCrary (U. S.) 537, set out in the preceding note.

**Judgment.** — Within the saving clause of a repealing act an unsatisfied judgment was held to be a *suit*. *Dobbins v. Peoria First Nat. Bank*, 112 Ill. 566. See also *Ulshafer v. Stewart*, 71 Pa. St. 174.

**A Judgment by Confession** has been held not to be a *suit*. *Dullard v. Phelan*, 83 Iowa 471.

**Mandamus.** — A proceeding for mandamus is a *suit* at law. *Hartman v. Greenhow*, 102 U. S. 672; *American Express Co. v. Michigan*, 177 U. S. 404; *Roodhouse v. Briggs*, 194 Ill. 435.

And, where an Illinois statute required all *suits* against a county to be brought in the Circuit Court, the term was held to be applicable to a proceeding by mandamus. *McBane v. People*, 50 Ill. 503. See also *State v. Jennings*, 56 Wis. 120.

**Petition.** — *Suit* includes a proceeding on a petition. *Re Wallis*, 23 L. R. Ir. 7.

**Probate Proceedings.** — The granting of probate *ex parte* is not a *suit*; yet, if a contest arises, and is carried on between parties litigating with each other, the proceeding then becomes a *suit*. *Gaines v. Fuentes*, 92 U. S. 10; *Ellis v. Davis*, 109 U. S. 485; *Hess v. Reynolds*, 113 U. S. 73; *Upshur County v. Rich*, 135 U. S. 476; *Haven v. Hilliard*, 23 Pick. (Mass.) 19; *Davis v. Livingston*, 6 Ohio 225; *Martin v. McAdams*, 87 Tex. 225. See also *Hunter's Will*, 6 Ohio 502, stated and quoted under *ACTION*, vol. 1, p. 581.

In *Gaines v. Fuentes*, 92 U. S. 24, it was held that a *suit* to annul a will as a muniment of title and to restrain the enforcement of a decree admitting it to probate was in essential particulars a *suit* in equity.

In *Hanson v. Towle*, 19 Kan. 279, it was said: "The word *suit* is general, and includes proceedings to establish claims in the Probate as well as the District Court."

**Prohibition.** — In *Weston v. Charleston*, 2 Pet. (U. S.) 449, the writ of prohibition was held to be a *suit* within the federal Judiciary Act providing for the removal of *suits* from state to federal courts.

**Poor Debtor.** — In *Matter of Jenckes*, 6 R. I. 18, it was held that the application of a poor debtor before a master in chancery to be admitted to the poor debtor's oath was a civil *suit*.

**Redemption of Land from Taxes.** — In *Rawson v. Boughton*, 5 Ohio 328, it was held that an application to redeem land sold for taxes was in the nature of a *suit*.

**Proceedings in Rem** have been held to be a *suit*. *Harris v. Phoenix Ins. Co.*, 35 Conn. 310.

In *Bailey v. Sundberg*, 1 U. S. App. 105, it was said: "A *suit in rem* is, in substance, a suit against all parties in interest in the *res* to the extent of their interests, and all such parties are parties to the *suit*, because they can intervene and make themselves actual parties and bring their rights before the court."

**Scire Facias.** — A proceeding in the nature of scire facias to repeal letters patent has been held to be a *suit*. *People v. Clarke*, 10 Barb. (U. S.) 150, affirmed 9 N. Y. 349. Compare *Heath v. Bates*, 70 Ga. 633, stated and quoted under *ACTION*, vol. 1, p. 582.

**Set-off.** — See *Millet v. Watkins*, 4 Bush (Ky.) 642, stated under *ACTION*, vol. 1, p. 582. See also *Warfield v. Gardner*, 79 Ky. 583.

**Suit Includes Special Proceedings.** — *Wisconsin Cent. R. Co. v. Cornell University*, 49 Wis. 164.

**Statutory Liability of Stockholders.** — An action brought by a receiver of a national bank to enforce the statutory liability of a stock-

used interchangeably, the former is the more comprehensive.<sup>1</sup> Again, "suit" applies to proceedings both at law and in equity, while "action" is properly confined to proceedings at law.<sup>2</sup>

**Criminal Prosecution.**—In its most extended sense the word "suit" includes not only a civil action, but also a criminal prosecution, as an indictment, an information, a conviction by a magistrate.<sup>3</sup>

**SUITABLE.**—Suitable means fitting; capable of suing; appropriate.<sup>4</sup>

holder has been held to be a *suit* at common law. *Stephens v. Bernays*, 41 Fed. Rep. 401; *Stephens v. Bernays*, 119 Mo. 143. See also *Appleton v. Turnbull*, 84 Me. 76.

**Summary Proceedings.**—If before judgment in an attachment suit in a state court the defendant is adjudged a bankrupt by the United States District Court, the attaching court loses all jurisdiction, and the district court may punish the subsequent intermeddling of the attaching creditor with the property attached by a summary proceeding, on its own motion by virtue of its inherent powers. Such a proceeding is not a *suit* in the ordinary meaning of the term, nor within the Bankruptcy Act, 1898, § 23, subdiv. b. *In re Tune*, 115 Fed. Rep. 906.

**Writ of Error.**—A writ of error was held not to be a *suit* within a statute providing that *suits* should not abate under certain circumstances. *Overseers of Poor v. Beedle*, 1 Barb. (N. Y.) 11, quoted under ACTION, vol. 1, p. 578. See also *McDonald v. Savings Bank*, (Supm. Ct. Spec. T.) 2 How. Pr. (N. Y.) 35.

In *Cohen v. Virginia*, 6 Wheat. (U. S.) 409, it was said: "A writ of error, then, is in the nature of a *suit* or action when it is to restore the party who obtains it to the possession of anything which is withheld from him, not when its operation is entirely defensive." See also *King v. McLean Asylum*, (C. C. A.) 64 Fed. Rep. 336.

**Writ of Possession.**—That a writ of possession is a *suit*, see *Ex p. Miller*, 129 Ala. 137.

1. **Suit and Action.**—See ACTION, vol. 1, p. 578, and see *Bains v. The Schooner James and Catherine*, *Baldw.* (U. S.) 544; *Barlow v. Daniels*, 25 W. Va. 516.

2. **Law and Equity.**—*Minnett v. Milwaukee*, etc., R. Co., 3 Dill. (U. S.) 463; *Appleton v. Turnbull*, 84 Me. 76. See also ACTION, vol. 1, p. 578.

But it has been said that *suit* is more properly applied to proceedings in chancery. *McPike v. McPike*, 10 Ill. App. 332; *Miller v. Rapp*, 7 Ind. App. 91; *Hall v. Bartlett*, 9 Barb. (N. Y.) 300.

3. **Suit May Include Criminal Prosecutions.**—*U. S. v. Mann*, 1 Gall. (U. S.) 177; *U. S. v. Moore*, 11 Fed. Rep. 251; *Snowden v. State*, 69 Md. 207; *Com. v. Livermore*, 4 Gray (Mass.) 18; *Com. v. O'Neil*, 6 Gray (Mass.) 343; *Com. v. Thrasher*, 11 Gray (Mass.) 55; *Com. v. Gee*, 6 Cush. (Mass.) 174; *Com. v. Abbott*, 13 Met. (Mass.) 120; *Com. v. Casey*, 12 Allen (Mass.) 217; *Com. v. Moore*, 143 Mass. 136.

Thus, Bacon says that an indictment is defined as an accusation at the *suit* of the king. *Bac. Abr.*, tit. Indictment; *U. S. v. Moore*, 11 Fed. Rep. 251. See also *Ex p. Fagg*, 38 Tex. Crim. 576, quoted under PROSECUTE—PROSECUTION, vol. 21, p. 270.

**Suit and Prosecution Distinguished.**—Lud-

low *v. Wade*, 5 Ohio 508. See also *Appleton v. Turnbull*, 84 Me. 76; *State v. Poll*, 1 Hawks (8 N. Car.) 442, 9 Am. Dec. 655.

**Suits for Penalties and Forfeitures.**—In *U. S. v. Mann*, 1 Gall. (U. S.) 177, it was held that the term "*suits* for penalties and forfeitures" as used in an act of Congress conferring exclusive jurisdiction of all *suits* for penalties and forfeitures upon the District Courts, must be restrained to such penalties and forfeitures as might be sued for in a civil action, as for instance an action for debt or an information for debt.

4. **Suitable.**—*White v. U. S.* 69 Fed. Rep. 93, holding that if an acticle is actually, practically, and commercially fitted for a given purpose, it is *suitable* although it is not commonly used for such purpose.

**Uncertainty.**—An ordinance prohibited "any awning, except the same be upon a *suitable* frame, and attached entirely to the building, which awning shall not when extended be less than six feet from the sidewalk." It was held that the ordinance was invalid and void for uncertainty because the word *suitable* had no definite and determined meaning in the connection in which it was used, and the defendant could not know that he had done any act which was prohibited by the ordinance. *State v. Clarke*, 69 Conn. 371. See generally the title STATUTES, vol. 26, p. 656.

**Suitable and Adequate Distinguished.**—In *St. Anthony Falls Water Power Co. v. Eastman*, 20 Minn. 277, in construing the words "*suitable* precautions" in a contract for the construction of a tunnel, it was said: "The ordinary and general signification of *suitable* is 'likely to suit,' 'capable of suiting,' 'adapted.' This is by no means equivalent to 'adequate.' That which is adequate must be *suitable*, but that which is *suitable* may not be adequate. What precautions are *suitable* for a particular purpose is a matter of judgment, and the best judgment may be erroneous, or the cautionary measures suggested by it may, for other reasons, prove to be ineffectual for the purposes for which they were designed; therefore 'all *suitable* precautions' may not be adequate to prevent the injury."

**Suitable Age.**—In *Temple v. Norris*, 53 Minn. 286, it was held that a person who had attained the age of fourteen years was *prima facie* a person of *suitable* age and discretion, within the meaning of a statute regulating the manner of service of process. See generally the title SERVICE OF PROCESS AND PAPERS, 19 ENCYC. OF PL. AND PR. 567.

**Suitable Bridges.**—In a *Massachusetts* statute providing that a railroad might build "*suitable* bridges," the term was held to mean such bridges as, in the judgment of the board of railroad commissioners, the safety and convenience

**SUITED.** — See note 1.

**SUITOR.** — See note 2.

**SULPHIDE OF ZINC.** — See note 3.

**SULPHURETS.** — See note 4.

**SUM.** — "One of the lexical definitions of the word 'sum,' and the sense in which it is most commonly used, is 'money.' 'A quantity of money or currency; any amount indefinitely; as, a sum of money, a small sum, or a large sum.'" <sup>5</sup>

of the public and the interest of the railroad corporation required. *Worcester v. Railroad Com'rs*, 113 Mass. 161.

**Suitable for Cultivation.** — See the title *STATE AND PUBLIC LANDS*, vol. 26, p. 262.

**Suitable Forms.** — Where a statute prescribed certain forms to be used in prosecutions for offenses defined, but provided that "this shall not be so construed as to prohibit the use of other *suitable* forms," it was held that a form which omitted a material allegation, expressly required by the statute, was not a "*suitable* form," within the saving clause. *Com. v. Certain Intoxicating Liquors*, 105 Mass. 178.

**Suitable Lots.** — Where a grant of mining rights provided that the grantee might subdivide the land into *suitable* lots, it was held that by this phrase lots fitted for mining purposes were intended. *Funk v. Haldeman*, 53 Pa. St. 246.

**Suitable Person.** — Where a statute authorized a justice of the peace to empower any *suitable* person, not being a party to the action, to serve process, it was held that a relative of the plaintiff was not thereby excluded. *Mudrock v. Phillips*, 65 Wis. 626. See generally the title *SERVICE OF PROCESS AND PAPERS*, 19 ENCYC. OF PL. AND PR. 590 *et seq.*

**Same — Assignment for Benefit of Creditors.** — A statute provided that in case of a vacancy in the office of assignee in any assignment for benefit of creditors, the court should appoint to the vacancy the person nominated by a majority of the creditors, provided such nominee was a *suitable* person. In construing this statute the court said: "A *suitable* person, within the meaning of the statute, obviously does not mean the most *suitable*. The court has no authority to reject the nominee of creditors merely because a better person, in the judgment of the presiding judge, can be obtained." *State v. Johnson*, 105 Wis. 182.

**Same — Administration.** (See also the title *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 720.) — A statute authorized the grant of administration to a "*suitable* person." It was held that "*suitable* person" meant proper and competent person, and intended a legal suitability, and not some vague and undefinable quality. *Peters v. Public Administrator*, 1 Bradf. (N. Y.) 207.

**Suitable Place.** — See *Crowell v. Londonderry*, 63 N. H. 42, stated under the title *CEMETERIES*, vol. 5, p. 782.

1. **Suited.** — Under an act of Congress providing that a dramatic composition to be entitled to copyright must be *suited* for public representation, it was held that by the word *suited* was not meant simply that the composition should be adapted to the stage, and capable of being produced upon it, but that to be *suited*

to public representation, it must be morally fit to be represented. *Martinetti v. Maguire*, 1 Abb. (U. S.) 362. See also the title *COPYRIGHT*, vol. 7, pp. 531, 538.

2. **Suitor.** — In *Carney v. State*, 79 Ala. 18, it was held that a witness in an action for seduction should not have been allowed to testify that the accused "acted toward" the prosecutrix "as a *suitor*." The court said: "A *suitor*, in the sense here employed, is 'one who solicits a woman in marriage. We think this was not a subject for expert or opinion evidence.'"

3. **Sulphide of Zinc.** — See *Gabriel v. U. S.*, 114 Fed. Rep. 401.

4. **Sulphurets.** — See *Fox v. Hale, etc.*, *Silver Min. Co.*, 108 Cal. 397.

5. **Sum.** — Webster's Dict., followed in *U. S. v. Van Auken*, 96 U. S. 366, in which case it was held that a statute which makes it an offense to circulate any obligation for a less *sum* than one dollar, intended to circulate as money, is not violated by circulating a note payable not in money, but in goods.

**The Word "Sum" of Itself Imports a Sum of Money.** — This is in fact its general meaning when the term is used with reference to values. *Wetz v. Elliott*, 4 Okla. 623; *Paul v. Grimm*, 165 Pa. St. 143.

A decree declaring that an estate is chargeable for *sums* advanced cannot be construed to include advances in the shape of personal services rendered. *Hodges v. Hodges*, 9 R. I. 32.

**Revenue Act.** — A statute whose main object was taxation authorized the treasurer to collect *sums* to be paid by curators of vacant successions. It was held to be restricted to *sums* that should go into the treasury as revenue, and not to include those which should be deposited there for absent heirs, and which constituted no part of the revenue. *D'Aquin's Succession*, 9 La. Ann. 400; *Leake v. Linton*, 6 La. Ann. 262.

**Sum of Money Claimed to Be Due.** — See *Reg. v. Kerswill*, (1895) 1 Q. B. 1.

**Amount in Controversy.** (See generally the title *AMOUNT IN CONTROVERSY*, 1 ENCYC. OF PL. AND PR. 702.) — A statute provided: "Either party may appeal from a judgment given in a justice's court in a civil action for a *sum* not less than twenty dollars; or for the recovery of personal property of the value of not less than twenty dollars, exclusive of costs," etc. In construing this provision the court said: "The word *sum* in this section evidently refers to the amount of the judgment given by the justice rather than to the amount in controversy between the parties, as is claimed by the respondent." *Stoll v. Hoback*, 2 Oregon 226.

## SUMMARILY RECOVERED — SUMMARY PROCEEDING.

**SUMMARILY RECOVERED.** — See note 1.

**SUMMARY PROCEEDING.** (See also the title SUMMARY PROCEEDINGS, 20 ENCYC. OF PL. AND PR. 1071.) — A summary proceeding is defined as any proceeding by which a controversy is settled, case disposed of, or trial conducted in a prompt, simple manner without the aid of a jury.<sup>2</sup>

In *Kline v. Wood*, 9 S. & R. (Pa.) 301, it was said: "*Sum* in controversy does not signify a precise *sum in numero*, no more than the word 'demand' does; demand and *sum* in controversy are the same."

In *Joule v. Taylor*, 7 Exch. 58, 21 L. J. Exch. 31, *sum* was held to be equivalent to "debt" in a statute limiting the jurisdiction of a court to actions wherein the *sum* or damages to be recovered did not exceed fifty pounds.

**Same — Sum in Dispute.** — In *Petrie v. Machan*, 28 Ont. 504, it was held, where the subject-matter of a claim in a division court was one cause of action exceeding one hundred dollars, and the amount recovered at the trial was under that *sum*, that an appeal lay to a division court under section 148 of the *Ontario Division Courts Acts*, the *sum* in dispute upon the appeal being the amount claimed, and not that amount less the *sum* recovered at the trial.

**Same — Sum in Question.** — In construing a statute which provided that the jurisdiction of justices of the peace should not extend to any cases where the *sum* in question should exceed one hundred dollars, the court said: "The words '*sum* in question,' in this section, cannot mean the amount claimed by the plaintiff, as that construction would deprive the justice of jurisdiction in all that numerous class of cases of mutual accounts where the dealings on either side exceed a hundred dollars, yet where the balance is quite small." *Moore v. Darrow*, 11 Neb. 464.

**Sum Demanded.** — In an action upon a note the *sum* demanded has been held to mean the principal of the note. *Brickell v. Bell*, 84 N. Car. 85. See also *Hedgecock v. Davis*, 64 N. Car. 650; *Dalton v. Webster*, 82 N. Car. 279; *Derr v. Stubbs*, 83 N. Car. 539.

**Sum Periodically Payable**, within the meaning of an *English* stamp act taxing annuities or *sums* periodically payable, has been held to mean the *sum* payable at the periods stated in the instrument. *Clifford v. Inland Revenue Com'rs*, (1896) 2 Q. B. 195.

**1. Summarily Recovered.** — In *Reg. v. Pratt*, L. R. 5 Q. B. 181, *Blackburn, J.*, said: "There

are many cases in which sums of money are recoverable *summarily* before a justice, and it was argued that '*summarily* recoverable' is a term of art, confined to cases in which, after summons and hearing, the justice awards a sum to be paid. But I do not agree that the term '*recoverable summarily*' is to be so confined; no doubt a sum is recovered, more strictly speaking, where the justice has to adjudicate; but there is a secondary sense in which, though the sum has been awarded or determined beforehand, as in the case of a poor rate, or in this very case of costs awarded by Quarter Sessions, the word '*recoverable*' is applied to the mode of enforcing the sum previously determined."

**2. Summary Proceeding.** — *Western, etc., R. Co. v. Atlanta*, 113 Ga. 537.

**Common Law — Abatement of Nuisances.** — In *Western, etc., R. Co. v. Atlanta*, 113 Ga. 537, it was said: "A *summary* proceeding is thus defined by Mr. Bouvier: 'A form of trial in which the ancient, established course of legal proceedings is disregarded, especially in the matter of trial by jury,' etc. And this eminent lexicographer, citing *Blackstone* and *Chancellor Kent*, together with a number of adjudicated cases, says, referring to such a proceeding, that in no case can a party be tried *summarily* unless such proceedings are authorized by legislative authority except, perhaps, in cases of contempt; for the common law is a stranger to such a mode of trial." And it was held that "the power given to abate nuisances in a *summary* manner does not at all mean that they may be abated without notice or hearing, but simply that it may be done without a trial in the ordinary forms prescribed by law for a regular judicial procedure."

**Game Laws.** — In *Schneider v. Marinelli*, 62 N. J. L. 739, it was held that the proceedings of the Court of Common Pleas in appeals under the *New Jersey Game and Fish Act* were not *summary* in the sense that the record of conviction must set forth the evidence on which the conviction rested.

**Summary Proceedings in Sense of Special Actions.** — See *Herkimer v. Keeler*, 109 Iowa 680.

Volume XXVII.

# SUMMARY PROCEEDINGS.

BY THEODOR MEGAARDEN.

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## CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPEDIA OF PLEADING AND PRACTICE*, title *SUMMARY PROCEEDINGS*, vol. 20, p. 1071.

For other matters of *SUBSTANTIVE LAW* related to this subject, see the following titles: *CONSTITUTIONAL LAW*, vol. 6, p. 577; *DUE PROCESS OF LAW*, vol. 10, p. 287.

**I. DEFINITION AND SCOPE OF TITLE** — *Definition* — The term "summary proceedings," as used here, designates those proceedings before judicial tribunals which are of an immediate, speedy, or peremptory nature. Proceedings are said to be summary when they are short and simple in comparison with regular or formal proceedings, from which they usually differ in that they dispense with the aid of a jury.<sup>1</sup>

*Scope of Title.* — No attempt will be made to enumerate the cases in which summary proceedings are allowed,<sup>2</sup> nor to state the procedure governing proceedings of a summary nature,<sup>3</sup> but this title will deal mainly with the question of the constitutionality of these proceedings.

**II. CONSTRUCTION OF STATUTES AUTHORIZING SUMMARY PROCEEDINGS.** — The statutes which authorize summary proceedings, being in derogation of the common law, must be strictly construed.<sup>4</sup>

1. *Definition of Summary Proceedings.* — Sweet's L. Dict.; Bouv. L. Dict.; 4 Bl. Com. 280; 1 Stephen Hist. Cr. Law, c. 4, p. 122.

2. *Cases in Which Available.* — As to the purposes for which summary proceedings may be employed, see the following titles: *ATTORNEY AND CLIENT*, vol. 3, p. 413 *et seq.*; *BOARDS OF HEALTH*, vol. 4, p. 601; *CONSTITUTIONAL LAW*, vol. 6, p. 979 *et seq.*; *CONTEMPT*, vol. 7, p. 66; *DUE PROCESS OF LAW*, vol. 10, p. 308; *LANDLORD AND TENANT*, vol. 18, p. 434 *et seq.*; *SHERIFFS AND CONSTABLES*, vol. 25, p. 689. See also the title *SUMMARY PROCEEDINGS*, 20 *ENCYC. OF PL. AND PR.*, p. 1077, and cross-references.

3. *Principles Governing Summary Proceedings.* — For an exhaustive discussion of the general principles of procedure governing summary proceedings, see the title *SUMMARY PROCEEDINGS*, 20 *ENCYC. OF PL. AND PR.* 1071. And for specific treatments of the different kinds of summary proceedings, see the cross-references there given.

4. *Construction of Statutes.* — 4 Bl. Com. 282, n. (2); *Endl. Interp. Stat.* 344, n. 112; *Blackw. Tax Tit.*, §§ 156, 157; 5 Rob. Pr. 14; *Milor v. Farrelly*, 25 Ark. 353; *Haley v. Petty*, 42 Ark. 392; *French v. Willer*, 126 Ill. 611, 9 Am. St. Rep. 651. And see generally the title *STATUTES*, vol. 26, p. 662.

**III. CONSTITUTIONALITY OF SUMMARY PROCEEDINGS — 1. General Rule.** — Constitutional provisions as to the right to trial by jury do not extend the right, but only secure it in cases in which it was a matter of right before.<sup>1</sup>

**2. Prosecutions for Minor Offenses.** — Summary proceedings are by statute in many of the *United States* and in *England* authorized in prosecutions for minor offenses. In these cases there is no intervention of a jury, but the trial is concluded before the magistrate or justice of the peace.<sup>2</sup> Such proceedings, in the case of minor and petty offenses, are not in violation of constitutional provisions declaring generally that the right to trial by jury shall remain inviolate.<sup>3</sup> Such minor offenses are sometimes excepted by the terms of the constitutional provision securing the right of trial by jury.<sup>4</sup>

**What Are Petty Offenses.** — It is often a matter of great difficulty to decide whether a particular offense is or is not such a petty offense as is not within a constitutional provision securing the right of trial by jury.<sup>5</sup> On the ground that the keeping of a house of ill-fame was an indictable offense by the common law, a person accused of the offense is entitled to a trial by jury.<sup>6</sup> And it has been held that the right of trial by jury is secured to a defendant in a prosecution for receiving stolen property,<sup>7</sup> for the offense of gaming,<sup>8</sup> for petit larceny,<sup>9</sup> and for assault and battery.<sup>10</sup> An infant cannot, without a trial by

**1. Generally as to the Constitutionality of Summary Proceedings — *United States*.** — *Callan v. Wilson*, 127 U. S. 540; *Walker v. Sauvinet*, 92 U. S. 90; *Matter of Dana*, 7 Ben. (U. S.) 1.

*California*. — *Woods v. Varnum*, 85 Cal. 639; *Grim v. Norris* 19 Cal. 141, 79 Am. Dec. 206. *Colorado*. — *McInerney v. Denver*, 17 Colo. 312. *Illinois*. — *Ward v. Farwell*, 97 Ill. 593.

*Indiana*. — *Lake Erie, etc., R. Co. v. Heath*, 9 Ind. 558.

*Kentucky*. — *Singleton v. Madison*, 1 Bibb (Ky.) 342.

*Maryland*. — *Matter of Glenn*, 54 Md. 572. *Missouri*. — *Ex p. Kiburg*, 10 Mo. App. 447.

*New Jersey*. — *Carter v. Camden Dist. Ct.*, 49 N. J. L. 600; *Howe v. Plainfield*, 37 N. J. L. 146.

*New York*. — *Warren v. People*, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 545.

*North Carolina*. — *Keddie v. Moore*, 2 Murph. (6 N. Car.) 41, 5 Am. Dec. 518.

*Ohio*. — *Inwood v. State*, 42 Ohio St. 186.

*Pennsylvania*. — *Com. v. Waldman*, 140 Pa. St. 89; *Haines v. Levin*, 51 Pa. St. 412; *Byers v. Com.*, 42 Pa. St. 89.

*Tennessee*. — *Trigally v. Memphis*, 6 Coldw. (Tenn.) 382.

*Virginia*. — *Ex p. Marx*, 86 Va. 40.

*Wisconsin*. — *Gaston v. Babcock*, 6 Wis. 503.

See also the titles CONSTITUTIONAL LAW, vol. 6, p. 974, note 6, and DUE PROCESS OF LAW, vol. 10, p. 305.

**2. Employment of Summary Prosecutions of Minor Offenses.** — See *Callan v. Wilson*, 127 U. S. 540; *Matter of Glenn*, 54 Md. 600; *People v. Dutcher*, 83 N. Y. 240; *People v. Rawson*, 61 Barb. (N. Y.) 619; *Devine v. People*, 20 Hun (N. Y.) 98.

**3. Constitutionality of Summary Prosecutions of Minor Offenses — *Alabama*.** — *Tims v. State*, 26 Ala. 165.

*Connecticut*. — *Beers v. Beers*, 4 Conn. 535, 10 Am. Dec. 186.

*Georgia*. — *Williams v. Augusta*, 4 Ga. 509.

*Kentucky*. — *Newport v. Holly*, 108 Ky. 621; *Frost v. Com.*, 9 B. Mon. (Ky.) 362.

*Louisiana*. — *State v. Gutierrez*, 15 La. Ann. 190.

*Maryland*. — *Matter of Glenn*, 54 Md. 573.

*New Jersey*. — *McGear v. Woodruff*, 33 N. J. L. 213.

*New York*. — *People v. Justices*, 74 N. Y. 406; *People v. McCarthy*, (Supm. Ct. Gen. T.) 45 How. Pr. (N. Y.) 97; *Duffy v. People*, 6 Hill (N. Y.) 75; *Murphy v. People*, 2 Cow. (N. Y.) 815; *People v. Phillips*, (Supm. Ct.) 1 Park. Crim. (N. Y.) 95.

*South Carolina*. — *State v. Maxcy*, 1 McMull. L. (S. Car.) 501.

*Vermont*. — *In re Dougherty*, 27 Vt. 325.

See also the title CONSTITUTIONAL LAW, vol. 6, p. 978, note 3.

**4.** See *State v. Mead*, 4 Blackf. (Ind.) 309, 30 Am. Dec. 661; *State v. M'Cory*, 2 Blackf. (Ind.) 5.

In *Vermont*, it was held that the legislature might, if it saw fit, provide that minor offenses punishable by fine only, or imprisonment in the county jail for a brief and limited period, having reference to the internal police of the state, be tried upon informal or merely oral complaint. *State v. Conlin*, 27 Vt. 318.

**5. Petty Offenses — What Constitute.** — See 1 Stephen's Hist. Cr. Law, c. 4, p. 122, giving the history and character of the English legislation relating to petty offenses. See also *Byers v. Com.*, 42 Pa. St. 89, and the title PETIT MISDEMEANOR, vol. 22, p. 760, note 2.

**6. Keeping House of Ill-Fame.** — *Slaughter v. People*, 2 Dougl. (Mich.) 334, note; *Warren v. People*, (Supm. Ct. Gen. T.) 3 Park. Crim. (N. Y.) 545; *Miller v. Com.*, 88 Va. 618.

**7. Receiving Stolen Property.** — *U. S. v. Jackson*, 20 D. C. 424, 20 Wash. L. Rep. 297.

**8. Gaming.** — *U. S. v. Herzog*, 20 D. C. 430, 20 Wash. L. Rep. 299. *Contra*, *Fletcher v. State*, 7 Ohio Cir. Dec. 316, the offense being punishable only by a fine.

**9. Petit Larceny.** — *In re Fauldan*, 20 D. C. 433, 20 Wash. L. Rep. 302; *Danner v. State*, 89 Md. 220. See *Stevens v. Anderson*, 145 Ind. 304. *Contra*, *People v. Stein*, 80 N. Y. App. Div. 357.

**10. Assault and Battery.** — *In re Robinson*, 20 D. C. 570.

jury, be committed to a reformatory or similar institution on a charge of burglary<sup>1</sup> or similar offense.<sup>2</sup> But it has been held that the commitment of a child to an industrial school corporation, not as a punishment for crime, but to furnish the child needed guardianship, maintenance, and care, for its benefit and that of society, is not an interference with personal liberty, requiring a trial by jury to justify it.<sup>3</sup> The legislature may provide for summary proceedings without a jury in the case of vagrancy,<sup>4</sup> in proceedings for the conviction and punishment of those who frequent public places for unlawful purposes,<sup>5</sup> in proceedings to compel a person to give security to keep the peace,<sup>6</sup> or in proceedings to impose fines for the breach of military duty.<sup>7</sup> It has been stated as a general rule that the right of trial by jury does not exist where the penalty is merely a fine, imprisonment being authorized only as a means of enforcing payment of the fine.<sup>8</sup> On the ground that the offenses were punishable by a fine only, it has been held that the right to a trial by jury did not exist in a prosecution for the violation of statutes regulating the use of highways,<sup>9</sup> a prosecution for disturbing a religious meeting,<sup>10</sup> and a prosecution for creating and maintaining a nuisance.<sup>11</sup>

**3. Prosecutions for New Statutory Offenses.** — There is some authority to the effect that a statute making a new offense may authorize a prosecution before courts of inferior jurisdiction by summary proceedings without a jury and yet not violate a constitutional requirement that trial by jury shall remain inviolate.<sup>12</sup> But according to what seems to be the better view, a statutory offense, which is created by statute after the adoption of a constitutional provision guaranteeing the right of trial by jury, is or is not triable by jury, according to its status as falling naturally within a class of offenses which were or which were not so tried before the adoption of the constitution.<sup>13</sup>

**4. Proceedings to Punish for Contempt.** — Since contempt was punished summarily at the common law, a summary commitment for contempt is not in violation of the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law,<sup>14</sup> or the constitutional right to trial by jury.<sup>15</sup>

**5. Proceedings to Disbar Attorneys.** — An attorney who is called upon to defend proceedings for his disbarment has never been entitled to a jury trial.<sup>16</sup> Nor is a defendant in a proceeding to revoke an order of a court admitting an attorney to practice law, obtained by fraud and deceit, entitled to a jury trial.<sup>17</sup>

**6. Prosecutions for Violations of Municipal Ordinances — In General.** — A common use of summary proceedings is in the enforcement of city ordinances.<sup>18</sup> Both in *England* and the *United States*, statutes have been enacted conferring

1. *Offenses by Infants.* — *Ex p. Becknell*, 119 Cal. 496.

2. *Mansfield's Case*, 22 Pa. Super. Ct. 224.

3. *Wisconsin Industrial School v. Clark County*, 103 Wis. 651.

4. *Vagrancy.* — *In re Fife*, 110 Cal. 8; *Ex p. Wong You Ting*, 106 Cal. 296; *Matter of Glenn*, 54 Md. 572; *People v. Forbes*, (Supm. Ct.) 4 Park. Crim. (N. Y.) 611; *State v. Maxcy*, 1 McMull. L. (S. Car.) 501.

5. *Byers v. Com.*, 42 Pa. St. 89.

6. *Breach of the Peace.* — *State v. Kennie*, 24 Mont. 45.

7. *Breach of Military Duty.* — *Moore v. Houston*, 3 S. & R. (Pa.) 169.

8. *Offenses Punishable by Fine.* — *Inwood v. State*, 42 Ohio St. 186; *Ward v. State*, 5 Ohio Dec. 230, 5 Ohio N. P. 81; *Fletcher v. State*, 7 Ohio Cir. Dec. 316; *Terry v. State*, 24 Ohio Cir. Ct. 111.

9. *Ward v. State*, 5 Ohio Dec. 230, 5 Ohio N. P. 81.

10. *Inwood v. State*, 42 Ohio St. 186.

11. *Terry v. State*, 24 Ohio Cir. Ct. 111.

12. *Statutory Offenses.* — *Tims v. State*, 26 Ala. 165; *Murphy v. People*, 2 Cow. (N. Y.) 815; *Van Swartow v. Com.*, 24 Pa. St. 131; *Rhimes v. Clark*, 51 Pa. St. 96. See also *Woods v. Varnum*, 85 Cal. 639.

13. *McInerney v. Denver*, 17 Colo. 302.

14. *Contempt.* — *Eilenbecker v. Plymouth County*, 134 U. S. 31; *Matter of McAdams*, 54 Hun (N. Y.) 637, 7 N. Y. Supp. 454.

15. *State v. Becht*, 23 Minn. 411. See the title *CONTEMPT*, vol. 7, p. 25.

16. *Disbarment of Attorneys.* — *Ex p. Wall*, 107 U. S. 273; *In re Shepard*, 109 Mich. 631; *Davis v. State*, 92 Tenn. 634.

17. *Dean v. Stone*, 2 Okla. 13.

18. *Employment of Summary Proceedings in Prosecuting Violations of Ordinances.* — See *State v. White*, 76 N. Car. 15; *State v. Threadgill*, 76 N. Car. 17.

the power upon municipal tribunals sitting within the bounds of the municipal corporation,<sup>1</sup> of enforcing the ordinances or by-laws of the corporation in summary proceedings.<sup>2</sup>

**Constitutionality of the Proceedings.** — These proceedings for the punishment of offenders against the ordinances, which are made in virtue of the implied or incidental power of the corporation, or in the exercise of its legitimate police authority, for the preservation of peace, good order, safety, and health, and which relate to minor acts and matters, are not usually or properly regarded as criminal, and hence are not in contravention of the constitutional guaranty of trial by jury in criminal cases.<sup>3</sup> And, moreover, since the constitutional provisions preserving the right of trial by jury do not extend the right, but merely secure it in the cases in which it was a matter of right before, these proceedings are not interdicted thereby, for they were in general use at the time of the adoption of the different constitutions.<sup>4</sup>

**Same — When Act Violates a State Law.** — It has been held sometimes that under constitutions summary proceedings of this kind can be employed only in the trial of such offenses as are "not embraced in the public criminal statutes of the state," and that where the act charged constitutes an offense against the criminal law of the state, a person charged with such act cannot be tried by a municipal court without a jury, even though such act may be a violation of an ordinance of the municipality.<sup>5</sup> This view seems based on the idea that otherwise a person might be liable to be tried and punished twice for the same

1. *Norristown, etc., Turnpike Co. v. Burket*, 26 Ind. 53. See the title **MUNICIPAL COURTS**, vol. 21, p. 1.

2. **Enforcing Municipal Ordinances.** — *Williams v. Augusta*, 4 Ga. 509; *Matter of Glenn*, 54 Md. 572; *Shafer v. Mumma*, 17 Md. 331, 79 Am. Dec. 656; *State v. Lee*, 29 Minn. 453; *Ex p. Hollwedell*, 74 Mo. 400; *Byers v. Com.*, 42 Pa. St. 89; *Thomas v. Com.*, 22 Gratt. (Va.) 912.

"A careful examination of authorities has led us to the conclusion that, both in this country and in England, the transgression of municipal regulations enacted under the police power for the purpose of preserving the health, peace, and good order, and otherwise promoting the general welfare within cities and towns had, for more than a century prior to the adoption of our constitution, been generally prosecuted without a jury." *Helm, J.*, in *McInerney v. Denver*, 17 Colo. 302.

3. **Constitutionality of Summary Prosecutions of Violations of Ordinances** — *United States*. — *Natal v. Louisiana*, 139 U. S. 621.

*Georgia*. — *Floyd v. Eatonton*, 14 Ga. 354, 58 Am. Dec. 559; *Williams v. Augusta*, 4 Ga. 509.

*Kansas*. — *State v. Topeka*, 36 Kan. 76, 59 Am. Rep. 529. See *Emporia v. Volmer*, 12 Kan. 622.

*Kentucky*. — *Williamson v. Com.*, 4 B. Mon. (Ky.) 146.

*Louisiana*. — *State v. Fisher*, 50 La. Ann. 47, citing 24 AM. AND ENG. ENCYC. OF LAW (1st ed.) 504; *Monroe v. Meuer*, 35 La. Ann. 1192; *State v. Gutierrez*, 15 La. Ann. 190.

*Missouri*. — *Delaney v. Police Ct.*, 167 Mo. 667; *Ex p. Hollwedell*, 74 Mo. 395.

*Nebraska*. — *Liberman v. State*, 26 Neb. 464, 18 Am. St. Rep. 791.

*Oregon*. — *Wong v. Astoria*, 13 Oregon 538.

*South Carolina*. — *Ex p. Schmidt*, 24 S. Car.

263.

*Tennessee*. — *Trigally v. Memphis*, 6 Coldw. (Tenn.) 382.

See *Mankato v. Arnold*, 36 Minn. 62; *Fire Dept. v. Harrison*, 2 Hilt. (N. Y.) 455.

4. *Colorado*. — *McInerney v. Denver*, 17 Colo. 302; *Greeley v. Hamman*, 12 Colo. 94.

*Florida*. — *Hunt v. Jacksonville*, 34 Fla. 504, 43 Am. St. Rep. 214, citing 24 AM. AND ENG. ENCYC. OF LAW (1st ed.) 504 *et seq.*

*Georgia*. — *Hill v. Dalton*, 72 Ga. 319; *Floyd v. Eatonton*, 14 Ga. 356, 58 Am. Dec. 559; *Williams v. Augusta*, 4 Ga. 509.

*Kansas*. — *In re Kinsel*, 64 Kan. 1, citing 24 AM. AND ENG. ENCYC. OF LAW (1st ed.) 504.

*Louisiana*. — *Board of Police v. Giron*, 46 La. Ann. 1364.

*Maryland*. — *Matter of Glenn*, 54 Md. 572.

*Minnesota*. — *Mankato v. Arnold*, 36 Minn. 62.

*Missouri*. — *Ex p. Kiburg*, 10 Mo. App. 447.

*Nevada*. — *State v. Ruhe*, 24 Nev. 251.

*New Jersey*. — *Unger v. Fanwood Tp.*, (N. J. 1903) 55 Atl. Rep. 42; *Howe v. Plainfield*, 37 N. J. L. 145; *McGear v. Woodruff*, 33 N. J. L. 213; *Johnson v. Barclay*, 16 N. J. L. 1.

*New York*. — *People v. Justices*, 74 N. Y. 406, 18 Alb. L. J. 254.

*Ohio*. — *Inwood v. State*, 42 Ohio St. 186.

*Oregon*. — *Cranor v. Albany*, (Oregon 1903) 71 Pac. Rep. 1042.

*South Carolina*. — *Anderson v. O'Donnell*, 29 S. Car. 355, 13 Am. St. Rep. 728.

5. **View that Right to Jury Exists When Act Violates State Law.** — *Lewis v. State*, 21 Ark. 211; *Durr v. Howard*, 6 Ark. 461; *Rector v. State*, 6 Ark. 187; *Taylor v. Reynolds*, 92 Cal. 573; *Matter of Sic*, 73 Cal. 142; *Matter of Jahn*, 55 Kan. 694; *In re Rolfs*, 30 Kan. 758; *Slaughter v. People*, note to *Welch v. Stowell*, 2 Dougl. (Mich.) 335; *Barter v. Com.*, 3 P. & W. (Pa.) 253; *Burns v. La Grange*, 17 Tex. 415.



offense. But this reason can have no force in those states where the same act may constitute an offense against both the state and the municipal corporation, and both offenses be punished without violating any constitutional principle. In the courts where this view is held it has been denied that the test is whether the act prohibited by ordinance is embraced in and made indictable by the criminal code of the state, and the true criterion declared to be rather whether it may not be an act not only against the peace and dignity of the state, but also subversive of, or dangerous to, the peace, good order, safety, or health of the municipality.<sup>1</sup>

**7. Statutory Civil Proceedings — a. IN GENERAL.** — On the ground that the constitutional provision giving a right to trial by jury merely secures the right as it had previously been enjoyed, it has frequently been held that the provision does not introduce the right into special summary proceedings unknown to the common law, which are authorized by statutes that make no provision for trial by jury.<sup>2</sup> Thus it has been held that the right of trial by jury may be denied in proceedings to compel a person to answer touching his possession

In *Ex p. Slattery*, 3 Ark. 484, it was held that a person might be proceeded against before a corporation court for using obscene language on the street, because such an offense was not declared criminal by any statute of the state.

In *Slaughter v. People*, 2 Dougl. (Mich.) 334, note, where the constitution provided that "no person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury," it was held that an ordinance prescribing the punishment for keeping a house of ill-fame within the limits of the city, and providing for conviction of offenders by the mayor's court without presentment of a grand jury, was valid.

Under a constitution declaring "that no free-man shall be put to answer any criminal charge but by indictment," etc., and "that no freeman shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court, as heretofore used," an act of the legislature which sought to confer upon the courts of a corporate town summary jurisdiction to try a person for acts which are indictable or are criminal offenses, in that it gave to an officer of the town the power of trying assault and battery or other crimes, was held unconstitutional because it violated both provisions of the constitution. *State v. Moss*, 2 Jones L. (47 N. Car.) 66.

In *Burns v. La Grange*, 17 Tex. 415, under a constitutional provision that "in all cases where justices of the peace or other judicial officers of inferior tribunals shall have jurisdiction in the trial of causes where the penalty for the violation of a law is fine and imprisonment (except in cases of contempt), the accused shall have the right of trial by jury," it was held that the mayor's court could not be given the power to try a person for assault summarily and without a jury.

The extent of the right to prosecute violations of municipal ordinances in summary proceedings which will be permitted by the authorities holding this view, has been stated as follows: "Violations of municipal by-laws proper, such as fall within the description of municipal police regulations — as, for example, those concerning markets, streets, water works, city

officers, etc., and which relate to acts and omissions that are not embraced in the general criminal legislation of the state, the legislature may authorize to be prosecuted in a summary manner, by and in the name of the corporation, and need not provide for a trial by jury. Such acts and omissions are not crimes or misdemeanors to which the constitutional right of trial by jury extends." 1 Dill. Mun. Corp. (4th ed.), § 433. See *Callan v. Wilson*, 127 U. S. 540.

**1. View Upholding Constitutionality of Summary Proceeding Though Act Violates State Law — United States.** — *Cross v. North Carolina*, 132 U. S. 131.

*Alabama.* — *Mobile v. Allaire*, 14 Ala. 400.

*Colorado.* — *McInerney v. Denver*, 17 Colo. 302; *Hughes v. People*, 8 Colo. 536.

*Florida.* — *Hunt v. Jacksonville*, 34 Fla. 504, 43 Am. St. Rep. 214.

*Illinois.* — *Robbins v. People*, 95 Ill. 175; *Wragg v. Penn Tp.*, 94 Ill. 11, 34 Am. Rep. 199.

*Indiana.* — *Waldo v. Wallace*, 12 Ind. 569.

*Kentucky.* — *Williamson v. Com.*, 4 B. Mon. (Ky.) 146.

*Louisiana.* — *Amite City v. Holly*, 50 La. Ann. 627.

*Maryland.* — *Shafer v. Mumma*, 17 Md. 331, 79 Am. Dec. 656.

*Minnesota.* — *State v. Lee*, 29 Minn. 453.

*Mississippi.* — *Johnson v. State*, 59 Miss. 543.

*Missouri.* — *St. Louis v. Cafferata*, 24 Mo. 96.

*Nebraska.* — *Brownville v. Cook*, 4 Neb. 101.

*New Jersey.* — *Riley v. Trenton*, 51 N. J. L. 498; *Howe v. Plainfield*, 37 N. J. L. 145.

*New York.* — *Polinsky v. People*, 11 Hun (N. Y.) 390; *Rogers v. Jones*, 1 Wend. (N. Y.) 238, 19 Am. Dec. 493.

*Oregon.* — *State v. Sly*, 4 Oregon 277.

*South Carolina.* — *Anderson v. O'Donnell*, 29 S. Car. 355, 13 Am. St. Rep. 728.

*Tennessee.* — *Greenwood v. State*, 6 Baxt. (Tenn.) 567, 32 Am. Rep. 539.

*Wisconsin.* — *Ogden v. Madison*, 111 Wis. 413.

**2. Constitutionality of Summary Proceedings in Civil Cases.** — See the title CONSTITUTIONAL LAW, vol. 6, p. 977 *et seq.*

of assets belonging to a decedent's estate,<sup>1</sup> and in proceedings for the dissolution of corporations.<sup>2</sup>

*b. PROCEEDINGS UPON BONDS.* — It is within the power of the legislature to prescribe summary proceedings for the enforcement of bonds of various kinds.<sup>3</sup> Thus, proceeding summarily upon an official bond, in pursuance of a statute which was in existence at the time of the execution of the bond, is not an infringement of the right to trial by jury.<sup>4</sup> It has similarly been held, where a statute authorized summary judgment upon an appeal bond operating as a supersedeas, and such proceedings were had in pursuance of a rule of court, that a surety had no right to trial by jury, for, by becoming a surety, he submitted himself to be governed by the fixed rules which regulate the practice of the court.<sup>5</sup>

*c. PROCEEDINGS FOR COLLECTION OF NEGOTIABLE PAPER.* — The constitutionality of summary proceedings for the collection of negotiable paper is sustainable upon the theory that the obligor, in entering into the contract, consents to the form of the remedy. Thus, a person may waive his right to trial by jury, by giving a note payable to a bank the charter of which authorizes collection by summary process.<sup>6</sup> Legislation authorizing these proceedings is intended only to secure a prompt and speedy remedy, and not to deprive the defendant of any defense founded upon real and substantial merit which he would have in the regular plenary action.<sup>7</sup>

*d. ACTION OF BOOK ACCOUNT.* — In *Vermont* it has been held that in view of the immemorial practice of proceeding to trial without a jury in actions of book account, a party, in an action of that kind, is not entitled to a trial by jury on the merits of the case by virtue of the constitutional provision to the effect that "when any issue in fact proper for the cognizance of a jury is joined in a court of law, the parties have a right to trial by jury, which ought to be held sacred."<sup>8</sup>

*e. PROCEEDINGS AGAINST PUBLIC OFFICERS — Proceedings for Removal.* — Proceedings for the removal of public officers are usually of a summary character.<sup>9</sup> The action of a court in removing one of its officers has been declared not to be for the purpose of punishment, but the proceeding is, in its nature, civil, and for the purpose of preserving the courts of justice from the official

1. *Proceedings to Recover Assets Belonging to Decedents' Estates.* — *Seavey v. Seavey*, 30 Ill. App. 625; *Mahoney v. People*, 98 Ill. App. 241.

2. *Proceedings for the Dissolution of Corporations.* — *Ward v. Farwell*, 97 Ill. 593.

3. *Proceedings upon Bonds.* — See the title *BONDS*, vol. 4, p. 618.

4. *Official Bonds — Alabama.* — *Ware v. Greene*, 37 Ala. 494; *Collier v. Powell*, 23 Ala. 579; *Smith v. Leavitts*, 10 Ala. 92; *Hodges v. Laird*, 10 Ala. 678; *Gary v. McCown*, 6 Ala. 370; *Orr v. Duvall*, 1 Ala. 262; *Nabors v. Governor*, 3 Stew. & P. (Ala.) 15.

*Arkansas.* — *Milor v. Farrelly*, 25 Ark. 353.

*Kentucky.* — *Thompson v. Healy*, 4 Met. (Ky.) 257.

*Tennessee.* — *Garner v. Carrol*, 7 Yerg. (Tenn.) 365; *Smith v. Wells*, 5 Yerg. (Tenn.) 202; *Cook v. Smith*, 1 Yerg. (Tenn.) 148; *McCrea v. Galey*, 1 Overt. (Tenn.) 251.

*Texas.* — *De la Garza v. Booth*, 28 Tex. 478, 91 Am. Dec. 328.

See also the title *SHERIFFS AND CONSTABLES*, vol. 25, p. 729.

It has been held that a statute authorizing judgment to be entered on motion, for a breach of an agreement thereafter to be made to pay

money for the building of a penitentiary, was not unconstitutional, and that, in such case, a judgment without a jury might be rendered, if the defendant should not appear. *Ewing v. Directors of Penitentiary*, Hard. (Ky.) 6.

5. *Smith v. Gaines*, 93 U. S. 341; *Hiriart v. Ballou*, 9 Pet. (U. S.) 156. See *Murry v. Askew*, 6 J. J. Marsh. (Ky.) 27.

6. *Proceedings to Collect Negotiable Paper.* — *Columbia Bank v. Okely*, 4 Wheat. (U. S.) 235; *Newbern Bank v. Taylor*, 2 Murph. (6 N. Car.) 266.

7. *Columbia Bank v. Sweeney*, 2 Pet. (U. S.) 671.

Upon the true interpretation of the provisions in the Duty Collection Act of 1799, c. 123, § 65, relative to granting judgment on motion in suits on bonds to the United States for duties, Congress intended no more than to interdict the party from an imparlance, or any other means for mere delay, and not to bar the party from any good defense against the suit founded upon real or substantial merits. *Ex p. Davenport*, 6 Pet. (U. S.) 661.

8. *Action of Book Account.* — *Hall v. Armstrong*, 65 Vt. 421.

9. *Removal of Public Officers.* — See *Woods v. Varnum*, 85 Cal. 639.

administration of unfit persons, so that the constitutional provisions which declare that no person shall be held to answer for capital or otherwise infamous crimes, unless on a presentment or indictment by a grand jury, and that the trial for all crimes, except for cases of impeachment, shall be by jury, have no relation to such a proceeding, although the offense which prompts the removal is indictable.<sup>1</sup> It has also been said that the acceptance of an office under a law which denies the officer the right to have the question of his removal tried by a jury, constitutes a waiver of the right, if any such right otherwise exists.<sup>2</sup>

**Proceedings to Enforce Performance of Duties.** — The courts have frequently upheld the validity of statutes prescribing summary proceedings to amerce sheriffs and constables for failure or refusal to execute and return process,<sup>3</sup> and similar proceedings against sheriffs who fail to pay over money,<sup>4</sup> and against tax collectors for a failure to collect and pay over taxes.<sup>5</sup>

**8. Effect of Giving Ultimate Trial by Jury.** — The statutes authorizing summary proceedings sometimes provide for a trial by a committing magistrate without the intervention of a jury, but give the accused a right of appeal and to a trial by a jury in the appellate court. It has been held that a statute which, although it authorizes a summary conviction in the first instance, gives a trial by jury in the appellate court, subject only to the requirement of giving bail for his appearance there, or, in default of bail, being committed to jail, is not unconstitutional as impairing the right of trial by jury.<sup>6</sup> If one does not choose to appeal, or to prosecute his appeal after it is taken, he waives his right to a jury trial.<sup>7</sup> The analogous practice in civil cases has been declared permissible, though constitutional provisions secure the right of trial by jury.<sup>8</sup> It has been held recently, however, by the *United States* Supreme Court, that in the case of so grave a crime as conspiracy, the accused is entitled to a jury in the court of first instance.<sup>9</sup>

**Restrictions on Appeal** — But the right to appeal must not be clogged with

1. *Ex p. Wall*, 107 U. S. 265; *Fields v. State*, 1 Mart. & Y. (Tenn.) 168.

2. *Caldwell v. Wilson*, 121 N. Car. 425.

3. **Proceedings to Compel Performance of Duties by Public Officers.** — See the title *SHERIFFS AND CONSTABLES*, vol. 25, p. 689.

4. *Wells v. Caldwell*, 1 A. K. Marsh. (Ky.) 441. See also *Woods v. Varnum*, 85 Cal. 639; *Matter of Marks*, 45 Cal. 218. See the title *SHERIFFS AND CONSTABLES*, vol. 25, p. 717.

5. *Boring v. Williams*, 17 Ala. 510; *School Dist. v. Pitts*, 184 Pa. St. 156.

6. **Jury Trial on Appeal** — *Connecticut*. — *State v. Brennan's Liquors*, 25 Conn. 278; *Beers v. Beers*, 4 Conn. 535, 10 Am. Dec. 186.

*Iowa*. — *Zelle v. McHenry*, 51 Iowa 572; *State v. Beneke*, 9 Iowa 203; *State v. Bryan*, 4 Iowa 349.

*Kansas*. — *Emporia v. Volmer*, 12 Kan. 622.

*Kentucky*. — *Pollard v. Holeman*, 4 Bibb (Ky.) 416. See *Head v. Hughes*, 1 A. K. Marsh. (Ky.) 372, 10 Am. Dec. 742. But see *Singleton v. Madison*, 1 Bibb (Ky.) 342.

*Maryland*. — *Steuart v. Baltimore*, 7 Md. 500.

*Massachusetts*. — *Jones v. Robbins*, 8 Gray (Mass.) 329.

*Minnesota*. — *St. Peter v. Bauer*, 19 Minn. 327; *State v. Everett*, 14 Minn. 439.

*Missouri*. — *State v. Allen*, 45 Mo. App. 551; *Marshall v. Standard*, 24 Mo. App. 193.

*North Carolina*. — *Wilson v. Simonton*, 1 Hawks (8 N. Car.) 482.

*Ohio*. — *Lamb v. Lane*, 4 Ohio St. 167.

*Oregon*. — *Wong v. Astoria*, 13 Oregon 538.

*Pennsylvania*. — *Biddle v. Com.*, 13 S. & R. (Pa.) 410; *Emerick v. Harris*, 1 Binn. (Pa.) 416.

*Rhode Island*. — *Littlefield v. Peckham*, 1 R. I. 500.

*Tennessee*. — *Morford v. Barnes*, 8 Yerg. (Tenn.) 444.

*West Virginia*. — *Moundville v. Fountain*, 27 W. Va. 182.

See *Ogden v. Madison*, 111 Wis. 413. But see *Wolverton v. Com.*, 75 Va. 909.

In *Maine*, under a statute authorizing a trial without jury in an inferior court, and a constitution guaranteeing a jury trial, it was held that although the statute was silent on the question of appeal, the right of appeal proceeded from the constitutional right to a jury trial as a necessary consequence, in order to give effect to the provision of the constitution. *Johnson's Case*, 1 Me. 230.

7. *Com. v. Whitney*, 108 Mass. 5; *State v. Larger*, 45 Mo. 510; *People v. Goodwin*, 5 Wend. (N. Y.) 251.

8. **In Civil Cases.** — *Beers v. Beers*, 4 Conn. 535, 10 Am. Dec. 186; *Flint River Steamboat Co. v. Foster*, 5 Ga. 194, 48 Am. Dec. 248; *Stuart v. Baltimore*, 7 Md. 500; *Keddie v. Moore*, 2 Murph. (6 N. Car.) 41, 5 Am. Dec. 518; *Wilson v. Simonton*, 1 Hawks (8 N. Car.) 482; *Norton v. McLeary*, 8 Ohio St. 205; *Haines v. Levin*, 51 Pa. St. 412; *Emerick v. Harris*, 1 Binn. (Pa.) 416; *Gaston v. Babcock*, 6 Wis. 503.

9. **Conspiracy.** — *Callan v. Wilson*, 127 U. S.

such conditions and restrictions as would, in effect, amount to a denial of trial by jury. It has been said that a statute which renders it difficult for the accused to obtain the privilege of a trial by jury, beyond what public necessity requires, as where the statute requires conditions for the purpose of prosecuting a trial by jury, impairs individual rights and is inconsistent with the constitutional guaranty.<sup>1</sup>

**Reasonableness of Restrictions.** — It has been held that the constitutional right to trial by a jury is not impaired because the right to an appeal is conditional on the appellant making oath "that he verily believes that injustice has been done him, and that the appeal is not made for the purpose of delay,"<sup>2</sup> or on his giving bonds for costs.<sup>3</sup> On the other hand it has been held that the constitutional right is violated when the appellant is required to give a bond with sureties,<sup>4</sup> to enter into a recognizance conditioned for his personal appearance before the appellate court "and for the payment of such fine and costs as shall be imposed on him if the case shall be determined against the appellant,"<sup>5</sup> or to give a bond for a large amount that he will not repeat the offense with which he is charged.<sup>6</sup> And a statute taking away from a person charged with assault and battery the right to give bail for his appearance at the next criminal court having jurisdiction, was held an infringement of the right to trial by jury.<sup>7</sup>

540. This case came up from the *District of Columbia*. The court, while conceding that there was a class of petty or minor offenses which might well be tried in the court of first instance without a jury, declared its opinion that the offense with which the accused was charged did not belong to that class, being by no means a petty or trivial offense, but one of a grave character affecting the public at large. The court said that "To accord to the accused a right to be tried by a jury in an appellate court after he has been once fully tried otherwise than by a jury in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the [United States] constitution." See also, as in line with this decision, *Matter of Fry*, 3 Mackey (D. C.) 135; *Matter of Dana*, 7 Ben. (U. S.) 1; *Danner v. State*, 89 Md. 220.

**1. Effect of Imposing Unreasonable Restrictions.**

— *McInerney v. Denver*, 17 Colo. 309; *Matter of Jahn*, 55 Kan. 694; *Saco v. Woodsum*, 39 Me. 258; *State v. Gurney*, 37 Me. 156, 58 Am. Dec. 782; *Saco v. Wentworth*, 37 Me. 165, 58 Am. Dec. 786; *State v. Everett*, 14 Minn. 439. See *Greene v. Briggs*, 1 Curt. (U. S.) 311; *Lord v. State*, 37 Me. 177; *In re Liquors*, 15 R. I. 608.

**2. Reasonable Restrictions.** — *Biddle v. Com.*, 13 S. & R. (Pa.) 405.

**3. State v. Brennan's Liquors**, 25 Conn. 278.

**4. Unreasonable Restrictions.** — *Reeves v. State*, 96 Ala. 33; *State v. Everett*, 14 Minn. 439.

**5. Matter of Jahn**, 55 Kan. 694.

**6. Saco v. Wentworth**, 37 Me. 165, 58 Am. Dec. 786.

**7. People v. Carroll**, (Supm. Ct.) 3 Park. Crim. (N. Y.) 22.

# SUMMARY SETTLEMENT OF ESTATES.

BY JOSEPH WALKER MAGRATH.

- I. INTRODUCTORY; OUTLINE AND PURPOSE OF STATUTES, 381.
- II. PROPERTY TO WHICH STATUTES APPLICABLE, 382.
- III. RIGHTS AS BETWEEN WIDOW AND CHILDREN, 382.
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- V. PRIORITY OF CERTAIN CLAIMS, 383.
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## CROSS-REFERENCES.

*For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: ALLOWANCES, vol. 2, p. 156; DEBTS OF DECEDENTS, vol. 8, p. 1003; EXECUTORS AND ADMINISTRATORS, vol. 11, p. 720; HOMESTEAD, vol. 15, p. 516.*

**I. INTRODUCTORY; OUTLINE AND PURPOSE OF STATUTES.**— In many of the states there have been enacted statutes providing that the entire estate of a decedent shall be vested in his widow or minor children in case it does not exceed in value a certain specified amount, or, in some states, in case it does not exceed the limit fixed by law as the allowance for the support of the widow and orphans or the exemptions allowed in their favor.<sup>1</sup> Rights more or less analogous are secured to the widow and children by statutes of other types.<sup>2</sup>

1. **Statutes** — *Alabama*. — Civ. Code Ala., §§ 2071, 2098, 2100.

*Arizona*. — Rev. Stat. Ariz., § 1730.

*Arkansas*. — Sanf. & H. Dig. Stat. Ark., §§ 3, 4, 79.

*California*. — Code Civ. Pro. Cal., § 1469.

*Colorado*. — Mill's Annot. Stat. Colo. (1891), § 4736.

*Idaho*. — Rev. Stat. Idaho, § 5445.

*Illinois*. — Starr & Curt. Annot. Stat. Ill. (1896), c. 3, par. 59; Little v. Williams, 7 Ill. App. 67.

*Indiana*. — Horner's Annot. Stat. Ind. (1901), §§ 2419-2422; Fleming v. Henderson, 123 Ind. 234.

*Maine*. — Rev. Stat. Me., c. 64, § 1; Danby v. Dawes, 81 Me. 30.

*Michigan*. — Comp. Laws Mich., § 9322.

*Minnesota*. — Stat. Minn. (1894), § 4477.

*Missouri*. — Rev. Stat. Mo., § 2.

*Montana*. — Code Civ. Pro. Mont., § 2585.

*Nevada*. — Gen. Stat. Nev., § 2795.

*New Hampshire*. — Pub. Stat. N. H., c. 195, § 1.

*Oklahoma*. — Stat. Okla., § 1307.

*Oregon*. — Hill's Annot. Laws Oregon, § 1129.

*South Dakota*. — Annot. Stat. S. Dak., § 7015.

*Utah*. — Comp. Laws Utah, §§ 4118, 4119; *In re Stone*, 14 Utah 205.

*Vermont*. — Stat. Vt., § 2425.

*Washington*. — Code of Pro. Wash. (1891), § 971.

*Wisconsin*. — Sanb. & B. Stat. Wis. (1898), § 3935, subd. 4.

*Wyoming*. — Sess. Laws Wyoming, 1890-1891, c. xiii, § 6.

See also the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 744.

In *Louisiana* it has been said that if a succession would not have defrayed the expenses of administration the widow was not bound to have it administered. *Soubiran v. Rivollet*, 4 La. Ann. 328.

In *Massachusetts* it has been held that the judge of a probate court may allow the widow of an intestate the whole of the personal estate unless the amount be so great as to make the allowance extravagant. *Brazer v. Dean*, 15 Mass. 183. See also the title ALLOWANCES, vol. 2, p. 156.

Under the *Pennsylvania Statute* creating an exemption from administration in favor of widows and orphans of real and personal estate to the value of three hundred dollars (*Pepper & Lewis Digest Pa. Laws, title Decedents' Estates*, § 210), where the property of a decedent, who was a widow at the time of her death, was appraised at less than three hundred dollars, her only surviving child had the right to have the property set off to her. *Himes's Appeal*, 94 Pa. St. 381, *distinguishing King's Appeal*, 84 Pa. St. 345.

2. **Widow's Year's Support.** — Under statute in some states, when the entire estate does not exceed a fixed amount, the court is authorized

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**Purpose of Statutes.** — The purpose of these statutes is to protect the widow and orphans by securing them a certain amount to meet their expenses; to secure the immediate settlement of small and insolvent estates; and to prevent paying out of the estate useless expenses to persons in no way interested in the estate except to the extent that they may be able to get money out of it.<sup>1</sup>

**Dispensing with Administration.** — It is usually provided that if the estate shall be found to come within the statute there shall be no administration, or if administration has been granted, upon the estate being found to be within the statute the administrator shall be discharged and the estate vested in the widow by an order of the court for that purpose, and there shall be no further proceedings in the administration unless further assets of the estate be discovered.<sup>2</sup>

**II. PROPERTY TO WHICH STATUTES APPLICABLE — Real or Personal Property.** — In *Arkansas* an early statute on this subject, providing that where the "estate" did not exceed three hundred dollars it should be vested absolutely in the widow or children, was held to refer to both real and personal property,<sup>3</sup> but a later statute has by its express terms limited the right of the widow or children to have the whole of the "personal estate" of the decedent vested in them in case such personal estate does not exceed in value the sum of three hundred dollars.<sup>4</sup>

**Separate Property of Married Woman.** — In *California* it is held that the statute covers all property, whether community or separate, and hence where a married woman dies, leaving a separate estate which does not exceed the statutory amount, the whole may be set aside to the minor children, to the exclusion of the husband.<sup>5</sup>

**III. RIGHTS AS BETWEEN WIDOW AND CHILDREN.** — Under the *Utah* statute it has been held that where the family consisted of a widow and minor children, and the property was "set apart for the use of the family," the widow did not become the absolute owner of such property to the exclusion of the heirs and members of the family, but she was entitled only to the use of the property assigned to the family.<sup>6</sup> Under the *California* statute it has been held that where the whole estate is set apart for the use and support of the widow and minor children, one-half only belongs to the widow, and the children are entitled to an undivided half.<sup>7</sup>

**IV. ASSIGNMENT OF WIDOW'S AND CHILDREN'S RIGHTS — Claim and Order of Court.** — Under the *Alabama* statute it has been held that where the estate is such that the widow or minor children are entitled to the whole, it is not indispensable for her or them to lay claim to it by having it set aside to her or them, but the law interferes and attaches her or their right to such property as absolutely as if the particular property had been selected, set apart, and

to assign the whole thereof for the support of the widow and children. See the title *ALLOWANCES*, vol. 2, p. 162.

**Homestead Statutes.** — See the title *HOMESTEAD*, vol. 15, p. 693 *et seq.*; see also the title *EXEMPTIONS (FROM EXECUTION)*, vol. 12, p. 94.

1. **Purpose of Statutes.** — See *Matter of Atwood*, 127 Cal. 427; *Wood v. Johnson*, 13 Ill. App. 548.

2. **Dispensing with Administration.** — See *Matter of Atwood*, 127 Cal. 427; *Wood v. Johnson*, 13 Ill. App. 548; *Kahn v. Tinder*, 77 Ind. 147.

3. **Real or Personal Property.** — *Harrison v. Lamar*, 33 Ark. 824.

4. *Wilson v. Massie*, 70 Ark. 25, quoting and construing Act of April 1, 1887, Sand. & Hill's Dig. Arkansas Stat. (1894), c. 1, § 3.

5. **Separate Property of Married Woman.** — *Matter of Leslie*, 118 Cal. 72. In this case the court said: "There is no more reason why a small separate estate of the deceased husband or wife should not be set apart to the minor children than there is why an estate of community property should not be set apart. The same object and purpose is subserved in both cases. The reasons for taking the estate out of administration, and setting it aside to the minor children, are the same whatever may be the technical character of the property belonging to the estate."

6. **Rights of Widow and Children.** — *Rands v. Brain*, 5 Utah 197, 272.

7. *McGuire v. Lynch*, 126 Cal. 576.

exempted.<sup>1</sup> In *Arkansas* it has been held that it is competent for the widow to show that the value of the estate does not exceed the statutory amount and avail herself of the benefit of the statute in a proceeding against her to account for the estate, although it does not appear that any decree has been rendered vesting the estate in her.<sup>2</sup> In other states the widow or children acquire no property rights until there has been an order of the court vesting the estate in her or them.<sup>3</sup> In *Indiana*, if at any time the administrator discovers that the estate is worth less than the amount fixed by statute, he must report to the court, and the property less the expenses of administration must be delivered to the widow.<sup>4</sup>

**Conclusiveness of Assignment.** — Under the *Indiana* statute, when an order is made assigning all the property to the widow, this entitles her to sue for and recover all debts due to the decedent and to have possession of all property belonging to the estate, and until the order is set aside in a strict proceeding it is conclusive although the actual value of the estate may exceed the limit fixed by the statute, but before the order is made provision is made by statute that any creditor, heir, or legatee may appear and show property improperly valued or not included in the inventory.<sup>5</sup>

**Discretion of Court.** — Under the *Vermont* statute it is discretionary with the court whether or not it will assign to the widow and children the whole of the estate where it amounts to not more than three hundred dollars in value.<sup>6</sup>

**Notice to Creditors of the Vesting of the Estate in the Widow** or children has been held unnecessary in some jurisdictions.<sup>7</sup>

**V. PRIORITY OF CERTAIN CLAIMS.** — As a general rule the property vests in the widow or children free from the claims of creditors of the decedent.<sup>8</sup> But specific liens against the property are protected,<sup>9</sup> and provision is also sometimes made for the payment of the expenses of the decedent's last illness,<sup>10</sup> his funeral expenses,<sup>11</sup> and the expenses of administration if any has been had.<sup>12</sup>

1. **Claim Not Necessary.** — *Brooks v. Johns*, 119 Ala. 412; *Gamble v. Kellum*, 97 Ala. 677; *Jackson v. Wilson*, 117 Ala. 432. See also *Howle v. Edwards*, 113 Ala. 187, *distinguishing* *Howle v. Edwards*, 97 Ala. 649; *Tucker v. Henderson*, 63 Ala. 280.

2. **Order of Court Not Necessary.** — *Hampton v. Physick*, 24 Ark. 561.

3. **Necessity for Order of Court.** — *Noblett v. Dillinger*, 23 Ind. 505; *Stanton v. Foster*, 122 Mich. 219; *Adey v. Adey*, 58 Mo. App. 408; *McMillan v. Wacker*, 57 Mo. App. 220; *Grand Lodge, etc., v. Dister*, 77 Mo. App. 608. See also *Quakenbush v. Taylor*, 86 Ind. 270.

4. *Pace v. Oppenheim*, 12 Ind. 533.

5. **Conclusiveness of Order Assigning Property to Widow.** — *Downs v. Downs*, 17 Ind. 95.

6. **Discretion of Court.** — *Frost v. Frost*, 40 Vt. 625; *Vermont Statutes* (1894), § 2425.

7. **Notice to Creditors Not Necessary.** — *Matter of Atwood*, 127 Cal. 427; *Wood v. Johnson*, 13 Ill. App. 548. See also *Matter of Palomares*, 63 Cal. 402.

8. **Claims of Creditors Barred.** — *McCord v. McKinley*, 92 Ill. 11; *Kahn v. Tinder*, 77 Ind. 147.

9. **Purchase Money Mortgage Protected.** — *Fairbanks v. Robinson*, 64 Cal. 250.

**Personal Property Mortgaged by the Decedent** can be recovered in an action of replevin from the widow notwithstanding it has been ordered and decreed to her by the court as a part of her husband's estate worth less than five hundred dollars. *Recker v. Kilgore*, 62 Ind. 10. See also *Quakenbush v. Taylor*, 86 Ind. 270.

**An Execution Which Has Been Levied upon Real Estate** of a husband during his lifetime is entitled to priority over the claim of the widow to whom the entire estate has been assigned as not exceeding in value five hundred dollars. *Mead v. McFadden*, 68 Ind. 340.

**Judgments Against the Decedent** are not specific liens, and hence are not protected, *Quakenbush v. Taylor*, 86 Ind. 270.

10. **Expenses of Last Illness.** — *Weir v. Sanders*, 124 Ind. 391; *Fleming v. Henderson*, 123 Ind. 234; *Green v. Weever*, 78 Ind. 494; *Matter of Thorn*, 24 Utah 209.

**Notes Given by Decedent for Medical Services** are not within the *Indiana* statute. *Weir v. Sanders*, 124 Ind. 391.

11. **Funeral Expenses.** — *McCord v. McKinley*, 92 Ill. 11; *Fleming v. Henderson*, 123 Ind. 234; *Green v. Weever*, 78 Ind. 494; *Matter of Thorn*, 24 Utah 209.

12. **Expenses of Administration.** — *Matter of Thorn*, 24 Utah 209. See also *Downs v. Downs*, 17 Ind. 95.

**Expenses to Be Paid First.** — Under the *Utah* statute the expenses of the last illness, funeral charges, and expenses of administration must first be paid before distribution to the widow. Consequently where the estate consisted almost entirely of real property less in value than fifteen hundred dollars such property could not be set apart to the widow, but it was proper to make an order of sale so that the expenses above referred to might be first paid. *Matter of Thorn*, 24 Utah 209.

## SUMMARY SETTLEMENT OF ESTATES — SUMMONS.

**VI. WIDOW'S RENUNCIATION OF WILL.** — In *Illinois* it has been held that the widow's right to receive the whole of her deceased husband's estate, where it does not exceed the statutory amount, cannot be affected by her failure to renounce the benefit of the provisions of her husband's will.<sup>1</sup>

**SUMMARY WAY.** — See note 2.

**SUMMER.** — The word "summer" strictly, perhaps, indicates only the months of June, July, and August, yet it is frequently used in a more general sense to indicate the warmest period of the year.<sup>3</sup>

**SUMMING UP.** — On the trial of an action by a jury the summing up is a recapitulation of the evidence adduced, in order to draw the attention of the jury to the salient points. The counsel for each party has the right of summing up his evidence, if he has adduced any, and the judge finally sums up the whole.<sup>4</sup>

**SUMMON — SUMMONED.** — See note 5.

**SUMMONS.** (See also the title **SUMMONS AND PROCESS**, 20 ENCYC. OF PL. AND PR. 1099.) — "A summons is 'the name of a writ commanding the sheriff or other authorized officer to notify a party to appear in court to answer a complaint made against him, and in said writ specified, on a day therein mentioned.'"<sup>6</sup>

1. **Renunciation of Benefit of Will.** — *Ross v. Smith*, 47 Ill. App. 197.

2. **Summary Way.** — In *State Bank v. Anderson*, 1 Mo. 244, it was held that a clause in a bank charter giving a remedy against the bank "in a *summary way*" on motion if the bank refused to pay its notes on demand did not dispense with the right to trial by jury, under the constitutional provision that the trial by jury shall remain inviolate.

An action on a solicitor's bill was stayed upon an agreement providing for evidence to be given to an accountant named, and in case of dispute, the matters disputed "to be referred in a *summary way*" to a designated person "under R. S. O. 174, for decision." It was held that by "a *summary way*" the parties meant that the reference was to be without ceremony or delay, the words "under R. S. O. 174" merely introducing the procedure under that act (the act respecting solicitors), and not to be construed as providing for an appeal. *Sale v. Lake Erie, etc., R. Co.*, 32 Ont. 159.

3. **Summer.** — *DeWitt v. Wheeler, etc., Sewing Mach. Co.*, 17 Neb. 533, citing *Webst. Dict.* And in this case, where, in a stipulation of facts, it was agreed that the debt accrued in the *summer* of a certain year, a homestead law having taken effect on the first day of June of that year, the court refused to presume that the debt accrued after the first of June.

So in *Vanderhoef v. Agricultural Ins. Co.*, 46 Hun (N. Y.) 328, a clause in an insurance policy consenting that the house might be left unoccupied "during the *summer*" was construed, in accordance with the apparent intent of the parties, to be equivalent to permission to leave the house unoccupied during the "farming season," and not to be limited to the *summer* months of June, July, and August.

4. **Summing Up.** — See ENCYC. OF PL. AND PR., titles **ARGUMENTS OF COUNSEL**, vol. 2, p. 698; **INSTRUCTIONS**, vol. 11, p. 47; **OPEN AND CLOSE**, vol. 15, p. 181.

**Sum Up.** — "To *sum up* means, *ex vi termini*, to present all the proof to the considera-

tion of the jury." *Johnson v. Kinsey*, 7 Ga. 431.

5. **Summon Jurors.** — In *State v. Queen*, 62 S. Car. 247, it was held that the words "*summon and impanel*" in a constitutional prohibition of local or special laws "to *summon* and impanel grand or petit jurors," included the listing and drawing of jurors.

**Summoned — Fees to Witnesses.** — An Act of Congress of 1799 provided for certain fees to witnesses "*summoned*" in any court of the United States." It was held that under this act the fees of witnesses who attended voluntarily were not taxable against the losing party. *Driskell v. Parrish*, 5 McLean (U. S.) 213, 241. See also *Woodruff v. Barney*, 1 Bond (U. S.) 528 (stated under **LAW**, vol. 18, p. 572), holding "pursuant to law" in an Act of Congress of 1853 equivalent to *summoned* in an Act of 1799.

6. **Summons.** — *Johns v. Phoenix Nat. Bank*, (Ariz. 1899) 56 Pac. Rep. 726.<sup>1</sup> See also *Hammond v. Tillotson*, 18 Barb. (N. Y.) 334.

**Summons and Citation Distinguished.** — See *Johns v. Phoenix Nat. Bank*, (Ariz. 1899) 56 Pac. Rep. 726, and see **CITATION**, vol. 6, p. 13.

**Summons Clause.** — In *Kennedy v. Agricultural Ins. Co.*, 165 Pa. St. 183, it was said: "In form as well as in effect the *summons* clause of an attachment execution, required to be served on the garnishee, is in every proper sense of the term a 'writ.'"

**Summons and Complaint.** — The *summons* "is at common law the process to commence the suit, and is the first step taken to bring the party sued before the court; while the declaration or complaint is necessarily the second step, which manifests the cause of action and sets out a narrative of the case." *Wilson v. Winchester, etc., R. Co.*, 82 Fed. Rep. 17.

**Summons and Process.** — See **PROCESS**, vol. 22, p. 162, and see *Franklyn v. Taylor Hydraulic Air Compressing Co.*, 68 N. J. L. 113, wherein it was said: "The word 'process' is very broad, and, as used in the act, it cannot be con-



**SUMPTUARY LAWS.** (See generally the titles CONSTITUTIONAL LAW, vol. 6, p. 882; POLICE POWER, vol. 22, p. 914.)—Sumptuary laws were laws made to restrain excess of expenditure in clothes, apparel, etc.

**SUM UP.** — See SUMMING UP, *ante*.

**SUNDAY EXCEPTED.** — See note 1.

sidered as only synonymous with the word *summons*. A *summons* is, of course, a process, but many kinds of process are not a *summons*."

1. **Sunday Excepted.** (See generally the titles GOVERNOR, vol. 14, p. 1103; STATUTES, vol. 26, pp. 550, 551.)—In *People v. Whitman*, 6 Cal. 659, it was held that the object of the words *Sunday excepted*, in the Constitution of

*California*, limiting the time within which the governor might return a bill to the legislature without his approval to ten days, was to prevent the governor from being deprived of one of the ten days in case the last day should fall on Sunday. Another Sunday occurring between the delivering of a bill to the governor and its return by him, it was held, should be counted as one of the ten days.

# SUNDAYS AND HOLIDAYS.

BY HAROLD N. ELDRIDGE.

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## CROSS-REFERENCES.

*For matters of PROCEDURE related to this title, see in the* ENCYCLOPEDIA OF PLEADING AND PRACTICE *the titles* PUBLICATION, vol. 17, pp. 98, 102; SERVICE OF PROCESS AND PAPERS, vol. 19, p. 600 *et seq.*; SUMMONS AND PROCESS, vol. 20, pp. 1108, 1166; SUNDAYS AND HOLIDAYS, vol. 20, p. 1189; TIME, vol. 21, p. 678; TIME TO PLEAD, vol. 21, p. 705. *For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see in this work, the titles* DATE, vol. 8, p. 727; DAY, vol. 8, p. 737; TIME (COMPUTATION OF).

**I. DEFINITIONS — 1. Sunday — a. AS A RELIGIOUS INSTITUTION.** — Sunday is the first day of the week; the Christian Sabbath; the Lord's day. It is a day observed by the Christian world as holy and set apart for the purposes of rest and worship, and is established in commemoration of the resurrection of Christ.<sup>1</sup>

**Sabbath.** — In the Jewish calendar the Sabbath is the seventh day of the week, now known as Saturday, and is observed as a day of rest from secular

1. **Sunday Defined.** — Century Dict.; Appletons' Am. Encyc.

employment, and of religious observance. But Christians use the word "Sabbath" as synonymous with Sunday or the Lord's day.<sup>1</sup>

**b. IN LAW.**—Sunday in law is a day set apart for the cessation of labor and business generally, in order that the physical and moral well-being of society may be promoted, as it is recognized that stated intervals of rest are necessary for that purpose. Sunday is a civil institution, and is regulated as such, notwithstanding it is the day of the week given up by Christian people to religious worship.<sup>2</sup>

**Sunday — Sabbath — Lord's Day.**—As used in the statutes no distinction has been made between the words "Sunday," "Sabbath," and "Lord's day." They are held to refer to the first day of the week.<sup>3</sup>

**2. Holiday.**—Holiday has been defined as a day on which the ordinary occupations are suspended.<sup>4</sup>

**II. DURATION OF SUNDAY.**—At common law and by the Roman civil law a day ordinarily begins and ends at midnight, and when Sunday laws merely

1. **Sabbath Defined.**—Century Dict.

2. **Sunday in Law**—*United States*.—*In re King*, 46 Fed. Rep. 905.

*Alabama*.—*Frolickstein v. Mobile*, 40 Ala. 725.

*Arkansas*.—*Shover v. State*, 10 Ark. 259; *Scales v. State*, 47 Ark. 476, 58 Am. Rep. 768.

*California*.—*Ex p. Newman*, 9 Cal. 518; *Ex p. Andrews*, 18 Cal. 685; *Ex p. Burke*, 59 Cal. 19, 43 Am. Rep. 231; *Ex p. Koser*, 60 Cal. 202; *Ex p. Jentzsch*, 112 Cal. 468.

*Connecticut*.—*Warner v. Smith*, 8 Conn. 14; *Wetherell v. Hollister*, 73 Conn. 622.

*Georgia*.—*Gunn v. State*, 89 Ga. 341; *Hennington v. State*, 90 Ga. 396; *Karwisch v. Atlanta*, 44 Ga. 204.

*Illinois*.—*Jones v. People*, 14 Ill. 196; *Langabier v. Fairbury, etc.*, R. Co., 64 Ill. 243, 16 Am. Rep. 550.

*Indiana*.—*Voglesong v. State*, 9 Ind. 112; *Foltz v. State*, 33 Ind. 215.

*Kansas*.—*State v. Nesbit*, 8 Kan. App. 104.

*Kentucky*.—*Megowan v. Com.*, 2 Met. (Ky.) 3.

*Louisiana*.—*State v. Judge*, 39 La. Ann. 132.

*Maryland*.—*Bode v. State*, 7 Gill (Md.) 326;

*Judefind v. State*, 78 Md. 510.

*Massachusetts*.—*Corn v. Has*, 122 Mass. 40.

*Minnesota*.—*State v. Petit*, 74 Minn. 376, 177 U. S. 164.

*Missouri*.—*State v. Ambs*, 20 Mo. 214.

*Nebraska*.—*State v. O'Rourke*, 35 Neb. 614;

*Seay v. Shrader*, (Neb. 1903) 95 N. W. Rep. 690.

*New York*.—*Neuendorff v. Duryea*, 69 N. Y.

557, 25 Am. Rep. 235; *People v. Moses*, 140 N.

Y. 214; *People v. Havnor*, 149 N. Y. 201, 52

Am. St. Rep. 707; *Lindenmuller v. People*, 33

Barb. (N. Y.) 548; *Watts v. Van Ness*, 1 Hill

(N. Y.) 76; *People v. Hagan*, (Supm. Ct. Spec.

T.) 36 Misc. (N. Y.) 349; *Story v. Elliot*, 8

Cow. (N. Y.) 27, 18 Am. Dec. 423.

*Ohio*.—*Bloom v. Richards*, 2 Ohio St. 391.

*Pennsylvania*.—*Specht v. Com.*, 8 Pa. St.

312, 49 Am. Dec. 518; *Sparhawk v. Union Pass.*

R. Co., 54 Pa. St. 439; *Society, etc.*, v. Com., 52

Pa. St. 126, 91 Am. Dec. 139; *Com. v. Wolf*,

3 S. & R. (Pa.) 48.

*South Carolina*.—*Charleston v. Benjamin*, 2

Strobh. L. (S. Car.) 508, 49 Am. Dec. 608.

*Tennessee*.—*Nashville v. Linck*, 12 Lea

(Tenn.) 499.

*Texas*.—*Ex p. Sundstrom*, 25 Tex. App. 133;

*Gabel v. Houston*, 29 Tex. 335.

*Utah*.—*State v. Sopher*, 25 Utah 318, 95 Am. St. Rep. 845.

*Virginia*.—*Norfolk, etc.*, R. Co. v. Com., 93 Va. 749, 57 Am. St. Rep. 827.

*West Virginia*.—*State v. Baltimore, etc.*, R. Co., 15 W. Va. 362, 36 Am. Rep. 803.

**Required by Public Economy.**—According to the common judgment of civilized men, public economy requires, for sanitary reasons, a day of general rest from labor, and the day naturally selected is that regarded as sacred by the greatest number of citizens, as this causes the least inconvenience through interference with business. *People v. Havnor*, 149 N. Y. 195, 52 Am. St. Rep. 707.

**Not a Religious Institution.**—In *State v. Powell*, 58 Ohio St. 340, that court, construing the constitutionality of a Sunday statute, says: "If the observance of Sunday as a day of rest and abstinence from all secular pursuits had for its object the enforcement of a religious requirement, there are few lawyers or judges that would undertake to sustain the statute as a valid enactment."

In *Ex p. Jentzsch*, 112 Cal. 471, the court says: "In construing Sunday laws, courts have variously regarded them, some from a religious view, others from a secular, and still others from an anomalous commingling of both. In [California] they have never been upheld from a religious standpoint."

**3. Sunday — Sabbath — Lord's Day.**—*Gunn v. State*, 89 Ga. 341; *Kilgour v. Miles*, 6 Gill & J. (Md.) 268; *State v. Drake*, 64 N. Car. 589.

In *State v. Drake*, 64 N. Car. 589, the court, referring to the words "Sabbath" and "Sunday," says: "The words are not strictly synonymous; the one signifying Saturday, the seventh day of the week, the Jewish Sabbath; the other, the first day of the week, commonly called the Lord's day. But by common usage the terms are used indiscriminately to denote the Christian Sabbath, to wit, Sunday."

"**Sabbath Night**" in a statute has been held to include as well the time between twelve o'clock on Saturday night and daylight on Sunday, as the time between after dark on Sunday and midnight on Sunday night. *Kroer v. People*, 78 Ill. 294.

**4. Holiday Defined.**—See HOLIDAYS, vol. 15, p. 512. And see generally *infra*, this title, XII. *Statutes Concerning Holidays*.

mention Sunday, without defining it, the ordinary day, beginning at twelve o'clock on Saturday night and ending at twelve o'clock on Sunday night, is meant.<sup>1</sup>

**Duration Defined by Statute.** — In some states, however, the Sunday meant by the statutes has been expressly defined by them.<sup>2</sup>

**III. SUNDAY AT COMMON LAW.** — At common law judicial proceedings only were prohibited on Sunday.<sup>3</sup> A person was not prohibited from doing his ordinary labor on Sunday,<sup>4</sup> and the making of contracts was lawful;<sup>5</sup> so also was the publication of notices not relating to judicial proceedings.<sup>6</sup>

**IV. STATUTORY REGULATION IN ENGLAND AND THE UNITED STATES** — In England. — The earliest statutes passed in England for the regulation of Sunday

1. **Ordinary Day Meant.** — *Kilgour v. Miles*, 6 Gill & J. (Md.) 268; *State v. Green*, 37 Mo. 466; *Shaw v. Dodge*, 5 N. H. 462; *Pulling v. People*, 8 Barb. (N. Y.) 384; *Huidekoper v. Cotton*, 3 Watts (Pa.) 56; *Hiller v. English*, 4 Strobb. L. (S. Car.) 486. And see the title *Day*, vol. 8, p. 737.

2. **Sunday Expressly Defined by Statute.** — See the statutes of the different states.

**From Rising to Setting of Sun.** — For some purposes statutes have limited Sunday to the time between the rising and the setting of the sun. See *Cameron v. Peck*, 37 Conn. 555; *Finn v. Donahue*, 35 Conn. 216; *Fox v. Abel*, 2 Conn. 541; *State v. Green*, 37 Mo. 466.

**Midnight to Sunset.** — In *Maine* and *Massachusetts* statutes formerly provided that Sunday should be held to extend from midnight between Saturday and Sunday to sunset on Sunday. *Bryant v. Biddeford*, 39 Me. 193; *Hilton v. Houghton*, 35 Me. 143; *Nason v. Dinsmore*, 34 Me. 391; *Tracy v. Jenks*, 15 Pick. (Mass.) 465; *Merriam v. Stearns*, 10 Cush. (Mass.) 257. And see *Stewart v. Thayer*, 168 Mass. 519, 60 Am. St. Rep. 407.

But the present statutes of those states provide that Sunday shall include the time between twelve o'clock on Saturday night and twelve o'clock on Sunday night, that is, the ordinary day. *Maine Rev. Stat.*, c. 124, § 22; *Mass. Rev. Laws* (1902), c. 99, § 16.

3. **Judicial Proceedings Only Prohibited.** — *Merritt v. Earle*, 29 N. Y. 116, 86 Am. Dec. 292; *Pepin v. Societe St. Jean Baptiste*, (R. I. 1902) 54 Atl. Rep. 47.

**Dies Non Juridicus.** — Sunday was regarded *dies non juridicus*, a day upon which courts could not transact other than necessary or ministerial business. *Reid v. State*, 53 Ala. 402, 25 Am. Rep. 627; *Tucker v. West*, 29 Ark. 388; *York v. Ackerman*, 3 N. J. L. 460; *Eden v. People*, 161 Ill. 296, 52 Am. St. Rep. 365; *Johnson v. Day*, 17 Pick. (Mass.) 107; *Allen v. Deming*, 14 N. H. 133, 40 Am. Dec. 179; *Pulling v. People*, 8 Barb. (N. Y.) 385; *Bbynton v. Page*, 13 Wend. (N. Y.) 429; *Story v. Elliot*, 8 Cow. (N. Y.) 27, 18 Am. Dec. 423; *Merritt v. Earle*, 29 N. Y. 116, 86 Am. Dec. 292; *Weidman v. Marsh*, 4 Pa. L. J. Rep. 401, 2 Am. L. J. 408; *Hellams v. Abercrombie*, 15 S. Car. 110, 40 Am. Rep. 684. And see the title *SUNDAYS AND HOLIDAYS*, 20 ENCYC. OF PL. AND PR. 1189.

4. **Labor Not Prohibited.** — *Reid v. State*, 53 Ala. 402, 25 Am. Rep. 627; *Eden v. People*, 161 Ill. 296, 52 Am. St. Rep. 365; *Boynton v. Page*, 13 Wend. (N. Y.) 429; *McCurdy v. Alaska*, etc., *Commercial Co.*, 102 Ill. App. 120.

**Exercising Trade of Butcher** on Sunday was not an offense at common law. *Rex v. Brotherton*, 1 Stra. 702.

5. **Making of Contract Not Prohibited** — *England*. — *Comyns v. Boyer*, Cro. Eliz. 485; *Drury v. Defontaine*, 1 Taunt. 131; *Mackaleys Case*, Cro. Jac. 280, 9 Coke 66b; *Rex v. Brotherton*, 1 Stra. 702; *Rex v. Whitnash*, 7 B. & C. 596, 14 E. C. L. 100; *Fennell v. Riddler*, 5 B. & C. 408, 11 E. C. L. 262; *Bloxsome v. Williams*, 3 B. & C. 232, 10 E. C. L. 60.

*United States*. — *Swann v. Swann*, 21 Fed. Rep. 301.

*Alabama*. — *Reid v. State*, 53 Ala. 402, 25 Am. Rep. 627.

*Arkansas*. — *Tucker v. West*, 29 Ark. 388.

*California*. — *Moore v. Murdock*, 26 Cal. 526.

*Illinois*. — *Richmond v. Moore*, 107 Ill. 429, 47 Am. Rep. 445; *Eden v. People*, 161 Ill. 296, 52 Am. St. Rep. 365.

*Indiana*. — *Western Union Tel. Co. v. Eskridge*, 7 Ind. App. 208.

*Kansas*. — *Johnson v. Brown*, 13 Kan. 529.

*Michigan*. — *Adams v. Hamell*, 2 Dougl. (Mich.) 73, 43 Am. Dec. 455; *O'Rourke v. O'Rourke*, 43 Mich. 58.

*Missouri*. — *Haufman v. Hamm*, 30 Mo. 387; *Roberts v. Barnes*, 127 Mo. 415, 48 Am. St. Rep. 640; *Glover v. Cheatham*, 19 Mo. App. 656; *More v. Clymer*, 12 Mo. App. 11; *Said v. Stromberg*, 55 Mo. App. 438.

*Nebraska*. — *Horacek v. Keebler*, 5 Neb. 355.

*New York*. — *Eberle v. Mehrbach*, 55 N. Y. 682; *Merritt v. Earle*, 29 N. Y. 120, 86 Am. Dec. 292; *Batsford v. Every*, 44 Barb. (N. Y.) 618; *Sayles v. Smith*, 12 Wend. (N. Y.) 57, 27 Am. Dec. 117.

*North Carolina*. — *Melvin v. Easley*, 7 Jones L. (52 N. Car.) 356.

*Ohio*. — *Bloqm v. Richards*, 2 Ohio St. 387.

*Pennsylvania*. — *Dale v. Knepp*, 98 Pa. St. 389, 42 Am. Rep. 624; *Kepner v. Keefer*, 6 Watts (Pa.) 231, 31 Am. Dec. 460, correcting mistake of Court of Common Pleas in *Morgan v. Richards*, 1 Browne (Pa.) 171, where it is said that a contract made on Sunday is void at common law.

*South Carolina*. — *Hellams v. Abercrombie*, 15 S. Car. 110, 40 Am. Rep. 684.

*Tennessee*. — *Amis v. Kyle*, 2 Yerg. (Tenn.) 31, 24 Am. Dec. 463.

*Vermont*. — *Adams v. Gay*, 19 Vt. 365; *Lovejoy v. Whipple*, 18 Vt. 379, 46 Am. Dec. 157.

6. **Publication of Notices Lawful.** — *Hastings v. Columbus*, 42 Ohio St. 585; *Knoxville v. Knoxville Water Co.*, 107 Tenn. 647.

were directed against fairs,<sup>1</sup> amusements,<sup>2</sup> and travelers of certain kinds.<sup>3</sup> These were followed by the important statute of 29 Car. II., c. 7, the main provisions of which were that no tradesman, artificer, workman, laborer, or other person whatsoever, should do or exercise any worldly labor, business, or work of their ordinary calling upon the Lord's day, or any part thereof; works of necessity or charity only excepted. This latter statute is still in force,<sup>4</sup> and its terms have been many times judicially construed both in England<sup>5</sup> and in the United States, where it has been adopted by state legislatures wholly or in part.

**In the United States.** — Sunday laws, or "laws for the better observance of the Lord's day" as they are generally called, were passed in most of the colonies,<sup>6</sup> and they now exist in practically all of the states of the Union.<sup>7</sup> The English statute of 29 Car. II., c. 7, has been the basis of the Sunday legislation in the United States. In many of the states it has been substantially adopted,<sup>8</sup> while in other states Sunday statutes are more comprehensive than the English statute, although it has been followed in part.<sup>9</sup>

**V. CONSTITUTIONALITY OF SUNDAY LAWS — 1. Generally Valid as Police Regulations.** — Sunday laws are generally sustained as constitutional on the ground that, since Sunday is a civil and political institution, established for the purpose of promoting the moral and physical well-being of society,<sup>10</sup> they are within the domain of the police power of the states.<sup>11</sup> In asserting their unconstitutionality it has been claimed that they were in violation of provisions safeguarding equal rights, personal or religious liberty, or that they took away liberty and property without due process of law, but where not so drawn as to

1. Fairs prohibited by statute of 27 Henry VI., c. 5. *Allen v. Deming*, 14 N. H. 133, 40 Am. Dec. 179; *Splane v. Com.*, (Pa. 1888) 12 Atl. Rep. 431.

2. Amusements prohibited by statute 1 Car. I., c. 1. 4 Black. Com. 53; *Allen v. Deming*, 14 N. H. 133, 40 Am. Dec. 179.

3. Travelers Prohibited. — See the statute of 3 Car. I., c. 1; *Sandiman v. Breach*, 7 B. & C. 96, 14 E. C. L. 22.

4. *Palmer v. Snow*, (1900) 1 Q. B. 725.

5. Judicially Construed in England. — See *infra*, this title, VIII. *Interpretation of Statutory Prohibitions and Exceptions.*

6. Sunday Laws Existed in Most of Colonies. — *Tucker v. West*, 29 Ark. 389; *Hennington v. State*, 90 Ga. 396; *Com. v. Dextra*, 143 Mass. 28. And see *People v. Havnor*, 149 N. Y. 201, 52 Am. St. Rep. 707.

7. Sunday Laws Exist in Practically All the States. — *Johnson v. Brown*, 13 Kan. 529. And see the statutes of the different states.

8. English Statute Substantially Adopted in Many States. — In *Eden v. People*, 161 Ill. 301, 52 Am. St. Rep. 365, the court says that the statute of 29 Car. II. "has been substantially adopted by the legislatures of many of the states in the Union," but not by the legislature of Illinois.

9. Some State Statutes More Comprehensive. — *Burns v. Moore*, 76 Ala. 342, 52 Am. Rep. 332; *O'Donnell v. Sweeney*, 5 Ala. 467, 39 Am. Dec. 336; *Eden v. People*, 161 Ill. 301, 52 Am. St. Rep. 365; *Miller v. Lynch*, 38 Miss. 346; *Reeves v. Butcher*, 31 N. J. L. 224; *Kepler v. Keefer*, 6 Watts (Pa.) 233, 31 Am. Dec. 460.

10. Sunday a Civil Institution. — See *supra*, *Definitions — Sunday — In Law.*

11. Within Domain of Police Power — *United States*. — *Soon Hing v. Crowley*, 113 U. S. 703;

*Petit v. Minnesota*, 177 U. S. 164; *Swann v. Swann*, 21 Fed. Rep. 299.

*Georgia*. — *Hennington v. State*, 90 Ga. 396.

*Kansas*. — *State v. Nesbit*, 8 Kan. App. 104.

*Kentucky*. — *Megowan v. Com.*, 2 Met. (Ky.) 3.

*Louisiana*. — *State v. Bott*, 31 La. Ann. 633, 33 Am. Rep. 224; *State v. Judge*, 39 La. Ann. 132; *State v. Gelpi*, 48 La. Ann. 520.

*Michigan*. — *People v. Bellet*, 99 Mich. 151, 41 Am. St. Rep. 589.

*Minnesota*. — *State v. Ludwig*, 21 Minn. 206; *State v. Petit*, 74 Minn. 376.

*New Jersey*. — *State v. Morris County*, 36 N. J. L. 72, 13 Am. Rep. 422.

*Oregon*. — *Ex p. Northrup*, 41 Oregon 489.

*South Carolina*. — *Charleston v. Benjamin*, 2 Strobb. L. (S. Car.) 508, 49 Am. Dec. 608; *Columbia v. Duke*, 2 Strobb. L. (S. Car.) 530.

*Texas*. — *Ex p. Sundstrom*, 25 Tex. App. 133; *Ex p. Kennedy*, 42 Tex. Crim. 148.

*Utah*. — *State v. Sopher*, 25 Utah 318, 95 Am. St. Rep. 845.

*Virginia*. — *Norfolk, etc., R. Co. v. Com.*, 93 Va. 749, 57 Am. St. Rep. 827.

*Washington*. — *State v. Nichols*, 28 Wash. 628.

*West Virginia*. — *State v. Baltimore, etc., R. Co.*, 24 W. Va. 783, 49 Am. Rep. 290.

See also the title POLICE POWER, vol. 22, p. 929.

**Sunday Statutes Prohibiting Running of Interstate Trains** have been attacked as unconstitutional on the ground that they affect interstate commerce, which is within the domain of Congress, but they are usually held constitutional as proper police regulations, notwithstanding the general power of Congress over interstate commerce. See the title INTERSTATE COMMERCE, vol. 17, p. 97.

be objectionable as class legislation, they have been sustained almost without exception.<sup>1</sup>

**2. When Directed Against Particular Occupations — Prohibition of Labor and Business Generally.** — The authorities are agreed that Sunday statutes prohibiting labor and business generally, except works of necessity or charity, are constitutional as being within the domain of the police power of the states.<sup>2</sup>

**Statutes Prohibiting the Following of Particular Occupations on Sunday** have been attacked as class legislation. By the weight of authority, however, they are held not to be unconstitutional on that ground,<sup>3</sup> provided they operate upon every member of the particular occupation.<sup>4</sup> And it makes no difference, as regards constitutionality of the statutes, whether the particular occupation is expressly prohibited,<sup>5</sup> or whether it is impliedly prohibited under a general statute of prohibition excepting from its operation, however, certain named occupations, but not the particular occupation.<sup>6</sup> But there is some authority

**1. Sustained Almost Without Exception.** — In *People v. Havnor*, 149 N. Y. 195, 52 Am. St. Rep. 707, the court said: "Sunday statutes have been sustained as constitutional almost without exception, the most notable instance to the contrary, *Ex p. Newman*, 9 Cal. 502, decided by a divided court in an early day in California, having been subsequently overruled by the courts of that state." See also *Brayer v. State*, 102 Tenn. 110.

**Unsuccessfully Attacked as Being in Violation of Constitutional Provisions Safeguarding —**

**Equal rights:** *Ex p. Northrup*, 41 Oregon 489.

**Personal liberty:** *State v. Powell*, 58 Ohio St. 324.

**Religious liberty:** *Ex p. Burke*, 59 Cal. 6, 43 Am. Rep. 231; *State v. Judge*, 39 La. Ann. 132; *Judefind v. State*, 78 Md. 510; *State v. Powell*, 58 Ohio St. 324.

**Due process of law:** *Ex p. Jentzsch*, 112 Cal. 471; *State v. Judge*, 39 La. Ann. 132; *Judefind v. State*, 78 Md. 510; *People v. Bellet*, 99 Mich. 151, 41 Am. St. Rep. 589; *People v. Havnor*, 149 N. Y. 195, 52 Am. St. Rep. 707; *Ex p. Northrup*, 41 Oregon 489; *State v. Sopher*, 25 Utah 318, 95 Am. St. Rep. 845; *State v. Nichols*, 28 Wash. 628.

**2. General Statutes Constitutional by All Authorities.** — *Eden v. People*, 161 Ill. 296, 52 Am. St. Rep. 365; *State v. Sopher*, 25 Utah 318, 95 Am. St. Rep. 845. And see *Ex p. Westerfield*, 55 Cal. 550, 36 Am. Rep. 47; *Ex p. Jentzsch*, 112 Cal. 468. See *supra*, V. 1. *Generally Valid as Police Regulations.*

In *Eden v. People*, 161 Ill. 296, 52 Am. St. Rep. 365, the court says: "If the public welfare of the state demands that all business and all labor of every description, except works of necessity and charity, should cease on Sunday, the first day of the week, and that day should be kept as a day of rest, the legislature has the power to enact a law requiring all persons to refrain from their ordinary callings on that day. All will then be placed on a perfect equality, and no one can complain of an unjust discrimination."

**Persons Observing Seventh Day as Sabbath.** — Such statutes are constitutional, though they make no exception in favor of persons observing the seventh day of the week as the Sabbath. *Frolickstein v. Mobile*, 40 Ala. 725; *Scales v. State*, 47 Ark. 476, 58 Am. Rep. 768; *Com. v. Has*, 122 Mass. 40; *Com. v. Wolf*, 3 S. &

R. (Pa.) 48; *Specht v. Com.*, 8 Pa. St. 312, 49 Am. Dec. 518; *Society, etc., v. Com.*, 52 Pa. St. 123, 91 Am. Dec. 139; *Charleston v. Benjamin*, 2 Strobb. L. (S. Car.) 508, 49 Am. Dec. 608; *Columbia v. Duke*, 2 Strobb. L. (S. Car.) 530; *Parker v. State*, 16 Lea (Tenn.) 476.

**3. Not Class Legislation.** — *Theisen v. McDavid*, 34 Fla. 440; *People v. Bellet*, 99 Mich. 151, 41 Am. St. Rep. 589; *People v. Havnor*, 149 N. Y. 195, 52 Am. St. Rep. 707; *People v. Hagan*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 349; *State v. Powell*, 58 Ohio St. 324; *Ex p. Northrup*, 41 Oregon 489; *Breyer v. State*, 102 Tenn. 103; *Nashville v. Linck*, 12 Lea (Tenn.) 499; *State v. Nichols*, 28 Wash. 628, *overruling Tacoma v. Krech*, 15 Wash. 296.

**4. Must Apply to Whole Class.** — In *Ex p. Northrup*, 41 Oregon 489, the court said: "If the act operates alike upon every individual of the class, its validity cannot be made to depend upon whether or not all persons are prohibited from doing any secular business or labor on Sunday."

A statute prohibiting any one engaged in the business of a barber from keeping open his bath-rooms on Sunday applies to part only of a class engaged in letting bath-rooms, and is unconstitutional as being class legislation. *Ragio v. State*, 86 Tenn. 272.

**Excepting Members of Same Class in Different Localities.** — The case of *People v. Havnor*, 149 N. Y. 195, 52 Am. St. Rep. 707, goes to the extreme of sustaining a law against Sunday barbering which contains an exception in favor of barbering in the city of New York and the village of Saratoga Springs until the hour of one o'clock Sunday afternoon.

**5. Statutes Expressly Prohibiting Barbering Constitutional.** — *People v. Bellet*, 99 Mich. 151, 41 Am. St. Rep. 589; *People v. Havnor*, 149 N. Y. 195, 52 Am. St. Rep. 707; *Ex p. Northrup*, 41 Oregon 489.

In *Tennessee*, where all persons are prohibited from carrying on business on Sunday under a penalty, a statute has been held constitutional which prohibits barbering under a heavier penalty. *Breyer v. State*, 102 Tenn. 103.

**Statutes Expressly Prohibiting Baseball Playing Constitutional.** — *State v. Powell*, 58 Ohio St. 324; *State v. Goode*, 5 Ohio Dec. 281, 5 Ohio N. P. 179.

**6. Particular Occupation Impliedly Prohibited.** — In *State v. Sopher*, 25 Utah 318, 95 Am. St. Rep. 845, it was held that a statute prohibit-

to the effect that statutes prohibiting the following of particular occupations, arbitrarily selected, where there is no general statute of prohibition affecting all classes, are unconstitutional.<sup>1</sup>

**Declaring What Are Not Occupations of Necessity and Charity.** — A statute declaring that a certain occupation is not a work of necessity or charity, as a matter of law, is not unconstitutional as being class legislation; although the question whether or not other occupations are works of necessity and charity is one of fact.<sup>2</sup>

**3. Exceptions of Persons Observing Seventh Day.** — Sunday statutes excepting from their operation of prohibition whoever conscientiously believes that the seventh day of the week ought to be observed as the Sabbath, and actually refrains from secular business and labor on that day, are not unconstitutional as discriminating between religious sects.<sup>3</sup>

**4. Act Embracing More than One Subject.** — Sunday statutes must, of course, comply with constitutional provisions forbidding statutes to embrace more than one subject.<sup>4</sup>

**VI. MUNICIPAL ORDINANCES — In General.** — Ordinances passed for the regulation of Sunday by virtue of statutes granting to municipalities express or implied authority to regulate Sunday are sustained where they are within the scope of the delegated power.<sup>5</sup>

ing the keeping open of any place of business for the purpose of transacting business was constitutional, notwithstanding a subsequent statute excepted from its operation hotels, boarding houses, baths, taverns, livery stables, retail drugstores, and such manufacturing establishments as were usually kept in constant operation; and that a barber was subject to its provision.

In *State v. Nichols*, 28 Wash.\*628, a person keeping open a store on Sunday for the purpose of selling goods, wares, and merchandise was held liable under a statute prohibiting the doing of business generally, but excepting from its operation hotels, drugstores, livery stables, and undertakers. The statute was attacked as class legislation.

**1. Statutes Prohibiting Particular Occupations Unconstitutional.** — In *Eden v. People*, 161 Ill. 296, 52 Am. St. Rep. 365, the court says: "When the legislature undertakes to single out one class of labor, harmless in itself, and condemns that and that alone, it transcends its legitimate powers."

**Statutes Prohibiting Barbering on Sunday Unconstitutional.** — *Ex p. Jentzsch*, 112 Cal. 468; *Eden v. People*, 161 Ill. 296, 52 Am. St. Rep. 365; *State v. Granneman*, 132 Mo. 326; *Tacoma v. Krech*, 15 Wash. 296, *overruled* in *State v. Nichols*, 28 Wash. 628.

**Where the Constitution Provides that the Legislature Shall Not Pass Local or Special Laws the violation of which is punishable as a misdemeanor, a statute making it a misdemeanor to engage in the business of baking for the purpose of sale for certain hours on Sunday is unconstitutional as being a special law.** *Ex p. Westerfield*, 55 Cal. 550, 36 Am. Rep. 47.

**2. Statute Constitutional Declaring Occupation Not One of Necessity or Charity.** — *State v. Petit*, 74 Minn. 376, 177 U. S. 164. And see *State v. Nichols*, 28 Wash. 632.

In *State v. Petit*, 74 Minn. 376, a statute was held constitutional which provided that "keeping open a barber shop on Sunday for the purpose of cutting hair and shaving beards

shall not be deemed a work of necessity or charity."

**3. Statutes Exempting Persons Observing the Seventh Day as Sabbath Constitutional.** — *Johns v. State*, 78 Ind. 332, 41 Am. Rep. 577; *People v. Bellet*, 99 Mich. 151, 41 Am. St. Rep. 589. But see *contra Shreveport v. Levy*, 26 La. Ann. 671, 21 Am. Rep. 553, *disapproved* in *People v. Bellet*, 99 Mich. 151, 41 Am. St. Rep. 589.

**Excepting Members of Same Class Who Observe Another Day as Sabbath.** — In *People v. Bellet*, 99 Mich. 151, 41 Am. St. Rep. 589, a statute was held constitutional which prohibited barbers from carrying on their business on Sunday, but excepted from its provision those barbers who observed another day as the Sabbath and actually refrained from labor on that day.

**4. Statutes Must Not Embrace More than One Subject.** — In *Ragio v. State*, 86 Tenn. 272, a statute was held unconstitutional which embraced two subjects, to wit, "barbering" and "bathing."

**5. Sunday Ordinance Within Scope of Delegated Power Valid.** — *Penniston v. Newman*, 117 Ga. 700; *McPherson v. Chebanse*, 114 Ill. 46, 55 Am. Rep. 857, 15 Ill. App. 313; *Baxter's Petition*, 12 R. I. 13; *State v. Langston*, 88 N. Car. 692; *Canton v. Nist*, 9 Ohio St. 439; *Nashville v. Linck*, 12 Lea (Tenn.) 499; *Angerhoffer v. State*, 15 Tex. App. 613; *Flood v. State*, 19 Tex. App. 584; *Bohmy v. State*, 21 Tex. App. 597; *Ex p. Ginnochio*, 30 Tex. App. 584. And see the titles INTOXICATING LIQUORS, vol. 17, pp. 282, 287; ORDINANCES, vol. 21, p. 943.

**Securing Health and Removing Nuisances.** — Power given to a municipality "to make regulations to secure the general health of the inhabitants, and to prevent and remove nuisances," does not authorize Sunday ordinances. *Nashville v. Linck*, 12 Lea (Tenn.) 499.

**Securing Health, Peace, and Improvement of City.** — Power to pass ordinances to secure the health, peace, and improvement of a city does not authorize an ordinance to prohibit the keeping open of stores and shops on Sunday. Cor-



**Must Not Conflict with Statutes.** — A Sunday ordinance must not conflict with a statute of the state on the same subject unless a clear intent is shown on the part of the legislature to delegate the power to make such an ordinance notwithstanding the state statute on the same subject.<sup>1</sup>

**VII. RULES OF CONSTRUCTION OF SUNDAY LAWS — 1. In General — Statutes Remedial.** — Sunday statutes are usually considered remedial, and are construed liberally to the end that the purpose for which they are passed may be attained.<sup>2</sup>

**Statutes Penal.** — But there are a few authorities that have considered Sunday statutes penal and have given them a strict construction.<sup>3</sup>

**2. Eiusdem Generis — In General.** — The rule of construction, that where particular words of a statute are followed by general, the general words are restricted in their meaning to objects of a like kind with those specified,<sup>4</sup> has been applied in construing Sunday statutes.

"Other Person Whatsoever," following the words "tradesman, artificer, workman, laborer," in the English statute of 29 Car. II., c. 7,<sup>5</sup> means persons *eiusdem generis* with those before mentioned.<sup>6</sup>

*vallis v. Carlile*, 10 Oregon 139, 45 Am. Rep. 134.

**Power to Regulate Certain Occupations** implies power to pass ordinances prohibiting the doing of business on Sunday by persons pursuing those occupations. *Nashville v. Linck*, 12 Lea (Tenn.) 499.

**Regulation of Convenience of Citizens.** — The power to pass ordinances necessary for the convenience of the citizens of the municipality implies a power to pass ordinances prohibiting a particular class of persons from doing business on Sunday. *Nashville v. Linck*, 12 Lea (Tenn.) 499.

**1. Ordinances Must Not Conflict with State Statutes.** — *State v. Welch*, 36 Conn. 215; *Loeb v. Attica*, 82 Ind. 175, 42 Am. Rep. 494; *State v. Langston*, 88 N. Car. 692; *Angerhoffer v. State*, 15 Tex. App. 613; *Flood v. State*, 19 Tex. App. 584; *Watson v. State*, 21 Tex. App. 598.

**Ordinance Prohibiting Sale of Liquor on Sunday** held in conflict with general statute on same subject, there being no clear intent shown to delegate the municipality power to legislate on that subject. *State v. Langston*, 88 N. Car. 692. And see the title INTOXICATING LIQUORS, vol. 17, p. 282.

**Ordinance Containing No Exceptions** has been held to be in conflict with a statute making exceptions in favor of works of necessity or charity and persons observing some other day as the Sabbath. *Canton v. Nist*, 9 Ohio St. 439; *Strauss v. Conneaut*, 23 Ohio Cir. Ct. 320.

**All Necessary Police Ordinances.** — Power to "pass and enforce all necessary police ordinances" implies power to prohibit persons keeping open their places of business on Sunday for the purpose of vending goods, wares, and merchandise, and the ordinance does not infringe the statute which goes only to the extent of forbidding such labor on Sunday as "disturbs the peace and good order of society." *McPherson v. Chebanse*, 114 Ill. 46, 55 Am. Rep. 857, 15 Ill. App. 311.

**2. Sunday Statutes Remedial and Liberally Construed.** — *Rex v. Younger*, 5 T. R. 449; *Smith v. Sparrow*, 4 Bing. 84, 13 E. C. L. 351; *Williams v. Paul*, 6 Bing. 653, 19 E. C. L. 192; *Fennell v. Ridler*, 5 B. & C. 406, 11 E. C. L. 261;

*Tucker v. West*, 29 Ark. 400; *Scammon v. Chicago*, 40 Ill. 149; *Towle v. Larrabee*, 26 Me. 469; *Smith v. Wilcox*, 24 N. Y. 353, 82 Am. Dec. 302; *Northrup v. Foot*, 14 Wend. (N. Y.) 248; *People v. Hoym*, (N. Y. Super. Ct. Spec. T.) 20 How. Pr. (N. Y.) 76; *Brunnett v. Clark, Sheld.* (N. Y.) 502; *Albrecht v. State*, 8 Tex. App. 313.

In *Johnson v. Com.*, 22 Pa. St. 109, the court said: "Our duty requires us to construe the statute so as to accomplish its purpose, which was to enforce an observance of Sunday, instead of obliterating it."

**3. Statutes Penal and Strictly Construed.** — *Flanagan v. Meyer*, 41 Ala. 136 (but see *Reid v. State*, 53 Ala. 408, 25 Am. Rep. 627, where the court says, "Sunday laws must have a reasonable interpretation"); *Myers v. State*, 1 Conn. 502; *St. Louis Agricultural, etc., Assoc. v. Delano*, 108 Mo. 217; *Ex p. Neet*, 157 Mo. 527, 80 Am. St. Rep. 638; *Melvin v. Easley*, 7 Jones L. (52 N. Car.) 356; *Bloom v. Richards*, 2 Ohio St. 405.

In *Murphy v. Simpson*, 14 B. Mon. (Ky.) 338, it is said: "The statute should not be extended by construction to embrace cases which are not clearly within its obvious meaning, but at the same time it should be fairly construed with a view to the accomplishment of the objects contemplated by the legislature in its enactment."

4. See the titles INTERPRETATION AND CONSTRUCTION, vol. 17, p. 6; OTHER, vol. 21, p. 1012.

5. See *supra*, this title, IV. *Statutory Regulation in England and the United States*.

6. "Other Person Whatsoever." — *Sandiman v. Breach*, 7 B. & C. 96, 14 E. C. L. 22; *Rex v. Whitnash*, 7 B. & C. 602, 14 E. C. L. 100; *Peate v. Dicken*, 1 C. M. & R. 422; *Reg. v. Silvester*, 10 Jur. N. S. 360; *Palmer v. Snow*, (1900) 1 Q. B. 725, *distinguishing Phillips v. Innes*, 4 Cl. & F. 234. And see *Atty.-Gen. v. Hamilton St. R. Co.*, 27 Ont. 49.

In *Rex v. Whitnash*, 7 B. & C. 596, 14 E. C. L. 100, the court, *per Littledale, J.*, says: "The words 'other persons' mean persons *eiusdem generis* with those before mentioned, but who, perhaps, might not strictly be included in those words."

**Games of Any Kind.** — Under a statute prohibiting horseracing, cock-fighting, or playing at cards or games of any kind, on Sunday, the words "or games of any kind" are limited to the preceding particular words and do not apply to all games.<sup>1</sup>

**VIII. INTERPRETATION OF STATUTORY PROHIBITIONS AND EXCEPTIONS** — 1. **In General.** — The Sunday statutes in the various jurisdictions must be examined for a full determination of their scope. Only such statutory provisions are here treated as have received judicial consideration.

2. **Acts Prohibited** — *a.* **LABOR, BUSINESS, WORK, OR EMPLOYMENT** — (1) **In General.** — The English statute of 29 Car. II. contains the words, "worldly labor, business, or work;"<sup>2</sup> and one or more, and often all, of these words appear in the statutes of the different states. In several states the words used are, "worldly employment or business."

"Labor, Business, or Work," as used in Sunday statutes, when not restricted by the words "ordinary calling,"<sup>3</sup> comprehend within their prohibition all acts of a secular nature belonging to or connected with ordinary business or common worldly affairs, although they might not fall within the line of the daily business or occupation in which a person happened to be employed.<sup>4</sup>

"Labor" and "Work." — The words "labor" and "work," as used in Sunday statutes prohibiting "labor" or "labor or work," have been held not to prohibit the making of contracts on Sunday,<sup>5</sup> unless of course the subject-matter of the contract is Sunday labor or work.<sup>6</sup> But there is some authority holding that the making of Sunday contracts is "labor" within the meaning of the statutes.<sup>7</sup> The words "labor" or "labor or work" have also been held to

1. **Games of Any Kind.** — St. Louis Agricultural, etc., Assoc. v. Delano, 108 Mo. 217, affirming 37 Mo. App. 284, and overruling State v. Williams, 35 Mo. App. 541; *Ex p.* Neet, 157 Mo. 527, 80 Am. St. Rep. 638, holding that base ball could not be classified among the games mentioned in the statute.

2. "Worldly" extends to the three substantives, "labor, business, or work." Rex v. Whitnash, 7 B. & C. 602, 14 E. C. L. 100.

**Labor.** — See LABOR — LABORER, vol. 18, p. 71.

**Business.** — See BUSINESS, vol. 5, p. 71.

**Work.** — See WORK.

**Employment.** — See EMPLOY — EMPLOYER — EMPLOYMENT, vol. 11, p. 1.

3. See *infra*, this section, (2) *Within Ordinary Calling*.

4. Bennett v. Brooks, 9 Allen (Mass.) 118.

**Contracts of Secular Nature Prohibited.** — Bennett v. Brooks, 9 Allen (Mass.) 118.

But see Geer v. Putnam, 10 Mass. 312, where it was held that the making of a promissory note on Sunday was valid. This case was criticised in Allen v. Deming, 14 N. H. 133, 40 Am. Dec. 179.

**A Marriage Contract** is neither labor, business, nor work in the sense in which these words are used in the statutes. Bennett v. Brooks, 9 Allen (Mass.) 118. And see Bloom v. Richards, 2 Ohio St. 401.

**Execution of Will** is neither labor, business, nor work within the meaning of the statutes. Bennett v. Brooks, 9 Allen (Mass.) 118; George v. George, 47 N. H. 27. And see Beitenman's Appeal, 55 Pa. St. 183; Weidman v. Marsh, 4 Pa. L. J. Rep. 401, 2 Am. L. J. 408.

5. **Making of Contracts Not "Labor"** — Illinois. — Richmond v. Moore, 107 Ill. 429, 47 Am. Rep. 445.

Kentucky. — Ray v. Catlett, 12 B. Mon. (Ky.) 535; Rice v. Com., 3 Bush (Ky.) 14; Watts v. Com., 5 Bush (Ky.) 309; Prather v. Harlan, 6 Bush (Ky.) 187; Dohoney v. Dohoney, 7 Bush (Ky.) 221.

Nebraska. — Horacek v. Keebler, 5 Neb. 355; Fitzgerald v. Andrews, 15 Neb. 52.

New York. — Boynton v. Page, 13 Wend. (N. Y.) 425; Watts v. Van Ness, 1 Hill (N. Y.) 76; Greenbury v. Wilkins, (C. Pl. Spec. T.) 9 Abb. Pr. (N. Y.) 206, note; Smith v. Wilcox, 24 N. Y. 353, 82 Am. Dec. 302; Merritt v. Earle, 29 N. Y. 120, 86 Am. Dec. 292.

Ohio. — Bloom v. Richards, 2 Ohio St. 387.

Tennessee. — Knoxville v. Knoxville Water Co., 107 Tenn. 647.

Washington. — Main v. Johnson, 7 Wash. 321.

And see Holden v. O'Brien, 86 Minn. 297, which holds that the statutory words "all labor" include all classes of business or work, but do not prohibit the casual execution and delivery of promissory notes on Sunday.

**Making of Contracts Not "Labor or Work."** — Johnson v. Brown, 13 Kan. 529; Birks v. French, 21 Kan. 238; More v. Clymer, 12 Mo. App. 14; Glover v. Cheatham, 19 Mo. App. 656; Said v. Stromberg, 55 Mo. App. 438; Kaufman v. Hamm, 30 Mo. 387; Roberts v. Barnes, 127 Mo. 415, 48 Am. St. Rep. 640, explaining Gwinn v. Simes, 61 Mo. 335.

6. **Contract for Sunday Labor or Work.** — Smith v. Wilcox, 24 N. Y. 353, 82 Am. Dec. 302; Merritt v. Earle, 29 N. Y. 115, 86 Am. Dec. 292; Boynton v. Page, 13 Wend. (N. Y.) 425; Watts v. Van Ness, 1 Hill (N. Y.) 76. And see *infra*, this title, IX. 2. *To Perform Something on Sunday Prohibited by Statute*.

7. **Making of Contracts Held "Labor."** — Tucker v. West, 29 Ark. 400; Stewart v. Davis, 31 Ark. 520, 25 Am. Rep. 576; Quarles v. State,

prohibit barbering,<sup>1</sup> trading, bartering, selling or buying goods, wares, or merchandise,<sup>2</sup> managing a theatre;<sup>3</sup> but they have been held not to prohibit hunting,<sup>4</sup> gaming,<sup>5</sup> business meetings of benevolent societies,<sup>6</sup> acting by professional actors,<sup>7</sup> or filing an application to purchase school lands in general land office.<sup>8</sup>

"Business," as used in Sunday statutes prohibiting "business" or "business of secular calling,"<sup>9</sup> includes the making of contracts.<sup>10</sup> It has also been held to include the obtaining of signatures to a petition of taxpayers.<sup>11</sup>

The Words "Worldly Employment or Business," as used in Sunday statutes, are very comprehensive, and the effect of them is to annul every transaction which if performed on a week day would be enforceable in a court of justice.<sup>12</sup> They include the making of Sunday contracts,<sup>13</sup> the publishing of a newspaper,<sup>14</sup> the selling of soda water, even by a restaurant keeper, when not done in connection with meals,<sup>15</sup> the keeping open of a public library on Sunday,<sup>16</sup> and the driving of a public conveyance;<sup>17</sup> but they have been held not to include traveling on Sunday,<sup>18</sup> drunkenness, swearing, and disorderly conduct,<sup>19</sup> or an engagement to marry.<sup>20</sup>

(2) *Within Ordinary Calling*—(a) *In General*.—Under the statute of 29 Car. II. and statutes following it,<sup>21</sup> the worldly labor, business, or work pro-

55 Ark. 10; Reynolds v. Stevenson, 4 Ind. 619; Link v. Clemmens, 7 Blackf. (Ind.) 479; Banks v. Werts, 13 Ind. 203; Bryan v. Watson, 127 Ind. 42; Sayre v. Wheeler, 31 Iowa 112, 32 Iowa 559; Miller v. Lynch, 38 Miss. 346.

1. Barbering is "labor." State v. Frederick, 45 Ark. 348, 55 Am. Rep. 555; State v. Wellott, 54 Mo. App. 310; State v. Granneman, 132 Mo. 326.

2. Business of Trading, Bartering, Selling, or Buying Goods, Wares, or Merchandise is "common labor." Cincinnati v. Rice, 15 Ohio 225.

3. Managing a Theatre is "laboring." Quarles v. State, 55 Ark. 10.

4. Hunting is not "work or labor." State v. Carpenter, 62 Mo. 595.

5. Gaming is not "common labor." State v. Conger, 14 Ind. 396.

6. Business Meetings of Benevolent Societies are not "labor." People v. Young Men's Father Mathew Benev. Soc., 65 Barb. (N. Y.) 357.

Reinstatement of Member in Benefit Society on Sunday is not "work or labor." Frame v. Sovereign Camp, etc., 67 Mo. App. 127.

7. Acting at Theatrical Performance is not "laboring." Wirth v. Calhoun, 64 Neb. 316.

8. Filing Application to Purchase School Land in general land office is not "labor." Stephens v. Porter, 29 Tex. Civ. App. 556.

9. See Allen v. Deming, 14 N. H. 133, 40 Am. Dec. 179; Varney v. French, 19 N. H. 233; Smith v. Foster, 41 N. H. 215.

"Secular calling" is different from "ordinary calling." Smith v. Foster, 41 N. H. 215. And see *infra*, this section, (2) *Within Ordinary Calling*.

10. Making of Contracts Is "Business"—England.—Rex v. Whitnash, 7 B. & C. 596, 14 E. C. L. 100.

Alabama.—O'Donnell v. Sweeney, 5 Ala. 470, 39 Am. Dec. 336; Tamplin v. Still, 77 Ala. 374.

Connecticut.—Fox v. Abel, 2 Conn. 548; Finn v. Donahue, 35 Conn. 216; Greathead v. Walton, 40 Conn. 235; Wight v. Geer, 1 Root (Conn.) 474.

Georgia.—Dorough v. Equitable Mortg. Co., (Ga. 1903) 45 S. E. Rep. 22.

Kansas.—Johnson v. Brown, 13 Kan. 529.

Maine.—Meador v. White, 66 Me. 90, 22 Am. Rep. 551; Bar Harbor First Nat. Bank v. Kingsley, 84 Me. 111; Bridges v. Bridges, 93 Me. 557.

Michigan.—Adams v. Hamell, 2 Dougl. (Mich.) 73, 43 Am. Dec. 455.

New Hampshire.—Allen v. Deming, 14 N. H. 133, 40 Am. Dec. 179; Varney v. French, 19 N. H. 233; Smith v. Foster, 41 N. H. 215.

Ohio.—Bloom v. Richards, 2 Ohio St. 387.

Pennsylvania.—Berrill v. Smith, 2 Miles (Pa.) 402.

Vermont.—Lyon v. Strong, 6 Vt. 219; Lovejoy v. Whipple, 18 Vt. 379, 46 Am. Dec. 157.

Wisconsin.—Troewert v. Decker, 51 Wis. 46, 37 Am. Rep. 808.

Selling Goods is business. Penniston v. Newnan, 117 Ga. 700.

11. Petition of Taxpayers.—De Forth v. Wisconsin, etc., R. Co., 52 Wis. 320, 38 Am. Rep. 737.

12. "Worldly Employment or Business" Very Comprehensive.—Reeves v. Butcher, 31 N. J. L. 224; Brewster v. Banta, 66 N. J. L. 367.

13. Sunday Contracts Prohibited.—Reeves v. Butcher, 31 N. J. L. 224; Com. v. Kendig, 2 Pa. St. 451; Kepner v. Keefer, 6 Watts (Pa.) 231, 31 Am. Dec. 460.

14. Publishing Newspaper.—Com. v. Houston, 14 Pa. Co. Ct. 395.

15. Selling of Soda Water.—Com. v. Hengler, 15 Pa. Co. Ct. 222; Com. v. Ryan, 15 Pa. Co. Ct. 223.

16. Keeping Open Public Library.—Granger v. Grubb, 7 Phila. (Pa.) 350.

17. Driving Public Conveyance.—Com. v. Jeandell, 2 Grant Cas. (Pa.) 506; Johnston v. Com., 22 Pa. St. 102.

18. Travelling.—Johnston v. Com., 22 Pa. St. 102.

19. Drunkenness, etc.—Noftsker v. Com., 22 Pa. Co. Ct. 559.

20. Engagement to Marry.—Fleischman v. Rosenblatt, 20 Pa. Co. Ct. 512.

21. See *supra*, this title, *Statutory Regulation in England and the United States*.

hibited must be of one's "ordinary calling;"<sup>1</sup> and where it is not of one's ordinary calling it is not prohibited.<sup>2</sup>

**Contracts.** — The making of a contract by a person in the exercise of his ordinary calling is prohibited as to him, notwithstanding the other party to the contract is not in the exercise of his ordinary calling,<sup>3</sup> and although the parties met to make the contract at the request of the latter.<sup>4</sup> But the making of a contract by a person not in the exercise of his ordinary calling is not prohibited as to him, although the other party to the contract is in the exercise of his ordinary calling, provided the fact that the latter was in the exercise of his ordinary calling was unknown to the former.<sup>5</sup>

**Whether Act Is Public or Private Is Immaterial.** — If it is done in the exercise of the ordinary calling of the parties it is unlawful.<sup>6</sup>

**1. Transaction Must Be Within Ordinary Calling** — *England.* — Scarfe v. Morgan, 4 M. & W. 270; Swann v. Broome, 3 Burr. 1595; Drury v. Defontaine, 1 Taunt. 131; Bloxsome v. Williams, 3 B. & C. 232, 10 E. C. L. 60; Rex v. Whitnash, 7 B. & C. 596, 14 E. C. L. 100; Peate v. Dicken, 1 C. M. & R. 422.

*Georgia.* — Sanders v. Johnson, 29 Ga. 526; Morgan v. Bailey, 59 Ga. 683; Dorrough v. Equitable Mortg. Co., (Ga. 1903) 45 S. E. Rep. 22.

*Rhode Island.* — Allen v. Gardiner, 7 R. I. 22; Whelden v. Chappel, 8 R. I. 230; Sayles v. Wellman, 10 R. I. 465; Smith v. Rollins, 11 R. I. 464, 23 Am. Rep. 509; Brown v. Browning, 15 R. I. 422, 2 Am. St. Rep. 908.

*South Carolina.* — Hellams v. Abercrombie, 15 S. Car. 110, 40 Am. Rep. 684.

*Tennessee.* — Swann v. Swann, 21 Fed. Rep. 299; Amis v. Kyle, 2 Yerg. (Tenn.) 31, 24 Am. Dec. 463; Berry v. Planters' Bank, 3 Tenn. Ch. 69.

"Secular Labor" in a statute has been held to include all labor, whether of one's ordinary calling or not. Frost v. Hull, 4 N. H. 157.

**Ordinary Calling Defined.** — "The true construction of the words 'ordinary calling' seems to me to be, not that without which a trade or business cannot be carried on, but that which the ordinary duties of the calling bring into continued action. Those things which are repeated daily or weekly in the course of trade or business are parts of the ordinary calling of a man exercising such trade or business, but the hiring of a servant once in the year does not come within the meaning of those words." Rex v. Whitnash, 7 B. & C. 600, 14 E. C. L. 100, per Bayley, J.

**"Ordinary Calling" Qualifies the Three Words "Labor," "Business," and "Work."** — Rex v. Whitnash, 7 B. & C. 602, 14 E. C. L. 100. But see dictum of Park, J., in Smith v. Sparrow, 4 Ring. 89, 13 E. C. L. 354.

**2. "Ordinary Calling" Considered in Following Cases** — *Alabama.* — O'Donnell v. Sweeney, 5 Ala. 467, 39 Am. Dec. 336.

*Connecticut.* — Finn v. Donahue, 35 Conn. 218.

*Massachusetts.* — Hazard v. Day, 14 Allen (Mass.) 487, 92 Am. Dec. 790.

*Michigan.* — Adams v. Hamell, 2 Dougl. (Mich.) 73, 43 Am. Dec. 455.

*Mississippi.* — Miller v. Lynch, 38 Miss. 346.

*New Hampshire.* — Allen v. Deming, 14 N. H. 133, 40 Am. Dec. 179; Smith v. Foster, 41 N. H. 215.

*New Jersey.* — Reeves v. Butcher, 31 N. J. L. 224.

*New York.* — Boynton v. Page, 13 Wend. (N. Y.) 425.

*Ohio.* — Bloom v. Richards, 2 Ohio St. 389.

*South Carolina.* — Hellams v. Abercrombie, 15 S. Car. 110, 40 Am. Rep. 684.

*Vermont.* — Adams v. Gay, 19 Vt. 365.

**Execution on Sunday of Release by Creditor to Assignee** under voluntary assignment not within ordinary calling. Allen v. Gardiner, 7 R. I. 22.

**Execution of Mortgage on Sunday** not within ordinary calling. Hellams v. Abercrombie, 15 S. Car. 110, 40 Am. Rep. 684.

**Purchase of Land** by farmer whose business it is to cultivate and purchase lands within ordinary calling. Morgan v. Bailey, 59 Ga. 683.

**Purchase of Dwelling House** for personal occupation of man and family not within ordinary calling. Hazard v. Day, 14 Allen (Mass.) 487, 92 Am. Dec. 790.

**Obligation in Penal Sum** conditioned for personal appearance of principal at stated term of court to answer indictment not within ordinary calling. Adams v. Candler, 114 Ga. 151.

**Execution of Deed of Gift** not within ordinary calling. Dorrough v. Equitable Mortg. Co., (Ga. 1903) 45 S. E. Rep. 22.

**Marriage Settlement** not within ordinary calling. Hayden v. Mitchell, 103 Ga. 431. And see Dorrough v. Equitable Mortg. Co., (Ga. 1903) 45 S. E. Rep. 22.

**Ordinary Calling as Agent.** — A man who follows his ordinary calling as agent for others is not less within the words of the statute, or the evils which it was intended to prevent, than one who follows his ordinary calling on his own account. Drury v. Defontaine, 1 Taunt. 131; Hazard v. Day, 14 Allen (Mass.) 487, 92 Am. Dec. 790.

**3. Cranson v. Goss**, 107 Mass. 442, 9 Am. Rep. 45; Hazard v. Day, 14 Allen (Mass.) 487, 92 Am. Dec. 790.

**Contract for Hire of Horse of Liveryman**, made on Sunday, is within ordinary calling of liveryman, and he cannot recover on the contract. Smith v. Rollins, 11 R. I. 464, 23 Am. Rep. 509.

**4. Cranson v. Goss**, 107 Mass. 442, 9 Am. Rep. 45; Hazard v. Day, 14 Allen (Mass.) 487, 92 Am. Dec. 790.

**5. Bloxsome v. Williams**, 3 B. & C. 232, 10 E. C. L. 60; Cranson v. Goss, 107 Mass. 442, 9 Am. Rep. 45; Roys v. Johnson, 7 Gray (Mass.) 162.

**6. Fennell v. Ridler**, 5 B. & C. 406, 11 E.

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(b) *Of Enumerated Classes.* — The English statute of 29 Car. II., c. 7,<sup>1</sup> and some statutes following it, do not prohibit labor, business, or work of everybody's ordinary calling, but only that of tradesmen, artificers, workmen, and laborers, "or other persons whatsoever."<sup>2</sup> Under these statutes certain classes have been held not to be prohibited from engaging in labor, business, or work on Sunday.<sup>3</sup>

(3) *To Disturbance of Others.* — In a few states the labor, business, or work prohibited must be to the disturbance of others,<sup>4</sup> or to the disturbance of the peace and good order of society.<sup>5</sup>

**Meaning of "Disturbance."** — It has been held that an act is a "disturbance to others" within the meaning of the statute if it only affects a single individual and if there is no objection to it by that individual.<sup>6</sup>

**6. KEEPING SHOP OPEN.** — The keeping open of shops,<sup>7</sup> stores,<sup>8</sup> saloons,<sup>9</sup> places of business,<sup>10</sup> and the like on Sunday is expressly prohibited by statute in many states. These statutes are sometimes very general, applying to all kinds of business,<sup>11</sup> but are often specific, designating particular kinds only.<sup>12</sup>

**Open for Purpose of Doing Business.** — By keeping open stores, shops, places of business, and the like is meant keeping them open for the purpose of doing

C. L. 261, explaining *Bloxsome v. Williams*, 3 B. & C. 232, 10 E. C. L. 60; *Miller v. Lynch*, 38 Miss. 346.

1. See *supra*, this title, *Statutory Regulation in England and the United States*.

2. "Artificer" means a person who makes something. *Palmer v. Snow*, (1900) 1 Q. B. 725.

"Tradesman" denotes a person carrying on a trade—buying and selling. *Palmer v. Snow*, (1900) 1 Q. B. 725.

"Workmen" and "Laborers" are interpreted to mean persons in employment. *Palmer v. Snow*, (1900) 1 Q. B. 725.

"Other Persons Whatsoever" are limited to classes of the kind particularly enumerated. See *supra*, this title, VII. 2. *Ejusdem Generis*.

3. Attorneys not prohibited. *Peate v. Dicken*, 1 C. M. & R. 422.

Barbers not prohibited. *Palmer v. Snow*, (1900) 1 Q. B. 725.

Farmers not prohibited. *Reg. v. Silvester*, 10 Jur. N. S. 360. And see *Rex v. Whitnash*, 7 B. & C. 596, 14 E. C. L. 100.

4. Acts Prohibited Must Disturb Others. — See *Allen v. Deming*, 14 N. H. 133, 40 Am. Dec. 179; *Varney v. French*, 19 N. H. 233; *Brackett v. Hoyt*, 29 N. H. 267; *Clough v. Shepherd*, 31 N. H. 490; *Smith v. Foster*, 41 N. H. 215; *State Capital Bank v. Thompson*, 42 N. H. 369.

5. To Disturbance of Peace and Good Order of Society. — See *Richmond v. Moore*, 107 Ill. 429, 47 Am. Rep. 445; *Eden v. People*, 161 Ill. 296, 52 Am. St. Rep. 365; *Collins Ice Cream Co. v. Stephens*, 189 Ill. 200; *Johnson v. People*, 42 Ill. App. 594; *Foll v. People*, 66 Ill. App. 405; *McCurdy v. Alaska, etc., Commercial Co.*, 102 Ill. App. 120.

6. "Disturbance" Defined. — In *Varney v. French*, 19 N. H. 237, the court said: "The only safe meaning we can give to the word 'disturbance' is a comprehensive one, going upon the ground that the main purpose of the law was to relieve an individual from the penalty who had been guilty of no act that actually did, or that tended to, disturb and distract the minds of others from those religious observ-

ances which the act unquestionably intended to respect. Such being the object of the statute, nothing should be tolerated that tends to defeat it."

7. Shop. — See SHOP, vol. 25, p. 1058.

A Dining Room kept open on Sunday by a common victualler is not a "shop" within the meaning of the statute, unless one of the purposes of keeping it open is to sell cigars. *Com. v. Graham*, 176 Mass. 5.

8. Store. — See STORE, STORING, STOREHOUSE, ETC., vol. 26, p. 1120.

Barber Shop not a store. *State v. Frederick*, 45 Ark. 347, 55 Am. Rep. 555.

Butcher Shop a store. *Petty v. State*, 58 Ark. 1.

9. Saloons. — See SALOON, vol. 24, p. 1177.

A Social Club Furnishing Liquors to Members has been held to be within the meaning of a statute prohibiting the opening of saloons on Sunday. *State v. Gelpi*, 48 La. Ann. 520.

10. Place of Business. — See PLACE OF BUSINESS, vol. 22, p. 831.

Theatre a "place of business." *St. Joseph v. Elliott*, 47 Mo. App. 418.

11. Kind of Business Immaterial. — Under a statute providing that "whoever on the Lord's day keeps open his shop, warehouse, or workhouse" shall be punished, it has been held that the kind of business transacted was immaterial. *Com. v. Dextra*, 143 Mass. 28; *Com. v. Osgood*, 144 Mass. 362.

Selling Sunday newspaper is prohibited. *Com. v. Osgood*, 144 Mass. 362. And so are cutting hair and shaving beards. *Com. v. Dextra*, 143 Mass. 28.

12. Keeping Open Place Where Liquor Sold Prohibited. — *State v. Ambs*, 20 Mo. 215; *Palmer v. State*, 2 Oregon 66. And see the title INTOXICATING LIQUORS, vol. 17, p. 346.

Store Open for Sale of Nonprohibited Articles. — Where the keeping open of a business house on Sunday is prohibited, but the selling of drugs is excepted from the prohibiting provision, a place of business where drugs are sold may be kept open on Sunday for the sale of drugs. *Penniston v. Newnan*, 117 Ga. 700.

business, whether the statute so specifies or not; and opening them for any other purpose is no violation of the statute.<sup>1</sup>

**Means of Access Immaterial.**—A shop is open within the meaning of the statute whether the doors are open or ajar,<sup>2</sup> or whether they are closed, provided all who please can obtain access thereto to buy.<sup>3</sup>

**c. EXPOSING GOODS FOR SALE.**—A statute prohibiting the exposing for sale of goods, wares, and merchandise on Sunday has been held to apply to public sales, and not to prohibit private transfers of property.<sup>4</sup>

**d. TRAVELING.**—Traveling on Sunday, except from necessity or charity,<sup>5</sup> is in a few states prohibited by statute.<sup>6</sup>

**Mode of Traveling Immaterial.**—Walking or riding,<sup>7</sup> or even sailing, may constitute traveling.<sup>8</sup>

**Traveling Determined from Circumstances of Particular Case.**—But all moving about by walking, riding, or sailing is not traveling within the meaning of the statute. Each case, however, must be decided largely upon its own peculiar circumstances.<sup>9</sup>

**e. EXHIBITIONS AND SPORTS—Public Exhibitions.**—Under many statutes public exhibitions on Sunday are prohibited.<sup>10</sup> These statutes, however, are

1. **Open for Purpose of Doing Business.**—*Snider v. State*, 59 Ala. 64; *Jebeles v. State*, 131 Ala. 41; *Com. v. Dextra*, 143 Mass. 31; *Miller v. State*, 68 Miss. 533; *Baxter's Petition*, 12 R. I. 13.

**Purpose for Which Place Opened a Question of Fact.**—*Snider v. State*, 59 Ala. 64.

**Sale Not Necessary to Constitute Offense of Opening Shop for Purpose of Business.**—*Dixon v. State*, 76 Ala. 89; *Jebeles v. State*, 131 Ala. 41.

2. **Doors Open or Ajar.**—*Seelig v. State*, 43 Ark. 96; *Whitcomb v. State*, 30 Tex. App. 269.

3. **Sufficient that Access Exists.**—*Dixon v. State*, 76 Ala. 89; *Com. v. Harrison*, 11 Gray (Mass.) 308.

**General Access to Shop through Dwelling House.**—*Com. v. Harrison*, 11 Gray (Mass.) 308.

**Side Door Closed but Unlocked.**—*Whitcomb v. State*, 30 Tex. App. 269.

**Front Door Closed but Intentionally Unlocked.**—*Seelig v. State*, 43 Ark. 96.

**Entrance through Back Door.**—*Caskey v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 753.

4. **Private Sales Valid.**—*Boynton v. Page*, 13 Wend. (N. Y.) 425; *Batsford v. Every*, 44 Barb. (N. Y.) 618; *Eberle v. Mehrbach*, 55 N. Y. 683; *Miller v. Roessler*, 4 E. D. Smith (N. Y.) 234.

**Public Selling.**—Contracts or casual sales privately made are not prohibited under a statute prohibiting all manner of public selling and offering for sale publicly. *Ward v. Ward*, 75 Minn. 269. See also *EXPOSE, EXPOSURE*, vol. 12, p. 522.

5. **Traveling from Necessity or Charity.**—See *infra*, this section, 3. a. (4) (b) *Traveling to Do Works*.

6. See the statutes of the different states.  
**Statute Prohibiting Traveling Abolished in Connecticut.**—*Horton v. Norwalk Tramway Co.*, 66 Conn. 272.

7. **Walking or Riding Is Traveling.**—*Cratty v. Bangor*, 57 Me. 423, 2 Am. Rep. 56.

8. **Sailing Is Traveling.**—*Wallace v. Merrimack River Nav., etc., Co.*, 134 Mass. 95, 45 Am. Rep. 301.

9. **All Moving About Not Traveling.**—*Sullivan v. Maine Cent. R. Co.*, 82 Me. 196.

In *Hamilton v. Boston*, 14 Allen (Mass.) 475 the court says: "It is difficult to prescribe by abstract definitions, applicable to all possible states of facts, what must be the duration and objects of a walk to constitute traveling, within these statutes. The legislature, after a long experience and repeated enactments, have left the language quite indefinite; and it is the duty of the court to decide cases as they arise, rather than to undertake by general rules to anticipate the circumstances and degrees of future cases."

**Taking Exercise Not Traveling.**—*O'Connell v. Lewiston*, 65 Me. 34, 20 Am. Rep. 673; *Davidson v. Portland*, 69 Me. 116, 31 Am. Rep. 253; *Sullivan v. Maine Cent. R. Co.*, 82 Me. 196; *Cleveland v. Bangor*, 87 Me. 267, 47 Am. St. Rep. 326; *Eaton v. Atlas Acc. Ins. Co.*, 89 Me. 570; *Hamilton v. Boston*, 14 Allen (Mass.) 475.

**Moving About for Pleasure Is Traveling.**—*Hinckley v. Penobscot*, 42 Me. 89; *Cratty v. Bangor*, 57 Me. 423, 2 Am. Rep. 56; *Parker v. Latner*, 60 Me. 528, 11 Am. Rep. 210; *Wheelenden v. Lyford*, 84 Me. 114.

Going a distance of twelve or fourteen miles to visit for pleasure is traveling. *Duran v. Standard L., etc., Ins. Co.*, 63 Vt. 437, 25 Am. St. Rep. 773.

**Traveling Consists in Passing from Town to Town.**—*Hamilton v. Boston*, 14 Allen (Mass.) 475. And see *Stanton v. Metropolitan R. Co.*, 14 Allen (Mass.) 485. But see *contra Cratty v. Bangor*, 57 Me. 423, 2 Am. Rep. 56.

10. See statutes of the different states.

**Place of Worship Not a Place "Used for Public Entertainment or Amusement,"** where the worship is not according to any established form, but the music is sacred, and nothing dramatic or hostile to religion is introduced, although there is a price charged for reserved seats. *Baxter v. Langley*, L. R. 4 C. P. 21, 38 L. J. M. C. 1.

**Aquarium.**—An aquarium where fish and animals are exhibited, and sacred music is played, and an admission is charged, is a place of "public entertainment." *Warner v. Brighton*

held not to prohibit private exhibitions or diversions.<sup>1</sup>

**Hunting or Fishing** on Sunday is in some states prohibited by statute.<sup>2</sup>

**Baseball Playing** on Sunday is sometimes expressly prohibited,<sup>3</sup> but it is oftener prohibited under more comprehensive words.<sup>4</sup>

**Recreation**, as used in a statute prohibiting Sunday "recreation," has been held not to include riding for pleasure on a street car.<sup>5</sup>

**3. Exceptions** — *a. WORKS OF NECESSITY OR CHARITY* — (1) *In General*. — Sunday statutes except from their operation works of necessity or charity.<sup>6</sup>

**Traveling on Sunday to Do Works of Necessity or Charity** is usually expressly excepted by statutes prohibiting traveling on Sunday.<sup>7</sup>

**Contracts to Do Works of Necessity or Charity on Sunday** may be made even in those states where the making of contracts on Sunday is prohibited.<sup>8</sup>

(2) *Definitions and Nature* — (a) *Necessity*. — By the word "necessity" as used in Sunday statutes is not meant a physical and absolute necessity; but a moral fitness or propriety of the thing done, under the circumstances of the particular case.<sup>9</sup>

**Convenience Is Not Necessity**. — It is no sufficient excuse for work on the Lord's day that it is more convenient or profitable to do it then than it would be to defer or omit it.<sup>10</sup>

(b) *Charity*. — Charity includes everything which proceeds from a sense of

Aquarium Co., L. R. 10 Exch. 291, 14 Moak. 578, 44 L. J. M. C. 175, note; Terry v. Brighton Aquarium Co., L. R. 10 Q. B. 306, 44 L. J. M. C. 173, 32 L. T. N. S. 458.

**Theatrical Performance** is not "sporting" within the meaning of a statute prohibiting sporting. Wirth v. Calhoun, 64 Neb. 316.

**1. Private Diversions Not Prohibited**. — A statute prohibiting "farces or plays of any kind, or any games, tricks, juggling, sleight of hand, or feats of dexterity, agility of body, or any bear baiting, or any bull baiting, horse-racing, cock-fighting, or any such like show or exhibition," has been held to apply only to such sports or contests as are exhibited as public spectacles, and not to private diversions such as playing at cards or dice. Rucker v. State, 67 Miss. 328.

Dancing to music of piano and violin, for amusement, and not as an exhibition, is not a theatrical or other performance. Matter of Allen, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 608.

**2. See the statutes of the different states.**

**Hunting Absolutely Prohibited** under statute prohibiting all hunting upon the first day of the week. People v. Moses, 140 N. Y. 214, 65 Hun (N. Y.) 161.

**3. See the statutes of the different states.**

**4. "Sporting"** includes playing base ball. Scougale v. Sweet, 124 Mich. 311, approving State v. O'Rourke, 35 Neb. 614; Seay v. Shrader, (Neb. 1903) 95 N. W. Rep. 690. And see Matter of Rupp, 33 N. Y. App. Div. 468.

**"Playing."** — Engaging in a game of baseball has been held to be playing. People v. Moses, 140 N. Y. 214; People v. Dennin, 35 Hun (N. Y.) 327.

**"Game."** — But the playing of baseball is not prohibited under a statute prohibiting "horse-racing, cock-fighting, or playing at cards or games of any kind" on Sunday, the statute being held to apply to games that have a demoralizing tendency, and not to mere athletic games like baseball. Ex p. Neet, 157 Mo. 527, 80 Am. St. Rep. 638,

**5. Riding for Pleasure Not "Recreation."** — Horton v. Norwalk Tramway Co., 66 Conn. 272.

**6. See the statutes of the different states.**

**7. See the statutes of the different states.** See also *infra*, this subsection, (4) (b) *Traveling to Do Works*.

**8. Contracts to Do Works of Necessity or Charity Excepted**. — Burns v. Moore, 76 Ala. 339, 52 Am. Rep. 332; Adams v. Gay, 19 Vt. 358. And see *infra*, this subsection, (4) (c) *Contracts to Do Works*.

**9. Definition** — *Alabama*. — Burns v. Moore, 76 Ala. 339, 52 Am. Rep. 332.

*Illinois*. — Johnston v. People, 31 Ill. 469.

*Indiana*. — Morris v. State, 31 Ind. 189; Yonoski v. State, 79 Ind. 393, 41 Am. Rep. 614; Western Union Tel. Co. v. Henley, 23 Ind. App. 14.

*Massachusetts*. — Flagg v. Millbury, 4 Cush. (Mass.) 243; Com. v. Knox, 6 Mass. 76; Doyle v. Lynn, etc., R. Co., 118 Mass. 197.

*Michigan*. — Allen v. Duffie, 43 Mich. 1, 38 Am. Rep. 159.

*Texas*. — Hennesdorf v. State, 25 Tex. App. 597, 8 Am. St. Rep. 448; Ex p. Kennedy, 42 Tex. Crim. 148.

*Vermont*. — McClary v. Lowell, 44 Vt. 116, 8 Am. Rep. 366.

*West Virginia*. — State v. McBee, 52 W. Va. 257.

**Necessity Must Be Real and Not Fancied**. — It is not an honest belief that a necessity exists, but the actual existence of the necessity, which renders the act lawful. Johnson v. Irasburgh, 47 Vt. 28, 19 Am. Rep. 111.

**10. Convenience Is Not Necessity**. — Burns v. Moore, 76 Ala. 339, 52 Am. Rep. 332; Com. v. Sampson, 97 Mass. 407; McGrath v. Merwin, 112 Mass. 467, 17 Am. Rep. 119; Bucher v. Fitchburg, etc., R. Co., 131 Mass. 156, 41 Am. Rep. 216; Allen v. Duffie, 43 Mich. 1, 38 Am. Rep. 159; State v. Stuckey, 98 Mo. App. 664; Ex p. Kennedy, 42 Tex. Crim. 148.

**Necessity Voluntarily Brought About** does not come within the statutory exception. State v. Stuckey, 98 Mo. App. 664.

moral duty, or a feeling of kindness and humanity, and is intended wholly for the purpose of the relief or comfort of another, and not for one's own benefit or pleasure.<sup>1</sup>

(3) *Whether Question of Fact or Law.* — It is usually held a question of fact for the jury, under the proper direction of the court, to determine whether the particular act was, under the circumstances of the case, a work of necessity or charity.<sup>2</sup>

(4) *Enumeration of Works* — (a) *In General.* — The difficulty of determining whether in any particular case the act done was one of necessity or charity within the meaning of the statute is usually very great. All the facts surrounding the case must be examined in the light of broad propositions laid down by the courts from time to time and of the adjudicated cases.

*Saving Property*, as in the case of fire, flood, or tempest, or other unusual peril, is work of necessity or charity.<sup>3</sup> And so is saving crops from effects of bad weather, or that are overripe.<sup>4</sup>

*Preparing Needful Food for Man or Beast* is work of necessity or charity.<sup>5</sup>

*Saving Life and Preventing or Relieving Suffering* are works of necessity or charity.<sup>6</sup>

*Work Connected with Religious Worship.* — All necessary or usual work connected with religious worship may be done on Sunday.<sup>7</sup>

*Business of Charitable Organization* is work of necessity or charity.<sup>8</sup>

*Work Incident to Particular Trade or Calling* is sometimes work of necessity or charity.<sup>9</sup>

1. *Definition.* — Gray, C. J., in *Doyle v. Lynn*, etc., R. Co., 118 Mass. 197.

*Act Done Must Be Itself a Charitable Act.* — The act of ascertaining whether a charity is needful is not charity. *Booker v. Fitchburg R. Co.*, 131 Mass. 156, 41 Am. Rep. 216, 125 U. S. 579.

*Charity Is Active Goodness.* — *Allen v. Duffie*, 43 Mich. 1, 38 Am. Rep. 159; *Dale v. Knepp*, 98 Pa. St. 389, 42 Am. Rep. 624.

2. *Question of Fact for Jury.* — *Reg. v. Cleworth*, 4 B. & S. 927, 116 E. C. L. 927; *Hooper v. Edwards*, 18 Ala. 284; *Burns v. Moore*, 76 Ala. 339, 52 Am. Rep. 332; *Ungericht v. State*, 119 Ind. 379, 12 Am. St. Rep. 419; *Sayre v. Wheeler*, 32 Iowa 559; *Com. v. Gillespie*, 146 Pa. St. 546; *State v. Knight*, 29 W. Va. 340; *State v. McBee*, 52 W. Va. 257.

*Question of Law for Court.* — But in *Allen v. Duffie*, 43 Mich. 1, 38 Am. Rep. 159, the court says: "It is a question of law purely, and cannot be left to depend upon the opinions of jurors as to what is a work of charity or necessity and what is not. If it could, there would be and could be no settled rule whatever, for jurors will never agree upon it. The question is purely one of statutory construction, and when we find what the statute intends, that intent must be the law for all cases."

3. *Saving Property.* — *State v. Goff*, 20 Ark. 289; *Johnson v. People*, 42 Ill. App. 594; *Com. v. Sampson*, 97 Mass. 409; *State v. McBee*, 52 W. Va. 257.

*Killing Animal Whose Horn Became Broken, to Save Meat* which it was feared would become fevered, not work of necessity. *State v. Knight*, 29 W. Va. 343.

*Gathering Sea Weed*, which would probably have floated away and been lost if not gathered on Sunday, not work of necessity. *Com. v. Sampson*, 97 Mass. 409.

4. *Saving Crops.* — *McGatrick v. Wagon*, 4 Ohio St. 566.

*Harvesting Dead-ripe Wheat*, which could not be cut sooner, and which might have been spoiled by rain if left until a later day, work of necessity. *Turner v. State*, 67 Ind. 595.

*Gathering Dead-ripe Melons*, which would otherwise decay and be wasted, where the melons were ripening and decaying much faster than with the facilities and labor at the owner's command they could be gotten to market, work of necessity. *Wilkinson v. State*, 59 Ind. 416, 26 Am. Rep. 84.

5. *Preparing Needful Food.* — *Com. v. Sampson*, 97 Mass. 409. And see *infra*, this subsection, (b) *Traveling to Do Works*.

6. *Saving Life and Relieving Suffering.* — *Com. v. Sampson*, 97 Mass. 409. And see *infra*, this subsection, (b) *Traveling to Do Works*.

7. *Work Connected with Religious Worship.* — *Arthur v. Norfield Parish Cong. Church Soc.*, 73 Conn. 718; *Bryan v. Watson*, 127 Ind. 42 [*Overruling Catlett v. M. E. Church*, 62 Ind. 365, 30 Am. Rep. 197]; *Ft. Madison First M. E. Church v. Donnell*, 110 Iowa 5; *Allen v. Duffie*, 43 Mich. 1, 38 Am. Rep. 159; *Dale v. Knepp*, 98 Pa. St. 389, 42 Am. Rep. 624; *Hodges v. Nalty*, 113 Wis. 567.

*Attending Spiritualist Camp Meeting* on Sunday work of charity. *Feital v. Middlesex R. Co.*, 109 Mass. 398, 12 Am. Rep. 720.

*Business of Auxiliary Society of Church* may be transacted on Sunday notwithstanding it may not be purely charitable or religious. *Toll v. Crimean*, 13 Montg. Co. L. Rep. (Pa.) 33. And see *infra*, this subsection, (b) *Traveling to Do Works*.

8. *Business of Benefit Association*, organized not for profit but for relief of members in case of sickness or death, work of necessity or charity. *Pepin v. Societe St. Jean Baptiste*, (R. I. 1902) 54 Atl. Rep. 47.

9. *Work Incident to Particular Trade or Calling.* — *McGatrick v. Wagon*, 4 Ohio St. 566.

*Work Held Within Exception.* — *Attending to*



(b) **Traveling to Do Works.** — Traveling to do works of necessity or charity is, as has been seen, generally expressly excepted from the prohibition of statutes directed against traveling on Sunday.<sup>1</sup>

duties of lock-keeper of a canal. *People v. Lyons*, 5 Hun (N. Y.) 643; *Murray v. Com.*, 24 Pa. St. 270.

Manufacturing malt beer. *Hennersdorf v. State*, 25 Tex. App. 597, 8 Am. St. Rep. 448.

Running an ice factory. *Hennersdorf v. State*, 25 Tex. App. 597, 8 Am. St. Rep. 448.

Hauling and boiling sugar water, where it appears that Sunday was a good day for the flowing of the water, that the trough was full and overflowing, and that there was no way to save the water but by gathering and boiling it. *Morris v. State*, 31 Ind. 189. And see *Whitcomb v. Gilman*, 35 Vt. 297.

Running a hotel. *Carver v. State*, 69 Ind. 61, 35 Am. Rep. 205; *Mueller v. State*, 76 Ind. 310, 40 Am. Rep. 245.

Delivering milk to customers. *Topeka v. Hempstead*, 58 Kan. 328.

Running a blast furnace. *Manhattan Iron Works Co. v. French*, (N. Y. Super. Ct. Spec. T.) 12 Abb. N. Cas. (N. Y.) 446.

Carrying mail. *Com. v. Knox*, 6 Mass. 76.

Shoeing stage horses used in transporting mails. *Nelson v. State*, 25 Tex. App. 599.

Piloting in vessel. *Perkins v. O'Mahoney*, 131 Mass. 546.

Running passenger trains. *Com. v. Louisville*, etc., R. Co., 80 Ky. 291, 44 Am. Rep. 475. And see *Sparhawk v. Union Pass. R. Co.*, 54 Pa. St. 451.

Running street cars. *Augusta*, etc., R. Co. *v. Renz*, 55 Ga. 126.

Running mail trains and fast freight trains carrying perishable property. *Com. v. Robb*, 3 Pa. Dist. 701.

Carrying forward of cattle trains. *Philadelphia*, etc., R. Co. *v. Lehman*, 56 Md. 209, 40 Am. Rep. 415.

Repairing railroad tracks, where it is shown that it could only be done on Sunday without delaying trains. *Yonoski v. State*, 79 Ind. 393, 41 Am. Rep. 614.

Inspecting and repairing cars lawfully in use on Sunday. *Com. v. Robb*, 14 Pa. Co. Ct. 473; *Com. v. Bobb*, 17 Pa. Co. Ct. 350.

Loading a vessel where there is danger of the closing of navigation. *Pate v. Wright*, 30 Ind. 476, 95 Am. Dec. 705; *McGatrick v. Wason*, 4 Ohio St. 566. See also *Philadelphia*, etc., R. Co. *v. Philadelphia*, etc., Steam Tow-boat Co., 23 How. (U. S.) 209; *Com. v. Louisville*, etc., R. Co., 80 Ky. 291, 44 Am. Rep. 475.

**Work Held Not Within Exception.** — Barbering, at least where no special circumstances exist. *Phillips v. Innes*, 4 Cl. & F. 234; *State v. Frederick*, 45 Ark. 347, 55 Am. Rep. 555; *Ungericht v. State*, 119 Ind. 379, 12 Am. St. Rep. 419; *State v. Wellott*, 54 Mo. App. 310; *Com. v. Williams*, 1 Pearson (Pa.) 61; *Com. v. Waldman*, 140 Pa. St. 89; *Breyer v. State*, 102 Tenn. 109; *Ex p. Kennedy*, 42 Tex. Crim. 148; *State v. Sopher*, 25 Utah 318, 95 Am. St. Rep. 845.

Selling newspapers. *Com. v. Matthews*, 152 Pa. St. 166, 22 Pittsb. Leg. J. N. S. (Pa.) 309; *Com. v. Beck*, 22 Pittsb. Leg. J. N. S. (Pa.) 310.

Selling cigars or tobacco, even by a hotel keeper. *Mueller v. State*, 76 Ind. 310, 40 Am. Rep. 245; *Penniston v. Newnan*, 117 Ga. 700; *Anonymous*, (N. Y. Super. Ct. Spec. T.) 12 Abb. N. Cas. (N. Y.) 458.

Selling soda water, even by a restaurant keeper. *Com. v. Hengler*, 15 Pa. Co. Ct. 222.

Selling uncooked meats. *Arnheiter v. State*, 115 Ga. 572; *People v. Hagan*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 349.

Running street cars. *Com. v. Jeandell*, 2 Grant Cas. (Pa.) 506.

Running omnibuses. *Johnson v. Com.*, 22 Pa. St. 102.

Supplying fresh meat to marketmen. *Jones v. Andover*, 10 Allen (Mass.) 18.

Transporting people by boat to and from pleasure resorts. *Dugan v. State*, 125 Ind. 130.

Moving threshing engine so as to be in readiness for threshing on Monday. *State v. Stuckey*, 98 Mo. App. 664.

Hoeing crops, notwithstanding they were suffering from want of hoeing. *Com. v. Josselyn*, 97 Mass. 411.

Running a reaping machine in a field of oats. *Johnson v. People*, 42 Ill. App. 594.

Pumping out oil wells, where only delay and not permanent loss would result from failing to do it. *Com. v. Funk*, 9 Pa. Co. Ct. 277; *Com. v. Gillispie*, 21 Pittsb. Leg. J. N. S. (Pa.) 213; *State v. McBee*, 52 W. Va. 257.

Operating pumps and fans of coal mine. *Shipley v. State*, 61 Ark. 216.

Clearing out a wheel pit, to prevent stoppage on week day of mill employing many hands. *McGrath v. Merwin*, 112 Mass. 467, 17 Am. Rep. 119.

Repairing a mill, to prevent stoppage and loss of time on subsequent day. *Hamilton v. Austin*, 62 N. H. 575.

Establishing telegraph offices on line of railroad, notwithstanding that all the movements of the trains were directed by telegraph, that it was necessary to disconnect the telegraph lines while the work was being done, and that fewer trains were run on Sunday than on secular days. *Cleary v. State*, 56 Ark. 124.

1. See *supra*, this section, 3. a. (1) *In General*.

**Traveling Held Within Exception.** — Visiting a sick child or other near relative. *Doyle v. Lynn*, etc., R. Co., 118 Mass. 197; *Cronan v. Boston*, 136 Mass. 384; or a sick friend. *Doyle v. Lynn*, etc., R. Co., 118 Mass. 197; or one's children properly away from home. *McClary v. Lowell*, 44 Vt. 116, 8 Am. Rep. 366; or one's father. *Logan v. Mathews*, 6 Pa. St. 417.

Attending divine services. *Feital v. Middlesex R. Co.*, 109 Mass. 398, 12 Am. Rep. 720; *Com. v. Nesbit*, 34 Pa. St. 398; or a funeral. *Horne v. Meakin*, 115 Mass. 326.

Procuring medicine for sick but convalescent child. *Gorman v. Lowell*, 117 Mass. 65.

Traveling by employer to bring back to his house on Sunday his maidservant, in order that she might prepare the needful food for his family. *Crosman v. Lynn*, 121 Mass. 301.

**Traveling Held Not Within Exception.** — Traveling by one who works by night instead

(c) **Contracts to Do Works.** — Contracts to do works of necessity or charity, as has been seen, are permitted.<sup>1</sup>

**Contracts for Transmission of Telegrams**, while prohibited generally along with other Sunday contracts, are not prohibited where the subject-matter of the telegram relates to work of necessity or charity.<sup>2</sup>

**Contracts for Transportation**, to carry out work of necessity or charity, are not prohibited.<sup>3</sup>

**Contracts Relating to Sick** are contracts to carry out work of necessity or charity and are not prohibited.<sup>4</sup>

**Contracts Relating to Preservation of Property** are contracts to carry out works of necessity or charity and are not prohibited.<sup>5</sup>

**Contracts Connected with Religious Worship** relate to work of necessity or charity and are not prohibited.<sup>6</sup>

**b. PARTICULAR OCCUPATIONS.** — Many Sunday statutes except from their provisions of prohibition certain occupations which, while not strictly work of necessity or charity, are yet of very great convenience to the public.<sup>7</sup>

of by day and who goes to see his master on Sunday for the purpose of inducing him to change his hours of labor from night to the day time in order that he may sleep better. *Connolly v. Boston*, 117 Mass. 64, 19 Am. Rep. 396. And see *State v. Stuckey*, 98 Mo. App. 664.

**Traveling** to ascertain whether a house which the traveler has hired and into cleaned. *Smith v. Boston*, etc., R. Co., 120 which he intends to move next day has been Mass. 490, 21 Am. Rep. 538.

**Traveling** in pursuance of a previous agreement by brother to take sister to a certain place. *Holcomb v. Danby*, 51 Vt. 428.

1. See *supra*, this section, 3. a. (1) *In General*.

**2. Contracts for Transmission of Telegram.** — *Western Union Tel. Co. v. Hutcheson*, 91 Ga. 252; *Willingham v. Western Union Tel. Co.*, 91 Ga. 449; *Rogers v. Western Union Tel. Co.*, 78 Ind. 169, 41 Am. Rep. 558; *Western Union Tel. Co. v. Yopst*, 118 Ind. 248; *Western Union Tel. Co. v. Henley*, 23 Ind. App. 14; *Thompson v. Western Union Tel. Co.*, 32 Mo. App. 191; *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599.

**Telegrams Relating to Sickness or Death** concern matter of necessity or charity, and contracts to transmit them are not prohibited. *Western Union Tel. Co. v. Wilson*, 93 Ala. 32, 30 Am. St. Rep. 23; *Western Union Tel. Co. v. Griffin*, 1 Ind. App. 46; *Gulf, etc., R. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269; *Brown v. Western Union Tel. Co.*, 6 Utah 219.

**A Telegram, "Come Up in the Morning; Bring All,"** does not, on its face, relate to work of necessity or charity, and contract to transmit it is prohibited. *Rogers v. Western Union Tel. Co.*, 78 Ind. 169, 41 Am. Rep. 558.

**A Telegram, "Meet the E. T. Train at Three O'clock,"** does not on its face relate to matter of necessity or charity. *Willingham v. Western Union Tel. Co.*, 91 Ga. 449.

**A Telegram, "Bring Forty Dollars if You Want Record,"** does not relate to matter of necessity or charity. *Western Union Tel. Co. v. Yopst*, 118 Ind. 248.

**A Telegram, "I Will Be Home To-night," Sent by Husband to Wife**, relates to matter of necessity or charity, and contract to transmit it is not prohibited. *Burnett v. Western Union Tel. Co.*, 39 Mo. App. 599.

**3. Contracts for Transportation.** — *Tillock v. Webb*, 56 Me. 100; *Feital v. Middlesex R. Co.*, 109 Mass. 398, 12 Am. Rep. 720; *Fisher v. Kyle*, 27 Mich. 454.

**Hiring Team to Take Prisoner to Jail** is contract to carry out work of necessity or charity. *Fisher v. Kyle*, 27 Mich. 454.

**Hiring Team to Visit Father** is contract to carry out work of necessity or charity. *Logan v. Mathews*, 6 Pa. St. 417.

**4. Contract for Employment of Physician** not prohibited. *Smith v. Watson*, 14 Vt. 332; *Staggers's Estate*, 8 Pa. Super. Ct. 260, 43 W. N. C. (Pa.) 79.

**Contract by Overseer of Poor for Relief of Sick Pauper** not prohibited. *Aldrich v. Blackstone*, 128 Mass. 148.

**5. Contract Relating to Preservation of Property.** — *Parmalee v. Wilks*, 22 Barb. (N. Y.) 539.

**6. Subscriptions to Build Church or Pay Off Debts** work of charity. *Arthur v. Norfield Parish Cong. Church Soc.*, 73 Conn. 718; *Bryan v. Watson*, 127 Ind. 42 [*overruling* *Catcliff v. M. E. Church*, 62 Ind. 365, 30 Am. Rep. 197]; *Ft. Madison First M. E. Church v. Donnell*, 110 Iowa 5; *Allen v. Duffie*, 43 Mich. 1, 38 Am. Rep. 159; *Dale v. Knepp*, 98 Pa. St. 389, 42 Am. Rep. 624; *Hodges v. Nalty*, 113 Wis. 567. And see *Lansing Turnverein Soc. v. Carter*, 71 Mich. 608.

**7. Particular Occupations Excepted.** — See the statutes of the different states.

**Bakers.** — A "baker," within the meaning of a Sunday statute excepting bakers from its provision, is one whose occupation it is to bake bread and other articles of food, and not one who keeps a shop for the purpose of selling bread and pastry not made by him, but bought for the purpose of resale, although he has a small stove in his shop, in which his wife sometimes bakes a few cookies or gingersnaps which he sells. *Com. v. Crowley*, 145 Mass. 430.

**Druggists.** — Tobacco is not "drugs or medicine" within the meaning of a Sunday statute allowing their sale on Sunday. *State v. Ohmer*, 34 Mo. App. 115. And see *Com. v. Marzynski*, 149 Mass. 68, where it was held that the selling of cigars on Sunday by a tobacconist in the ordinary way was not the selling of "drugs or medicines" within the meaning of the statute.

But the selling of Florida water on Sunday

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c. PERSONS OBSERVING SEVENTH DAY AS SABBATH. — Sunday statutes in many states except from their operation persons who observe the seventh day as the Sabbath.<sup>1</sup>

Only Persons Laboring are excepted, however, in some states.<sup>2</sup>

4. Violation of Sunday Statutes by Agent. — Where Sunday statutes are violated by an agent, both he and the principal are liable.<sup>3</sup>

IX. CONTRACTS AS AFFECTED BY SUNDAY LAWS — 1. Prohibited by Sunday Statutes — a. AS TO CONTRACTS GENERALLY — (1) *Contracts Void* — (a) In General. — Sunday contracts made in violation of statutes prohibiting them under a penalty are void, although not expressly declared to be so.<sup>4</sup> This

has been held lawful as being "drugs or medicine." *Todd v. State*, 30 Tex. App. 667.

**Common Carriers.** — The business of a wharfbat association is embraced within a proviso in a Sunday statute "that nothing in this section shall apply to railroads or steamboat navigation in this state." *Merchants' Wharfbat Assoc. v. Wood*, 64 Miss. 661, 60 Am. Rep. 76.

Under a statute allowing freight trains starting Saturday night to run through to destination, provided the time of arrival according to schedule by which trains started on trip shall not be later than eight o'clock on Sunday morning, the freight train must be actually started on or before twelve o'clock on Saturday night. *Jackson v. State*, 88 Ga. 787.

1. See the statutes of the different states.

**Constitutionality of Statutes.** — See *supra*, this title, V. 3. *Exceptions of Persons Observing Seventh Day.*

2. **Trading** on Sunday not "labor." *Anonymous*, (N. Y. Super. Ct. Spec. T.) 12 Abb. N. Cas. (N. Y.) 455.

**Selling Intoxicating Liquor** on Sunday not "labor." *Com. v. Hyneman*, 101 Mass. 30.

3. **Both Principal and Agent Liable.** — *Marre v. State*, 36 Ark. 222; *Com. v. Dale*, 144 Mass. 363; *Com. v. Ryan*, 15 Pa. Co. Ct. 223.

4. **Sunday Contracts Void** — *Alabama*. — *Williams v. Armstrong*, 130 Ala. 389; *Flanagan v. Meyer*, 41 Ala. 132; *Saltmarsh v. Tuthill*, 13 Ala. 390; *Butler v. Lee*, 11 Ala. 885, 46 Am. Dec. 230; *Dodson v. Harris*, 10 Ala. 566; *Shippey v. Eastwood*, 9 Ala. 198; *O'Donnell v. Sweetney*, 5 Ala. 468, 39 Am. Dec. 336.

*Arkansas*. — *Edwards v. Probst*, 38 Ark. 661; *Stewart v. Davis*, 31 Ark. 518, 25 Am. Rep. 576; *Tucker v. West*, 29 Ark. 389.

*Connecticut*. — *Grant v. McGrath*, 56 Conn. 333; *Cameron v. Peck*, 37 Conn. 557; *Finn v. Donahue*, 35 Conn. 216.

*Delaware*. — *Terry v. Platt*, 1 Penn. (Del.) 185.

*Georgia*. — *Calhoun v. Phillips*, 87 Ga. 482.

*Indiana*. — *Evansville v. Morris*, 87 Ind. 273, 44 Am. Rep. 763; *Perkins v. Jones*, 26 Ind. 499; *Banks v. Werts*, 13 Ind. 203; *Link v. Clemmens*, 7 Blackf. (Ind.) 479; *Western Union Tel. Co. v. Eskridge*, 7 Ind. App. 208; *Williamson v. Brandenburg*, 6 Ind. App. 97.

*Iowa*. — *Gunderson v. Richardson*, 56 Iowa 56, 41 Am. Rep. 81; *Sayre v. Wheeler*, 32 Iowa 559, 31 Iowa 112; *Riech v. Bolch*, 68 Iowa 526; *Clough v. Goggins*, 40 Iowa 325; *Pike v. King*, 16 Iowa 49.

*Maine*. — *Bridges v. Bridges*, 93 Me. 562; *Bar Harbor First Nat. Bank v. Kingsley*, 84 Me. 111; *Meador v. White*, 66 Me. 90, 22 Am.

Rep. 551; *Plaisted v. Palmer*, 63 Me. 576; *Tillock v. Webb*, 56 Me. 100; *Pope v. Linn*, 50 Me. 83.

*Massachusetts*. — *Cardoze v. Swift*, 113 Mass. 250; *Cranston v. Goss*, 107 Mass. 439, 9 Am. Rep. 45; *Horton v. Buffinton*, 105 Mass. 399; *Hazard v. Day*, 14 Allen (Mass.) 487, 92 Am. Dec. 790; *Bradley v. Rea*, 14 Allen (Mass.) 20, 103 Mass. 188, 4 Am. Rep. 524; *Ladd v. Rogers*, 11 Allen (Mass.) 209; *Merriam v. Stearns*, 10 Cush. (Mass.) 257; *Day v. McAllister*, 15 Gray (Mass.) 433; *Johnson v. Willis*, 7 Gray (Mass.) 164.

*Michigan*. — *Bollin v. Hooper*, 127 Mich. 287; *Pillen v. Erickson*, 125 Mich. 68; *Costello v. Ten Eyck*, 86 Mich. 348, 24 Am. St. Rep. 128; *Searles v. Reed*, 63 Mich. 485; *Saginaw, etc., R. Co. v. Chappell*, 56 Mich. 194; *Braze v. Bryant*, 50 Mich. 141; *Winfield v. Dodge*, 45 Mich. 355, 40 Am. Rep. 476; *Tucker v. Mowrey*, 12 Mich. 378; *Adams v. Hamell*, 2 Dougl. (Mich.) 73, 43 Am. Dec. 455.

*Minnesota*. — *Hanchett v. Jordan*, 43 Minn. 149; *Durant v. Rhener*, 26 Minn. 362; *Webb v. Kennedy*, 20 Minn. 419; *Finley v. Quirk*, 9 Minn. 194, 86 Am. Dec. 93.

*Mississippi*. — *Foster v. Wooten*, 67 Miss. 540; *Block v. McMurry*, 56 Miss. 217, 31 Am. Rep. 357; *Herndon v. Henderson*, 41 Miss. 584; *Kountz v. Price*, 40 Miss. 341; *Miller v. Lynch*, 38 Miss. 346.

*New Hampshire*. — *Gilman v. Berry*, 59 N. H. 62; *Smith v. Foster*, 41 N. H. 220; *Woodman v. Hubbard*, 25 N. H. 67, 57 Am. Dec. 310; *Allen v. Deming*, 14 N. H. 133, 40 Am. Dec. 179.

*New Jersey*. — *Kempson v. Kempson*, 63 N. J. Eq. 787; *Gennert v. Wuestner*, 53 N. J. Eq. 302; *Nibert v. Baghurst*, 47 N. J. Eq. 201; *Ryno v. Darby*, 20 N. J. Eq. 231; *Cannon v. Ryan*, 49 N. J. L. 314; *Reeves v. Butcher*, 31 N. J. L. 224, *disapproving* dictum of court in *Crocket v. Vanderveer*, 3 N. J. L. 422, that it was not prepared to say that all contracts made on Sunday are void; *Rush v. Rush*, (N. J. 1889) 18 Atl. Rep. 221.

*Oregon*. — *Smith v. Case*, 2 Oregon 192.

*Pennsylvania*. — *Foreman v. Ahl*, 55 Pa. St. 325; *Uhler v. Applegate*, 26 Pa. St. 140; *Com. v. Kendig*, 2 Pa. St. 449; *Miley v. Wildermuth*, 4 W. N. C. (Pa.) 462, 560; *Kepler v. Keefer*, 6 Watts (Pa.) 231, 31 Am. Dec. 460; *Morgan v. Richards*, 1 Browne (Pa.) 171; *Lee v. Drake*, 10 Pa. Co. Ct. 276; *Granger v. Grubb*, 7 Phila. (Pa.) 350.

*Tennessee*. — *Annis v. Kyle*, 2 Verg. (Tenn.) 31, 24 Am. Dec. 463.

*Texas*. — *Beham v. Giho*, 75 Tex. 87; *Schnel-*

rule applies to promissory notes as well as other agreements.<sup>1</sup>

(b) **Must Be Fully Consummated.** — A contract to be void because made on Sunday must be fully consummated on that day, and a contract is valid which is

der *v.* Sansom, 62 Tex. 203, 50 Am. Rep. 521; Gulf, etc., R. Co. *v.* Levy, 59 Tex. 542, 46 Am. Rep. 269.

*Vermont.* — Lovejoy *v.* Whipple, 18 Vt. 379, 46 Am. Dec. 157; Lyon *v.* Strong, 6 Vt. 219.

*West Virginia.* — State *v.* Knight, 29 W. Va. 341.

*Wisconsin.* — Ainsworth *v.* Williams, 111 Wis. 17; State *v.* Chicago, etc., R. Co., 79 Wis. 259; Vinz *v.* Beatty, 61 Wis. 648; Thomas *v.* Hatch, 53 Wis. 296; De Forth *v.* Wisconsin, etc., R. Co., 52 Wis. 320, 38 Am. Rep. 737, 5 Am. & Eng. R. Cas. 28; Troewert *v.* Decker, 51 Wis. 46, 37 Am. Rep. 808; Blakesley *v.* Johnson, 13 Wis. 530; Walsh *v.* Blatchley, 6 Wis. 422, 70 Am. Dec. 469; Hill *v.* Sherwood, 3 Wis. 346.

**Express Declaration Unnecessary.** — In Tucker *v.* West, 29 Ark. 388, the court said: "It is a settled principle of the common law that all contracts which are founded on an act prohibited by statute under a penalty are void, although not expressly declared to be so."

**1. Notes Executed on Sunday.** — As between the parties a promissory note executed on Sunday is void.

*Alabama.* — O'Donnell *v.* Sweeney, 5 Ala. 467, 30 Am. Dec. 336; Dodson *v.* Harris, 10 Ala. 566; Saltmarsh *v.* Tuthill, 13 Ala. 390; Hooper *v.* Edwards, 18 Ala. 280, 25 Ala. 528; Hussey *v.* Roquemore, 27 Ala. 281.

*Connecticut.* — Wight *v.* Geer, 1 Root (Conn.) 474; Finn *v.* Donahue, 35 Conn. 218.

*Georgia.* — Hill *v.* Wilker, 41 Ga. 449, 5 Am. Rep. 540.

*Indiana.* — Reynolds *v.* Stevenson, 4 Ind. 619; State *v.* Stogdel, 13 Ind. 565.

*Iowa.* — Pike *v.* King, 16 Iowa 49; Sayre *v.* Wheeler, 31 Iowa 112, 32 Iowa 559; Johns *v.* Bailey, 45 Iowa 241.

*Maine.* — Towle *v.* Larrabee, 26 Me. 464; Hilton *v.* Houghton, 35 Me. 143; Cumberland Bank *v.* Mayberry, 48 Me. 198; Pope *v.* Linn, 50 Me. 83.

*Massachusetts.* — Cranson *v.* Goss, 107 Mass. 443, 9 Am. Rep. 45.

*Michigan.* — Adams *v.* Hamell, 2 Dougl. (Mich.) 73, 43 Am. Dec. 455; Beman *v.* Wesels, 53 Mich. 549.

*Minnesota.* — Brimhall *v.* Van Campen, 8 Minn. 13, 82 Am. Dec. 118; Finney *v.* Callendar, 8 Minn. 41; Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93.

*Mississippi.* — Miller *v.* Lynch, 38 Miss. 346.

*New Hampshire.* — Clough *v.* Davis, 9 N. H. 500; Allen *v.* Deming, 14 N. H. 133, 40 Am. Dec. 179; Varney *v.* French, 19 N. H. 233; Smith *v.* Foster, 41 N. H. 215; State Capital Bank *v.* Thompson, 42 N. H. 369; Gilman *v.* Berry, 59 N. H. 62.

*Pennsylvania.* — Foreman *v.* Ahl, 55 Pa. St. 325.

*Vermont.* — Lovejoy *v.* Whipple, 18 Vt. 379, 46 Am. Dec. 157; Sumner *v.* Jones, 24 Vt. 317.

*Wisconsin.* — Hill *v.* Sherwood, 3 Wis. 343.

**If the Consideration for Its Execution Was a Debt Contracted on a Secular Day** the void promissory

note may be disregarded and an action brought on the debt. Edwards *v.* Probst, 38 Ark. 661.

**Validity of Note in Hands of Indorsee or Holder.**

— But a promissory note executed on Sunday, though void as between the parties, is valid in the hands of a *bona fide* indorsee or holder taking before maturity and without notice of facts affecting its validity. Saltmarsh *v.* Tuthill, 13 Ala. 390; Trieber *v.* Commercial Bank, 31 Ark. 128; Clinton Nat. Bank *v.* Graves, 48 Iowa 229; Cumberland Bank *v.* Mayberry, 48 Me. 198; Pope *v.* Linn, 50 Me. 83; Cranson *v.* Goss, 107 Mass. 443, 9 Am. Rep. 45; Vinton *v.* Peck, 14 Mich. 287; Allen *v.* Deming, 14 N. H. 133, 40 Am. Dec. 179; State Capital Bank *v.* Thompson, 42 N. H. 369; Gilman *v.* Berry, 59 N. H. 62; Houlston *v.* Parsons, 9 U. C. Q. B. 681; Crombie *v.* Overholtzer, 11 U. C. Q. B. 55.

And the fact that the note was dated on Sunday is not conclusive evidence that the third party took it with notice, since it may have been delivered on a secular day and therefore valid even as between the parties. Cranson *v.* Goss, 107 Mass. 443, 9 Am. Rep. 45; Gilman *v.* Berry, 59 N. H. 62.

A promissory note is valid in the hands of a *bona fide* assignee after maturity, provided the note bears date as of a secular day, and the assignee has no knowledge that the note was really executed on Sunday. Leightman *v.* Kadetska, 58 Iowa 676, 43 Am. Rep. 129.

**Notes Indorsed on Sunday.** — An indorsement of a promissory note on Sunday is void, since the indorsement creates a new contract. Bar Harbor First Nat. Bank *v.* Kingsley, 84 Me. 111; Prescott Nat. Bank *v.* Butler, 157 Mass. 548. And see Walsh *v.* Blatchley, 6 Wis. 422, 70 Am. Dec. 469.

**Lease** made on Sunday is void. Vinz *v.* Beatty, 61 Wis. 645; Ainsworth *v.* Williams, 111 Wis. 17.

**Parol Agreement Extending Time of Payment of Mortgage Debt** is void if made on Sunday. Rush *v.* Rush, (N. J. 1889) 18 Atl. Rep. 221.

**Agreement for the Formation of Partnership *in presenti***, on Sunday, is void. Durant *v.* Rhener, 26 Minn. 362.

**Insurance Policy** executed on Sunday is void. Heller *v.* Crawford, 37 Ind. 279.

**Contract of Rescission** made on Sunday is void. Merritt *v.* Robinson, 35 Ark. 483; Myers *v.* Meinrath, 101 Mass. 366, 3 Am. Rep. 368; Benedict *v.* Bachelder, 24 Mich. 425, 9 Am. Rep. 130.

**Contracts of Warranty** made on Sunday are void. Blossome *v.* Williams, 3 B. & C. 232, 10 E. C. L. 60; Murphy *v.* Simpson, 14 B. Mon. (Ky.) 337; Hulet *v.* Stratton, 5 Cush. (Mass.) 539; Bradley *v.* Rea, 103 Mass. 188, 4 Am. Rep. 524, 14 Allen (Mass.) 20; Finley *v.* Quirk, 9 Minn. 194, 86 Am. Dec. 93; Block *v.* McMurphy, 56 Miss. 220, 31 Am. Rep. 357; Smith *v.* Bean, 15 N. H. 579; Lyon *v.* Strong, 6 Vt. 219.

**Agreement to Indemnify** a person for becoming a surety upon a promissory note is void if made on Sunday. Hill *v.* Sherwood, 3 Wis. 343.

completed on a subsequent secular day, although negotiations leading up to it are made on Sunday,<sup>1</sup> or which was completed on a prior secular day although something not essential to the completeness of the contract was performed on Sunday.<sup>2</sup>

**Where Delivery of an Instrument Is Essential** to the completion of a contract, as in the case of bills, notes, bonds, and deeds, if the contract is written, dated, or signed on Sunday, but not delivered until a secular day, it is valid.<sup>3</sup>

**A Contract of Guaranty made on Sunday is void.** *Tyler v. Waddingham*, 58 Conn. 375; *Carrick v. Morrison*, 2 Marv. (Del.) 157; *Merriam v. Stearns*, 10 Cush. (Mass.) 257.

And this is so although the contract to which the guaranty refers is not executed until a subsequent secular day. *Merriam v. Stearns*, 10 Cush. (Mass.) 257.

**1. Contract Not Void Unless Fully Consummated on Sunday — England.** — *Bloxsome v. Williams*, 3 B. & C. 232, 10 E. C. L. 60. But see *Smith v. Sparrow*, 4 Bing. 84, 13 E. C. L. 351.

*Alabama.* — *Butler v. Lee*, 11 Ala. 885, 46 Am. Dec. 230.

*Connecticut.* — *Tyler v. Waddingham*, 58 Conn. 375.

*Indiana.* — *Evansville v. Morris*, 87 Ind. 274, 44 Am. Rep. 763.

*Iowa.* — *McKinnis v. Estes*, 81 Iowa 749.

*Kentucky.* — *Prather v. Haraln*, 6 Bush (Ky.) 185; *Ray v. Catlett*, 12 B. Mon. (Ky.) 537.

*Maine.* — *Plaisted v. Palmer*, 63 Me. 576.

*Massachusetts.* — *Winchell v. Carey*, 115 Mass. 560, 15 Am. Rep. 151; *Tuckerman v. Hinkley*, 9 Allen (Mass.) 452.

*Michigan.* — *Aspell v. Hosbein*, 98 Mich. 117; *Wooliver v. Boylston Ins. Co.*, 104 Mich. 132; *Barger v. Farnham*, 130 Mich. 487.

*Minnesota.* — *State v. Young*, 23 Minn. 551.

*Mississippi.* — *Foster v. Wooten*, 67 Miss. 540; *Kountz v. Price*, 40 Miss. 341.

*New Hampshire.* — *Allen v. Deming*, 14 N. H. 133, 40 Am. Dec. 179; *Merrill v. Downs*, 41 N. H. 72; *Smith v. Foster*, 41 N. H. 215; *Provonchee v. Piper*, 68 N. H. 31; *Stackpole v. Symonds*, 23 N. H. 229.

*New Jersey.* — *Cannon v. Ryan*, 49 N. J. L. 314.

*Pennsylvania.* — *Foreman v. Ahl*, 55 Pa. St. 325; *Beitenman's Appeal*, 55 Pa. St. 183; *Com. v. Kendig*, 2 Pa. St. 448.

*Rhode Island.* — *Sayles v. Wellman*, 10 R. I. 465.

*Tennessee.* — *Moseley v. Vanhooser*, 6 Lea (Tenn.) 289, 40 Am. Rep. 37; *McDowell v. Murfreesboro*, 103 Tenn. 726.

*Texas.* — *Beham v. Ghio*, 75 Tex. 87.

*Vermont.* — *Adams v. Gay*, 19 Vt. 358; *Lovejoy v. Whipple*, 18 Vt. 379, 46 Am. Dec. 157.

*Wisconsin.* — *Taylor v. Young*, 61 Wis. 314.

**Acceptance on Secular Day of Offer Made on Sunday** completes contract commenced on Sunday, and the contract is valid. *Tuckerman v. Hingley*, 9 Allen (Mass.) 452; *Cranson v. Goss*, 107 Mass. 442, 9 Am. Rep. 45; *Stackpole v. Symonds*, 23 N. H. 229; *McDonald v. Fernald*, 68 N. H. 171. And see *Cannon v. Ryan*, 49 N. J. L. 314.

**Sunday Contract for Purchase of Land Subject to Subsequent Approval or Rejection of one of the vendors is incomplete, and if, on a secular**

day, the vendor entitled to do so rejects the contract, the vendee may recover the purchase price which he had paid on a secular day. *Merrill v. Downs*, 41 N. H. 72.

**Where Goods Were to Be Inspected Before Buyer Was to Be Absolutely Bound**, it was held that, although the terms of the sale were agreed upon on Sunday, there was no completed sale on that day. *Moseley v. Vanhooser*, 6 Lea (Tenn.) 286, 40 Am. Rep. 37.

**Severance of Performance of Sunday Contract.** — Where a Sunday contract was made for the purchase of fifteen mules, and thirteen were delivered on Sunday, but two were delivered on Monday, it was held that the seller could not recover the purchase price of the mules delivered on Sunday, but could for the two mules delivered on Monday, on the ground that though the contract was entire the parties severed it in the performance, and therefore as to the two mules delivered on Monday the bargain was begun on Sunday and was not consummated until Monday. *Foreman v. Ahl*, 55 Pa. St. 325.

**Delivery on Secular Day** of shingles bought and paid for on Sunday was held not to make the contract incomplete on Sunday and therefore valid, where it appeared that the shingles remained with the seller until a secular day for the convenience merely of the purchaser and not because the contract was to be considered incomplete until removal. *Allen v. Deming*, 14 N. H. 133, 40 Am. Dec. 179.

**2. Execution of a Bill of Sale of horses on Sunday**, in pursuance of a sale made on a prior secular day, is not the consummation of the sale, but only the evidence of it, and the sale is not invalid. *Foster v. Wooten*, 67 Miss. 540.

**3. Bill or Note Made but Not Delivered on Sunday Valid — United States.** — *Gibbs, etc., Mfg. Co. v. Brucker*, 111 U. S. 597.

*Alabama.* — *Burns v. Moore*, 76 Ala. 342, 52 Am. Rep. 332; *Flanagan v. Meyer*, 41 Ala. 132; *Saltmarsh v. Tuthill*, 13 Ala. 390; *Butler v. Lee*, 11 Ala. 885, 46 Am. Dec. 230.

*Connecticut.* — *Greathead v. Walton*, 40 Conn. 235; *Cameron v. Peck*, 37 Conn. 556.

*Delaware.* — *Terry v. Platt*, 1 Penn. (Del.) 185.

*Indiana.* — *Love v. Wells*, 25 Ind. 503, 87 Am. Dec. 375; *Davis v. Barger*, 57 Ind. 54. And see *King v. Fleming*, 72 Ill. 21, 22 Am. Rep. 131, which involved validity of Indiana note.

*Iowa.* — *Bell v. Mahin*, 69 Iowa 408.

*Kentucky.* — *Dohoney v. Dohoney*, 7 Bush (Ky.) 221; *Prather v. Harlan*, 6 Bush (Ky.) 185; *Hofer v. McClung*, (Ky. 1902) 68 S. W. Rep. 438.

*Louisiana.* — *McCalop v. Hereford*, 4 La. Ann. 185.

*Maine.* — *Harris v. Morse*, 40 Me. 432, 77 Am. Dec. 269; *Cumberland Bank v. Mayberry*, 48 Me. 198; *Hilton v. Houghton*, 35 Me. 143.

Where an Indorsement Is Necessary to the completion of a contract, as in the case of an accommodation note, the note is valid though made on Sunday if indorsed by the payee on Monday.<sup>1</sup>

(c) **Fraud in Making.** — Where a contract is void because made on Sunday no action can be maintained for fraud in the making of it.<sup>2</sup>

(d) **Conflict of Laws.** — The law governing Sunday contracts made in one state and sought to be enforced in another is discussed elsewhere.<sup>3</sup>

(2) **Ratification of Contracts.** — By the great weight of authority a contract void because made on Sunday cannot be ratified on a secular day.<sup>4</sup> But there are a few cases which hold that void Sunday contracts may be subsequently ratified on a week day. In these cases, however, the person ratifying has received some benefit from the contract which he has retained.<sup>5</sup>

*Massachusetts.* — *Stacy v. Kemp*, 97 Mass. 166.

*Minnesota.* — *State v. Young*, 23 Minn. 551.

*Mississippi.* — *Kountz v. Price*, 40 Miss. 341.

*Missouri.* — *Fritsch v. Heislen*, 40 Mo. 555.

*New Hampshire.* — *Marshall v. Russell*, 44 N. H. 509; *Smith v. Foster*, 41 N. H. 220; *Allen v. Deming*, 14 N. H. 139, 40 Am. Dec. 179; *Clough v. Davis*, 9 N. H. 500.

*Pennsylvania.* — *Com. v. Kendig*, 2 Pa. St. 449; *Miley v. Wildermuth*, 4 W. N. C. (Pa.) 462.

*Vermont.* — *Goss v. Whitney*, 24 Vt. 187; *Lovejoy v. Whipple*, 18 Vt. 379, 46 Am. Dec. 157.

**Bond Made but Not Delivered on Sunday Valid.** — *Evansville v. Morris*, 87 Ind. 269, 44 Am. Rep. 763; *Prather v. Harlan*, 6 Bush (Ky.) 185; *Hall v. Parker*, 37 Mich. 590, 26 Am. Rep. 540; *State v. Young*, 23 Minn. 551; *Beitenman's Appeal*, 55 Pa. St. 183; *Com. v. Kendig*, 2 Pa. St. 448; *Stevens v. Hallock*, 7 Kulp (Pa.) 260.

**Deed Made but Not Delivered on Sunday Valid.** — *Flanagan v. Meyer*, 41 Ala. 132; *Williams v. Armstrong*, 130 Ala. 389; *Love v. Wells*, 25 Ind. 50, 17 Am. Dec. 375; *Schwab v. Rigby*, 38 Minn. 157.

**Insurance Policy** dated and delivered on Monday is not a Sunday contract, though property was examined and amount of insurance agreed on on Sunday. *Wooliver v. Boylston Ins. Co.*, 104 Mich. 132.

**Voluntary Assignment** for benefit of creditors signed by one of two partners on Sunday and signed and delivered by the other partner on a secular day is valid, delivery being essential to completeness. *Farwell v. Webster*, 71 Wis. 485.

**1. Accommodation Notes.** — *Cumberland Bank v. Mayberry*, 48 Me. 198.

**2. Fraud in the Making.** — *Grant v. McGrath*, 56 Conn. 333; *Gunderson v. Richardson*, 56 Iowa 56, 41 Am. Rep. 81; *Plaisted v. Palmer*, 63 Me. 576; *Robeson v. French*, 12 Met. (Mass.) 24, 45 Am. Dec. 236; *Cardoze v. Swift*, 113 Mass. 250; *Block v. McMurry*, 56 Miss. 220; *Smith v. Bean*, 15 N. H. 579; *Northrup v. Foot*, 14 Wend. (N. Y.) 248; *Schneider v. Sansom*, 62 Tex. 203, 50 Am. Rep. 521.

**3. Conflict of Laws.** — See the title PRIVATE INTERNATIONAL LAW, vol. 22, p. 1329.

**4. Void Sunday Contracts Cannot Be Ratified.** — *Alabama.* — *Shippey v. Eastwood*, 9 Ala. 198; *Butler v. Lee*, 11 Ala. 885, 46 Am. Dec. 230; *Rainey v. Capps*, 22 Ala. 288.

*Arkansas.* — *Hill v. Hite*, 79 Fed. Rep. 826 (Arkansas contract).

*Delaware.* — *Spahn v. Willman*, 1 Penn. (Del.) 125.

*Georgia.* — *Meriwether v. Smith*, 44 Ga. 541; *Calhoun v. Phillips*, 87 Ga. 482.

*Maine.* — *Pope v. Linn*, 50 Me. 85; *Plaisted v. Palmer*, 63 Me. 576.

*Massachusetts.* — *Ladd v. Rogers*, 11 Allen (Mass.) 209; *Day v. McAllister*, 15 Gray (Mass.) 433; *Bradley v. Rea*, 103 Mass. 188, 4 Am. Rep. 524; *Stewart v. Thayer*, 168 Mass. 519, 60 Am. St. Rep. 407.

*Michigan.* — *Adams v. Hamell*, 2 Dougl. 73, 43 Am. Dec. 455; *Tucker v. Mowrey*, 12 Mich. 379; *Winfield v. Dodge*, 45 Mich. 355, 40 Am. Rep. 476; *Brazee v. Bryant*, 50 Mich. 141; *Saginaw, etc., R. Co. v. Chappell*, 56 Mich. 194; *Costello v. Ten Eyck*, 86 Mich. 348, 24 Am. St. Rep. 128; *Acme Electrical Illustrating, etc., Co. v. Van Derbeck*, 127 Mich. 341, 89 Am. St. Rep. 476.

*Mississippi.* — *Kountz v. Price*, 40 Miss. 341.

*New Hampshire.* — *Allen v. Deming*, 14 N. H. 133, 40 Am. Dec. 179; *Varney v. French*, 19 N. H. 233. But see *Clough v. Davis*, 9 N. H. 500.

*New Jersey.* — *Steffens v. Earl*, 40 N. J. L. 137, 29 Am. Rep. 214; *Cannon v. Ryan*, 49 N. J. L. 314; *Ryno v. Darby*, 20 N. J. Eq. 231; *Neibert v. Baghurst*, (N. J. 1892) 25 Atl. Rep. 474; *Gennert v. Wuestner*, 53 N. J. Eq. 302; *Riddle v. Keller*, 61 N. J. Eq. 513.

*Wisconsin.* — *Vinz v. Beatty*, 61 Wis. 645; *Hopkins v. Stefan*, 77 Wis. 45.

And see *Reeves v. Butcher*, 31 N. J. L. 224, where the court says: "There can be no such thing in law, strictly speaking, as a ratification of a transaction which, at the time of its performance, was prohibited by statute. The parties cannot legalize that which the law has declared illegal. It is competent to them to impart a new efficacy to a voidable act, but they have no power to give life to an act which, from reasons of public policy, has been ordained by the legislative authority to be absolutely void."

**5. Void Sunday Contracts May Be Ratified.** — *Indiana.* — *Banks v. Werts*, 13 Ind. 203; *Perkins v. Jones*, 26 Ind. 499; *Heller v. Crawford*, 37 Ind. 279; *Catlett v. M. E. Church*, 62 Ind. 366, 30 Am. Rep. 197; *Parker v. Pitts*, 73 Ind. 597, 38 Am. Rep. 155; *Rogers v. Western Union Tel. Co.*, 78 Ind. 169, 41 Am. Rep. 558; *Evansville v. Morris*, 87 Ind. 269, 44 Am. Rep. 763; *Kuhns v. Gates*, 92 Ind. 66; *Williamson v. Brandenburg*, 6 Ind. App. 97. See *King v. Fleming*, 72 Ill. 21, 22 Am. Rep. 131, which

**What Amounts to Ratification.** — In those states which hold that a void Sunday contract may be ratified on a subsequent secular day, it has been held that a retention of whatever has been received under the contract is not of itself a ratification of the contract,<sup>1</sup> but that part payment under the contract is.<sup>2</sup>

(3) **Subsequent New Contracts.** — While by the weight of authority a contract void because made on Sunday cannot be ratified on a subsequent secular day,<sup>3</sup> yet the acts of the parties in dealing with the subject-matter of the void Sunday contract may be such as to create a new and valid contract.<sup>4</sup>

*b.* **CONTRACTS WHOLLY EXECUTORY.** — Where the contract is wholly executory, and there is neither delivery of the goods on the one hand nor payment of price on the other, the authorities are agreed that the attitude of the courts should be one of absolute nonaction.<sup>5</sup>

*c.* **CONTRACTS WHOLLY OR PARTLY EXECUTED** — (1) *In General.* — The course pursued by the courts where contracts void because made on Sunday have been wholly or partly executed on that day has been changed in a few states by reason of statutes, and these statutes should be borne in mind in considering what follows concerning contracts wholly or partly executed.

**Return of Valuable Consideration.** — These statutes provide in substance that he who receives a valuable consideration for a contract made on Sunday shall not defend against it on the ground that it was made on Sunday until he restores the consideration,<sup>6</sup> and it is immaterial that the consideration is in the nature of things not capable of being restored.<sup>7</sup> The effect has been to allow actions

held that a contract executed in Indiana on Sunday was void and incapable of ratification.

*Iowa.* — *Harrison v. Colton*, 31 Iowa 16; *Russell v. Murdock*, 79 Iowa 101, 18 Am. St. Rep. 348.

*Kentucky.* — *Campbell v. Young*, 9 Bush (Ky.) 240.

*Pennsylvania.* — *Whitmire v. Montgomery*, 165 Pa. St. 253; *Cook v. Forker*, 193 Pa. St. 468, 74 Am. St. Rep. 699.

*Rhode Island.* — *Sayles v. Wellman*, 10 R. I. 465; *Flynn v. Columbus Club*, 21 R. I. 534.

*Vermont.* — *Adams v. Gay*, 19 Vt. 358; *Sargeant v. Butts*, 21 Vt. 102; *Sumner v. Jones*, 24 Vt. 323.

In *Adams v. Gay*, 19 Vt. 358, the court said: "Contracts made upon Sunday should be held an exception, in some sense, from the general class of contracts which are void for illegality. Such contracts are not tainted with any general illegality; they are illegal only as to the time in which they are entered into. When purged of this ingredient they are like other contracts."

1. **Retention of Benefit Received from Contract Not a Ratification.** — *Rogers v. Western Union Tel. Co.*, 78 Ind. 169, 41 Am. Rep. 558.

2. **Part Payment on a secular day for goods sold and delivered on Sunday ratifies the Sunday contract.** *Banks v. Werts*, 13 Ind. 203; *Sumner v. Jones*, 24 Vt. 317.

And part payment on a note executed on Sunday, and therefore void, ratifies the note and makes it valid. *Russell v. Murdock*, 79 Iowa 101, 18 Am. St. Rep. 348.

3. See *supra*, this subsection, (2) *Ratification of Contracts.*

4. **Acts Such as to Create New Contract.** — *Day v. McAllister*, 15 Gray (Mass.) 433; *Cranson v. Goss*, 107 Mass. 441, 9 Am. Rep. 45; *Winchell v. Carey*, 115 Mass. 560, 15 Am. Rep. 151; *Tucker v. Mowrey*, 12 Mich. 378; *Acme Electrical Illustrating, etc., Co. v. Van Derbeck*, 127 Mich. 341, 89 Am. St. Rep. 476; *Bollin v.*

*Hooper*, 127 Mich. 287; *Ryno v. Darby*, 20 N. J. Eq. 233; *Reeves v. Butcher*, 31 N. J. L. 224; *Riddle v. Keller*, 61 N. J. Eq. 513; *Uhler v. Applegate*, 26 Pa. St. 140; *Ainsworth v. Williams*, 111 Wis. 17.

**Occupation of Land as Tenant.** — While a lease executed on Sunday is void, if the lessee, on a subsequent secular day, enters upon the land and occupies the same, he will be liable to an action upon an implied promise to pay what the use of the land is reasonably worth; but the void lease cannot be resorted to to determine such contract. *Cranson v. Goss*, 107 Mass. 441, 9 Am. Rep. 45; *Stebbins v. Peck*, 8 Gray (Mass.) 553, explained in *Day v. McAllister*, 15 Gray (Mass.) 433; *Vinz v. Beatty*, 60 Mass. 645.

**Goods Delivered on Secular Day.** — Where goods are bargained for on Sunday, but are delivered and accepted on a secular day with the purpose that they be sold and paid for, the seller may recover upon the implied contract of the buyer to pay what they are reasonably worth, and neither can be permitted to prove the terms agreed between them on Sunday. *Cranson v. Goss*, 107 Mass. 442, 9 Am. Rep. 45; *Bradley v. Rea*, 14 Allen (Mass.) 20, 103 Mass. 188, 4 Am. Rep. 524.

And see *Hopkins v. Stefah*, 77 Wis. 45, where it is held that delivery of goods on a secular day, on the faith of a promise made on a secular day to pay for them, creates a new contract, although a similar promise may have been made on Sunday.

5. **Attitude of Courts Absolute Nonaction.** — *Calhoun v. Phillips*, 87 Ga. 482; *Thompson v. Williams*, 58 N. H. 248; *Shuman v. Shuman*, 27 Pa. St. 90; *Chestnut v. Harbaugh*, 78 Pa. St. 473.

6. See the statutes of the different states.

**Statutes Not Applicable to Actions for Negligence.** — *Wheelden v. Lyford*, 84 Me. 114.

7. **Immaterial that Consideration Is Not in Nature of Things Restorable.** — *Wheelden v. Lyford*, 84 Me. 114.

on contracts of sale by the seller to recover the purchase price where the property delivered has not been restored,<sup>1</sup> and by the buyer to recover the price paid for property which he has received and offered to return;<sup>2</sup> actions on notes indorsed on Sunday by indorsee against indorser;<sup>3</sup> and actions by a bailor on contracts of bailment to recover the hire of property bailed.<sup>4</sup>

(2) *Contracts Wholly Executed*—(a) *Sales of Personal Property*.—In the absence of statutes to the contrary,<sup>5</sup> if the Sunday contract of sale is completely executed on that day by the delivery of the property to the buyer, and the payment of the price to the seller, the weight of authority is to the effect that the parties are *in pari delicto*, and that neither has any remedy against the other,<sup>6</sup> nor can the property sold be recovered by the seller's creditors.<sup>7</sup>

**Minority Rule.**—There is some authority to the effect that, the contract being void, no title to the property delivered passes, and the seller, on tendering back the purchase price, may recover the property, and the buyer, on tendering back the property, may recover the purchase price.<sup>8</sup>

(b) *Sales of Real Property*.—Where a deed is executed on Sunday and the money paid, the possession of the land having previously been given, the law will leave the parties where it finds them, and the courts will not interfere.<sup>9</sup> Nor can property conveyed by deed executed on Sunday be recovered by the grantor's creditors claiming under a subsequent levy.<sup>10</sup>

(c) *Payment of Debts*.—Payment of debts on Sunday discharges them, and the debtor cannot recover back the amount paid, nor can the creditor while retaining the amount paid treat the payment as a nullity and enforce payment over again.<sup>11</sup>

1. **Seller Allowed to Recover Purchase Price.**—*Wetherell v. Hollister*, 73 Conn. 622; *Wentworth v. Woodside*, 79 Me. 156.

2. **Buyer Allowed to Get Back Purchase Price Paid.**—*Bridges v. Bridges*, 93 Me. 557.

3. **Indorsee Allowed to Recover on Note.**—*Bar Harbor First Nat. Bank v. Kingsley*, 84 Me. 114.

4. **Bailor Allowed to Recover Horse Hire** although the consideration which bailee received could not, in the nature of things, be restored. *Wheelden v. Lyford*, 84 Me. 114.

5. See *supra*, this subsection, c. (1) *In General*.

6. **No Remedy Lies by Either Party**—*Alabama*.—*Thornhill v. O'Rear*, 108 Ala. 299.

*Maine*.—*Ellis v. Higgins*, 32 Me. 35; *Greene v. Godfrey*, 44 Me. 25; *Bar Harbor First Nat. Bank v. Kingsley*, 84 Me. 111.

*Massachusetts*.—*Myers v. Meinrath*, 101 Mass. 366, 3 Am. Rep. 368; *Horton v. Buffinton*, 105 Mass. 399; *Cranston v. Goss*, 107 Mass. 441, 9 Am. Rep. 45.

*Mississippi*.—*Block v. McMurtry*, 56 Miss. 217, 31 Am. Rep. 357; *Strouse v. Lancot*, (Miss. 1901) 27 So. Rep. 606; *Foster v. Wooten*, 67 Miss. 540.

*New Hampshire*.—*Thompson v. Williams*, 58 N. H. 248.

*Pennsylvania*.—*Shuman v. Shuman*, 27 Pa. St. 90; *Chestnut v. Harbaugh*, 78 Pa. St. 473.

*Wisconsin*.—*Moore v. Kendall*, 1 Chand. (Wis.) 33; *Cohn v. Heimbauch*, 86 Wis. 176.

**Reason for Rule.**—In *Myers v. Meinrath*, 101 Mass. 366, 3 Am. Rep. 368, the court said: "The purpose of the rule of law, however, is not to give validity to the transaction, but to deprive the parties of all right to have either enforcement of or relief from their illegal contracts. In such cases, the defense of illegality

prevails, not as a protection to the defendant, but as a disability in the plaintiff."

**Exchange of Property.**—Where a Sunday contract for the exchange of personal property has been wholly executed on that day by the delivery of the property on each side, neither party has any remedy against the other. *Kelley v. Cosgrove*, 83 Iowa 229; *Myers v. Meinrath*, 101 Mass. 366, 3 Am. Rep. 368. And this is so notwithstanding he has returned the property received by him. *Myers v. Meinrath*, 101 Mass. 366, 3 Am. Rep. 368.

**But Where Condition for Return of Property if Unsatisfactory** is inserted in the contract of sale, the buyer may return the property and sue for the purchase price, though the sale was completely executed on Sunday. *Maurer v. Wolff*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 202.

7. **No Remedy by Seller's Creditors.**—*Horton v. Buffinton*, 105 Mass. 399; *Moore v. Kendall*, 1 Chand. (Wis.) 33, 2 Pin. (Wis.) 99, 52 Am. Dec. 145.

8. **Remedy Lies.**—*Tucker v. Mowrey*, 12 Mich. 378; *Winfield v. Dodge*, 45 Mich. 355, 40 Am. Rep. 476; *Brazee v. Bryant*, 50 Mich. 140. And see *Dodson v. Harris*, 10 Ala. 566; *Adams v. Gay*, 19 Vt. 358.

9. **No Recovery of Property or Price.**—*Ellis v. Hammond*, 57 Ga. 179.

10. **Grantor's Creditors Cannot Recover Property.**—*Greene v. Godfrey*, 44 Me. 25.

11. **Payment of Debts on Sunday.**—*Cranston v. Goss*, 107 Mass. 441, 9 Am. Rep. 45; *Johnson v. Willis*, 7 Gray (Mass.) 164; *Lamore v. Frisbie*, 42 Mich. 186; *Jameson v. Carpenter*, 68 N. H. 62; *Berry v. Planters' Bank*, 3 Tenn. Ch. 69; *Shields v. Klopff*, 70 Wis. 69.

**Payments Made for Sunday Labor.**—*Calkins v. Seabury-Calkins Consol. Min. Co.*, 5 S. Dak. 299.



(3) *Contracts Partly Executed* — (a) *Where No Subsequent Express Promise Exists* — aa. *CONTRACTS OF SALE — Recovery of Purchase Price or Fair Value.* — Where property is sold and delivered on Sunday without payment of the price, it is generally held, in the absence of a subsequent express promise to pay, that the price cannot be recovered.<sup>1</sup> Nor will assumpsit lie for the fair value of the property.<sup>2</sup>

*Recovery of Property Delivered.* — It is usually held that no action will lie by the seller to recover back property sold and delivered on Sunday, notwithstanding the purchase price has not been paid.<sup>3</sup> Nor will an action lie by the creditors of the seller to get possession of the property delivered.<sup>4</sup> In fact, where the seller gets possession of the property without process on a secular day, the courts will aid the buyer to recover the same.<sup>5</sup> But a few cases hold that as the Sunday contract of sale is void no title passes to the buyer, and the seller may on another day make a demand for the property, and if it is not returned maintain an action of trover or replevin.<sup>6</sup>

bb. *CONTRACTS OF BAILMENT OR PLEDGE — Recovery of Hire.* — Where property is transferred to a person on Sunday under a contract of bailment for hire, void because made on that day, and the property bailed is returned in accordance with the terms of the bailment, but the consideration for the bailment is not paid, no action lies by the bailor against the bailee to recover such consideration.<sup>7</sup>

*Recovery of Property.* — Property delivered on Sunday by way of bailment or pledge may be retained by the bailee or pledgee until the special purpose for which it was received has been carried out.<sup>8</sup> But a retention not in accordance with the terms of the bailment or pledge amounts to a conversion.<sup>9</sup>

cc. *CONTRACTS FOR LOAN OF MONEY.* — Where money is loaned on Sunday no

1. *Action for Price Will Not Lie — Connecticut.* — Finn v. Donahue, 35 Conn. 216.

*Iowa.* — Pike v. King, 16 Iowa 49.

*Maine.* — Meader v. White, 66 Me. 90, 22 Am. Rep. 551.

*Massachusetts.* — Ladd v. Rogers, 11 Allen (Mass.) 209; Cranson v. Goss, 107 Mass. 442, 9 Am. Rep. 45.

*Michigan.* — Adams v. Hamell, 2 Dougl. (Mich.) 73, 43 Am. Dec. 455.

*Mississippi.* — Block v. McMurry, 56 Miss. 217, 31 Am. Rep. 357.

*New Hampshire.* — Smith v. Bean, 15 N. H. 579; Thompson v. Williams, 58 N. H. 248.

*Pennsylvania.* — Foreman v. Ahl, 55 Pa. St. 325.

*Texas.* — Schneider v. Sansom, 62 Tex. 203, 50 Am. Rep. 521.

*Wisconsin.* — Troewert v. Decker, 51 Wis. 46, 37 Am. Rep. 808.

In Thompson v. Williams, 58 N. H. 248, the seller retook goods which had been delivered without the buyer's consent, whereupon the buyer recovered them in a trespass action, and notwithstanding, when sued for the price, he successfully defended on the ground that the sale was on Sunday.

2. *Dodson v. Harris*, 10 Ala. 566; Ladd v. Rogers, 11 Allen (Mass.) 209; Cranson v. Goss, 107 Mass. 442, 9 Am. Rep. 45.

3. *Property Delivered Not Recoverable.* — Block v. McMurry, 56 Miss. 220, 3 Am. Rep. 357; Smith v. Bean, 15 N. H. 578; Moore v. Kendall, 1 Chand. (Wis.) 33.

4. *Action Not Maintainable by Creditors of Seller.* — Smith v. Bean, 15 N. H. 577.

5. *Buyer May Recover Property if Taken from Him.* — Kinney v. McDermot, 55 Iowa 674, 39

Am. Rep. 191; Smith v. Bean, 15 N. H. 578; Thompson v. Williams, 58 N. H. 248.

6. *Action to Recover Property Maintainable.* — Dodson v. Harris, 10 Ala. 566; Ladd v. Rogers, 11 Allen (Mass.) 209; Adams v. Gay, 19 Vt. 358. And see Cranson v. Goss, 107 Mass. 441, 9 Am. Rep. 45; Tucker v. Mowrey, 12 Mich. 378; Winfield v. Dodge, 45 Mich. 355, 40 Am. Rep. 476; Brazee v. Bryant, 50 Mich. 140.

7. *No Action Lies for Horse Hire — Arkansas.* — Stewart v. Davis, 31 Ark. 518, 25 Am. Rep. 576.

*Maine.* — Morton v. Gloster, 46 Me. 520; Tillock v. Webb, 56 Me. 100; Parker v. Latner, 60 Me. 528, 11 Am. Rep. 210.

*Massachusetts.* — Gregg v. Wyman, 4 Cush. (Mass.) 322.

*New Hampshire.* — Chenette v. Teehan, 63 N. H. 149.

*New York.* — Nodine v. Doherty, 46 Barb. (N. Y.) 59.

*Pennsylvania.* — Berrill v. Smith, 2 Miles (Pa.) 402.

*Rhode Island.* — Smith v. Rollins, 11 R. I. 464, 23 Am. Rep. 509.

*Wisconsin.* — Thomas v. Hatch, 53 Wis. 296.

8. *Retained until Special Purposes Accomplished.* — King v. Green, 6 Allen (Mass.) 139; Cranson v. Goss, 107 Mass. 441, 9 Am. Rep. 45.

9. *Retention Not in Accordance with Terms Is Conversion.* — Tamplin v. Still, 77 Ala. 374.

*Money on Deposit.* — It is conversion for the bailee to use money deposited on Sunday for safekeeping, and an action lies in tort or the tort may be waived and assumpsit maintained for money had and received. Tamplin v. Still, 77 Ala. 374.

action can be maintained for its return, either on the express promise made on Sunday or on an implied promise for its repayment.<sup>1</sup>

(b) **Where Subsequent Express Promise Exists.** — Where a person receives the benefit of a void Sunday contract, and subsequently, on a secular day, makes an express promise to perform his side of it, it is held valid and enforceable even in those states which do not go to the extent of holding that Sunday contracts may be ratified;<sup>2</sup> but nothing short of an express new promise will be held sufficient.<sup>3</sup>

**2. To Perform Something on Sunday Prohibited by Statute** — *a.* IN GENERAL. — Contracts to perform on Sunday something prohibited by statute are void whether made on Sunday or on a secular day.<sup>4</sup> And in such cases it is immaterial whether the execution of Sunday contracts generally is prohibited.<sup>5</sup>

**Entire Contract Providing for Part Performance on Sunday** is void, where the acts to be performed on Sunday are prohibited by statute; and no recovery can be had for the part performed on a secular day.<sup>6</sup>

**Presumption that Labor Was to Be Performed on Secular Day.** — In the absence of proof to the contrary it will be presumed that the labor contracted for was to be performed on a secular day.<sup>7</sup>

**1. Money Loaned on Sunday Not Recoverable.** — *Tamplin v. Still*, 77 Ala. 374; *Finn v. Donahue*, 35 Conn. 216; *Meader v. White*, 66 Me. 90, 22 Am. Rep. 551; *Troewert v. Decker*, 51 Wis. 46, 37 Am. Rep. 808.

**But Money Loaned on a Week Day on a Note Made on Sunday** may be recovered where the lender is ignorant of the fact that the note was made on Sunday. *Beman v. Wessels*, 53 Mich. 549.

**2. Purchase Price for Goods Sold and Delivered on Sunday** may be recovered where the lender is chaser, on a subsequent secular day, makes an express promise to pay it. *Williams v. Paul*, 6 Bing. 653, 19 E. C. L. 192, criticised in *Simpson v. Nicholls*, 3 M. & W. 240; *Sayles v. Wellman*, 10 R. I. 465; *Melchoir v. McCarty*, 31 Wis. 252, 11 Am. Rep. 605; *Williams v. Lane*, 87 Wis. 152. And see *Winchell v. Carey*, 115 Mass. 560, 15 Am. Rep. 151.

"The cases are not uniform in stating the reasons for this exception, but they all recognize its existence." *Melchoir v. McCarty*, 31 Wis. 253, 11 Am. Rep. 605.

**Action on a Note Made on Sunday Lies** where express promise is made on a subsequent week day to pay it. *Tucker v. West*, 29 Ark. 386; *Brewster v. Banta*, 66 N. J. L. 367.

**Money Borrowed on Sunday** may be recovered where there is an express promise on a secular day to repay the money. *Gwinn v. Simes*, 61 Mo. 335; *Smith v. Case*, 2 Oregon 191.

**3. Nothing Short of Express Promise Sufficient.** — In *Reeves v. Butcher*, 31 N. J. L. 224, it was held that payment on a secular day of interest on a note, void because made on Sunday, does not in itself amount to a new promise to pay the money due.

**4. Contracts to Perform Sunday Labor Void** — *England.* — *Peate v. Dicken*, 1 C. M. & R. 422. *United States.* — *Gauthier v. Cole*, 17 Fed. Rep. 716.

*Iowa.* — *Alfree v. Gates*, 82 Iowa 19.

*Kansas.* — *Johnson v. Brown*, 13 Kan. 529.

*Kentucky.* — *Slade v. Arnold*, 14 B. Mon. (Ky.) 232.

*Missouri.* — *Bernard v. Lipping*, 32 Mo. 341; *Roberts v. Barnes*, 127 Mo. 405, 48 Am. St. Rep. 640.

*New Hampshire.* — *Woodman v. Hubbard*, 25 N. H. 67, 57 Am. Dec. 310.

*New York.* — *Watts v. Van Ness*, 1 Hill (N. Y.) 76; *Rigney v. White*, 4 Daly (N. Y.) 400; *Lindemuller v. People*, 33 Barb. (N. Y.) 548; *Smith v. Wilcox*, 24 N. Y. 353, 82 Am. Dec. 302, 25 Barb. (N. Y.) 341; *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292, 31 Barb. (N. Y.) 38; *Bilordeaux v. H. Bencke Lith. Co.*, 16 Daly (N. Y.) 78; *Cornelius v. Reiser*, (C. Pl. Gen. T.) 18 N. Y. Supp. 113; *Brunnett v. Clark, Sheld.* (N. Y.) 500.

*Pennsylvania.* — *Johnston v. Com.*, 22 Pa. St. 102.

**Contract to Take Charge of Advertising Business** of daily, Sunday, and weekly edition of newspapers is void, where the issuing, publishing, and circulating of Sunday newspapers are prohibited by statutes. *Handy v. St. Paul Globe Pub. Co.*, 41 Minn. 188, 16 Am. St. Rep. 695.

**5. Immaterial Whether Execution of Sunday Contracts Generally Is Prohibited.** — *Johnson v. Brown*, 13 Kan. 529; *Roberts v. Barnes*, 127 Mo. 405, 48 Am. St. Rep. 640; *Smith v. Wilcox*, 24 N. Y. 353, 82 Am. Dec. 302, affirming 25 Barb. (N. Y.) 341; *Merritt v. Earle*, 29 N. Y. 115, 86 Am. Dec. 292, affirming 31 Barb. (N. Y.) 38; *Watts v. Van Ness*, 1 Hill (N. Y.) 76; *Rigney v. White*, 4 Daly (N. Y.) 400; *Lindemuller v. People*, 33 Barb. (N. Y.) 548; *Bilordeaux v. H. Bencke Lith. Co.*, 16 Daly (N. Y.) 78; *Cornelius v. Reiser*, (C. Pl. Gen. T.) 18 N. Y. Supp. 113; *Brunnett v. Clark, Sheld.* (N. Y.) 500.

**6. Entire Contract Providing for Part Performance on Sunday.** — *Stewart v. Thayer*, 170 Mass. 560; *Handy v. St. Paul Globe Pub. Co.*, 41 Minn. 188, 16 Am. St. Rep. 695; *Williams v. Hasting*, 59 N. H. 373; *Fountain Square Theater Co. v. Evans*, 4 Ohio Dec. 151.

**7. Presumption that Labor Was to Be Performed on Secular Day.** — *Van Winkle v. Satterfield*, 58 Ark. 617; *Alfree v. Gates*, 82 Iowa 19; *Goddard v. Morrissey*, 172 Mass. 594; *Rigney v. White*, 4 Daly (N. Y.) 400; *Porter v. Sanderson*, 37 Wis. 41. And see *Johnston v. Com.*, 22 Pa. St. 102, where it was held that a contract of hiring by the month does not in general bind the laborer to work on Sunday.

**b. RATIFICATION.** — While there is a difference in the decisions on the question whether a contract void merely because it was made on Sunday may be ratified on a secular day so as to become valid,<sup>1</sup> there is no conflict on the proposition that a contract void because it stipulates for doing something prohibited by the Sunday laws is incapable of being ratified.<sup>2</sup>

**3. Revival of Debt Barred by Statute of Limitations.** — Where a debt barred by the statute of limitations is acknowledged, or a part payment is made, on Sunday, by the weight of authority the debt is not revived.<sup>3</sup> There is some authority, however, to the contrary.<sup>4</sup>

**4. Contract Within Statute of Frauds, but Delivery Made on Sunday.** — Delivery and receipt on Sunday of goods sold under a verbal contract, void because within the statute of frauds, are insufficient to validate the contract.<sup>5</sup>

**X. INJURIES RECEIVED WHILE VIOLATING SUNDAY STATUTES — 1. In General.** — Statutes exist in a few states which provide that Sunday statutes shall not affect in any way an action for a tort or injury suffered on Sunday.<sup>6</sup> These statutes have in *Maine* and *Massachusetts* changed the law formerly existing, and must be borne in mind in considering what follows.<sup>7</sup>

**2. Actions of Tort — a. IN GENERAL.** — By the great weight of authority it is no defense to an action for negligence that the plaintiff, at the time the injury occurred, was engaged in the violation of some Sunday statute. This is on the ground that the proximate cause of the injury was the negligence of the defendant and not the violation of the Sunday statute by the plaintiff.<sup>8</sup>

**Duty of Apprentice to Labor on Sunday under Covenant of Indenture.** — See the title *APPRENTICES*, vol. 2, p. 502.

**Duty of Servant to Labor on Sunday.** — And see the title *MASTER AND SERVANT*, vol. 20, p. 19.

**Duty of Seamen to Work on Sundays.** — See the title *SEAMEN*, vol. 25, p. 131.

**1. Handy v. St. Paul Globe Pub. Co.,** 41 Minn. 188, 16 Am. St. Rep. 695. And see *supra*, this section, 1. a. (2) *Ratification of Contracts*.

**2. Handy v. St. Paul Globe Pub. Co.,** 41 Minn. 188, 16 Am. St. Rep. 695.

**3. Debt Not Revived.** — *Hussey v. Roquemore*, 27 Ala. 281; *Bumgardner v. Taylor*, 28 Ala. 687; *Dennis v. Sharman*, 31 Ga. 607; *Clapp v. Hale*, 112 Mass. 368, 17 Am. Rep. 111; *Pillen v. Erickson*, 125 Mich. 68; *Whitcher v. McConnell*, 59 N. H. 470; *Matter of Linn*, 2 Pearson (Pa.) 487; *Haydock v. Tracy*, 3 W. & S. (Pa.) 507. And see *Beardsley v. Hall*, 36 Conn. 270, 4 Am. Rep. 74.

**4. Debt Not Revived.** — *Ayres v. Bane*, 39 Iowa 518; *Thomas v. Hunter*, 29 Md. 406.

**5. Delivery and Receipt on Sunday.** — *Ash v. Aldrich*, 67 N. H. 581. And see *Beaumont v. Brengeri*, 5 C. B. 301, 57 E. C. L. 301, where the question was left undecided.

**6. Statutes Making Violation of Sunday Laws No Defense.** — *Maine Pub. Laws* 1895, c. 129, § 1; *Mass. Pub. Laws* 1902, c. 98, § 17; *Bridges v. Bridges*, 93 Me. 559. And see the statutes of the different states.

In *Maine* the statute reads as follows: "The provisions of chapter one hundred twenty-four of the revised statutes relating to the observance of the Lord's day, shall not affect in any way the rights or remedy of either party in any action for a tort or injury suffered on that day." *Maine Pub. Laws* 1895, c. 129, § 1.

**7. Statutes Directed Against Common Carriers,** and providing that the fact that a person was traveling on Sunday in violation of statute

should not constitute a defense in an action against the common carrier for a tort suffered, existed in *Massachusetts* prior to more general statute. *McDonough v. Metropolitan R. Co.*, 137 Mass. 210.

**8. Damages for Injuries Caused by Defective Highway Are Recoverable** against the town, though the injuries were received while the plaintiff was traveling in violation of law. *Black v. Lewiston*, 2 Idaho 276; *Gross v. Miller*, 93 Iowa 72; *Kansas City v. Orr*, 62 Kan. 61; *Norris v. Litchfield*, 35 N. H. 271, 69 Am. Dec. 546; *Sewell v. Webster*, 59 N. H. 586; *Wentworth v. Jefferson*, 60 N. H. 158; *Platz v. Cohoes*, 89 N. Y. 219, 42 Am. Rep. 286; *Sutton v. Wauwatosa*, 29 Wis. 21, 9 Am. Rep. 534.

**Damages for Injuries Caused by Dog Are Recoverable**, though the plaintiff was unlawfully traveling when they were received. *Schmid v. Humphrey*, 48 Iowa 652, 30 Am. Rep. 414.

And this was held to be the law in *Massachusetts* in a case decided before the statute was passed making it immaterial that the plaintiff was violating Sunday statutes on the ground that the act of traveling was a condition and not a contributory cause of the injury. *White v. Lang*, 128 Mass. 598, 35 Am. Rep. 402.

**Damages for Injuries to Boat Caused by Obstruction in Water** may be recovered, though the boat was running in violation of a statute prohibiting worldly employment on Sunday. *Philadelphia, etc., R. Co. v. Philadelphia, etc., Steam Towboat Co.*, 23 How. (U. S.) 209.

**A Person Shot While Hunting** on Sunday in violation of a statute prohibiting hunting on that day may recover damages against a companion who negligently did the shooting. *Gross v. Miller*, 93 Iowa 72.

**Employee Injured While Laboring for Employer** in violation of Sunday statutes prohibiting "labor" may recover damages for the injuries sustained. *Louisville, etc., R. Co. v. Buck*, 116 Ind. 566, 9 Am. St. Rep. 883; *Louisville, etc.,*

But there is some authority to the effect that in the absence of statutes to the contrary<sup>1</sup> the fact that the plaintiff was engaged in violating a Sunday statute at the time the injuries were received is an absolute defense, provided the plaintiff's violation of the Sunday statute contributed to the injuries.<sup>2</sup>

*b. TORTS ARISING OUT OF SUNDAY CONTRACTS OF BAILMENT—(1) Conversion.*—Where personal property is hired under a contract of bailment, void because made on Sunday, and the property is converted by the bailee, as where a horse is hired to go to a certain place and is driven to a different place, it is generally held, even in the absence of statutes making the violation of a Sunday statute no defense to an action of tort, that the bailor may maintain an action for the conversion,<sup>3</sup> but a few cases have held in the absence of statutes to the contrary that no action will lie under such circumstances.<sup>4</sup>

*R. Co. v. Frawley*, 110 Ind. 18; *Taylor v. Star Coal Co.*, 110 Iowa 40; *Johnson v. Missouri Pac. R. Co.*, 18 Neb. 690; *Solarz v. Manhattan R. Co.*, (N. Y. Super. Ct. Tr. T.) 31 Abb. N. Cas. (N. Y.) 426, 8 Misc. (N. Y.) 656; *Hoadley v. International Paper Co.*, 72 Vt. 79. And see the title *FELLOW SERVANTS*, vol. 12, p. 893.

**Damages for Injuries Caused by Collision of Teams Are Recoverable** when the plaintiff was unlawfully traveling on Sunday. *Baldwin v. Barney*, 12 R. I. 392, 34 Am. Rep. 670.

**Damages for the Killing of Person at Railroad Crossing** by being run over by train are recoverable, though the person killed was traveling on Sunday in violation of law. *Boyden v. Fitchburg R. Co.*, 70 Vt. 125.

**Damages for Injuries to Passenger or Property Being Transported by Common Carrier** are recoverable, though the transportation was in violation of Sunday statutes. *Opsahl v. Judd*, 30 Minn. 126; *Knowlton v. Milwaukee City R. Co.*, 59 Wis. 278; *Delaware, etc., R. Co. v. Trautwein*, 52 N. J. L. 169, 19 Am. St. Rep. 442. And see *Chicago, etc., R. Co. v. Graham*, 3 Ind. App. 28, 50 Am. St. Rep. 256; *Smith v. New York, etc., R. Co.*, 46 N. J. L. 7.

1. See *supra*, this section, 1. *In General*.

2. **Violation Must Contribute to Injuries and Not Be Condition Merely.**—*White v. Lang*, 128 Mass. 598, 35 Am. Rep. 402; *Wallace v. Merrimack River Nav., etc., Co.*, 134 Mass. 95, 45 Am. Rep. 301.

**Damages for Injuries Caused by Defective Highway Are Not Recoverable** in the absence of a statute to the contrary, where the plaintiff was violating Sunday statutes against traveling.

*Maine.*—*Hinckley v. Penobscot*, 42 Me. 89; *Craty v. Bangor*, 57 Me. 423, 2 Am. Rep. 56; *Parker v. Latner*, 60 Me. 528, 11 Am. Rep. 210; *O'Connell v. Lewiston*, 65 Me. 34, 20 Am. Rep. 673; *Cleveland v. Bangor*, 87 Me. 259, 47 Am. St. Rep. 326.

And see *Beacham v. Portsmouth Bridge*, 68 N. H. 382, 73 Am. St. Rep. 607, where the court, applying the law of Maine, refused to allow the plaintiff, who was traveling on Sunday in violation of law, on the part of a toll bridge between New Hampshire and Maine which was in Maine, to recover damages of the toll-bridge company for injuries sustained by his horse, due to a defect in the toll bridge.

*Massachusetts.*—*Jones v. Andover*, 10 Allen (Mass.) 18; *Bosworth v. Swansey*, 10 Met. (Mass.) 363, 43 Am. Dec. 441; *Connolly v. Boston*, 117 Mass. 64, 19 Am. Rep. 396; *Gor-*

*man v. Lowell*, 117 Mass. 65; *Lyons v. Desotelle*, 124 Mass. 389; *Davis v. Somerville*, 128 Mass. 594, 35 Am. Rep. 399; *White v. Lang*, 128 Mass. 598, 35 Am. Rep. 402; *Barker v. Worcester*, 139 Mass. 74.

*Vermont.*—*McClary v. Lowell*, 44 Vt. 116, 8 Am. Rep. 366; *Johnson v. Irasburgh*, 47 Vt. 32, 19 Am. Rep. 111; *Holcomb v. Danby*, 51 Vt. 435; *Hoadley v. International Paper Co.*, 72 Vt. 79.

But in Vermont this rule is put upon the ground that a town is under no obligation to provide a safe road for such a traveler; and the rule does not apply to injuries caused by private corporations or persons. *Boyden v. Fitchburg R. Co.*, 70 Vt. 125; *Hoadley v. International Paper Co.*, 72 Vt. 79.

**Damages for Injuries Caused by Being Hit by Railroad Gate Are Not Recoverable** in the absence of a statute to the contrary, where the plaintiff was traveling at the time in violation of Sunday statutes. *Smith v. Boston, etc., R. Co.*, 120 Mass. 490, 21 Am. Rep. 538.

**Damages for Injuries Caused by Collision on Water or Land Are Not Recoverable** in the absence of a statute to the contrary, where the plaintiff was violating a Sunday statute against traveling. *Lyons v. Desotelle*, 124 Mass. 387; *Wallace v. Merrimack River Nav., etc., Co.*, 134 Mass. 95, 45 Am. Rep. 301.

**Damages for Injuries to Passenger Are Not Recoverable** in the absence of a statute to the contrary, where the passenger was traveling in violation of Sunday statute. *Bucher v. Fitchburg R. Co.*, 131 Mass. 156, 41 Am. Rep. 216, 125 U. S. 555.

3. **Action Lies for Conversion.**—*Stewart v. Davis*, 31 Ark. 518, 25 Am. Rep. 576; *Frost v. Plumb*, 40 Conn. 111, 16 Am. Rep. 18; *Doolittle v. Shaw*, 92 Iowa 348, 54 Am. St. Rep. 562; *Marton v. Gloster*, 46 Me. 520, distinguished in *Parker v. Latner*, 60 Me. 528, 11 Am. Rep. 210; *Hall v. Corcoran*, 107 Mass. 251, 9 Am. Rep. 30 [overruling *Gregg v. Wyman*, 4 Cush. (Mass.) 322]; *Nodine v. Doherty*, 46 Barb. (N. Y.) 59. And see *Fisher v. Kyle*, 27 Mich. 454.

4. **Action Does Not Lie for Conversion.**—*Gregg v. Wyman*, 4 Cush. (Mass.) 322 [overruled in *Hall v. Corcoran*, 107 Mass. 251, 9 Am. Rep. 30]; *Whelden v. Chappel*, 8 R. I. 230; *Smith v. Rollins*, 11 R. I. 464, 23 Am. Rep. 509.

*Whelden v. Chappel*, 8 R. I. 230, was decided on the authority of *Gregg v. Wyman*, 4 Cush. (Mass.) 322, and was affirmed in *Smith v. Rollins*, 11 R. I. 464, 23 Am. Rep. 509, where

**Reason for Allowing Action.** — Where an action of conversion is maintainable it is on the ground that the conversion puts an end to the illegal contract, and the bailor in proving his case is not obliged to rely essentially upon the contract, although it may incidentally appear.<sup>1</sup>

(2) *Negligence.* — Where personal property held under a contract of bailment, void because made on Sunday, is injured or destroyed by the bailee on that day through his negligence, but while he is acting within the terms of the bailment so far as not to be liable to an action for conversion, as where a horse is hired on Sunday to go to a certain place and while being driven to that place is injured through the bailee's negligence, the weight of authority, in the absence of statutes making the violation of Sunday laws no defense to an action of tort,<sup>2</sup> is that the bailor cannot maintain an action for damages because a reliance on the illegal contract of bailment would be necessary.<sup>3</sup> But there is authority that an action will lie.<sup>4</sup>

### 3. Actions on Contracts of Insurance. — Actions on contracts of accident

the court said that it could not agree with the conclusions in *Hall v. Corcoran*, 107 Mass. 251, 9 Am. Rep. 30, and *Woodman v. Hubbard*, 25 N. H. 67, 57 Am. Dec. 310, but was still of opinion that the decision in *Whelden v. Chappel*, 8 R. I. 230, was founded upon the better reason.

1. **Reason for Allowing Action.** — *Parker v. Latner*, 60 Me. 528, 11 Am. Rep. 210. But see *Smith v. Rollins*, 11 R. I. 470, 23 Am. Rep. 509, where the court says that proof of the contract is essential to proof of the conversion. And see *Woodman v. Hubbard*, 25 N. H. 67, 57 Am. Dec. 310.

In *Frost v. Plumb*, 40 Conn. 111, 16 Am. Rep. 18, the court says: "We understand the rule to be this: the plaintiff cannot recover whenever it is necessary for him to prove, as a part of his cause of action, his own illegal act, or other illegal transaction; but if he can show a complete cause of action without being obliged to prove his own illegal act, although such illegal act may incidentally appear, and may be important even as explanatory of other facts in the case, he may recover. It is sufficient if his cause of action is not essentially founded upon something which is illegal. If it is, whatever may be the form of the action, he cannot recover. Apply that rule to this case. It was only necessary for the plaintiff to prove his own title to the property, and a conversion by the defendant. The destruction of the horse was a conversion; and proof that the injury which caused his death occurred while being driven without the consent of the owner shows a complete cause of action without any reference to an illegal contract. The illegal letting may or may not appear. If it does, it simply explains the defendant's possession, and proves that it was by the owner's permission, at least for a certain purpose. It may give the defendant an opportunity to injure the horse, but it does not cause the injury; nor does it contribute to it in such a sense as to make the plaintiff a party to the wrongful act. If it does not appear, before the defendant can avail himself of it as a defense it becomes necessary for him to prove the illegal contract to which he was a party, and his own illegal conduct in traveling upon the Sabbath. But he can no more avail himself of that as a defense than the plaintiff can as a cause of action. Either party, whose

success depends upon proving his own violation of law, must fail."

2. See *supra*, this section, 1. *In General.*

3. **No Action Lies for Negligence.** — *Parker v. Latner*, 60 Me. 528, 11 Am. Rep. 210; *Way v. Foster*, 1 Allen (Mass.) 408, distinguished in *Hall v. Corcoran*, 107 Mass. 251, 9 Am. Rep. 30. And see *Frost v. Plumb*, 40 Conn. 111, 16 Am. Rep. 18; *Whelden v. Chappel*, 8 R. I. 230; *Smith v. Rollins*, 11 R. I. 464, 23 Am. Rep. 509.

4. **Action Lies for Negligence.** — *Newbury v. Luke*, 68 N. J. L. 189; *Nodine v. Doherty*, 46 Barb. (N. Y.) 59.

**Reason for Rule.** — In *Newbury v. Luke*, 68 N. J. L. 189, the court says: "The Sunday hiring and the Sunday driving happened to furnish the conditions under which the death of the horse was occasioned. But its death was the direct and natural result of the overdriving and abuse, and of these alone. These causes would have produced the same result if they had occurred on any other day of the week, just as they would have produced it had they occurred without any contract of bailment whatsoever. It follows that the Sunday violation is as clearly nonessential upon the question of defendant's liability as are such questions as the exact location of the occurrence, the time of day, the color of the horse, and the like. But if an inquiry into the contract of bailment were material, what is the result? The contract falls because made on Sunday. That destroys the defendant's right to drive the horse, but it certainly does not confer the right to overdrive it. It vitiates the temporary right of use, but it does not pass the permanent right of property. In short, it leaves the defendant's liability upon the same basis as if the horse had been taken without the leave or license of the plaintiff. Unless, therefore, the plaintiff is debarred by the application of the maxim, *In pari delicto potior est conditio defendentis*, the plaintiff must prevail. But as the plaintiff can make out his case without reference to the illegal contract, it seems clear that this maxim has no applicancy."

**Contract of Pasturage**, though void because made on Sunday, will not prevent an action against the agistor for loss of a horse, due to his negligence. *Costello v. Ten Eyck*, 86 Mich. 348, 24 Am. St. Rep. 128.

insurance by policy holders receiving injuries on Sunday while violating Sunday statutes are considered elsewhere.<sup>1</sup>

**XI. EVIDENCE — 1. Burden of Proof** — As to Prohibitory Clause of Sunday Statute. — The person who seeks to establish the fact that the prohibiting clause of a Sunday statute has been violated has the burden of proof.<sup>2</sup>

As to Excepting Clause of Sunday Statute. — The person who seeks to bring himself within the clause of a Sunday statute which excepts certain things from its prohibition has the burden of proof.<sup>3</sup>

**2. As to Date** — *a.* JUDICIALLY NOTICED. — Courts will take judicial notice that a certain day of the month falls upon Sunday.<sup>4</sup>

*b.* TRUE DATE SHOWN. — While there is a presumption that an instrument was dated as of its true day,<sup>5</sup> yet an instrument dated as of Sunday may be shown to have been misdated and proof received of its true date.<sup>6</sup> So, as between the parties, evidence may be received that a transaction purporting to be of another date was in truth on Sunday.<sup>7</sup>

As to Date of Delivery of Instrument. — It will be presumed that an instrument was delivered on the day of its date, but this presumption may be overcome and an instrument dated on Sunday shown to have been delivered on a week day.<sup>8</sup>

**XII. STATUTES CONCERNING HOLIDAYS.** — Statutes exist generally setting apart certain days as holidays and regulating to some extent their proper observance.<sup>9</sup> These statutes are not so general in their regulation as Sunday statutes;<sup>10</sup> they usually provide merely for the suspension of judicial proceedings,<sup>11</sup> for the presentation and protest of commercial paper on the next secular business day,<sup>12</sup> for the suspension of business in the public offices,<sup>13</sup> and for the

**1. Action on Contracts of Insurance.** — See the title ACCIDENT INSURANCE, vol. 1, p. 320.

**2. Burden of Proving that Contract Was Made on Sunday,** and therefore void as violating clause of statute prohibiting the making of contracts on Sunday, is on the person assailing it. *Sanders v. Johnson*, 29 Ga. 526; *Nason v. Dinsmore*, 34 Me. 391; *O'Shea v. Kohn*, 33 Hun (N. Y.) 114; *Troewert v. Decker*, 51 Wis. 46, 37 Am. Rep. 808.

**Ordinary Calling.** — Burden of proving that a Sunday contract was "within ordinary calling" of the parties, where the invalidity is dependent on that fact, is on the person alleging invalidity. *Sanders v. Johnson*, 29 Ga. 526; *Mills v. Williams*, 16 S. Car. 593; *Bethune v. Hamilton*, 6 U. C. Q. B. O. S. 105.

**3. Work of Necessity or Charity.** — Burden of showing that certain acts alleged to be prohibited by Sunday statutes were acts of necessity or charity, and hence within the clause excepting work of necessity or charity, is on the one doing the acts. *Shipley v. State*, 61 Ark. 216; *Jackson v. State*, 88 Ga. 787; *Western Union Tel. Co. v. Yopst*, 118 Ind. 248; *State v. Southern R. Co.*, 119 N. Car. 814, 56 Am. St. Rep. 689; *Com. v. Bobb*, 17 Pa. Co. Ct. 350. But see *contra*, *State v. Baltimore, etc., R. Co.*, 15 W. Va. 362, 36 Am. Rep. 803, 24 W. Va. 783, 49 Am. Rep. 290; *State v. McBee*, 52 W. Va. 257.

**4. Sunday Judicially Noticed.** — See the titles DATE, vol. 8, p. 735; JUDICIAL NOTICE, vol. 17, p. 904.

**5. Presumption as to Date.** — *Hauerwas v. Goodloe*, 101 Ala. 162. And see the title DATE, vol. 8, p. 729.

**6. Instrument Dated as of Sunday.** — *Cumberland Bank v. Mayberry*, 48 Me. 198.

**In Maine It Is Provided by Statute** that no deed, contract, receipt, or other instrument in writing is void because it bears date upon the Lord's day without other proof than the date of its having been made and delivered on that day. *Bar Harbor First Nat. Bank v. Kingsley*, 84 Me. 111.

**7. Transaction Purporting to Be of Another Date.** — *Cumberland Bank v. Mayberry*, 48 Me. 108. And see the title DATE, vol. 8, p. 727.

**8. Showing Date of Delivery.** — *William v. Armstrong*, 130 Ala. 389.

**9. See the statutes of the different states.**

**10. Holidays Not Placed on Same Basis as Sunday.** — *Page v. Shainwald*, 169 N. Y. 246.

**11. Judicial Proceedings Suspended.** — *Page v. Shainwald*, 169 N. Y. 246. And see the title SUNDAYS AND HOLIDAYS, 20 ENCYC. OF PL. AND PR. 1205.

**12. Presentation and Protest of Commercial Paper on Subsequent Business Day.** — *State v. Atkinson*, 139 Ind. 426; *Handy v. Maddox*, 85 Md. 547; *Hitchcock v. Hogan*, 99 Mich. 124; *Lord v. Gifford*, 67 N. J. L. 193; *Page v. Shainwald*, 169 N. Y. 252; *Robeson v. Pels*, 202 Pa. St. 399. And see the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, pp. 368, 436.

**13. Public Offices Closed.** — *Lord v. Gifford*, 67 N. J. L. 193; *Page v. Shainwald*, 169 N. Y. 252.

**Municipal Legislation on Holidays Is Not Inhibited** under a statute prohibiting the "transaction of business in the public offices of this state or counties of this state." *Mueller v. Egg Harbor City*, 55 N. J. L. 245; *Lord v. Gifford*, 67 N. J. L. 193.

regulation of the sale of intoxicating liquors on certain holidays.<sup>1</sup> All transactions not within the statutory prohibitions may be carried on as on any other day.<sup>2</sup>

**SUNDAY SCHOOL.**—See note 3.

**SUNK—SUNKEN.**—See note 4.

**SUNSET.**—See note 5.

**SUNSTROKE.**—See the title ACCIDENT INSURANCE, vol. 1, p. 292.

**SUPERFLUOUS LAND.**—See note 6.

**SUPERINTEND.**—To superintend means to oversee.<sup>7</sup>

**SUPERINTENDENCE.** (See also MANAGEMENT, vol. 19, p. 706.)—"Superintendence" is defined as "the act of superintending; care and oversight for the purpose of direction and with authority to direct."<sup>8</sup>

**SUPERINTENDENT.** (See also the title FELLOW SERVANTS, vol. 12, p. 893.)—The word "superintendent," in its ordinary acceptation, means one

1. **Sale or Gift of Intoxicating Liquors on Election Day.**—See the title INTOXICATING LIQUORS, vol. 17, p. 347.

2. **Transactions Not Prohibited by Statute May Be Carried On.**—Glenn v. Eddy, 51 N. J. L. 255, 14 Am. St. Rep. 684; Lord v. Gifford, 67 N. J. L. 193; Page v. Shainwald, 169 N. Y. 246; Walton v. Stafford, 162 N. Y. 558; Morel v. Stearns, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 486.

In Glenn v. Eddy, 51 N. J. L. 255, 14 Am. St. Rep. 684, the court says: "When the statute declares [certain days] to be legal holidays, it does not permit a reference to the legal status of Sunday to discover its meaning; for it proceeds to interpret the phrase, so far as it is prohibitory, by an express enactment declaring what shall not be done thereon. What it thus expresses is prohibited; what it fails to prohibit remains lawful to be done."

**The Making of Ordinary Contracts on holidays** is not within the operation of *Pennsylvania* statutes. Robeson v. Pels, 202 Pa. St. 399.

**Legal Holiday Not "Dies Non"** in *Maryland*. Handy v. Maddox, 85 Md. 547.

3. **Sunday School.**—A bequest of a sum of money, to a church "to be applied to the *Sunday school* belonging to or attached to said church" was held sufficiently definite and certain and capable of being enforced. The church was a corporate body, and the *Sunday school* was unincorporated, but being an integral part of the church organization, it was embraced within the scope of the corporate functions of the church. Eutaw Place Baptist Church v. Shively, 67 Md. 493. See also the title CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, pp. 926, 930.

4. **Sunk.**—See Bryant v. London Assur., 2 Times Rep. 591; The Glenlivet, (1893) P. 170.

**Sunken Wreck.**—See The Munroe, (1893) P. 248, stated under the title MARINE INSURANCE, vol. 19, p. 1027.

5. **Sunset.**—In Gordon v. Cann, 68 L. J. Q. B. 434, 80 L. T. 20, it was held that under a statute requiring riders of bicycles to exhibit lights "one hour after sunset," the hour of actual sunset at the place of riding, and not the hour of sunset at Greenwich was to be regarded.

6. **Superfluous Land.**—As to the meaning of this term under the English Land Clauses Con-

solidation Act, 1885, § 127, see Mulliner v. Midland R. Co., 11 Ch. D. 611; Norton v. London, etc., R. Co., 13 Ch. D. 268; *In re Metropolitan Dist. R. Co.*, 13 Ch. D. 607; May v. Great Western R. Co., L. R. 7 Q. B. 378; Hooper v. Bourne, 3 Q. B. D. 258; Carington v. Wycombe R. Co., L. R. 3 Ch. 382; Betts v. Great Eastern R. Co., L. R. 8 Exch. 303.

7. **Superintend.**—People v. Steele, 2 Barb. (N. Y.) 397.

**Superintend and Manage.**—See MANAGE, vol. 19, p. 706, and see Ure v. Ure, 185 Ill. 216.

8. **Superintendence.**—Ure v. Ure, 185 Ill. 216, quoting Webst. Dict.

The word *superintendence* means oversight or inspection. Moffitt v. Asheville, 103 N. Car. 237.

**Person Having Superintendence—Employers' Liability.**—See the title FELLOW SERVANTS, vol. 12, p. 942 *et seq.*

**Act of Superintendence.**—See Gardner v. New England Telephone, etc., Co., 170 Mass. 159.

**Superintendence and Control Synonymous.**—See Ure v. Ure, 185 Ill. 216.

**Superintendence of Penal Institutions.** (See also the title PRISONS AND PRISONERS, vol. 22, p. 1298.)—The Constitution of *North Carolina* provided that it should be required by competent legislation that the structure and *superintendence* of the penal institutions of the state should secure the health of the prisoners. In construing this provision the court said: "The word *superintendence* means oversight or inspection, and was intended, as used in the constitution, to impose upon the governing officials of a municipal corporation the duty of exercising ordinary care in procuring articles essential for the health and comfort of prisoners and of overlooking their subordinates in immediate control of the prisons (so far, at least, as to replenish the supply of such necessary articles when notified that they are needed), and of employing such agents and raising and appropriating such amounts of money as may be necessary to keep the prison in such condition as to secure the comfort and health of the inmates." Moffitt v. Asheville, 103 N. Car. 257. See also Threadgill v. Anson County, 99 N. Car. 352.

**Superintendence of Public Schools.**—See Watson v. Cambridge, 157 Mass. 561, and see the title SCHOOLS, vol. 25, p. 52 *et seq.*

who superintends; a director; an overseer;<sup>1</sup> one who has oversight and charge of something with the power of direction.<sup>2</sup>

**SUPERIOR.** — Superior means higher in dignity, quality, or excellence.<sup>3</sup>

**SUPERIOR COURT.** (See also the title COURTS, vol. 8, p. 37.) — See note 4.

**SUPERNUMERARY.** — In military law, a supernumerary is an officer whose battalion or corps has been reduced or disbanded, or so arranged as to leave him for the present no command.<sup>5</sup>

**SUPERSEDE.** (See also SUSPEND — SUSPENSION, *post.*) — “To supersede is to set aside, to annul. An order which sets aside or annuls a decree dissolving an injunction must *ipso facto* reinstate the injunction.”<sup>6</sup> To supersede, when used of a military officer, means to put one in a place which, by the ordinary course of military promotion, belongs to another.<sup>7</sup>

**SUPERSEDEAS.** (See also the title SUPERSEDEAS AND STAY OF PROCEEDINGS, 20 ENCYC. OF PL. AND PR. 1207.) — “A supersedeas, properly so called, is a suspension of the power of the court below to issue an execution on the judgment or decree appealed from; or, if a writ of execution has issued, it is a prohibition emanating from the court of appeal against the execution of the

1. **Superintendent.** — *Salem v. McClintock*, 16 Ind. App. 656, holding that in the absence of an undertaking defining, fixing, and enlarging the duties of a *superintendent*, his duties must be taken to be such, and such only, as the ordinary acceptance of the word would imply. See also *Lafayette v. James*, 92 Ind. 244; *St. Louis, etc., R. Co. v. De Ford*, 38 Kan. 300.

The Word “Superintendent” in the Wisconsin Railway Employee Act of 1889 (see the title FELLOW SERVANTS, vol. 12, p. 985) is to be interpreted in the sense in which the word was commonly used with respect to railway service when the act was passed, and does not embrace the foreman of a repair shop. Moreover, the intent of the act was to provide remedies for the neglect of officers and employees having to do with the operation of the road, the movement of trains and cars. *Hartford v. Northern Pac. R. Co.*, 91 Wis. 374.

2. **Presumption.** — *Sacalaris v. Eureka, etc.*, R. Co., 18 Nev. 161, in which case the court also said: “When an agent is clothed with a title implying general powers, as *superintendent*, the business public and courts may fairly presume he is what the corporation holds him out as being.”

**Financial Agent.** — “There is nothing in the word *superintendent*, in the common use of it, which implies that he shall be a collector of moneys, much less a financial agent for the settlement of accounts and the handling of the revenues of a city or town.” *Salem v. McClintock*, 16 Ind. App. 656. See also *Lafayette v. James*, 92 Ind. 244.

**Lessee.** — A statute gave a lien to all persons who might be employed by the owner or owners, agent, or *superintendent*, for services rendered to any steam sawmill. It was held that a lessee was neither an agent nor a *superintendent* within the contemplation of the statute. *Harman v. Allen*, 11 Ga. 46.

**Supt.** — That judicial notice will be taken that the abbreviation “supt.” stands for *superintendent*, see the titles ABBREVIATIONS, vol. 1, p. 98; JUDICIAL NOTICE, vol. 17, p. 897.

3. **Superior.** — *Gilman v. Jones*, 87 Ala. 691,

quoting *Worcester*. Dict. and holding, where a certain sum was payable, by the terms of a contract, contingently, “whenever it is finally decided in said suit or otherwise that said bonds are a *superior* lien to the other bonds of said railroad,” etc., that *superior* manifestly meant “prior,” “*superior* lien” meaning “prior lien.”

In *Laufer v. Bridgeport Traction Co.*, 68 Conn. 475, it was held that the word *superior*, when used as descriptive of the rights which an electric car has in a street, meant no more than that the right which such car has in such street is only that other travelers should turn off from its tracks in reasonable time to allow it to pass. See also the title STREET RAILWAYS, *ante*, p. 57.

**Superior Force** (*vis major*, or *force majeure*) is defined in the *Louisiana Civil Code* (art. 3556, subdiv. 14) as follows: “Those accidents are said to be caused by *superior* force which human prudence can neither foresee nor prevent.” Fortuitous event (*cas fortuit*) is defined in the same code (art. 3556, subdiv. 15): “That which happens by a cause which we cannot resist.” In *Viterbo v. Friedlander*, 120 U. S. 728, the court said: “The Louisiana Code, following the French law and the Code Napoleon, recognizes two kinds or degrees of what, under various but equivalent names, has been called *vis major*, *cas fortuit*, irresistible force, inevitable accident, or unforeseen event; the one, ordinary, which might have been foreseen by any man of common prudence as not unlikely to happen at some time; the other, extraordinary, which could not have been foreseen, or expected to occur at any time.”

4. **Superior Court.** — See *Hahn v. Kelly*, 34 Cal. 414; *Ryne v. Lipscombe*, 122 N. Car. 650; *Mott v. Forsyth County*, 126 N. Car. 866.

**Superior City Court.** — See *Efray v. Masson*, (N. Y. City Ct. Gen. T.) 22 Civ. Pro. (N. Y.) 59.

5. **Supernumerary.** — *Com. v. Lilly*, 1 Leigh (Va.) 529.

6. **Supersede.** — *New River Mineral Co. v. Seeley*, 117 Fed. Rep. 982.

7. **Ex p. Hall**, 1 Pick. (Mass.) 262.



writ. It operates from the time of the completion of those acts which are requisite to call it into existence."<sup>1</sup>

**SUPERSTITIOUS USE.** — A superstitious use is that which arises where any manors, lands, tenements, rents, annuities, profits, hereditaments, goods, or chattels are given, received, or appointed for and towards the maintenance of a priest to say mass; for the maintenance of a priest or other man to pray for the soul of any dead man, in such a church or elsewhere; or to maintain perpetual obits, lamps, torches, etc., to be used at certain times, to save the souls of men out of purgatory; or to maintain an anniversary or obit, or any light or lamp, in any church or chapel, or any like.<sup>2</sup>

**SUPERSTRUCTURE.** — With reference to railroads, superstructure is defined to be "sleepers, rails, and fastenings," in distinction from the roadbed — called also "permanent way."<sup>3</sup>

**SUPERVISE — SUPERVISION.** — To supervise means to oversee for direction; to superintend; to inspect; as, to supervise the press for correction.<sup>4</sup>

1. *Supersedeas.* — *Hovey v. McDonald*, 109 U. S. 159. See also *Williams v. Bruffy*, 102 U. S. 249; *Dulin v. Pacific Wood, etc., Co.*, 98 Cal. 304.

In *Mabry v. Ross*, 1 Heisk. (Tenn.) 773, it was said: "The writ of *supersedeas* is technically a writ to suspend the execution of a judgment. There must be something in the course of execution to suspend which the writ is awarded — something *in fieri*, but not yet finished. Its most common function is to stop the execution of a judgment at law or a decree in equity, whether interlocutory or final, and whether for money or other property, or whether the said execution be for the performance of any other act under the mandate of the court. There must be some affirmative act to be done, to prevent the doing of which the writ is awarded."

In *Tyler v. Presley*, 72 Cal. 291, a *supersedeas* was said to be "a writ issued to a ministerial officer, commanding him to supersede or desist from proceeding under another writ previously or subsequently issued to him."

"The Term *Supersedeas* Is a Comprehensive One. — Sometimes it is express in its commands, at others only so by implication. In the first, when the person to whom it is directed is commanded from the doing of an act therein mentioned; or, if the act has already been done, to annul it as far as possible. In the second, it only suspends without annulling acts done before its issuing, and which before were lawful. It was used in England for setting aside an erroneous judicial process, etc.; to discharge prisoners: so, if illegally arrested upon mesne or final process; so, if a privileged person. \* \* \* Almost every writ, whether it be of error, habeas corpus, prohibition, and the like, are, in their nature and effects, to some extent writs of *supersedeas*, intimately connected with the appellate jurisdiction of this court, or in aid of its superintending and controlling power over the inferior courts." *Ex p. Woods*, 3 Ark. 538.

*Used Synonymously with "Stay of Proceedings."* — See *Dulin v. Pacific Wood, etc., Co.*, 98 Cal. 304.

*Statutory Supersedeas.* — In *Dulin v. Pacific Wood, etc., Co.*, 98 Cal. 306, it was said: "Section 949 of the Code of Civil Procedure declares that in cases like the present the perfecting of

an appeal 'stays proceedings in the court below upon the judgment or order appealed from,' thus creating a statutory *supersedeas*, or 'a suspension of the power of the court below to issue an execution on the judgment or decree appealed from; or, if a writ of execution is issued, a prohibition against the execution of the writ.'"

*Indiana.* — In *Northern Indiana R. Co. v. Michigan Cent. R. Co.*, 3 Ind. 12, it was said: "In our practice, a writ of error is seldom or never issued. \* \* \* It therefore becomes necessary that the inferior court should be informed of the order of the Supreme Court, or of one of the judges, that the proceedings on error shall 'stay or supersede' execution, by some other mode than by indorsement on the writ of error, and this is usually done by the clerk of the Supreme Court sending down what is called a writ of *supersedeas*. This is a conditional writ, and becomes operative upon the filing, by the plaintiff in error, of a bond similar to that required in cases of appeal."

*Kentucky Code.* — See *Reed v. Lander*, 5 Bush (Ky.) 599; *Roberts v. Jenkins*, 80 Ky. 669; *Smith v. Western Union Tel. Co.*, 83 Ky. 271.

2. *Superstitious Use.* — *Bac. Abr.*, tit. *Charitable Uses and Mortmain*, D; *Green v. Allen*, 5 *Humph.* (Tenn.) 193. See also the title *CHARITIES AND TRUSTS FOR CHARITABLE USES*, vol. 5, p. 927 *et seq.* And see further the title *LEGACIES AND DEVISES*, vol. 18, p. 735, note 2.

3. *Superstructure.* — *Cass County v. Chicago*, etc., R. Co., 25 Neb. 353, stated under *ROADBED* — *ROADWAY*, vol. 24, p. 989.

But in *Philadelphia v. Philadelphia, etc., R. Co.*, 177 Pa. St. 292, under a statute declaring in explicit terms that the *superstructure* and water stations of railroads should be exempt from taxation, it is said: "Although the word *superstructure* might, in present railway-engineering phraseology, be limited to sleepers, rails, and fastenings (see *superstructure*, *Century Dictionary*), yet we have no doubt the legislature of that day, adopting the ordinary meaning of the word, intended by it the roadbed, with whatever has been constructed upon it. Except this and water stations, railroad real estate should be subject to taxation."

4. *Supervise.* — *Vantongerren v. Heffernan*, 5 Dak. 188.

*Supervision* is the act of overseeing; inspection.

Volume XXVII,

**SUPERVISING FARMER.**—See FARMER, vol. 12, p. 885.

**SUPERVISORS.**—See the titles COUNTY COMMISSIONERS, vol. 7, p. 975;

TOWNS AND TOWNSHIPS.

**SUPPLEMENT.**—See note 1.

**SUPPLEMENTAL.**—The word “supplemental” means supplying a deficiency; meeting a want.<sup>3</sup>

**SUPPLEMENTAL BILL.**—“A supplemental bill, properly so called, is a bill filed for the purpose of supplying a defect which has arisen in the progress of the suit by the happening of some event subsequent to the filing of the original bill; and is in continuation of the original suit.”<sup>2</sup>

**SUPPLEMENTAL COMPLAINT.**—See note 4.

**SUPPLEMENTAL PLEADINGS.**—See the title SUPPLEMENTAL PLEADINGS, 21 ENCYC. OF PL. AND PR. 1.

**SUPPLEMENTARY PROCEEDINGS.**—See the title SUPPLEMENTARY PROCEEDINGS, 21 ENCYC. OF PL. AND PR. 85.

**SUPPLETORY OATH.**—See the title OATHS AND AFFIRMATIONS, vol. 21, p. 746.

**SUPPLICAVIT.** (See also the title SUPPLICAVIT, 21 ENCYC. OF PL. AND PR. 208.)—A mandatory writ, issuing out of chancery or the King's Bench, requiring a justice or the sheriff to compel a person to give security to keep the peace toward a party in bodily danger.<sup>6</sup>

**SUPPLY—SUPPLIES.** (See also NECESSARIES, vol. 21, p. 448.)—To supply is to furnish with what is wanted; to afford or furnish a sufficiency for; to provide.<sup>6</sup> A supply is defined as “that which supplies a want; sufficiency of things for use or want; especially, the food, and the like, which meets the daily necessities of an army or other large body of men.”<sup>7</sup>

tion; superintendence. *State v. Fremont, etc., R. Co., 22 Neb. 328.*

**Public Lands.**—The secretary of the interior and, under his direction, the commissioner of the general land office have a general “supervision of all public business relating to the public lands.” *Vantongeren v. Heffernan, 5 Dak. 188.* See also the title STATE AND PUBLIC LANDS, vol. 26, p. 376 *et seq.*

1. **Supplement.**—Upon the meaning of the word *supplement* as used in Const. N. J., art. 4, § 7, par. 4, the court said: “The ordinary meaning of the word *supplement* doubtless is ‘a supplying by addition of what is wanting.’ A glance at our legislation from the time of the adoption of the constitutional provision will show that the word has constantly been used in a sense so broad as to possibly justify a claim that it has acquired thereby a special meaning broader than the ordinary one. But for the purposes of this case it is sufficient to say that the ordinary meaning of the word will, under our construction of this clause, cover every species of amendatory legislation which goes to complete the legislative scheme.” *Rahway Sav. Inst. v. Rahway, 53 N. J. L. 51.* See generally the title STATUTES, vol. 26, pp. 591 *et seq.*, 708.

2. **Supplemental.**—*Loomis v. Runge, (C. C. A.) 66 Fed. Rep. 859,* distinguishing “supplemental act” and “amendatory act.” See also the title STATUTES, vol. 26, p. 709.

3. **Supplemental Bill.**—*Butler v. Cunningham, 1 Barb. (N. Y.) 87.* See also *Ridgeway v. Toram, 2 Md. Ch. 315,* and see generally the title SUPPLEMENTAL PLEADINGS, 21 ENCYC. OF PL. AND PR. 1.

4. **Supplemental Complaint.**—See *Musselman v. Manly, 42 Ind. 465,* and see the title SUP-

PLEMENTAL PLEADINGS, 21 ENCYC. OF PL. AND PR. 1.

5. **Supplicavit.**—4 Black. Com. 253; 4 Steph. Com. (13th ed.) 250; Bac. Abr., tit. Surety of the Peace, E. The writ is obsolete.

As to applications for *supplicavit* by wife against husband, see the title ALIMONY, vol. 2, p. 93, note 1, and see *Prather v. Prather, 4 Desaus. (S. Car.) 37.*

As to bonds to keep the peace, see the title BAIL AND RECOGNIZANCE, vol. 3, p. 729.

6. **Supply.**—*Mooney v. Hough, 84 Ala. 85.*

7. *People v. Pullman's Palace Car Co., 175 Ill. 155,* quoting Webst. Dict.

*Supply* means that which is or can be *supplied*; available aggregate of things needed or demanded; an amount sufficient for a given use or purpose. *Strickland v. Stiles, 107 Ga. 308.*

**Supplies.**—In *Mooney v. Hough, 84 Ala. 85,* it was said: “The word *supplies*, noun of the verb ‘to *supply*,’ has a very large meaning.”

**Same—Agricultural Liens.**—*Supplies* have been held to include money in a statute giving an agricultural lien. *Strickland v. Stiles, 107 Ga. 308.* For other cases construing *supplies*, see the titles CROPS, vol. 8, p. 301; LANDLORD AND TENANT, vol. 18, pp. 351, 352.

**Same—Attachment and Liens on Vessels.** (See also titles MARITIME LIENS, vol. 19, p. 1079; MASTERS OF VESSELS, vol. 20, p. 221.)—Wood furnished to a steamboat for fuel was held not to be *supplies* within a New York statute of 1798 allowing the attachment or arrest of vessels for debts for *supplies* furnished, on the ground that *supplies* in the act did not include “such articles as are daily

consumed and constantly replaced." *Johnson v. Steam-Boat Sandusky*, 5 Wend. (N. Y.) 512. But see under a later statute *Crooke v. Slack*, 20 Wend. (N. Y.) 177.

Money advanced to enable a boat to prosecute her voyages has been held not to be *supplies* within the *Missouri* act giving a lien on vessels. *Gibbons v. Steamboat Fanny Barker*, 40 Mo. 255, the court saying: "The word *supplies* cannot be interpreted to mean *supplies* of money for all the purposes for which money may be required in the navigation of the vessel. In its ordinary acceptation, it is understood to mean those articles which a boat may find it necessary to purchase for consumption and use on the voyage."

Money loaned to pay off sailors on a steamboat has been held not to be included within the term *supplies* in a statute giving a preference to such debts of vessels. *Steamboat P. H. White v. Levy*, 10 Ark. 412.

In *Lawson v. Higgins*, 1 Mich. 226, it was said: "The lien for *supplies* furnished can only attach when the ship, boat, or vessel is actually built. If furnished when the ship, etc., is in progress of construction, the law does not create a lien, but leaves the person so furnishing *supplies* to his common-law remedy." And it was held accordingly that *supplies* did not include materials.

**Same—Log and Lumber Liens.**—The word *supplies* in the *Wisconsin* statute providing for a lien in favor of persons furnishing *supplies* to men engaged in getting out logs and timber has been held to include the board of men, even when furnished at a hotel in a city several miles from the place where they were at work. *Kollock v. Parcher*, 52 Wis. 393. See also *Winslow v. Urquhart*, 39 Wis. 260; *Bradford v. Underwood Lumber Co.*, 80 Wis. 50; and generally the title LOGS AND LUMBER, vol. 19, p. 533 *et seq.*

**Same—Medical Services Furnished to Railroad Employee.**—In *Newgass v. Atlantic, etc., R. Co.*, 56 Fed. Rep. 685, it was said: "As to

the claim of the Hospital of St. Vincent of Paul for medical services and board rendered to an employee of the railroad company, who had been injured and disabled in its service, it does not seem to us to fall within the terms of the statute giving the lien, and must be disallowed. The hospital did not furnish '*supplies* necessary to the operation of the railroad,' in favor of which section 2485 gives a lien."

**Supplies to Paupers.**—See the title POOR AND POOR LAWS, vol. 22, p. 944.

**Supplies for Travelers.**—Wines and liquors have been held to be *supplies* for travelers, within the meaning of a charter provision authorizing a corporation to sell *supplies* to travelers on its cars. *People v. Pullman's Palace Car Co.*, 175 Ill. 125.

**Supply of Water.**—In *West Surrey Water Co. v. Chertsey Union*, (1894) 3 Ch. 513, it was held that a local authority may, notwithstanding section 52 of the English Public Health Act, 1875, construct and use waterworks for the *supply* of water for its own use only in the district of a water company able and willing to *supply* such water. North, J., said: "*Supply* I understand to mean the passing of water from persons who have it to persons who want it. I do not see how it could be said that *supply* of water means supplying 'yourself' in the natural meaning of the words." And in *Jones v. Conway, etc., Water Supply Board*, (1893) 2 Ch. 603, it was held that a local authority that had power and was taking steps to *supply* water had *supplied* water within the meaning of the same act.

A statute provided that if any person *supplied* with water by a company negligently suffered the water to be wasted, he should be subject to a penalty. It was held where a house was let to a tenant, but the owner was liable to pay the water rate, that the owner was the person *supplied* with water and was under a duty to take care that the water *supplied* was not wasted. *Brock v. Harrison*, (1889) 1 Q. B. 958.

# SUPPORT AND MAINTENANCE.

BY HERBERT WHARTON BEALL.

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## CROSS-REFERENCES.

*For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: APPRENTICES, vol. 2, p. 488; BASTARDY, vol. 3, p. 871; CONSIDERATION, vol. 6, p. 667; GUARDIAN AND WARD, vol. 15, p. 16; HUSBAND AND WIFE, vol. 15, p. 785; MASTER AND SERVANT, vol. 20, p. 3; PARENT AND CHILD, vol. 21, p. 1034; POOR AND POOR LAWS, vol. 22, p. 944.*

**I. SCOPE OF TITLE.** — The obligation of one to support and maintain another may be imposed by common or statute law on persons standing in certain relations to each other, as parent and child, husband and wife, guardian and ward, etc. These legally imposed obligations are discussed elsewhere under the appropriate titles. But an obligation to support and maintain may be assumed by contract between persons not bound to each other by any of the domestic relations, or by those so bound in addition to the obligations imposed by law. It is only these contractual obligations that are considered in this title.<sup>1</sup>

**II. BETWEEN PARENT AND CHILD — 1. In General.** — Where parent and child live together the relationship between them is so intimate that the law will presume that what the one may do for the other is done gratuitously; hence a claim by either for payment for support and maintenance furnished by the other must be based on an express contract.<sup>2</sup>

1. **Legacies for Support and Maintenance.** — As to the favor shown to legacies for support and maintenance, in protecting them from abatement, see the title ABATEMENT OF LEGACIES, vol. 1, p. 46.

2. **Between Parent and Child.** — *Faloon v. Mc-*

*Intyre*, 118 Ill. 292; *Fruitt v. Anderson*, 12 Ill. App. 421; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Cummings v. Cummings*, 8 Watts (Pa.) 366; *Seitz's Appeal*, 87 Pa. St. 159.

If a child, after reaching its majority, lives with its parents as before, the law will presume,

**2. Support of Child — a. LEGITIMATE CHILDREN.** — Whether a father is legally bound to support his infant children, or whether it is only a moral duty that rests on him in this respect,<sup>1</sup> very slight circumstances are generally regarded as sufficient to raise an implied promise on his part to pay third persons for furnishing such support.<sup>2</sup>

**Emancipation of Child.** — After a child is emancipated the moral duty of the parent to support it ceases, and an obligation on his part can be shown only by showing an express contract, or a request from which a promise may be inferred.<sup>3</sup>

**A Mother Who Is Guardian of Her Infant Son** is liable personally, and not as guardian, on her undertaking to pay for the maintenance of such son. Such contract is not a contract of suretyship, but is an original undertaking.<sup>4</sup>

**Effect of Adoption Proceedings.** — Where an attempt to adopt a child is frustrated by the real parent, he is liable on a note given by him to pay for the support of the child while with those who attempted to adopt it.<sup>5</sup>

**Where a Child Has Property of Its Own** the parent is sometimes allowed to lay claim thereto under an implied contract accompanying the support.<sup>6</sup>

**b. ILLEGITIMATE CHILDREN.** — While it has been said that the moral duty resting on a parent to maintain his illegitimate child is not sufficient consideration to support a contract on the father's part to pay for the child's maintenance,<sup>7</sup> the weight of authority seems to be that such duty is a sufficient consideration;<sup>8</sup> and *a fortiori* is such promise binding when by statute it is made his duty to support his illegitimate children.<sup>9</sup>

**Promise in Consideration of Cohabitation.** — A promise of the putative father, however, is void where it is made to facilitate a state of cohabitation between him and the mother.<sup>10</sup>

in the absence of evidence to the contrary, that the relation of parent and child continues. Wall v. Wall, 69 Ill. App. 389.

1. See the title PARENT AND CHILD, vol. 21, p. 1049 *et seq.*

2. **Implied Promise to Pay for Support — England.** — Blackburn v. Mackey, 1 C. & P. 1, 11 E. C. L. 295; Fluck v. Tollemache, 1 C. & P. 5, 11 E. C. L. 296; Shelton v. Springett, 11 C. B. 452, 73 E. C. L. 452.

**Arkansas.** — Jordan v. Wright, 45 Ark. 237. **Illinois.** — Hunt v. Thompson, 4 Ill. 179, 36 Am. Dec. 538; Murphy v. Ottenheimer, 84 Ill. 39, 25 Am. Rep. 424; Clark v. Gotts, 1 Ill. App. 454; Bedford v. Bedford, 32 Ill. App. 460.

**Iowa.** — Porter v. Powell, 79 Iowa 151, 18 Am. St. Rep. 353; Cushman v. Hassler, 82 Iowa 295. **Vermont.** — Swain v. Tyler, 26 Vt. 9.

**Taking a Child from the Father with the father's assent but without his request, and supporting it, is not enough to fasten on the father an obligation to pay for such support.** Chilcott v. Trimble, 13 Barb. (N. Y.) 502. See also Duffey v. Duffey, 44 Pa. St. 399; Eitel v. Walter, 2 Bradf. (N. Y.) 287.

3. Perkins v. Westcoat, 3 Colo. App. 338; Kernodle v. Caldwell, 46 Ind. 153; Mills v. Wyman, 3 Pick. (Mass.) 207. See also Loomis v. Newhall, 15 Pick. (Mass.) 159; Dodge v. Adams, 19 Pick. (Mass.) 429.

But it has been held that where the child is only partially emancipated, the moral duty remaining may be the basis of an inferred promise to pay for support furnished it. Porter v. Powell, 79 Iowa 151, 18 Am. St. Rep. 353.

4. **Liability of Mother.** — McNabb v. Clipp, 5 Ind. App. 204.

5. Clayton v. Whitaker, 62 Iowa 412; Taylor v. Desceve, 81 Tex. 246.

6. **Where Child Has Property.** — Fruitt v. Anderson, 12 Ill. App. 421; Whipple v. Dow, 2 Mass. 415.

7. **Consideration for Promise to Support Illegitimate Child.** — Mercer v. Mercer, 87 Ky. 30; Nine v. Starr, 8 Oregon 49.

8. **Promise to Pay for Support of Bastard.** — See generally the title BASTARDY, vol. 3, p. 890 *et seq.* See also Anonymous, 2 Show. 184; Hesketh v. Gowing, 5 Esp. 131; Nichole v. Allen, 3 C. & P. 36, 14 E. C. L. 198; Wiggins v. Keizer, 6 Ind. 252.

If the father of an illegitimate child consents to pay an annual sum for its support, he must thereafter continue to do so, or provide for the child at his own expense, or give distinct notice of his intention to pay such sum no longer. Cameron v. Baker, 1 C. & P. 268, 11 E. C. L. 388.

**Where the Father Acknowledges or Adopts the Child as his own** he is bound by his express promise to support it. *In re Plaskett*, 30 L. J. Ch. 606; Hook v. Pratt, 78 N. Y. 371, *affirming* 14 Hun (N. Y.) 396; Todd v. Weber, 95 N. Y. 181; Bunn v. Winthrop, 1 Johns. Ch. (N. Y.) 329.

9. **Statutory Liability.** — Davis v. Herrington, 53 Ark. 5; Wallace v. Rappleye, 103 Ill. 239.

The *Illinois* statute imposes such liability on the father of a bastard only when the mother is an unmarried woman. Vetten v. Wallace, 39 Ill. App. 390.

10. **Infancy of Father No Defense.** — Where the father's duty to support is imposed by law, infancy of the father is no defense to a promise to furnish such support. Stowers v. Hollis, 83 Ky. 544.

11. **Promise in Consideration of Cohabitation.** — Trovinger v. M'Burney, 5 Cow. (N. Y.) 253.

**Forbearance and Compromise of Suit.** — Where a father is under a legal duty to support his illegitimate child, forbearance by the mother to sue or the compromise of an action is a valuable consideration for his promise to support and maintain the child.<sup>1</sup> Such forbearance and compromise are not unlawful or immoral.<sup>2</sup>

**The Surrender of a Child** by the mother to the father is sufficient consideration to support his promise to maintain the child, and to give him money and the tract of land on which the father lives. And if the land has been sold at the father's death its value may be recovered by the child.<sup>3</sup>

**3. Support of Parents.** — Family arrangements are not uncommon by which a child, usually on a conveyance to him of the property of the parent, agrees to furnish the latter with support and maintenance during the remainder of his life. Such arrangements are not *per se* unreasonable or indicative of fraud or undue influence.<sup>4</sup> And where a statute creates a liability on the part of children to support their indigent parents, such liability is a sufficient consideration to support a bond given to the overseers of the poor to defray the necessary expenses of such support.<sup>5</sup>

**When Parent Has Means.** — If a parent lives apart from his child and has independent means of support, but subsequently removes to the house of a son, who cares for him at great expense, an implied contract to pay for such support may be established by proof of facts and circumstances showing that it was the intention of the parties that payment should be made.<sup>6</sup>

**Promise to Third Person.** — A promise to support a parent is enforceable though made to a third person instead of the parent.<sup>7</sup>

**III. OTHER RELATIONS — 1. In General.** — In other relations than that of parent and child, such as son-in-law, mother-in-law, brother, and stepfather, the law has regarded the relationship as so close that the presumption of gratuitous support is entertained, and an express contract must be shown to maintain an action for such support.<sup>8</sup>

See also *Binnington v. Wallis*, 4 B. & Ald. 650, 6 E. C. L. 639.

**1. Forbearance and Compromise of Suit.** — *Maurer v. Mitchell*, 9 W. & S. (Pa.) 69 [*disapproving* *Shenk v. Mingle*, 13 S. & R. (Pa.) 291; *Cameron v. Baker*, 1 C. & P. 268, 11 E. C. L. 388; *Hargroves v. Freeman*, 12 Ga. 342; *Davis v. Moody*, 15 Ga. 175; *Jackson v. Finney*, 33 Ga. 512; *Maxwell v. Campbell*, 8 Ohio St. 265; *Rohrheimer v. Winters*, 126 Pa. St. 253. See also *Anandale v. Harris*, 2 P. Wms. 432; *Doe v. Horn*, 1 Ind. 363, 50 Am. Dec. 470; *Wyant v. Leshner*, 23 Pa. St. 338.

As to the general subject of forbearance to sue as a consideration for a promise, see the title *CONSIDERATION*, vol. 6, p. 748.

It has even been held that the liability of a father to be sued for maintenance is sufficient consideration to support an agreement by him to convey land to the child. *Allen v. Davison*, 16 Ind. 416.

**2. Burgen v. Straughan**, 7 J. J. Marsh. (Ky.) 583; *Clarke v. McFarland*, 5 Dana (Ky.) 45.

**3. Surrender of Child by Mother.** — *Benge v. Hiatt*, 82 Ky. 666, 56 Am. Rep. 912.

**4. Support of Parents.** — *Scott v. Davis*, 117 Ind. 232; *Van Donge v. Van Donge*, 23 Mich. 321; *Bogie v. Bogie*, 41 Wis. 209.

Where the true consideration for a deed is an agreement to pay the grantor's debts and to board and care for him and his wife during their lives, the recital of a money consideration is not inconsistent, since the matter of board and care for the grantors is an additional considera-

tion and not a contrary one. *Rankin v. Wallace*, (Ky. 1890) 14 S. W. Rep. 79.

**Value of Property Conveyed.** — Where the land conveyed by the parents to the child is inadequate to accomplish the object of the contract, the parents are supposed to add to their support as far as possible by their own exertions. In general, the undertaking by one to support and take care of another is to be understood according to the varied circumstances of the parties. *Keltner v. Keltner*, 6 B. Mon. (Ky.) 40; *Bull v. McCrea*, 8 B. Mon. (Ky.) 422.

**5. Statutory Duty to Support Indigent Parents.** — *Turner v. Hadden*, 62 Barb. (N. Y.) 480. And see generally the title *POOR AND POOR LAWS*, vol. 22, p. 1015.

**6. When Parent Has Means.** — *Switzer v. Kee*, 146 Ill. 577.

**7. Promise to Third Person.** — *Stone v. Stone*, 32 Conn. 142; *Kendall v. Kendall*, 7 Me. 171; *Matter of Wyatt*, (Surrogate Ct.) 9 Misc. (N. Y.) 285; *Kennedy v. Badgett*, 19 S. Car. 591.

**8. Other Relations.** — *Cooper v. Martin*, 4 East 76; *Clark v. Clark*, 46 Conn. 586; *Barnes v. Kelly*, 71 Conn. 220; *Harris v. McIntyre*, 118 Ill. 275; *Switzer v. Kee*, 146 Ill. 577; *Heffron v. Brown*, 155 Ill. 322; *Chapman v. Chapman*, 87 Ill. App. 427; *Dolbear v. Coultas*, 94 Ill. App. 55; *Gall v. Stark*, 98 Ill. App. 121; *Kendall v. Kendall*, 7 Me. 171; *Ellicott v. Turner*, 4 Md. 476; *Kennedy v. Badgett*, 19 S. Car. 591. See also *Dickson v. Field*, 77 Wis. 439. And see generally the title *POOR AND POOR LAWS*, vol. 22, p. 1015.

**2. Guardian and Ward.** — Being under no previous obligation to support and educate his ward at his own expense, a promise by a guardian to do so is without consideration and not binding on him.<sup>1</sup>

**IV. CONTRACT PERSONAL TO OBLIGOR.** — An agreement to furnish another with a home and to take care of him, and assist him to live in a comfortable manner, is personal to the obligor and cannot be shifted to a third person without the consent or against the will of the obligee.<sup>2</sup>

**V. PARTY IN INTEREST MAY SUE.** — Where the contract is to furnish support and maintenance to a third person not party to the contract, such third person may generally, as the party beneficially interested, bring an action in his own name to enforce such contract.<sup>3</sup>

**VI. DURATION OF CONTRACT.** — Where a contract for the support of a child fixes no time for its termination, and is not determined by the parties, the law will presume that it continues to run until the child arrives at majority. Such contract is therefore entire, and not one from year to year.<sup>4</sup> But where the contract is between an overseer of the poor and one who undertakes to support a pauper for no definite period, either party is at liberty to terminate the arrangement at the end of a year or other period deemed by construction to be within the meaning and intent of the contract.<sup>5</sup>

**VII. RIGHTS OF CREDITORS.** — Where one conveys his entire property to another on condition that the grantee will support the grantor during life, such conveyance is fraudulent and void as to existing creditors unless it can be shown that the grantee has, in addition to the support and maintenance promised, paid full value for the property so conveyed.<sup>6</sup>

**VIII. SETTING ASIDE CONVEYANCE.** — Where one conveys his real estate to another in return for a promise of support and maintenance, and afterwards refuses or fails to furnish such support, a court of equity will grant relief by setting aside the deed of conveyance and reinvesting the grantor with the title on the principles governing rescission in other cases.<sup>7</sup>

A widow, with a child, cannot make a contract with her husband for the support of her child by a former husband that will bind the child. She has no power thus to dispose of the child's property. *Gerdes v. Weiser*, 54 Iowa 591, 37 Am. Rep. 229.

**1. Guardian and Ward.** — *Armstrong v. Walkup*, 9 Gratt. (Va.) 372. See the title **GUARDIAN AND WARD**, vol. 15, p. 78.

Under the *Kentucky* statute the personal estate of an infant may be applied by the guardian in support of the infant. "But neither the ward nor his real estate shall be liable for any such disbursement." Under the act the father cannot make a contract with a third person for the support of his minor child to be paid out of the real estate of such child. Such contract imposes a debt upon the father and not upon the child. *Cox v. Storts*, 14 Bush (Ky.) 502.

**2. Contract Personal to Obligor.** — *Divan v. Loomis*, 68 Wis. 150.

A covenant of a son to support his sister, made on a conveyance of land by the father to the son, is personal and does not give the sister a right in the land nor charge her maintenance on it, and her rights cannot be enforced by a writ of ejectment. *Harkins v. Doran*, (Pa. 1888) 15 Atl. Rep. 928.

**3. Party in Interest May Sue.** — *Allen v. Davison*, 16 Ind. 416; *Clarke v. McFarland*, 5 Dana (Ky.) 45; *Todd v. Weber*, 95 N. Y. 181. See also *State v. Baker*, 8 Md. 44. See the title **CONSIDERATION**, vol. 6, p. 667, and 15 ENCYC. OF PL. AND PR. 456, title **PARTIES TO ACTIONS**.

Where land is given to secure the support of the daughter, and a mortgage is given to insure performance by the grantee, such mortgage may not be released by the mother, but may be enforced by the daughter in a proper action. *Henderson v. McDonald*, 84 Ind. 149.

**4. Duration of Contract.** — *Carroll v. McCoy*, 40 Iowa 38.

**5. Palmer v. Vandenberg**, 3 Wend. (N. Y.) 193; *M'Lees v. Hale*, 10 Wend. (N. Y.) 426.

**6. Rights of Creditors.** — *Woodall v. Kelly*, 85 Ala. 368, 7 Am. St. Rep. 57; *Easum v. Pirtle*, 81 Ky. 561; *Smith v. Smith*, 11 N. H. 459; *Albee v. Webster*, 16 N. H. 362; *Vial v. Mathewson*, 34 Hun (N. Y.) 70; *Bent v. Bent*, 50 Hun (N. Y.) 602, 3 N. Y. Supp. 750; *Jolly v. Kyle*, 27 Oregon 95; *Kelsey v. Kelley*, 63 Vt. 41; *Torrey Cedar Co. v. Eul*, 95 Wis. 615. See also the title **FRAUDULENT SALES AND CONVEYANCES**, vol. 14, pp. 246, 248.

**7. See the title RESCISSION, CANCELLATION, AND REFORMATION**, vol. 24, p. 620. See also *Henschel v. Mamero*, 120 Ill. 660, affirming 20 Ill. App. 346; *Bogie v. Bogie*, 41 Wis. 209; *Bresnahan v. Bresnahan*, 46 Wis. 385; *Blake v. Blake*, 56 Wis. 392.

It has been held that where property is conveyed to another in consideration of support, cancellation of the deed on failure to perform by the grantee is not the proper remedy, but that an action should be brought on the undertaking. *Gardner v. Knight*, 124 Ala. 273; *Campbell v. Potter*, 147 Ill. 576.

**IX. DAMAGES.** — Where there has been a breach of the contract to support and maintain, if the plaintiff may treat the contract as absolutely and finally broken, and elects to do so, the damages are assessed as of a total breach of an entire contract. Such damages are not subsequent or prospective, and the uncertainty in the duration of a life has not, since the adoption of the mortality tables, been regarded as a reason why full relief should not be afforded for a failure to perform a contract which by its terms was to continue during life.<sup>1</sup>

**X. STATUTE OF FRAUDS.** — A promise to pay for support furnished an emancipated son is a promise to pay for the debt of another and must be in writing or it is void under the statute of frauds.<sup>2</sup> But the promise to pay for the support and education of children whose death within a year is a contingency is one which may be performed within a year and is moreover original and not collateral, and for both reasons is not within the statute of frauds.<sup>3</sup>

**SUPPORTS.** — See note 4.

**SUPPOSE.** — The term "suppose" is an equivalent of "believe."<sup>5</sup>

**SUPPOSITION.** — See note 6.

**SUPPRESS.** (See also **PROHIBIT — PROHIBITION**, vol. 23, p. 192; **REGULATE — REGULATING — REGULATION**, vol. 24, p. 243, and the references there given.) — To suppress is to put a stop to when actually existing; to prevent; never, therefore, to license or sanction.<sup>7</sup>

1. **Damages.** — *Shover v. Myrick*, 4 Ind. App. 7; *Amos v. Oakley*, 131 Mass. 413; *Parker v. Russell*, 133 Mass. 74; *Shaffer v. Lee*, 8 Barb. (N. Y.) 412; *Schell v. Plumb*, 55 N. Y. 592; *Carpenter v. Carpenter*, 66 Hun (N. Y.) 177.

In allowing damages for breach of a contract of support, it has been held that the value of the services or probable earnings of the covenantor should be taken into consideration and deducted from the damages. *Morrison v. McAtee*, 23 Oregon 530.

Damages for a breach of contract to furnish support to a person "when he is sober and well-behaved" are to be assessed to the date of the writ, on the principle that the damages sustained after the date of the writ arise from a new breach or a new cause of action. *Fay v. Guynon*, 131 Mass. 31.

2. **Statute of Frauds.** — *Loomis v. Newhall*, 15 Pick. (Mass.) 159. But see *M'Lees v. Hale*, 10 Wend. (N. Y.) 426. See generally the title **VERBAL AGREEMENTS (STATUTE OF FRAUDS)**.

3. *Ehlicott v. Turner*, 4 Md. 476.

4. **Supports.** — The **supports** of a bridge are the abutments, piers, and trestles on which the stringpieces rest from beneath; and the crosspieces under the stringpieces and to which they are bolted are not the **supports**. *Abbott v. Wolcott*, 38 Vt. 666.

5. **Suppose.** — See **BELIEF — BELIEVE**, vol. 3, p. 914.

**Suppose and Promise Distinguished.** — See *Fife v. Com.*, 29 Pa. St. 436.

**Supposed — Understood.** — In *Cole v. Fowler*, 68 Conn. 450, it was said: "It was **supposed**, as the finding phrases it — which word, we presume, is used as equivalent to 'understood' — by both partners that these overdrafts would be paid into the firm, and they were treated as cash."

**Supposed Codicil.** — In *Smith v. Henline*, 174 Ill. 200, it was said: "The first instruction given for the appellees is criticised because it uses the expressions 'alleged execution of the

codicil' and '**supposed** codicil.' It is said that the use of the words 'alleged' and **supposed** was equivalent to telling the jury that the codicil was not the real codicil of the testator. We do not think so."

**Supposed Bounds or Lines.** — The boundaries of a tract of land were described as follows: "Beginning at the mouth of a gut, **supposed** to be Isaac Jordan's bounds, running along his **supposed** line south 300 poles in the pocosin, to or near the head of Middle or Speller's creek," etc. In construing this description the court said: "The call itself, the '**supposed** bounds' and the '**supposed** line' of Isaac Jordan, clearly indicates that there was then no established and known line." *Mizell v. Simmons*, 79 N. Car. 187.

6. **Supposition — Instruction.** — In *Yarbrough v. State*, 105 Ala. 43, it was said: "The use of the word **supposition** in a charge of itself has a tendency to excite an imaginative or speculative inquiry, and is not permissible unless the context shows that it is a **supposition** or hypothesis reasonably arising from or suggested by the facts in evidence."

**Same — Hypothesis.** — The trial court instructed the jury that if the evidence, though in part circumstantial, was consistent with the **supposition** that the defendant was guilty, and inconsistent with the **supposition** that he was innocent, they should find him guilty. In sustaining this instruction, the appellate court said: "Defendant takes exception to the use of the words **supposition** and 'assumption,' as used in the foregoing instruction. These words, used as they were in the instruction, are synonymous with 'hypothesis,' and mean primarily, as defined by Webster, 'what is not known to be true, or not proved.'" *State v. Harras*, 25 Wash. 416.

7. **Suppress.** — *Schwuchow v. Chicago*, 68 Ill. 448; *Ogden v. Madison*, 111 Wis. 413. See also *Wong v. Astoria*, 13 Oregon 538.

Authority to **suppress** is not authority to



## SUPPRESSION OF EVIDENCE — SURETY COMPANIES.

**SUPPRESSION OF EVIDENCE.** — See the titles EVIDENCE, vol. 11, pp. 503, 504; ILLEGAL CONTRACTS, vol. 15, p. 977; PRESUMPTIONS, vol. 22, p. 1256; PRODUCTION OF DOCUMENTS, vol. 23, p. 166; WITNESSES.

**SUPPRESSIO VERI.** — See note 1.

**SUPRA PROTEST.** — See the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, pp. 232, 498.

**SUPREME COURT.** (See also the titles COURTS, vol. 8, p. 21; UNITED STATES COURTS.) — See note 2.

**SUPREME LAW OF THE LAND.** — See note 3.

**SUPT.** — See the titles ABBREVIATIONS, vol. 1, p. 98; JUDICIAL NOTICE, vol. 17, p. 897.

**SURCHARGE AND FALSIFY.** — See the title ACCOUNTS, vol. 1, p. 463, and see the title SURCHARGING AND FALSIFYING, 21 ENCYC. OF PL. AND PR. 210, and the cross-references there given.

**SUREFOOTED.** — See note 4.

**SURETY COMPANIES.** — See the titles FIDELITY AND GUARANTY INSURANCE, vol. 13, p. 3; GUARANTY, vol. 14, p. 1127; LOAN, TRUST, AND SAFE-DEPOSIT COMPANIES, vol. 19, p. 477; SURETYSHIP, *post*.

permit and regulate. *Chicago v. Brownell*, 41 Ill. App. 70.

To *suppress* anything is to put a stop to it when actually existing, and does not extend to preventing it by *suppressing* what may lead to it. *Chelsea v. King*, 17 C. B. N. S. 625, 112 E. C. L. 625.

**Means of Suppression.** — Where power to *suppress* is conferred the power to adopt means for the *suppression* follows by necessary implication. *Shreveport v. Roos*, 35 La. Ann. 1010; *Ogden v. Madison*, 111 Wis. 413.

1. **Suppressio Veri.** (See generally the title FRAUD AND DECEIT, vol. 14, p. 12.) — In *Juzan v. Toulmin*, 9 Ala. 684, it was said: "Nearly allied to the fraud which is perpetuated by *suggestio falsi* is that which is inferable from *suppressio veri*. To constitute the latter, there must be a suppression of facts which one party is under a legal or equitable obligation to communicate and in respect to which he cannot be innocently silent, because the other has a right not merely *in foro conscientia*, but *juris et de jure*, to know." See also *Terrell v. Kirksey*, 14 Ala. 212; *Torrey v. Buck*, 2 N. J. Eq. 366.

2. **Supreme Court.** — See *Webster v. State*, 43 Ohio St. 699.

**Supreme in Sense of Highest.** — In *Koonce v. Doolittle*, 48 W. Va. 592, it was said: "The

errors of this court, in absence of a federal question, are beyond the pale of correction by any human tribunal, as the title of this court indicates, being the *Supreme Court* of Appeals; the word *supreme* meaning highest in the sense of final or last resort."

In *State v. Atherton*, 19 Nev. 342, it was said: "The name *Supreme Court*, for instance, indicates that it is a court of the highest authority in the state, and so it is in this state; yet in New York this name is given to courts possessing a similar jurisdiction to that given to the District Courts in this state, and the name 'Court of Appeals' is given to the highest court. In *Texas* the name 'Court of Appeals' is given to a court having appellate jurisdiction in criminal cases, and the name *Supreme Court* applied to the court having appellate jurisdiction in civil cases."

3. **Supreme Law of the Land.** — In *Matter of Rafferty*, 1 Wash. 382, it was held that a provision in the Constitution of *Washington* that "the Constitution of the United States is the *supreme law of the land*" related only to those matters wherein the general government assumed and controlled the individual states, and that the requirement of a presentment by a grand jury was not one of them.

4. **Surefooted.** — See *Morse v. Pitman*, 64 N. H. 11, stated under the title HORSES, vol. 15, p. 756; and see generally the title WARRANTY.

# SURETYSHIP.

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## CROSS-REFERENCES.

For matters of *PROCEDURE*, see in the *ENCYCLOPEDIA OF PLEADING AND PRACTICE* the title *PRINCIPAL AND SURETY OR GUARANTOR*, vol. 16, p. 925. For other matters of *SUBSTANTIVE LAW AND EVIDENCE*, see the following titles in this work: *ACCOMMODATION PAPER*, vol. 1, p. 334; *AGENCY*, vol. 1, p. 930; *ALTERATION OF INSTRUMENTS*, vol. 2, p. 181; *APPLICATION OF PAYMENTS*, vol. 2, p. 433; *BAIL (IN CIVIL CASES)*, vol. 3, p. 587; *BAIL AND RECOGNIZANCE*, vol. 3, p. 651; *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 65; *BONDS*, vol. 4, p. 618; *CLERKS OF COURTS*, vol. 6, p. 141; *COMPOSITION WITH CREDITORS*, vol. 6, p. 376; *CONSIDERATION*, vol. 6, p. 667; *CONTRIBUTION AND EXONERATION*, vol. 7, p. 325; *CORPORATIONS (PRIVATE)*, vol. 7, p. 620; *DURESS*, vol. 10, p. 320; *ESCROW*, vol. 11, p. 333; *EXECUTION AND PROOF OF DOCUMENTS*, vol. 11, p. 583; *FORTHCOMING AND DELIVERY BONDS*, vol. 13, p. 1129; *FRAUD AND DECEIT*, vol. 14, p. 12; *GUARANTY*, vol. 14, p. 1127; *GUARDIAN AND WARD*, vol. 15, p. 16; *HUSBAND AND WIFE*, vol. 15, p. 785; *INDEMNITY CONTRACTS*, vol. 16, p. 167; *INFANTS*, vol. 16, p. 255; *INSANITY*, vol. 16, p. 558; *INSOLVENCY AND BANKRUPTCY*, vol. 16, p. 630; *INTERPRETATION AND CONSTRUCTION*, vol. 17, p. 1; *INTOXICATION*, vol. 17, p. 398; *JUSTICES OF THE PEACE*, vol. 18, p. 48; *LIMITATION OF ACTIONS*, vol. 18, p. 136; *MISTAKE*, vol. 20, p. 805; *NOTARY PUBLIC*, vol. 21, p. 552; *OFFICERS AND AGENTS OF PRIVATE CORPORATIONS*, vol. 21, p. 833; *PARENT AND CHILD*, vol. 21, p. 1034; *PAROL EVIDENCE*, vol. 21, p. 1077; *PAYMENT*, vol. 22, p. 513; *PLEDGE AND COLLATERAL SECURITY*, vol. 22, p. 839; *POSTAL LAWS*, vol. 22, p. 1036; *PUBLIC OFFICERS*, vol. 23, p. 314; *RECITALS*, vol. 24, p. 56; *RELEASE AND DISCHARGE*, vol. 24, p. 282; *SHERIFFS AND CONSTABLES*, vol. 25, p. 658; *SUBROGATION*, *ante*, p. 199; *TAXATION, post*; *UNDUE INFLUENCE*; *VENDOR AND PURCHASER*; *WORKING CONTRACTS*.

**I. DEFINITION AND NATURE.** — The Contract of Suretyship has been defined as a contract whereby one person engages to be answerable for the debt, default, or miscarriage of another.<sup>1</sup>

A Surety is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so.<sup>2</sup>

**General Nature.** — Suretyship is an accessory contract, and presupposes the existence of a principal obligation.<sup>3</sup> The surety is equally bound with his principal as original promisor. He is a debtor from the beginning, and must see that the debt is paid.<sup>4</sup> Suretyship has been said also to be a consensual contract as between the creditor and the surety,<sup>5</sup> but it would seem that the

1. *Suretyship Defined.* — *Evans v. Keeland*, 9 Ala. 42; *White v. Life Assoc. of America*, 63 Ala. 419, 35 Am. Rep. 45; *Keene v. Newark Watch Case Material Co.*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 6. See also *Lachman v. Block*, (La. 1894) 15 So. Rep. 649.

2. *Surety Defined.* — *Smith v. Shelden*, 35 Mich. 42, 24 Am. Rep. 529; *Wendlandt v. Sohre*, 37 Minn. 162; *Cassan v. Maxwell*, 39 Minn. 391.

3. *Accessory Contract.* — *Evans v. Keeland*, 9 Ala. 42; *White v. Life Assoc. of America*, 63 Ala. 419, 35 Am. Rep. 45; *Mouton v. Beauchamp*, 10 La. Ann. 666; *Gay v. Blanchard*, 32 La. Ann. 497; *Lachman v. Block*, (La. 1894) 15 So. Rep. 649; *Kramph v. Hatz*, 52 Pa. St. 525.

**Party to Original Promise and Consideration.** — When the agreement is an original undertaking on the part of the promisor in which he is directly interested and benefited, he cannot be a surety. *Wimberly v. Windham*, 104 Ala. 409, 53 Am. St. Rep. 70; *Salomon v. Reese*, 34 Cal. 28; *Maher v. Willson*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 80; *Perkins v. Goodman*, 21 Barb. (N. Y.) 218.

4. *Surety Equally Bound.* — *Baylies on Sureties*, p. 3; *Kroncke v. Madsen*, 56 Neb. 609; *Perkins v. Goodman*, 21 Barb. (N. Y.) 218; *Shaw v. McFarlane*, 1 Ired. L. (23 N. Car.) 216.

5. *Consensual Contract.* — *Gay v. Blanchard*, 32 La. Ann. 497.

**Debtor's Assent Not Essential.** — *Harty v.*  
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contract may at least come into existence by operation of law and without the knowledge or consent of the creditor.<sup>1</sup>

**Distinguished from Guaranty.** — The terms "suretyship" and "guaranty" are often confounded, from the fact that the guarantor is, in common acceptance, a surety for another. The true distinction seems to be that a surety is in the first instance answerable for the debt for which he makes himself responsible, while a guarantor is only liable where default is made by the party whose undertaking is guaranteed.<sup>2</sup>

**Distinguished from Indorsement.** — The rules governing the relationship of principal and surety are not, generally speaking, applicable to indorsers.<sup>3</sup> The liability of an ordinary indorser is greater than that of a surety. The latter becomes bound simply for the accommodation of his principal, and receives no consideration for the favor he bestows. He is bound only to the same extent as his principal, and the latter's defense is his defense. But with the indorser it is different. He usually receives a consideration for his promise, and although the note he indorses be invalid he may nevertheless be bound.<sup>4</sup>

**II. CONTRACT OF SURETYSHIP AND ITS ELEMENTS** — 1. Creation — *a.* BY EXPRESS AGREEMENT GENERALLY. — A surety may become such by an express contract which requires the elements necessary in any other contract.<sup>5</sup>

**One Instrument Binding Principal and Surety.** — A surety is usually bound with his principal by the same instrument, executed at the same time and upon the same consideration.<sup>6</sup>

**No Particular Form of Words Essential.** — The relation may be established by any form of words which expresses such intention,<sup>7</sup> and while the addition of the

Smith, 74 Ill. App. 194; Hughes v. Littlefield, 18 Me. 400; Powers v. Nash, 37 Me. 322. But see Lathrop v. Wilson, 30 Vt. 604.

1. **Creation by Operation of Law.** — Wayman v. Jones, 58 Mo. App. 313. See also *infra*, this title, II. *Contract of Suretyship and Its Elements* — *Creation*.

2. **Surety's and Guarantor's Contracts Distinguished** — *Indiana.* — Markland Min., etc., Co. v. Kimmel, 87 Ind. 560; La Rose v. Logansport Nat. Bank, 102 Ind. 332; Nading v. McGregor, 121 Ind. 465; Conduitt v. Ryan, 3 Ind. App. 1; Lane v. Mayer, 15 Ind. App. 382; Bryant v. Stout, 16 Ind. App. 380; Newcomb Bros. Wall Paper Co. v. Emerson, 17 Ind. App. 482; Wittmer Lumber Co. v. Rice, 23 Ind. App. 586.

*Louisiana.* — Hornor v. McDonald, 52 La. Ann. 397; Green v. Hart, 52 La. Ann. 213; Lachman v. Block, (La. 1894) 15 So. Rep. 649; Alter v. Zunts, 27 La. Ann. 317.

*Massachusetts.* — Courtis v. Dennis, 7 Met. (Mass.) 510.

*Pennsylvania.* — Scott v. Swain, (Pa. 1887) 8 Atl. Rep. 24; Amsbaugh v. Gearhart, 11 Pa. St. 482; Allen v. Hubert, 49 Pa. St. 259; Reigart v. White, 52 Pa. St. 440; Woods v. Sherman, 71 Pa. St. 100; Riddle v. Thompson, 104 Pa. St. 330.

*Wisconsin.* — Omaha Nat. Bank v. Johnson, 111 Wis. 372.

See also the title GUARANTY, vol. 14, p. 1130.

The surety is an insurer of the debt; the guarantor is an insurer of the solvency of the debtor. McIntosh-Huntington Co. v. Reed, 89 Fed. Rep. 464; Kramph v. Hatz, 52 Pa. St. 525. See also the following cases: Hall v. Weaver, 34 Fed. Rep. 104; White v. Life Assoc. of America, 63 Ala. 419, 35 Am. Rep. 45; Clark v. Morgan, 13 Ill. App. 597; Ward v. Wilson, 100 Ind. 52, 50 Am. Rep. 763; Read v. Cutts, 7 Me. 186, 22 Am. Dec. 184; Cox v. Weed Sew-

ing Mach. Co., 57 Miss. 350; Allen v. Hubert, 49 Pa. St. 259; Riddle v. Thompson, 104 Pa. St. 330; Campbell v. Sherman, 151 Pa. St. 70, 31 Am. St. Rep. 735; Lender v. Kline, 167 Pa. St. 188; Harris v. Newell, 42 Wis. 687.

3. **Rules Inapplicable to Indorsers.** — Crampton v. Foster, 29 N. Y. App. Div. 215.

4. **Distinguished from Indorsement.** — Monson v. Drakeley, 40 Conn. 553; Graham v. Robertson, 79 Ga. 72; Sibley v. American Exch. Nat. Bank, 97 Ga. 126; Stephens v. Monongahela Nat. Bank, 88 Pa. St. 157, 32 Am. Rep. 438. See also the title BILLS AND NOTES, vol. 4, p. 478; Harris v. Harris, 92 Ill. App. 455, holding that a statute giving a remedy to drawers, indorsers, and guarantors of negotiable paper has no application to sureties.

5. See the titles BILLS AND NOTES, vol. 4, p. 65; BONDS, vol. 4, p. 618.

**Writing** has been held essential to a contract of suretyship. Ingersoll v. Baker, 41 Mich. 48; Bonine v. Denniston, 41 Mich. 292. See also the title VERBAL AGREEMENTS (STATUTE OF FRAUDS). This seems unsound as a general proposition, since a surety, unlike a guarantor, is primarily bound. See the title GUARANTY, vol. 14, p. 1130.

6. See the titles CONSIDERATION, vol. 6, p. 687; GUARANTY, vol. 14, p. 1133.

**When Liability Commences.** (See also *infra*, this section, *Execution*.) — Where the principal in a promissory note deposits and transfers to the creditor as collateral security for the payment of the note certain personal property, and as further and additional security other parties sign the note as sureties, the liability of such other sureties becomes fixed at the time the collateral security is exhausted. Dussol v. Bruguere, 50 Cal. 456.

7. Clark v. Turk, (Tex. Civ. App. 1899) 50 S. W. Rep. 1070,



words "principal" and "surety" to their respective signatures may indicate the capacity in which the instrument was executed, the fact of suretyship generally is matter *in pais* and may be explained by parol.<sup>1</sup>

*b.* BY EXECUTION OF JOINT OBLIGATION. — Where several persons join in executing a bond or other obligation, they become sureties for each other.<sup>2</sup>

*c.* BY PARTNER'S RETIREMENT FROM FIRM. — Upon the retirement of a member of a firm he becomes a surety of the other partners who assume the firm's debts.<sup>3</sup>

*d.* BY ASSUMPTION OF MORTGAGE. — Where the grantee in a conveyance of land agrees to assume and discharge a mortgage existing on the land at the time of the execution of the deed as part payment of the purchase money, such grantee becomes the principal debtor for the payment of the incumbrance, and the grantor becomes the surety,<sup>4</sup> and this rule applies to subsequent purchasers so long as the incumbrance subsists.<sup>5</sup>

*e.* BY MORTGAGE OR PLEDGE TO SECURE ANOTHER'S DEBT — (1) *Generally*. — When property of any kind is pledged or mortgaged by the owner to secure the debt, default, or miscarriage of another person, such property occupies the position of a surety.<sup>6</sup>

1. See *infra*, this section, *Relationship May Be Shown by Parol*.

**Competency to Contract.** — *Campbell v. Murray*, 62 Ga. 86.

**Sureties in a Joint Obligation.** — *Goodall v. Wentworth*, 20 Me. 322; *Hatch v. Norris*, 36 Me. 419; *Brownlee v. Young*, 25 Mont. 38; *Crafts v. Mott*, 4 N. Y. 604; *Magill v. Brown*, 20 Tex. Civ. App. 662.

**Administrators Joining in Bond Are Sureties for Each Other.** — *Braxton v. State*, 25 Ind. 82; *Moore v. State*, 49 Ind. 558; *Newton v. Newton*, 53 N. H. 537; *Boyd v. Boyd*, 3 Gratt. (Va.) 113. And see the title JOINT EXECUTORS AND ADMINISTRATORS, vol. 17, p. 619.

**Vendees of Land Joining in a Bond for the purchase money become sureties for each other.** *Owen v. McGehee*, 61 Ala. 440.

**Where Two Persons Execute a Note and Each Receives Half the Consideration, they are as between themselves principals for one-half the debt and sureties for each other as to the other half.** *Fraser v. McConnell*, 23 Ga. 368; *Hall v. Hall*, 34 Ind. 314; *M'Questen v. Noyes*, 6 N. H. 19; *Watriss v. Pierce*, 32 N. H. 560; *Traders Nat. Bank v. Clare*, 76 Tex. 47.

But see *Small v. Older*, 57 Iowa 326, where it was held, where two persons gave their joint note for borrowed money, and each received one-half of the consideration, it was not a case of suretyship for each other, but they were liable as principals, each for the whole debt.

3. See the title PARTNERSHIP, vol. 22, p. 185. And see also the following cases: *Williams v. Boyd*, 75 Ind. 286; *Bays v. Conner*, 105 Ind. 415; *Gillen v. Peters*, 39 Kan. 489; *Graham v. Thornton*, (Miss. 1891) 9 So. Rep. 292; *Allen v. Cooley*, 53 S. Car. 414; *Bryan v. Henderson*, 88 Tenn. 23; *Johnson v. Young*, 20 W. Va. 614.

**Notice to Creditors and Third Persons Necessary.** — *Wiley v. Temple*, 85 Ill. App. 69; *Smith v. Sheldon*, 35 Mich. 42, 24 Am. Rep. 529; *Osborne v. Baker*, 103 Mich. 247; *Young v. Bell*, (N. J. 1898) 41 Atl. Rep. 226; *Millard v. Thorn*, 56 N. Y. 402; *Colgrove v. Tallman*, 67 N. Y. 95, 23 Am. Rep. 90; *Lazelle v. Miller*, 40 Oregon 549; *Frow's Estate*, 73 Pa. St. 459; *Johnson v.*

*Young*, 20 W. Va. 614. See also *Fensler v. Prather*, 43 Ind. 119.

**4. Assumption of Mortgage** — *Illinois*. — *Moore v. Topliff*, 107 Ill. 241.

*Massachusetts*. — *Lappen v. Gill*, 129 Mass. 349.

*Michigan*. — *Unger v. Smith*, 44 Mich. 22.

*Missouri*. — *Burnside v. Fitzner*, 63 Mo. 107;

*American Nat. Bank v. Klock*, 58 Mo. App. 335.

*New Jersey*. — *Huyler v. Atwood*, 26 N. J. Eq. 504.

*New York*. — *Halsey v. Reed*, 9 Paige (N. Y.) 446; *Marsh v. Pike*, 10 Paige (N. Y.) 595; *Ferris v. Crawford*, 2 Den. (N. Y.) 595; *Trotter v. Hughes*, 12 N. Y. 74, 62 Am. Dec. 137; *Belmont v. Coman*, 22 N. Y. 438, 78 Am. Dec. 213; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556; *Comstock v. Drohan*, 71 N. Y. 13; *Ayers v. Dixon*, 78 N. Y. 318.

*Pennsylvania*. — *Bartholomay Brewing Co. v. Thomeier*, 2 Pa. Super. Ct. 345.

*South Carolina*. — *Crenshaw v. Thackston*, 14 S. Car. 437.

*Virginia*. — *Willard v. Worsham*, 76 Va. 392; *Osborne v. Cabell*, 77 Va. 462.

*Canada*. — *Leeming v. Smith*, 25 Grant Ch. (U. C.) 256. See also the title MORTGAGES, vol. 20, pp. 997, 1058.

One who purchases a business and agrees, as part of the consideration, to assume the liabilities of the vendors, becomes a principal as to such liabilities and not a surety. *Berbling v. Glaser*, (N. Y. City Ct. Gen. T.) 3 Misc. (N. Y.) 624.

6. *Perkins v. Squier*, 1 Thomp. & C. (N. Y.) 620.

**6. Property Pledged to Secure Debt of Another** — *England*. — *Robinson v. Gee*, 1 Ves. 251.

*Canada*. — *Joseph v. Heaton*, 5 Grant Ch. (U. C.) 636; *Royal Canadian Bank v. Payne*, 19 Grant Ch. (U. C.) 180.

*United States*. — *Allen v. O'Donald*, 28 Fed. Rep. 346.

*Illinois*. — *Home Nat. Bank v. Waterman*, 30 Ill. App. 535.

*Michigan*. — *Denison v. Gibson*, 24 Mich. 187.

*Minnesota*. — *Campion v. Whitney*, 30 Minn. 177.

(2) *Wife's Separate Property for Husband's Debt.* — A married woman may usually pledge or mortgage her separate property to secure the debt of her husband.<sup>1</sup> Consequently where a wife pledges or mortgages her separate property for her husband's debt, she occupies the position of surety in respect to such mortgaged property.<sup>2</sup>

2. *Relationship May Be Shown by Parol.* — While some courts have held that the instruction of parol evidence to prove the relation of suretyship between the parties to a written contract is inadmissible as tending to vary the terms of the writing,<sup>3</sup> the better doctrine is that suretyship is a fact collateral

*Mississippi.* — *Union Bank v. Govan*, 10 Smed. & M. (Miss.) 333.

*Oregon.* — *Walker v. Goldsmith*, 7 Oregon 161; *Hoffman v. Habighorst*, 38 Oregon 270.

*Texas.* — *Durrell v. Farwell*, 88 Tex. 98; *Washington L. Ins. Co. v. Gooding*, 19 Tex. Civ. App. 490; *Levy v. Williams*, 20 Tex. Civ. App. 651.

*Wisconsin.* — *Leffingwell v. Freyer*, 21 Wis. 392.

See also the title PLEDGE AND COLLATERAL SECURITY, vol. 22, pp. 908, 909, for additional cases.

Where one borrows for the use of another and both mortgage their respective lands for the debt, the borrower's land must be sold first under a decree of foreclosure, but he will be entitled to reimbursement from the land of the party who received the loan. *Canaday v. Boliver*, 25 S. Car. 547.

In *Cotton v. Atlas Nat. Bank*, 145 Mass. 43, it was held that where a party transferred collaterals to secure the note of another in bank, the pledgor's business being managed by his son, although the note was renewed from time to time and the last renewal was made after the death of the pledgor, such collaterals still remained pledged as security for the note.

In *Casey v. Gibbons*, 136 Cal. 368, it was held that a mother, as between herself and the mortgagee, was a principal debtor and not a surety for her son where she executed her individual note, which on its face treated her as principal, and simultaneously gave a mortgage on her property to secure a loan made to her son.

1. See the title SEPARATE PROPERTY OF MARRIED WOMEN, vol. 25, p. 415.

2. *Mortgage of Wife's Separate Property* — *California.* — *Hassey v. Wilke*, 55 Cal. 528; *Bull v. Coe*, 77 Cal. 54, 11 Am. St. Rep. 235.

*Delaware.* — *Hood v. Jones*, 5 Del. Ch. 77.

*Indiana.* — *Moffitt v. Roche*, 77 Ind. 48; *Vogel v. Leichner*, 102 Ind. 55.

*Kansas.* — *Hawkins v. King*, 62 Kan. 526.

*Michigan.* — *Denison v. Gibson*, 24 Mich. 187.

*Minnesota.* — *Agnew v. Merritt*, 10 Minn. 308; *Siebert v. Quesnel*, 65 Minn. 107, 60 Am. St. Rep. 441.

*Mississippi.* — *Knight v. Whitehead*, 26 Miss. 245.

*New York.* — *Wheelwright v. De Peyster*, 4 Edw. (N. Y.) 232; *Dibble v. Richardson*, 171 N. Y. 131.

*North Carolina.* — *Hinton v. Greenleaf*, 113 N. Car. 6; *Smith v. Old Dominion Bldg., etc., Assoc.*, 119 N. Car. 257; *Hedrick v. Byerly*, 119 N. Car. 420; *Sherrod v. Dixon*, 120 N. Car. 60.

*Virginia.* — *Christian v. Keen*, 80 Va. 369.

See also the titles MORTGAGES, vol. 20, p.

1058; SEPARATE PROPERTY OF MARRIED WOMEN, vol. 25, p. 417.

In England, where a wife mortgaged her property to indemnify a surety of her husband, the property thus mortgaged was treated in all respects as a surety. *Hodgson v. Hodgson*, 2 Keen 704.

The General Rule to Determine Whether the Wife Is a Surety as to the mortgaged property only, or whether she is personally liable as a principal, has been stated to be whether she does not or does share in the consideration. *Siebert v. Quesnel*, 65 Minn. 107, 60 Am. St. Rep. 441. See also *Vogel v. Leichner*, 102 Ind. 55; *McFillen v. Hoffman*, 35 N. J. Eq. 364; *Dibble v. Richardson*, 171 N. Y. 131; *Dickinson v. Codwise*, 1 Sandf. Ch. (N. Y.) 214.

A Married Woman May Become Personally Liable for the debt of her husband secured by bond or note and by a mortgage on her separate property, so that a deficiency judgment can be rendered on the mortgage against her, when she joins in the bond or note and expressly charges her separate property, *McKeon v. Hagan*, 18 Hun (N. Y.) 65; or where she joins in the note and is estopped to assert her status as surety, *Alexander v. Bouton*, 55 Cal. 15. See also the title SEPARATE PROPERTY OF MARRIED WOMEN, vol. 25, p. 423. But it seems a married woman can never be liable to a deficiency judgment unless she signs the bond or note as well as the mortgage. *Exchange Nat. Bank v. Wolverton*, 11 Wash. 108. See also the title FORECLOSURE OF MORTGAGES, 9 ENCYC. OF PL. AND PR. 485.

*Notice of Relation to Mortgagee.* — In *Von Hemert v. Taylor*, 73 Minn. 339, it was held that where a wife, to secure a debt of the husband, joins with him in executing a mortgage on land where the title of record is in the husband, but the wife has an equitable ownership of an undivided interest therein, she is surety to the extent of her interest. But the mortgagee is not charged with sufficient notice of such interest by the mere fact that the wife joined in the covenant of seisin as to justify the wife in asserting the rights of a surety where the mortgagee extended the time of payment.

3. *Parol Evidence Held Incompetent.* — *Dane v. Corduan*, 24 Cal. 164; *Hunt v. Adams*, 7 Mass. 518; *Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150; *Mayhew v. Prince*, 11 Mass. 54; *Derry Bank v. Baldwin*, 41 N. H. 434; *Heath v. Derry Bank*, 44 N. H. 174; *Erwin v. Saunders*, 1 Cow. (N. Y.) 240, 13 Am. Dec. 520; *Fitzhugh v. Runyon*, 8 Johns. (N. Y.) 375; *Thompson v. Ketcham*, 8 Johns. (N. Y.) 190, 5 Am. Dec. 332; *Wells v. Baldwin*, 18 Johns. (N. Y.) 44; *Farrington v. Gallaway*, 10 Ohio 543.

to the contract and not a part of it,<sup>1</sup> and accordingly parol evidence is held competent to establish the fact that a party to a written instrument is a surety both in courts of equity<sup>2</sup> and in courts of law,<sup>3</sup> especially in courts having no separate jurisdiction of law and equity.<sup>4</sup> It is, therefore, well established that one who appears on the face of a note or other obligation as a maker has the right to show by parol testimony that he is in fact a surety.<sup>5</sup> The same rule applies equally to instruments under seal,<sup>6</sup> although some authorities hold that in such a case parol evidence is inadmissible at law<sup>7</sup> while

1. **As Proving Extrinsic and Collateral Facts.**—Ward v. Stout, 32 Ill. 399; Rose v. Williams, 5 Kan. 483; Mariner's Bank v. Abbott, 28 Me. 280; Guild v. Butler, 127 Mass. 386; Hubbard v. Gurney, 64 N. Y. 457; Hoffman v. Habighorst, 38 Oregon 261; Smith v. Tunno, 1 McCord Eq. (S. Car.) 443, 16 Am. Dec. 617; Gillett v. Taylor, 14 Utah 190, 60 Am. St. Rep. 890; Farmers, etc., Bank v. Rathbone, 26 Vt. 19, 58 Am. Dec. 200, stated and quoted in title ACCOMMODATION PAPER, vol. 1, p. 344.

2. **Competent Only in Courts of Equity.**—Rees v. Berrington, 2 Ves. Jr. 540; Yates v. Donaldson, 5 Md. 389, 61 Am. Dec. 283; Farrington v. Galloway, 10 Ohio 543; Burke v. Cruger, 8 Tex. 66, 58 Am. Dec. 102. See also the title ACCOMMODATION PAPER, vol. 1, p. 378, note.

3. **Competent Both at Law and in Equity.**—State Bank v. Watkins, 6 Ark. 123; Foster v. Wallace, 2 Mo. 231; Garrett v. Ferguson, 9 Mo. 125; Mechanics' Bank v. Wright, 53 Mo. 153; King v. Baldwin, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415; Fowler v. Alexander, 1 Heisk. (Tenn.) 425.

4. Cole v. Fox, 83 N. Car. 463.

5. **Parol Evidence to Show Suretyship**—England. —Craythorne v. Swinburne, 14 Ves. Jr. 160.

Canada. —Perley v. Loney, 17 U. C. Q. B. 279.

United States. —Hall v. Weaver, 34 Fed. Rep. 104.

Alabama. —Bruce v. Edwards, 1 Stew. (Ala.) 117, 18 Am. Dec. 33.

California. —Lawton v. Gordon, 34 Cal. 36, 91 Am. Dec. 670. See also the title ACCOMMODATION PAPER, vol. 1, p. 344, note.

Colorado. —Drescher v. Fulham, 11 Colo. App. 62; Torbit v. Heath, 11 Colo. App. 492.

Georgia. —St. Marys' Bank v. Mumford, 6 Ga. 44; Fraser v. McConnell, 23 Ga. 368; Higdon v. Bailey, 26 Ga. 426; Matheson v. Jones, 30 Ga. 306, 76 Am. Dec. 647; Stewart v. Parker, 55 Ga. 311.

Illinois. —Flynn v. Mudd, 27 Ill. 323; School Trustees v. Southard, 31 Ill. App. 359.

Indiana. —Holland v. Johnson, 51 Ind. 346; Harvey v. Osborn, 55 Ind. 535; Knopf v. Morel, 111 Ind. 570; Brannon v. Irons, 19 Ind. App. 305.

Iowa. —Corielle v. Allen, 13 Iowa 289; Lauman v. Nichols, 15 Iowa 161; Piper v. Newcomer, 25 Iowa 221; Murray v. Graham, 29 Iowa 520.

Kansas. —Rose v. Williams, 5 Kan. 483.

Kentucky. —Chapeze v. Young, 87 Ky. 476; Greene v. Anderson, 102 Ky. 216.

Louisiana. —Roberts v. Jenkins, 19 La. 453.

Maine. —Fernald v. Dawley, 26 Me. 470; Springer v. Toothaker, 43 Me. 383, 69 Am. Dec. 66; Lime Rock Bank v. Mallett, 34 Me. 547, 56

Am. Dec. 673, 42 Me. 349; Fournier v. Cyr, 64 Me. 32.

Massachusetts. —Wilson v. Foot, 11 Met. (Mass.) 285.

Michigan. —Smith v. Sheldon, 35 Mich. 42, 24 Am. Rep. 529; Barron v. Cady, 40 Mich. 259; Stevens v. Oaks, 58 Mich. 343.

Mississippi. —Davis v. Mikell, Freem. (Miss.) 548; Meggett v. Baum, 57 Miss. 22.

Missouri. —Scott v. Bailey, 23 Mo. 140; O'Howell v. Kirk, 41 Mo. App. 523; Mechanics' Bank v. Wright, 53 Mo. 153; Coats v. Swindle, 55 Mo. 31.

New Hampshire. —Grafton Bank v. Kent, 4 N. H. 221, 17 Am. Dec. 414.

New York. —Barry v. Ransom, 12 N. Y. 462; Continental Nat. Bank v. Bell, 125 N. Y. 38.

North Carolina. —Cole v. Fox, 83 N. Car. 463; Welfare v. Thompson, 83 N. Car. 276.

Ohio. —Baker v. Kellogg, 29 Ohio St. 663.

Oklahoma. —Stovall v. Adair, 9 Okla. 620.

Oregon. —Thompson v. Coffman, 15 Oregon 631.

Texas. —Burke v. Cruger, 8 Tex. 67, 58 Am. Dec. 102; Stroop v. McKenzie, 38 Tex. 132; Coffin v. Loomis, (Tex. Civ. App. 1897) 41 S. W. Rep. 511.

Utah. —Gillett v. Taylor, 14 Utah 190, 60 Am. St. Rep. 890.

Vermont. —St. Albans Bank v. Smith, 30 Vt. 148; Lathrop v. Wilson, 30 Vt. 604; Arbuckle v. Templeton, 65 Vt. 205.

Virginia. —Harper v. McVeigh, 82 Va. 751; Boulware v. Hartsook, 83 Va. 679.

Washington. —Harmon v. Hale, 1 Wash. Ter. 422, 34 Am. Rep. 816; Culbertson v. Wilcox, 11 Wash. 522; British Columbia Bank v. Jeffs, 15 Wash. 230.

West Virginia. —Creigh v. Hedrick, 5 W. Va. 140; Parsons v. Harrold, 46 W. Va. 122.

Wisconsin. —Irvine v. Adams, 48 Wis. 468, 33 Am. Rep. 817.

See also the title ACCOMMODATION PAPER, vol. 1, pp. 343, 358.

It is competent for one who is a joint surety to show by parol whether the sureties were sureties for the principal alone, or for each other also. Appgar v. Hiler, 24 N. J. L. 812; Robison v. Lyle, 10 Barb. (N. Y.) 512; Sisson v. Barrett, 6 Barb. (N. Y.) 199.

6. **Sealed Instruments.**—Rogers v. School Trustees, 46 Ill. 428; Dickerson v. Ripley County, 6 Ind. 128, 63 Am. Dec. 373; Kennebec Bank v. Turner, 2 Me. 42; Smith v. Clifton, 48 Miss. 66; Forbes v. Sheppard, 98 N. Car. 111; Fowler v. Alexander, 1 Heisk. (Tenn.) 425; Smith v. Doak, 3 Tex. 215; Creigh v. Hedrick, 5 W. Va. 140.

7. Willis v. Ives, 1 Smed. & M. (Miss.) 307; Pintard v. Davis, 20 N. J. L. 205; Levy v.

admissible in equity.<sup>1</sup>

**When the Word "Principal" Is Added to the Signature** the surety is estopped to assert that he was a surety merely.<sup>2</sup>

**Knowledge of Creditor.** — Where the instrument does not show the suretyship on its face, knowledge of the suretyship must be brought home to the creditor to entitle the surety to the rights and privileges of his position.<sup>3</sup>

**3. Change in Status by Subsequent Transaction.** — The relation as between principal and surety may be changed, the surety becoming the principal and the principal the surety. This is effected by the surety for a valuable consideration agreeing to pay the joint indebtedness,<sup>4</sup> or by subsequent dealings between himself and the creditor.<sup>5</sup> By the voluntary acts of a guarantor he may assume the position of a surety.<sup>6</sup> Again, the surety may waive his rights as such so far as the interpretation and enforcement of the contract of surety are concerned.<sup>7</sup> But the substitution of a new security, such as a bond, for the security on which a party became originally bound as surety, does not change the character of his relation from a surety to that of a principal.<sup>8</sup>

**No Merger by Judgment.** — The relationship between principal and surety is not affected by a judgment obtained against them jointly; there is no merger.<sup>9</sup>

**4. Who May Become Sureties** — *a. INSANE PERSONS.* — A person bereft of reason and understanding who enters into a contract of suretyship cannot be held liable thereon, even though the person with whom he contracts had no knowledge that the surety's mind was unsound, and practiced no fraud or imposition upon him.<sup>10</sup>

*b. INFANTS.* — The capacity of an infant to enter into a contract of suretyship has been treated elsewhere.<sup>11</sup>

*c. MARRIED WOMEN.* — As at common law a married woman's contracts

Hampton, 1 McCord L. (S. Car.) 145; Deberry v. Adams, 9 Yerg. (Tenn.) 52; Dozier v. Lea, 7 Humph. (Tenn.) 520. Compare Fowler v. Alexander, 1 Heisk. (Tenn.) 425; Cole v. Fox, 83 N. Car. 463.

1. Burke v. Cruger, 8 Tex. 66, 58 Am. Dec. 102. See also cases cited in the last note *supra*.

2. **Signing as Principal.** — Menaugh v. Chandler, 89 Ind. 94; Waterville Bank v. Redington, 52 Me. 466; Picot v. Signiogo, 22 Mo. 587; Derry Bank v. Baldwin, 41 N. H. 434. See also Rees v. Berington, 2 Ves. Jr. 542; *infra*, this title, III. 5. *b. By Signing as Principal*; and the title ACCOMMODATION PAPER, vol. 1, p. 344.

3. **Relation Must Be Known to Creditor.** — Smith v. Shelden, 35 Mich. 42, 24 Am. Rep. 529; Cox v. Weed Sewing Mach. Co., 57 Miss. 350; Goodman v. Litaker, 84 N. Car. 8, 37 Am. Rep. 602; Stroop v. McKenzie, 38 Tex. 132; Frank v. Snow, 6 Wyo. 42. See also *infra*, this title, VI. *Discharge of Surety*, and the title ACCOMMODATION PAPER, vol. 1, p. 374 *et seq.*

**Notice Must Be Clear.** — Wolleshlare v. Searles, 45 Pa. St. 45. See also Johnson v. King, 20 Ala. 270; Summerhill v. Tapp, 52 Ala. 227; Alabama Nat. Bank v. Hunt, 125 Ala. 512; Routon v. Lacy, 17 Mo. 399; Meriden Silver Plate Co. v. Flory, 44 Ohio St. 43.

**Assent to Deal with a Person as Surety** has been held essential as well as knowledge of his suretyship. Manley v. Boycot, 2 El. & Bl. 46, 75 E. C. L. 46; Yates v. Donaldson, 5 Md. 389, 61 Am. Dec. 283.

So in *California* by statute. Farmers, etc., Bank v. De Shorb, 137 Cal. 685. See also Casey

v. Gibbons, 136 Cal. 368; California Nat. Bank v. Ginty, 108 Cal. 148; Leeke v. Hancock, 76 Cal. 127; Chase v. Evoy, 58 Cal. 348; Harlan v. Ely, 55 Cal. 340; Damon v. Pardow, 34 Cal. 278; Shriver v. Lovejoy, 32 Cal. 575; Aud v. Magruder, 10 Cal. 282.

4. **Change of Relation.** — Sefton v. Hargett, 113 Ind. 592; Chaplin v. Baker, 124 Ind. 385; Bishop v. Day, 13 Vt. 81, 37 Am. Dec. 582.

5. Fluker v. Henry, 27 Ala. 403; Hayward v. Fullerton, 75 Iowa 371, holding, however, that a surety who makes a payment on a note, and, acting in behalf of the principal, procures an extension of time for the payment of the note, does not change his obligation from that of a surety to a principal.

6. Grant v. Ludlow, 8 Ohio St. 1; Lender v. Kline, 167 Pa. St. 188.

7. Arbuckle v. Templeton, 65 Vt. 205.

8. Merriken v. Godwin, 2 Del. Ch. 236.

9. See *infra*, this title, VI. *Discharge of Surety*.

10. **Persons Non Compos Mentis Not Bound.** — Van Patton v. Beals, 46 Iowa 62. See also Seaver v. Phelps, 11 Pick. (Mass.) 304, 22 Am. Dec. 372.

In Causey v. Wiley, 27 Ga. 444, the court said: "On the issue of fraud or no fraud in procuring the contract, weakness of capacity, combined with the fact that it is a contract of suretyship, is entitled to consideration."

11. See the title INFANTS, vol. 16, p. 285, and also the title BAIL AND RECOGNIZANCE, vol. 3, p. 710. See also Maples v. Wightman, 4 Conn. 376 (infant's contract as surety on note void); Patchin v. Cromach, 13 Vt. 330 (infant's recognizance).

were void,<sup>1</sup> her capacity to become a surety must depend on statute.<sup>2</sup>

*d. PARTNERS.* — One partner has no implied authority to bind the firm as surety by a contract of suretyship or guaranty.<sup>3</sup>

*e. ATTORNEYS.* — The statutory disqualification of attorneys to become surety for their clients has been treated elsewhere.<sup>4</sup>

*f. CORPORATIONS.* — (1) *Generally.* — The power of a corporation to enter into contracts of suretyship has been discussed elsewhere.<sup>5</sup>

(2) *Surety Companies.* — Surety companies are incorporated under the laws of different states,<sup>6</sup> and as such, by complying with the laws thereof, are authorized to transact business in other states in the way of guaranteeing bonds and undertakings, as well as becoming surety for the fidelity of persons having fiduciary relations or holding positions of public or private trust.<sup>7</sup> Statutes creating such authority are held valid and as not contravening constitutional provisions against granting to corporations special and exclusive privileges and immunities, and such companies may, therefore, lawfully become sureties.<sup>8</sup> When a bond or undertaking is signed by a surety company, a statute requiring two sureties may be dispensed with.<sup>9</sup> Upon complying with statutory provisions requiring a sworn statement of its condition to be filed with the clerk of the county in which its principal place of business

1. See the title HUSBAND AND WIFE, vol. 15, p. 790.

2. See the title SEPARATE PROPERTY OF MARRIED WOMEN, vol. 25, p. 418 *et seq.* See also the titles ACCOMMODATION PAPER, vol. 1, p. 350; BAIL AND RECOGNIZANCE, vol. 3, p. 710; HUSBAND AND WIFE, vol. 15, pp. 793, 801.

Where a married woman may contract in all respects as a *feme sole* (see title HUSBAND AND WIFE, vol. 15, p. 791 *et seq.*) her contract of suretyship is valid. *Frederick-Town Sav. Inst. v. Michael*, 81 Md. 502.

3. See the titles ACCOMMODATION PAPER, vol. 1, p. 345 *et seq.*; GUARANTY, vol. 14, p. 1132; PARTNERSHIP, vol. 22, p. 157.

*Validation of Contract of Suretyship.* — *Sandilands v. Marsh*, 2 B. & Ald. 673; *Dubuque First Nat. Bank v. Carpenter*, 41 Iowa 518; *Kidder v. Page*, 48 N. H. 380; *Rochester Bank v. Bowen*, 7 Wend. (N. Y.) 159; *Cockroft v. Claflin*, 64 Barb. (N. Y.) 464; *Fore v. Hitson*, 70 Tex. 517. See also the title PARTNERSHIP, vol. 22, p. 136.

4. *Attorneys.* — See the titles ATTORNEY AND CLIENT, vol. 3, p. 291 *et seq.*; BAIL AND RECOGNIZANCE, vol. 3, p. 683; BONDS, vol. 4, p. 634. See also *Hicks v. Chouteau*, 12 Mo. 342; *Luce v. Foster*, 42 Neb. 818.

5. See the title CORPORATIONS (PRIVATE), vol. 7, p. 788 *et seq.*

6. See the title CORPORATIONS (PRIVATE), vol. 7, p. 793; GUARANTY, vol. 14, p. 1132, note.

*Construction of Surety Companies' Contracts.* — See *infra*, this title, III. 1. a. (3) *Contracts of Surety Companies.*

7. *Surety Companies — California.* — *Cramer v. Tittle*, 72 Cal. 12.

*Connecticut.* — *Lovejoy v. Isbell*, 70 Conn. 557.

*Kentucky.* — *Coleman v. Parrott*, (Ky. 1890) 13 S. W. Rep. 525; *Bank of Commerce v. Payne*, 86 Ky. 446; *Phalan v. Louisville Safety Vault, etc., Co.*, 88 Ky. 24; *Johnson v. Johnson*, 88 Ky. 275.

*Louisiana.* — *Standard Cotton Seed Oil Co. v. Matheson*, 48 La. Ann. 1321; *Holmes v. Ten-*

*nessee Coal, etc., R. Co.*, 49 La. Ann. 1465; *Moffet v. Koch*, 106 La. 371.

*Maryland.* — *Gans v. Carter*, 77 Md. 1; *Herzberg v. Warfield*, 76 Md. 446.

*Michigan.* — *Steel v. Auditor Gen.*, 111 Mich. 381.

*Minnesota.* — *Minnesota L. & T. Co. v. Beebe*, 40 Minn. 7.

*Montana.* — *King v. Pony Gold Min. Co.*, 24 Mont. 470.

*New York.* — *Hurd v. Hannibal, etc., R. Co.*, 33 Hun (N. Y.) 109.

*Pennsylvania.* — *Clark's Estate*, 195 Pa. St. 520.

*Wisconsin.* — *Roane Iron Co. v. Wisconsin Trust Co.*, 99 Wis. 273, 67 Am. St. Rep. 856.

The provisions of the Act of Congress, approved August 13, 1894, 2 Supp. Rev. Stat. U. S., (1892-96), § 1, p. 237, relative to the authority of surety companies to transact business, are construed to apply to all parts of the United States, and to all courts of the United States, as far as their judicial proceedings are concerned, in the territories as well as the states. *Ranney-Alton Mercantile Co. v. Mineral Belt Constr. Co.*, 2 Ind. Ter. 134.

In Texas it is not necessary to state, in a sequestration bond signed by a surety company, that the corporation is authorized to do business in the state. *Clopton v. Goodbar*, (Tex. Civ. App. 1900) 55 S. W. Rep. 972.

8. *Statutes Creating Authority Held Valid.* — *Lovejoy v. Isbell*, 70 Conn. 557; *Ranney-Alton Mercantile Co. v. Mineral Belt Constr. Co.*, 2 Ind. Ter. 134; *Miller v. Matthews*, 87 Md. 464; *Schmitt v. Clinton*, 111 Mich. 99; *In re Philadelphia, etc., Terminal R. Co.*, 28 W. N. C. (Pa.) 117; *Altoona, etc., Terminal R. Co.'s Bond*, 24 Pa. Co. Ct. 561; *Less v. Ghio*, 92 Tex. 651. See also the titles CORPORATIONS, (PRIVATE), vol. 7, p. 793; GUARANTY, vol. 14, p. 1132, note.

9. *Surety Companies May Be Accepted as Sole Surety upon an appeal undertaking.* *White v. Rintoul*, 51 N. Y. Super. Ct. 512; *Hurd v. Hannibal, etc., R. Co.*, 33 Hun (N. Y.) 109. But see *Nichols v. MacLean*, 98 N. Y. 458.

is located, a foreign surety company may become surety on bonds or undertakings, and courts may accept it without further justification; but this authority is merely permissive, and not mandatory, and does not deprive courts of the power, as a condition of acceptance and approval, to require that such company shall further justify, if its sufficiency is excepted to.<sup>1</sup>

**5. Offer and Acceptance.** — A contract of suretyship, like any other contract, requires the meeting of the minds of the parties. Consequently an offer to become a surety is not binding until acceptance by the person to whom it is made, and is revocable until that time. But the acceptance may be given at any time before the offer is withdrawn, and it may be either express or implied, or, under certain circumstances, may be manifested by silence or inaction.<sup>2</sup>

**6. Execution** — *a. GENERALLY.* — The execution of a document includes its signing and delivery, and, where necessary, sealing as well.<sup>3</sup>

*b. SIGNATURE* — (1) *Generally* — *Place of Signature.* — The obligation of the parties does not depend upon the place or order of the signatures to the contract, and one who signs above another may be in fact the surety to him who signs below, if such was the intention of all the parties.<sup>4</sup>

*Signature as Waiver of Defects.* — Sureties signing a bond impliedly waive defects in the instrument.<sup>5</sup>

(2) *Failure of Principal to Sign.* — A surety may voluntarily bind himself for the debt or default of another without joining with him in the same instrument the person for whom he becomes surety.<sup>6</sup> Consequently it has

**1. Courts May Require Surety Companies to Justify.** — *Fox v. Hale, etc., Silver Min. Co.*, 97 Cal. 353; *State v. District Ct.*, 58 Minn. 351; *Earle v. Earle*, 49 N. Y. Super. Ct. 57; *McGean v. MacKeller*, (N. Y. Super. Ct. Spec. T.) 67 How. Pr. (N. Y.) 273; *Haines v. Hein*, 67 N. Y. App. Div. 389; *Matter of American Banking, etc., Co.*, 4 Pa. Dist. 757.

**Presumption of Solvency of Surety Companies.** — *Matter of Keogh*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 747.

**2. Offer and Acceptance.** — *Lachman v. Block*, (La. 1894) 15 So. Rep. 649. See also *Sturgis v. Arceneaux*, 9 La. Ann. 136.

When the offer is unconditional and has been accepted, a failure to collect the demand from the principal need not be shown. *Watson v. Beabout*, 18 Ind. 281.

Where the terms of an offer to become surety are general, the offerer must be regarded as consenting to whatever the terms cover upon a reasonable construction. *Webster v. Smith*, 4 Ind. App. 44.

It has been held that a person was bound by a written offer "to go on" another's note "as surety," made to and acted on by a third person, although he afterwards refused to sign the note. *Webster v. Smith*, 4 Ind. App. 44.

**An Action Lies for Breach of a Promise to Become Surety** on a future contract. *Mann v. McDowell*, 3 Pa. St. 357, 45 Am. Dec. 649. See also *Paul v. Stockhouse*, 38 Pa. St. 302.

**The Acceptance of the paper with knowledge** that the party signed it as surety is sufficient evidence of assent and is binding upon delivery. *Ward v. Stout*, 32 Ill. 399; *Newcomb Bros. Wall Paper Co. v. Emerson*, 17 Ind. App. 482; *Cummings v. Little*, 45 Me. 183; *Stovall v. Adair*, 9 Okla. 620.

Acceptance of an offer to become surety is sufficiently shown by the obligee acting upon the offer without the acceptance being in writing. *Reigart v. White*, 52 Pa. St. 438.

**A Surety Is Not Entitled to Notice** of a creditor's acceptance of the instrument. *Cox v. Weed Sewing Mach. Co.*, 57 Miss. 350.

**3. See the titles BILLS AND NOTES**, vol. 4, p. 200; **EXECUTION AND PROOF OF DOCUMENTS**, vol. 11, p. 584. See also the title **SEALS**, vol. 25, p. 73.

**4. Place of Signature.** — *Palmer v. Stephens*, 1 Den. (N. Y.) 471; *Fournier v. Cyr*, 64 Me. 32; *Richardson v. Boynton*, 12 Allen (Mass.) 138, 90 Am. Dec. 141; *U. S. Fidelity, etc., Co. v. Siegmans*, 87 Minn. 175; *Brockway v. Allen*, 17 Wend. (N. Y.) 40; *Brink v. Stratton*, 64 N. Y. App. Div. 331; *Polacheck v. Moore*, 114 Wis. 261. See also the titles **BILLS AND NOTES**, vol. 4, p. 108; **BONDS**, vol. 4, p. 621.

**Signature in Any Part.** — A party may become bound in an instrument by signing it in any part thereof, when he signs with that intention. *State v. Wilcox*, 59 Mo. 176; *North St. Louis Bldg., etc., Assoc. v. Obert*, 169 Mo. 507. See also the title **SIGN — SIGNATURE**, vol. 25, p. 1065.

**Signature of Principal Affixed to Oath Only.** — See *State v. Hill*, 47 Neb. 456.

**5. Signature Waiver of Defects.** — *State v. Winfree*, 12 La. Ann. 643. See also *State v. Hampton*, 14 La. Ann. 736; *School Directors v. Judice*, 39 La. Ann. 896, and *infra*, this title, III. 5. *Estoppel of Surety*.

**6. Contract Binding One Person for Another's Default.** — *Fassnacht v. Emsing Gagen Co.*, 18 Ind. App. 80, 63 Am. St. Rep. 322; *Novak v. Pitlick*, (Iowa 1903) 94 N. W. Rep. 916; *Senour v. Maschinot*, (Ky. 1895) 31 S. W. Rep. 481; *Martin v. Hornsby*, 55 Minn. 187, 43 Am. St. Rep. 487; *Bollman v. Pasewalk*, 22 Neb. 761; *M'Questen v. Noyes*, 6 N. H. 19; *Bank of Northern Liberties v. Cresson*, 12 S. & R. (Pa.) 306; *Blankenship v. Ely*, 98 Va. 359; *Eureka Sandstone Co. v. Long*, 11 Wash. 161.

Where the liability of the principal is fixed by contract or by operation of law, a surety who

been held that a surety's liability is not affected by the principal's failure to sign a recognizance bond,<sup>1</sup> replevin bond,<sup>2</sup> school treasurer's bond,<sup>3</sup> town tax collector's bond,<sup>4</sup> bond of indemnity,<sup>5</sup> attachment bond<sup>6</sup> or bond to prevent attachment,<sup>7</sup> appeal bond,<sup>8</sup> constable's bond,<sup>9</sup> or bond to perform the conditions and performance of a lease.<sup>10</sup>

**Where Principal Named in Instrument Fails to Sign.**—There is much conflict of authority as to whether a surety is bound when the principal who is named in the instrument fails to sign it.<sup>11</sup> The general rule is that where an instrument is drawn by which one person is to be bound as the principal obligor, and another is bound as surety, wherein he undertakes that his principal shall faithfully discharge the terms of the obligation therein assumed by him, the surety cannot be held liable upon such contract if it be not signed by the principal, unless the surety consents to its delivery in its incomplete and defective condition.<sup>12</sup> But it has been held that where a bond is conditioned for the faithful performance of official duty, that is, is an official bond, the principal being by law bound to perform his duty irrespective of the bond, the engagement of the surety is collateral and he is bound if he executes and delivers the instrument without the signature of the principal, and the bond

enters into a guaranty for the fulfilment of that obligation cannot avoid his obligation because the principal does not sign the bond with him. *Cockrill v. Davie*, 14 Mont. 131.

1. **Recognizance Bond.**—*State v. Peyton*, 32 Mo. App. 522; *Irwin v. State*, 10 Neb. 325.

2. **Replevin Bond.**—*Matter of Cahill*, 48 Mich. 616. But see *Green v. Kindy*, 43 Mich. 279, where it was held that if the principal's name be signed to a forthcoming bond in replevin without his knowledge or consent, the sureties will not be bound thereby unless it clearly appears that they signed with full knowledge of the facts, and that the bond would be delivered as executed.

3. **School Treasurer's Bond.**—*School Trustees v. Sheik*, 119 Ill. 579, 59 Am. Rep. 830.

4. **Town Tax Collector's Bond.**—*Deering v. Moore*, 86 Me. 181, 41 Am. St. Rep. 534.

5. **Indemnity Bond.**—*Woodman v. Calkins*, 13 Mont. 363, 40 Am. St. Rep. 449; *Bollman v. Pasewalk*, 22 Neb. 761; *Luce v. Foster*, 42 Neb. 818.

6. **Attachment Bond.**—*Adams v. Kellogg*, 63 Mich. 105; *McIntosh v. Hurst*, 6 Mont. 287.

7. **Bond to Prevent Attachment.**—*Pierse v. Miles*, 5 Mont. 549; *McIntosh v. Hurst*, 6 Mont. 287.

8. **Appeal Bond.**—*Webster v. Wailles*, 35 Fla. 267; *Harrison v. State Bank*, 3 J. J. Marsh. (Ky.) 375; *Lindsay v. Price*, 33 Tex. 280; *San Roman v. Watson*, 54 Tex. 254.

In *Johnson v. Johnson*, 31 Ohio St. 131, it was held that in respect to appeals from the common pleas to the district court, where the statute provides that "the party desirous of appealing shall give an undertaking with one or more sufficient sureties, etc.," the words "with sureties" is held to mean by sureties, and that on such an appeal bond the surety may be held without the signature of the principal.

9. **Constable's Bond.**—*Rader v. Davis*, 5 Lea (Tenn.) 536.

10. **Bond for Performance of Lease.**—*New York v. Kent*, 57 N. Y. Super. Ct. 109.

11. **The Failure of the Obligor to Be Named in the Bond** does not affect its validity. *Potter v.*

*State*, 23 Ind. 550. See the title BONDS, vol. 4, p. 624.

12. **Surety Not Bound Where Principal Fails to Sign**—*California*.—*Sacramento v. Dunlap*, 14 Cal. 421; *People v. Hartley*, 21 Cal. 585, 82 Am. Dec. 758; *Cavanaugh v. Casselman*, 88 Cal. 549; *Kurtz v. Forquer*, 94 Cal. 91.

*Connecticut*.—*Ferry v. Burchard*, 21 Conn. 597.

*Indiana*.—*Wild Cat Branch v. Ball*, 45 Ind. 213.

*Louisiana*.—*Curtis v. Moss*, 2 Rob. (La.) 367; *Wells v. Dill*, 1 Mart. N. S. (La.) 665.

*Massachusetts*.—*Wood v. Washburn*, 2 Pick. (Mass.) 24; *Bean v. Parker*, 17 Mass. 591; *Russell v. Annable*, 109 Mass. 72, 12 Am. Rep. 665; *Goodyear Dental Vulcanite Co. v. Bacon*, 151 Mass. 462.

*Michigan*.—*Palmer v. Oakley*, 2 Dougl. (Mich.) 443, 47 Am. Dec. 41; *Hall v. Parker*, 37 Mich. 590, 26 Am. Rep. 540; *Johnston v. Kimball Tp.*, 39 Mich. 590; *Sievers v. Woodburn Sarven Wheel Co.*, 43 Mich. 279; *Hessell v. Johnson*, 63 Mich. 623, 6 Am. St. Rep. 334.

*Minnesota*.—*State v. Austin*, 35 Minn. 51; *Martin v. Hornsby*, 55 Minn. 187, 43 Am. St. Rep. 487.

*Mississippi*.—*New Orleans, etc., R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689; *State v. Martin*, 56 Miss. 108.

*Missouri*.—*Bunn v. Jetmore*, 70 Mo. 228, 35 Am. Rep. 425; *Gay v. Murphy*, 134 Mo. 58, 56 Am. St. Rep. 496; *State v. Peyton*, 32 Mo. App. 522.

*Montana*.—*Ney v. Orr*, 2 Mont. 559.

*Nebraska*.—*Gregory v. Cameron*, 7 Neb. 414.

*South Dakota*.—*Board of Education v. Sweeney*, 1 S. Dak. 642, 36 Am. St. Rep. 767.

*Vermont*.—*Fletcher v. Austin*, 11 Vt. 447, 34 Am. Dec. 698.

**Surety Signing and Delivering Bond with Knowledge that Principal Has Not Signed.**—*Goodyear Dental Vulcanite Co. v. Bacon*, 148 Mass. 542.

**Execution by Principal After Delivery No Defense to Surety.**—*Kelly v. State*, 25 Ohio St. 567.

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may be enforced as a common-law bond.<sup>1</sup> Other jurisdictions hold that the completeness of the bond depends, *stricti juris*, simply upon whether it was given, rather than signed, by the principal.<sup>2</sup> Some authorities, however, hold in such a case a delivery without the principal's signature a delivery in escrow only, and the surety not bound where the redelivery was without authority.<sup>3</sup>

(3) *Signature of Agent*. — An agent to sign a contract of suretyship must be properly authorized.<sup>4</sup> In *Kentucky* the authority by statute must be in writing.<sup>5</sup> Where the signature of the principal, a corporation, is affixed by an agent to a bond to dissolve an attachment without authority, the sureties on the contract are not bound.<sup>6</sup>

c. DELIVERY — (1) *Generally*. — When the investment evidencing the contract of the surety is under seal<sup>7</sup> or is negotiable,<sup>8</sup> delivery is essential to its validity, and the surety is not bound in the absence of a valid delivery.<sup>9</sup>

(2) *Delivery upon Condition*. — When a surety's signature is given on some condition which is not fulfilled, the question of his liability depends on the circumstances of the case. These circumstances are generally the character of the instrument itself, whether a bond under seal, a negotiable instrument, or an ordinary contract,<sup>10</sup> and the relation to the contract of the person to whom the conditional delivery is made.<sup>11</sup>

1. *Surety Bound Though Principal Fails to Sign* — *United States*. — *St. Louis Brewing Assoc. v. Hayes*, (C. C. A.) 97 Fed. Rep. 859.

*Alabama*. — *McClure v. Colclough*, 5 Ala. 65; *McKissack v. McClendon*, 133 Ala. 558.

*Arizona*. — *Pima County v. Snyder*, (Ariz. 1896) 44 Pac. Rep. 297.

*Illinois*. — *School Trustees v. Sheik*, 119 Ill. 579, 59 Am. Rep. 830.

*Kansas*. — *Johnson v. Weatherwax*, 9 Kan. 75; *Tillson v. State*, 29 Kan. 452.

*Maine*. — *Scott v. Whipple*, 5 Me. 336; *Howard v. Brown*, 21 Me. 385; *State v. Peck*, 53 Me. 284; *Scarborough v. Parker*, 53 Me. 252; *Deering v. Moore*, 86 Me. 181, 41 Am. St. Rep. 534.

*Mississippi*. — *Hall v. State*, 69 Miss. 529; *Gloster v. Harrell*, 77 Miss. 793.

*Nebraska*. — *Bollman v. Pasewalk*, 22 Neb. 761. *New York*. — *Williams v. Marshall*, 42 Barb. (N. Y.) 524; *Parker v. Bradley*, 2 Hill (N. Y.) 584.

*Pennsylvania*. — *Keyser v. Keen*, 17 Pa. St. 327; *Loew v. Stocker*, 68 Pa. St. 226.

*Texas*. — *Johnson v. Erskine*, 9 Tex. 1. *Utah*. — *Butterfield v. Mountain Ice, etc., Co.*, 11 Utah 194.

*Vermont*. — *Fletcher v. Austin*, 11 Vt. 447, 34 Am. Dec. 698.

*Wisconsin*. — *Douglas County v. Bardon*, 79 Wis. 641.

*Rule Applies to Both Sealed and Unsealed Instruments*. — *U. S. v. Linn*, 15 Pet. (U. S.) 290; *Redwood County v. Tower*, 28 Minn. 45. See also *Van De Casteel v. Cornwall*, 5 Cal. 419; *Sacramento County v. Bird*, 31 Cal. 66; *Montville v. Haughton*, 7 Conn. 543; *McLeod v. State*, 69 Miss. 221; *Skellinger v. Yendes*, 12 Wend. (N. Y.) 306; *Board of Education v. Fonda*, 77 N. Y. 350.

2. *State v. Bowman*, 10 Ohio 445; *Eureka Sandstone Co. v. Long*, 11 Wash. 161.

3. *Contra*. — *Johnson v. Baker*, 4 B. & Ald. 440, 6 E. C. L. 551; *U. S. v. Nelson*, 2 Brock. (U. S.) 64; *Pawling v. U. S.*, 4 Cranch (U. S.) 219; *Duncan v. U. S.*, 7 Pet. (U. S.) 435; *Bibb*

*v. Reid*, 3 Ala. 88; *Linn County v. Farris*, 52 Mo. 75, 14 Am. Rep. 389; *State Bank v. Evans*, 15 N. J. L. 155; *Lovett v. Adams*, 3 Wend. (N. Y.) 380; *People v. Bostwick*, 32 N. Y. 445. And see the titles *BILLS AND NOTES*, vol. 4, p. 204 *et seq.*; *BONDS*, vol. 4, p. 623; *ESCROW*, vol. 11, p. 333.

4. See the titles *AGENCY*, vol. 1, p. 930; *BONDS*, vol. 4, pp. 622, 637.

*Ratification of Signature as Surety Made Without Authority*. — *Hall v. State*, 39 Ind. 301.

5. See the title *AGENCY*, vol. 1, p. 955, note 3. See also *Billington v. Com.*, 79 Ky. 400; *Com. v. Magoffin*, (Ky. 1894) 25 S. W. Rep. 599; *Com. v. Campbell*, (Ky. 1898) 45 S. W. Rep. 89.

6. *Dole Bros. Co. v. Cosmopolitan Preserving Co.*, 167 Mass. 481, 57 Am. St. Rep. 477.

7. See the title *BONDS*, vol. 4, p. 622 *et seq.*

*Delivery of Official Bonds*. — *Sacramento County v. Bird*, 31 Cal. 66; *Fletcher v. Leight*, 4 Bush (Ky.) 303; *Young v. State*, 7 Gill & J. (Md.) 253; *Paxton v. State*, 59 Neb. 460, 80 Am. St. Rep. 689; *State v. Sooy*, 39 N. J. L. 539; *State v. Shirley*, 1 Ired. L. (23 N. Car.) 597; *Goodrum v. Carroll*, 2 Humph. (Tenn.) 490, 37 Am. Dec. 564; *McFarlane v. Howell*, 16 Tex. Civ. App. 246; *Blanton v. Com.*, 91 Va. 1.

*The Deposit of a Sheriff's Bonds for Record* is a delivery of the same. *McCracken v. Todd*, 1 Kan. 149.

8. See the title *BILLS AND NOTES*, vol. 4, p. 201 *et seq.*

9. *Delivery Necessary*. — *Johnson v. Weatherwax*, 9 Kan. 75; *Hudspeth v. Tyler*, 108 Ky. 520; *Hoops v. Schmidt*, (N. Y. City Ct. Tr. T.) 4 N. Y. Supp. 1; *Benjamin v. Ver Nooy*, 36 N. Y. App. Div. 581.

*Possession of Obligor or Promisee as Evidence of Delivery*. — See the titles *BONDS*, vol. 4, p. 624; *PRESUMPTIONS*, vol. 22, p. 1276.

10. See the title *ESCROW*, vol. 11, p. 333 *et seq.*

The strict doctrine of escrow has been said to be confined to sealed instruments only. See the titles *BILLS AND NOTES*, vol. 4, p. 205, note 1; *ESCROW*, vol. 11, pp. 335, 339.

11. A delivery in escrow must in strictness be



(3) *Instrument Containing Blanks.* — When the instrument is signed by the surety and delivered to the principal or the obligee with blanks left for the insertion of some material matter, the question of the liability of the surety on the completed instrument depends on questions fully discussed in other portions of this work.<sup>1</sup>

7. *Construction* — *a. GENERALLY.* — A surety is entitled to stand upon the letter of his contract, and his undertaking is to be construed strictly in his favor and is not to be extended by implication or inference beyond the fair scope of its terms.<sup>2</sup> But there are conflicting cases, and it is sometimes held that the contract of a surety is to be taken as strongly against him as

a delivery to a stranger. See the title *Escrow*, vol. 11, pp. 333, 337. Where the delivery is to a party to a contract, there is a difference of opinion as to its effect.

**Sealed Instrument Delivered to Obligor or Agent.** — A surety on a sealed instrument may not plead as a defense that he signed and delivered the instrument to the obligor or to his agent on condition of procuring other sureties, which the obligor failed to do. *Blume v. Bowman*, 2 Ired. L. (24 N. Car.) 338. See also the title *Escrow*, vol. 11, pp. 337, 339. But the surety may maintain an action for damages against the obligor. *Hudspeth v. Tyler*, 108 Ky. 520.

**Negotiable Instrument Delivered to Obligor or Agent.** — With respect to negotiable instruments the rule is sometimes stated to be otherwise. See the title *BILLS AND NOTES*, vol. 4, p. 204 *et seq.*, and p. 151.

**Sealed Instrument Delivered to Principal.** — The rule is unsettled as to the effect of a surety's delivering the instrument to his principal on condition of procuring other sureties, but the weight of authority seems to be that breach of such condition constitutes no defense to the surety unless the form of the instrument puts the obligor on notice, or he has actual notice. See the title *Escrow*, vol. 11, p. 340.

**Negotiable Instrument Delivered to Principal.** — The same rule very generally obtains as to negotiable instruments. See the title *BILLS AND NOTES*, vol. 4, p. 206.

1. *Filling Blanks.* — See the title *ALTERATION OF INSTRUMENTS*, vol. 2, p. 249 *et seq.*; and as to insertions in sealed instruments by parol authority, see further the title *AGENCY*, vol. 1, p. 954. See also the titles *BILLS AND NOTES*, vol. 4, pp. 207, 337 *et seq.*; *BONDS*, vol. 4, p. 642.

**Failure to Name an Obligor in an Official Bond** will not prevent its enforcement where it is obviously intended as a compliance with a statutory requirement that it shall be given to the state for the benefit of any person injured by the malfeasance of the officer. *State v. Wood*, 51 Ark. 205.

2. *Construction* — *England.* — *Wright v. Russell*, 2 W. Bl. 934; *Pearsall v. Summersett*, 4 Taunt. 593.

*United States.* — *Miller v. Stewart*, 9 Wheat. (U. S.) 680; *Leggett v. Humphreys*, 21 How. (U. S.) 66.

*Alabama.* — *Ellis v. Bibb*, 2 Stew. (Ala.) 63; *Montgomery v. Hughes*, 65 Ala. 201.

*Arkansas.* — *State v. Churchill*, 48 Ark. 426.

*Florida.* — *Raney v. Baron*, 1 Fla. 327; *Robinson v. Epping*, 24 Fla. 237.

*Illinois.* — *Field v. Rawlings*, 6 Ill. 581; *Chicago, etc., R. Co. v. Higgins*, 58 Ill. 128; *Stull*

*v. Hance*, 62 Ill. 52; *Salomon v. People*, 89 Ill. App. 374; *Dodgson v. Henderson*, 113 Ill. 360; *Burlington Ins. Co. v. Johnson*, 120 Ill. 622; *People v. Toomey*, 122 Ill. 308; *Vinyard v. Barnes*, 124 Ill. 346; *Linch v. Litchfield*, 16 Ill. App. 612; *Reed v. Cramb*, 22 Ill. App. 34; *Ewen v. Wilbor*, 99 Ill. App. 132.

*Indiana.* — *Markland Min., etc., Co. v. Kimmel*, 87 Ind. 560; *Weir Plow Co. v. Walmsley*, 110 Ind. 242; *Irwin v. Kilburn*, 104 Ind. 113; *State v. Hinsdale-Doyle Granite Co.*, 117 Ind. 476.

*Iowa.* — *Independent Dist. v. Reichard*, 50 Iowa 98; *Noyes v. Granger*, 51 Iowa 227; *Webster County v. Hutchinson*, 60 Iowa 721.

*Kansas.* — *Hays v. Closson*, 20 Kan. 120; *Edwards v. Ellis*, 27 Kan. 344; *Ryan v. Williams*, 29 Kan. 487; *Packard v. Herrington*, 41 Kan. 469; *Henrie v. Buck*, 39 Kan. 381.

*Louisiana.* — *Dunlop v. Gordon*, 10 La. Ann. 243.

*Maine.* — *Manufacturers' Bank v. Cole*, 39 Me. 188.

*Maryland.* — *Brooks v. Brooke*, 12 Gill & J. (Md.) 306, 38 Am. Dec. 310; *Baltimore First Nat. Bank v. Gerke*, 68 Md. 449, 6 Am. St. Rep. 453.

*Massachusetts.* — *Carkin v. Savory*, 14 Gray (Mass.) 528; *Rice v. Filene*, 6 Allen (Mass.) 230.

*Michigan.* — *Bishop v. Freeman*, 42 Mich. 533; *Gunn v. Geary*, 44 Mich. 615; *White Sewing Mach. Co. v. Hines*, 61 Mich. 423.

*Minnesota.* — *Tomlinson v. Simpson*, 33 Minn. 443.

*Missouri.* — *Blair v. Perpetual Ins. Co.*, 10 Mo. 559, 47 Am. Dec. 129; *Fisher v. Cutter*, 20 Mo. 206; *Allen v. Central Sav.-Bank*, 4 Mo. App. 66; *Fisse v. Einstein*, 5 Mo. App. 78; *Sedalia, etc., R. Co. v. Smith*, 27 Mo. App. 371; *Erath v. Allen*, 55 Mo. App. 107.

*Montana.* — *Missoula County v. McCormick*, 4 Mont. 115.

*Nebraska.* — *Lee v. Hastings*, 13 Neb. 508.

*New Jersey.* — *Frost v. Mixsell*, 38 N. J. Eq. 586; *Hoey v. Jarman*, 39 N. J. L. 523.

*New York.* — *Farmers', etc., Bank v. Evans*, 4 Barb. (N. Y.) 487; *Henderson v. Marvin*, 31 Barb. (N. Y.) 297; *Fairlie v. Lawson*, 5 Cow. (N. Y.) 424; *Knowles v. Cuddeback*, 19 Hun (N. Y.) 590; *Pratt v. Matthews*, 24 Hun (N. Y.) 387; *Delaware, etc., R. Co. v. Burkhard*, 36 Hun (N. Y.) 57; *Walsh v. Baillie*, 10 Johns. (N. Y.) 180; *Leeds v. Dunn*, 10 N. Y. 469; *Rochester City Bank v. Elwood*, 21 N. Y. 88; *People v. Vilas*, 36 N. Y. 460, 93 Am. Dec. 520; *Barns v. Barrow*, 61 N. Y. 39; *Davis v. Cope-land*, 67 N. Y. 127; *Ward v. Stahl*, 81 N. Y.

the words will admit,<sup>1</sup> while other authorities declare that such a contract is to be construed like any other contract with a view of ascertaining the intent of the parties, and effect is to be given to it only when its true intent and meaning are ascertained.<sup>2</sup>

**b. NOT RETROACTIVE — Past Defaults.** — A contract of suretyship is ordinarily not to be construed as retroactive so as to render the surety liable for prior defaults, and the same rule applies to sureties on official bonds.<sup>3</sup>

**8. Illegality of Contract.** — A person cannot bind himself as a surety in an obligation executed in violation of an express statute, nor can he evade the spirit of the law by doing indirectly what he is forbidden to do directly.<sup>4</sup>

406; *Merchants' Nat. Bank v. Hall*, 83 N. Y. 338, 38 Am. Rep. 434; *Farmers', etc., Nat. Bank v. Lang*, 87 N. Y. 209; *Jennery v. Olmstead*, 90 N. Y. 363.

*Ohio*. — *Lang v. Pike*, 27 Ohio St. 498.

*Oregon*. — *Weiler v. Henarie*, 15 Oregon 28; *Holbrook v. Investment Co.*, 32 Oregon 104.

*Pennsylvania*. — *Mercer County v. Coovert*, 6 W. & S. (Pa.) 70; *Whelen v. Boyd*, 114 Pa. St. 228.

*Rhode Island*. — *Bailey v. Larchar*, 5 R. I. 530.

*Tennessee*. — *State v. Orr*, 12 Lea (Tenn.) 725; *Cross v. Scarboro*, 6 Baxt. (Tenn.) 134.

*Texas*. — *Ryan v. Morton*, 65 Tex. 258.

*Utah*. — *Victor Sewing-Mach. Co. v. Crockwell*, 3 Utah 152; *Coughran v. Bigelow*, 9 Utah 260.

*Virginia*. — *Burson v. Andes*, 83 Va. 445; *Ayers v. Hite*, 97 Va. 466.

*Wisconsin*. — *W. W. Kimball Co. v. Baker*, 62 Wis. 526.

See also the titles **GUARANTY**, vol. 14, p. 1143; **SHERIFFS AND CONSTABLES**, vol. 25, p. 723.

**1. Words of Contract Construed Most Strongly Against Surety.** — *Hoey v. Jarman*, 39 N. J. L. 523; *Bailey v. Larchar*, 5 R. I. 530.

In *Fisse v. Einstein*, 5 Mo. App. 78, it was held that a surety on an appeal bond is not released by reason of a subsequent discharge in bankruptcy of the judgment debtor, and that in such a case the rule applies that the words of a contract of suretyship are to be taken most strongly against the surety. *Compare Odell v. Wootten*, 38 Ga. 224; *Payne v. Able*, 7 Bush (Ky.) 344, 3 Am. Rep. 316; *Carpenter v. Turrell*, 100 Mass. 450; *Williams v. Atkinson*, 36 Tex. 16.

**2. Construed as Other Contracts as to Intent and Meaning.** — *New Haven County Bank v. Mitchell*, 15 Conn. 206; *Stull v. Hance*, 62 Ill. 52; *Ewen v. Wilbor*, 99 Ill. App. 132; *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279; *Langan v. Hewett*, 13 Smed. & M. (Miss.) 122; *Allen v. Central Sav.-Bank*, 4 Mo. App. 66; *Fisse v. Einstein*, 5 Mo. App. 78; *Horne v. Lyman*, 2 Abb. App. Dec. (N. Y.) 399; *Warner v. Price*, 3 Wend. (N. Y.) 397; *Griffiths v. Hardenbergh*, 41 N. Y. 464; *Gamble v. Cuneo*, 21 N. Y. App. Div. 473; *Belloni v. Freeborn*, 63 N. Y. 383; *Smith v. Molleson*, 148 N. Y. 24, 51 Am. St. Rep. 654; *Victor Sewing-Mach. Co. v. Crockwell*, 3 Utah 152. See also *infra*, this title, III. 1. a. *As Dependent on Construction of Contract.*

In construing a contract of suretyship it is the duty of the court to put itself in a position to view the contract from the same standpoint that the parties did when they entered into it.

*North St. Louis Bldg., etc., Assoc. v. Obert*, 169 Mo. 507. See also *Kean v. Davis*, 21 N. J. L. 683, 47 Am. Dec. 182.

**3. Contract Not Retroactive — Arkansas.** — *Haley v. Petty*, 42 Ark. 392; *State v. Churchill*, 48 Ark. 426.

*Colorado*. — *Johnson v. Fisher*, 4 Colo. 242.

*Illinois*. — *Coons v. People*, 76 Ill. 383; *Stern v. People*, 96 Ill. 475; *Potter v. School Trustees*, 11 Ill. App. 280.

*Indiana*. — *Dickens v. State*, 7 Blackf. (Ind.) 358; *Rogers v. State*, 99 Ind. 218; *Weir Plow Co. v. Walmsley*, 110 Ind. 242.

*Iowa*. — *Webster County v. Hutchinson*, 60 Iowa 721.

*Kentucky*. — *Colyer v. Higgins*, 1 Duv. (Ky.) 6, 85 Am. Dec. 601.

*Maine*. — *Scarborough v. Parker*, 53 Me. 252.

*Maryland*. — *State v. Banks*, 76 Md. 136.

*Massachusetts*. — *Rochester v. Randall*, 105 Mass. 295, 7 Am. Rep. 519.

*Michigan*. — *Paw Paw v. Eggleston*, 25 Mich. 36; *Detroit v. Weber*, 29 Mich. 24.

*Minnesota*. — *Pine County v. Willard*, 39 Minn. 125, 12 Am. St. Rep. 622.

*Mississippi*. — *Montgomery v. Governor*, 7 How. (Miss.) 68; *Chaffe v. Taliaferro*, 58 Miss. 544.

*Missouri*. — *Marney v. State*, 13 Mo. 7; *State v. Jones*, 89 Mo. 470; *State v. Alsup*, 91 Mo. 172.

*Nebraska*. — *Van Sickel v. Buffalo County*, 13 Neb. 103, 42 Am. Rep. 753.

*New Jersey*. — *Jeffers v. Johnson*, 18 N. J. L. 382.

*New York*. — *Board of Education v. Fonda*, 77 N. Y. 350; *Thomson v. MacGregor*, 81 N. Y. 592; *Kellum v. Clark*, 97 N. Y. 390; *Delaware, etc., R. Co. v. Burkard*, 114 N. Y. 197.

*North Carolina*. — *Fitts v. Hawkins*, 2 Hawks (9 N. Car.) 394; *Governor v. Lee*, 4 Dev. & B. L. (20 N. Car.) 457; *Richardson v. Smith*, 2 Jones L. (47 N. Car.) 8; *Taylor v. Galbraith*, 65 N. Car. 409.

*Tennessee*. — *State v. Orr*, 12 Lea (Tenn.) 725.

*Wisconsin*. — *Vivian v. Otis*, 24 Wis. 518, 1 Am. Rep. 199.

See also *infra*, this title, III. 1. b. *Duration of Liability*, and VIII. *Sureties on Official Bonds*.

**The Rule Seems Contra as to Sureties on Administration Bonds.** — See the title **EXECUTORS AND ADMINISTRATORS**, vol. 11, p. 880.

**4. Illegal Obligation.** — *State v. Layton*, 4 Harr. (Del.) 512; *Jose v. Hewitt*, 50 Me. 248; *Nottingham v. Giles*, 2 N. J. L. 111; *Cannell*

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The contract must not be opposed to public policy.<sup>1</sup>

**9. Facts Negating Consent** — *a. FRAUD ON SURETY* — (1) *Misrepresentation and Concealment* — (a) *Generally*. — The contract of suretyship imports entire good faith and confidence between the parties in respect to the whole transaction,<sup>2</sup> and where the signature of a surety has been procured by the obligee through any fraudulent misrepresentation or concealment of material facts<sup>3</sup> the contract is voidable and the surety is not bound by it.<sup>4</sup> In the

*v. Crawford County*, 59 Pa. St. 196; *Enochs v. Wilson*, 11 Lea (Tenn.) 228.

**Bonds Required Colore Officii.** — Where a bond is extorted, *colore officii*, against the requisition of the statute, it is an illegal bond, and void *in toto*. *U. S. v. Humason*, 6 Sawy. (U. S.) 199. See also *U. S. v. Tingey*, 5 Pet. (U. S.) 115; *Hawes v. Marchant*, 1 Curt. (U. S.) 140; *Churchill v. Perkins*, 5 Mass. 541; *Smith v. Allen*, 1 N. J. Eq. 43, 21 Am. Dec. 33; *Lowe v. Guthrie*, 4 Okla. 287.

**Exceeding Requisition of Statute.** — A bond taken under a statute is void if it exceeds the requisition of the statute. *Armstrong v. U. S.*, Pet. (C. C.) 46, 1 Fed. Cas. No. 549. See also *U. S. v. Howell*, 4 Wash. (U. S.) 620, 26 Fed. Cas. No. 15,405; *U. S. v. Gordon*, 1 Brock (U. S.) 190, 25 Fed. Cas. No. 15,232.

**Each Surety Agreeing for Aliquot Part of Penalty** — Where the terms of the bond limit the liability of each surety to an aliquot part of the penalty, the surety cannot be held bound beyond the terms of the bond. *State v. Polk*, 14 Lea (Tenn.) 1.

**1. Void if Opposed to Public Policy.** — *Rouse v. Mohr*, 29 Ill. App. 321; *Board of Education v. Thompson*, 33 Ohio St. 321. See also generally the title *ILLEGAL CONTRACTS*, vol. 15, p. 927.

**2. Contract of Suretyship Imports Good Faith.** — *White v. Life Assoc.*, 63 Ala. 419, 35 Am. Rep. 45; *Burks v. Wonteline*, 6 Bush (Ky.) 20; *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.) 23, 19 Am. Rep. 50; *Com. v. Berry*, 95 Ky. 443; *Gano v. Farmers' Bank*, 103 Ky. 508, 82 Am. St. Rep. 596.

**As to Surety's Right to Full Disclosure**, see *infra*, this title, III. 2. *a. Right to Full Disclosure*.

**3. Fraudulent Misrepresentation and Concealment** — *Connecticut*. — *Doughty v. Savage*, 28 Conn. 146.

*Georgia*. — *Satterfield v. Spier*, 114 Ga. 127. *Illinois*. — *Roper v. Sangamon Lodge No. 6*, 91 Ill. 519, 33 Am. Rep. 60.

*Indiana*. — *Taylor v. Lohman*, 74 Ind. 418; *Wilson v. Monticello*, 85 Ind. 10; *Lucas v. Owens*, 113 Ind. 521; *Springfield Engine, etc., Co. v. Park*, 3 Ind. App. 173; *Fassnacht v. Emsing Gagen Co.*, 18 Ind. App. 80, 63 Am. St. Rep. 322.

*Iowa*. — *Home Ins. Co. v. Holway*, 55 Iowa 571, 39 Am. Rep. 179; *Conger v. Bean*, 58 Iowa 321.

*Kentucky*. — *Stanford First Nat. Bank v. Mattingly*, 92 Ky. 650; *Deposit Bank v. Peak*, (Ky. 1901) 62 S. W. Rep. 268; *Frank Fehr Brewing Co. v. Mullican*, (Ky. 1902) 66 S. W. Rep. 627.

*Maine*. — *Franklin Bank v. Cooper*, 36 Me. 179.

*Michigan*. — *Beath v. Chapoton*, 115 Mich. 506, 69 Am. St. Rep. 589.

*Missouri*. — *Home Sav.-Bank v. Traube*, 6 Mo. App. 221.

*New York*. — *Farmers' Nat. Bank v. Van Slyke*, 49 Hun (N. Y.) 7; *Howe Mach. Co. v. Farrington*, 82 N. Y. 121; *Bostwick v. Van Voorhis*, 91 N. Y. 357.

*Pennsylvania*. — *Meek v. Frantz*, 171 Pa. St. 632.

*Rhode Island*. — *Atlas Bank v. Brownell*, 9 R. I. 168.

*Texas*. — *Screwmen's Benev. Assoc. v. Smith*, 70 Tex. 168.

*West Virginia*. — *Warren v. Branch*, 15 W. Va. 21.

*Wisconsin*. — *Ætna L. Ins. Co. v. Mabbett*, 18 Wis. 667; *Remington Sewing Mach. Co. v. Kezertee*, 49 Wis. 409.

See also the title *FRAUD AND DECEIT*, vol. 14, p. 79.

**4. Surety Not Bound** — *England*. — *Stone v. Compton*, 5 Bing. N. Cas. 152, 35 E. C. L. 60.

*United States*. — *U. S. v. American Bonding, etc., Co.*, 89 Fed. Rep. 921.

*Alabama*. — *Southern Cotton Oil Co. v. Bass*, 126 Ala. 343; *Folmar v. Siler*, 132 Ala. 297.

*Georgia*. — *Matheson v. Jones*, 30 Ga. 306, 76 Am. Dec. 647; *Denton v. Butler*, 99 Ga. 264.

*Illinois*. — *Booth v. Storrs*, 75 Ill. 438; *Drabek v. Grand Lodge, etc.*, 24 Ill. App. 82.

*Indiana*. — *Fassnacht v. Emsing Gagen Co.*, 18 Ind. App. 80, 63 Am. St. Rep. 322.

*Iowa*. — *Home Ins. Co. v. Holway*, 55 Iowa 571, 39 Am. Rep. 179; *Benton County Sav. Bank v. Boddicker*, 105 Iowa 548, 67 Am. St. Rep. 310; *Robinson v. Larson*, 112 Iowa 173.

*Kentucky*. — *Burks v. Wonteline*, 6 Bush (Ky.) 20; *Woolley v. Louisville Banking Co.*, 81 Ky. 527; *Hamilton v. Williams*, (Ky. 1897) 38 S. W. Rep. 851; *Bellevue Loan, etc., Assoc. v. Jeckel*, 104 Ky. 159; *Deposit Bank v. Hearne*, 104 Ky. 819.

*Louisiana*. — *Reusch v. Keenan*, 42 La. Ann. 419.

*Michigan*. — *Denison v. Gibson*, 24 Mich. 187.

*Minnesota*. — *Traders' Ins. Co. v. Herber*, 67 Minn. 106; *Powers Dry-Goods Co. v. Harlin*, 68 Minn. 193, 64 Am. St. Rep. 460; *Capital F. Ins. Co. v. Watson*, 76 Minn. 387, 77 Am. St. Rep. 657.

*Mississippi*. — *Graves v. Tucker*, 10 Smed. & M. (Miss.) 22.

*Missouri*. — *Harrison v. Lumbermen, etc., Ins. Co.*, 8 Mo. App. 37.

*Nebraska*. — *Labaree v. Klosterman*, 33 Neb. 150; *Gist v. Feitz*, 43 Neb. 238.

*New Mexico*. — *Wells, etc., Co.'s Express v. Walker*, 9 N. Mex. 170.

*New York*. — *Bostwick v. Van Voorhis*, 91 N. Y. 353; *U. S. Life Ins. Co. v. Salmon*, 157 N. Y. 682, *affirming* 91 Hun (N. Y.) 535.

*Ohio*. — *Selser v. Brock*, 3 Ohio St. 302; *Commonwealth Bldg., etc., Co. v. Fromlet*, 6

note will be found specific instances of matters held sufficient or not sufficient to avoid the contract of suretyship for fraud or concealment.<sup>3</sup>

(b) *Ignorance of Creditor or Obligees.* — But where fraud is practiced by a principal without the knowledge of the creditor, the obligation is binding upon the surety,<sup>3</sup> nor can a surety escape liability upon an obligation negligently

Ohio Dec. 184; *Dinsmore v. Tidball*, 34 Ohio St. 411.

*Pennsylvania.* — *Macey v. Heger*, 195 Pa. St. 125; *Lauer Brewing Co. v. Riley*, 195 Pa. St. 449; *Goebel Brewing Co. v. McLean*, 15 Pa. Super. Ct. 38.

*South Carolina.* — *Wilmington, etc., R. Co. v. Ling*, 18 S. Car. 116.

*Texas.* — *Galbraith v. Townsend*, 1 Tex. Civ. App. 447; *Trammell v. Swan*, 25 Tex. 473.

*Utah.* — *Jungk v. Holbrook*, 15 Utah 198, 62 Am. St. Rep. 921.

*Vermont.* — *Connecticut Gen. L. Ins. Co. v. Chase*, 72 Vt. 176.

**1. Evidence Necessary to Maintain Allegation of Fraud or Concealment.** — In order to maintain a general allegation of concealment and fraud on the part of the payee in procuring the signature of a surety to a note, it must be shown that the payee either procured the surety's signature or was present when he signed, and then misrepresented or suppressed material facts which he should have truly disclosed. *Burks v. Wontertine*, 6 Bush (Ky.) 20. See also *Smith v. London First Nat. Bank*, 107 Ky. 257.

**Misrepresentation on the Part of City Officials** whose duty is to approve bonds of public officers has been held not attributable to the city so as to release a surety on such a bond. *Haffettsville v. Long*, 11 Tex. Civ. App. 180.

**Nondisclosure in the Absence of Inquiry** does not ordinarily amount to fraud so as to discharge a surety. *Lake v. Thomas*, 84 Md. 608; *Palatine Ins. Co. v. Crittenden*, 18 Mont. 413; *Hubbard v. Fravel*, 12 Lea (Tenn.) 304; *Domestic Sewing Mach. Co. v. Jackson*, 15 Lea (Tenn.) 418; *Warren v. Branch*, 15 W. Va. 21. See also the title FRAUD AND DECEIT, vol. 14, pp. 66, 75.

**Creditor's Failure to Disclose Principal's Insolvency to Surety.** — *Roper v. Sangamon Lodge No. 6*, 91 Ill. 518, 33 Am. Rep. 60; *Ham v. Greve*, 34 Ind. 18. Both these cases are stated in the title FRAUD AND DECEIT, vol. 14, p. 79. See also *Oregon Nat. Bank v. Gardner*, 13 Wash. 154, holding a creditor's failure to disclose the existence of a judgment against the principal not to be such a concealment as will release the surety.

**Concealment of Mere Moral Delinquency.** — The misconduct of an employee, the concealment of which by the employer will release the guarantor or surety, must be something more than mere moral delinquency, and must relate to the particular service in which the employee is engaged. *La Rose v. Logansport Nat. Bank*, 102 Ind. 332. See also *Pacific F. Ins. Co. v. Pacific Surety Co.*, 93 Cal. 7; *Charlotte, etc., R. Co. v. Gow*, 59 Ga. 685, 27 Am. Rep. 403; *Ida County Sav. Bank v. Seidensticker*, (Iowa 1902) 92 N. W. Rep. 862; *Ætna Indemnity Co. v. Schroeder*, (N. Dak. 1903) 95 N. W. Rep. 436; *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am.

Rep. 231; *Wilmington, etc., R. Co. v. Ling*, 18 S. Car. 116.

Knowledge of mere irregularities, although they may be serious and extensive, but which fall short of dishonesty and crime, imposes no duty on the obligee to disclose such knowledge to the sureties. *Harrisburg v. Guiles*, 192 Pa. St. 191. See also *People v. Smith*, 123 Cal. 70; *Home Ins. Co. v. Holway*, 55 Iowa 571, 39 Am. Rep. 179; *Wade v. Mt. Sterling*, (Ky. 1896) 33 S. W. Rep. 1113; *Tapley v. Martin*, 116 Mass. 275; *Boreland v. Washington County*, 20 Pa. St. 150; *Wayne v. Commercial Nat. Bank*, 52 Pa. St. 343; *Pittsburg, etc., R. Co. v. Shaeffer*, 59 Pa. St. 350; *Beyerle v. Hain*, 61 Pa. St. 226; *Farmers', etc., Nat. Bank v. Braden*, 145 Pa. St. 473; *National Bank of Republic v. Rochester Tumbler Co.*, 172 Pa. St. 626.

**The Publication of False Reports of the Assets and Liabilities** of a national bank (the report being required by statute) renders the bond of a surety for an employee void when it is shown that such reports induced the surety to sign the bond. But compare *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.) 23, 19 Am. Rep. 50; *Ashuelot Sav. Bank v. Albee*, 63 N. H. 152, 56 Am. Rep. 501; *Lieberman v. Wilmington First Nat. Bank*, 2 Penn. (Del.) 416, 82 Am. St. Rep. 414.

**Where Surety Has Same Knowledge of the Facts as the Obligees.** — *Court Vesper No. 69 v. Fries*, 22 Pa. Super. Ct. 250. And see the title FRAUD AND DECEIT, vol. 14, p. 72.

**Misrepresenting the Legal Effect of an Order of Arrest** will not discharge a surety. *Reed v. Sidener*, 32 Ind. 373.

**When the Inducement to Sign Is a Corrupt Bargain**, the surety cannot claim to have been misled thereby. *Graham v. Marks*, 98 Ga. 67.

**2. Fraud of Principal.** — *Wallace v. Wilder*, 13 Fed. Rep. 707. And see the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 880.

*Arkansas.* — *Stiewel v. American Surety Co.*, 70 Ark. 512.

*Colorado.* — *Fisher v. Denver Nat. Bank*, 22 Colo. 373.

*Delaware.* — *Lieberman v. Wilmington First Nat. Bank*, 2 Penn. (Del.) 416, 82 Am. St. Rep. 414.

*Illinois.* — *Davis Sewing Mach. Co. v. Buckles*, 89 Ill. 237.

*Indiana.* — *Lucas v. Owens*, 113 Ind. 521.

*Iowa.* — *Monroe Bank v. Gifford*, 72 Iowa 750.

*Kentucky.* — *Sebree Deposit Bank v. Clark*, 105 Ky. 212.

*Massachusetts.* — *New York L. Ins. Co. v. Macomber*, 169 Mass. 380.

*Mississippi.* — *Graves v. Tucker*, 10 Smed. & M. (Miss.) 9.

*New York.* — *Coleman v. Bean*, 1 Abb. App. Dec. (N. Y.) 394; *Rothschild v. Frank*, 14 N. Y. App. Div. 399.

*Texas.* — *Garner v. McGowen*, 27 Tex. 487;

signed by him, upon the ground that he did not read its contents or have it read to him.<sup>1</sup>

(2) *Forgery of Cosurety's Name.* — A surety may be held liable to the obligee of a bond or the holder of a promissory note although the name of a cosurety to the instrument is a forgery.<sup>2</sup>

(3) *Disregarding Conditions Imposed by Surety — Signing for Specified Purpose.* — When the payee has notice that the surety signed the obligation for a specific purpose, he is bound to apply it to that purpose, and a diversion thereof to another use releases the surety.<sup>3</sup>

*Signing on Specified Conditions.* — When the surety's signature is on specified conditions, as that other signatures to the instrument are to be secured, and the instrument is delivered without such signatures, the obligee cannot hold him liable.<sup>4</sup>

(4) *Conduct Waiving Fraud.* — The defense of a surety on the ground of fraudulent representations in procuring his signature to an instrument may be waived by the subsequent acts of the surety.<sup>5</sup>

*b. DURESS.* — Duress of the surety renders the contract voidable by the surety,<sup>6</sup> but duress of the principal does not avoid the contract of the surety.<sup>7</sup>

**10. Consideration.** — A contract of suretyship to be valid must be supported by a sufficient consideration,<sup>8</sup> of some benefit or value either to the principal

Riley v. Reifert, (Tex. Civ. App. 1895) 32 S. W. Rep. 185.

See also the titles **BILLS AND NOTES**, vol. 4, p. 326; **FRAUD AND DECEIT**, vol. 14, p. 154.

**1. Where Surety Negligently Fails to Read Instrument.** — Metropolitan Loan Assoc. v. Esche, 75 Cal. 513; State v. Pepper, 31 Ind. 76; Schmidt v. Archer, 113 Ind. 365; Spring Garden Ins. Co. v. Lemmon, 117 Iowa 691; Jaycox v. Tremblay, 42 N. Y. App. Div. 416; Meek v. Frantz, 171 Pa. St. 632; Johnston v. Patterson, 114 Pa. St. 398.

**2. Cosurety's Signature Forged — Georgia.** — Colquitt v. Simpson, 72 Ga. 501; Mathis v. Morgan, 72 Ga. 517, 53 Am. Rep. 847.

**Illinois.** — Stern v. People, 102 Ill. 540.

**Indiana.** — State v. Pepper, 31 Ind. 76.

**Kentucky.** — Hall v. Smith, 14 Bush (Ky.) 604; Wheeler v. Traders' Deposit Bank, 107 Ky. 653.

**Maine.** — Franklin Bank v. Stevens, 39 Me. 532; York County M. F. Ins. Co. v. Brooks, 51 Me. 506.

**Missouri.** — State v. Hewitt, 72 Mo. 603.

**Nebraska.** — Lombard v. Mayberry, 24 Neb. 674, 8 Am. St. Rep. 234; Kansas City Terra-Cotta Lumber Co. v. Murphy, 49 Neb. 674.

**South Carolina.** — Sullivan v. Williams, 43 S. Car. 489.

See also the title **BILLS AND NOTES**, vol. 4, p. 326, note 1.

Apart from the negotiable character of the instrument, these holdings have been rested sometimes on the ground that where one of two innocent persons must suffer by a third person's fraud, he who reposed confidence in the deceiver should be the loser. Stoner v. Millikin, 85 Ill. 218. Sometimes on the principle that a signature as surety is an implied assertion of the genuineness of those which preceded it. York County M. F. Ins. Co. v. Brooks, 51 Me. 506 (a case of a bond). See also Chamberlin v. Brewer, 3 Bush (Ky.) 562.

**3. Where Surety Signs for Specific Purpose.** — Ham v. Greve, 34 Ind. 18; Haworth v. Crosby,

(Iowa 1903) 94 N. W. Rep. 1098; Seabee Deposit Bank v. Clark, 105 Ky. 212. See also the title **ACCOMMODATION PAPER**, vol. 1, p. 379 *et seq.*, and *infra*, this title, **Discharge of Surety**.

Where one signs as surety generally he will be bound thereby although the note is passed to another than the payee. Browning v. Fountain, 1 Duv. (Ky.) 14. See also Ward v. Northern Bank, 14 B. Mon. (Ky.) 283; Perkins v. Ament, 2 Head (Tenn.) 110. And see generally the title **BILLS AND NOTES**, vol. 4, p. 202.

**4. Swope v. Forney**, 17 Ind. 385.

As to the rules regulating negotiable paper signed on such conditions, see the title **BILLS AND NOTES**, vol. 4, pp. 205, 206.

**Notes Signed by a Surety with Understanding that the Principal Shall Sign**, but delivered without such signature, do not bind the surety. Williams v. Luther, (Ky. 1895) 30 S. W. Rep. 199; Yohn v. Shumaker, 5 Pa. Super. Ct. 320.

**5. Waiver of Defense.** — Where a surety, with knowledge of the fraudulent representations of the maker and payee in procuring his signature to a note, asks and obtains further time in which to pay it, he thereby waives the fraud, whether he had knowledge that fraud was a defense in law or not. Rindskopf v. Doman, 28 Ohio St. 516. And see generally the title **FRAUD AND DECEIT**, vol. 14, p. 169.

**6. Duress of Surety Himself.** — State v. Brantley, 27 Ala. 44; Coffelt v. Wise, 62 Ind. 451; Wilkerson v. Hood, 65 Mo. App. 491. See also the title **DURESS**, vol. 10, p. 328 *et seq.*

**7. Duress of Principal No Defense to Surety.** — Thompson v. Buckhannon, 2 J. J. Marsh. (Ky.) 416; Oak v. Dustin, 70 Me. 23, 1 Am. St. Rep. 281; Springfield Card Mfg. Co. v. West, 1 Cush. (Mass.) 388. See also the title **DURESS**, vol. 10, p. 331, where the question is fully discussed.

**8. Necessity of Consideration.** — Davis v. Wells, 104 U. S. 159; Jackson v. Jackson, 7 Ala. 791; Hetherington v. Hixon, 46 Ala. 297; Cowles v. Peck, 55 Conn. 251, 3 Am. St. Rep. 44; Furst, etc., Mfg. Co. v. Black, 111 Ind. 308;

or surety, or some detriment to the creditor.<sup>1</sup> It is an elementary principle that where a person contemporaneously becomes surety for the debt, or for the performance of a duty of a third person, the consideration is the favor the surety receives from a compliance with his express or implied request that credit should be given to the principal.<sup>2</sup> But, unless the promise be contemporaneous with the original debt and constitute the inducement thereto,<sup>3</sup> it is not binding, for the guaranty of a debt already contracted, without a new consideration, is of no force.<sup>4</sup> An extension of time for the payment of

*Snyder v. Click*, 112 Ind. 293; *Taylor v. Wightman*, 51 Iowa 411; *Alter v. Hornor*, 33 La. Ann. 243; *Kulenkamp v. Groff*, 71 Mich. 675, 15 Am. St. Rep. 283; *Cobb v. Page*, 17 Pa. St. 469; *Allison v. Wood*, 147 Pa. St. 197, 30 Am. St. Rep. 726. See also the title *GUARANTY*, vol. 14, p. 1133.

**Contract under Seal.**—The act of sealing the instrument of suretyship so far expresses consideration in a legal sense as to be deemed a compliance with the statute of frauds. *Dougllass v. Howland*, 24 Wend. (N. Y.) 35. See also *Rosenbaum v. Gunter*, 2 E. D. Smith (N. Y.) 415; *Bennett v. Pratt*, 4 Den. (N. Y.) 275; *McKensie v. Farrell*, 4 Bosw. (N. Y.) 192.

**Official Bonds — Approval After Filing and Waiver of Forfeiture Sufficient Consideration.**—*State v. Paxton*, (Neb. 1902) 90 N. W. Rep. 983.

**Failure of Consideration.**—One cannot as surety be bound for a debt which is not due by reason of failure of consideration against the principal. *Adams v. Cuny*, 15 La. Ann. 485.

But it has been held that want or failure of consideration on the original contract on which a person is surety is no defense as against a suit for contribution by a cosurety who has paid. See *Cave v. Burns*, 6 Ala. 780 (where evidence offered to show the failure of consideration on the original note was excluded, a judgment having been obtained on the note which one surety had been compelled to pay); *Faurot v. Gates*, 86 Wis. 575 (where in a case between guarantors of a renewal note, proof of want of consideration in the original note was held to have been properly rejected).

These cases seem to announce a principle (not, perhaps, required in either case by the facts before the court) which in effect allows recovery for a voluntary payment. See the titles *CONTRIBUTION AND EXONERATION*, vol. 7, p. 336; *PAYMENT*, vol. 22, p. 609.

1. **Disadvantage to Creditor.**—*Barnes v. Van Keuren*, 31 Neb. 165; *Merchants' Nat. Bank v. Ryan*, 67 Ohio St. 448; *Connely v. Macfarlane*, 97 Pa. St. 361.

2. **Credit to Principal Sufficient Consideration — Alabama.**—*Darby v. Berney Nat. Bank*, 97 Ala. 643; *McAfee v. Glen Mary Coal, etc., Co.*, 97 Ala. 709; *Turner v. Smith*, 112 Ala. 334.

*Illinois.*—*Brokaw v. Kelsey*, 20 Ill. 303; *Green v. Shaw*, 66 Ill. App. 74; *Harty v. Smith*, 74 Ill. App. 194.

*Indiana.*—*Anderson v. Meeker*, 31 Ind. 245; *Bingham v. Kimball*, 33 Ind. 184; *Wheeler v. Barr*, 7 Ind. App. 381; *Eppert v. Hall*, 133 Ind. 417; *Lackey v. Boruff*, 152 Ind. 371.

*Maine.*—*Hughes v. Littlefield*, 18 Me. 400.

*Missouri.*—*Robertson v. Findley*, 31 Mo. 384.

*New York.*—*McNaught v. McClaughry*, 42 N. Y. 22, 1 Am. Rep. 487.

*Pennsylvania.*—*Hughes's Estate*, 13 Pa. Super. Ct. 240; *Court Vesper No. 69 v. Fries*, 22 Pa. Super. Ct. 250; *Connely v. Macfarlane*, 97 Pa. St. 361.

*Tennessee.*—*Henderson v. Rice*, 1 Coldw. (Tenn.) 223.

See also the title *CONSIDERATION*, vol. 6, pp. 687, 718.

3. **Promise Contemporaneous with Original Undertaking.**—*Fidelity, etc., Co. v. Mobile County*, 124 Ala. 144; *Stroud v. Thomas*, 139 Cal. 274, 96 Am. St. Rep. 111; *La Rose v. Logansport Nat. Bank*, 102 Ind. 332; *Deposit Bank v. Peak*, (Ky. 1901) 62 S. W. Rep. 268. See also *De Mattos v. Jordan*, 15 Wash. 378, and the title *CONSIDERATION*, vol. 6, p. 687.

4. **When New Consideration Required — Alabama.**—*Anderson v. Bellenger*, 87 Ala. 334, 13 Am. St. Rep. 46; *Savage v. Rome First Nat. Bank*, 112 Ala. 508.

*Illinois.*—*Chicago Sash, etc., Mfg. Co. v. Haven*, 195 Ill. 474; *Martin v. Stubbings*, 20 Ill. App. 381; *Crofut v. Aldrich*, 54 Ill. App. 541.

*Indiana.*—*Owens v. Tague*, 3 Ind. App. 245; *Brant v. Barnett*, 10 Ind. App. 653; *Wiperman v. Hardy*, 17 Ind. App. 142; *Ritenour v. Mathews*, 42 Ind. 7; *Favorite v. Stidham*, 84 Ind. 423; *Bridges v. Blake*, 106 Ind. 332; *Brownlee v. Lowe*, 117 Ind. 420.

*Kentucky.*—*Jackson v. Cooper*, (Ky. 1897) 39 S. W. Rep. 39.

*Missouri.*—*La Fayette Mut. Bldg. Assoc. v. Kleinhoffer*, 40 Mo. App. 388; *Lowenstein v. Sorge*, 75 Mo. App. 281.

*Nebraska.*—*Kansas Mfg. Co. v. Gandy*, 11 Neb. 448, 38 Am. Rep. 370; *Barnes v. Van Keuren*, 31 Neb. 165.

*Pennsylvania.*—*Altoona Second Nat. Bank v. Dunn*, 151 Pa. St. 228, 31 Am. St. Rep. 742; *Dunbar v. Fleisher*, 137 Pa. St. 85.

*Texas.*—*Simmang v. Farnsworth*, (Tex. Civ. App. 1893) 24 S. W. Rep. 541.

See further the title *GUARANTY*, vol. 14, p. 1135.

It is no defense to a surety that he signed a note after it was delivered to the payee, and that it was therefore without consideration, the payee having accepted the note on condition that the surety should sign it. *Deposit Bank v. Peak*, (Ky. 1901) 62 S. W. Rep. 268.

**Waiving Discharge by Alteration of Instrument — No New Consideration Necessary.**—*Owens v. Tague*, 3 Ind. App. 245. See also *Pelton v. Prescott*, 13 Iowa 567, and generally the title *ALTERATION OF INSTRUMENTS*, vol. 2, p. 259 et seq.

a debt,<sup>1</sup> a renewal of a note for the same debt,<sup>2</sup> or forbearance by the creditor to enforce legal rights,<sup>3</sup> are sufficient considerations for a contract of suretyship.

11. **Termination of Relationship** — *a.* ON NOTICE. — A surety who has signed a contract of suretyship cannot ordinarily, and before the breach of the contract, by giving notice, terminate his suretyship or escape future liability for his principal, unless a stipulation to that effect appears in the contract.<sup>4</sup> But it has been held that a surety may revoke his principal's authority at any time before the obligation is delivered.<sup>5</sup>

*b.* ON DEFAULT OF PRINCIPAL. — When the principal has made such a default as constitutes a breach of his contract, the surety may require its determination and confine his indebtedness to the damages then recoverable.<sup>6</sup>

*c.* EFFECT OF DEATH OF SURETY. — Whether and to what extent the engagement of a surety is enforceable against his estate after his death, and the effect of the contract as being joint or joint and several in form, have been considered elsewhere.<sup>7</sup>

12. **Estoppel of Surety**. — The recitals in a bond estop both principal and surety to deny any fact recited therein.<sup>8</sup> Sureties on a judicial bond are estopped from denying the jurisdiction of the court in which the bond was entered.<sup>9</sup> Signing as surety a bond given by a corporation estops the surety from denying either the existence of the corporation<sup>10</sup> or its authority to make the bond.<sup>11</sup>

13. **Particular Statutory Requirements** — *a.* GENERALLY. — Statutes frequently make provision for the form and sufficiency of statutory and official bonds. The general nature and effect of these provisions have been discussed elsewhere in this work.<sup>12</sup>

1. **Extension of Time of Payment**. — *Aultman, etc., Co. v. Gorham*, 87 Mich. 233; *Hooper v. Pike*, 70 Minn. 84, 68 Am. St. Rep. 512; *Grandy v. Campbell*, 78 Mo. App. 502; *Williamson v. Cline*, 40 W. Va. 194. See also the titles CONSIDERATION, vol. 6, p. 746; GUARANTY, vol. 14, p. 1135.

2. **Renewal of Obligation**. — *Stroud v. Thomas*, 139 Cal. 274, 96 Am. St. Rep. 111; *Hancock First Nat. Bank v. Johnson*, (Mich. 1903) 95 N. W. Rep. 975; *Bell v. Boyd*, 76 Tex. 133, following *Boyd v. Bell*, 69 Tex. 735; *Williamson v. Cline*, 40 W. Va. 194.

3. **Forbearance to Sue**. — *Davis v. National Surety Co.*, 139 Cal. 223; *Wylie v. Dickenson*, 50 Ill. App. 622; *Cooper v. Jackson*, (Ky. 1900) 57 S. W. Rep. 254; *Howard v. Lawrence*, (Ky. 1901) 63 S. W. Rep. 589; *Hannay v. Moody*, (Tex. Civ. App. 1902) 71 S. W. Rep. 325; *Williamson v. Cline*, 40 W. Va. 194 (forbearance for single day). See also the title CONSIDERATION, vol. 6, p. 742 *et seq.*

**Forbearance and Release of Other Sureties as Consideration**. — *Jackson v. Cooper*, (Ky. 1897) 39 S. W. Rep. 39. See also *Burrus v. Davis*, 67 Mo. App. 210.

4. **Surety Cannot Revoke Contract Before Breach Without Stipulation**. — *Hough v. Warr*, 1 C. & P. 151, 11 E. C. L. 350; *Calvert v. Gordon*, 1 M. & R. 497, 7 B. & C. 809, 14 E. C. L. 135; *Gordon v. Calvert*, 2 Sim. 253; *Calvert v. Gordon*, 3 M. & R. 124; *Hunt v. Roberts*, 45 N. Y. 691.

5. **May Revoke Before Bond Delivered**. — *Paxton v. State*, 59 Neb. 460, 80 Am. St. Rep. 689, citing *State v. Dunn*, 11 La. Ann. 550; *Lachman v. Block*, (La. 1894) 15 So. Rep. 649.

6. **Default of Principal**. — *Jeudevine v. Rose*, 36 Mich. 54; *Emery v. Baltz*, 94 N. Y. 408; *Hunt v. Roberts*, 45 N. Y. 691.

7. See *infra*, this title, III. 1. *g. Death of Surety*, and the titles BONDS, vol. 4, p. 638 *et seq.*; DEBTS OF DECEDENTS, vol. 8, pp. 1010, 1013. See also the titles BILLS AND NOTES, vol. 4, p. 1113; GUARANTY, vol. 14, p. 1160.

8. See *infra*, this title, III. 5. *Estoppel of Surety*, and the title RECITALS, vol. 24, p. 67. See also the title INTOXICATING LIQUORS, vol. 17, p. 278.

9. *Harbaugh v. Albertson*, 102 Ind. 69; *Pannill v. Calloway*, 78 Va. 387; *Franklin v. Depriest*, 13 Gratt. (Va.) 257. But see *Dickenson v. State*, 20 Neb. 72.

10. *Father Mathew Young Men's Total Abstinence, etc., Soc. v. Fitzwilliams*, 84 Mo. 406; *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16. See also the title DE FACTO CORPORATIONS, vol. 8, p. 769.

11. *Simons v. Steele*, 36 N. H. 73; *Remsen v. Graves*, 41 N. Y. 471; *Wayne v. Commercial Nat. Bank*, 52 Pa. St. 343. See also *Indianapolis v. Skeen*, 17 Ind. 628; *Wilson v. Monticello*, 85 Ind. 10; *Denison v. Gibson*, 24 Mich. 187.

12. See the title BONDS, vol. 4, p. 618, especially at p. 667 *et seq.* And see the titles FORTHCOMING AND DELIVERY BONDS, vol. 13, p. 1129; EXECUTORS AND ADMINISTRATORS, vol. 11, p. 862; INTOXICATING LIQUORS, vol. 17, p. 273; and other specific titles.

**Provision for Acknowledgment**. — See the title BONDS, vol. 4, p. 669, and the following cases: *Brown v. State*, 76 Ind. 214; *State v. Minton*, 49 Iowa 591; *McLean v. Buchanan*, 8 Jones L. (53 N. Car.) 444; *Buford v. Cox*, 3 Lea (Tenn.) 518; *Amis v. Marks*, 3 Lea (Tenn.) 568; *Miller v. Moore*, 2 Humph. (Tenn.) 421.

**Recording Bonds — Requirement Merely Directory**. — See the title BONDS, vol. 4, p. 669. See also *State v. Houston*, 1 Harr. (Del.) 230;

*b. DEFECTIVE STATUTORY BONDS ENFORCEABLE.* — While a contract of suretyship itself, made pursuant to a statute, may be void for some failure to comply with the statutory terms, the bond made pursuant to such statute nevertheless may be enforced as a common-law bond, as it derives force from its provisions rather than from any statute.<sup>1</sup>

*c. NUMBER AND RESIDENCE OF SURETIES.* — The contract of suretyship

*Bryan v. Glass*, 2 Humph. (Tenn.) 390; *Barnes v. White*, 2 Swan (Tenn.) 442; *Wright v. Leath*, 24 Tex. 24; *Poer v. Brown*, 24 Tex. 34; *Calwell v. Com.*, 17 Gratt. (Va.) 391.

*Provision that Sureties shall Justify.* — See the title BONDS, vol. 4, p. 670.

*Nebraska.* — The Governor may approve bonds of state and district officers, but has no authority to bind the state by their acceptance. *Paxton v. State*, 59 Neb. 460, 80 Am. St. Rep. 689.

*1. Enforced as Common-law Bonds.* — *Kiessig v. Allspaugh*, 99 Cal. 452; *Summerton v. Hanson*, 117 Cal. 252; *Union Sheet Metal Works v. Dodge*, 129 Cal. 390; *People's Lumber Co. v. Gillard*, 136 Cal. 55; *Justices v. Wynn, Dudley (Ga.)*, 22; *Faurote v. State*, 110 Ind. 463; *Hart v. State*, 120 Ind. 83; *Quimby v. Adams*, 11 Me. 332; *Harris v. Hanson*, 11 Me. 243; *Renville County v. Gray*, 61 Minn. 242; *Hoboken v. Evans*, 31 N. J. L. 342. See also the title SHERIFFS AND CONSTABLES, vol. 25, p. 666.

*Unseald Obligation of Suretyship for deputy United States revenue collector enforced.* *Schuster v. Weissman*, 63 Mo. 552.

*Statutory Bonds Enforced as Common-law Bonds* — *United States.* — *Farrar v. U. S.*, 5 Pet. (U. S.) 373; *U. S. v. Bradley*, 10 Pet. (U. S.) 343; *U. S. v. Brown, Gilp.* (U. S.) 155; *Moses v. U. S.*, 166 U. S. 571.

*Alabama.* — *Armstrong v. State, Minor (Ala.)* 160; *Harris v. Bradford*, 4 Ala. 214; *Bagby v. Chandler*, 9 Ala. 770; *Burnett v. Nesmith*, 62 Ala. 261.

*Arkansas.* — *State v. Wood*, 51 Ark. 205.

*California.* — *People v. Breyfogle*, 17 Cal. 504; *Dorsey v. Smith*, 28 Cal. 21.

*Delaware.* — *State v. Layton*, 4 Harr. (Del.) 512.

*District of Columbia.* — *District of Columbia v. Waggaman*, 4 Mackey (D. C.) 328.

*Idaho.* — *People v. Slocum*, 1 Idaho 62.

*Illinois.* — *Barnes v. Brookman*, 107 Ill. 317; *People v. Shannon*, 10 Ill. App. 364; *People v. Pace*, 57 Ill. App. 674.

*Indiana.* — *Graham v. State*, 66 Ind. 386; *State v. McGill*, 15 Ind. App. 289.

*Iowa.* — *Charles v. Haskins*, 11 Iowa 329, 77 Am. Dec. 148; *State v. Henderson*, 40 Iowa 242; *Walters-Cates v. Wilkinson*, 92 Iowa 129.

*Kansas.* — *McCracken v. Todd*, 1 Kan. 148.

*Kentucky.* — *Johnson v. Gwathney*, 2 Bibb (Ky.) 186, 4 Am. Dec. 694; *Justices v. Bartlett*, 5 B. Mon. (Ky.) 195.

*Maine.* — *Potter v. Titcomb*, 7 Me. 319; *Lord v. Lancey*, 21 Me. 468.

*Maryland.* — *Young v. State*, 7 Gill & J. (Md.) 253; *Frownfelter v. State*, 66 Md. 80.

*Massachusetts.* — *Sweetser v. Hay*, 2 Gray (Mass.) 49.

*Michigan.* — *Bay County v. Brock*, 44 Mich.

45. *Mississippi.* — *Tucker v. Hart*, 23 Miss. 548;

*Matthews v. Lee*, 25 Miss. 417; *Summers v. Foote*, 28 Miss. 671.

*Missouri.* — *State v. Thomas*, 17 Mo. 503; *State v. Miserez*, 64 Mo. 596; *Wimpey v. Evans*, 84 Mo. 144; *State v. Horn*, 94 Mo. 162.

*Montana.* — *Jefferson County v. Lineberger*, 3 Mont. 231, 35 Am. Rep. 462.

*Nebraska.* — *Huffman v. Koppelkom*, 8 Neb. 344; *Kopplekom v. Huffman*, 12 Neb. 95; *Thomas v. Hinkley*, 19 Neb. 324; *Valley County v. Robinson*, 32 Neb. 256; *Riggs v. Miller*, 34 Neb. 666; *Stoner v. Keith County*, 48 Neb. 279; *Perkins County v. Miller*, 55 Neb. 141; *Clark v. Douglas*, 58 Neb. 571.

*Nevada.* — *State v. Rhoades*, 6 Nev. 352.

*New Hampshire.* — *Horn v. Whittier*, 6 N. H. 88.

*New Jersey.* — *Smith v. Allen*, 1 N. J. Eq. 43, 21 Am. Dec. 33.

*New York.* — *Warren v. Philips*, 30 Barb. (N. Y.) 646; *Allegany County v. Van Campen*, 3 Wend. (N. Y.) 48; *Skellinger v. Yendes*, 12 Wend. (N. Y.) 306; *Horton v. Parsons*, 37 Hun (N. Y.) 42; *Board of Education v. Fonda*, 77 N. Y. 350; *Sutherland v. Carr*, 85 N. Y. 105; *Titus v. Fairchild*, 49 N. Y. Super. Ct. 211.

*North Carolina.* — *Governor v. Matlock*, 2 Hawks (9 N. Car.) 366; *White v. Miller*, 3 Dev. & B. L. (20 N. Car.) 55; *Governor v. Montfort*, 1 Ired. L. (23 N. Car.) 155; *State v. McAlpin*, 4 Ired. L. (26 N. Car.) 140; *Reid v. Humphreys*, 7 Jones L. (52 N. Car.) 258; *Board of Com'rs v. Sutton*, 120 N. Car. 298.

*Ohio.* — *Barrett v. Reed*, 2 Ohio 409; *State v. Findley*, 10 Ohio 51; *Creswell v. Nesbitt*, 16 Ohio St. 35; *Place v. Taylor*, 22 Ohio St. 317; *Kelly v. State*, 25 Ohio St. 567.

*Oklahoma.* — *Lowe v. Guthrie*, 4 Okla. 287.

*Oregon.* — *Hume v. Kelly*, 28 Oregon 398.

*Pennsylvania.* — *Com. v. Lamb*, 1 W. & S. (Pa.) 261.

*South Carolina.* — *Treasurers v. Bates*, 2 Bailey L. (S. Car.) 362; *State v. Toomer*, 7 Rich. L. (S. Car.) 216; *Stevens v. Treasurers*, 2 McCord L. (S. Car.) 107.

*South Dakota.* — *Custer County v. Albien*, 7 S. Dak. 482.

*Tennessee.* — *Polk v. Plummer*, 2 Humph. (Tenn.) 500, 37 Am. Dec. 566; *Miller v. Moore*, 2 Humph. (Tenn.) 421; *Cannon v. Hollis*, 4 Humph. (Tenn.) 334; *Kincannon v. Carroll*, 9 Yerg. (Tenn.) 11, 30 Am. Dec. 391; *McLean v. State*, 8 Heisk. (Tenn.) 22; *Maddox v. Shacklett*, (Tenn. Ch. 1895) 36 S. W. Rep. 731; *State v. Witherspoon*, 9 Humph. (Tenn.) 394; *Findley v. Tipton*, 4 Hayw. (Tenn.) 216.

*Texas.* — *Smith v. Wingate*, 61 Tex. 54.

*West Virginia.* — *State v. McGuire*, 46 W. Va. 328, 76 Am. St. Rep. 822.

*Wisconsin.* — *Jefferson County v. Jones*, 19 Wis. 51; *Lewis v. Stout*, 22 Wis. 234.

See also the title BONDS, vol. 4, p. 672 *et seq.*, for many cases and illustrations.



should conform substantially to statutory requirements in respect to the number of sureties required on the bond.<sup>1</sup> This condition, however, may be waived by the surety.<sup>2</sup> In *Ohio* sureties on appeal bonds who are sufficient in other respects are not required to be residents of the county where the undertaking is to be given.<sup>3</sup>

*d. APPROVAL OF OFFICIAL BONDS.* — The settled rule, in the absence of statutory provision, is that failure of the proper officers to approve an official bond will not invalidate it nor release the sureties from their liability thereon;<sup>4</sup> the approval of a statutory bond not being, primarily, for the benefit of the principal obligor or the sureties so much as the protection of the obligee.<sup>5</sup>

The fact that a bond has not been approved in accordance with law may be cured by subsequent legislation.<sup>6</sup>

*e. TIME OF GIVING BOND PRESCRIBED.* — The sureties on an official bond given after the time prescribed by statute are liable for the defaults of the officer continuing in office after the giving of such bond,<sup>7</sup> notwithstanding the statute also declares that on failure to file the bond the office shall be declared vacant.<sup>8</sup> Likewise the sureties are held to be liable in jurisdictions

1. *Statutory Requirements as to Number of Sureties.* — *Cutler v. Roberts*, 7 Neb. 4, 29 Am. Rep. 371. See also the title BONDS, vol. 4, p. 668. And see EXECUTORS AND ADMINISTRATORS, vol. 11, p. 875, and other specific titles.

2. *Dore v. Covey*, 13 Cal. 502; *Murdock v. Brooks*, 38 Cal. 596; *Heater v. Pearce*, 59 Neb. 583; *Cutler v. Roberts*, 7 Neb. 4, 29 Am. Rep. 371; *Gray v. School Dist.*, 35 Neb. 438.

3. *Bushong v. Graham*, 2 Ohio Cir. Dec. 464.

4. *Approval Not Essential to Official Bonds — United States.* — *U. S. Bank v. Dandridge*, 12 Wheat. (U. S.) 64. *Compare* Postmaster Gen. v. Norvell, Gilp. (U. S.) 107.

*Arkansas.* — *Taylor v. Auditor*, 2 Ark. 174.

*California.* — *People v. Evans*, 29 Cal. 429; *People v. Huson*, 78 Cal. 154. *Compare* *People v. Kneeland*, 31 Cal. 288.

*Colorado.* — *Irwin v. Crook*, 17 Colo. 16.

*Illinois.* — *Waldo v. Averett*, 2 Ill. 487; *Comstock v. Gage*, 91 Ill. 328.

*Indiana.* — *Clark v. State*, 7 Blackf. (Ind.) 570; *Marshall v. State*, 8 Blackf. (Ind.) 162; *State v. Blair*, 32 Ind. 313; *Mowbray v. State*, 88 Ind. 324.

*Iowa.* — *Moore v. McKinley*, 60 Iowa 367.

*Kentucky.* — *Combs v. Breathitt County*, (Ky. 1896) 38 S. W. Rep. 138.

*Louisiana.* — *Police Jury v. Haw*, 2 La. 47, 20 Am. Dec. 294; *Elam v. Barr*, 14 La. Ann. 682; *School Directors v. Judice*, 39 La. Ann. 896.

*Maryland.* — *Burgess v. Lloyd*, 7 Md. 178. *Compare* *Milburn v. State*, 1 Md. 1; *Bruce v. State*, 11 Gill & J. (Md.) 382; *State v. Jarrett*, 17 Md. 309.

*Massachusetts.* — *Bartlett v. Willis*, 3 Mass. 86.

*Michigan.* — *Evart v. Postal*, 86 Mich. 325. *Compare* *O'Marrow v. Port Huron*, 47 Mich. 585.

*Mississippi.* — *McCrosky v. Riggs*, 9 Smed. & M. (Miss.) 107.

*Missouri.* — *Gathwright v. Callaway County*, 10 Mo. 663.

*Nebraska.* — *Holt County v. Scott*, 53 Neb. 176; *Philadelphia Fire Assoc. v. Ruby*, 60 Neb. 216, reversing 58 Neb. 730.

*New York.* — *Doughty v. Hope*, 3 Den. (N.

Y.) 253; *McCoy v. Curtice*, 9 Wend. (N. Y.) 17, 24 Am. Dec. 113; *Downing v. Rugar*, 21 Wend. (N. Y.) 179, 34 Am. Dec. 223; *Yates v. Russell*, 17 Johns. (N. Y.) 468; *Warren v. Philips*, 30 Barb. (N. Y.) 646.

*North Carolina.* — *State v. McAlpin*, 4 Ired. L. (26 N. Car.) 140; *State v. Perkins*, 10 Ired. L. (32 N. Car.) 333; *Battle v. Baird*, 118 N. Car. 854.

*Ohio.* — *Westerhaven v. Clive*, 5 Ohio 136; *Place v. Taylor*, 22 Ohio St. 317; *Kelly v. State*, 25 Ohio St. 567.

*Oregon.* — *Portland v. Besser*, 10 Oregon 245. *Pennsylvania.* — *Young v. Com.*, 6 Binn. (Pa.) 87; *McBride v. Com.*, 2 Watts (Pa.) 448; *Com. v. Ross*, 5 Pa. Co. Ct. 593; *Muselman v. Com.*, 7 Pa. St. 240.

*South Carolina.* — *Stevens v. Treasurers*, 2 McCord L. (S. Car.) 107.

*Tennessee.* — *Goodrum v. Carroll*, 2 Humph. (Tenn.) 490, 37 Am. Dec. 564.

*Wisconsin.* — *Omro v. Kaime*, 39 Wis. 468. See also the title BONDS, vol. 4, p. 670.

5. *Approval Is for Protection of Obligees.* — *People v. Edwards*, 9 Cal. 286; *Irwin v. Crook*, 17 Colo. 16; *State v. Blair*, 32 Ind. 313; *Mowbray v. State*, 88 Ind. 324.

6. *State v. Pool*, 5 Ired. L. (27 N. Car.) 105.

7. *Sureties Liable on Bond Filed After Statutory Time.* — *McElhanon v. Washington County Ct.*, 54 Ill. 163; *Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182; *Cawley v. People*, 95 Ill. 249; *State v. Porter*, 7 Ind. 204; *Milburn v. State*, 1 Md. 1; *Williams v. School Dist. No. 1*, 21 Pick. (Mass.) 75, 11 Am. Dec. 146; *Dumphy v. People*, 25 Mich. 10; *State v. Lansing*, 46 Neb. 514; *McFarlane v. Howell*, 16 Tex. Civ. App. 246; *Weston v. Sprague*, 54 Vt. 396.

8. *Alabama.* — *Sprowl v. Lawrence*, 33 Ala. 674.

*Georgia.* — *Bassett v. Governor*, 11 Ga. 207.

*Illinois.* — *Ashkum v. Lake*, 12 Ill. App. 25.

*Indiana.* — *Middleton v. State*, 120 Ind. 166.

*Kentucky.* — *Ferguson v. Landram*, 5 Bush (Ky.) 237, 96 Am. Dec. 350.

*Louisiana.* — *Police Jury v. Brookshier*, 31 La. Ann. 736.

*Maryland.* — *Waters v. State*, 1 Gill (Md.) 302.

where the statutes provide that failure to file the bond within the prescribed time creates a vacancy in the office.<sup>1</sup>

**III. RIGHTS AND REMEDIES AS BETWEEN SURETY AND CREDITOR OR THIRD PERSON — 1. Liabilities of Surety — a. AS DEPENDENT ON CONSTRUCTION OF CONTRACT — (1) Rules of Construction.** — The rules governing the construction of the obligation of a surety are not different from those which are applicable in the interpretation of other written agreements; and courts may resort to the same aids, and will invoke the canons of interpretation, which apply to other contracts.<sup>2</sup> The terms used are to have a reasonable interpretation, according to the intent of the parties, as disclosed by the instrument read in the light of surrounding circumstances, and the purposes for which it was made.<sup>3</sup> Where the terms of the undertaking are ambiguous, the courts will look to the recitals, the subject-matter, and the surrounding circumstances, and therefrom determine its scope and object;<sup>4</sup> and when the terms will admit of more senses than one, the promise is to be construed in that sense in which the promisor

*Mississippi.* — *State v. Cooper*, 53 Miss. 615.

*Missouri.* — *Mississippi County v. Jackson*, 51 Mo. 23.

*Nebraska.* — *Holt County v. Scott*, 53 Neb. 176; *Blaco v. State*, 58 Neb. 557; *Paxton v. State*, 59 Neb. 460, 80 Am. St. Rep. 689.

*Nevada.* — *State v. Rhoades*, 6 Nev. 352.

*New Jersey.* — *Hoboken v. Harrison*, 30 N. J. L. 73.

*New York.* — *Olean v. King*, 116 N. Y. 355; *Dutton v. Kelsey*, 2 Wend. (N. Y.) 615.

*Ohio.* — *Westerhaven v. Clive*, 5 Ohio 136.

*Pennsylvania.* — *Com. v. Philadelphia*, 27 Pa. St. 497; *Com. v. Stambaugh*, 164 Pa. St. 437.

*South Carolina.* — *State v. Toomer*, 7 Rich. L. (S. Car.) 216.

*Tennessee.* — *Chandler v. State*, 1 Lea (Tenn.) 296.

*Texas.* — *Morris v. State*, 47 Tex. 583; *Swan v. State*, 48 Tex. 120.

*Virginia.* — *Monteith v. Com.*, 15 Gratt. (Va.) 172.

*Wisconsin.* — *State v. Southwick*, 13 Wis. 365.

*Contra.* — But it has been held that where a statute prescribes that an officer shall hold until his successor is elected and qualified, and requires him to qualify within a specified time, and that on his failure to do so the office shall be declared vacant, such statute is mandatory and not directory, and that delivery of a bond after such time is ineffectual to give the bond validity, as the officer remains in office and discharges the functions by virtue of his first election. *Archer v. State*, 74 Md. 443, 28 Am. St. Rep. 261, *overruling* *McPherson v. Leonard*, 29 Md. 377.

1. *People v. Percells*, 8 Ill. 59; *Kelly v. State*, 25 Ohio St. 567. See also the title **PUBLIC OFFICERS**, vol. 23, p. 362.

2. *Construed as Other Contracts.* — *Vann v. Lunsford*, 91 Ala. 576; *Ramsay v. People*, 97 Ill. App. 283, *affirmed* 197 Ill. 572, 90 Am. St. Rep. 177; *Ewen v. Wilbor*, 99 Ill. App. 132; *Dunlop v. Wilson Sewing Mach. Co.*, 81 Ill. 496; *Bush Wine, etc., Co. v. Wolff*, 48 La. Ann. 918; *Beers v. Wolf*, 116 Mo. 184; *N. K. Fairbank Co. v. American Bonding, etc., Co.*, 97 Mo. App. 205; *Gamble v. Cuneo*, 21 N. Y. App. Div. 413, *affirmed* 162 N. Y. 634; *Walsh v. Miller*, 51

Ohio St. 462; *Pelzer v. Steadman*, 22 S. Car. 288.

A **Railroad Organisation Bond** was held to include condemnation proceedings and negotiations. *St. Paul Title, etc., Co. v. Sabin*, 112 Wis. 105.

3. **Reasonable Interpretation.** — *McDonald v. Harris*, 75 Ill. App. 171; *Weir Flow Co. v. Walmsley*, 110 Ind. 242. And see generally the title **INTERPRETATION AND CONSTRUCTION**, vol. 17, p. 18.

**Sureties on Contractors' Bonds — United States.** — *U. S. v. Rundle*, (C. C. A.) 107 Fed. Rep. 229; *Citizens' Trust, etc., Co. v. Zane*, 113 Fed. Rep. 596, *affirmed* *Zane v. Citizens' Trust, etc., Co.*, (C. C. A.) 117 Fed. Rep. 814.

*Alabama.* — *Fidelity, etc., Co. v. Robertson*, 136 Ala. 379; *American Surety Co. v. U. S.*, 127 Ala. 349.

*California.* — *Ernest v. Cummings*, 55 Cal. 179.

*Illinois.* — *Sterling v. Wolf*, 163 Ill. 467, *affirming* 61 Ill. App. 515; *Finnery v. Condon*, 86 Ill. 78.

*Indiana.* — *Dunlap v. Eden*, 15 Ind. App. 575; *Sullivan v. Cluggage*, 21 Ind. App. 667; *Brown v. Markland*, 22 Ind. App. 652; *Greenfield Lumber, etc., Co. v. Parker*, 159 Ind. 573.

*Iowa.* — *Wells v. Kavanagh*, 70 Iowa 519; *Tuttle v. Independent School Dist.*, 62 Iowa 422.

*Michigan.* — *People v. Sheehan*, 118 Mich. 539.

*Missouri.* — *Leavel v. Porter*, 52 Mo. App. 632.

*Nebraska.* — *Comstock v. Cameron*, 41 Neb. 814; *King v. Murphy*, 49 Neb. 670.

*New Jersey.* — *Welch v. Hubachmitt Bldg. etc., Co.*, 61 N. J. L. 57.

*New York.* — *New York v. Crawford*, 111 N. Y. 638; *Buffalo Cement Co. v. McNaughton*, 90 Hun (N. Y.) 74, *affirmed* 156 N. Y. 702; *Wilson v. Whitmore*, 92 Hun (N. Y.) 469, *affirmed* 157 N. Y. 693.

*Oregon.* — *Hand Mfg. Co. v. Marks*, 36 Oregon 523.

*Washington.* — *Griffith v. Rundle*, 23 Wash. 453.

4. **When Terms Are Ambiguous.** — *Bonney v. Robertson*, 6 Colo. App. 485. See also the title **INTERPRETATION AND CONSTRUCTION**, vol. 17, p. 21 *et seq.*

believed the other party to have accepted it.<sup>1</sup> Where the undertaking is general, it is restrained, and its obligatory force limited, within the recitals.<sup>2</sup> When reference is made by the undertaking of the surety to a contract between the principal and obligee, they are to be construed together, but the surety is not liable for undertakings in the contract not referred to in the bond.<sup>3</sup> The rules and regulations of a corporation existing at the time of the execution of a bond of an officer do not become terms and conditions thereof, unless such an intention be expressed on the face of the bond.<sup>4</sup>

(2) *Rules of Application.* — The foregoing are rules of construction and not of application. When the meaning of the contract has been ascertained, the obligation of the surety is *strictissimi juris*; he has the right to stand on its precise terms, and his liability cannot be extended by construction or implication.<sup>5</sup>

1. *Terms Will Admit of More Senses than One.* — *Gamble v. Cuneo*, 21 N. Y. App. Div. 413, affirmed 162 N. Y. 634. See *Burton v. Blin*, 23 Vt. 151.

2. *General Undertaking Restrained by Recitals.* — *Pearshall v. Summersett*, 4 Taunt. 593; *Jones v. McQueety*, 4 Ohio Dec. 417. See also *Napier v. Bruce*, 8 Cl. & F. 470.

3. *When Construed with Contract Between Principal and Obligor* — *United States*. — U. S. v. *Tillotson*, 1 Paine (U. S.) 305.

*California.* — *Humboldt Sav., etc., Soc. v. Wennerhold*, 81 Cal. 528.

*Illinois.* — *Bartlett v. Wheeler*, 195 Ill. 445.

*Indiana.* — *Dill v. Lawrence*, 109 Ind. 565; *Dunlap v. Eden*, 15 Ind. App. 575; *American Surety Co. v. Lauber*, 22 Ind. App. 331.

*Iowa.* — *Noyes v. Granger*, 51 Iowa 227.

*Louisiana.* — *Bush Wine, etc., Co. v. Wolff*, 48 La. Ann. 918.

*Missouri.* — *Leavel v. Porter*, 52 Mo. App. 632.

*Montana.* — *Cole Mfg. Co. v. Morton*, 24 Mont. 58.

*New York.* — *Wilson v. Whitmore*, 92 Hun (N. Y.) 471, affirmed 157 N. Y. 693.

*Ohio.* — *Higgins v. Drucker*, 12 Ohio Cir. Dec. 220, 22 Ohio Cir. Ct. 112.

*Wisconsin.* — *W. W. Kimball Co. v. Baker*, 62 Wis. 526.

*Terms of Employment of Principal May Be Proved by Parol* to show extent of default. *Southern Cotton Oil Co. v. Bass*, 113 Ala. 603.

4. *Richmond, etc., R. Co. v. Kasey*, 30 Gratt. (Va.) 218.

5. *Rules of Application* — *United States*. — *McMicken v. Webb*, 6 How. (U. S.) 292; *Mutual L. Ins. Co. v. Wilcox*, 8 Biss. (U. S.) 197; *U. S. v. Morgan*, 35 Fed. Rep. 489.

*Alabama.* — *Vann v. Lunsford*, 91 Ala. 576; *Elliott v. Boaz*, 13 Ala. 535.

*California.* — *Humboldt Sav., etc., Soc. v. Wennerhold*, 81 Cal. 528; *Gillespie v. Lake*, 85 Cal. 402.

*Colorado.* — *Rockford Ins. Co. v. Rogers*, 15 Colo. App. 23.

*Connecticut.* — *Davis v. Kingsley*, 13 Conn. 285.

*Illinois.* — *Burlington Ins. Co. v. Johnson*, 120 Ill. 622; *Welke v. Pabst Brewing Co.*, 74 Ill. App. 152; *Pfirshing v. Peterson*, 98 Ill. App. 74; *Ewen v. Wilbor*, 99 Ill. App. 132. See also *Masury v. Westwater*, 94 Ill. App. 30.

*Indiana.* — *Wilson v. Monticello*, 85 Ind. 13; *Irwin v. Kilburn*, 104 Ind. 113; *Weir Plow*

*Co. v. Walmsley*, 110 Ind. 242; *Greenfield Lumber, etc., Co. v. Parker*, 159 Ind. 571; *Dunlap v. Eden*, 15 Ind. App. 575.

*Iowa.* — *Crapo v. Brown*, 40 Iowa 487.

*Kansas.* — *Merrimack River Sav. Bank v. Curry*, 4 Kan. App. 125.

*Kentucky.* — *Charles Brown Grocery Co. v. Wasson*, (Ky. 1902) 68 S. W. Rep. 404; *U. S. Fidelity, etc., Co. v. Merkley*, (Ky. 1901) 65 S. W. Rep. 614; *Thompson v. Fruit Growers' Co.*, (Ky. 1899) 50 S. W. Rep. 1094.

*Louisiana.* — *Stewart v. Lewis*, 42 La. Ann. 37.

*Massachusetts.* — *Agawam Bank v. Sears*, 4 Gray (Mass.) 95.

*Michigan.* — *Gunn v. Geary*, 44 Mich. 615; *Union Cent. L. Ins. Co. v. Smith*, 105 Mich. 353; *Grasser, etc., Brewing Co. v. Rogers*, 112 Mich. 112, 67 Am. St. Rep. 389.

*Missouri.* — *Gray v. Davis*, 89 Mo. App. 450; *Sullivan County v. Hatfield*, 108 Mo. 67.

*Nebraska.* — *Larabee v. Klosterman*, 33 Neb. 159; *Gray v. School Dist.*, 35 Neb. 438; *Hopewell v. McGrew*, 50 Neb. 789; *Griswold v. Hazels*, 62 Neb. 891; *Korty v. McGill*, 44 Neb. 516; *Grimison v. Russell*, 20 Neb. 337.

*New York.* — *Ludlow v. Simond*, 2 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 291; *Union Dime Sav. Inst. v. Neppert*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 797, affirmed 123 N. Y. 627; *Gamble v. Cuneo*, 21 N. Y. App. Div. 413, affirmed 162 N. Y. 634; *De Camp v. Bulard*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 441, affirmed 159 N. Y. 450; *Keene v. Newark Watch Case Material Co.*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 8; *John Hancock Mut. L. Ins. Co. v. Lowenberg*, 120 N. Y. 44; *Sachs v. American Surety Co.*, 72 N. Y. App. Div. 60. But see *Scott v. Duncombe*, 49 Barb. (N. Y.) 73.

*North Dakota.* — *Northern Light Lodge No. 1 v. Kennedy*, 7 N. Dak. 150.

*Ohio.* — *Walsh v. Miller*, 51 Ohio St. 462; *American Surety Co. v. Boyle*, 65 Ohio St. 486.

*Pennsylvania.* — *Bensinger v. Wren*, 100 Pa. St. 500; *Cannell v. Crawford County*, 59 Pa. St. 196. See *Roth v. Miller*, 15 S. & R. (Pa.) 100.

*Texas.* — *Essex v. Murray*, (Tex. Civ. App. 1902) 68 S. W. Rep. 736.

*Virginia.* — *Kirschbaum v. Blair*, 98 Va. 35.

*Wisconsin.* — *Wussow v. Hase*, 108 Wis. 382; *Lawton v. Waite*, 103 Wis. 244; *Charley v. Potthoff*, (Wis. 1903) 95 N. W. Rep. 124.

(3) *Contracts of Surety Companies.* — The rules of construction and application of suretyship contracts above set out do not refer to contracts where the surety receives compensation and the suretyship is in the line of its regular business.<sup>1</sup> Such contracts resemble insurance contracts, and are construed upon the same general principles as insurance policies, that is, most strongly against the surety, and most favorably to their general intent and essential purpose.<sup>2</sup> This rule cannot be availed of to refine away terms of a contract expressed with sufficient clearness to convey the plain meaning of the parties, and embodying requirements compliance with which is made the condition to liability thereon.<sup>3</sup> If the bond is fairly and reasonably susceptible of two constructions, one unfavorable and the other favorable to the surety, the former, if consistent with the objects for which the bond was given, must be adopted.<sup>4</sup>

b. *DURATION OF LIABILITY.*<sup>5</sup> — A surety on a bond is liable for the defaults of the principal only from the time the bond is given unless it is retrospective in terms.<sup>6</sup> The liability continues during the time mentioned in the bond,<sup>7</sup> or during the term of the agency for the faithful performance of which the bond is given.<sup>8</sup> When the bond recites that the principal will discharge the duties of the office "during the time he holds the said appointment, and until he is relieved therefrom," the liability of the surety does not cease before the revocation of the appointment.<sup>9</sup>

c. *EXTENT AND NATURE OF LIABILITY* — (1) *Joint and Several.* — The Principles of Law and Statutory Provisions governing the liability of obligors on joint, and joint and several, obligations, apply to such as are executed by sureties.<sup>10</sup>

Where the Surety Signed "Surety, 90 Days from Date," the liability of surety was limited to that term. *Ulmer v. Reed*, 11 Me. 293.

*Surety by Mortgage — No Personal Liability.* — When a mortgage given by a surety to secure another's debt expressly provides that there shall be no "personal cost or liability," the surety is not at all personally liable. *Van Orden v. Durham*, 35 Cal. 136. See also *New Orleans Canal, etc., Co. v. Hagan*, 1 La. Ann. 66.

When a Note Is Signed to Enable a Principal to Discount It, and made payable to a bank or order, but not discounted at the bank, the surety is liable on the note to a person who advances money on it, and subsequent transferees. *Ward v. Northern Bank*, 14 B. Mon. (Ky.) 283. But see *Herring v. Winans, Smed. & M. Ch.* (Miss.) 466.

1. *Contracts of Surety Companies.* — *Walker v. Holtzclaw*, 57 S. Car. 459. See also this title, *supra*, II. 4. f. (2) *Surety Companies, and infra*, VI. 9. *Discharge of Surety on Fidelity Bond.*

2. *Construed as Insurance Policies.* — *Tarboro Bank v. Fidelity, etc., Co.*, 126 N. Car. 320; *Tarboro Bank v. Fidelity, etc., Co.*, 128 N. Car. 366, 83 Am. St. Rep. 682. See the title FIDELITY AND GUARANTY INSURANCE, vol. 13, p. 3.

3. *Guarantee Co. of North America v. Mechanics Sav. Bank, etc., Co.*, 183 U. S. 402; *Granite Bldg. Co. v. Saville*, (Va. 1903) 43 S. E. Rep. 351.

4. *Susceptible of Two Constructions.* — *American Surety Co. v. Pauly*, 170 U. S. 133.

5 See the titles OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 21, p. 847; EXECUTORS AND ADMINISTRATORS, vol. 11, p. 882. And see *infra*, this section, (5) (a) *Executors, Administrators, Guardians, and Receivers*; VIII. *Sureties on Official Bonds*,

6. *Duration of Liability.* — *Bartlett v. Wheeler*, 195 Ill. 445. See also *Hecox v. Citizens' Ins. Co.*, 9 Biss. (U. S.) 421; *Prudential Ins. Co. v. Berger*, (C. Pl. Gen. T.) 16 N. Y. Supp. 515; *State v. Banks*, 76 Md. 143. See also *supra*, this title, II. 7. b. *Not Retroactive.*

7. *During Time Mentioned in Bond.* — *Coleman v. People*, 78 Ill. App. 215.

8. *During Term of Agency.* — *Rockford Ins. Co. v. Rogers*, 15 Colo. App. 27.

*Bond of Bank Given to Secure State Deposits.* — *Barnes v. Cushing*, 168 N. Y. 542.

9. *Not Before Revocation of Appointment.* — *Mobile, etc., R. Co. v. Brewer*, 76 Ala. 141.

10. *How Principles of Law and Statutory Provisions Govern.* — *Jones v. Lewis*, 87 Ga. 446; *Kirkpatrick v. Gray*, 43 Kan. 434; *Metropolitan Bank v. Muller*, 50 La. Ann. 1278, 69 Am. St. Rep. 475; *New Orleans v. Waggaman*, 31 La. Ann. 299; *Brighton Bank v. Smith*, 12 Allen (Mass.) 250, 90 Am. Dec. 144; *Davis v. Hoopes*, 33 Miss. 173; *Wyckoff v. Vliet*, (N. J. 1887) 9 Atl. Rep. 680; *Benedict v. Rea*, 35 Hun (N. Y.) 34; *Western Twine Co. v. Wright*, 11 S. Dak. 521.

*Signing as "Surety."* — Where two persons sign an obligation for the payment of money, and it is expressed in it that one signs as surety, and he annexes to his signature the word "surety," still both are bound jointly. *Riley v. Jarvis*, 43 W. Va. 43.

*Bond for Customs Duties.* — Obligors on a joint and several bond given for the duties at the customhouse, as between them and the United States, are deemed principal debtors. *U. S. v. Cushman*, 2 Sumn. (U. S.) 426.

*Bond for Funds Loaned by Order of Court.* — On bond being given by commissioners appointed by the court to loan funds collected for the court, the bond given by the commissioners and their sureties being joint, all the obligors

While a court of equity, in the case of principals, will ordinarily presume that a contract, in form joint, was intended to be joint and several, in the case of a surety nothing will be presumed beyond what the positive facts substantiate, and if the contract is in form joint, it will not be presumed to have been joint and several unless upon distinct and satisfactory proofs to that effect.<sup>1</sup>

(2) *Penalty of Bond.* — A surety is not liable beyond the penalty of his bond.<sup>2</sup> When a surety completes a contract at a loss greater than the penalty on his bond to a creditor who has advanced money to the contractor, he is nevertheless liable on such bond.<sup>3</sup>

*Penalty or Liquidated Damages.* — The law ordinarily regards a general sum stated in a bond as a penalty, and will allow only a recovery of the damages actually sustained. *Prima facie*, the sum stated is a mere penalty.<sup>4</sup>

(3) *Interest — From Time of Demand.* — It is generally held that a surety is not liable for interest from the date of the actual default by the principal, but from the time when demand for payment has been made on the surety,<sup>5</sup> and the interest is computed to the date of the execution.<sup>6</sup>

*Beyond Penal Sum of Bond.* — The liability for interest does not ordinarily extend beyond the penal sum of the bond,<sup>7</sup> unless the surety has in some way resisted or obstructed the recovery of the claim against him.<sup>8</sup> Interest cannot be recovered on the penalty of the bond when a statute limits recovery to judgment for the penalty with costs of suit.<sup>9</sup>

are liable as principals to the plaintiff, but as between themselves the commissioner who received and used part of the fund is liable primarily, the co-commissioner secondly, and the sureties thirdly. *Brooks v. Miller*, 29 W. Va. 499.

*Judgment on a Joint Bond.* — When the liability is a joint one, and the parties have been jointly sued, and have jointly defended, a judgment against one of them which takes no notice whatever of the other is erroneous. *Smith v. State*, 12 Neb. 309.

1. *Rules in Equity.* — *U. S. v. Cushman*, 2 Sumn. (U. S.) 435, citing *Wiser v. Blachly*, 1 Johns. Ch. (N. Y.) 607; *Berg v. Radcliff*, 6 Johns. Ch. (N. Y.) 302; *Rawstone v. Parr*, 3 Russ. 424; *Weaver v. Shryock*, 6 S. & R. (Pa.) 262; *Thomas v. Frazer*, 3 Ves. Jr. 399; *Hunt v. Rousmaniere*, 8 Wheat. (U. S.) 211; *Hunt v. Rhodes*, 1 Pet. (U. S.) 16; *Miller v. Stewart*, 9 Wheat. (U. S.) 680; *Sumner v. Powell*, 2 Meriv. 36; *Devaynes v. Noble*, 1 Meriv. 564.

2. *Not Liable Beyond Penalty of Bond.* — *Seamans v. White*, 8 Ala. 656; *Stewart v. Levis*, 42 La. Ann. 37; *Cole Mfg. Co. v. Morton*, 24 Mont. 58; *Bulowa v. Orgo*, 57 N. J. Eq. 428; *Clark v. Bush*, 3 Cow. (N. Y.) 151; *Rayner v. Clark*, 7 Barb. (N. Y.) 581; *American Surety Co. v. U. S.*, (C. C. A.) 123 Fed. Rep. 287. See *Lombard v. Mayberry*, 24 Neb. 674, 8 Am. St. Rep. 234; *Higgins v. Drucker*, 12 Ohio Cir. Dec. 220; *Prudential Ins. Co. v. Berger*, (C. Pl. Gen. T.) 16 N. Y. Supp. 515.

*Several Sureties on a Several Bond.* — Ten sureties having bound themselves each in the sum of two thousand dollars, the obligee could recover judgments against each to the extent of his several liability, though the total default was less than twenty thousand dollars. *Brighton Bank v. Smith*, 12 Allen (Mass.) 243, 90 Am. Dec. 144.

*As to a Bond under a Statute Creating a Double Liability*, see *U. S. v. Rundle*, (C. C. A.) 100 Fed. Rep. 400.

3. *Surety Completes Contract at a Greater Loss than Penalty.* — *Folz v. Tradesmen's Trust, etc., Co.*, 201 Pa. St. 583.

4. *Sum Stated Regarded as a Penalty.* — *Dill v. Lawrence*, 109 Ind. 565; *Shute v. Taylor*, 5 Met. (Mass.) 61; *Wallis v. Carpenter*, 13 Allen (Mass.) 19; *Cheddick v. Marsh*, 21 N. J. L. 463; *Spear v. Smith*, 1 Den. (N. Y.) 464; *Baird v. Tolliver*, 6 Humph. (Tenn.) 186, 44 Am. Dec. 298.

5. *Interest from Time of Demand.* — *Brighton Bank v. Smith*, 12 Allen (Mass.) 243, 90 Am. Dec. 144; *Degnon-McLean Constr. Co. v. City Trust Safe Deposit, etc., Co.*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 530; *Pennsylvania Ins. Co. v. Swain*, 7 Pa. Dist. 406, affirmed 189 Pa. St. 626; *Holmes v. Frost*, 125 Pa. St. 331; *Folz v. Tradesmen's Trust, etc., Co.*, 201 Pa. St. 583; *U. S. v. Quinn*, (C. C. A.) 12 Fed. Rep. 65.

When by the terms of a money obligation the surety only bound himself for the payment of the capital and not the interest, he is only bound to pay interest from the day on which he was put in default. *Dorsett v. Lambeth*, 6 La. Ann. 51.

6. *Computed to Date of Execution.* — *McKim v. Hibbard*, 142 Mass. 422.

7. *Not Extend Beyond Penal Sum.* — *Fairlie v. Lawson*, 5 Cow. (N. Y.) 424. See *Clark v. Wilkinson*, 59 Wis. 543; *Westbrook v. Moore*, 59 Ga. 204. See also the title *INTEREST*, vol. 16, p. 1009.

8. *Unless Recovery Obstructed.* — *McMullen v. Winfield Bldg., etc., Assoc.*, 64 Kan. 302, 91 Am. St. Rep. 236; *Leighton v. Brown*, 98 Mass. 515; *Brighton Bank v. Smith*, 12 Allen (Mass.) 243, 90 Am. Dec. 144; *Thomas Laughlin Co. v. American Surety Co.*, (C. C. A.) 114 Fed. Rep. 627. See *American Surety Co. v. Lawrenceville Cement Co.*, 110 Fed. Rep. 717.

*On an Intervener's Bond for Costs.* — *Grand Lodge, etc., v. Cleghorn*, 20 Tex. Civ. App. 136.

9. *Statute Limits Recovery.* — *Randle v. Barn-*  
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**On Partial Payments Being Made by Sureties** no interest will be allowed during the interval between the payment and the suing out of the writ, but interest will be allowed to the creditor on the balance from the commencement of the suit.<sup>1</sup>

(4) *Costs*. — A general or indefinite suretyship extends to all the accessories of the principal obligation, and even to costs of suit.<sup>2</sup> A surety has been held liable for costs of an action against the principal on account-render, on a bond given to secure a balance that might be found due from the principal, though the surety was not a party to that action.<sup>3</sup>

(5) *Attorney's Fees*. — When a note provides for the payment of attorney's fees, the surety is liable for such fees incurred in a suit on the note.<sup>4</sup>

(6) *Usury*. — A surety on a note is a borrower within the meaning of the usury laws.<sup>5</sup> Usury will not avoid a contract as to a surety beyond the extent to which it is vitiated as to the principal, and when the effect of usury is not to vitiate the entire contract but only to the extent of the usury, the surety is liable accordingly.<sup>6</sup> A surety is bound although at the time a note is executed the principal secretly agrees with the creditor to pay, and afterwards does pay, usurious interest, which is indorsed generally on the note as payment,<sup>7</sup> unless the payment or agreement for the payment of usury increased the risk of the surety.<sup>8</sup> The surety may insist that credit shall be given on the bond for usury exacted of the principal.<sup>9</sup>

*d. AS DEPENDENT ON LIABILITY OF PRINCIPAL*. — In general, the liability of the surety follows that of the principal, and if the obligation is valid against the principal, it is valid against the surety.<sup>10</sup> A surety cannot be held liable on a note which is void as to the principal,<sup>11</sup> nor under a judgment void

ard, 99 Fed. Rep. 348, *affirmed* (C. C. A.) 110 Fed. Rep. 906.

1. **On Partial Payments Made by Surety**. — McGill v. U. S. Bank, 12 Wheat. (U. S.) 512.

2. **Surety Liable for Costs of Suit**. — Scully v. Hawkins, 14 La. Ann. 179. See also La Fayette Mut. Bldg. Assoc. v. Kleinhoffer, 40 Mo. App. 388.

*When the Penal Sum Named in the Bond is exceeded by the addition of costs*. Held v. New York, 83 N. Y. App. Div. 509.

Though the liability of a surety on a bond to procure an arrest is limited to the penal sum of the bond, and the surety has the benefit of the payment of costs to the extent of such sum. Sutorius v. Dunstan, (N. Y. Super Ct. Gen. T.) 20 Civ. Pro. (N. Y.) 241. See also Furber v. McCarthy, (Supm. Ct. Gen. T.) 20 Civ. Pro. (N. Y.) 229.

3. **When Not a Party to the Action**. — Holmes v. Frost, 125 Pa. St. 331.

Held not liable for costs where notice of the action was not given nor its defense tendered to the surety. Brinker v. Meyer, 81 Wis. 33.

4. **Attorney's Fees**. — Shoup v. Snepp, 22 Ind. App. 30.

5. **Usury**. — Livingston v. Harris, 11 Wend. (N. Y.) 329. See also Crawford v. McAdams, 63 N. Car. 67. And see *infra*, this title, VI. 4. b. (3) *Payment of Usury*, and the title *USURY*.

6. **Usury Vitiates to Extent Vitiates as to Principal**. — Selser v. Brock, 3 Ohio St. 302; Columbus First Nat. Bank v. Garlinghouse, 22 Ohio St. 492, 10 Am. Rep. 751. See also Samuel v. Withers, 16 Mo. 532; Mitchell v. Cotton, 3 Fla. 136; Pugh v. Cameron, 11 W. Va. 523; Cante v. Blair, 2 Rich. Eq. (S. Car.) 46; Richmond v. Standclift, 14 Vt. 258. See Gillon v. Kentucky Nat. Bank, (Ky. 1888) 8 S. W. Rep. 193, that the usury cannot affect the

surety when the claim unpaid amounts to more than the note for which the surety is bound.

*Surety May Set Up Defense of Usury* although the principal refuse to join in such defense. Morse v. Hovey, 9 Paige (N. Y.) 198.

7. **Principal Secretly Agrees to Pay Usury**. — Fisher v. Denver Nat. Bank, 22 Colo. 373; Samuel v. Withers, 16 Mo. 532.

**Waiver of Homestead and Tainted with Usury**. — In Georgia it is held that where a note containing a waiver of homestead is secretly tainted with usury of which the surety has no knowledge, the surety is not bound, because the usury makes the waiver void and thus renders the surety's risk greater than it would otherwise have been. Lewis v. Brown, 89 Ga. 115; Harrington v. Finkley, 89 Ga. 385; Howard v. Johnson, 91 Ga. 319; Vandiver v. Wright, 94 Ga. 698; Denton v. Butler, 99 Ga. 264; Allen v. Wilkerson, 99 Ga. 139; but this rule is not applicable when the creditor charging the usury is a national bank. Dalton First Nat. Bank v. McEntire, 112 Ga. 232; and the defense cannot be evaded by an arrangement purging the note of usury, the surety not assenting thereto. Howard v. Johnson, 91 Ga. 319.

8. **Mount v. Tappey**, 7 Bush (Ky.) 617.

9. **Credit for Usury Exacted**. — Crutcher v. Trabue, 5 Dana (Ky.) 80.

10. **Liability of Surety Follows That of Principal**. — Chicago, etc., R. Co. v. Bartlett, 120 Ill. 603; Hardesty v. Cox, 53 Kan. 618; Mouton v. Beauchamp, 10 La. Ann. 666; Carhart v. Ryder, 11 Daly (N. Y.) 101; Delo v. Banks, 101 Pa. St. 458; Kendrick v. Moss, 104 Tenn. 376; Allen v. De Nyse, 60 N. Y. App. Div. 71. See Cummings v. Tell City Brewing Co., 26 Ind. App. 541; Warren v. Sennett, 4 Pa. St. 114.

11. **Note Void as to Principal**. — Gill v. Morris, 11 Heisk. (Tenn.) 614, 27 Am. Rep. 744; State

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as to his principal.<sup>1</sup> He cannot be subjected to more onerous conditions than the principal.<sup>2</sup> A surety may avail himself of all the defenses to which his principal is entitled,<sup>3</sup> as in case of setting up a breach of warranty in the sale in an action on a note;<sup>4</sup> but when the defense rests on an equity against the contract, the surety follows the fate of the principal, and if the contract is voidable, the principal has the election.<sup>5</sup> A surety cannot be sued and his property attached before the period for payment stipulated by his contract, notwithstanding the debt has matured as against the principal by actual insolvency, or by a cession of property, which, under the code, would mature the debt.<sup>6</sup> He cannot defend on the ground that the wrongful act of the principal has rendered a performance by him impossible.<sup>7</sup>

**c. EFFECT OF JUDGMENT AGAINST PRINCIPAL.** — It is generally held that a judgment against a principal is not conclusive but only *prima facie* evidence against his surety, to show breach of contract and liability,<sup>8</sup> unless the condition of the bond makes it conclusive.<sup>9</sup> A former judgment against the principal debtor, still remaining unsatisfied, cannot be pleaded in bar of a subsequent action on the same note against the surety.<sup>10</sup> Judgment against the principal does not estop the obligee from setting up, in an action against the

Bank *v.* Robinson, 13 Ark. 224. See also Hazard *v.* Irwin, 18 Pick. (Mass.) 95, as to a voidable note the principal has rescinded.

1. **Judgment Void as to Principal.** — McCloskey *v.* Wingfield, 29 La. Ann. 141.

2. **Not Subject to More Onerous Conditions than the Principal.** — Pecquet *v.* Pecquet, 17 La. Ann. 204; Stewart *v.* Lewis, 42 La. Ann. 37; U. S. *v.* Allsbury, 4 Wall. (U. S.) 186.

3. **May Set Up Same Defenses as Principal.** — Ohio Thresher, etc., Co. *v.* Hensel, 9 Ind. App. 328; Marquette Opera House Bldg. Co. *v.* Wilson, 109 Mich. 223.

4. **Breach of Warranty.** — Crist *v.* Jacoby, 10 Ind. App. 688; Scroggin *v.* Holland, 16 Mo. 419. But see Grier *v.* Wallace, 7 S. Car. 182.

5. **Equitable Defenses.** — Evans *v.* Keeland, 9 Ala. 42; Lyon *v.* Leavitt, 3 Ala. 430; Brown *v.* Wright, 7 T. B. Mon. (Ky.) 396, 18 Am. Dec. 190; Walker *v.* Gilbert, 7 Smed. & M. (Miss.) 456; Commissioner in Equity *v.* Robinson, 1 Bailey L. (S. Car.) 151; Ross *v.* Woodville, 4 Munf. (Va.) 324.

**On Death of the Principal,** a surety on a note for the purchase of land sold by an administrator cannot set up invalidity of sale. Lathrop *v.* Masterson, 44 Tex. 527.

6. **Surety Not Sued Before Period for Payment.** — State Nat. Bank *v.* New Orleans Brewing Assoc., 49 La. Ann. 934. See also Corbett *v.* Woodward, 5 Sawy. (U. S.) 413.

7. **Wrongful Act Rendering Performance Impossible.** — Carney *v.* Walden, 16 B. Mon. (Ky.) 388. See also Leavel *v.* Porter, 52 Mo. App. 632.

8. **Judgment Not Conclusive Against Surety.** — U. S. *v.* Rundle, (C. C. A.) 107 Fed. Rep. 229; Fidelity, etc., Co. *v.* Robertson, 136 Ala. 379; McConnell *v.* Poor, 113 Iowa 133; Park *v.* Ensign, 66 Kan. 50; Macready *v.* Schenck, 41 La. Ann. 456; La Fayette Mut. Bldg. Assoc. *v.* Kleinhoffer, 40 Mo. App. 403; Lee *v.* Clark, 1 Hill (N. Y.) 56; Aeschlimann *v.* Presbyterian Hospital, 29 N. Y. App. Div. 630, *affirmed* 165 N. Y. 296, 80 Am. St. Rep. 723; Strong *v.* Giltinan, 7 Phila. (Pa.) 176; Munford *v.* Overseers of Poor, 2 Rand. (Va.) 313; Ihrig *v.*

Scott, 13 Wash. 559; Grafton *v.* Hinkley, 111 Wis. 46.

**Judgment by Confession** has but the value of a private agreement between the principal and his creditor. Allison *v.* Thomas, 29 La. Ann. 732. See also Atkins *v.* Baily, 9 Yerg. (Tenn.) 111; Carroll *v.* Hamilton, 30 La. Ann. 520.

**An Award in an Arbitration** between the principal and obligee, finding a balance due to their accounts, cannot be read either as *prima facie* or as conclusive evidence in an action against the sureties when the award was founded on the acknowledgments of the principal, and a view of the partnership books, but appeared not to be confined altogether to the assumed debts, and only made upon part of the accounts. Simon-ton *v.* Boucher, 2 Wash. (U. S.) 473. But see Binse *v.* Wood, 37 N. Y. 535, as to the award of an arbitration provided for in the contract.

**When a Statute Makes It the Duty of an Officer** to obey the order of the court to pay a specific sum into the county treasury, the surety on his bond is concluded, without having been a party thereto. State *v.* Thornton, 8 Mo. App. 27.

**Liquor Dealer's Bond.** — Under a local statute, conviction of the principal constitutes a breach of the bond. Welch *v.* McKane, 55 Conn. 25. Under another statute, the surety may contest the breach of the obligation. Margoley *v.* Com., 3 Met. (Ky.) 405.

**Official Bond.** — Judgment on a sci. fa. against a sheriff is conclusive as to his sureties. M'Broom *v.* Governor, 4 Port. (Ala.) 90. See also Aeschlimann *v.* Presbyterian Hospital, 29 N. Y. App. Div. 630, *affirmed* 165 N. Y. 296, 80 Am. St. Rep. 723; Martin *v.* Buffaloe, 128 N. Car. 307, 83 Am. St. Rep. 679.

**When the Surety Is a Party to the Suit,** he is concluded by the judgment. Eastin *v.* School Directors, 40 La. Ann. 705.

9. **Condition of Bond Making Judgment Conclusive.** — McConnell *v.* Poor, 113 Iowa 133; Aeschlimann *v.* Presbyterian Hospital, 29 N. Y. App. Div. 630, *affirmed* 165 N. Y. 296, 80 Am. St. Rep. 723; Binse *v.* Wood, 37 N. Y. 526.

10. **Cannot Plead Former Judgment Against Principal.** — Noble *v.* Cothran, 18 S. Car. 442.

surety, defalcations of the principal discovered subsequently.<sup>1</sup>

*f. EFFECT OF ADMISSIONS BY PRINCIPAL.* — Admissions and declarations made by a principal in the course of the business, for the performance of which the surety is bound, are binding on the surety.<sup>2</sup> The adjustment of an account by the principal with the obligee is binding on the surety unless on proof of error, fraud, or mistake.<sup>3</sup>

*g. DEATH OF SURETY* — *Liability on Joint and Several Obligations.* — At law, if a surety sign a joint obligation, upon his death the debt is extinguished against his representative and the surviving obligor is alone chargeable,<sup>4</sup> and, in the absence of fraud, accident, or mistake, equity can give no remedy.<sup>5</sup> Where there were joint and several bonds, and a joint judgment is recovered against all the obligors, and the surety dies, the obligee cannot proceed in equity for the purpose of holding the assets of the surety's estate liable.<sup>6</sup> When the obligation is several as well as joint, an action may be maintained or revived against the personal representatives of the deceased surety.<sup>7</sup>

By Statute in some states provision is made for the bringing of suits against the personal representative in the same manner as if the obligation had been several as well as joint.<sup>8</sup> In other states it is provided by statute that if the decedent be a surety on a joint or a joint and several obligation, his estate shall not be liable unless the principal is a nonresident of the state and is insolvent.<sup>9</sup>

Whenever the Undertaking Is for a Definite Period, as for the conduct of an officer during his term of office, or for the repayment of advances made to the principal in the bond, until notice is given the obligee that the liability is terminated, the estate of the surety is answerable for any default of the principal occurring after his death,<sup>10</sup> especially where the surety bound himself, his "heirs, executors, and administrators."<sup>11</sup>

1. Defalcations Discovered Subsequent to Judgment. — *Phillips v. Bossard*, 35 Fed. Rep. 99. See also *Noble v. Cothran*, 18 S. Car. 443.

2. Admissions and Declarations Made by Principal. — *Blair v. Perpetual Ins. Co.*, 10 Mo. 559, 47 Am. Dec. 129; *Union Sav. Assoc. v. Edwards*, 47 Mo. 445; *Lasater v. Purcell Mill, etc., Co.*, 22 Tex. Civ. App. 33; *Screwmen's Benev. Assoc. v. Smith*, 70 Tex. 175; *Wilson v. Green*, 25 Vt. 450, 60 Am. Dec. 279; *U. S. v. Cutter*, 2 Curt. (U. S.) 617. And see the title ADMISSIONS, vol. 1, p. 702.

3. Adjustment of an Account. — *U. S. v. Boyd*, 5 How. (U. S.) 50; *Bryant v. Crosby*, 36 Me. 562; *Lewison v. Hoffman*, (N. Y. Super. Ct. Tr. T.) 8 Misc. (N. Y.) 583.

4. Surviving Joint Obligor Alone Liable. — *Fielden v. Lahens*, 6 Blatchf. (U. S.) 524; *Pickersgill v. Lahens*, 15 Wall. (U. S.) 140; *Davis v. Van Buren*, 72 N. Y. 587; *Crosby v. Crafts*, 5 Hun (N. Y.) 327; *Douglass v. Ferris*, 63 Hun (N. Y.) 413; *Chard v. Hamilton*, 56 Hun (N. Y.) 259, affirmed 125 N. Y. 777. *Contra*, *Hudelson v. Armstrong*, 70 Ind. 99; *Hughes's Estate*, 13 Pa. Super. Ct. 240; *Stevenson v. Long*, 23 Pa. Co. Ct. 391; *Susong v. Valden*, 10 S. Car. 247, 30 Am. Rep. 50; *Shubrick v. Russell*, 1 Desaus. (S. Car.) 315. Compare *Holthausen v. Kells*, 18 N. Y. App. Div. 80, affirmed 154 N. Y. 776.

Undertaking on Appeal. — *Wood v. Fisk*, 63 N. Y. 245, 20 Am. Rep. 528.

5. Equity Follows the Law. — *Pickersgill v. Lahens*, 15 Wall. (U. S.) 140; *Dixon v. Vandenberg*, 35 N. J. Eq. 47; *Bowman v. Kistler*, 33 Pa. St. 106; *Harrison v. Field*, 2 Wash. (Va.) 136.

6. Death of Surety After Joint Judgment. — *U. S. v. Price*, 9 How. (U. S.) 83, affirming 1 Wall. Jr. (C. C.) 173. But see *U. S. v. Cushman*, 2 Sumn. (U. S.) 426; *Smith v. Kibbe*, 31 Hun (N. Y.) 390.

7. Several Obligation — Action Revived. — *Douglass v. Ferris*, 138 N. Y. 192, 34 Am. St. Rep. 435.

8. Statutory Provisions Make Actions Survive. — *Gillespie v. Hauenstein*, 72 Miss. 838; *Horne v. Tartt*, 76 Miss. 304; *Dixon v. Vandenberg*, 35 N. J. Eq. 47; *Donnerberg v. Oppenheimer*, 15 Wash. 290. See also *Bowman v. Kistler*, 33 Pa. St. 106, as to the death of surety pending suit, and *Baskin v. Huntington*, 130 N. Y. 313, affirming 53 Hun (N. Y.) 95, as to death after judgment. And see the statutes of the several states.

9. Not Unless Principal Is Nonresident or Insolvent. — *Tremain v. Severin*, 16 Ind. App. 447. See *Kent v. Waters*, 18 Md. 53.

10. Estate Liable on Undertaking for Definite Period. — *Green v. Young*, 8 Me. 14, 22 Am. Dec. 218. See also *Holthausen v. Kells*, 18 N. Y. App. Div. 80, affirmed 154 N. Y. 776.

For the Rent During an Extended Term, when the lease may continue from year to year, the estate of the surety is liable. *De Morat v. Howard*, 20 Pa. Co. Ct. 491.

Official Bond. — *Snyder v. State*, 5 Wyo. 318, 63 Am. St. Rep. 60.

11. Bound Himself, His "Heirs, Executors, and Administrators." — *Pond v. U. S.*, (C. C. A.) 111 Fed. Rep. 989; *Hecht v. Weaver*, 34 Fed. Rep. 111; *Royal Ins. Co. v. Davies*, 40 Iowa 469; *Shackamaxon Bank v. Yard*, 150 Pa. St. 351, 30 Am. St. Rep. 807.



The Lands of the Principal Debtor Should Be Subjected before the lands of the deceased surety;<sup>1</sup> and when the estate of a deceased surety has been duly settled without knowledge of the deceased's liability, the legatees and devisees are liable to the extent of assets received,<sup>2</sup> but the children cannot be made to pay money received as advances when the obligation to pay the debt was contracted after the advancements.<sup>3</sup>

*h. CONFLICT OF LAWS.* — It is a general rule that a surety is liable according to the law of the place of his contract.<sup>4</sup>

*i. DEMAND OR NOTICE OF DEFAULT.* — No demand or notice of default by the principal is necessary to fix the liability of a surety,<sup>5</sup> except in cases where such demand and notice are expressly required by the language of the contract.<sup>6</sup> When the bond requires that notice shall be given "immediately," it means within a reasonable time,<sup>7</sup> to permit an investigation into the condition of the principal's accounts.<sup>8</sup> When the bond provides that notice shall be given to the surety within five days after default, it need not be given in writing.<sup>9</sup>

*j. REVIVAL OF LIABILITY BY NEW PROMISE.* — When a surety has been discharged from liability on his obligation he will be bound by any new obligation entered into with a full knowledge of the facts, but such obligation can only extend to the legal liability of the principal,<sup>10</sup> and a new consideration is not necessary to support the subsequent assent of the surety;<sup>11</sup> but a surety is not estopped by any admission of liability made in ignorance of his legal rights.<sup>12</sup>

*k. CHARGING SURETY IN EQUITY.* — A court of equity will not enforce a liability on a surety where he is not held at law,<sup>13</sup> but if a surety, bound at law, cannot be held there, by reason of fraud, accident, or mistake, a court of

1. *Lands of Principal First Subjected.* — Alderson v. Alderson, 53 W. Va. 388.

2. *Distributees Liable to Extent of Assets.* — Lanier v. Griffin, 11 S. Car. 565.

3. *Recovery of Advancements.* — Norwood v. Cobb, 37 Tex. 141.

4. *Liable According to Law of Place of Contract.* — Walker v. Forbes, 25 Ala. 139, 60 Am. Dec. 498; Bacon v. Dahlgreen, 7 La. Ann. 601; Long v. Templeman, 24 La. Ann. 564; Frier-son v. Williams, 57 Miss. 451; Howard v. Fletcher, 59 N. H. 151; Pugh v. Cameron, 11 W. Va. 523.

*Whether the Surety Has Been Discharged,* has been held to be a question going to the remedy, and to be decided according to *lex fori*. Toomer v. Dickerson, 37 Ga. 428.

5. *No Demand or Notice of Default Necessary.* — Murphy v. Victor Sewing Mach. Co., 112 U. S. 688; Streeper v. Victor Sewing Mach. Co., 112 U. S. 676; White v. Swift, 1 Cranch (C. C.) 442; Mahaffey v. Gray, 85 Ga. 460; Burnham v. Gallentine, 11 Ind. 295; Kirby v. Studebaker, 15 Ind. 45; Leonard v. Shirts, 33 Ind. 214; Frash v. Polk, 67 Ind. 55; Kline v. Raymond, 70 Ind. 271; Sullivan v. Cluggage, 21 Ind. App. 667; McMillan v. Bull's Head Bank, 32 Ind. 11; Wood v. Barstow, 10 Pick. (Mass.) 368; Aultman, etc., Co. v. Gorham, 87 Mich. 233; Buchanan County v. Kirtley, 42 Mo. 534; Morris Canal, etc., Co. v. Van Vorst, 21 N. J. L. 116; Mann v. Eckford, 15 Wend. (N. Y.) 502; Sleight v. Watson, 8 Jones L. (53 N. Car.) 10. But see Wooldridge v. Griffith, 59 Tex. 290, as to necessity of notice to surety on appeal bond.

*Statutes in Some States Control* the necessity for demand on notice in the case of sureties on

bonds in judicial proceedings or of persons under judicial control.

*Attachment Bond.* — Johnson v. Chicago, etc., Elevator Co., 105 Ill. 462.

*Administrator's Bond.* — Fuller v. Dupont, 183 Mass. 596. But see Paine v. Moffitt, 11 Pick. (Mass.) 496.

6. *Unless the Contract Requires Notice or Demand.* — *In re Brown*, (1893) 2 Ch. 300; Treweek v. Howard, 105 Cal. 434; Morgan v. Menzies, 65 Cal. 243, 60 Cal. 341; Lee v. Briggs, 39 Mich. 592; Heebner v. Townsend, (Supm. Ct. Spec. T.) 8 Ab. Pr. (N. Y.) 234; George A. Fuller Co. v. Doyle, 87 Fed. Rep. 692.

7. *"Immediately" — Within Reasonable Time.* — Fidelity, etc., Co. v. Courtney, 186 U. S. 342, affirming 103 Fed. Rep. 599; Fidelity, etc., Co. v. Robertson, 136 Ala. 379.

8. *Tarboro Bank v. Fidelity, etc., Co.*, 128 N. Car. 366, 83 Am. St. Rep. 682.

9. *Notice Need Not Be in Writing.* — Lee v. Briggs, 39 Mich. 592. See Martin v. Buffalo, 128 N. Car. 308, 83 Am. St. Rep. 679.

10. *Bound by New Obligation.* — Ellis v. Bibb, 2 Stew. (Ala.) 63; Johnson v. Prater, 84 Ga. 141. See also Owens v. Tague, 3 Ind. App. 245.

As to payment or new promise by a principal stopping the running of the statute of limitations, see the title LIMITATION OF ACTIONS, vol. 19, p. 308 *et seq.*

11. *New Consideration Not Necessary.* — Pelton v. Prescott, 13 Iowa 567.

12. *Admission in Ignorance of Legal Rights.* — Welch v. Seymour, 28 Conn. 387.

13. *Equity Will Not Aid When Not Bound at Law.* — Fielden v. Lahens, 6 Blatchf. (U. S.)

equity, to prevent a failure of justice, will interfere.<sup>1</sup> Equity regards a surety as a mere guarantor of the principal's ability to pay the debt, and requires the creditor to obtain as much of his money from the principal debtor as practicable, and to hold the surety responsible only to the extent of the principal's inability,<sup>2</sup> and to entitle a party seeking to recover in a court of equity, against one of several sureties in a trustee's bond, the whole amount of his claim against the defaulting trustee, he must prove not only the insolvency of the principal in the bond, but of all the other cosureties.<sup>3</sup>

1. **SURETIES FOR PARTICULAR DEBTS OR ACTS** — (1) *Particular Business or Office.* — A surety for the fidelity or capacity of a principal, appointed to a particular office or employment, is not bound if the nature of the employment is so changed by the act of the employer that the risk of the surety is materially altered from what was contemplated by the parties at the time of entering into the bond.<sup>4</sup> An undertaking for the fidelity of another as agent for a corporation is limited to such acts as the corporation, by its charter, may lawfully require an agent to perform.<sup>5</sup> The surety on the bond of a bank cashier cannot be held liable for his default while acting as cashier of the company after incorporation when the company was not incorporated as had been contemplated at the time of the execution of the bond.<sup>6</sup> When a bond of suretyship is given for an officer, and by the act of the obligee the office is materially changed, as by promotion, so as to affect the risk of the surety, the bond as to him is avoided,<sup>7</sup> but not when the bond extends to employment generally in the business of the obligee,<sup>8</sup> nor when there is a mere addition of duties which do not interfere with the performance of the duties of the office for which the bond was given.<sup>9</sup> The surety cannot be held liable for transactions of the principal while acting in a distinct capacity,<sup>10</sup> and one on the bond of a contractor is not liable for debts incurred

524; *Gosman v. Cruger*, 69 N. Y. 87, 25 Am. Rep. 141; *Leffingwell v. Freyer*, 21 Wis. 392.

1. **Bound but Cannot Be Held at Law, Equity Will Interfere.** — *Graves v. M'Call*, 1 Call (Va.) 414; *Gorsuch v. Briscoe*, 56 Md. 573; *Brooks v. Brooke*, 12 Gill & J. (Md.) 319, 38 Am. Dec. 310. See also *Hunt v. Daniel*, 6 J. J. Marsh. (Ky.) 398; *Ogden v. Waller*, 24 Miss. 190.

**On Death of a Delinquent Trustee** without accounting for the trust estate. *Gorsuch v. Briscoe*, 56 Md. 573.

2. **First Subject Principal's Estate.** — *Roane v. Pickett*, 7 Ark. 510.

3. *Clagett v. Worthington*, 3 Gill (Md.) 83.

4. **Change in Employment Alters Risk.** — *Bonar v. Macdonald*, 3 H. L. Cas. 226; *Gass v. Stinson*, 2 Sumn. (U. S.) 453; *Johnson v. Eaton Milling, etc., Co.*, 18 Colo. 331; *Green v. Locke*, 31 La. Ann. 656; *Salem v. McClintock*, 16 Ind. App. 661; *Baltimore First Nat. Bank v. Gerke*, 68 Md. 449, 6 Am. St. Rep. 453; *Grocers' Bank v. Kingman*, 16 Gray (Mass.) 474; *Boston Hat Manufactory v. Messinger*, 2 Pick. (Mass.) 223; *Rapier v. Louisiana Equitable L. Ins. Co.*, 57 Ala. 100; *Singer Mfg. Co. v. Hibbs*, 21 Mo. App. 574; *Ludlow v. Simond*, 2 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 291. See *Bartlett v. Atty.-Gen.*, *Parker* 277; *Rollstone Nat. Bank v. Carleton*, 136 Mass. 226; *Socialistic Co-operative Pub. Assoc. v. Hoffmann*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 440. But see *Lionberger v. Krieger*, 88 Mo. 160.

5. **Acts of Agent Within Scope of Corporation**

**Charter.** — *Blair v. Perpetual Ins. Co.*, 10 Mo. 559, 47 Am. Dec. 129.

**For Profits Outside the Scope of Its Corporate Authority**, made and appropriated by agent in the business use of the name and credit of the company, surety is liable. *Goodhue Farmers' Warehouse Co. v. Davis*, 81 Minn. 210.

6. **Change by Incorporation of Employers.** — *Bensinger v. Wren*, 100 Pa. St. 500.

7. **Promotion.** — *Manufacturers' Nat. Bank v. Dickerson*, 41 N. J. L. 448; *National Mechanics Banking Assoc. v. Conkling*, 90 N. Y. 116, 48 Am. Rep. 146; *Jennery v. Olmstead*, 90 N. Y. 363; *Northwestern Nat. Bank v. Keen*, 14 Phila. (Pa.) 7, 37 Leg. Int. (Pa.) 124; *American Dist. Tel. Co. v. Lennig*, 139 Pa. St. 601.

8. **Bond Extends to Employment Generally.** — *Union Dime Sav. Inst. v. Neppert*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 797, affirmed 123 N. Y. 627; *New York Fourth Nat. Bank v. Spinney*, 120 N. Y. 560.

9. **Mere Addition of Duties.** — *Lieberman v. Wilmington First Nat. Bank*, (Del. Ch. 1898) 40 Atl. Rep. 382; *Detroit Sav. Bank v. Ziegler*, 49 Mich. 157, 43 Am. Rep. 456; *Cumberland Bldg. Loan Assoc. v. Gibbs*, 119 Mich. 321; *Home Sav. Bank v. Traube*, 75 Mo. 199, 42 Am. Rep. 402; *Rochester City Bank v. Elwood*, 21 N. Y. 88; *New York v. Kelly*, 98 N. Y. 467, 50 Am. Rep. 699; *Vogele's Appeal*, (Pa. 1888) 15 Atl. Rep. 878; *American Dist. Tel. Co. v. Lennig*, 139 Pa. St. 601.

10. **Transactions in Distinct Capacity.** — *Dedham Bank v. Chickering*, 4 Pick. (Mass.) 314; *Zinns Mfg. Co. v. Mendelson*, 89 Wis. 133.

by a subcontractor,<sup>1</sup> nor is the surety of an agent liable for defaults of a subagent,<sup>2</sup> nor for the transactions of the agent outside the territory assigned.<sup>3</sup>

(2) *Rent*. — When one becomes surety for the payment of rent and the performance of the covenants of the lease, his liability is coextensive with the right of occupation by the lessee.<sup>4</sup> When there is a covenant in the lease for the return of the property at the expiration of the term, there is no breach making the surety liable in damages when the tenant holds over with the presumed consent of the lessor.<sup>5</sup> The surety is not released from the whole contract by the nonperformance by the lessor of an independent agreement.<sup>6</sup> When the rent is payable in stated terms, the lessee may extend the time of payment of rent due without discharging the surety for rent thereafter to accrue.<sup>7</sup> A surety is liable for rent though the buildings have been destroyed by fire.<sup>8</sup> When the lessee covenants to keep the property insured, and the lessor, at his request, renews the insurance and pays the premium, the surety of the lessee is not liable to the lessor for the amount paid.<sup>9</sup> The surety has no right to call on the lessor to proceed by distress warrant against the lessee.<sup>10</sup>

(3) *Individual and Partnership Debts* — (a) *Surety for an Individual*. — A surety on the bond of an individual cannot be held liable for the defalcations, omissions, or neglect of a firm of which the principal is partner.<sup>11</sup>

(b) *Surety for a Partnership*. — A contract of suretyship entered into on behalf of a partnership continues no longer than the partnership itself, so that a surety for a copartnership is not liable for a default by one or more of the members of the firm after there has been a dissolution.<sup>12</sup>

1. *Debts Incurred by Subcontractor*. — *Faurote v. State*, 110 Ind. 463; *McCluskey v. Cromwell*, 11 N. Y. 593.

2. *Defaults of Subagent*. — *Phoenix Mut. L. Ins. Co. v. Holloway*, 51 Conn. 310. See also *Equitable L. Assur. Soc. v. Coats*, 44 Mich. 260.

3. *Transactions of Agent Outside Territory*. — *White Sewing Mach. Co. v. Mullins*, 41 Mich. 339.

Unless the Bond Reserves the Right to Transfer the Agent. — *Howe Sewing Mach. Co. v. Layman*, 88 Ill. 39.

4. *Liability Coextensive with Right of Occupation by Lessee*. — *McDonald v. Harris*, 75 Ill. App. 111; *Holden v. Tanner*, 6 La. Ann. 74; *Rice v. Loomis*, 139 Mass. 302; *Preston v. Huntington*, 67 Mich. 139; *Decker v. Gaylord*, 8 Hun (N. Y.) 110; *Dufau v. Wright*, 25 Wend. (N. Y.) 636; *Coe v. Vogdes*, 71 Pa. St. 383; *Deblois v. Earle*, 7 R. I. 26; *Morrow v. Brady*, 12 R. I. 130. But see *Brewer v. Thorp*, 35 Ala. 9.

When the Principal Has the Mere Privilege of Renewing, a surety is not liable after the term. *Fasnacht v. Winkelman*, 21 La. Ann. 727. See also *Brewer v. Knapp*, 1 Pick. (Mass.) 332; *Kennebec Bank v. Turner*, 2 Me. 42.

A Surety on a Bond for Rent for a Certain Year, due on Jan. 15, is liable for the rent due on that date though the bond bore date Jan. 11, and was for one year. *Springs v. Brown*, 97 Fed. Rep. 406.

On the Death of the Lessee, the surety is bound for after-accruing rent when he has bound himself for the rent for the entire term. *Supplee v. Herrman*, 16 Pa. Super. Ct. 45.

5. *Covenant for Return of Property*. — *Kyle v. Proctor*, 7 Bush (Ky.) 493.

6. *Nonperformance of Independent Agreement*. — *Ellis v. McCormick*, 1 Hilt. (N. Y.) 313.

7. *Rent Payable in Stated Terms*. — *Coe v. Cassidy*, 72 N. Y. 133. See *Palmer v. Purdy*, 83 N. Y. 144.

8. *Buildings Destroyed by Fire*. — *Kingsbury v. Westfall*, 61 N. Y. 356.

9. *Insurance Paid by Lessor — Surety Liable for Amount*. — *Woodbridge v. Richardson*, 2 Thomp. & C. (N. Y.) 418.

10. *Requiring Lessor to Proceed Against Lessee*. — *Brooks v. Carter*, 36 Ala. 682; *Ruggles v. Holden*, 3 Wend. (N. Y.) 216. See also *Turnure v. Hohenthal*, 36 N. Y. Super. Ct. 79.

11. *Surety for an Individual*. — *White Sewing Mach. Co. v. Hines*, 61 Mich. 423. See also *London F. Assur. Corp. v. Bold*, 6 Q. B. 514, 51 E. C. L. 514; *Montefiore v. Lloyd*, 15 C. B. N. S. 203, 109 E. C. L. 203; *Connecticut Mut. L. Ins. Co. v. Scott*, 81 Ky. 540; *Mallory v. Brent*, 75 Mo. App. 480. But see *Braun v. Woollacott*, 129 Cal. 107; *Hayden v. Hill*, 52 Vt. 259.

12. *Surety for a Partnership*. — *Cambridge University v. Baldwin*, 5 M. & W. 580; *Connecticut Mut. L. Ins. Co. v. Bowler*, *Holmes (U. S.)* 263; *Gargan v. School Dist. No. 15*, 4 Colo. 53; *State v. Boon*, 44 Mo. 254; *Standard Oil Co. v. Arnestad*, 6 N. Dak. 259, 66 Am. St. Rep. 604. See *Bill v. Barker*, 16 Gray (Mass.) 62. As to the obligations assumed of the predecessor, one of the partners, see *Ball v. Watertown F. Ins. Co.*, 44 Mich. 137.

But the Surety on a Contractors' Bond, given pursuant to a mechanic's lien law, is liable after an assignment by one partner of his interest to his copartner. *Abbott v. Morrisette*, 46 Minn. 10.

As to a Sealed Note Executed in the Name of the Firm Purporting to Bind Only a Partner, on which surety was liable, see *Harter v. Moore*, 5 Blackf. (Ind.) 367.

(4) *Individual and Partnership Demands* — (a) *Surety in Favor of an Individual*. — A surety on a bond in favor of an individual is not liable after the individual takes a partner.<sup>1</sup>

(b) *Surety in Favor of a Partnership*. — A surety on an obligation due to a partnership is not bound after there has been a dissolution of or a change in the membership of the partnership.<sup>2</sup>

(5) *Bonds of Persons under Judicial Control* — (a) *Executors, Administrators, Guardians, and Receivers*. — The liabilities of sureties on the bonds of executors, administrators, guardians, and receivers are discussed elsewhere in this work.<sup>3</sup>

(b) *Assignees* — *aa. IN GENERAL*. — The surety of an assignee is not relieved from liability by the fact that the assignee was employed as an attorney to establish a claim against the estate, and not to collect the claim, where there was no separation of the money from other funds belonging to the estate.<sup>4</sup> When a bond has been executed under one assignment, the liability of the surety on such bond cannot be ascertained when other trusts are united with it, as it is rendered impossible to determine to what extent, if any, there is a deficiency in the first trust.<sup>5</sup> The original surety is liable for the proceeds of real estate sold by the assignee, notwithstanding a statute requires special security to be given; such special security is merely cumulative.<sup>6</sup>

*bb. NECESSITY OF ESTABLISHING LIABILITY OF PRINCIPAL*. — It is not necessary by action to establish a devastavit against the principal before action can be maintained against the surety.<sup>7</sup>

*cc EFFECT OF DECREE ON FINAL ACCOUNT*. — When a decree has been entered against an assignee, upon the final accounting, the surety is concluded by it,<sup>8</sup> in the absence of fraud.<sup>9</sup>

(6) *Bonds Given in Judicial Proceedings*. — The liabilities of the sureties on bonds given in judicial proceedings are considered under the various appropriate titles throughout this work.<sup>10</sup>

2. *Rights of Surety* — *a. RIGHT TO FULL DISCLOSURE* — (1) *Before Contract*. — A contract of suretyship may be avoided, if the circumstances are such that it can be fairly inferred that the surety reposed confidence in the obligee, and the latter suffered the former to deal under a material delusion; or if obligee and surety were brought into such connection with each other as to make the concealment equivalent to an assertion, on the part of the obligee, of the nonexistence of the facts concealed.<sup>11</sup> The failure to disclose need not

1. *Surety in Favor of an Individual*. — Wright v. Russel, 2 W. Bl. 934.

2. *Surety in Favor of a Partnership*. — Pemberton v. Oakes, 4 Russ. 154; McCloskey v. Wingfield, 29 La. Ann. 141. But see Pease v. Hirst, 10 B. & C. 122, 21 E. C. L. 38.

*Surety Liable When Company Is a Fluctuating Body, and There Is a Change in the Holders of Shares*. — Metcalf v. Bruin, 12 East 400.

*Statute Providing that Change of Company Works No Release to Sureties on Bonds*. — Eastern Union R. Co. v. Cochrane, 9 Exch. 197.

3. See the titles EXECUTORS AND ADMINISTRATORS, vol. 11, p. 879 *et seq.*; GUARDIAN AND WARD, vol. 15, p. 116 *et seq.*; RECEIVERS, vol. 23, p. 1114 *et seq.*

4. *Assignee Employed as Attorney*. — Taylor v. State, 73 Md. 208.

5. *Other Trusts United*. — Cook v. Lehmer, 2 Ohio Dec. 111.

6. *Proceeds of Sale of Real Estate*. — Rhawn v. Com., 102 Pa. St. 450.

7. *Surety May Be Sued Before Establishing Devastavit*. — Kaufman v. Wolf, 77 Tex. 250.

8. *Decree on Final Accounting Concludes Surety*. — Garver v. Tisinger, 46 Ohio St. 56; *In re*

Stelle, 34 N. J. Eq. 199; Hindman v. Lewman, (Ky. 1901) 63 S. W. Rep. 478, *affirming* on rehearing (Ky. 1901) 61 S. W. Rep. 470. See also Pierpoint v. McGuire, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 70.

*Surety a Party to the Accounting*. — Van Slyke v. Bush, 123 N. Y. 47.

9. *Absence of Fraud*. — Walsh v. Miller, 51 Ohio St. 462.

10. See for instance such titles as BAIL (IN CIVIL CASES), vol. 3, p. 587; BAIL AND RECOGNIZANCE, vol. 3, p. 651; INJUNCTIONS, vol. 16, p. 439 *et seq.*; REPLEVIN, vol. 24, p. 529 *et seq.*

11. *Right to Disclosure Before Contract* — *England*. — Pidcock v. Bishop, 3 B. & C. 605, 10 E. C. L. 197; Davis v. London, etc., Marine Ins. Co., 8 Ch. D. 469; Hamilton v. Watson, 12 Cl. & F. 119; North British Ins. Co. v. Lloyd, 10 Exch. 531; Owen v. Homan, 4 H. L. Cas. 997; Phillips v. Foxall, L. R. 7 Q. B. 666. See Small v. Currie, 2 Drew. 102.

*United States*. — Magee v. Manhattan L. Ins. Co., 92 U. S. 93.

*Alabama*. — Evans v. Keeland, 9 Ala. 42. *Indiana*. — Ham v. Greve, 34 Ind. 18.

be wilful or intentional on the part of the obligee, or with a view to his advantage, but his act must be such as to have operated as a fraud on the surety.<sup>1</sup> Concealment of a known prior default,<sup>2</sup> or culpable carelessness, will relieve the surety<sup>3</sup> when such concealment would be a fraud in fact or in law,<sup>4</sup> and when inquiry had been made by the surety,<sup>5</sup> but not when there was no intent to conceal or culpable negligence on the part of the obligee.<sup>6</sup> The facts concealed must be those immediately affecting the liability of the surety, and bearing directly on the particular transaction to which the suretyship attaches,<sup>7</sup> and materially increasing the obligation of the surety;<sup>8</sup> but the creditor is under no obligation to inform the intended surety of the insolvency of the principal.<sup>9</sup> A misrepresentation of facts by the creditor which will avoid the contract as to the surety must be a false assertion of a fact, and not the expression of an opinion.<sup>10</sup> If the surety requires to know any particular matter, he must make it the subject of distinct inquiry.<sup>11</sup> The surety is not relieved as against one who was in no way connected with the deception,<sup>12</sup> nor by reason of his ignorance of the extent of the obligation assumed,<sup>13</sup> nor by mere verbal representations of what the written contract contained.<sup>14</sup>

*Kentucky.*—Stanford First Nat. Bank v. Mattingly, 92 Ky. 650.

*Louisiana.*—State v. Dunn, 11 La. Ann. 549.

*Michigan.*—Hancock First Nat. Bank v. Johnson, (Mich. 1903) 95 N. W. Rep. 975.

*Missouri.*—Harrison v. Lumbermen, etc., Ins. Co., 8 Mo. App. 37.

*New York.*—Farmers Nat. Bank v. Van Slyke, 49 Hun (N. Y.) 7.

*Ohio.*—Dinsmore v. Tidball, 34 Ohio St. 411.

*Pennsylvania.*—Farmers', etc., Nat. Bank v. Braden, 145 Pa. St. 473.

*Rhode Island.*—Atlas Bank v. Brownell, 9 R. I. 168, 11 Am. Rep. 231.

*Wisconsin.*—Ætna L. Ins. Co. v. Mabbett, 18 Wis. 667.

1. **Failure to Disclose Need Not Be Wilful.**—Railton v. Mathews, 10 Cl. & F. 934; Harrison v. Lumbermen, etc., Ins. Co., 8 Mo. App. 37; Sooy v. State, 39 N. J. L. 135.

2. **Concealment of Known Prior Default.**—Mutual L. Ins. Co. v. Wilcox, 8 Biss. (U. S.) 197; Guarantee Co. of North America v. Mechanics' Sav. Bank, etc., Co., 183 U. S. 417; Guardian F., etc., Assur. Co. v. Thompson, 68 Cal. 208; Indiana, etc., Live Stock Ins. Co. v. Bender, (Ind. 1904) 69 N. E. Rep. 691; Deposit Bank v. Hearne, 104 Ky. 819; Ingraham v. Maine Bank, 13 Mass. 208; St. Louis Third Nat. Bank v. Owen, 101 Mo. 558; Sooy v. State, 39 N. J. L. 135; Dinsmore v. Tidball, 34 Ohio St. 411; Wilmington, etc., R. Co. v. Ling, 18 S. Car. 116.

See Bowne v. Mt. Holly Nat. Bank, 45 N. J. L. 360, where it was held that neglect of the bank to ascertain a prior default would not relieve the surety; Tapley v. Martin, 116 Mass. 275; Traders' Ins. Co. v. Herber, 67 Minn. 110. But see State v. Rushing, 17 Fla. 226, as to failing to disclose prior defaults of a state officer on his reappointment; Cawley v. People, 95 Ill. 249; Pine County v. Willard, 39 Minn. 125, 12 Am. St. Rep. 622.

3. **Concealment of Culpable Carelessness.**—Smith v. Josselyn, 40 Ohio St. 409.

4. **When Concealment Amounts to a Fraud.**—Howe Mach. Co. v. Farrington, 82 N. Y. 121.

5. **When Inquiry Made by Surety.**—Lee v. Jones, 17 C. B. N. S. 482, 112 E. C. 482;

Smith v. Scotland Bank, 1 Dow. 272; Drabek v. Grand Lodge, etc., 24 Ill. App. 82; Monroe Bank v. Anderson Bros. Min., etc., Co., 65 Iowa 692; Wayne v. Commercial Nat. Bank, 52 Pa. St. 343; Remington Sewing Mach. Co. v. Kexertee, 49 Wis. 409. See also Stone v. Compton, 5 Bing. N. Cas. 142, 35 E. C. L. 57.

6. **No Intent to Conceal or Culpable Negligence.**—Ætna L. Ins. Co. v. American Surety Co., 34 Fed. Rep. 291; Anaheim Union Water Co. v. Parker, 101 Cal. 483; Bostwick v. Van Noorhis, 91 N. Y. 353. See also Ashuelot Sav. Bank v. Albee, 63 N. H. 152, 56 Am. Rep. 501.

7. **Immediately Affecting Liability of Surety.**—Comstock v. Gage, 91 Ill. 328; Wilson v. Monticello, 85 Ind. 13; Franklin Bank v. Stevens, 39 Me. 532; Franklin Bank v. Cooper, 36 Me. 179; Harrison v. Lumbermen, etc., Ins. Co., 8 Mo. App. 37.

8. **Materially Increasing Obligation of Surety.**—Pidcock v. Bishop, 3 B. & C. 605, 10 E. C. L. 197; Cashin v. Perth, 7 Grant Ch. (U. C.) 340; Graves v. Lebanon Nat. Bank, 10 Bush (Ky.) 23, 19 Am. Rep. 50; Bryant v. Crosby, 36 Me. 571; Atlas Bank v. Brownell, 9 R. I. 168, 11 Am. Rep. 231; Screwmen v. Smith, 70 Tex. 172; Warren v. Branch, 15 W. Va. 21.

9. **Insolvency of Surety.**—Wythes v. Labouchere, 3 De G. & J. 593; Roper v. Sangamon Lodge No. 6, 91 Ill. 518, 33 Am. Rep. 60; Farmers', etc., Nat. Bank v. Braden, 145 Pa. St. 473. See Mathis v. Morgan, 72 Ga. 517, 53 Am. Rep. 847.

10. **Misrepresentation Must Be False Assertion of Fact.**—Evans v. Keeland, 9 Ala. 42.

11. **Must Inquire as to Any Particular Matter.**—Hamilton v. Watson, 12 Cl. & F. 109.

12. **Liable to One Not Connected with Deception.**—Davis Sewing Mach. Co. v. Buckles, 89 Ill. 237; Lucas v. Owens, 113 Ind. 521; Casoni v. Jerome, 58 N. Y. 321; Western New York L. Ins. Co. v. Clinton, 66 N. Y. 326; Holmes v. Frost, 125 Pa. St. 328. See Home Ins. Co. v. Holway, 55 Iowa 571, 39 Am. Rep. 179.

13. **Ignorant of Extent of Obligation.**—Metropolitan Loan Assoc. v. Esche, 75 Cal. 513; Phoenix Mut. L. Ins. Co. v. Holloway, 51 Conn. 310; Farmers' Bank v. Burchard, 33 Vt. 346.

14. **Verbal Representation of Contents of Written Contract.**—McCormick v. Hubbell, 4 Mont. 87,

(2) *After Contract.* — When the employer of a clerk or other agent takes from another a bond of indemnity, or other instrument, guaranteeing the honesty and fidelity of such clerk or agent while in the service of the employer, the latter impliedly stipulates that he will not knowingly retain such clerk or agent in his service after a breach of the guaranty justifying his discharge, and that in the event he does so without the surety's consent, it is to be at the employer's own risk.<sup>1</sup> Continuing to employ an agent after knowledge of his defalcation will relieve the surety,<sup>2</sup> if the principal fails to disclose it to the surety,<sup>3</sup> but not where a default of the employee was not occasioned by fraud or dishonesty.<sup>4</sup> The failure of the employer to notify the surety of information that the employee was engaged in speculation defeats a recovery on the employee's bond for defalcation after such information was received, when the bond provides for notification on the employer's becoming aware of the employee's being engaged in speculation or gambling.<sup>5</sup>

**Neglect to Discover Defaults.** — The surety is not relieved if the directors of a bank neglect to discover defaults of the cashier,<sup>6</sup> or if the principal, an employee of a corporation, fails to conform to a by-law of the company, and the surety is not informed.<sup>7</sup>

**b. RIGHT TO REVOKE OR TERMINATE CONTRACT.** — A surety bound for the fidelity and honesty of his principal, and so for an indefinite and contingent liability, and not for a sum fixed and certain to become due, may revoke and end his future liability in either of two cases, viz.: first, where the guaranteed contract has no definite time to run; and, second, where it has such definite time, but the principal has so violated it and is so in default that the creditor may safely and lawfully terminate it on account of the breach.<sup>8</sup> But the surety cannot dissolve the contract for a definite term by mere notice.<sup>9</sup> It is sometimes provided by the contract that the surety may, on giving certain notice, discontinue his liability, and when such notice has been given the surety cannot be held responsible for any subsequent transactions.<sup>10</sup> A notice from the surety of a public officer,<sup>11</sup> or an officer of a private corporation, that he wants to be relieved from his suretyship cannot operate instantaneously; time must be given to procure a new bond.<sup>12</sup>

**c. ENFORCEMENT OF CONTRACT AGAINST, AND SECURITIES GIVEN BY, PRINCIPAL** — (1) *Before Action Against Surety* — (a) *At Law.* — At law, the payee of an obligation may maintain an action thereon against the surety without first exhausting the remedies against or the security given by the prin-

1. *After Contract.* — Phillips v. Foxall, L. R. 7 Q. B. 666; Sanderson v. Aston, L. R. 8 Exch. 73; Rapp v. Phoenix Ins. Co., 113 Ill. 390, 55 Am. Rep. 427.

2. *Continuing to Employ After Knowledge of Defalcation* — Adjala Tp. v. McElroy, 9 Ont. 580; Roberts v. Donovan, 70 Cal. 108.

3. *Connecticut Mut. L. Ins. Co. v. Scott*, 81 Ky. 540. See *Planters' Bank v. Lamkin*, R. M. Charit. (Ga.) 29. But see *Peel v. Tatlock*, 1 B. & P. 419.

4. *Default Not Occasioned by Fraud.* — Atlantic, etc., Tel. Co. v. Barnes, 64 N. Y. 385, 21 Am. Rep. 621. See also *Cumberland Bldg. Loan Assoc. v. Gibbs*, 119 Mich. 318; *Screwmen v. Smith*, 70 Tex. 174.

5. *Employee Engaged in Speculation.* — Guarantee Co. of North America v. Mechanics' Sav. Bank, etc., Co., 183 U. S. 402.

6. *Frelinghuysen v. Baldwin*, 16 Fed. Rep. 452. See also *Tarboro Bank v. Fidelity, etc., Co.*, 128 N. Car. 366, 83 Am. St. Rep. 682.

7. *Employee Fails to Conform to By-law of Company.* — Watertown F. Ins. Co. v. Simmons, 131

Mass. 85, 41 Am. Rep. 196; *Richmond, etc., R. Co. v. Kasey*, 30 Gratt. (Va.) 218; *Pittsburg etc., R. Co. v. Shaeffer*, 59 Pa. St. 350. See *Nashville v. Knight*, 12 Lea (Tenn.) 700.

8. *Right to Revoke Contract.* — Emery v. Baltz, 94 N. Y. 408. See also *Dwelling-House Ins. Co. v. Johnston*, 90 Mich. 170. But see *Gordon v. Calvert*, 4 Russ. 581; *Sanderson v. Aston*, L. R. 8 Exch. 76.

9. *Coe v. Vogdes*, 71 Pa. St. 383.

10. *Transaction Subsequent to Notice.* — Gass v. Stinson, 2 Sumn. (U. S.) 453.

*Notice by Surety Company.* — *Tarboro Bank v. Fidelity, etc., Co.*, 128 N. Car. 366, 83 Am. St. Rep. 682.

After a building contract has been broken by the principal, the surety may insist that the work should not go on and add to his liability as surety. *Hunt v. Roberts*, 45 N. Y. 695.

11. *Reasonable Time to Procure New Bond.* — *Reilly v. Dodge*, 131 N. Y. 153.

12. *La Rose v. Logansport Nat. Bank*, 102 Ind. 333; *Bostwick v. VanVoorhis*, 91 N. Y. 353.

cipal,<sup>1</sup> unless, under the terms of the bond, a foreclosure of the security given by the principal was a condition precedent to a right of recovery against the surety.<sup>2</sup>

(b) *In Equity.* — A surety for a debt may, by a bill in equity, compel the creditor to proceed against the principal, where the character of the complainant as surety appears on the face of the evidence of the debt when he offers to indemnify the creditor in his proceedings against the principal, and also offers to pay whatever the principal may fail to pay under those very proceedings,<sup>3</sup> even when the surety gave a mortgage on his property for the payment of the debt.<sup>4</sup> This cannot be done if it be shown that the principal is insolvent,<sup>5</sup> nor before the debt is due.<sup>6</sup> When security is given by both the principal and surety on the separate and individual property of each, the creditor must first resort to the security given by the principal.<sup>7</sup> A surety has a right

1. *At Law, Obligor May First Sue Surety — United States.* — *Muscatine v. Mississippi*, etc., R. Co., 1 Dill. (U. S.) 536.

*California.* — See *London*, etc., *Bank v. Smith*, 101 Cal. 420.

*Indiana.* — *Webster v. Smith*, 4 Ind. App. 44; *Jones v. Tinch*, 15 Ind. 310.

*Louisiana.* — *New Orleans Canal*, etc., Co. v. *Escoffie*, 2 La. Ann. 830.

*Maryland.* — *Garay v. Hignutt*, 32 Md. 552.

*Massachusetts.* — *Lincoln v. Bassett*, 23 Pick. (Mass.) 154; *Adams Bank v. Anthony*, 18 Pick. (Mass.) 238; *Allen v. Woodard*, 125 Mass. 403.

*Minnesota.* — *Huey v. Pinney*, 5 Minn. 310.

*Missouri.* — *Carr v. Card*, 34 Mo. 517; *Callaway County Sav. Bank v. Terry*, 13 Mo. App. 99; *Aultman*, etc., Co. v. *Smith*, 52 Mo. App. 351.

*Nebraska.* — *Kroncke v. Madsen*, 56 Neb. 609.

*New Jersey.* — *Pintard v. Davis*, 20 N. J. L. 206.

*New York.* — *Loud v. Sergeant*, 1 Edw. (N. Y.) 164; *Keene v. Newark Watch Case Material Co.*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 8; *Luce v. Alexander*, 49 N. Y. Super. Ct. 202, affirmed 100 N. Y. 613.

*Pennsylvania.* — *Geddis v. Hawk*, 1 Watts (Pa.) 280; *Domestic Sewing-Mach. Co. v. Saylor*, 86 Pa. St. 287.

*South Carolina.* — *Miller v. White*, 25 S. Car. 235; *Shubrick v. Russell*, 1 Desaus. (S. Car.) 315.

*Tennessee.* — *Harlan v. Sweeny*, 1 Lea (Tenn.) 686.

*Texas.* — *Walker v. Collins*, 22 Tex. 189.

*Virginia.* — *Shannon v. McMullin*, 25 Gratt. (Va.) 211.

*West Virginia.* — *Armstrong v. Poole*, 30 W. Va. 666.

When the Principal Dies, the payee may look to the surety as primarily liable, and need not present the claim to the administrator of the deceased principal for allowance and payment. *Willis v. Chowning*, 90 Tex. 617. See also *Scantlin v. Kemp*, 34 Tex. 388.

2. Unless Terms Require Foreclosure of Principal's Security. — *Beebe v. Canney*, 52 Minn. 491.

3. Equity Will Compel Creditor to Proceed Against Principal — *England.* — *Lee v. Rook*, *Mosley* 318; *Wright v. Simpson*, 6 Ves. Jr. 734; *Ranelagh v. Hayes*, 1 Vern. 189.

*United States.* — *Matter of Babcock*, 3 Story (U. S.) 398.

*Florida.* — *West v. Chasten*, 12 Fla. 315.

*Illinois.* — *Wise v. Shepherd*, 13 Ill. 41.

*Indiana.* — *Hinkle v. Hinkle*, 20 Ind. App. 387.

*Mississippi.* — *Solomon v. Meridan First Nat. Bank*, 72 Miss. 854.

*Minnesota.* — *Huey v. Pinney*, 5 Minn. 310.

*New Jersey.* — *Philadelphia*, etc., R. Co. v. *Little*, 41 N. J. Eq. 519; *Irick v. Black*, 17 N. J. Eq. 189; *Pintard v. Davis*, 20 N. J. L. 205.

*New York.* — *Wright v. Austin*, 56 Barb. (N. Y.) 13; *Singer v. Troutman*, 49 Barb. (N. Y.) 182; *King v. Baldwin*, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415, overruling 2 Johns. Ch. (N. Y.) 554; *Hayes v. Ward*, 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554; *Sheppard v. Conley*, (Supm. Ct. Spec. T.) 9 N. Y. Supp. 777; *Hannay v. Pell*, 3 E. D. Smith, (N. Y.) 432.

*North Carolina.* — But see *Gary v. Cannon*, 3 Ired. Eq. (38 N. Car.) 64.

*Oregon.* — *Brown v. Whittington*, 39 Oregon 302.

*Tennessee.* — *Croone v. Bivens*, 2 Head (Tenn.) 339; *Harlan v. Sweeny*, 1 Lea (Tenn.) 686.

*Virginia.* — *Kent v. Matthews*, 12 Leigh (Va.) 573. See also *Beckham v. Duncan*, (Va. 1889) 9 S. E. Rep. 1002, where the principal was a devisee of the surety. See *Dillard v. Krise*, 86 Va. 410.

*Washington.* — *Rotting v. Cleman*, 20 Wash. 116.

*West Virginia.* — *Wilson v. Carrico*, 50 W. Va. 336.

Request Must Be to Proceed by Due Process of Law. — *Singer v. Troutman*, 49 Barb. (N. Y.) 182.

When Surety Has Indemnity. — *Newsom v. Mc-Lendon*, 6 Ga. 392.

Indemnity from Principal to Cosurety First Subjected. — *West v. Belches*, 5 Munf. (Va.) 187.

On the Death of the Principal. — *Paxton v. Rich*, 85 Va. 378.

4. When Surety Gave Security. — *Stone v. Bicket*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 683, affirmed 62 N. Y. App. Div. 617. But see *Webber v. Webber*, 109 Mich. 147.

5. Not When Principal Insolvent. — *Barnard v. Martin*, 112 N. Car. 754.

6. Not Before Debt Due. — *Hinckley v. Pfister*, 83 Wis. 64.

7. Surety Given by Both. — *Gresham v. Ware*, 79 Ala. 192; *Kempner v. Dooley*, 60 Ark. 526; *Hoppes v. Hoppes*, 123 Ind. 401;

to demand that any securities held by the creditor as collateral for the payment of the debt shall be applied in satisfaction thereof.<sup>1</sup>

(c) *Under Statutes.* — By statute in some states a surety, by service of notice on the creditor, may compel him to bring suit on the note,<sup>2</sup> but when the surety has received from the principal indemnity against loss he cannot resort to the statute.<sup>3</sup> The notice must be given when the cause of action has accrued, and not in advance of that time,<sup>4</sup> and the failure of the creditor to sue is an election not to sue; the duty is on the creditor to use "due diligence" to ascertain the residence of the principal.<sup>5</sup> To justify judgment against the surety in the absence of the principal the creditor must show the insolvency<sup>6</sup> or death of the principal.<sup>7</sup>

(2) *After Judgment Against Surety* — (a) *At Law.* — A creditor, having judgment against both principal and surety, may cause the property of either to be taken to effect the payment of the debt.<sup>8</sup> The recovery of a joint judgment against principal and surety does not merge the suretyship of the surety and render him a principal debtor.<sup>9</sup> On a motion to revive a dormant judgment against the principal and surety on a note, the surety may set up any defense or reasons why the judgment should not be revived against him that have arisen or accrued since the judgment was taken so that an agreement for an extension of time of payment of the judgment, without the knowledge of the surety, would release the surety.<sup>10</sup>

(b) *In Equity.* — A surety, after judgment, is in equity entitled to be protected<sup>11</sup> and to have execution issued first against his principal,<sup>12</sup> unless he is

Wright v. Crump, 25 Ind. 339; Wheat v. McBrayer, (Ky. 1894) 26 S. W. Rep. 809; Kidd v. Hurley, 54 N. J. Eq. 177; Vartie v. Underwood, 18 Barb. (N. Y.) 561; Neimcewicz v. Gahn, 3 Paige (N. Y.) 614; Weil v. Thomas, 114 N. Car. 197; Keel v. Levy, 19 Oregon 450; Bruce v. Laing, (Tex. Civ. App. 1901) 64 S. W. Rep. 1019.

1. *Collateral Securities to Be Applied.* — Pierce v. Atwood, 64 Neb. 92. See also Gastonia v. McEntee-Peterson Engineering Co., 131 N. Car. 359; Spalding v. Susquehanna County Bank, 9 Pa. St. 28.

2. *Notice to Creditor to Sue Principal.* — Barnes v. Sammons, 128 Ind. 596; Whittlesey v. Hebrer, 48 Ind. 260; Macready v. Schenck, 41 La. Ann. 456; Denny v. Sayward, 10 Wash. 428; Gillilan v. Ludington, 6 W. Va. 128.

There Must Be Foreclosure of Mortgage Given by Principal. — Lewiston First Nat. Bank v. Williams, 2 Idaho 670.

The Statute Does Not Contemplate a notice to be given to sue, in cases where judgment has been already obtained against the surety. Irwin v. Helgenberg, 21 Ind. 106.

3. *Not When Surety Has Indemnity.* — Wilson v. Tebbetts, 29 Ark. 587.

4. *Notice When Cause of Action Has Accrued.* — Scales v. Cox, 106 Ind. 261.

5. *Creditor Must Be Diligent to Ascertain Residence of Principal.* — Cox v. Jefferies, 73 Mo. App. 413. See Thrasher v. Buckingham, 40 Miss. 67, in which it was held that the burden of showing that the principal is a resident is upon the surety. See also Harrison v. Price, 25 Gratt. (Va.) 553.

6. *Insolvency of Principal.* — Welch v. Phelps, etc., Windmill Co., (Tex. Civ. App. 1896) 37 S. W. Rep. 175.

*Absence from the State.* — See Rowe v. Buchtel, 13 Ind. 381.

7. *Death of Principal.* — Davis v. Gillilan, 71 Mo. App. 498.

*Claim Bond — No Right to Take Judgment by Default Against Surety.* — Muenster v. Tremont Nat. Bank, 92 Tex. 425, reversing (Tex. Civ. App. 1898) 46 S. W. Rep. 277.

8. *At Law, Creditor May Subject Property of Either.* — Davis v. Patrick, (C. C. A.) 57 Fed. Rep. 909; American Surety Co. v. Lawrenceville Cement Co., 96 Fed. Rep. 25; Abercrombie v. Knox, 3 Ala. 728, 37 Am. Dec. 721; Keaton v. Cox, 26 Ga. 162; Battle v. Stephens, 32 Ga. 25; Fuller v. Loring, 42 Me. 481; Eason v. Petway, 1 Dev. & B. L. (18 N. Car.) 44. See also McNeilly v. Cooksey, 2 Lea (Tenn.) 39.

9. *Joint Judgment Not Merger of Suretyship.* — La Farge v. Herter, 11 Barb. (N. Y.) 159, affirmed 9 N. Y. 241. See Dubuque County v. Koch, 17 Iowa 229, and *infra*, this title, VI. 8. *Judgment and Execution Liens.*

10. *Motion to Revive Dormant Judgment.* — Salisbury First Nat. Bank v. Swink, 129 N. Car. 261.

11. *Protection of Surety in Equity.* — Wren v. Peel, 64 Tex. 374. See also Davis v. Mikell, Freem. (Miss.) 548.

*Against an Illegal Disposition of the Principal's Property.* — Breese v. Schuler, 48 Ill. 329.

*Failure of Principal to Confess a Judgment and Stay It,* as promised to surety, constitutes no ground for equitable relief. Carpenter v. Kee, 5 Humph. (Tenn.) 585.

12. *Execution Issued First Against Principal.* — Miller v. Hudson, 114 Ind. 550; Commercial Bank v. Western Reserve Bank, 11 Ohio 444; State Bank v. Campbell, 2 Rich. Eq. (S. Car.) 179; Hollimon v. Karger, 30 Tex. Civ. App. 558; Wytheville Crystal Ice, etc., Co. v. Frick Co., 66 Va. 141; Womack v. Paxton, 84 Va. 9. See Muscatine v. Mississippi, etc., R. Co., 1 Dill. (U. S.) 536; Womack v. Fluder, 13 La.



insolvent;<sup>1</sup> the property of the principal should first be exhausted,<sup>2</sup> so far as it can be done without too great delay and expense.<sup>3</sup>

(e) **Under Statutes.** — In some states, statutes provide that after judgment the property of the principal is primarily liable.<sup>4</sup> By other statutes it is provided that judgment should order execution to be levied first on the principal's property.<sup>5</sup> Such a statute does not apply to the case of a surety who has been sued alone on a bond executed jointly by him and the principal,<sup>6</sup> nor when the principal's property is in the control and custody of the court.<sup>7</sup> A statute that permits a party to procure himself to be declared a surety,<sup>8</sup> and entitled to favor in the collection of the judgment, does not require the creditor to pursue collateral remedies.<sup>9</sup> The surety may aid an officer to find property of the principal on which to levy execution.<sup>10</sup>

d. **DEFENDING SUITS AGAINST PRINCIPAL.** — A surety may defend an action against his principal, may set up any legal or equitable defense which would have availed the principal, and may establish it by proof notwithstanding the principal fails to plead.<sup>11</sup>

3. **Rights of Creditor.** — The creditor cannot be compelled by a surety to apply payments made by a debtor owing more than one account,<sup>12</sup> or the proceeds of the sale of security, to the particular debt for which the surety is liable so as to relieve the surety from liability, in the absence of a direction by the debtor,<sup>13</sup> unless circumstances show that such application was intended by

Ann. 196; Hanby v. Henritze, 85 Va. 182. See also Barnes v. Cavanagh, 53 Iowa 27, as to a surety on a stay of execution.

1. **Unless Principal Is Insolvent.** — Sheldon v. Reynolds, 14 La. Ann. 703; Huey v. Pinney, 5 Minn. 310; National Lead Co. v. Montpelier Hardware Co., 73 Vt. 120. See also Bardwell v. Witt, 42 Minn. 468.

As to Exhausting Vendor's Lien. — Armstrong v. Poole, 30 W. Va. 666.

2. **Property of Principal First Exhausted.** — Delaware, etc., R. Co. v. Oxford Iron Co., 38 N. J. Eq. 151; McNeel v. Aldridge, 25 W. Va. 113; Alderson v. Alderson, 53 W. Va. 388.

3. **Creditor Must Not Be Delayed.** — Richards v. Osceola Bank, 79 Iowa 713; Hill v. Miller, 7 La. Ann. 622; Philadelphia, etc., R. Co. v. Little, 41 N. J. Eq. 519; Cumberland First Nat. Bank v. Parsons, 42 W. Va. 137.

4. **Under Statutes Property of Principal Primarily Liable.** — Walker v. Tyson, 52 Ala. 593; Johnson v. Harris, 69 Ind. 305; Delevan v. Pratt, 19 Iowa 429; Brink v. Bartlett, 105 La. 336; Lepretre v. Barthet, 25 La. Ann. 124; Hill v. Bourcier, 29 La. Ann. 841; Delaware, etc., R. Co. v. Oxford Iron Co., 38 N. J. Eq. 151; Watson v. Sutherland, 1 Tenn. Ch. 208. See Elmore v. Robinson, 18 La. Ann. 651.

**Official Bond.** — Stinson v. Hill, 21 La. Ann. 560.

5. **Judgment Should Discriminate Between Principal and Surety.** — Schooley v. Fletcher, 45 Ind. 86; Douch v. Bliss, 80 Ind. 316; Morris v. McAnally, 3 Coldw. (Tenn.) 304; Montrose v. Fannin County Bank, (Tex. Civ. App. 1893) 23 S. W. Rep. 709; Dignowity v. Staacke, (Tex. Civ. App. 1894) 25 S. W. Rep. 824. See also Stewart v. Ray, 4 Ired. L. (26 N. Car.) 269, and the title PRINCIPAL AND SURETY, 16 ENCYC. OF PL. AND PR. 938.

**For Procedure under the Indiana Statute** see Dodge v. Dunham, 41 Ind. 186; Harvey v. Osborn, 55 Ind. 535; Boys v. Simmons, 72 Ind. 593; Williams v. Fleenor, 77 Ind. 36; Chaplin v.

Baker, 124 Ind. 385; Zimmerman v. Gaumer, 152 Ind. 552.

**Where Joint Judgment Does Not State Fact of Suretyship,** execution may issue against surety. Work v. Harper, 31 Miss. 107, 66 Am. Dec. 549; Grissom v. Moore, 1 Sneed (Tenn.) 361.

**Certificate by Clerk, in Recording the Judgment,** that parties are principal and surety, required by statute. Blaco v. State, 58 Neb. 557; Drexel v. Pusey, 57 Neb. 30; Maxwell v. Home F. Ins. Co., 57 Neb. 207.

**Common-law Remedy Held Unaffected by Such Statutory Remedy.** — Harker v. Glidewell, 23 Ind. 219.

6. **Surety Sued Alone.** — Davis v. Sanderlin, 1 Ired. L. (23 N. Car.) 390.

7. **Property of Principal in Control of Court.** — Knode v. Baldridge, 73 Ind. 54.

8. **Chaplin v. Baker,** 124 Ind. 385; Frank v. Traylor, 130 Ind. 145.

9. **Creditor Need Not Pursue Collateral Remedies.** — Brown v. Brown, 17 Ind. 475.

10. **Surety May Aid Officer to Find Property of Principal.** — Martin v. Rice, 16 Tex. 157.

11. **Defending Suits Against Principal.** — Bird v. Mitchell, 101 Ga. 46; Aeschlinann v. Presbyterian Hospital, 165 N. Y. 296, 80 Am. St. Rep. 723, affirming 29 N. Y. App. Div. 630; Jewett v. Crane, 35 Barb. (N. Y.) 208.

12. **Creditor Not Compelled by Surety to Apply Payments.** — Martin v. Pope, 6 Ala. 533, 41 Am. Dec. 66; Brewer v. Knapp, 1 Pick. (Mass.) 332; Grasser, etc., Brewing Co. v. Rogers, 112 Mich. 112, 67 Am. St. Rep. 389; James v. Malone, 1 Bailey L. (S. Car.) 334; Pelzer v. Steadman, 22 S. Car. 286; Zinns Mfg. Co. v. Mendelson, 89 Wis. 135. But see Riner v. New Hampshire F. Ins. Co., 9 Wyo. 81, affirmed on rehearing 9 Wyo. 446.

13. **Tolerton, etc., Co. v. Roberts,** 115 Iowa 474, 91 Am. St. Rep. 171; Noble v. Murphy, 91 Mich. 653, 30 Am. St. Rep. 507. But see Anaheim Union Water Co. v. Parker, 101 Cal. 483.

**On Foreclosure,** proceeds applied on debt pri-

the obligor;<sup>1</sup> but a direction by the debtor must be followed.<sup>2</sup> The payment by a collector of taxes of the amount collected on taxes due in a certain year upon the tax bills of former years, constitutes no defense to an action against the surety on his bond for that year.<sup>3</sup> When the defalcations of the principal exceed the amount of the bond, the creditor need not credit the amount due on the bond with an amount realized from the assets of the principal, but may recover from the sureties the full amount of the bond.<sup>4</sup> When the creditor has collected a sum of money by action against the principal debtor, he may, as against the surety, deduct from the sum realized by execution against the principal debtor the costs of the recovery.<sup>5</sup>

**4. Assignment of Contract.** — A surety, in executing a writing assignable in its character, cannot be considered as intending to limit its use to the payee.<sup>6</sup> The assignee of a note signed by a surety acquires only such rights as were possessed by the assignor, and the surety may set up any facts going to his discharge of which the assignee had knowledge.<sup>7</sup>

**5. Estoppel of Surety — a. IN GENERAL.** — A surety is estopped from pleading that he signed the note in ignorance of his legal rights,<sup>8</sup> or under a mistake as to the legal effect of the bond;<sup>9</sup> that the principal had no authority to sign the obligation,<sup>10</sup> or that he signed under duress;<sup>11</sup> he cannot set up a defense that the principal cannot make;<sup>12</sup> and when he has been sued at law, and makes his defense, which is overruled as insufficient, he cannot afterwards, on the same facts, obtain relief in equity.<sup>13</sup> When the surety is fully secured, by property in his hands, he is estopped from objecting to any enlargement of the time of payment, made by arrangement between the creditor and the principal.<sup>14</sup>

**b. BY SIGNING AS PRINCIPAL.** — A surety who has placed himself in the position of a principal by expressly declaring upon his contract that he binds himself as such, is estopped to set up a defense that he signed merely as

marily intended to be secured. *Jackson v. May*, 28 Ill. App. 305.

**A Case of Single Indebtedness,** as where judgment is given against the principal for more than the liability of the surety, is not one for the appropriation of payments. *School Trustees v. Smith*, 88 Ill. 181.

**1. Circumstances Show Application Was Intended.** — *Mellendy v. Austin*, 69 Ill. 15; *Hansen v. Rounsavell*, 74 Ill. 238; *Chaffee v. Taliaferro*, 58 Miss. 544. See *Dr. Blair Medical Co. v. U. S. Fidelity, etc., Co.*, (Iowa 1902) 89 N. W. Rep. 20. See also *Hecox v. Citizens' Ins. Co.*, 9 Biss. (U. S.) 421, where it was held that money remitted by an insurance agent on current business cannot be entered as credits on defaults of the agent previous to the execution of the bond, so as to render the sureties liable; *Rockford Ins. Co. v. Rogers*, 15 Colo. App. 27; *Riner v. New Hampshire F. Ins. Co.*, 9 Wyo. 81, affirmed on rehearing.

**2. Direction by Debtor Must Be Followed.** — *McDonald v. Pickett*, 2 Bailey L. (S. Car.) 617.

**Money Contributed by Surety to principal** for the payment of the debt, with direction as to its application. *Reed v. Boardman*, 20 Pick. (Mass.) 441.

**3. Taxes Collected Applied on Previous Year's Tax Bills.** — *Montpelier v. Clarke*, 67 Vt. 479. See also *Frost v. Mixsell*, 38 N. J. Eq. 586, that in the absence of a direction by the creditor or debtor, the law will apply to the oldest debt collections paid in by a collector of taxes.

**4. When Defalcations Exceed Amount of Bond.** — *Phillips v. Bossard*, 35 Fed. Rep. 99.

**5. May Pay Costs Out of Sum Realized by Suit.** — *Mosher v. Hotchkiss*, 3 Abb. App. Dec. (N. Y.) 326.

**6. Smith v. Moberly**, 10 B. Mon. (Ky.) 271. See also *Dixon v. Sims*, (Tenn. Ch. 1901) 61 S. W. Rep. 1052.

**Assignment of Claims of Laborers and Materialmen to Bank.** — Sureties on contractor's bond, given under the Act of Congress approved Aug. 13, 1894, were held liable. *U. S. v. Rundle*, (C. C. A.) 100 Fed. Rep. 400.

**7. Hale v. Aldaffer**, 5 Kan. App. 40. See also *Cummings v. Little*, 45 Me. 186.

**8. Signed in Ignorance of Legal Rights.** — *Bowers v. Cobb*, 31 Fed. Rep. 678.

**Not Estopped to Set Up Ignorance as to Facts.** — *Blaney v. Rogers*, 174 Mass. 277.

**9. Under Mistake as to Legal Effect of Bond.** — *Nevin v. Fouché*, 77 Ga. 47.

**10. Authority of Principal to Sign.** — *Klein v. German Nat. Bank*, 69 Ark. 140.

**11. Principal Signed under Duress.** — *Thompson v. Buckhannon*, 2 J. J. Marsh. (Ky.) 416.

**12. Cannot Set Up Defense Principal Cannot Make.** — *Evans v. Keeland*, 9 Ala. 46. See also *Van Kirk v. Adler*, 111 Ala. 104; *Dillingham v. Jenkins*, 7 Smed. & M. (Miss.) 479.

**13. Effect of Judgment at Law.** — *King v. Baldwin*, 2 Johns. Ch. (N. Y.) 554.

**14. Having Security, Cannot Set Up Extension of Time as Discharge.** — *Smith v. Steele*, 25 Vt. 427, 60 Am. Dec. 276; *McDougall v. Walling*, 21 Wash. 478, 75 Am. St. Rep. 849. See *Campbell Printing-Press, etc., Co. v. Powell*, (Tex. Civ. App. 1893) 24 S. W. Rep. 965.

surety.<sup>1</sup> To sealed instruments all parties are principals, unless it appear on the face of the instrument that some are sureties, and they are estopped by their seals.<sup>2</sup> When notes are signed in such a manner as not to show on their face that some of the signers are sureties, and a holder has had express or implied notice of the fact that any of them are sureties, the fact may be proved by parol evidence.<sup>3</sup>

c. BY RECITALS.<sup>4</sup> — A surety is estopped to deny the facts recited in his obligation.<sup>5</sup> On a bond for the release of an attachment the surety cannot deny that an attachment issued.<sup>6</sup> By signing a note to pay a judgment the surety cannot attack the validity of the judgment.<sup>7</sup> A surety on a bond issued or taken by a municipal corporation cannot make the defense of *ultra vires* or total lack of power on the part of the corporation,<sup>8</sup> or that it transcended its municipal powers;<sup>9</sup> he is estopped from defending on the ground that, in letting a municipal contract, legal formalities had not been complied with.<sup>10</sup>

d. PRINCIPAL UNDER DISABILITY. — A person who becomes surety on the obligation of a married woman, a minor, or other person incapable of contracting, cannot set up the defense that the obligation is void on account of the disability of the principal,<sup>11</sup> where there is no fraud, duress, deceit, violation of law or public policy, on the part of the payee in procuring the note.<sup>12</sup>

e. FORGERY. — By signing his name on an obligation a surety sanctions and affirms the genuineness of the previous signatures, and is estopped to set up their forgery, of which the creditor had no notice.<sup>13</sup> But a person whose

1. *By Signing as Principal.* — Sprigg v. Mt. Pleasant Bank, 10 Pet. (U. S.) 265; Chamblee v. Davie, 88 Ga. 205; Menaugh v. Chandler, 89 Ind. 94; Waterville Bank v. Redington, 52 Me. 466; Picot v. Signiogo, 22 Mo. 587; McMillan v. Parkell, 64 Mo. 286; Derry Bank v. Baldwin, 41 N. H. 434; Claremont Bank v. Wood, 10 Vt. 582; Arbuckle v. Templeton, 65 Vt. 205. See also Patterson v. Clark, 101 Ga. 214.

As Against an Assignee. — Piper v. Headlee, 39 Ill. App. 93.

2. *Sealed Instruments.* — Willis v. Ives, 1 Smed. & M. (Miss.) 307. See also Neel v. Harding, 2 Met. (Ky.) 247; Davis v. Mikell, Freem. (Miss.) 548. But see Metzner v. Baldwin, 11 Minn. 150, as to evidence of the fact of suretyship.

3. *May Show Notice of Fact of Suretyship.* — Cummings v. Little, 45 Me. 186.

In an Action on the Contract, the creditor will not be held at law bound to treat as sureties those who contracted as principals, merely because they were in fact or became sureties to his knowledge. The remedy is in chancery. Shute v. Taylor, 61 N. J. L. 256.

4. See title RECITALS, vol. 24, p. 67.

5. *Cannot Deny Facts Recited.* — Collins v. Mitchell, 5 Fla. 364; Willis v. Rivers, 80 Ga. 556; May v. May, 19 Fla. 373; Coleman v. People, 78 Ill. App. 215; Brockway v. Petted, 79 Mich. 620; St. Louis County v. American Loan, etc., Co., 75 Minn. 489; Thompson v. Rush, (Neb. 1902) 92 N. W. Rep. 1060; Seiple v. Elizabeth, 27 N. J. L. 407; Charities, etc., Com'rs v. O'Rourke, 34 Hun (N. Y.) 349; Lee v. Clark, 1 Hill (N. Y.) 56; Decker v. Judson, 16 N. Y. 439; Cocks v. Barker, 49 N. Y. 107; Weaver v. Ruhm, (Tenn. Ch. 1897) 47 S. W. Rep. 171; Cordle v. Burch, 10 Gratt. (Va.) 480.

6. Coleman v. Bean, 1 Abb. App. Dec. (N. Y.) 394. See also Harrison v. Wilkin, 69 N. Y. 412,

as to a replevin bond; and Washington Ice Co. v. Webster, 125 U. S. 426, as to the value of the property stated.

7. *Cannot Deny Validity of Judgment for Which Note Given.* — Apperson v. Gogin, 3 Ill. App. 48.

8. *Authority of Municipal Corporation.* — Wilson v. Monticello, 85 Ind. 13; American Surety Co. v. Lauber, 22 Ind. App. 329; Hendersonville v. Price, 96 N. Car. 423; Madison v. American Sanitary Engineering Co., (Wis. 1903) 95 N. W. Rep. 1097.

9. Indianapolis v. Skeen, 17 Ind. 632; Middleton v. State, 120 Ind. 166; Homer v. Merritt, 27 La. Ann. 568.

10. Madison v. American Sanitary Engineering Co., (Wis. 1903) 95 N. W. Rep. 1097.

11. *Principal under Disability of Coverture, Minority, Etc.* — Arkansas. — Stillwell v. Bertrand, 22 Ark. 375.

Iowa. — Jones v. Crosthwaite, 17 Iowa 393.

Kentucky. — Robinson v. Robinson, 11 Bush (Ky.) 174.

Massachusetts. — Winn v. Sanford, 145 Mass. 302, 1 Am. St. Rep. 461.

Mississippi. — Whitworth v. Carter, 43 Miss. 61; Foxworth v. Bullock, 44 Miss. 457.

Pennsylvania. — Wiggins's Appeal, 100 Pa. St. 155.

South Carolina. — Smyley v. Head, 2 Rich. L. (S. Car.) 590, 45 Am. Dec. 750.

Tennessee. — Hicks v. Randolph, 3 Baxt. (Tenn.) 352, 27 Am. Rep. 760.

Vermont. — St. Albans Bank v. Dillon, 30 Vt. 122, 73 Am. Dec. 295; Noble v. Scofield, 44 Vt. 281.

Virginia. — Kyger v. Sipe, 89 Va. 507.

12. Davis v. Statts, 43 Ind. 103, 13 Am. Rep. 382.

13. *Cannot Attack Genuineness of Previous Signatures.* — Selser v. Brock, 3 Ohio St. 302; Arthur v. Sherman, 11 Wash. 254.

name has been signed as surety is not estopped from setting up the defense that it was not signed by him or by his authorized agent<sup>1</sup> unless he purposely kept from the holder of the note the information that the signature thereto was not genuine.<sup>2</sup>

**6. Contractual Limitation.** — A clause of an indemnity contract providing that in the event of the death or dismissal of the employee the right to make a claim thereunder shall cease at the end of six months from such time, is a reasonable and material condition, and the terms of the contract should be fulfilled.<sup>3</sup> A letter from the president of the employing company merely informing the surety that the books and accounts of the company were being examined, and that a report of the result would be made as soon as such examination was completed, is not such a claim as is contemplated by the contract.<sup>4</sup> When a bond contains a provision that any claim under the bond shall "embrace and cover only for acts and defaults committed \* \* \* within twelve months next before the date of the discovery of the act or default upon which such claim is based," the surety is not liable for defaults extending over a longer period than one year, though the misconduct of the officer prevent discovery of previous embezzlements.<sup>5</sup>

**IV. RIGHTS AND REMEDIES AS BETWEEN SURETY AND PRINCIPAL — 1. Rights of Surety — a. IN GENERAL.** — A surety paying the debt, after the default of his principal, has a right of action against the latter for reimbursement. In the absence of an express agreement to reimburse, the law raises or implies a promise to that effect,<sup>6</sup> even though the relationship of principal and surety was not created at the request of the former, but existed merely with his assent, expressly or impliedly given.<sup>7</sup> The implied contract of indemnity arises and takes effect from the time when the surety becomes bound, and the surety becomes a creditor of his principal from that time.<sup>8</sup> The payment of the

**1. May Set Up Forgery of His Own Signature.** — *English v. Dycus*, (Ky. 1887) 5 S. W. Rep. 44.

**2. Maxwell v. Wright**, (Ind. App. 1902) 64 N. E. Rep. 893.

**3. Must Sue Within Six Months.** — *California Sav. Bank v. American Surety Co.*, 87 Fed. Rep. 118; *Granite Bldg. Co. v. Saville*, (Va. 1903) 43 S. E. Rep. 351. See also *Fidelity, etc., Co. v. Courtney*, 186 U. S. 342, *affirming* (C. C. A.) 103 Fed. Rep. 599, as to filing claim "as soon as practicable."

**4. What Is a Sufficient Claim.** — *Granite Bldg. Co. v. Saville*, (Va. 1903) 43 S. E. Rep. 351.

**5. For Defaults Committed Within Twelve Months.** — *Fidelity, etc., Co. v. Consolidated Nat. Bank*, (C. C. A.) 71 Fed. Rep. 116, *reversing* 67 Fed. Rep. 874.

**6. Right of Action of Surety — Alabama.** — *Martin v. Ellerbe*, 70 Ala. 326.

*Georgia.* — *King v. McGehee*, 99 Ga. 621.

*Iowa.* — *Johnston v. Belden*, 49 Iowa 301.

*Mississippi.* — *May v. Williams*, 61 Miss. 125, 48 Am. Rep. 80.

*Missouri.* — *Halliburton v. Carter*, 55 Mo. 435; *Bauer v. Gray*, 18 Mo. App. 164; *Mosely v. Fullerton*, 59 Mo. App. 143.

*Ohio.* — *Poe v. Dixon*, 60 Ohio St. 124, 71 Am. St. Rep. 713.

*Pennsylvania.* — *Wynn v. Brooke*, 5 Rawle (Pa.) 106.

*Texas.* — *Willis v. Chowning*, 90 Tex. 617, 59 Am. St. Rep. 842.

*West Virginia.* — *Butler v. Butler*, 8 W. Va. 674.

See also, citing additional cases, the title

CONTRIBUTION AND EXONERATION, vol. 7, p. 345.

**Where a Surety Becomes Bankrupt** and his assignee makes no claim against the principal for reimbursement, the surety after his discharge may recover from the principal for the amount paid by him, the assignee's right of action being barred by limitation. *Coleman v. Riggs*, 61 Iowa 543.

**A Surety on a Replevin Bond** may recover from the principal though he knew the replevin suit to be groundless and malicious. *Smith v. Rines*, 32 Me. 177.

**7. Assent of Principal Creates Liability.** — *Powers v. Nash*, 37 Me. 322; *Hecker v. Mahler*, 64 Ohio St. 398. Compare *Carter v. Black*, 4 Dev. & B. L. (20 N. Car.) 425; *White v. White*, 30 Vt. 338.

**Though the Surety's Own Illegal Act Necessitates the Suretyship**, he is not thereby estopped from recovering from the principal any amount he is compelled to pay out because of his suretyship. *Green v. Schoenhofen Brewing Co.*, 103 Iowa 252.

**8. When Surety Becomes Creditor of Principal.** — *In re Stout*, 109 Fed. Rep. 794; *May v. Williams*, 61 Miss. 125, 48 Am. Rep. 80; *Elwood v. Deifendorf*, 5 Barb. (N. Y.) 398; *Poe v. Dixon*, 60 Ohio St. 124, 71 Am. St. Rep. 713; *Barney v. Grover*, 28 Vt. 391. Compare *Derouen v. Norres*, 40 La. Ann. 1131; *Hearne v. Keath*, 63 Mo. 84; *Burckhardt v. Helfrich*, 77 Mo. 376; *Bauer v. Gray*, 18 Mo. App. 164. See also the title CONTRIBUTION AND EXONERATION, vol. 7, p. 347, and *infra*, this section, *Remedies of Surety — In Equity*.

debt creates no new contract, but relates back to the date of the suretyship.<sup>1</sup> The surety may recover only from him for whom he actually became bound, and has no claim upon a third person who merely benefited by the suretyship. Thus, a surety for one of two partners cannot recover from the partnership though the obligation was given for a partnership debt,<sup>2</sup> nor has a surety on the custom-house bond of a consignee of goods any remedy against the owner of such goods unless he was requested by the latter to become surety.<sup>3</sup> But an undisclosed principal in the original obligation is liable to the surety.<sup>4</sup>

**Recovery from Estate of Principal.** — If the surety pays the debt after the death of his principal, he may recover from the latter's executors, heirs, or devisees.<sup>5</sup>

**Notice and Demand.** — Failure to notify the principal of an action brought against the surety is not fatal to the surety's right of reimbursement.<sup>6</sup> If, however, the surety confesses judgment or submits to judgment by default without giving the principal notice and opportunity to defend, he assumes the burden of establishing the validity of the original debt in his own action against the principal.<sup>7</sup> The surety need not notify his principal that he has paid the debt,<sup>8</sup> nor need he demand payment of the amount,<sup>9</sup> before suing. But he may not sue upon partial payments without notice and demand.<sup>10</sup>

**When Surety May Not Recover.** — The surety has no claim against his principal when he has been released from liability;<sup>11</sup> or when the principal has paid a judgment against them both;<sup>12</sup> or when principal and sureties were partners in the transaction;<sup>13</sup> or when the surety assumed the debt in purchasing property from the principal;<sup>14</sup> or when the principal has made a general assignment in consideration of his release from all liability to the surety;<sup>15</sup> or when the surety has been released by the creditor.<sup>16</sup> But in *Indiana* an agreement between surety and principal, by which the surety agrees to surrender to the principal certain notes of his if the latter will secure the surety's release from liability from the debt on which he is surety, has been held to be without consideration moving from the principal and cannot be set up by him as a defense.<sup>17</sup>

**When Surety Not Liable for Debt.** — When the surety might have defeated recovery against himself upon the original obligation, he cannot ask his principal for indemnity,<sup>18</sup> though it has been held that the failure by the surety to set up a

1. **Relation Back of Payment.** — Washburn v. Blundell, 75 Miss. 266.

2. **Surety for Partner.** — Asbury v. Fleisher, 11 Mo. 610; Tom v. Goodrich, 2 Johns. (N. Y.) 213; Krafts v. Creighton, 3 Rich. L. (S. Car.) 273. Compare Burns v. Parish, 3 B. Mon. (Ky.) 8. See also Hoskins v. Parsons, 1 Metc. (Ky.) 251.

3. **Surety for Consignee of Goods.** — Knox v. Devens, 5 Mason (U. S.) 380.

4. **Undisclosed Principal.** — City Trust, etc., Co. v. American Brewing Co., 70 N. Y. App. Div. 511. Compare Childs v. Shoemaker, 1 Wash. (U. S.) 494.

5. See *infra*, this section, *Remedies of Surety*.

6. **Surety Need Not Notify Principal of Suit.** — Riley v. Stallworth, 56 Ala. 481; Holmes v. Weed, 19 Barb. (N. Y.) 128; Newnan v. Campbell, Mart. & Y. (Tenn.) 63. See also *infra*, this section, *Extent of Principal's Liability — Costs and Expenses*, and the title CONTRIBUTION AND EXONERATION, vol. 7, p. 348, note.

7. **Effect of Failure to Notify Principal.** — Riley v. Stallworth, 56 Ala. 481.

8. **Notice of Payment of Debt Unnecessary.** — Ward v. Henry, 5 Conn. 595, 13 Am. Dec. 119.

9. **Demand of Payment.** — Odlin v. Greenleaf, 3 N. H. 270; Williams v. Williams, 5 Ohio 444.

See also the title CONTRIBUTION AND EXONERATION, vol. 7, p. 348, note.

10. Williams v. Williams, 5 Ohio 444.

11. A surety who has borrowed money from A. to pay the debt for which he was surety has no claim against his principal when the latter has, by repaying the money borrowed of A., released the surety from all liability. Morrison v. Cassell, 25 Ill. 368.

12. Putney v. McDow, 52 S. Car. 540.

13. Pollard v. Stanton, 5 Ala. 451.

**Connivance of Surety.** — The surety on a bond cannot recover from his principal the amount of a *devastavit* committed with the connivance of the surety. Tighe v. Morrison, 116 N. Y. 263.

14. Lewis v. Lewis, 92 Ill. 237. See also U. S. Bank v. Stewart, 4 Dana (Ky.) 27.

15. Lange v. Perley, 47 Mich. 352.

16. Mathews v. Ritenour, 31 Ind. 31.

17. Ritenour v. Mathews, 42 Ind. 7, holding that the agreement was without consideration, as the principal was already bound to do what he did — indemnify the surety.

18. **When Surety Might Have Evaded Payment.** — Hollinsbee v. Ritchey, 49 Ind. 261; Kimble v. Cummins, 3 Met. (Ky.) 327; May v. Ball, 108 Ky. 180; Hatchett v. Pegram, 21 La. Ann. 722; Postell v. Ramsay, 1 Treadw. Const. (S. Car.) 429; Randolph v. Randolph, 3 Rand. (Va.) 490.

defense not available to the principal is not a bar to his right of recovery.<sup>1</sup> The principal, however, cannot complain that the surety did not defend, without showing that a defense would have been of avail.<sup>2</sup> Nor can he escape liability because the surety failed to make technical objections to the instrument by which the latter was bound,<sup>3</sup> or because the original suit, to which the principal was a party, was not skillfully managed.<sup>4</sup>

**When Principal Not Liable for Debt.** — Until the principal is in default, either on his contract with the creditor or on his contract with the surety, he is not bound to indemnify the latter.<sup>5</sup> And if the surety pays a debt for which the principal was not liable, he does not pay the latter's debt, but merely his own, and cannot recover.<sup>6</sup> On this point, however, the authorities are not uniform, some holding that though the principal be not liable, yet if the surety be compelled to pay, he is entitled to reimbursement.<sup>7</sup> The surety cannot be deprived of his right to indemnity because of the neglect of the principal's attorneys in defending the suit,<sup>8</sup> nor because of a secret agreement between principal and creditor, releasing the former, of which the surety was ignorant.<sup>9</sup> When the principal suffers judgment by default, he admits his liability upon the debt and cannot thereafter defend against the surety on the ground that the latter did not oppose judgment.<sup>10</sup>

**Where the Principal Buys Property of the Surety** sold under execution against them both, he cannot set up title thereto against the surety, as he has merely paid his own debt.<sup>11</sup> But there is no objection to the purchase by the surety of property of the principal sold under similar circumstances.<sup>12</sup>

**b. AS DEPENDENT UPON PAYMENT BY SURETY** — (1) *Necessity of Payment.* — The right of the surety to call upon the principal for indemnity does not accrue until the surety has paid the whole or part of the debt,<sup>13</sup> or has been in

See also *infra*, this subsection, *c. As to Collateral Security.*

**The Surety on a Forthcoming Bond** is not entitled to recover from the principal the amount of the execution paid by him, as the obligation of the bond is only for the delivery of property. *Gray v. Bowls*, 1 Dev. & B. L. (18 N. Car.) 437.

**Failure to Defend Disputed Claim.** — Where a suit is pending against principal and surety on a disputed claim and the surety compromises the same as to himself, he can recover the amount so paid from his principal if his liability for the debt be eventually shown. *Bancroft v. Pearce*, 27 Vt. 668.

1. *Shaw v. Loud*, 12 Mass. 447.

2. *Doran v. Davis*, 43 Iowa 86.

3. *Reynolds v. Harral*, 2 Strobb. L. (S. Car.) 87.

4. *Rice v. Rice*, 14 B. Mon. (Ky.) 335.

5. *Campbell v. Macomb*, 4 Johns. Ch. (N. Y.) 534.

6. **When Principal Not Liable for Debt.** — *Stone v. Hammell*, 83 Cal. 547, 17 Am. St. Rep. 272; *Hollinsbee v. Ritchey*, 49 Ind. 261; *Sponhaur v. Malloy*, 21 Ind. App. 287; *Clason v. Kehoe*, 87 Hun (N. Y.) 368.

**Sureties of a Married Woman** cannot recover from her if the creditor could not. *Sellers v. Heinbaugh*, 117 Pa. St. 218; *Cureton v. Moore*, 2 Jones Eq. (N. Car.) 204.

7. **Principal Liable When Surety Compelled to Pay.** — *Frith v. Sprague*, 14 Mass. 455; *Stinson v. Brennan*, Cheves L. (S. Car.) 15; *Peters v. Barnhill*, 1 Hill L. (S. Car.) 234; *Marshall v. Hudson*, 9 Yerg. (Tenn.) 57; *Willis v. Chowning*, 90 Tex. 617, 59 Am. St. Rep. 842. See also *infra*, this section, *Extent of Principal's Liability* — *Interest and Usury.*

8. *Odell v. Mundy*, 59 Ga. 641.

9. *Hyde v. Miller*, 45 N. Y. App. Div. 396, affirmed 168 N. Y. 590.

10. *Reynolds v. Harral*, 2 Strobb. L. (S. Car.) 87.

11. **Purchase by Principal of Property of Surety.** — *Pond v. Wadsworth*, 24 Ala. 531; *Madgett v. Fleenor*, 90 Ind. 517; *Perry v. Yarbrough*, 3 Jones Eq. (56 N. Car.) 66.

12. *Carlos v. Ansley*, 8 Ala. 900.

13. **Surety Must Have Paid Whole or Part of Debt** — *United States*. — *Horton v. Sayward*, 66 Fed. Rep. 265.

*Alabama*. — *Tyree v. Parham*, 66 Ala. 424.

*California*. — *Matter of Hill*, 67 Cal. 238.

*Illinois*. — *Shepard v. Ogden*, 3 Ill. 257; *Bonham v. Galloway*, 13 Ill. 68.

*Indiana*. — *Stearns v. Irwin*, 62 Ind. 558; *Covey v. Neff*, 63 Ind. 391.

*Kentucky*. — *Walker v. McKay*, 2 Met. (Ky.) 294.

*Maine*. — *Ingalls v. Dennett*, 6 Me. 79.

*Maryland*. — *Gillespie v. Creswell*, 12 Gill & J. (Md.) 36.

*Massachusetts*. — *Hoyt v. Wilkinson*, 10 Pick. (Mass.) 31.

*Nebraska*. — *Minick v. Huff*, 41 Neb. 516.

*New Hampshire*. — *Child v. Eureka Powder Works*, 44 N. H. 354.

*New Jersey*. — *Delaware, etc., R. Co. v. Oxford Iron Co.*, 38 N. J. Eq. 151.

*New York*. — *Crampton v. Foster*, 29 N. Y. App. Div. 215; *Crafts v. Mott*, 5 Barb. (N. Y.) 305; *Elwood v. Diefendorf*, 5 Barb. (N. Y.) 398; *Powell v. Smith*, 8 Johns. (N. Y.) 249.

*North Carolina*. — *Green v. Williams*, 11 Ired. L. (33 N. Car.) 139; *Ponder v. Carter*, 12 Ired. L. (34 N. Car.) 242.

some manner actually damnified;<sup>1</sup> and payment by the surety after he has brought suit against the principal for indemnity is not sufficient.<sup>2</sup> But if the principal has broken an express agreement to do or refrain from doing some particular act, or to save the surety from some particular charge or liability, the surety may sue before he has paid the debt.<sup>3</sup> An express promise by the principal to pay the surety upon demand, in consideration of the outstanding liability of the latter, is valid<sup>4</sup> and enforceable by the surety before the maturity of such liability.<sup>5</sup>

(2) *What Constitutes Payment.*—The surety need not pay the debt in money in order to recover the amount thereof from his principal. Whatever discharges the liability of the principal to the creditor and is accepted by the latter as a payment is sufficient.<sup>6</sup> Thus, the surety may pay in land,<sup>7</sup> or he may give his note,<sup>8</sup> bond,<sup>9</sup> or other negotiable security in extinguishment of

*Ohio.*—*Stump v. Rogers*, 1 Ohio 533; *Poe v. Dixon*, 60 Ohio St. 124, 71 Am. St. Rep. 713.

*Pennsylvania.*—*Miller v. Howry*, 3 P. & W. (Pa.) 374, 24 Am. Dec. 320.

*South Carolina.*—*Hellams v. Abercrombie*, 15 S. Car. 110, 40 Am. Rep. 684.

*Tennessee.*—*Marshall v. Hudson*, 9 Yerg. (Tenn.) 57.

*Texas.*—*Saunders v. Ireland*, 87 Tex. 316; *Willis v. Chowning*, 90 Tex. 617, 59 Am. St. Rep. 842.

*Vermont.*—*Bullard v. Brown*, 74 Vt. 120.

*Wisconsin.*—*Barth v. Graf*, 101 Wis. 27.

*Presumption as to Payment of Obligation in Possession of Surety.*—*Landrum v. Brookshire*, 1 Stew. (Ala.) 252; *Waldrip v. Black*, 74 Cal. 409; *Heaton v. Ainley*, (Iowa 1898) 74 N. W. Rep. 766. See also the title PAYMENT, vol. 22, p. 589.

*Purpose of Payment.*—It is not necessary for a surety who has paid the debt of his principal to show that his only purpose in paying was to relieve his principal from his obligation. *Lange v. Perley*, 47 Mich. 352.

*Acts to Be Performed by Surety in discharge of debt must be performed before surety can sue principal.* *Hearne v. Keath*, 63 Mo. 84.

*Attachment will not lie before payment of debt.* *Newell v. Morrow*, 9 Wyo. 1; *Hearne v. Keath*, 63 Mo. 84.

*Garnishment will not lie before payment of debt.* *Mudd v. Rogers*, 10 La. Ann. 648.

*In Louisiana*, by statute, a surety may, before making any payment, bring a suit against the debtor to be indemnified by him, either when the surety has been sued, or when the debtor is insolvent, or when the debtor is bound to discharge him within a certain time, or when the debt has become due, or at the expiration of ten years when the principal obligation is of the nature to last a longer time. *Edwards v. Prather*, 22 La. Ann. 334.

*In Oklahoma*, by statute, a surety may maintain an action against his principal to obtain indemnity against a debt or obligation for which he is bound, before it is due, and without having first paid or satisfied the same, whenever any of the grounds exist upon which an order of attachment may issue. *Walton v. Williams*, 5 Okla. 642.

*Judgment Over Against Principal.*—In an action brought against principal and surety, in which judgment is rendered against both, it is error to also enter judgment in favor of the

surety against the principal for the full amount without reference to whether the surety should satisfy the judgment against his principal. *Labbe v. Corbett*, 69 Tex. 503.

1. *Surety Must Have Been Actually Damnified.*—*Ward v. Henry*, 5 Conn. 595, 13 Am. Dec. 119; *Darst v. Bates*, 51 Ill. 439; *Stevens v. Hurlburt*, 25 Ill. App. 124; *Buford v. Francisco*, 3 Dana (Ky.) 68; *Twibill's Succession*, 14 La. Ann. 655; *Woodbridge v. Scott*, 3 Brev. (S. Car.) 193. See also *infra*, this section, *Remedies of Surety—In Equity*.

2. *Dennison v. Soper*, 33 Iowa 183.

3. *Barth v. Graf*, 101 Wis. 27.

4. *Gladwin v. Gladwin*, 13 Cal. 330.

5. *Little v. Little*, 13 Pick. (Mass.) 426.

6. *What Is Sufficient Payment.*—*Knighton v. Curry*, 62 Ala. 404; *Hulett v. Soullard*, 26 Vt. 295. See generally the title PAYMENT, vol. 22, p. 538 *et seq.*

*When Relation of Debtor and Creditor Merged.*—Where a judgment is rendered against principal and surety, and the surety thereafter takes the place of the judgment creditor, so that the relation of debtor and creditor centres in one person, the law pronounces the debt paid, and such payment is sufficient to warrant an action by the surety against the principal to recover the amount thereof. *Lane v. Westmoreland*, 79 Ala. 372. See also the title PAYMENT, vol. 22, p. 577.

7. *Land as Payment.*—*Lord v. Staples*, 23 N. H. 448; *Bonney v. Seeley*, 2 Wend. (N. Y.) 481; *Ainslie v. Wilson*, 7 Cow. (N. Y.) 662, 17 Am. Dec. 532.

*Land Subjected to Payment After Conveyance.*—Where a surety has conveyed his land in fraud of creditors, but such conveyance is set aside and the land subjected to the payment of a judgment recovered against him as surety, he will be considered nevertheless to have paid the debt of his principal. *State Bank v. Davis*, 4 Ind. 653.

8. *Note as Payment.*—*Knighton v. Curry*, 62 Ala. 404; *Coburn v. Parker*, 11 Gray (Mass.) 335; *Cornwall v. Gould*, 4 Pick. (Mass.) 444; *Brooks v. King*, 1 Jones L. (N. Car.) 45; *Miller v. Howry*, 3 P. & W. (Pa.) 374, 24 Am. Dec. 320; *Feamster v. Withrow*, 12 W. Va. 611. See also the title CONTRIBUTION AND EXONERATION, vol. 7, p. 349.

*The Note May Be Invalid and Uncollectible*, but it is nevertheless a payment. *Hardin v. Branner*, 25 Iowa 364.

9. *Dodd v. Wilson*, 4 Del. Ch. 108.

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the debt, and may recover from the principal before the maturity of such obligation.<sup>1</sup> But in some jurisdictions the giving of a non-negotiable note does not constitute a payment.<sup>2</sup> A draft upon the principal, accepted by the creditor, is a sufficient payment although the principal refuses to honor the same.<sup>3</sup> The imprisonment<sup>4</sup> of the surety is not such a satisfaction of the debt as will warrant suit against the surety, nor does a mere promise<sup>5</sup> by the surety to pay the creditor amount to a payment. The obligation of the principal to the surety not being indivisible, the latter may have relief upon making partial payments.<sup>6</sup> Payment directly to the creditor is not essential. Reimbursement of a stranger who has paid the debt,<sup>7</sup> or contribution to a cosurety,<sup>8</sup> will suffice to give the surety a right of action.

(3) *Time of Payment.* — The surety must wait until he is legally liable to pay or subject to be coerced to pay before he discharges the debt.<sup>9</sup> He need not, however, wait until he has been sued, unless warned by the principal not to pay,<sup>10</sup> nor need he wait longer than the maturity of the debt<sup>11</sup> or the default of the principal.<sup>12</sup> If the surety voluntarily pays the debt before its maturity, he cannot sue the principal until maturity.<sup>13</sup>

c. AS AFFECTED BY INSOLVENCY OF PRINCIPAL. — If the principal becomes insolvent, the surety may have relief though he has not paid the debt.<sup>14</sup> The release of the principal from his debt to the creditor through a discharge in bankruptcy has been held to discharge the claim of the surety to reimbursement.<sup>15</sup>

d. AS AFFECTED BY JUDGMENT AGAINST SURETY. — The rendition of judgment against the surety entitles him to relief without payment thereof,<sup>16</sup> and the judgment is *prima facie* evidence of the surety's right to recover from his principal, whether the latter had<sup>17</sup> or did not have<sup>18</sup> notice of the pending action. A foreign judgment has the same effect.<sup>19</sup> It has been held, however,

1. *Recovery Before Maturity of Note.* — Jordan v. Adams, 7 Ark. 348; Auerbach v. Rogin, (Supm. Ct. App. T.) 40 Misc. (N. Y.) 695; Elwood v. Diefendorf, 5 Barb. (N. Y.) 398; Boulware v. Robinson, 8 Tex. 327, 58 Am. Dec. 117.

2. *Note Must Be Negotiable.* — Pitzer v. Harmon, 8 Blackf. (Ind.) 112, 44 Am. Dec. 738; White v. Miller, 47 Ind. 385; Romine v. Romine, 59 Ind. 346; Nixon v. Beard, 111 Ind. 137; Boulware v. Robinson, 8 Tex. 327, 58 Am. Dec. 117. See also Hommel v. Gamewell, 5 Blackf. (Ind.) 5; Bennett v. Buchanan, 3 Ind. 47. And see the title PAYMENT, vol. 22, p. 560.

3. Sapp v. Aiken, 68 Iowa 699.

4. Powell v. Smith, 8 Johns. (N. Y.) 249.

5. Newell v. Morrow, 9 Wyo. 1.

6. *Partial Payments.* — Wilson v. Crawford, 47 Iowa 469; Pickett v. Bates, 3 La. Ann. 627.

7. Harper v. McVeigh, 82 Va. 751.

But it would seem that a stranger's payment would be voluntary, and the act of the surety in repaying him likewise voluntary and therefore could not be recovered. See the title PAYMENT, vol. 22, p. 609 *et seq.*, and the title CONSIDERATION, vol. 6, p. 688.

8. Stone v. Hammell, (Cal. 1889) 22 Pac. Rep. 203.

9. *When Surety May Pay.* — Lane v. Westmoreland, 79 Ala. 372. See also Weir-Booger Dry Goods Co. v. Kelly, 80 Miss. 64.

10. Martin v. Ellerbe, 70 Ala. 326; Constant v. Matteson, 22 Ill. 546; May v. Ball, 108 Ky. 180; Hazelton v. Valentine, 113 Miss. 472.

11. Nixon v. Beard, 111 Ind. 137; Feamster v. Withrow, 12 W. Va. 611.

12. Gray v. Bowls, 1 Dev. & B. L. (18 N. Car.) 437; Martin v. Ellerbe, 70 Ala. 326.

13. White v. Miller, 47 Ind. 385; Ross v. Menefee, 125 Ind. 432.

14. *Insolvency of Principal.* — Crafts v. Mott, 5 Barb. (N. Y.) 305; Polk v. Gallant, 2 Dev. & B. Eq. (22 N. Car.) 395, 34 Am. Dec. 410; Egerton v. Alley, 6 Ired. Eq. (41 N. Car.) 188. See also *infra*, this section, *Remedies of Surety*.

*Under the Act of 1800*, if the surety paid the debt before the discharge of the principal, he was entitled to preference out of the bankrupt's estate. Reed v. Emory, 1 S. & R. (Pa.) 339.

15. See the title INSOLVENCY AND BANKRUPTCY, vol. 16, p. 793. But see the following additional cases holding that payment made after the principal's discharge creates a new debt: Stone v. Hammell, (Cal. 1889) 22 Pac. Rep. 203; Haddon v. Chambers, 1 Yeates (Pa.) 529, 2 Dall. (Pa.) 236.

16. *Judgment Against Surety.* — Union Trust Co. v. Morrison, 125 U. S. 591; Crawford v. Richeson, 101 Ill. 351; Newnan v. Campbell, Mart. & Y. (Tenn.) 63; Marshall v. Hudson, 9 Yerg. (Tenn.) 57. Compare Hodges v. Armstrong, 3 Dev. L. (14 N. Car.) 253. See also *infra*, this section, *Remedies of Surety*.

17. Konitzky v. Meyer, 49 N. Y. 571. See also Benjamin v. Von Nooy, 36 N. Y. App. Div. 581, affirmed 168 N. Y. 578.

18. Horton v. Sayward, 66 Fed. Rep. 265; Denny v. Sayward, 10 Wash. 422.

19. Edge v. Keith, 13 Smed. & M. (Miss.) 295; Konitzky v. Meyer, 49 N. Y. 571.



that a judgment against the surety does not establish the relation of principal and surety unless the question was expressly adjudicated in the suit.<sup>1</sup>

c. **AS TO COLLATERAL SECURITY.** — A surety may, before the maturity of the debt, procure security against loss,<sup>2</sup> and additional security taken from a stranger or a cosurety is presumed to be cumulative and not exclusive.<sup>3</sup> The outstanding liability of the surety is a sufficient consideration to support a mortgage<sup>4</sup> or an assignment of securities<sup>5</sup> executed by the principal, but not, it seems, a promise by a third person to indemnify the surety.<sup>6</sup> A mortgage of indemnity is not invalid because it covers debts due from the principal to the surety other than the one arising from the suretyship.<sup>7</sup> An indemnity given the surety for a particular debt remains in force though the form of the debt be changed,<sup>8</sup> but will not extend to a new and subsequent debt for which the surety becomes bound.<sup>9</sup>

**Property as Security.** — The rights of a surety in property given him to secure his indemnity are superior to a secret equity in a third person of which the surety had no notice;<sup>10</sup> and a mere agreement to transfer property to the surety gives him an equity therein enforceable against all persons with notice.<sup>11</sup> A surety who holds land as security is entitled merely to the possession thereof. The owner may sell the land and discharge the debt, or, if the surety has received rents and profits therefrom sufficient to satisfy the debt, the owner is entitled to a reconveyance.<sup>12</sup>

**Retention of Security.** — The surety is entitled to retain his collateral indemnity until he is relieved or discharged from liability.<sup>13</sup>

**Assignment of Security.** — The surety may transfer to the creditor security held by him in compromise of the indebtedness,<sup>14</sup> but he cannot assign or transfer his securities to a third person who pays the debt,<sup>15</sup> or to a surety who has superseded him.<sup>16</sup>

**Enforcement of Security.** — The surety may, as soon as he is legally liable to pay the debt because of the default or insolvency of his principal, and without

1. *Edge v. Keith*, 13 Smed. & M. (Miss.) 295.

**Judgment as Merging Relation of Principal and Surety.** — The effect of a judgment against the principal and surety jointly has been held to be to merge the relationship so that thereafter both are principals, and the surety's only remedy is to be substituted to the rights of the creditor after paying the judgment. *Findlay v. U. S. Bank*, 2 McLean (U. S.) 44. But see *Storms v. Thorn*, 3 Barb. (N. Y.) 314.

2. **Right to Procure Security Before Payment.** — *McLaughlin v. Carter*, 13 Tex. Civ. App. 694. See also *Atkinson v. Tomlinson*, 1 Ohio St. 237.

3. **Presumption as to Additional Security.** — *Water Power Co. v. Brown*, 23 Kan. 676; *Hancock v. Holbrook*, 40 La. Ann. 53; *Mosely v. Fullerton*, 59 Mo. App. 143; *Wesley Church v. Moore*, 10 Pa. St. 273.

4. *Simmons Hardware Co. v. Thomas*, 147 Ind. 313.

**Chattel Mortgage.** — *Ferguson v. Union Furnace Co.*, 9 Wend. (N. Y.) 345.

**Mortgage to Additional Sureties.** — *Barker v. Boyd*, (Ky. 1903) 71 S. W. Rep. 528.

**Mortgage by Principal and Third Person.** — *Harlan County v. Whitney*, (Neb. 1902) 90 N. W. Rep. 993.

5. *In re Reynolds*, 16 Nat. Bankr. Reg. 158.

**Deposit of Funds.** — *Keller v. Rhoads*, 39 Pa. St. 513, 80 Am. Dec. 539.

6. *Rix v. Adams*, 9 Vt. 233.

7. *Simmons Hardware Co. v. Thomas*, 147 Ind. 313.

8. *Jarboe v. Shiveley*, 109 Ky. 402. **Security Will Cover Note Executed by Principal for Part Payment by Surety.** — *Bray v. First Ave. Coal Min. Co.*, 148 Ind. 599.

9. *Miller v. Lucas*, 1 Murph. (5 N. Car.) 228.

10. *Phipps v. Mansfield*, 62 Ga. 209; *Dueber Watch Case Mfg. Co. v. Daugherty*, 62 Ohio St. 589.

11. *Dueber Watch Case Mfg. Co. v. Daugherty*, 62 Ohio St. 589.

**Agreement to Transfer in Case Surety Becomes Bound.** — *Newby v. Hill*, 2 Met. (Ky.) 530.

12. *Polhill v. Brown*, 84 Ga. 338. See also *Sellick v. Munson*, 2 Aik. (Vt.) 150, 16 Am. Dec. 689.

13. **Retention of Security until Discharge.** — *Ruble v. Coulter*, 63 Ill. App. 484; *Nourse v. Weitz*, (Iowa 1903) 95 N. W. Rep. 251; *Porter v. Howard*, 1 A. K. Marsh. (Ky.) 358; *Cook v. Casler*, 76 N. Y. App. Div. 279. See also *McNish v. Pope*, 7 Rich. Eq. (S. Car.) 186.

**Discharge by Statute of Limitations.** — *Waller v. Todd*, 3 Dana (Ky.) 503, 28 Am. Dec. 94; *Rucks v. Taylor*, 49 Miss. 552; *Shea v. Fidelity, etc., Co.*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 107.

**Principal Paying Debt May Recover Security.** — *Blackwood v. Brown*, 34 Mich. 4. See also *Owen v. Ashlock*, 9 Port. (Ala.) 417.

14. *Simmons v. Goodrich*, 68 Ga. 750; *Smith v. Kiser*, 98 N. Car. 379.

15. *Heist v. Tobias*, 182 Pa. St. 442, 41 W. N. C. (Pa.) 140.

16. *Bonham v. Galloway*, 13 Ill. 68.

actual payment thereof, enforce security given him for his indemnity,<sup>1</sup> particularly where such security contains an express agreement to pay the amount for which the surety is bound.<sup>2</sup> But until the surety has discharged the debt, he cannot call upon the principal for additional security or a different contract for indemnity.<sup>3</sup> The security may be looked to for only so much of the debt as it was pledged for,<sup>4</sup> and if the surety has gratuitously paid a debt for which he was not liable, the security cannot be enforced at all.<sup>5</sup> Moneys realized upon the foreclosure of security must be devoted to reimbursing claims of the surety resulting from the suretyship to the exclusion of other claims he may have against the principal,<sup>6</sup> and such moneys must be accounted for by the surety before he can recover a balance of the debt from the principal.<sup>7</sup> Prior incumbrances paid by him should be allowed the surety on his accounting.<sup>8</sup> A court of equity may properly decree the application of the proceeds to the payment of the principal indebtedness.<sup>9</sup>

**2. Remedies of Surety — a. AT LAW.** — The general rule is that a surety who has paid a debt of his principal cannot maintain an action at law upon the original obligation, as that is deemed to have been extinguished by the payment.<sup>10</sup> If there is an express contract of indemnity, he may sue on that.<sup>11</sup> Otherwise, his right to relief rests upon the implied promise of reimbursement and he may maintain an action for money paid for the use of the principal.<sup>12</sup>

**1. Security May Be Enforced Before Payment of Debt.** — *Hunter v. Levan*, 11 Cal. 11; *Constat v. Matteson*, 22 Ill. 546; *Roberts v. American Bonding, etc., Co.*, 83 Ill. App. 463; *Bates v. Wiggin*, 37 Kan. 44, 1 Am. St. Rep. 234; *Montgomery's Succession*, 2 La. Ann. 469; *Thurston v. Prentiss*, 1 Mich. 193; *Monell v. Smith*, 5 Cow. (N. Y.) 441; *Bird v. Benton*, 2 Dev. L. (13 N. Car.) 179; *Daniel v. Joyner*, 3 Ired. Eq. (38 N. Car.) 513; *Blanton v. Bostic*, 126 N. Car. 418; *Miller v. Howry*, 3 P. & W. (Pa.) 374, 24 Am. Dec. 320; *Hellams v. Abercrombie*, 15 S. Car. 110, 40 Am. Rep. 684; *In re Reynolds*, 16 Nat. Bankr. Reg. 158.

**Damification Necessary at Law — Unnecessary in Equity.** — *Daniel v. Joyner*, 3 Ired. Eq. (38 N. Car.) 513.

**The Surety Must Have Been Damified** before he can foreclose mortgage security, *Darst v. Bates*, 51 Ill. 439; and the rule is no different where the surety has assigned the mortgage, *Stevens v. Hurlburt*, 25 Ill. App. 124.

**Where the Security Is in Terms Payable on a Day Certain**, the surety may enforce the same when due, though he has not paid the debt, provided he still remains liable to pay it. *Russell v. La Roque*, 11 Ala. 352.

**Where Notes Are Transferred to the Sureties to Collect** the same and hold the proceeds until they are released from liability, they may maintain an action thereon before they have been compelled to pay the debt of the principal. *Klein v. Funk*, 82 Minn. 3.

**2. When Security Contains Agreement to Pay Debt.** — *Gunel v. Cue*, 72 Ind. 34; *Bodkin v. Merit*, 86 Ind. 560; *Waller v. Todd*, 3 Dana (Ky.) 503, 28 Am. Dec. 94.

3. *Nash v. Burchard*, 87 Mich. 85.

4. *Chase v. McDonald*, 7 Har. & J. (Md.) 160.

5. *May v. Ball*, 108 Ky. 180; *Bachelor v. Priest*, 12 Pick. (Mass.) 399.

**When Surety Had Defense Not Available to Principal.** — *Shaw v. Loud*, 12 Mass. 447.

See also *supra*, this section, *Rights of Surety — In General*.

6. *Whipple v. Briggs*, 30 Vt. 111.

7. *Riddle v. Bowman*, 27 N. H. 236.

**Where the Security Proves Worthless**, it is no defense to the principal, in an action by the surety to recover the amount paid by the latter, that the surety failed diligently to prosecute the security. *Taylor v. Cox*, 32 W. Va. 148.

8. *Riddle v. Bowman*, 27 N. H. 236.

9. *Meeker v. Waldron*, 62 Neb. 689. Compare *West v. Rutland Bank*, 19 Vt. 403.

**10. Action Not upon Original Obligation.** — *Sparks v. Childers*, 2 Indian Ter. 187; *Crisfield v. State*, 55 Md. 192; *Rittenhouse v. Levering*, 6 W. & S. (Pa.) 190; *Hill v. Voorhies*, 22 Pa. St. 68. Compare *Stratton v. Heuser*, (Ky. 1897) 42 S. W. Rep. 1133; *Gibbs v. Bryant*, 1 Pick. (Mass.) 118. See also the titles ACCOMMODATION PAPER, vol. 1, p. 352; CONTRIBUTION AND EXONERATION, vol. 7, p. 346.

**Sureties Who Have Paid a Note** have not the right to sue thereon and maintain an action in attachment upon the ground that the claim is on an overdue promissory note. *Fitch v. Hammer*, 17 Colo. 591.

**Accommodation Indorsers** may generally sue either upon the instrument or for money paid. See the title ACCOMMODATION PAPER, vol. 1, p. 354. See also the title BILLS AND NOTES, vol. 4, pp. 497, 498.

11. *Hill v. Wright*, 23 Ark. 530; *Powell v. Smith*, 8 Johns. (N. Y.) 249.

For the general rule that an express contract supersedes an implied contract on the subject-matter, see the title IMPLIED CONTRACTS, vol. 15, p. 1078.

As to contracts to indemnify, see the title INDEMNITY CONTRACTS, vol. 16, p. 167.

**More Forgetfulness** on the part of a surety of an express contract of indemnity given him by his principal will not constitute an abandonment thereof, nor prevent the surety recovering thereon subsequent to payment of the debt by him. *Chadwick v. Manning*, (1896) A. C. 231.

**12. Action upon Implied Contract for Money Paid** — *Alabama*. — *Martin v. Ellerbe*, 70 Ala. 326.

*Illinois*. — *Junker v. Rush*, 136 Ill. 179.

*Indiana*. — *Harker v. Glidewell*, 23 Ind. 219;

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though the debt may have been paid in land or the principal has expressly agreed to repay the surety in land.<sup>1</sup> And the right of the surety to sue upon the implied promise is not impaired by his having taken collateral security, unless it was expressly agreed that such security was to be alone relied upon for reimbursement.<sup>2</sup> An action for money had and received will never lie,<sup>3</sup> nor can the surety sue in tort to escape the defense of a discharge in bankruptcy.<sup>4</sup> The surety must sue in his own name,<sup>5</sup> and must prove the suretyship by the original obligation or otherwise.<sup>6</sup>

**Statutory Provisions** giving remedies to sureties are merely cumulative and do not supersede existing common-law remedies.<sup>7</sup> The claim of the surety does not differ from an ordinary debt, and he has no exceptional right or remedy which does not rest upon a particular statute.<sup>8</sup> Statutes, therefore, providing additional or provisional remedies must be strictly followed.<sup>9</sup>

**If the Principal Be Dead** when the surety pays the indebtedness, the latter may present his claim to the administrator,<sup>10</sup> or he may sue<sup>11</sup> him at once without demand.<sup>12</sup> Upon failure to recover from the principal's representatives, the surety may maintain an action against the devisees.<sup>13</sup>

**b. IN EQUITY.**—The remedy of the surety in equity is not confined, as at law, to the obtaining of indemnity after the payment of the debt. As soon as the debt has become payable, or the surety is endangered, he may file a bill to compel payment by the principal and be thereby relieved from responsibility.<sup>14</sup>

*Gieseke v. Johnson*, 115 Ind. 308; *Goodwin v. Davis*, 15 Ind. App. 120.

*Indian Territory.*—*Sparks v. Childers*, 2 Indian Ter. 187.

*Kentucky.*—*Mudd v. Mullican*, (Ky. 1889) 12 S. W. Rep. 385. See also *Veach v. Wickersham*, 11 Bush (Ky.) 261.

*Missouri.*—*Halliburton v. Carter*, 55 Mo. 435; *Bauer v. Gray*, 18 Mo. App. 164.

*New Hampshire.*—*Pearson v. Parker*, 3 N. H. 366.

*New York.*—*Elwood v. Deifendorf*, 5 Barb. (N. Y.) 398; *Gould v. Gould*, 8 Cow. (N. Y.) 168.

*Ohio.*—*Poe v. Dixon*, 60 Ohio St. 124, 71 Am. St. Rep. 713.

*Texas.*—*Saunders v. Ireland*, 87 Tex. 316; *Willis v. Chowning*, 90 Tex. 617, 59 Am. St. Rep. 842; *Boyd v. Beville*, 91 Tex. 439.

*Vermont.*—*Hulett v. Soullard*, 26 Vt. 295.

See also, citing additional cases, the title CONTRIBUTION AND EXONERATION, vol. 7, p. 346.

**Immaterial that Surety May Enforce Judgment Paid by Him.**—It is no objection to a recovery by the surety that his payment was of a judgment recovered by the creditor against them both, and that the surety, by reason of such payment, is entitled to the benefit of the judgment as against the principal, and may enforce it against him by execution. *Kimmel v. Lowe*, 28 Minn. 265.

**1. When Debt Paid in Land.**—*Lord v. Staples*, 23 N. H. 448; *Ainslie v. Wilson*, 7 Cow. (N. Y.) 662, 17 Am. Dec. 532; *Bonney v. Seely*, 2 Wend. (N. Y.) 481; *Fraser v. Goode*, 3 Rich. L. (S. Car.) 199.

**2. When Surety Has Taken Collateral Security.**—*Cornwall v. Gould*, 4 Pick. (Mass.) 444. See also *supra*, this section, *Rights of Surety—As to Collateral Security*; and the title PLEDGE AND COLLATERAL SECURITY, vol. 22, p. 871.

**3. Ford v. Keith**, 1 Mass. 139, 2 Am. Dec. 4; *Child v. Eureka Powder Works*, 44 N. H. 354.

**4. Ledbetter v. Torney**, 11 Ired. L. (33 N. Car.) 294.

**5. U. S. v. Preston**, 4 Wash. (U. S.) 446; *Martindale v. Brock*, 41 Md. 571.

**When the Surety's Administrator Pays the Debt**, the implied promise accrues to him and he may sue in his own name. *Mowry v. Adams*, 14 Mass. 327.

**6. Burns v. Parish**, 3 B. Mon. (Ky.) 8; *Edge v. Keith*, 13 Smed. & M. (Miss.) 295. See also *supra*, this section, *Rights of Surety—As Affected by Judgment Against Surety*.

**7. Statutory Remedies Cumulative.**—*Riley v. Stallworth*, 56 Ala. 481; *Dodd v. Wilson*, 4 Del. Ch. 399; *Harker v. Glidewell*, 23 Ind. 219. See generally the title STATUTES, vol. 26, p. 671.

**8. Noll's Estate**, 5 Pa. Dist. 716.

**9. Statutory Remedies to Be Strictly Followed.**—*Patterson v. Caldwell*, 1 Met. (Ky.) 489; *Meyer v. Ruff*, (Ky. 1891) 16 S. W. Rep. 84; *Derouen v. Norres*, 49 La. Ann. 1131. See generally the title STATUTES, vol. 26, pp. 671, 672.

The Tennessee Statute providing that sureties for the prosecution or defense of any suit may require their principal to give counter security to indemnify them against liability as such sureties applies in favor of sureties in all cases irrespective of the attitude of the parties as plaintiff or defendant. *Kincaid v. Sharp*, 3 Head (Tenn.) 151.

**10. Surety May Present Claim to Administrator.**—*Matter of Hill*, 67 Cal. 238; *Burckhardt v. Helfrich*, 77 Mo. 376; *Bauer v. Gray*, 18 Mo. App. 164. And see the title DEBTS OF DECEDENTS, vol. 8, pp. 1067, 1068.

**11. Reeves v. Pulliam**, 7 Baxt. (Tenn.) 119.

**12. Lucking v. Gegg**, 12 Bush (Ky.) 298.

**13. Buckner v. Morris**, 7 J. J. Marsh. (Ky.) 648. And see the title DEBTS OF DECEDENTS, vol. 8, p. 1098.

**14. Relief in Equity Before Payment—United States.**—*Humphreys v. Leggett*, 9 How. (U. S.) 297, 21 How. (U. S.) 66; *In re Reynolds*, 16 Nat. Bankr. Reg. 158.

If the court is asked to interfere on behalf of the surety before judgment is recovered against him, he must present some special ground of equitable relief.<sup>1</sup> But where judgment has been recovered against both parties, the equity of the surety, to have the property of the principal first applied to satisfy the execution, is clear.<sup>2</sup> A surety who has paid the debt may also have relief in equity,<sup>3</sup> but not where he has secured a judgment against his principal and has thereby or otherwise an adequate remedy at law.<sup>4</sup> Equitable relief will not be denied to an insolvent surety,<sup>5</sup> nor to a surety's heirs<sup>6</sup> or assignees.<sup>7</sup>

**Recovery from Principal's Estate.** — A surety may file a bill in equity against the executors and heirs of his principal, to subject personal property in the hands of the former, and real property in the hands of the latter, to the payment of the debt.<sup>8</sup> But equity will not interfere when the claim against the estate is barred.<sup>9</sup>

**Appointment of Receiver.** — A surety cannot, before he has paid, come into equity and compel the principal to turn over his property to a receiver,<sup>10</sup> unless

*Delaware.* — *Miller v. Stout*, 5 Del. Ch. 259.

*Florida.* — *West v. Chasten*, 12 Fla. 315.

*Georgia.* — *Outlaw v. Reddick*, 11 Ga. 669; *Anderson v. Walton*, 35 Ga. 202; *Sanford v. U. S. Fidelity, etc., Co.*, 116 Ga. 689.

*Illinois.* — *Ridgeway v. Potter*, 114 Ill. 457, 55 Am. Rep. 875; *Roberts v. American Bonding, etc., Co.*, 83 Ill. App. 463; *Moore v. Topliff*, 107 Ill. 241.

*Indiana.* — *Hinkle v. Hinkle*, 20 Ind. App. 384; *Ritenour v. Mathews*, 42 Ind. 7; *Smith v. Harbin*, 124 Ind. 434.

*Iowa.* — *Richards v. Osceola Bank*, 79 Iowa 707.

*Kentucky.* — *Partlow v. Lane*, 3 B. Mon. (Ky.) 424, 39 Am. Dec. 473; *Sims v. Wallace*, 6 B. Mon. (Ky.) 410; *Taylor v. Taylor*, 8 B. Mon. (Ky.) 419, 48 Am. Dec. 400; *Rice v. Downing*, 12 B. Mon. (Ky.) 44; *Buford v. Francisco*, 3 Dana (Ky.) 68; *Meador v. Meador*, 88 Ky. 217.

*Louisiana.* — *Montgomery's Succession*, 2 La. Ann. 469; *Edwards v. Prather*, 22 La. Ann. 334.

*Maryland.* — *Whitridge v. Durkee*, 2 Md. Ch. 442.

*Minnesota.* — *Huey v. Pinney*, 5 Minn. 310.

*Mississippi.* — *Marsh v. Bennett*, 6 How. (Miss.) 215.

*Missouri.* — *Benne v. Schenecko*, 100 Mo. 250.

*New Jersey.* — *Irick v. Black*, 17 N. J. Eq. 189; *Delaware, etc., R. Co. v. Oxford Iron Co.*, 38 N. J. Eq. 151; *Philadelphia, etc., R. Co. v. Little*, 41 N. J. Eq. 519.

*New York.* — *Gibbs v. Mennard*, 6 Paige (N. Y.) 258; *Sheppard v. Conley*, (Supm. Ct. Spec. T.) 9 N. Y. Supp. 777.

*North Carolina.* — *Williams v. Helme*, 1 Dev. Eq. (16 N. Car.) 151, 18 Am. Dec. 580; *Ferrer v. Barrett*, 4 Jones Eq. (57 N. Car.) 455; *Thigpen v. Price*, Phil. Eq. (62 N. Car.) 146; *Taylor v. Miller*, Phil. Eq. (62 N. Car.) 365; *Allen v. Smitherman*, 6 Ired. Eq. (41 N. Car.) 341.

*Ohio.* — *Stump v. Rogers*, 1 Ohio 533; *McConnell v. Scott*, 15 Ohio 401, 45 Am. Dec. 583; *Poe v. Dixon*, 60 Ohio St. 124, 71 Am. St. Rep. 713.

*Pennsylvania.* — *Beaver v. Beaver*, 23 Pa. St. 167.

*South Carolina.* — *Taylor v. Heriot*, 4 Desaus. (S. Car.) 227; *Norton v. Reid*, 11 S. Car. 593; *Hollams v. Abercrombie*, 15 S. Car. 110, 40 Am. Rep. 684.

*Tennessee.* — *Croone v. Bivens*, 2 Head (Tenn.) 339; *Washington v. Tait*, 3 Humph. (Tenn.) 543; *Gilliam v. Esselman*, 5 Sneed (Tenn.) 86; *Howell v. Cobb*, 2 Coldw. (Tenn.) 104, 88 Am. Dec. 591; *Saylors v. Saylors*, 3 Heisk. (Tenn.) 525; *Greene v. Starnes*, 1 Heisk. (Tenn.) 582; *Miller v. Speed*, 9 Heisk. (Tenn.) 196; *Delaney v. Tipton*, 3 Hayw. (Tenn.) 14; *Carpenter v. Kee*, 5 Humph. (Tenn.) 585.

*Vermont.* — *Bishop v. Day*, 13 Vt. 81, 37 Am. Dec. 582.

*Virginia.* — *Stephenson v. Taverners*, 9 Gratt. (Va.) 398; *Womack v. Paxton*, 84 Va. 9; *Paxton v. Rich*, 85 Va. 378.

*West Virginia.* — *Mattingly v. Sutton*, 19 W. Va. 19; *Maxwell v. Miller*, 38 W. Va. 261; *Neal v. Buffington*, 42 W. Va. 327; *Armstrong v. Poole*, 30 W. Va. 666.

*Wisconsin.* — *Dobie v. Fidelity, etc., Co.*, 95 Wis. 540, 60 Am. St. Rep. 135; *McMillen v. Mason*, 71 Wis. 405; *Harris v. Newell*, 42 Wis. 687.

**Surety May Compel Fiduciary Principal to Account.** — *Ridgeway v. Potter*, 114 Ill. 457, 55 Am. Rep. 875. See also *Curtis v. Bailey*, 1 Pick. (Mass.) 198; *McElroy v. Hatheway*, 44 Mich. 399.

1. *Conrey v. Brandegge*, 2 La. Ann. 132; *Irick v. Black*, 17 N. J. Eq. 189.

2. *Irick v. Black*, 17 N. J. Eq. 189.

3. *Thomas v. Beckman*, 1 B. Mon. (Ky.) 29; *Hite v. Campbell*, 10 B. Mon. (Ky.) 80.

4. *McMillen v. Mason*, 71 Wis. 405.

5. *Ferrer v. Barrett*, 4 Jones Eq. (57 N. Car.) 455.

6. *Meador v. Meador*, 88 Ky. 217.

7. *Hite v. Campbell*, 10 B. Mon. (Ky.) 80.

8. *Conley v. Boyle*, 6 T. B. Mon. (Ky.) 637.

**A Surety upon an Appeal Bond, who has not paid anything, cannot recover from the estate of his principal as upon a specialty debt, to the exclusion of simple contract creditors.** *Green v. Williams*, 11 Ired. L. (33 N. Car.) 139.

9. *Bauer v. Gray*, 18 Mo. App. 164.

10. *McElroy v. Hathaway*, 44 Mich. 399; *Nash v. Burchard*, 87 Mich. 85.

such property is being wasted and the surety is for that reason in danger.<sup>1</sup>

**Preventing Removal of Property.** — The right to maintain a bill to prevent the removal from the state of the property of the principal generally rests upon a particular statute.<sup>2</sup>

**Setting Aside Fraudulent Conveyance.** — The authorities are conflicting as to when the right accrues to the surety to come into equity for the purpose of setting aside a fraudulent conveyance executed by his principal. It is variously said that such right accrues when the surety becomes bound and before he pays the debt,<sup>3</sup> when judgment has been obtained against him,<sup>4</sup> when he pays the debt and before he has obtained judgment against the principal,<sup>5</sup> and not until such latter judgment has been obtained.<sup>6</sup> A surety is not estopped to assert this equitable right because he knew of the fraudulent conveyance at the time he became bound.<sup>7</sup>

**Subrogation and Substitution.** — The right of the surety to invoke the aid of the equitable doctrine of subrogation is fully treated elsewhere in this work.<sup>8</sup>

**c. SUMMARY REMEDY.** — In some jurisdictions a summary remedy is given by statute to a surety who has paid a judgment rendered against him for the debt of his principal, such surety being entitled, on motion, to a judgment over against the principal for the amount paid with interest.<sup>9</sup> Where a joint judgment has been rendered against cosureties, they may have a joint judgment but not several judgments against their principal.<sup>10</sup> These statutes have been held to extend to the personal representatives of a deceased surety.<sup>11</sup>

**d. SET-OFF.** — A surety is not entitled to retain funds in his hands belonging to the principal, or to set off against his liability a debt due from himself to the principal, until he has paid the suretyship debt or in some manner

1. *Allen v. Cooley*, 53 S. Car. 414.

2. **Preventing Removal of Property.** — *Ruddell v. Childress*, 31 Ark. 511; *Buford v. Francisco*, 3 Dana (Ky.) 68. See also *Jennings v. Shropshire*, 9 B. Mon. (Ky.) 431; *Rice v. Downing*, 12 B. Mon. (Ky.) 44.

3. **Before Payment of Debt.** — *Strong v. Taylor School Tp.*, 79 Ind. 208; *McKee v. Scobee*, 80 Ky. 124; *Loughridge v. Rowland*, 52 Miss. 546; *Taylor v. Heriot*, 4 Desaus. (S. Car.) 227. See *Findlay v. U. S. Bank*, 2 McLean (U. S.) 44; *Kimball v. Greig*, 47 Ala. 230; *Oneal v. Smith*, 10 Lea (Tenn.) 340.

4. *Saylors v. Saylors*, 3 Heisk. (Tenn.) 525.

5. **After Payment of Debt.** — *Bragg v. Patterson*, 85 Ala. 233; *Meux v. Anthony*, 11 Ark. 411, 52 Am. Dec. 274; *Williams v. Bizzell*, 11 Ark. 716; *Choteau v. Jones*, 11 Ill. 300, 50 Am. Dec. 460; *Partlow v. Lane*, 3 B. Mon. (Ky.) 424, 39 Am. Dec. 473; *Peeples v. Tatum*, 1 Ired. Eq. (N. Car.) 414; *Williams v. Tipton*, 5 Humph. (Tenn.) 66, 42 Am. Dec. 420; *Shapira v. Paletz*, (Tenn. Ch. 1900) 59 S. W. Rep. 774. See also *Pratt v. Green*, 25 Iowa 39; *Buford v. Buford*, 1 Bibb (Ky.) 305.

6. **When Judgment Obtained Against Principal.** — *Sanders v. Watson*, 14 Ala. 198; *Mugge v. Ewing*, 54 Ill. 236. See also *Martin v. Walker*, 12 Hun N. Y.) 46.

7. *Shapira v. Paletz*, (Tenn. Ch. 1900) 59 S. W. Rep. 774.

8. See the title SUBROGATION, *ante*, p. 199.

9. **Summary Remedy of Surety.** — *Brown v. Wheeler*, 3 Ala. 287; *Elliott v. Clements*, 5 Ala. 470; *Pait v. Pait*, 19 Ala. 713; *Tennell v. Dozier*, Hard. (Ky.) 51; *Herdon v. Mason*, 4 J. J. Marsh. (Ky.) 575; *Brown v. Oldham*, Walk. (Miss.) 493; *Dibrell v. Dandridge*, 51

Miss. 55; *Sevier v. Roddie*, 51 Mo. 580; *Hall v. Tompkins*, 9 Humph. (Tenn.) 592; *Voorhies v. Dickson*, 1 Sneed (Tenn.) 348; *Graves v. Webb*, 1 Call (Va.) 443; *Ayers v. Lewellin*, 3 Leigh (Va.) 609.

In *Kentucky* the statute does not authorize a judgment for interest accruing subsequently to payment by the surety. *Reading v. Holton*, Hard. (Ky.) 68; *Dorsey v. Beall*, Hard. (Ky.) 574.

In *Mississippi* such a statute has been held unconstitutional. *Smith v. Smith*, 1 How. (Miss.) 102.

In *Missouri* the remedy by motion given by the statute does not extend to sureties on bonds which are given to secure the performance of private official trusts. *State v. Darby*, 11 Mo. App. 528.

In *Tennessee* the summary remedy does not apply to sureties for the stay of executions. *Frost v. Rucker*, 4 Humph. (Tenn.) 57.

In *Virginia* the statute concerning sheriffs does not authorize a summary proceeding by motion by the sureties of a sheriff or collector; nor does the statute providing a summary remedy for sureties authorize a judgment against devisees of the principal. *Bacchus v. Gee*, 2 Leigh (Va.) 68.

For proceedings to enforce this remedy, see the title PRINCIPAL AND SURETY, 16' ENCYC. OF PL. AND PR. 965.

10. **Summary Remedy of Joint Sureties.** — *Newnan v. Campbell*, Mart. & Y. (Tenn.) 63; *M'Nairy v. Eastland*, 10 Yerg. (Tenn.) 310. See also *Graham v. Green*, 4 Hayw. (Tenn.) 187.

11. **Summary Remedy of Surety's Representatives.** — *Harris v. Wynne*, 4 Ga. 521; *Reeves v. Pulliam*, 7 Baxt. (Tenn.) 119.

assumed the same so as to discharge the principal.<sup>1</sup> But this rule does not obtain when the principal has become insolvent, and the surety may then retain the moneys of the principal or the amount of his own indebtedness as a fund for his indemnity.<sup>2</sup> A surety who has paid, or against whom judgment has been rendered for, a debt of his deceased principal, may retain funds in his hands or a debt which he owes the estate, provided such estate is solvent;<sup>3</sup> if not solvent, he may only retain his proportionate share of the assets thereof.<sup>4</sup> The principal may assign a debt due him by the surety as an offset to any one particular debt of several for which the surety is liable, so that no injustice be done thereby to the latter.<sup>5</sup> The surety is entitled to apply funds in his hands directly to the payment of the mutual indebtedness when the principal has directed such application.<sup>6</sup>

**e. JOINT SURETIES.**—When each of several cosureties has contributed to the payment of the debt, each has a separate right of action against the principal.<sup>7</sup> Such right cannot be affected by any act of a cosurety,<sup>8</sup> nor, in general, will any private arrangement between cosureties for the distribution of liability *inter sese* operate, unless expressly so stipulated, to release the liability of the common principal to them all.<sup>9</sup> But if one surety has paid the whole debt without contribution, he alone can maintain suit;<sup>10</sup> and if the debt has been paid from a joint fund or by means of money raised upon joint credit, the recovery must be by joint action.<sup>11</sup> The latter rule is not applicable, however, to a payment made from partnership funds in a matter without the partnership. Such a payment effects a severance of the joint funds *pro tanto*, and the partners must sue separately.<sup>12</sup>

**Amount of Recovery.**—A cosurety may recover no more than the amount actually paid by him,<sup>13</sup> or his proportionate share of a joint fund used to dis-

1. **Set-off Before Payment of Debt.**—*Tyree v. Parham*, 66 Ala. 424; *Ingalls v. Dennett*, 6 Me. 79; *McCormick v. Sullivan*, 71 Hun (N. Y.) 333; *Williams v. Helme*, 1 Dev. Eq. (16 N. Car.) 151, 18 Am. Dec. 580. See also the title SET-OFF, RECOURTMENT, AND COUNTERCLAIM, vol. 25, p. 513. Compare *Sims v. Wallace*, 6 B. Mon. (Ky.) 410; *Woodbury v. Bowman*, 14 Me. 154; *Beaver v. Beaver*, 23 Pa. St. 167; *Morehead's Appeal*, 32 Pa. St. 297.

**Suretyship Debt May Be Paid After Suit Brought by Principal.**—*Richardson v. Merritt*, 74 Minn. 354.

2. **When Principal Is Insolvent.**—*Abbey v. Van Campen*, Freem. (Miss.) 273; *Battle v. Hart*, 2 Dev. Eq. (17 N. Car.) 31; *Scott v. Timberlake*, 83 N. Car. 382; *McKnight v. Bradley*, 10 Rich. Eq. (S. Car.) 557; *Mattingly v. Sutton*, 19 W. Va. 19. See also *Merwin v. Austin*, 58 Conn. 22.

3. **A Surety Sued by an Assignee of His Insolvent Principal on a debt due the principal may interpose as a defense his liability as surety.** *Inter se* Reynolds, 16 Nat. Bankr. Reg. 158; *Battle v. Hart*, 2 Dev. Eq. (17 N. Car.) 31; *Walker v. Dicks*, 80 N. Car. 263; *Mattingly v. Sutton*, 19 W. Va. 19. See also the title SET-OFF, RECOURTMENT, AND COUNTERCLAIM, vol. 25, p. 605.

4. *Bates v. Vary*, 40 Ala. 421; *Poorman v. Goswiler*, 2 Watts (Pa.) 69.

**Surety Cannot Retain Funds Received by Him After Principal's Death.**—*Sharp v. Caldwell*, 7 Humph. (Tenn.) 415.

5. *Creager v. Minard*, Wright (Ohio) 519. Compare *Beaver v. Beaver*, 23 Pa. St. 167.

6. *Miller v. Cherry*, 4 Jones Eq. (57 N. Car.) 197.

7. *Mandigo v. Mandigo*, 26 Mich. 349.

7. **Recovery by Sureties Generally.**—*Whitbeck v. Ramsay*, 74 Ill. App. 524; *Gould v. Fuller*, 18 Me. 364; *Ilsley v. Jewett*, 2 Met. (Mass.) 168; *Peabody v. Chapman*, 20 N. H. 418; *McCole v. Beattie*, 51 Vt. 265. See also *Gillespie v. Creswell*, 12 Gil & J. (Md.) 36.

As to summary remedy of joint sureties, see *supra*, this subsection, *Summary Remedy*.

8. *Ilsley v. Jewett*, 2 Met. (Mass.) 168.

9. **Right of Surety Not Affected by Arrangement Between Sureties.**—*Hook v. Richeson*, 115 Ill. 431; *Water-Power Co. v. Brown*, 23 Kan. 676; *Crowdus v. Shelby*, 6 J. J. Marsh. (Ky.) 61; *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274.

**Surety Not Paying Cannot Object to Release of Principal.**—*Jackson v. Murray*, 77 Tex. 644.

10. **Where One Surety Has Paid Whole Debt.**—*Lowry v. Lumbermen's Bank*, 2 W. & S. (Pa.) 210. See also *Dodd v. Wilson*, 4 Del. Ch. 108; *Morgan v. Street*, 28 Ind. App. 131.

11. **Recovery by Sureties Jointly.**—*Osborne v. Harper*, 5 East 225; *Parker v. Leek*, 1 Stew. (Ala.) 523; *Ross v. Allen*, 67 Ill. 317; *Whitbeck v. Ramsay*, 74 Ill. App. 524; *Jewett v. Cornforth*, 3 Me. 107; *Smith v. Sayward*, 5 Me. 504; *Appleton v. Bascom*, 3 Met. (Mass.) 169; *Sevier v. Roddie*, 51 Mo. 580; *Pearson v. Parker*, 3 N. H. 366; *Littler v. Horsey*, 2 Ohio 209; *Boggs v. Curtin*, 10 S. & R. (Pa.) 211; *Lowry v. Lumbermen's Bank*, 2 W. & S. (Pa.) 210; *Stewart v. Vaughan*, 1 Rice L. (S. Car.) 33; *Thomas v. Carter*, 63 Vt. 609.

**Rule Applicable Where Payment Made by Joint Note.**—*Ross v. Allen*, 67 Ill. 317.

12. *Gould v. Gould*, 8 Cow. (N. Y.) 168.

13. **Cosurety Can Recover Only His Share.**—*Ilsley v. Jewett*, 2 Met. (Mass.) 168; *Mosely v. Fuller*.

charge the debt.<sup>1</sup> He is entitled to judgment for the whole amount of the debt only when the other sureties have failed to contribute towards its payment.<sup>2</sup>

**Duty of Principal to Cosureties.** — The principal is not bound to any one surety to keep the original obligation *in statu quo* as to either the number or the solvency of his cosureties.<sup>3</sup>

**f. JOINT PRINCIPALS.** — A surety for two or more joint principals may recover from them either jointly<sup>4</sup> or severally,<sup>5</sup> even for the default of one of their number.<sup>6</sup> But if the payment by the surety has been of a judgment entered against one principal only, a joint action will not lie.<sup>7</sup> Where one principal has died the surety may proceed either against the estate of the decedent<sup>8</sup> or against the survivors.<sup>9</sup> Similarly, when one principal has absconded those remaining are liable to the surety.<sup>10</sup>

**3. Extent of Principal's Liability** — **a. IN GENERAL.** — The principal and surety may agree as to the amount of reimbursement which the latter shall receive,<sup>11</sup> but if no such agreement is made the surety can recover no more than the sum for which the principal was liable to the creditor,<sup>12</sup> and, in any event, no more than he himself has actually paid.<sup>13</sup> If the surety pays money, he may recover an equal amount; if he pays in property, he may recover the value thereof,<sup>14</sup> not, however, exceeding the amount of the debt paid by the property.<sup>15</sup> If the surety has discharged the debt by giving a bond, he may recover the entire amount thereof.<sup>16</sup> Where a surety is sued with his principal, or where he is sued alone and notifies his principal, so as to enable the latter to defend or to furnish the surety with a defense, the recovery against the

ton, 59 Mo. App. 143. See *infra*, this section, *Extent of Principal's Liability*.

1. Thomas v. Carter, 63 Vt. 609.

2. Jackson v. Murray, 77 Tex. 644.

3. Ridgeway v. Potter, 114 Ill. 457, 55 Am. Rep. 875.

4. Joint Principals. — Babcock v. Hubbard, 2 Conn. 536; Dessar v. King, 110 Ind. 69.

5. Apgar v. Hiler, 24 N. J. L. 812; Clay v. Severance, 55 Vt. 300. See also American Surety Co. v. Thurber, 121 N. Y. 655.

The Principals Being Severally Liable, an agreement by one of them to pay the whole debt constitutes no consideration for a release by the surety of the other principals. Cameron v. Warbritton, 9 Ind. 351.

6. Albro v. Robinson, 93 Ky. 195; Overton v. Woodson, 17 Mo. 453. Compare Brazier v. Clark, 5 Pick. (Mass.) 96.

7. Reeves v. Isenhour, 59 Ind. 478.

8. West v. Rutland Bank, 19 Vt. 403.

9. Riddle v. Bowman, 27 N. H. 236.

10. Warner v. Hall, 5 Vt. 156.

11. Extent of Liability. — Southall v. Farish, 85 Va. 403.

**Compensation for Becoming Surety.** — Where an agreed compensation is to be paid to one who becomes surety upon a bond for the release of certain goods, such compensation may be recovered by the surety from his principal though the former was liable upon the bond for but a short space of time, due to the fact that the goods were immediately seized upon new and separate process. Blount v. Bowne, 82 Ga. 346.

12. Martin v. Ellerbe, 70 Ala. 326.

Where a Grantee Assumes the Principal Obligation to the surety, he cannot be held liable beyond the amount thereof as represented to him by both principal and surety. Ricketts v. Braun, 42 Ind. 316.

**13. Recovery of Amount Surety Has Paid** — *California.* — Stone v. Hammell, 83 Cal. 547, 17 Am. St. Rep. 272.

*Iowa.* — Heaton v. Ainley, (Iowa 1898) 74 N. W. Rep. 766.

*Kentucky.* — Rice v. Rice, 14 B. Mon. (Ky.) 335. See also Jarvis v. Whitman, 12 B. Mon. (Ky.) 97.

*Massachusetts.* — Rice v. Southgate, 16 Gray (Mass.) 142.

*Mississippi.* — Washburn v. Blundell, 75 Miss. 266.

*Missouri.* — Hearne v. Keath, 63 Mo. 84.

*West Virginia.* — Butler v. Butler, 8 W. Va. 674; Teamster v. Withrow, 9 W. Va. 296, 12 W. Va. 611.

*Wisconsin.* — Barth v. Graf, 101 Wis. 27.

See also the title CONTRIBUTION AND EXONERATION, vol. 7, p. 350, where additional cases are cited.

The Law Presumes that the amount paid by the surety and for which he sues is the whole of his liability. Collins v. Boyd, 14 Ala. 505.

Where Execution Is Levied upon the Principal's Property, the surety cannot recover the whole debt paid by him without showing that the execution was not satisfied. Brown v. Kidd, 34 Miss. 291.

See also *supra*, this section, *Remedies of Surety — Joint Sureties*.

14. Hickman v. McCurdy, 7 J. J. Marsh. (Ky.) 555. See also the title CONTRIBUTION AND EXONERATION, vol. 7, p. 351.

**Surety Must Have Owned Property Used to Pay Debt.** — Head v. McDonald, 7 T. B. Mon. (Ky.) 203.

15. Coleman v. Riggs, 61 Iowa 543; Hickman v. McCurdy, 7 J. J. Marsh. (Ky.) 555; Lord v. Staples, 23 N. H. 448.

16. Burns v. Parish, 3 B. Mon. (Ky.) 8.

surety is the measure of his damage against the principal, in the absence of fraud or collusion, or negligence of the surety in defending.<sup>1</sup> But the surety is not bound by the amount of recovery against the principal, and may recover the whole debt though judgment was entered against the principal for a less amount.<sup>2</sup>

**Collateral Security.** — Where the surety has received security from the principal, he may enforce the same for such amount only as is necessary to his complete indemnity against actual and probable loss.<sup>3</sup>

**b. COMPROMISE OF DEBT.** — If the surety compromises the debt for less than the amount due, he can recover from the principal only the sum paid in compromise,<sup>4</sup> unless the principal has agreed to pay him the face value of the property devoted to the extinguishment of the debt,<sup>5</sup> or unless the surety has stipulated with the creditor for all of the latter's rights against the principal.<sup>6</sup> The surety must disclose the exact terms of his settlement,<sup>7</sup> and if he falsely induces the principal to pay him the full amount of the debt, the latter may recover back the overpayment.<sup>8</sup>

**Payment in Depreciated Paper.** — Where the surety has paid the debt with depreciated paper, the actual value thereof is the measure of his damage against the principal.<sup>9</sup>

**c. COSTS AND EXPENSES — Costs.** — The surety may recover the necessary costs of an action brought against him upon the debt,<sup>10</sup> particularly where he suffered judgment by default,<sup>11</sup> or where the principal agreed in writing to save him harmless.<sup>12</sup> But costs arising from the surety's having engaged in unnecessary litigation are not properly an item of his damages.<sup>13</sup>

**Expenses.** — The surety may also recover expenses which are reasonable and may be considered as additional losses, the necessary consequence of the failure of the principal to discharge his own debt.<sup>14</sup>

**Attorney's Fees.** — The surety may recover the attorney's fees allowed in a note indorsed by him where he paid the same,<sup>15</sup> but he must show that the sum paid by him was the usual amount charged by attorneys in such cases.<sup>16</sup>

**d. INTEREST AND USURY — Interest.** — The surety is allowed simple inter-

1. *Hare v. Grant*, 77 N. Car. 203.  
**Rule Obtains When Surety Sued in Foreign Jurisdiction.** — *Thomas v. Beckman*, 1 B. Mon. (Ky.) 29.

2. *Hellams v. Abercrombie*, 15 S. Car. 110, 40 Am. Rep. 684.

3. **Amount of Recovery in Enforcing Security.** — *Gunel v. Gue*, 72 Ind. 34; *Monell v. Smith*, 5 Cow. (N. Y.) 441; *Borland's Appeal*, 66 Pa. St. 470. See also *supra*, this section, *Rights of Surety — As to Collateral Security*.

**Mesne Profits.** — A surety holding land as security cannot recover mesne profits except to apply upon the debt. *Polhill v. Brown*, 84 Ga. 338.

4. **Recovery under Compromise of Debt.** — *Martin v. Ellerbe*, 70 Ala. 326; *Stanford v. Connery*, 84 Ga. 731; *Simmons v. Goodrich*, 68 Ga. 750; *Goodwin v. Davis*, 15 Ind. App. 120; *Pickett v. Bates*, 3 La. Ann. 627; *Eaton v. Lambert*, 1 Neb. 339; *Delaware, etc., R. Co. v. Oxford Iron Co.*, 38 N. J. Eq. 151; *Bonney v. Seely*, 2 Wend. (N. Y.) 481; *Wynn v. Brooke*, 5 Rawle (Pa.) 106; *Price v. Horton*, 4 Tex. Civ. App. 526; *Matthews v. Hall*, 21 W. Va. 510.

5. *Southall v. Farish*, 85 Va. 403.

6. *Hickman v. McCurdy*, 7 J. J. Marsh. (Ky.) 555.

7. *Pickett v. Bates*, 3 La. Ann. 627.

8. *Price v. Horton*, 4 Tex. Civ. App. 526.

9. **Payment in Depreciated Paper.** — *Stone v. Hammell*, 83 Cal. 547, 17 Am. St. Rep. 272; *Dinkgrave's Succession*, 31 La. Ann. 703. See also the title CONTRIBUTION AND EXONERATION, vol. 7, p. 351.

10. **Recovery of Necessary Costs.** — *Doran v. Davis*, 43 Iowa 86; *Butler v. Butler*, 8 W. Va. 674; *Feamster v. Withrow*, 9 W. Va. 296, 12 W. Va. 611. See also the title CONTRIBUTION AND EXONERATION, vol. 7, p. 351.

11. *Holmes v. Weed*, 24 Barb. (N. Y.) 546.

12. *Albany v. Andrews*, 29 N. Y. App. Div. 20; *Bonney v. Seely*, 2 Wend. (N. Y.) 481. See also *Hall v. Profater*, 2 J. J. Marsh. (Ky.) 130. And see the title INDEMNITY CONTRACTS, vol. 16, p. 181.

13. **Costs Arising from Unnecessary Litigation.** — *Beckley v. Munson*, 22 Conn. 299. And see the title CONTRIBUTION AND EXONERATION, vol. 7, p. 351, note.

14. See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 351, note. See also *Hale v. Andrus*, 6 Cow. (N. Y.) 225.

15. **Recovery of Attorney's Fees Allowed in Note.** — *Gieseke v. Johnson*, 115 Ind. 308. See also *Ellis v. Norman*, (Ky. 1898) 44 S. W. Rep. 429; *Beville v. Boyd*, 16 Tex. Civ. App. 491. And see the title BILLS AND NOTES, vol. 4, p. 98 *et seq.*

16. *Coffeen Coal, etc., Co. v. Barry*, 56 Ill. App. 587.



est on the sum paid by him from the time of payment.<sup>1</sup> The rate recoverable is the legal rate, though the contract or judgment, to the rights of which he is substituted, provides for a greater rate.<sup>2</sup> But the surety may recover such interest as was provided for in the original instrument and was actually paid by him.<sup>3</sup>

**Usury.**—Where the surety discharges a usurious debt of his principal without notice from his principal not to pay, he may recover the amount paid by him.<sup>4</sup> But usury is not recoverable where it was paid by the surety in order to gain time to take up the original obligation,<sup>5</sup> or where the surety knew that it was the intention of the principal to avoid the usury.<sup>6</sup>

**c. CONSEQUENTIAL DAMAGES.**—In the absence of an express agreement to that effect, the surety cannot recover consequential damages, such as the loss suffered either through a forced sale of his property under execution<sup>7</sup> or through his imprisonment for the debt.<sup>8</sup>

**4. Statute of Limitations.**—As between principal and surety, the statute of limitations begins to run against the latter from the date of payment by him and not from the date of the original obligation.<sup>9</sup> Upon the same principle, the period within which the surety must present his claim to the representatives of his deceased principal must be computed from the time the surety becomes a creditor and his right to exhibit a demand against the estate accrues.<sup>10</sup> A mere promise by the principal to reimburse the surety at a

1. **Surety May Recover Interest on His Payment**—*Indiana*.—Gieseke v. Johnson, 115 Ind. 308. *Iowa*.—Heaton v. Ainley, (Iowa 1898) 74 N. W. Rep. 766.

*Massachusetts*.—Gibbs v. Bryant, 1 Pick. (Mass.) 118; Ilsley v. Jewett, 2 Met. (Mass.) 168. *Michigan*.—Thurston v. Prentiss, Walk. (Mich.) 529.

*Nebraska*.—Eaton v. Lambert, 1 Neb. 339. *New Hampshire*.—Riddle v. Bowman, 27 N. H. 236; Child v. Eureka Powder Works, 44 N. H. 354.

*Pennsylvania*.—Wynn v. Brooke, 5 Rawle (Pa.) 106.

*Virginia*.—Kendrick v. Forney, 22 Gratt. (Va.) 748.

*West Virginia*.—Butler v. Butler, 8 W. Va. 674; Feamster v. Withrow, 9 W. Va. 296, 12 W. Va. 611.

*Wisconsin*.—Barth v. Graf, 101 Wis. 27.

See also the title INTEREST, vol. 16, p. 1011.

**Presumption that Payment Was at Maturity.**—Heaton v. Ainley, (Iowa 1898) 74 N. W. Rep. 766.

2. *Waldrip v. Black*, 74 Cal. 409.

**The Rate of Interest of the Surety's Domicil** will govern where the surety has been sued in a foreign jurisdiction and there is no proof of the rate of interest allowable therein. *Thomas v. Beckman*, 1 B. Mon. (Ky.) 29.

3. *White v. Miller*, 47 Ind. 385; *Goodwin v. Davis*, 15 Ind. App. 120; *Newman v. Newman*, 29 Mo. App. 649.

**4. When Surety May Recover Usury.**—*Turman v. Looper*, 42 Ark. 500; *Polhill v. Brown*, 84 Ga. 338; *Ford v. Keith*, 1 Mass. 139, 2 Am. Dec. 4; *Thurston v. Prentiss*, Walk. (Mich.) 529; *Thurston v. Prentiss*, 1 Mich. 193; *Wade v. Green*, 3 Humph. (Tenn.) 547; *Jackson v. Jackson*, 51 Vt. 253, 31 Am. Rep. 688. But compare *Roe v. Kiser*, 62 Ark. 92, 54 Am. St. Rep. 288.

5. *Lucking v. Gegg*, 12 Bush (Ky.) 298; *Thurston v. Prentiss*, 1 Mich. 193,

6. *Hargraves v. Lewis*, 3 Ga. 162.

7. **Consequential Damages.**—*Vance v. Lancaster*, 3 Hayw. (Tenn.) 130.

**Measure of Damages Arising from Forced Sale.**—*Beckley v. Munson*, 22 Conn. 299.

8. *Powell v. Smith*, 8 Johns. (N. Y.) 249. See also *Hayden v. Cabot*, 17 Mass. 169.

9. **Statute Runs from Payment of Debt**—*California*.—*Stone v. Hammell*, (Cal. 1889) 22 Pac. Rep. 203; *Stone v. Hammell*, 83 Cal. 547, 17 Am. St. Rep. 272; *Ryland v. Commercial, etc., Bank*, 127 Cal. 525.

*Illinois*.—*Junker v. Rush*, 136 Ill. 179.

*Iowa*.—*Lamb v. Withrow*, 31 Iowa 164; *Johnston v. Belden*, 49 Iowa 301.

*Mississippi*.—*Magee v. Leggett*, 48 Miss. 139; *Rucks v. Taylor*, 49 Miss. 552.

*Montana*.—*Oppman v. Steinbrenner*, 17 Mont. 369.

*Ohio*.—*Poe v. Dixon*, 60 Ohio St. 124, 71 Am. St. Rep. 713.

*South Carolina*.—*Peters v. Barnhill*, 1 Hill L. (S. Car.) 234.

*Tennessee*.—*Morrow v. Morrow*, 2 Tenn. Ch. 549.

**Where Judgment Has Been Rendered Against the Surety**, it has been held that the statute runs from the payment thereof. *Reeves v. Pullian*, 7 Baxt. (Tenn.) 119. But as the right of action against the principal accrues when the surety's liability is fixed (*Keller v. Rhoads*, 39 Pa. St. 513, 80 Am. Dec. 539), the statute has been held to run from entry of judgment instead of from the payment thereof. *Cathcart v. Bryant*, 28 Wash. 31.

**When Judgment Dormant.**—Where a judgment paid by the surety has become dormant, the amount thereof cannot be made an item of a mutual account subsequently rendered between the principal and surety. *Elder v. Elder*, 43 Kan. 514.

10. **Presentation of Claim Against Principal's Estate.**—*Bauer v. Gray*, 18 Mo. App. 164; *Marshall v. Hudson*, 9 Yerg. (Tenn.) 57.

specified time will not suspend the accrual of the latter's cause of action to that time.<sup>1</sup>

**What Statute Applicable.** — As regards the surety's right of action at law upon the implied contract of indemnity, the statute applicable to such contracts governs;<sup>2</sup> as regards his right to proceed in equity upon the original obligation, through the operation of the doctrine of subrogation, the nature of such obligation determines the particular statute of limitations applicable in the premises.<sup>3</sup>

**5. Statute of Frauds.** — An agreement by the principal to save the surety harmless is generally held not to be within the statute of frauds and not to require writing;<sup>4</sup> and the same is true of an agreement by a third person to indemnify the surety if he will become such.<sup>5</sup>

**V. RIGHTS AND REMEDIES AS BETWEEN COSURETIES** — 1. **Contribution Between Sureties** — *a.* **IN GENERAL.** — Where two or more persons are cosureties for a third person, and one pays the debt, he is entitled to demand contribution from the other for whatever sum he has paid in excess of his aliquot part.<sup>6</sup>

**No Relief in Equity When Claim Against Estate Barred.** — See *supra*, this section, *Remedies of Surety — In Equity*.

1. *Wilson v. Crawford*, 47 Iowa 469.

2. **Statute Applicable to Action at Law.** — *Dewitt v. Boring*, 123 Ind. 4; *Kreider v. Isebice*, 123 Ind. 10; *Harrah v. Jacobs*, 75 Iowa 72; *Buckner v. Morris*, 2 J. J. Marsh. (Ky.) 121. See also the title **LIMITATION OF ACTIONS**, vol. 19, p. 272.

3. **Statute Applicable to Action in Equity.** — *Dodd v. Wilson*, 4 Del. Ch. 399; *Sparks v. Childers*, 2 Indian Ter. 187.

**As to Running of Statute Against Right of Subrogation**, see the title **SUBROGATION**, *ante*, p. 199.

4. **Statute of Frauds.** — *Tighe v. Morrison*, 116 N. Y. 263. See also the title **INDEMNITY CONTRACTS**, vol. 16, p. 169.

5. *Minick v. Huff*, 41 Neb. 516. See generally the title **VERBAL AGREEMENTS (STATUTE OF FRAUDS)**.

6. **Right of Cosurety to Contribution.** — See the title **CONTRIBUTION AND EXONERATION**, vol. 7, p. 331. And see the following cases:

*United States.* — *Knight v. Weeks*, (C. C. A.) 115 Fed. Rep. 970.

*Alabama.* — *Cummings v. May*, 91 Ala. 233.

*California.* — *Williams v. Riehl*, 127 Cal. 365, 78 Am. St. Rep. 60.

*Colorado.* — *McAllister v. Irwin*, (Colo. 1903) 73 Pac. Rep. 47.

*Delaware.* — *Hutchison v. Roberts*, 6 Del. Ch. 112; *Hutchinson v. Roberts*, 8 Houst. (Del.) 459.

*Florida.* — *Hayden v. Thrasher*, 18 Fla. 795.

*Illinois.* — *Drummond v. Yager*, 10 Ill. App. 380; *Porter v. Horton*, 80 Ill. App. 333; *Burgett v. Streat*, 85 Ill. App. 72.

*Indiana.* — *Reiter v. Cumback*, 1 Ind. App. 41.

*Iowa.* — *Novak v. Dupont*, 112 Iowa 334.

*Kentucky.* — *Lee v. Forman*, 3 Met. (Ky.) 114; *Chapeze v. Young*, 87 Ky. 476; *Letcher v. Yantis*, 3 Dana (Ky.) 160; *Bolling v. Doneghy*, 1 Duv. (Ky.) 220; *Bottoms v. Leonard*, (Ky. 1899) 53 S. W. Rep. 273.

*Louisiana.* — *Stockmeyer v. Oertling*, 35 La. Ann. 467.

*Massachusetts.* — *Johnson v. Johnson*, 11 Mass. 359.

*Missouri.* — *Labeaume v. Sweeney*, 17 Mo. 153; *Jeffries v. Ferguson*, 87 Mo. 244; *Frost v. Tracy*, 52 Mo. App. 308; *Wilkerson v. Sampson*, 56 Mo. App. 276; *Leeper v. Paschal*, 70 Mo. App. 117.

*Montana.* — *Northwestern Nat. Bank v. Great Falls Opera House Co.*, 23 Mont. 1.

*Nebraska.* — *Smith v. Mason*, 44 Neb. 610.

*New Jersey.* — *Paulin v. Kaighn*, 29 N. J. L. 480; *Neilson v. Williams*, 42 N. J. Eq. 291.

*New York.* — *Cuyler v. Ensworth*, 6 Paige (N. Y.) 32.

*North Carolina.* — *Sherrod v. Woodard*, 4 Dev. L. (15 N. Car.) 360, 25 Am. Dec. 714; *Peebles v. Gay*, 115 N. Car. 38, 44 Am. St. Rep. 429.

*Ohio.* — *Kehnast v. Daum*, 6 Ohio Dec. 401, citing with approval AM. AND ENG. ENCYC. OF LAW, vol. 24, pp. 809, 810; *Daum v. Kehnast*, 9 Ohio Cir. Dec. 867.

*Oregon.* — *Fischer v. Gaither*, 32 Oregon 161; *Thompson v. Dekum*, 32 Oregon 506; *Ladd v. Chamber of Commerce*, 37 Oregon 49.

*Pennsylvania.* — *Cooper's Estate*, 4 Pa. Super. Ct. 615.

*South Carolina.* — *Gourdin v. Trenholm*, 25 S. Car. 362; *Lucas v. Guy*, 2 Bailey L. (S. Car.) 403; *Aikin v. Peay*, 5 Strobb. L. (S. Car.) 15, 53 Am. Dec. 684.

*Tennessee.* — *Hickerson v. Price*, 7 Coldw. (Tenn.) 151; *Stephens v. Meek*, 6 Lea (Tenn.) 226; *Cage v. Foster*, 5 Yerg. (Tenn.) 261, 26 Am. Dec. 265.

*Texas.* — *Acers v. Curtis*, 68 Tex. 423; *Jackson v. Murray*, 77 Tex. 644; *Scott v. Rowland*, 14 Tex. Civ. App. 370.

*Vermont.* — *Liddell v. Wiswell*, 59 Vt. 365.

*Virginia.* — *Tate v. Winfree*, 99 Va. 255.

*West Virginia.* — *Hawker v. Moore*, 40 W. Va. 49.

*Wisconsin.* — *Smith v. Hodson*, 50 Wis. 279; *Faurot v. Gates*, 86 Wis. 569; *Boutin v. Etsell*, 110 Wis. 276.

**Indebitatus Assumpsit** will lie by one surety against another on the contract implied from their relation as cosureties to receive from him his share of the amount paid in settlement of the common liability. *Weeks v. Parsons*, 176 Mass. 570.

*b. NATURE AND ORIGIN OF RIGHT* — (1) *Nature*. — The doctrine of contribution rests on the principle that when the parties stand in *æquo juri*, the law requires under the maxim, "equality in equity," that one of them shall not be obliged to bear the burden in ease of the rest. It is founded not on contract, but on the principle that equality of burden as a common right is equity, and the obligation to contribute arises from the nature of the relation between the parties.<sup>1</sup>

(2) *Origin*. — It was in courts of equity exclusively, according to the ancient practice, that a surety had a right to claim contribution from his cosureties. But the doctrine is now well settled that, while courts of equity have not been ousted of their jurisdiction, redress may be obtained at law.<sup>2</sup>

*c. WHO LIABLE FOR CONTRIBUTION* — (1) *In General*. — The duty of contribution on the one hand, and the right to demand it on the other, spring out of a common burden resting on two or more persons occupying a like position toward the creditor. It is essential that the common liability shall exist, and the parties must occupy toward the creditor exactly the same attitude.<sup>3</sup>

*Privity with, or Knowledge of, the Liability of the Other Surety* is not necessary to the existence of the right to contribution.<sup>4</sup>

(2) *Sureties on Different Instruments*. — If sureties are bound for a common principal to insure the performance of the same duty or obligation, the

**1. Contribution Founded on Principle of Equity.** — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 331. And see also the following cases:

*Alabama*. — Carter v. Fidelity, etc., Co., 134 Ala. 369, 92 Am. St. Rep. 41.

*Delaware*. — Hutchison v. Roberts, 8 Houst. (Del.) 459.

*Illinois*. — Drummond v. Yager, 10 Ill. App. 380; Harts v. Latham, 84 Ill. App. 483.

*Indiana*. — Bagott v. Mullen, 32 Ind. 332, 2 Am. Rep. 351.

*Kentucky*. — Mitchell v. Sproul, 5 J. J. Marsh. (Ky.) 270.

*Massachusetts*. — Weeks v. Parsons, 176 Mass. 570; Wood v. Leland, 1 Met. (Mass.) 387.

*Missouri*. — Dysart v. Crow, 170 Mo. 275.

*Montana*. — Northwestern Nat. Bank v. Great Falls Opera House Co., 23 Mont. 1.

*New York*. — Crisfield v. Murdock, 127 N. Y. 315; Barnes v. Cushing, 43 N. Y. App. Div. 158.

*North Carolina*. — Hughes v. Boone, 81 N. Car. 204; Smith v. Carr, 128 N. Car. 150; McDowell County v. Nichols, 131 N. Car. 501, 92 Am. St. Rep. 785.

*Ohio*. — Daum v. Kehnast, 9 Ohio Cir. Dec. 867.

*Oregon*. — Fisher v. Gaither, 32 Oregon 161; Thompson v. Dekum, 32 Oregon 506; Ladd v. Chamber of Commerce, 37 Oregon 49.

*South Carolina*. — Aikin v. Peay, 5 Strobb. L. (S. Car.) 15, 53 Am. Dec. 684.

*Vermont*. — Liddell v. Wiswell, 59 Vt. 365.

*Virginia*. — Strother v. Mitchell, 80 Va. 149; Tate v. Winfree, 99 Va. 255; Wayland v. Tucker, 4 Gratt. (Va.) 267, 50 Am. Dec. 76.

*Wisconsin*. — Smith v. Hodson, 50 Wis. 279.

**The Right Is Contingent until Payment** and then becomes a fixed liability against the cosurety. Washington v. Norwood, 128 Ala. 383.

**2. Origin and Jurisdiction.** — Broughton v. Wimberly, 65 Ala. 549; Drummond v. Yager, 10

Ill. App. 380; Keach v. Hamilton, 84 Ill. App. 413; Mitchell v. Sproul, 5 J. J. Marsh. (Ky.) 270; January v. January, 7 T. B. Mon. (Ky.) 542, 18 Am. Dec. 211; Wood v. Leland, 22 Pick. (Mass.) 503; Jeffries v. Ferguson, 87 Mo. 244; Fischer v. Gaither, 32 Oregon 161; Wayland v. Tucker, 4 Gratt. (Va.) 267, 50 Am. Dec. 76. And see the title CONTRIBUTION AND EXONERATION, vol. 7, p. 328.

**3. Only Cosureties Liable.** — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 834. See also the following cases:

*Georgia*. — Snow v. Brown, 100 Ga. 117.

*Indiana*. — Knopf v. Morel, 111 Ind. 570; Houck v. Graham, 123 Ind. 277.

*Kentucky*. — Chapeze v. Young, 87 Ky. 476; Johnson v. Hicks, 97 Ky. 116.

*Louisiana*. — Stockmeyer v. Oertling, 35 La. Ann. 467.

*Maryland*. — McPherson v. Talbott, 10 Gill & J. (Md.) 499, 32 Am. Dec. 191.

*Mississippi*. — Matthews v. Millsaps, 58 Miss. 564.

*Missouri*. — Citizens' Ins. Co. v. Broyles, 78 Mo. App. 364.

*New York*. — Barnes v. Cushing, 71 N. Y. App. Div. 366; Egbert v. Hanson, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 596.

*Texas*. — Mulkey v. Templeton, (Tex. Civ. App. 1901) 60 S. W. Rep. 439.

*Virginia*. — Boulware v. Hartsook, 83 Va. 679.

**Indorsers on an Accommodation Note** who indorsed before the note became operative by being transferred to some person not a party for value received and who are charged by notice of demand and nonpayment are to be treated as cosureties. Atwater v. Farthing, 118 N. Car. 388. But see Egbert v. Hanson, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 596.

**4. Privity and Knowledge of Cosurety's Liability.** — Matthews v. Millsaps, 58 Miss. 564; Daniel v. McRae, 2 Hawks (9 N. Car.) 590, 11 Am. Dec. 787. And see the title CONTRIBUTION AND EXONERATION, vol. 7, p. 334.

fact that they may be bound by different instruments given at different times is immaterial; the right of contribution exists.<sup>1</sup> But where the sureties are bound by different instruments for different portions of a debt due from the same principal, and the suretyship of each is for a separate and distinct transaction, there will be no right of contribution among the sureties.<sup>2</sup>

(3) *Surety at Request of Cosurety.* — If one becomes a surety at the request of his cosurety, he is not, in general, liable to the latter for contribution.<sup>3</sup> But the cases on this point are in conflict; some courts holding that to relieve the surety from liability without contribution there must be a contract express or implied for such immunity. In such cases the mere request to sign does not affect the liability.<sup>4</sup>

(4) *Surety of Surety.* — A person who is a surety for another surety is not liable for contribution.<sup>5</sup>

d. **LIABILITY AS AFFECTED BY AGREEMENT.** — Sureties may make any contract they please as between themselves, and the sureties may thus fix their liability to contribute.<sup>6</sup> Such contract may be proved by parol or be evidenced by the circumstances of the case.<sup>7</sup>

e. **EFFECT OF DEATH OF COSURETY.** — The death of a cosurety does not affect the right to demand contribution,<sup>8</sup> and a surety who has paid the debt may maintain his action against the estate of such deceased cosurety.<sup>9</sup>

Where the Executor of a Deceased Cosurety Pays the Obligation he is entitled to contribution from the other sureties.<sup>10</sup>

1. **Sureties on Different Instruments Liable.** — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 333. See also the following cases:

*Georgia.* — *Tittle v. Bennett*, 94 Ga. 405; *Snow v. Brown*, 100 Ga. 117.

*Indiana.* — *Allen v. State*, 61 Ind. 268, 28 Am. Rep. 673; *State v. Mitchell*, 132 Ind. 461.

*Mississippi.* — *Matthews v. Millsaps*, 58 Miss. 564.

*North Carolina.* — *Hughes v. Boone*, 81 N. Car. 204; *Daniel v. McRae*, 2 Hawks (9 N. Car.) 590, 11 Am. Dec. 787.

*Ohio.* — *Daum v. Kehnaast*, 9 Ohio Cir. Dec. 867.

*Oregon.* — *Thompson v. Dekum*, 32 Oregon 506.

*Wisconsin.* — *Rudolf v. Malone*, 104 Wis. 470.

Where There Are Several Distinct Bonds with Several and Distinct Penalties, contribution between the sureties is in proportion to the penalties of their respective bonds. *Toucey v. Schell*, (Supm. Ct.) 15 Misc. (N. Y.) 350.

2. **Sureties for Different Portions of Debt Not Liable.** — *Hutchison v. Roberts*, 6 Del. Ch. 112; *Stockmeyer v. Oertling*, 35 La. Ann. 467.

3. **Surety at Request of Cosurety Not Liable.** — *Hayden v. Thrasher*, 18 Fla. 795; *Byers v. McClanahan*, 6 Gill & J. (Md.) 250; *Taylor v. Savage*, 12 Mass. 98; *Mickley v. Stocksleger*, 10 Pa. Co. Ct. 345; *Dullnig v. Weekes*, 16 Tex. Civ. App. 1.

A Surety at the Request of a Cosurety May Recover from his cosurety all that he has been compelled to pay. *Apgar v. Hiler*, 24 N. J. L. 812.

4. **Mere Request to Sign Does Not Relieve from Liability.** — *Hayden v. Thrasher*, 18 Fla. 795, 28 Fla. 162; *Bagott v. Mullen*, 32 Ind. 332, 2 Am. Rep. 351; *McKee v. Campbell*, 27 Mich. 497; *Burnett v. Millsaps*, 59 Miss. 333.

5. **Surety of Surety Not Liable.** — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 332.

And see also the following cases: *Allen v. State*, 61 Ind. 268, 28 Am. Rep. 673; *Houck v. Graham*, 123 Ind. 277; *State v. Mitchell*, 132 Ind. 461; *Chapeze v. Young*, 87 Ky. 476; *McCollum v. Boughton*, 132 Mo. 601.

6. **Liability as Affected by Agreement.** — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 339. And see also the following cases: *Hutchison v. Roberts*, 6 Del. Ch. 112; *Mickley v. Stocksleger*, 10 Pa. Co. Ct. 345; *Peyton v. Stuart*, 88 Va. 50.

Where There Is a Failure of the Consideration for the agreement by which a surety agrees to exonerate his cosurety from liability, the surety may therefore enforce contribution from the cosurety. *Devazac v. Seiler*, 93 Ky. 418.

7. **Proof of Agreement Between Cosureties.** — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 339. And see also the following cases: *Drummond v. Yager*, 10 Ill. App. 380; *Egbert v. Hanson*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 596; *Leeper v. Paschal*, 70 Mo. App. 117; *Mickley v. Stocksleger*, 10 Pa. Co. Ct. 345; *Sloan v. Gibbes*, 56 S. Car. 480, 76 Am. St. Rep. 559.

8. **Death of Surety Does Not Affect Liability of Cosureties.** — *Dennis v. Sanger*, 15 Tex. Civ. App. 411.

9. **Estate of Deceased Cosurety Liable.** — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 332. And see also the following cases: *Wood v. Leland*, 1 Met. (Mass.) 387; *Egbert v. Hanson*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 596; *Wetmore v. Dobbins*, 2 Pa. Super. Ct. 110; *Stephens v. Meek*, 6 Lea (Tenn.) 226.

Death of Surety Who Has Paid Obligation. — Where a surety who has discharged more than his share of the obligation dies, his executor may bring an action against the estate of a deceased cosurety for contribution. *Shurts v. Howell*, 30 N. J. Eq. 418.

10. **Payment by Executor of Deceased Cosurety.** — *Dussol v. Bruguere*, 50 Cal. 456.

*f.* **EFFECT OF INSOLVENCY OF COSURETY.** — At Common Law the insolvency of one of the sureties does not affect the amount for which each surety is liable.<sup>1</sup>

But in Equity a surety who has paid the debt may compel the solvent sureties to contribute *pro rata* according to the number of such solvent cosureties.<sup>2</sup>

In Some Jurisdictions courts of law adopt the equitable rule and contribution is distributed equally between those sureties who are solvent.<sup>3</sup>

*g.* **ABSENCE OF COSURETY FROM JURISDICTION.** — Absence from the jurisdiction of the court is, for the purpose of contribution, equivalent to insolvency.<sup>4</sup>

*h.* **EFFECT OF RELEASE OF PRINCIPAL.** — Where the surety who has paid the debt agrees to release the principal, the cosurety is also released from liability even though it is expressly stipulated that he shall remain liable to contribution.<sup>5</sup>

*i.* **WHEN RIGHT ACCRUES** — (1) *In General.* — Before a surety can compel contribution from a cosurety, one of two circumstances must exist: first, that he has paid more than his proportion or *pro rata* part of the entire amount for which he and his cosurety were bound; or, second, that the amount paid by him, being less than the whole amount for which both were liable, was accepted in full satisfaction of the entire liability, and had the effect to discharge from further liability the surety against whom contribution is sought.<sup>7</sup>

A Judgment at Law is not a necessary prerequisite to filing a bill to compel contribution.<sup>8</sup>

Demand and Notice are not necessary before bringing a suit for contribution.<sup>9</sup>

(2) *Compulsory Payment Necessary.* — The whole right of contribution rests

1. **Effect of Insolvency at Common Law.** — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 341.

2. **Effect of Insolvency in Equity.** — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 341. And see also the following cases: *Burroughs v. Lott*, 19 Cal. 125; *Williams v. Riehl*, 127 Cal. 365, 78 Am. St. Rep. 60; *Hutchison v. Roberts*, 6 Del. Ch. 112; *Hayden v. Thrasher*, 18 Fla. 795; *Fischer v. Gaither*, 32 Oregon 161; *Acers v. Curtis*, 68 Tex. 423; *Faurot v. Gates*, 86 Wis. 569.

3. **Equitable Distribution Adopted at Law.** — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 342. And see also the following cases: *Smith v. Mason*, 44 Neb. 610; *Sloan v. Gibbs*, 56 S. Car. 480, 76 Am. St. Rep. 559; *Liddell v. Wiswell*, 59 Vt. 365; *Faurot v. Gates*, 86 Wis. 569.

4. **Absence from Jurisdiction Equivalent to Insolvency.** — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 342. And see also the following cases: *Lee v. Forman*, 3 Met. (Ky.) 114; *Bottoms v. Leonard*, (Ky. 1899) 53 S. W. Rep. 273; *Sherrod v. Woodard*, 4 Dev. L. (15 N. Car.) 360, 25 Am. Dec. 714; *Liddell v. Wiswell*, 59 Vt. 365; *Faurot v. Gates*, 86 Wis. 569.

5. **Release of Principal.** — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 340. And see also *Hamilton v. Glasscock*, (Tex. 1888) 9 S. W. Rep. 207.

6. **Right Accrues upon Payment of More than Pro Rata Part.** — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 333. And see also the following cases:

*England.* — *Wolmershausen v. Gullick*, (1893) 2 Ch. 514.

*Alabama.* — *Nation v. Roberts*, 20 Ala. 544; *Washington v. Norwood*, 128 Ala. 383.

*California.* — *Williams v. Riehl*, 127 Cal. 365, 78 Am. St. Rep. 60.

*Georgia.* — *Cooper v. Chamblee*, 114 Ga. 116.

*Indiana.* — *Reiter v. Cumbach*, 1 Ind. App. 41.

*Iowa.* — *Novak v. Dupont*, 112 Iowa 334.

*Kentucky.* — *Caldwell v. Roberts*, 1 Dana (Ky.) 355; *Bottoms v. Leonard*, (Ky. 1899) 53 S. W. Rep. 273.

*Louisiana.* — *Stockmeyer v. Oertling*, 35 La. Ann. 467.

*Maryland.* — *Smith v. State*, 46 Md. 617.

*Massachusetts.* — *Wood v. Leland*, 1 Met. (Mass.) 387.

*Montana.* — *Northwestern Nat. Bank v. Great Falls Opera House Co.*, 23 Mont. 1.

*Nebraska.* — *Smith v. Mason*, 44 Neb. 610.

*North Carolina.* — *Leak v. Covington*, 99 N. Car. 559; *Sherrod v. Woodard*, 4 Dev. L. (15 N. Car.) 360, 25 Am. Dec. 714.

*Oregon.* — *Ladd v. Chamber of Commerce*, 37 Oregon 49.

*South Carolina.* — *Gourdin v. Trenholm*, 25 S. Car. 362.

*Texas.* — *Jackson v. Murray*, 77 Tex. 644; *Hamilton v. Glasscock*, (Tex. 1888) 9 S. W. Rep. 207.

*Virginia.* — *Wayland v. Tucker*, 4 Gratt. (Va.) 267, 50 Am. Dec. 76.

7. **Acceptance of Less than Amount Due.** — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 333. And see also *Hamilton v. Glasscock*, (Tex. 1888) 9 S. W. Rep. 207.

8. **Judgment Against Surety Not Necessary.** — *Ryneearson v. Turner*, 52 Mich. 7; *Neilson v. Williams*, 42 N. J. Eq. 291.

9. **Demand and Notice Unnecessary.** — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 338. And see *Cage v. Foster*, 5 Yerg. (Tenn.)

on the doctrine of compulsory payment. The obligation is raised by the necessity which the paying surety is under of making the payment, and therefore he can have no contribution unless his payment is compulsory.<sup>1</sup> But a surety need not wait until payment is extorted from him. If he is legally liable to pay, then any payment made by him under such conditions is not a voluntary payment but is legally compulsory.<sup>2</sup>

(3) *Payment by Note*. — If one of the cosureties pays the debt by giving his note which is accepted by the creditor as payment, the surety thus paying may at once and before paying the note sue his cosurety for contribution the same as if he had paid the debt in money.<sup>3</sup>

j. *INSOLVENCY OF PRINCIPAL*. — It seems to be well settled that in a suit at law the right to bring an action for contribution in no way depends on the insolvency of the principal.<sup>4</sup>

Conversely, in equity, the weight of authority is that the insolvency of the principal is a prerequisite to the action.<sup>5</sup>

k. *STATUTE OF LIMITATIONS*. — The limitation begins to run against the right of a surety to demand contribution from his cosurety as soon as payment is made by him.<sup>6</sup>

l. *EXTENT OF RIGHT* — (1) *In General*. — A surety who has paid the debt can recover from each of his cosureties only the aliquot portion of the whole amount paid, calculated on the basis of the number of sureties,<sup>7</sup> unless it appears that some of them are insolvent.<sup>8</sup> If a party attempts to enforce contribution for a greater amount than is due, he may be enjoined.<sup>9</sup>

Interest from the date of payment may be recovered by the surety who has paid the debt.<sup>10</sup>

261, 26 Am. Dec. 265; *Mason v. Pierron*, 69 Wis. 585.

1. *Payment Must Be Compulsory*. — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 336. See also *Robinson v. Boyd*, 60 Ohio St. 57; *Ladd v. Chamber of Commerce*, 37 Oregon 49.

*Payment under an Invalid Execution* is treated as voluntary. *Halsey v. Murray*, 112 Ala. 185.

2. *Surety Need Not Await Suit*. — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 337. And see also the following cases: *Halsey v. Murray*, 112 Ala. 185; *Harts v. Latham*, 84 Ill. App. 483; *Reiter v. Cumbach*, 1 Ind. App. 41; *Bottoms v. Leonard*, (Ky. 1899) 53 S. W. Rep. 273; *Bond v. Bishop*, 18 La. Ann. 549; *Craig v. Craig*, 5 Rawle (Pa.) 91.

3. *Payment of Note Unnecessary*. — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 338. And see *Ryan v. Krusor*, 76 Mo. App. 496; *Smith v. Mason*, 44 Neb. 610.

4. *Insolvency of Principal — Actions at Law*. — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 338. And see also *Boutin v. Etsell*, 110 Wis. 276.

5. *Rule in Equity*. — See the title CONTRIBUTION AND EXONERATION, vol. 7, pp. 338, 339. And see *Crow v. Murphy*, 12 B. Mon. (Ky.) 444; *Fischer v. Gaither*, 32 Oregon 161; *Tabor v. Cockrell*, 4 Tex. App. Civ. Cas., § 126.

*Insolvency Must Exist When Action Is Brought*. — *Leak v. Covington*, 99 N. Car. 559.

6. *Statute of Limitations Runs from Payment*. — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 340. And see *Washington v. Norwood*, 128 Ala. 383; *Northwestern Nat. Bank v. Great Falls Opera House Co.*, 23 Mont. 1; *Sherrord v. Woodard*, 4 Dev. L. (15 N. Car.) 360, 25 Am. Dec. 714.

7. *Extent of Recovery — Alabama*. — *Simmons v. Varnum*, 36 Ala. 92; *Mitchell v. Turner*, 37 Ala. 660.

*Colorado*. — *McAllister v. Irwin*, (Colo. 1903) 73 Pac. Rep. 47.

*Kentucky*. — *Lytle v. Pope*, 11 B. Mon. (Ky.) 297; *Hutson v. Combs*, (Ky. 1901) 62 S. W. Rep. 709.

*Maryland*. — *Smith v. State*, 46 Md. 617.

*Nevada*. — *Alderson v. Mendes*, 16 Nev. 298.

*Pennsylvania*. — *Cooper's Estate*, 4 Pa. Super. Ct. 615.

*South Carolina*. — *Aiken v. Peay*, 5 Strobb. L. (S. Car.) 15, 53 Am. Dec. 684.

*Texas*. — *Acers v. Curtis*, 68 Tex. 423; *Scott v. Rowland*, 14 Tex. Civ. App. 370; *Mulkey v. Templeton*, (Tex. Civ. App. 1901) 60 S. W. Rep. 439.

And see the title CONTRIBUTION AND EXONERATION, vol. 7, p. 341.

*Agreement to Contribute Pro Rata*. — Where sureties are liable, each for the whole sum, so that the full amount may be collected of either, they may, as against each other, assume *pro rata* shares of the liability, and an action for contribution may be maintained therefor. *Belond v. Guy*, 20 Wash. 160.

8. *Extent of Recovery Where One Surety Is Insolvent*. — See *supra*, this section, *Effect of Insolvency of Cosurety*. And see *Stone v. Buckner*, 12 Smed. & M. (Miss.) 73.

9. *Injunction to Restrain Collection of Excessive Amount*. — *Northwestern Nat. Bank v. Great Falls Opera House Co.*, 23 Mont. 1.

10. *Interest Recoverable*. — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 344. And see also *Scott v. Rowland*, 14 Tex. Civ. App. 370; *Fletcher v. Jackson*, 23 Vt. 581, 56 Am. Dec. 98.

**Costs and Expenses** of defending a suit for the debt may be included in the claim for contribution<sup>1</sup> unless the defense was needless or frivolous.<sup>2</sup>

**Sureties Liable for Different Amounts** cannot be required to contribute beyond the sums for which they have become bound,<sup>3</sup> unless they agree between themselves to equalize the loss.<sup>4</sup>

(2) **Money Borrowed to Prevent Breach of Bond.** — Before the right of contribution arises, the cosureties are mere strangers, one to the other, and as one has no authority to make contracts for another he cannot bind a non-participating surety for money voluntarily borrowed to prevent a breach of the bond.<sup>5</sup>

(3) **Misconduct of Surety.** — Where a surety pays the damage which his own conduct was instrumental in causing, he cannot recover from his cosureties, who are innocent, their *pro rata* of the loss he has sustained.<sup>6</sup>

(4) **Benefits Secured from Creditor.** — A surety cannot speculate off his cosureties, and if in paying the debt he secured any benefits, his cosureties are entitled to their share therein.<sup>7</sup>

**2. Indemnity or Security Given Cosurety** — *a. IN GENERAL.* — As a general rule, where one of several cosureties takes security or indemnity from the principal it inures to the benefit of all.<sup>8</sup>

**1. Costs and Expenses Recoverable.** — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 344. And see *Carter v. Fidelity, etc., Co.*, 134 Ala. 369, 92 Am. St. Rep. 41; *Wagenseller v. Prettyman*, 7 Ill. App. 192; *Fletcher v. Jackson*, 23 Vt. 581, 56 Am. Dec. 98; *Boutin v. Etsell*, 110 Wis. 276.

**Actual Payment of Expenses by the Surety Is a Prerequisite** to his right to obtain contribution therefor. *Acers v. Curtis*, 68 Tex. 423.

**2. Needless Costs and Expenses Not Recoverable.** — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 345. And see also *Carter v. Fidelity, etc., Co.*, 134 Ala. 369, 92 Am. St. Rep. 41.

**3. Sureties Bound in Different Amounts.** — *Snow v. Brown*, 100 Ga. 117.

**4. Agreement to Equalize Loss.** — *Patterson v. Patterson*, 23 Pa. St. 464.

**5. Money Borrowed to Prevent Breach.** — *Ladd v. Chamber of Commerce*, 37 Oregon 49.

**6. Misconduct of Surety.** — *Scofield v. Gaskill*, 60 Ga. 277; *Block v. Estes*, 92 Mo. 318; *McCroory v. Parks*, 18 Ohio St. 1.

**7. Cosureties Entitled to Share Benefits.** — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 342. And see *Crozier v. Grayson*, 4 J. J. Marsh. (Ky.) 514; *Acers v. Curtis*, 68 Tex. 423.

**8. Indemnity or Security Inures to Common Benefit.** — See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 343. And see also the following cases:

*England.* — *Berridge v. Berridge*, 44 Ch. D. 168.

*California.* — *Williams v. Riehl*, 127 Cal. 365, 78 Am. St. Rep. 60.

*Delaware.* — *Hutchison v. Roberts*, 6 Del. Ch. 112.

*Indiana.* — *Comegys v. State Bank*, 6 Ind. 357.

*Iowa.* — *Hoover v. Mowrer*, 84 Iowa 43, 35 Am. St. Rep. 293.

*Kansas.* — *Gilmore v. Gilmore*, 6 Kan. App. 922, 50 Pac. Rep. 99, 104.

*Kentucky.* — *Barker v. Boyd*, (Ky. 1903) 71 S. W. Rep. 529.

*Michigan.* — *Roeder v. Niedermeier* 112 Mich. 608.

*Nebraska.* — *Smith v. Mason*, 44 Neb. 610.

*New Jersey.* — *Wolcott v. Hagerman*, 50 N. J. L. 289; *Paulin v. Kaighn*, 29 N. J. L. 480.

*New York.* — *Crisfield v. Murdock*, 127 N. Y. 315; *Sherman v. Foster*, 158 N. Y. 587.

*North Carolina.* — *Peebles v. Gay*, 115 N. Car. 38, 44 Am. St. Rep. 429; *Carr v. Smith*, 129 N. Car. 232; *McDowell County v. Nichols*, 131 N. Car. 501, 92 Am. St. Rep. 785.

*Ohio.* — *Wilson v. Stewart*, 24 Ohio St. 504.

*Oregon.* — *Farmers Nat. Bank v. Snodgrass*, 29 Oregon 395, 54 Am. St. Rep. 797.

*Tennessee.* — *Pile v. McCoy*, 99 Tenn. 367.

*Texas.* — *Urbahn v. Martin*, 19 Tex. Civ. App. 93.

*Vermont.* — *Prindle v. Page*, 21 Vt. 94; *Flanagan v. Post*, 45 Vt. 246; *Somers v. Johnson*, 57 Vt. 274.

*Wyoming.* — *Bolln v. Metcalf*, 6 Wyo. 1, 71 Am. St. Rep. 898, citing with approval 24 AM. AND ENG. ENCYC. OF LAW 815; *Cramer v. Redman*, 10 Wyo. 338.

**A Surety Is Bound to Accept Indemnity** from his principal whenever offered. *Smith v. Mason*, 44 Neb. 610.

**Action by Surety Holding Indemnity.** — A surety may maintain an action against his cosurety for contribution regardless of any indemnity he may hold. In such case whatever may be afterwards received by a sale of the indemnity shall be accounted for and proportionately paid to the sureties. *Williams v. Riehl*, 127 Cal. 365, 78 Am. St. Rep. 60; *Paulin v. Kaighn*, 29 N. J. L. 480.

**Surety Entitled to Attorney's Fees** incurred in defending his title to security given him by the principal. *Hoover v. Mowrer*, 84 Iowa 43, 35 Am. St. Rep. 293.

**Payment by Cosurety of Party Receiving Security.** — Where there are two or more persons sustaining the relation of cosurety, and one of them has received security from the principal for his own indemnity, and the other surety pays the debt, he thereby becomes entitled to all the securities held by the first surety. *Butler v. Birkey*, 13 Ohio St. 514.

**b. BEFORE RELATION OF COSURETY EXISTS.**— Until the relation of cosuretyship exists, the sureties have a right to look out for their own separate indemnity, and a security or indemnity stipulated for before that time does not inure to the common benefit.<sup>1</sup>

**c. PRINCIPAL LIABLE TO SURETY ON DIFFERENT OBLIGATIONS.**— Where a surety who obtains a security is the surety on a prior indebtedness of the principal, or where the principal is liable to him for an individual loan, such surety need not apply the security for the benefit of his cosurety.<sup>2</sup>

**d. AFTER PAYMENT BY SURETIES IN EQUAL PROPORTIONS.**— Where the debt is paid by several sureties in equal proportions the equities between them as cosureties cease, and each becomes an independent creditor of the principal for the amount he may have paid; so that if one of them subsequently receives indemnity from the principal for his own debt the others are not entitled to participate therein, providing such indemnity does not proceed from securities held by the surety previous to the payment of the debt.<sup>3</sup> The sureties on so paying the debt may contract between themselves for an equal division of whatever may afterward be collected by either one upon the debt of the principal.<sup>4</sup>

**3. Loss or Release of Security Given Cosurety.**— The cosurety who holds the security becomes the trustee for the other cosureties, and as such must faithfully hold the securities for the benefit of all his cosureties, and he has no right without their consent to transfer, surrender, or cancel them. And as a general rule, if he misapplies them and is afterwards compelled as surety to pay the debt he cannot compel contribution from a cosurety.<sup>5</sup>

**4. Fraudulent Conveyance by Cosurety.**— A surety is entitled to protection against a fraudulent conveyance made by his cosurety at any time subsequent to the execution of the common obligation.<sup>6</sup>

**Agreement to Obtain Indemnity Individually.**— After two persons have become sureties for a common principal, they may by agreement between themselves renounce their right to take benefit from any securities they may respectively obtain, and each look out for himself exclusively for an indemnity from the principal or for contribution from another cosurety. *McDowell County v. Nichols*, 131 N. Car. 501, 92 Am. St. Rep. 785.

**Property of the Principal Purchased by the Surety** under an execution does not inure to the benefit of a cosurety as an indemnity against the joint liability. *Crompton v. Vasser*, 19 Ala. 259.

**Security Given by Surety.**— A security given by a surety for the payment of the debt does not inure to the benefit of the cosurety when the latter pays the debt. *Bowditch v. Green*, 3 Met. (Mass.) 360.

**1. Indemnity Secured Before Cosuretyship.**— *McDowell County v. Nichols*, 131 N. Car. 501, 92 Am. St. Rep. 785.

**2. Principal Liable to Surety on Different Obligations.**— *Titcomb v. McAllister*, 81 Me. 399; *Wilcox v. Fairhaven Bank*, 7 Allen (Mass.) 270; *Urbahn v. Martin*, 19 Tex. Civ. App. 93; *Sanders v. Wettermark*, 20 Tex. Civ. App. 175. *Contra*, *Moore v. Moberly*, 7 B. Mon. (Ky.) 299.

**Apportionment of Indemnity.**— It has been held that where there are several demands on which a person is surety with different cosureties, any security taken generally for his indemnity shall be apportioned upon all the demands *pro rata*. *Mueller v. Barge*, 54 Minn.

314; *Brown v. Ray*, 18 N. H. 102, 45 Am. Dec. 361; *Urbahn v. Martin*, 19 Tex. Civ. App. 93.

**3. Indemnity After Payment of Debt.**— *Messer v. Swan*, 4 N. H. 482; *Hall v. Cushman*, 16 N. H. 462, 43 Am. Dec. 562; *Tabor v. Cockrell*, 4 Tex. App. Civ. Cas., § 126; *Urbahn v. Martin*, 19 Tex. Civ. App. 93; *Cramer v. Redman*, 10 Wyo. 338.

**4. Agreement to Share Indemnity.**— *Smith v. Hicks*, 5 Wend. (N. Y.) 48; *Cramer v. Redman*, 10 Wyo. 338.

**5. Loss or Release of Security Given Cosurety.**— See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 343. And see also the following cases: *Simmons v. Camp*, 71 Ga. 54; *Roberts v. Sayre*, 6 T. B. Mon. (Ky.) 188; *Hayes v. Davis*, 18 N. H. 600; *Wilson v. Stewart*, 24 Ohio St. 504; *Eshleman v. Bolenius*, 28 W. N. C. (Pa.) 573.

**Good Faith in Releasing Security.**— It has been held that where the surety releases security in good faith, and does not fraudulently conceal the fact of such release from his cosurety, he is not liable therefor. *Brandon v. Medley*, 1 Jones Eq. (54 N. Car.) 313.

**Release under Judgment.**— Where a surety has been adjudged to surrender security to another, he must show such other's superior claim, and that he was compelled to perform and did perform the judgment by surrendering the security. *Cornett v. Holcomb*, (Ky. 1901) 62 S. W. Rep. 477.

**6. Fraudulent Conveyance by Cosurety.**— *Washington v. Norwood*, 128 Ala. 383; *Bowen v. Hoskins*, 45 Miss. 183, 7 Am. Rep. 728; *Neilson v. Williams*, 42 N. J. Eq. 291.



**VI. DISCHARGE OF SURETY — 1. In General — a. LEGAL AND EQUITABLE DISCHARGE.** — Apart from statutory provision, the grounds upon which sureties may be discharged fall under two main heads: first, discharge by the extinguishment, satisfaction, release, or change of the principal contract; second, discharge by acts *in pais*. The first of these heads evidently includes purely legal defenses, while the term “act *in pais*” is used to indicate the fact that the act which constitutes the ground of discharge owes its efficacy to equitable considerations, but that it is nevertheless cognizable in the legal forum. The distinction between the legal and equitable defenses of the surety was at one time of some importance,<sup>1</sup> but in the first decade of the nineteenth century<sup>2</sup> courts of law began to discharge sureties upon equitable grounds, and since then there has been, save in a very few jurisdictions, a complete interfusion of legal and equitable principles. Hence, no absolute line of demarcation between legal and equitable discharges can now be drawn, though it often becomes necessary to ascertain the source of a particular rule. Equitable doctrines really irrigate the entire subject, and rules which would once have been able to stand upon a legal footing only are now supported by equitable considerations also. To illustrate: a binding agreement between creditor and debtor for an extension of time discharges the surety on the legal ground that the obligation is thereby changed. Nevertheless the discharge, in perhaps the majority of cases, is put on the purely equitable ground that the surety's right of immediate payment and subrogation is interfered with.<sup>3</sup>

**b. EXTINGUISHMENT, PERFORMANCE, PAYMENT.** — Whatever extinguishes the main obligation necessarily discharges the surety, as where a debt is canceled by will,<sup>4</sup> or where the principal debtor succeeds in annulling the obligation in an action against him, although the surety may have suffered judgment by default.<sup>5</sup> The surety may also be released or discharged from

**1. At Law and in Equity.** — The following are instances where relief could formerly be had by the surety only in equity: I. Where parol evidence was necessary in order to prove the fact of suretyship. *Craythorne v. Swinburne*, 14 Ves. Jr. 160; *Clinton v. Hooper*, 1 Ves. Jr. 173; *Ashbee v. Pidduck*, 1 M. & W. 564. See also the title ACCOMMODATION PAPER, vol. 1, pp. 344, 378, and *supra*, this title, II. 2. *Relationship May Be Shown by Parol*. Traces of this rule are still found in decisions to the effect that where the contract is under seal the remedy of the surety is in equity. *Wittmer v. Ellison*, 72 Ill. 301; *Lewis v. Harbin*, 5 B. Mon. (Ky.) 574; *Devers v. Ross*, 10 Gratt. (Va.) 252, 60 Am. Dec. 331; *Parsons v. Harrold*, 46 W. Va. 122; *Cumberland First Nat. Bank v. Parsons*, 42 W. Va. 137; *Glenn v. Morgan*, 23 W. Va. 467; *Sayre v. King*, 17 W. Va. 562. See also *Maxwell v. Connor*, 1 Hill Eq. (S. Car.) 14. II. The right of the surety to be discharged where the creditor failed to bring suit upon request (not statutory) was of equitable origin. *Bailey v. Edwards*, 4 B. & S. 771, 116 E. C. L. 771; *Wright v. Simpson*, 6 Ves. Jr. 734; *Strong v. Foster*, 17 C. B. 201, 84 E. C. L. 201. In some jurisdictions this became also a legal defense early in the nineteenth century. *Herbert v. Hobbs*, 3 Stew. (Ala.) 9; *King v. Baldwin*, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415; *Cope v. Smith*, 8 S. & R. (Pa.) 110, 11 Am. Dec. 582. In others it remained solely an equitable defense. *M'Haney v. Crabtree*, 6 T. B. Mon. (Ky.) 104; *Hancock v. Bryant*, 2 Yerg. (Tenn.) 476; *Harris v. Newell*, 42 Wis. 687.

But the rule now generally prevailing is that all defenses of the surety may be pleaded at law. *Hempstead v. Watkins*, 6 Ark. 317; *Springer v. Toothaker*, 43 Me. 381, 69 Am. Dec. 66; *Harris v. Brooks*, 21 Pick. (Mass.) 195, 32 Am. Dec. 254; *Greely v. Dow*, 2 Met. (Mass.) 176; *People v. Jansen*, 7 Johns. (N. Y.) 332, 5 Am. Dec. 275; *Steubenville Bank v. Hoge*, 6 Ohio 17; *Wayne v. Kirby*, 2 Bailey L. (S. Car.) 551; *U. S. v. Howell*, 4 Wash. (U. S.) 620. Consequently equity will not release a surety who has no legal defense. Nor will it hold the surety liable on equitable grounds where he has a good defense at law. *Leffingwell v. Freyer*, 21 Wis. 392.

**2.** Lord Eldon said in 1818 that the courts of law had then only recently adopted the rule, always prevailing in equity, that an extension of time released the surety. *Hawkshaw v. Parkins*, 2 Swanst. 539. And in 1844 Vice Chancellor Wigram said that the rules of law and equity pertaining to the discharge of sureties by the improper disposition of securities were perfectly similar. *Mackintosh v. Wyatt*, 3 Hare 567.

**3. Legal and Equitable Basis for Discharge Where Time Is Extended.** — See *Gahn v. Niemcewicz*, 11 Wend. (N. Y.) 312.

**4. Debt Canceled.** — *Dibble v. Richardson*, 171 N. Y. 131, reversing 64 N. Y. App. Div. 520.

**5. Successful Defense by Principal.** — *State Bank v. Fowler*, 22 Ark. 112; *U. S. v. Mattoon*, 5 Mackey (D. C.) 565; *Michener v. Springfield Engine, etc., Co.*, 142 Ind. 130; *Ames v. Maclay*,

liability by any agreement between him and the creditor sufficient to discharge a party in other relations.<sup>1</sup> Likewise an act of the principal or any transaction between him and the creditor which destroys the main obligation or discharges the principal from liability thereon will discharge the surety also;<sup>2</sup> or payment by him,<sup>3</sup> or by the surety,<sup>4</sup> or by a third person<sup>5</sup> will have this effect.

The Application of Payments, as affecting the rights of sureties, has been discussed elsewhere.<sup>6</sup>

Tender of Payment made by the principal debtor will discharge the surety.<sup>7</sup> The discharge, in this case, is based upon equitable as well as legal grounds. It is not necessary, therefore, that a tender to discharge the surety should be formally made,<sup>8</sup> or that it should be made good by payment into court. But a mere offer of payment, refused by the creditor because he did not need the money, has, in *New York*, been held not to discharge the surety, there being nothing to show that the debtor insisted upon paying as a legal right.<sup>9</sup> This

14 Iowa 281; *Dickason v. Bell*, 13 La. Ann. 249. *Compare Hill v. McKenzie*, 39 Ala. 314; *Dillingham v. Mudd*, 1 Bush (Ky.) 102; *State v. Coste*, 36 Mo. 437, 88 Am. Dec. 148; *Sonnenheil v. Texas Guarantee, etc., Co.*, 23 Tex. Civ. App. 436.

1. Discharge of Surety by Agreement with Creditor. — *Lyle v. Morse*, 24 Ill. 95; *Stockton v. Stockton*, 40 Ind. 225; *De Goey v. Van Wyk*, 97 Iowa 491; *Gilbert v. State Ins. Co.*, 3 Kan. App. 1; *Mockett v. Boston Invest. Co.*, (Neb. 1902) 89 N. W. Rep. 283; *Austin v. Belknap*, 54 Vt. 495. See also the title RELEASE AND DISCHARGE, vol. 24, p. 282.

As to the effect of a promise on the part of the principal to secure other bondsmen, see *McGehee v. Scott*, 15 Ga. 74; *Wilson v. Glover*, 3 Pa. St. 404.

Gratuitous Promise Not Sufficient. — *Auchampaugh v. Schmidt*, 77 Iowa 13; *Muse v. Fraley*, (Ky. 1899) 50 S. W. Rep. 534; *Foster v. Walker*, 34 Miss. 365; *Smith v. McCall*, 63 Mo. App. 631, 2 Mo. App. Rep. 953.

Discharge of Surety by Novation — Change of Parties. — *Reid v. Nunnally*, 24 Ark. 356; *Georgetown First Nat. Bank v. Gatewood*, (Ky. 1897) 39 S. W. Rep. 509; *Koenig v. Miller Bros. Brewery Co.*, 38 Mo. App. 182. And see the title NOVATION, vol. 21, p. 659.

2. Performance on the Part of the Principal. — See *Dumont v. U. S.*, 98 U. S. 142.

3. Payment by Principal. — *Stewart v. Levis*, 42 La. Ann. 37; *Coots v. Farnsworth*, 61 Mich. 497.

4. Payment by Surety of his part of the debt will not release him from liability for the whole though the creditor accepts it in full. *Vaughn v. Haden*, 37 Mo. 178; *Martin v. Frantz*, 127 Pa. St. 389, 14 Am. St. Rep. 859. See also the titles ACCORD AND SATISFACTION, vol. 1, p. 413; COMPOSITION WITH CREDITORS, vol. 6, p. 377, note 3.

5. Payment by Third Person. — A third person who pays off the debt at the request of the principal is not subrogated to the principal contract and has no recourse against the surety. *Riddle v. Russell*, 108 Iowa 591; *Blackburn v. Beall*, 21 Md. 208; *Elmendorph v. Tappen*, 5 Johns. (N. Y.) 176. *Compare Burnet v. Courts*, 5 Har. & J. (Md.) 78.

A Payment Subsequently Avoided in Bankruptcy does not release the surety. *Petty v. Cooke*, L. R. 6 Q. B. 790, 40 L. J. Q. B. 281.

6. See the title APPLICATION OF PAYMENTS, vol. 2, p. 433, especially pp. 435, 440, 456.

Application of Payment by Debtor to Unsecured Debt. — *Robson v. McKoin*, 18 La. Ann. 544; *Wetherell v. Joy*, 40 Me. 325; *Harding v. Tift*, 75 N. Y. 461.

Usurious Interest. — The surety is bound by the application of a payment made by his principal to usurious interest. *Allen v. Jones*, 8 Minn. 202.

Application by Creditor to Unsecured Debt. — *Tyson v. Cox*, T. & R. 395; *O'Reilly v. Manderson*, 6 Moo. P. C. 239; *Davis Sewing Mach. Co. v. Buckles*, 89 Ill. 237; *Mathews v. Switzler*, 46 Mo. 301; *Morrison v. Citizens Nat. Bank*, 65 N. H. 253, 23 Am. St. Rep. 39; *Hoyt v. French*, 24 N. H. 198.

7. Discharge of Surety by Tender — *Alabama*. — *White v. Life Assoc. of America*, 63 Ala. 419 35 Am. Rep. 45; *Life Assoc. of America v. Neville*, 72 Ala. 517.

*California*. — *Hayes v. Josephi*, 26 Cal. 535; *Curia v. Packard*, 29 Cal. 194; *Sharp v. Miller*, 57 Cal. 415.

*Georgia*. — *Bonner v. Nelson*, 57 Ga. 433.

*Indiana*. — *Taylor v. Lohman*, 74 Ind. 418; *Wilson v. McVey*, 83 Ind. 110; *Spurgeon v. Smitha*, 114 Ind. 453.

*Kansas*. — *Fisher v. Stockebrand*, 26 Kan. 565.

*Louisiana*. — *Williams v. Reynolds*, 11 La. 230.

*Massachusetts*. — *Hampshire Manufacturers Bank v. Billings*, 17 Pick. (Mass.) 87; *Johnson v. Mills*, 10 Cush. (Mass.) 503.

*Michigan*. — *Sears v. Van Dusen*, 25 Mich. 351.

*New Hampshire*. — *M'Questen v. Noyes*, 6 N. H. 19.

*North Carolina*. — *Smith v. Old Dominion Bldg., etc., Assoc.*, 119 N. Car. 257.

*Ohio*. — *State v. Alden*, 12 Ohio 59.

*Pennsylvania*. — *Appleton v. Donaldson*, 3 Pa. St. 381.

*Tennessee*. — *Johnson v. Ivey*, 4 Coldw. (Tenn.) 608, 94 Am. Dec. 206.

*Vermont*. — *Joslyn v. Eastman*, 46 Vt. 258.

8. Informal Tender. — *O'Connor v. Morse*, 112 Cal. 31, 53 Am. St. Rep. 155; *Daneri v. Gazola*, 139 Cal. 416; *Smith v. Old Dominion Bldg., etc., Assoc.*, 119 N. Car. 257.

9. *Clark v. Sickler*, 64 N. Y. 231, 21 Am. Rep. 606.

view has also been taken in other jurisdictions.<sup>1</sup>

**c. SATISFACTION.** — Any other mode of satisfaction besides payment will likewise discharge the surety. Thus, where a note or other security is taken for the debt,<sup>2</sup> the surety is no longer bound, although such security should prove of no value.<sup>3</sup>

**Effect of Taking Note or Other Obligation.** — Much controversy has arisen as to the exact effect to be attached to the mere acceptance by the creditor of a negotiable note or other obligation. Several difficulties arise. There may be doubt as to whether the note is accepted in satisfaction of the old obligation or as collateral security merely or in conditional payment. Again, there may be a question whether the acceptance of the security operates as an agreement on the part of the creditor to extend time. The liability of the surety on the principal debt can, of course, be enforced only where the obligation is taken solely as collateral or additional security. If it be taken in satisfaction or in conditional satisfaction the surety is discharged. The understanding of the parties at the time of the transaction will, of course, control,<sup>4</sup> but in many cases it is necessary to resort to the legal presumptions that arise. Where the creditor takes new negotiable paper from the debtor, the surety is *prima facie* discharged. This is true whether the question arises in those states where negotiable paper operates as *prima facie* satisfac-

**1. Mere Offer of Payment Not Sufficient to Discharge Surety.** — *Winne v. Colorado Springs Co.*, 3 Colo. 155; *Hiller v. Howell*, 74 Ga. 174; *Wilson v. McVey*, 83 Ind. 108; *Clark v. Sickler*, 64 N. Y. 231, 21 Am. Rep. 606; *McCann v. Dennett*, 13 N. H. 528; *Cunningham v. Morrow*, 24 Pa. Co. Ct. 348. *Contra*, *Taylor v. Lohman*, 74 Ind. 418.

An offer of payment followed by an oral agreement for a new loan discharges the surety. *Musgrave v. Glasgow*, 3 Ind. 31.

**2. Note or Security Taken in Satisfaction — England.** — *Bolton v. Buckenham*, (1891) 1 Q. B. 278. *Compare* *Bolton v. Salmon*, (1891) 2 Ch. 48.

**United States.** — *Bowers v. Cobb*, 31 Fed. Rep. 678; *Smith v. Crease*, 2 Cranch (C. C.) 481.

**Georgia.** — *Simmons v. Guise*, 46 Ga. 473.  
**Massachusetts.** — *Whitaker v. Smith*, 4 Pick. (Mass.) 83; *Fowler v. Bush*, 21 Pick. (Mass.) 230; *Huse v. Alexander*, 2 Met. (Mass.) 157; *Parham Sewing-Mach. Co. v. Brock*, 113 Mass. 194.

**Minnesota.** — *Bell v. Forrestal*, 55 Minn. 431, 436.

**New Jersey.** — *Bell v. Martin*, 18 N. J. L. 167.

**New York.** — *Fellows v. Prentiss*, 3 Den. (N. Y.) 518, 45 Am. Dec. 484; *Hubbard v. Gurney*, 64 N. Y. 457.

**Pennsylvania.** — *Maples v. Hicks*, Bright. (Pa.) 56; *Wolf v. Fink*, 1 Pa. St. 435, 44 Am. Dec. 141.

**Tennessee.** — *Foy v. Sinclair*, 93 Tenn. 296.  
**Virginia.** — *Burson v. Andes*, 83 Va. 445.

**Washington.** — *Seattle First Nat. Bank v. Harris*, 139.

**Wisconsin.** — *Paine v. Voorhees*, 26 Wis. 522; *Omaha Nat. Bank v. Johnson*, 111 Wis. 372.

**Wyoming.** — *Riner v. New Hampshire F. Ins. Co.*, 9 Wyo. 446.

See generally, as to what amounts to a satisfaction, the titles ACCORD AND SATISFACTION,

vol. 1, p. 415 *et seq.*; PAYMENT, vol. 22, p. 513, especially pp. 550, 555 *et seq.*

**Check or Bill of Exchange.** — The taking of a check or unaccepted bill of exchange as a mode of payment does not release the surety if the paper be dishonored. *Board of Education v. Fonda*, 77 N. Y. 350. *Contra*, where the check matures in future and there is agreement for delay. *Okie v. Spencer*, 2 Whart. (Pa.) 253, 30 Am. Dec. 251.

**Demand Note.** — The taking of a demand note will not operate to discharge the surety on the original debt, unless it be shown to be taken in satisfaction. *Hall v. Hays City First Nat. Bank*, 5 Kan. App. 493.

**New Note Void.** — If the new note is void, as by reason of forgery, the surety is not discharged. *Hubbard v. Hart*, 71 Iowa 668; *Carter v. Columbia Bank*, (Ky. 1891) 16 S. W. Rep. 79; *Bowman v. Humphrey*, (Ky. 1896) 37 S. W. Rep. 150; *Central Sav. Bank v. Danckmeyer*, 70 Mo. App. 168; *Officer v. Marshall*, 9 Tex. Civ. App. 428; *Lyndonville Nat. Bank v. Fletcher*, 68 Vt. 81, 54 Am. St. Rep. 874. See also *Kelley v. Post*, 37 Ill. App. 396.

**Illegal Satisfaction.** — Satisfaction which cannot be lawfully accepted by the creditor will not discharge the surety, as where the receiver of an insolvent national bank allows a set-off in favor of the debtor which operates as preference. *Northern Bank v. Farmers' Nat. Bank*, (Ky. 1901) 63 S. W. Rep. 604; *Beckham v. Shackelford*, 8 Tex. Civ. App. 660.

**Public Officer.** — The sureties on a treasurer's bond are discharged where the county commissioners take the personal note of the treasurer secured by a mortgage in satisfaction of the amount for which he is in arrears. *Goodin v. State*, 18 Ohio 6.

**3. Mortgage Security Impeached in Bankruptcy.** — *Frederick-Town Sav. Inst. v. Michael*, 81 Md. 487.

**4. Intention of Parties Controlling.** — *Weller v. Ranson*, 34 Mo. 362; *Sayre v. King*, 17 W. Va. 562; *Paine v. Voorhees*, 26 Wis. 522. See

tion,<sup>1</sup> or in those states where it operates as conditional payment only.<sup>2</sup> In the one case the debt is *prima facie* paid, in the other there is a *prima facie* extension of time. If, instead of being negotiable, the security taken consists of bonds, mortgages, or other choses in action, the presumption that it was taken in satisfaction or in conditional payment does not arise, and it is *prima facie* treated as collateral only.<sup>3</sup> The fact that such collateral matures in the future is not of itself sufficient to raise the presumption of an extension of time such as to release the surety.<sup>4</sup>

**Effect of Satisfaction.** — An obligation once satisfied cannot be revived or reissued against the surety without his consent.<sup>5</sup> And a secret agreement between the principal and creditor to keep the debt alive against him will be ineffectual.<sup>6</sup> When the principal debtor takes up a note it is presumed to be paid, but if he in fact acts for another the surety is not discharged.<sup>7</sup> In addition to discharging the surety from personal liability, the satisfaction or release of the principal obligation necessarily discharges additional security held by the creditor, such as a mortgage executed by the surety or collateral pledged by him.<sup>8</sup>

**2. Release or Discharge of Principal — a. ACT OF CREDITOR.** — The surety is discharged where the creditor discharges the principal upon compromise for less than the whole amount due,<sup>9</sup> or where he enters into a composition,<sup>10</sup> or makes an agreement for composition amounting to an accord and satisfaction of the debt.<sup>11</sup> The same result follows where the creditor executes a binding release or discharge of the principal debtor without receiving payment or satisfaction of any kind.<sup>12</sup> The surety is likewise dis-

also the references in the last note but one *supra*.

**1. Negotiable Paper Prima Facie Taken in Satisfaction.** — *Alford v. Baker*, 53 Ind. 279; *Wiseman v. Lyman*, 7 Mass. 286; *Ely v. James*, 123 Mass. 36.

**2. Conditional Payment.** — *Mooring v. Mobile Marine Dock, etc., Ins. Co.*, 27 Ala. 256; *Berry v. Griffin*, 10 Md. 27, 69 Am. Dec. 123; *Wadlington v. Covert*, 51 Miss. 631; *Sweet v. James*, 2 R. I. 270; *Paine v. Voorhees*, 26 Wis. 522.

**3. Non-negotiable Securities.** — *Sayre v. King*, 17 W. Va. 562. See to the same effect, *Pring v. Clarkson*, 1 B. & C. 14, 8 E. C. L. 7; *Andrews v. Marrett*, 58 Me. 539; *Brooks v. Wright*, 13 Allen (Mass.) 72; *Bangs v. Mosher*, 23 Barb. (N. Y.) 478; *Okie v. Spencer*, 2 Whart. (Pa.) 253, 30 Am. Dec. 251.

**Collateral Proving Worthless.** — Where a new note of the debtor is not taken in satisfaction or part payment, but is negotiated and its proceeds applied to the debt, if the note is subsequently dishonored and is taken up by the creditor who had indorsed it, the payment credited on the note may be stricken off and the surety held liable for the whole. *Greenawalt v. McDowell*, 65 Pa. St. 464.

**Usurious Instrument.** — Where the creditor takes in satisfaction security which proves to be unenforceable because usurious, the surety is nevertheless discharged. *La Farge v. Herter*, 9 N. Y. 241, *affirming* 11 Barb. (N. Y.) 159; *Miller v. Kerr*, 1 Bailey L. (S. Car.) 4.

**4. Collateral Maturing in Future.** — *Hayes v. Wells*, 34 Md. 512; *Noll v. Oberhellmann*, 20 Mo. App. 336.

**5. Obligation Paid.** — *Miller v. Montgomery*, 31 Ill. 350; *Marquardt Sav. Bank v. Freund*, 80 Mo. App. 657; *Gibson v. Rix*, 32 Vt. 824; *Seattle First Nat. Bank v. Harris*, 7 Wash. 139.

**6. Keeping Debt Alive.** — *Burnet v. Courts*, 5 Har. & J. (Md.) 78; *Coots v. Farnsworth*, 61 Mich. 497.

**7. Debtor Acting as Agent in Buying Note.** — *Du Bois v. Stoner*, 11 Ill. App. 403.

**Agency Must Be Manifested.** — But the note is paid if the maker does nothing to apprise the holder that he is acting as agent for another, although the money is actually furnished by a third person. *Cason v. Heath*, 86 Ga. 438.

**8. Discharge of Collateral.** — *Montgomery v. Sayre*, 100 Cal. 182, 38 Am. St. Rep. 271; *Thomas v. Stetson*, 59 Me. 229; *Merrimack Bank v. Parker*, 7 Pick. (Mass.) 88; *Chapman v. Collins*, 12 Cush. (Mass.) 163; *Finnegan v. Janeway*, 85 Minn. 384; *Marquardt Sav. Bank v. Freund*, 80 Mo. App. 657; *Gove v. Lawrence*, 6 Lans. (N. Y.) 89.

**9. Compromise.** — *Daniel v. Wharton*, 90 Va. 584; *Renick v. Ludington*, 14 W. Va. 367.

**10. Composition with Creditors.** — *Webb v. Hewitt*, 3 Kay & J. 438; *Schuff v. Germania Safety-Vault, etc., Co.*, (Ky. 1897) 43 S. W. Rep. 229; *Ordinary v. Dean*, 44 N. J. L. 64. See also the title COMPOSITION WITH CREDITORS, vol. 6, p. 391.

**11. Lewis v. Jones**, 4 B. & C. 513, 10 E. C. L. 395.

**12. Release of Principal — England.** — *Ex p. Smith*, 3 Bro. C. C. 1; *Ex p. Wilson*, 11 Ves. Jr. 410; *Ex p. Glendinning*, Buck 517; *Cragoe v. Jones*, L. R. 8 Exch. 81; *Hawkshaw v. Parkins*, 2 Swanst. 539; *Commercial Bank v. Jones*, (1893) A. C. 313.

**California.** — *Bull v. Coe*, 77 Cal. 54, 11 Am. St. Rep. 235.

**Illinois.** — *Dupee v. Blake*, 148 Ill. 453.

**Indiana.** — *Dick v. Dumbauld*, 10 Ind. App. 508.

**Iowa.** — *Heitz v. Atlee*, 67 Iowa 483.

charged where the creditor releases a third person who, by joining with the principal in the commission of the act on which liability is predicated, becomes primarily liable with him as a joint tortfeasor.<sup>1</sup>

**Where the Surety Is Indemnified.** — It has been held that where the surety is fully indemnified, the release of the debtor does the surety no damage and therefore does not discharge him;<sup>2</sup> nor is the surety discharged, if, previous to the release of the principal, the surety has paid part and given security for the remainder, as such act amounts to a substantial assumption of the debt.<sup>3</sup>

**b. OPERATION OF LAW.** — The surety is not discharged where the principal, instead of being discharged by the creditor, owes his discharge to an act of law, as where he is discharged in bankruptcy,<sup>4</sup> or insolvency proceedings,<sup>5</sup> or where the action against him is barred by limitation.<sup>6</sup> An additional reason for the rule that a discharge of the principal by the statute of limi-

*Michigan.* — *Greenlee v. Lowing*, 35 Mich. 63.

*Mississippi.* — *Anthony v. Capel*, 53 Miss. 350.

*Pennsylvania.* — *Carlisle Bank v. Barnett*, 3 W. & S. (Pa.) 248; *Metropolitan Nat. Bank v. Merchants*, etc., Bank, 155 Pa. St. 20.

*Texas.* — *Bridges v. Phillips*, 17 Tex. 128.

*Vermont.* — *Paddleford v. Thacher*, 48 Vt. 574.

See generally the title RELEASE AND DISCHARGE, vol. 24, p. 303.

**1. Release of Third Person Jointly Liable with the Principal.** — *Foss v. Chicago*, 34 Ill. 489. See also the title RELEASE, vol. 24, p. 306.

**Sureties on Bond of Public Officers.** — The sureties on the bond of a public officer are discharged where the official bond is canceled by authority of law, *Lockwood v. Penn.*, 22 La. Ann. 29; or where the officer is given an acquittance or discharge by the proper officers, *State v. Dow*, 53 Me. 305; *Oconto County v. Hall*, 47 Wis. 208. *Compare Ward v. School Dist. No. 15*, 10 Neb. 295, 35 Am. Rep. 477.

Not so, however, where the discharge is procured by fraud. *Whitlow v. School Trustees*, 93 Ill. App. 664.

It has been held that the county treasurer has no power to give a valid discharge to the collector. *Templeton v. Com.*, (Pa. 1886) 8 Atl. Rep. 167.

**2. Surety Indemnified.** — *Turner v. Stewart*, 51 W. Va. 493; *Fay v. Tower*, 58 Wis. 286; *Jones v. Ward*, 71 Wis. 152. *Compare Thomas v. Wason*, 8 Colo. App. 452; *Moore v. Paine*, 12 Wend. (N. Y.) 123; *Hoss v. Crouch*, (Tenn. Ch. 1898) 48 S. W. Rep. 724.

**3. Hall v. Hutchons**, 3 Myl. & K. 426.

**Discharge of Cosurety Who Has Become Primarily Liable.** — Where a guardian lends the trust funds to a firm composed of himself and one of the sureties on his bond, such surety thereby becomes primarily liable on the loan, and where he is subsequently discharged by the ward on becoming of age, the latter cannot then proceed against another surety on the bond. *Roberson v. Tonn*, 76 Tex. 556.

**4. Bankruptcy of Principal or of Cosurety — England.** — *Ex p. Agra Bank*, L. R. 9 Eq. 725; *Ellis v. Wilmot*, L. R. 10 Exch. 10; *Ex p. Jacobs*, L. R. 10 Ch. 211; *Hughes v. Palmer*, 19 C. B. N. S. 393, 115 E. C. L. 393; *Glegg v. Gilbey*, 2 Q. B. D. 209; *Browne v. Carr*, 2 Russ. 600, 5 M. & P. 497; *Duncan v. Sutton*,

1 Scott 338, 1 Bing. N. Cas. 431, 27 E. C. L. 446.

*Indiana.* — *Post v. Losey*, 111 Ind. 74.

*Kansas.* — *Ray v. Brenner*, 12 Kan. 105.

*New Hampshire.* — *Cilley v. Colby*, 61 N. H. 63.

*North Carolina.* — *Jones v. Hagler*, 6 Jones L. (51 N. Car.) 542; *Commercial Nat. Bank v. Simpson*, 90 N. Car. 467.

*Wisconsin.* — *Whereatt v. Ellis*, 103 Wis. 348, 74 Am. St. Rep. 865.

See also the title INSOLVENCY AND BANKRUPTCY, vol. 16, p. 792.

**Surety Liable Where Payments Are Surrendered.** — Where the creditor is compelled in a bankrupt court to return a payment as having been made in fraud of creditors, he may recover it of the surety, there being no bad faith on his part. *Swarts v. St. Louis Fourth Nat. Bank*, (C. C. A.) 117 Fed. Rep. 1.

**Discharge "From Any Cause."** — It has been held that a statute providing for the discharge of a surety where the principal is discharged "from any cause" applies to causes originating in the acts of the parties, and does not apply to a discharge by the act of the law. *Phillips v. Solomon*, 42 Ga. 192.

**5. Insolvent Proceedings.** — *U. S. v. Stansbury*, 1 Pet. (U. S.) 573; *Fertig v. Bartles*, 78 Fed. Rep. 866; *Ames v. Wilkinson*, 47 Minn. 148. *Compare Moore v. Paine*, 12 Wend. (N. Y.) 123.

**6. Bar of Principal Debt Does Not Discharge Surety.** — *Nelson v. Killingley First Nat. Bank*, (C. C. A.) 69 Fed. Rep. 798; *M'Broom v. Governor*, 6 Port. (Ala.) 32; *Whiting v. Clark*, 17 Cal. 407; *Bull v. Coe*, 77 Cal. 54, 11 Am. St. Rep. 235; *Kulp v. Brant*, 162 Pa. St. 222; *Reeves v. Pulliam*, 7 Baxt. (Tenn.) 119; *Willis v. Chowning*, 90 Tex. 617, 59 Am. St. Rep. 842; *Daniel v. Harvin*, 10 Tex. Civ. App. 439.

**Contra.** — *Auchampaugh v. Schmidt*, 70 Iowa 642, 59 Am. Rep. 459; *Mulvane v. Sedgley*, 63 Kan. 105. So also in *Kentucky* by statute, see *Davies v. Womack*, 8 B. Mon. (Ky.) 383; *Craig v. Gresham*, 12 B. Mon. (Ky.) 401.

**Fraudulent Concealment of Cause of Action.** — Where the statute of limitations does not begin to run in favor of the principal, owing to the fraudulent concealment of the cause of action, it will not begin to run in favor of the surety. *McMullen v. Winfield Bldg., etc., Assoc.*, 64 Kan. 298; *Lieberman v. Wilmington First Nat. Bank*, 2 Penn. (Del.) 416.

tations does not discharge the surety is found in the principle, elsewhere stated, that the creditor owes to the surety no duty of active diligence. Still another reason is that the bar of the statute does not extinguish the debt, but merely the remedy.<sup>1</sup> At common law a discharge of the surety by the act of law occurs when the debtor and creditor intermarry.<sup>2</sup> It has also been held that where the maker of a note payable to an estate becomes administrator *de bonis non*, the surety cannot be held liable on the note, he being then chargeable with the note as cash in hand.<sup>3</sup>

**3. Alteration in or Deviation from Contract — a. GENERAL RULE.** — Any material alteration in or deviation from the terms of the contract for whose performance the surety is bound will, if made without his consent, release him from his obligation.<sup>4</sup>

1. *Sichel v. De Carrillo*, 42 Cal. 493.

2. *Govan v. Moore*, 30 Ark. 667.

3. *Donnan v. Watts*, 22 S. Car. 430.

**4. Alteration in or Deviation from Contract — England.** — *Small v. Currie*, 5 De G. M. & G. 141; *Bolton v. Salmon*, (1891) 2 Ch. 48; *Phillips v. Astling*, 2 Taunt. 206; *General Steam Nav. Co. v. Rolt*, 6 C. B. N. S. 550, 95 E. C. L. 550.

*Canada.* — *O'Gara v. Union Bank*, 22 Can. Sup. Ct. 404.

*United States.* — *Edmondston v. Drake*, 5 Pet. (U. S.) 624; *Cross v. Allen*, 141 U. S. 528; *Coughran v. Bigelow*, 164 U. S. 304; *Allen v. O'Donald*, 28 Fed. Rep. 17; *Morgan County v. Branham*, 57 Fed. Rep. 179; *Bowers v. Cobb*, 31 Fed. Rep. 678; *Earnshaw v. Boyer*, 60 Fed. Rep. 528; *Mundy v. Stevens*, (C. C. A.) 61 Fed. Rep. 77; *U. S. v. Freely*, 92 Fed. Rep. 299; *Joyce v. Cochill*, (C. C. A.) 92 Fed. Rep. 838; *U. S. v. McIntyre*, 111 Fed. Rep. 590; *Brown v. Newton First Nat. Bank*, (C. C. A.) 112 Fed. Rep. 901.

*Alabama.* — *Crescent Brewing Co. v. Handley*, 90 Ala. 486; *Moses v. Home Bldg., etc., Assoc.*, 100 Ala. 465; *Saint v. Wheeler, etc., Mfg., Co.*, 95 Ala. 362, 36 Am. St. Rep. 210.

*California.* — *Roberts v. Donovan*, 70 Cal. 108; *Tuohy v. Woods*, 122 Cal. 665.

*Connecticut.* — *Rowan v. Sharps' Rifle Mfg. Co.*, 33 Conn. 1; *Chester v. Leonard*, 68 Conn. 495.

*Georgia.* — *Jones v. Keer*, 30 Ga. 93; *Charlotte, etc., R. Co. v. Gow*, 59 Ga. 685, 27 Am. Rep. 403.

*Illinois.* — *Cunningham v. Wrenn*, 23 Ill. 64; *McCartney v. Ridgway*, 160 Ill. 129.

*Indiana.* — *Zimmerman v. Judah*, 13 Ind. 286; *Judah v. Zimmerman*, 22 Ind. 388; *Good Roads Machinery Co. v. Moore*, 25 Ind. App. 479.

*Kansas.* — *Peru Plow, etc., Co. v. Ward*, 1 Kan. App. 6; *Singer Mfg. Co. v. Armstrong*, 7 Kan. App. 314.

*Kentucky.* — *Ruble v. Norman*, 7 Bush (Ky.) 584; *Warren v. Fant*, 79 Ky. 1; *Gano v. Farmers' Bank*, 103 Ky. 508, 82 Am. St. Rep. 596.

*Louisiana.* — *Allison v. Thomas*, 29 La. Ann. 732.

*Maryland.* — *Clagett v. Salmon*, 5 Gill & J. (Md.) 314.

*Michigan.* — *Fay v. Jenks*, 93 Mich. 130.

*Minnesota.* — *Morrison v. Arons*, 65 Minn. 321; *Fidelity Mut. L. Assoc. v. Dewey*, 83 Minn. 389.

*Missouri.* — *Warden v. Ryan*, 37 Mo. App. 466; *Fred Heim Brewing Co. v. Hazen*, 55 Mo.

App. 277; *Mallory v. Brent*, 75 Mo. App. 473; *Fullerton Lumber Co. v. Gates*, 89 Mo. App. 201.

*Nebraska.* — *Gallagher v. St. Patrick's Church*, 45 Neb. 535.

*New York.* — *Ludlow v. Simond*, 2 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 291; *Wilson v. Edwards*, 6 Lans. (N. Y.) 134; *Walsh v. Baillie*, 10 Johns. (N. Y.) 180; *Paine v. Jones*, 76 N. Y. 274; *Hyde v. Miller*, 168 N. Y. 590; *Tradesmen's Nat. Bank v. National Surety Co.*, 169 N. Y. 563; *American Casualty Ins. Co. v. Green*, 70 N. Y. App. Div. 267; *New York v. Clark*, 84 N. Y. App. Div. 383.

*Ohio.* — *Trustees v. Miller*, 3 Ohio 261; *Koppitz-Melchers Brewing Co. v. Schultz*, 68 Ohio St. 407; *Iliff v. Western-Southern L. Ins. Co.*, 5 Ohio Cir. Dec. 429, 11 Ohio Cir. Ct. 426; *Gerke v. George Weidemann Brewing Co.*, 11 Ohio Cir. Dec. 206, 20 Ohio Cir. Ct. 174.

*Pennsylvania.* — *Wiley's Estate*, 12 Phila. (Pa.) 152, 35 Leg. Int. (Pa.) 431; *Fitzpatrick v. McAndrews*, 2 Pa. Dist. 713; *Smith v. Shidler*, 3 Pittsb. (Pa.) 550; *Mowery v. Brumbaugh*, 14 Pa. Co. Ct. 257; *Hibbs v. Rue*, 4 Pa. St. 348.

*South Carolina.* — *Greenville v. Ormand*, 51 S. Car. 125.

*Tennessee.* — *Southern Bridge Co. v. Bogen-shot*, (Tenn. Ch. 1897) 48 S. W. Rep. 97.

*Texas.* — *Durrell v. Farwell*, 88 Tex. 98; *Clark v. Cummings*, 84 Tex. 610; *Sanders v. Hambrick*, 16 Tex. Civ. App. 459; *House v. American Surety Co.*, 21 Tex. Civ. App. 590.

*Virginia.* — *Steele v. Boyd*, 6 Leigh (Va.) 547, 29 Am. Dec. 218; *Blanton v. Com.*, 91 Va. 1; *Kirschbaum v. Blair*, 98 Va. 35.

*Wisconsin.* — *W. W. Kimball Co. v. Baker*, 62 Wis. 526.

See also the title ALTERATION OF INSTRUMENTS, vol. 2, p. 181, especially pp. 186, 192.

A surety for the performance of two obligations may, by an alteration of the agreement, be discharged as to one but not as to the other. *Parke, etc., Co. v. White River Lumber Co.*, 110 Cal. 658.

Money paid by a surety cannot be recovered back upon the subsequent discovery of an alteration in the contract which would have discharged him if known before such payment. *Blakey v. Johnson*, 13 Bush (Ky.) 197.

**Alteration by Stranger No Discharge of Surety.** — *State v. Berg*, 50 Ind. 496. See also *State v. Smith*, 9 Houst. (Del.) 143; *Dover v. Robinson*, 64 Me. 183; and the title ALTERATION OF INSTRUMENTS, vol. 2, p. 214.

b. LIMITATIONS. — But if such alteration be made with his consent,<sup>1</sup> or if it is expressly provided for in the contract<sup>2</sup> or appears to have been within the contemplation of the parties when the contract was made and therefore implied therein,<sup>3</sup> or if the change is colorable rather than real,<sup>4</sup> or if the alteration charged consists in making or changing a subsidiary or independent agreement,<sup>5</sup> or if it be immaterial and cannot affect the surety adversely,<sup>6</sup> the surety is not discharged.

c. BUILDING CONTRACTS. — Probably in no other class of contracts have alterations in or deviations from the terms of the agreement been so often made as in building contracts. The general rule applies here as elsewhere, that such alterations or deviations discharge the surety,<sup>7</sup> unless the change is pro-

1. If Surety Consents. — *American Surety Co. v. Lauber*, 22 Ind. App. 326; *Seeburger v. Wyman*, 108 Iowa 527; *Jordan v. Walters*, (Iowa 1899) 80 N. W. Rep. 530; *Baker v. Elliot*, 73 Me. 392; *Wehr v. German, etc., Congregation*, 47 Md. 177; *Brand v. Johnrowe*, 60 Mich. 210; *Janes v. Ferd Heim Brewing Co.*, (Tex. Civ. App. 1897) 44 S. W. Rep. 896; *Brown Iron Co. v. Templeman*, 30 Tex. Civ. App. 50. See also the title ALTERATION OF INSTRUMENTS, vol. 2, p. 206.

2. Alteration Provided for in Contract. — *United States*. — U. S. v. Freely, 92 Fed. Rep. 299.

*Alabama*. — *Fidelity, etc., Co. v. Robertson*, 136 Ala. 379.

*Arkansas*. — *Marree v. Ingle*, 69 Ark. 126.

*California*. — *People's Lumber Co. v. Gillard*, 136 Cal. 55.

*Connecticut*. — *Chester v. Leonard*, 68 Conn. 495.

*Indiana*. — *Young v. Young*, 21 Ind. App. 509.

*Missouri*. — *Howard County v. Baker*, 119 Mo. 397; *Western Bldg., etc., Assoc. v. Fitzmaurice*, 7 Mo. App. 283; *Ashenbroedel Club v. Finlay*, 53 Mo. App. 256; *Casey v. Gunn*, 29 Mo. App. 14; *Burnes v. Fidelity, etc., Co.*, 96 Mo. App. 467.

*Nebraska*. — *Hayden v. Cook*, 34 Neb. 670; *O'Rourke v. Burke*, 44 Neb. 821.

*Pennsylvania*. — *Crompton's Estate*, 9 Pa. Co. Ct. 134.

*Washington*. — *Drumheller v. American Surety Co.*, 30 Wash. 530.

3. Alteration Contemplated. — *United States*. — *Pascault v. Cochran*, 34 Fed. Rep. 358; *St. Louis Brewing Assoc. v. Hayes*, (C. C. A.) 71 Fed. Rep. 110; *U. S. Glass Co. v. Mathews*, (C. C. A.) 89 Fed. Rep. 828; *U. S. v. Freely*, 92 Fed. Rep. 299.

*Illinois*. — *Stein v. Jones*, 18 Ill. App. 543.

*Kentucky*. — *Mattingly v. Riley*, (Ky. 1899) 49 S. W. Rep. 799.

*Michigan*. — *Stevens v. Pendleton*, 83 Mich. 342.

*Missouri*. — *Western Bldg., etc., Assoc. v. Fitzmaurice*, 7 Mo. App. 283.

*New York*. — *Standard Underground Cable Co. v. Stone*, 35 N. Y. App. Div. 62.

*Wisconsin*. — *New York L. Ins. Co. v. Hamlin*, 100 Wis. 17.

See also *Cutter v. Richardson*, 125 Mass. 72.

4. Merely Colorable. — *The Beaconsfield*, 158 U. S. 303; *Cross v. Allen*, 141 U. S. 528; *Springfield Lighting Co. v. Hobart*, (Mo. App. 1902) 68 S. W. Rep. 942; *Monsarratt v. Equitable Trust Co.*, 30 Pittab. Leg. J. N. S. (Pa.) 305; *Grafton v. Hinkley*, 111 Wis. 46.

5. Independent Agreement. — *Allen v. O'Donald*, 28 Fed. Rep. 17, 346; *Domestic Sewing Mach. Co. v. Webster*, 47 Iowa 357; *N. K. Fairbank Co. v. American Bonding, etc., Co.*, 97 Mo. App. 205; *Barclay v. Deckerhoof*, 151 Pa. St. 374; *Stuts v. Strayer*, 60 Ohio St. 384, 71 Am. St. Rep. 723.

6. Immaterial Alteration. — *United States*. — *Smith v. Addison*, 5 Cranch (C. C.) 623; *Roach v. Summers*, 20 Wall. (U. S.) 165; *Hall v. Weaver*, 34 Fed. Rep. 104; *Harper v. National L. Ins. Co.*, (C. C. A.) 56 Fed. Rep. 281; *Fertig v. Bartles*, 78 Fed. Rep. 866; *U. S. Glass Co. v. Mathews*, (C. C. A.) 89 Fed. Rep. 828.

*Illinois*. — *Longan v. Taylor*, 130 Ill. 412.

*Iowa*. — *Domestic Sewing Mach. Co. v. Webster*, 47 Iowa 357; *Howe Mach. Co. v. Woolly*, 50 Iowa 549; *Steele v. Mills*, 68 Iowa 406; *Starr v. Blatner*, 76 Iowa 356; *Black v. De Camp*, 78 Iowa 718.

*Kansas*. — *Evans v. Watson*, 8 Kan. App. 144.

*Massachusetts*. — *Amicable Mut. L. Ins. Co. v. Sedgwick*, 110 Mass. 163.

*Michigan*. — *Haines v. Gibson*, 115 Mich. 131.

*Minnesota*. — *National Invest. Co. v. Schickling*, 56 Minn. 283; *Norwegian Evangelical Lutheran Bethlehem Congregation v. U. S. Fidelity, etc., Co.*, 83 Minn. 269.

*Missouri*. — *Merrick v. Greely*, 10 Mo. 106; *State v. Benedict*, 51 Mo. App. 642.

*Nebraska*. — *Taylor v. Standard L., etc., Ins. Co.*, 47 Neb. 673; *Anderson v. Hall*, (Neb. 1903) 94 N. W. Rep. 981.

*New York*. — *Ellis v. McCormick*, 1 Hilt. (N. Y.) 313; *Smith v. Molleson*, 148 N. Y. 241; *Kunzweiler v. Lehman*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 466; *Kellogg v. Farquhar*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 208.

*Oregon*. — *Denny v. Seeley*, 34 Oregon 364.

*Pennsylvania*. — *Fitzpatrick v. McAndrews*, 12 Pa. Co. Ct. 353.

*Texas*. — *Claiborne v. Birge*, 42 Tex. 98.

*Washington*. — *Kittridge v. Stegmire*, 11 Wash. 3.

*West Virginia*. — *Merchants', etc., Bank v. Evans*, 9 W. Va. 373.

*Wisconsin*. — *Stephens v. Elver*, 101 Wis. 392; *Madison v. American Sanitary Engineering Co.*, (Wis. 1903) 95 N. W. Rep. 1097.

7. Building Contracts. — *Alabama*. — *Forst v. Leonard*, 116 Ala. 82.

*Arkansas*. — *Erfurth v. Stevenson*, (Ark. 1903) 72 S. W. Rep. 49; *Miller-Jones Furniture Co. v. Ft. Smith Ice, etc., Co.*, 66 Ark. 287; *O'Neal v. Kelley*, 65 Ark. 550.

*Florida*. — *Gato v. Warrington*, 37 Fla. 542.

*Iowa*. — *Stillman v. Wickham*, 106 Iowa 597.

vided for in the contract or is so slight as to have no material effect upon the liability of the surety.<sup>1</sup>

**Retaining Part of Contract Price.** — Where the contract provides, as it usually does, that the owner shall withhold a certain per cent. of the contract price until the contractor has completed the building, the failure to withhold such money will discharge the surety, not only on the ground that it is an alteration of the contract, but that it is a surrender of security agreed to be held for his benefit.<sup>2</sup> There are cases, however, holding that the surety is not discharged by the failure to retain such money, either on the ground that the retention is for the sole benefit of the owner, or that the security has not thereby been impaired, or that the retention was not obligatory but merely allowed.<sup>3</sup> And it has been held that such prepayment discharges the surety merely to the extent of the unauthorized payment or to the extent of the injury sustained.<sup>4</sup>

**Paying a Contractor at an Earlier Date** than that fixed by the contract has been held not to discharge the surety.<sup>5</sup>

**d. ALTERATION IN NOTES AND BONDS.** — The surety upon a note or bond is released by any material alteration therein made without his consent.<sup>6</sup> Instances of such alterations are: erasing the name of a surety without the

*Kansas.* — *Morgan County v. McRae*, 53 Kan. 358.

*Minnesota.* — *Erickson v. Brandt*, 53 Minn. 10.

*Missouri.* — *Beers v. Wolf*, 116 Mo. 179; *Killoren v. Meehan*, 55 Mo. App. 427; *Eldridge v. Fuhr*, 59 Mo. App. 44; *Swasey v. Doyle*, 88 Mo. App. 536; *Bowman v. Globe Steam Heating Co.*, 80 Mo. App. 628; *Chapman v. Eneberg*, 95 Mo. App. 128; *Burnes v. Fidelity, etc., Co.*, 96 Mo. App. 467; *Evans v. Graden*, 125 Mo. 72.

*Nebraska.* — *Dorsey v. McGee*, 30 Neb. 657. *New York.* — *Livingston v. Moore*, 15 N. Y. App. Div. 15.

*North Dakota.* — *Northern Light Lodge No. 1 v. Kennedy*, 7 N. Dak. 146.

*Pennsylvania.* — *Whelen v. Boyd*, 114 Pa. St. 228.

**1. Alterations Slight or Allowable** — *United States.* — *U. S. v. Freely*, 92 Fed. Rep. 299; *George A. Fuller Co. v. Doyle*, 87 Fed. Rep. 687.

*Indiana.* — *Higgins v. Quigley*, 23 Ind. App. 348.

*Kansas.* — *McLennan v. Wellington*, 48 Kan. 756; *Risse v. Hopkins Planing Mill Co.*, 55 Kan. 518.

*Michigan.* — *People v. Powers*, 108 Mich. 339.

*Mississippi.* — *Moore v. Fountain*, (Miss. 1891) 8 So. Rep. 509.

*Nebraska.* — *Consaul v. Sheldon*, 35 Neb. 247.

*New York.* — *Wilson v. Whitmore*, 92 Hun (N. Y.) 466; *Henricus v. Englert*, 137 N. Y. 488; *Smith v. Molleson*, 148 N. Y. 241; *Wilson v. Webber*, (N. Y. 1898) 51 N. E. Rep. 1094.

*Washington.* — *De Mattos v. Jordan*, 15 Wash. 378.

**2. Retaining Part of Contract Price** — *California.* — *Bragg v. Shain*, 49 Cal. 131.

*Illinois.* — *Finney v. Condon*, 86 Ill. 78.

*Iowa.* — *McConnell v. Poor*, 113 Iowa 133.

*Kentucky.* — *St. Mary's College v. Meagher*, (Ky. 1889) 11 S. W. Rep. 608.

*Michigan.* — *Backus v. Archer*, 109 Mich. 666.

*Minnesota.* — *Simonson v. Grant*, 36 Minn. 439.

*Missouri.* — *Kane v. Thuener*, 62 Mo. App. 69; *Evans v. Graden*, 125 Mo. 72.

*Nebraska.* — *Bell v. Paul*, 35 Neb. 240.

*New Jersey.* — *Welch v. Hubschmitt Bldg., etc., Co.*, 61 N. J. L. 57.

*Oregon.* — *Wehrung v. Denham*, 42 Oregon 386.

*Pennsylvania.* — *Fitzpatrick v. McAndrews*, 12 Pa. Co. Ct. 353.

*South Carolina.* — *Beaubien v. Strong, Spears Eq. (S. Car.)* 508.

*Texas.* — *Ryan v. Morton*, 65 Tex. 258.

*Washington.* — *Peters v. Mackay*, 20 Wash. 172.

*Wisconsin.* — *Cowdery v. Hahn*, 105 Wis. 455, 76 Am. St. Rep. 921.

See also *Calvert v. London Dock Co.*, 2 Keen 639; *Taylor v. Jeter*, 23 Mo. 244; *Cochran v. Baker*, 34 Oregon 555. But see *New York v. Brady*, 70 Hun (N. Y.) 250.

**3. Nonretention No Ground for Discharge.** — *Fidelity, etc., Co. v. Robertson*, 136 Ala. 379; *Hand Mfg. Co. v. Marks*, 36 Oregon 523; *Meyers v. Wood*, 26 Tex. Civ. App. 591; *Leonard v. Jackson County Ct.*, 25 W. Va. 45. But see *Casey v. Gunn*, 29 Mo. App. 14.

**4. Discharge Only to Extent of Injury.** — *Picard v. Shantz*, 70 Miss. 381; *Taylor v. Jeter*, 23 Mo. 244; *Watkins v. Pierce*, 10 Mo. App. 595; *Brennan v. Clark*, 29 Neb. 385; *Cochran v. Baker*, 34 Oregon 555.

**5. Anticipating Payments.** — *Doll v. Crume*, 41 Neb. 655; *Kaufmann v. Cooper*, 46 Neb. 644; *King v. Murphy*, 49 Neb. 670.

**Alteration by Architect's Order.** — Generally alterations can be made only upon written order of the architect. A verbal order discharges the surety. *Cowles v. U. S. Fidelity, etc., Co.*, 32 Wash. 120.

**Extra Allowance to the Contractor** for work contemplated by the plans but not included in the contract does not discharge the surety. *Moore v. Fountain*, (Miss. 1891) 8 So. Rep. 509.

**6. Alteration in Notes and Bonds** — *England.* — *Burchfield v. Moore*, 3 El. & Bl. 683, 77 E. C. L. 683; *Master v. Miller*, 4 T. R. 320; *Pigot's Case*, 11 Coke 26b.



knowledge of the cosurety,<sup>1</sup> adding the name of a new surety,<sup>2</sup> increasing or decreasing the penal sum of the bond,<sup>3</sup> changing the rate of interest or the time of its payment,<sup>4</sup> or the amount,<sup>5</sup> or the date of the instrument,<sup>6</sup> or

*United States*.—*Wood v. Steele*, 6 Wall. (U. S.) 80; *U. S. v. Corwine*, 1 Bond (U. S.) 339; *Victor Sewing Mach. Co. v. Langham*, 9 Biss. (U. S.) 183; *Martin v. Thomas*, 24 How. (U. S.) 315; *Angle v. Northwestern L. Ins. Co.*, 92 U. S. 330; *U. S. v. O'Neill*, 19 Fed. Rep. 567; *Evans v. Lawton*, 34 Fed. Rep. 233; *U. S. Glass Co. v. West Virginia Flint Bottle Co.*, 81 Fed. Rep. 993.

*Arkansas*.—*State v. Churchill*, 48 Ark. 426.

*California*.—*Bragg v. Shain*, 49 Cal. 131; *Victor Sewing Mach. Co. v. Scheffler*, 61 Cal. 530.

*Georgia*.—*Simmons v. Guise*, 46 Ga. 473.

*Idaho*.—*Mulkey v. Long*, (Idaho 1897) 47 Pac. Rep. 949.

*Illinois*.—*Pankey v. Mitchell*, 1 Ill. 383; *Newlan v. Harrington*, 24 Ill. 206.

*Indiana*.—*Huff v. Cole*, 45 Ind. 300; *Bailey v. Boyd*, 75 Ind. 126; *Johnston v. May*, 76 Ind. 293; *Eckert v. Louis*, 84 Ind. 99; *Weir Plow Co. v. Walmsley*, 110 Ind. 242; *Windle v. Williams*, 18 Ind. App. 158; *Owens v. Tague*, 3 Ind. App. 245.

*Iowa*.—*Middleton v. Marshalltown First Nat. Bank*, 40 Iowa 29; *Bell v. Mahin*, 69 Iowa 408.

*Kentucky*.—*Stout v. Cloud*, 5 Litt. (Ky.) 205; *Warren v. Fant*, 79 Ky. 1.

*Maine*.—*Waterman v. Vose*, 43 Me. 504; *Andrews v. Marrett*, 58 Me. 539.

*Maryland*.—*Baltimore First Nat. Bank v. Gerke*, 68 Md. 449, 6 Am. St. Rep. 453.

*Massachusetts*.—*Draper v. Wood*, 112 Mass. 315, 17 Am. Rep. 92.

*Michigan*.—*Farnsworth v. Coots*, 46 Mich. 117.

*Minnesota*.—*Simonson v. Grant*, 36 Minn. 439.

*Missouri*.—*Kincaid v. Yates*, 63 Mo. 45; *Singer Mfg. Co. v. Hibbs*, 21 Mo. App. 574; *Handley v. Barrows*, 68 Mo. App. 623.

*New York*.—*Cornell v. Eagan*, 13 Daly (N. Y.) 505; *Grant v. Smith*, 46 N. Y. 93; *Vose v. Florida R. Co.*, 50 N. Y. 369.

*Ohio*.—*Selser v. Brock*, 3 Ohio St. 302; *People's Ins. Co. v. McDonnell*, 41 Ohio St. 650.

*Pennsylvania*.—*Nesbitt v. Turner*, 7 Kulp (Pa.) 41; *Whelen v. Boyd*, 114 Pa. St. 228.

*Tennessee*.—*Crockett v. Thomason*, 5 Sneed (Tenn.) 342.

*Texas*.—*Ryan v. Morton*, 65 Tex. 258; *Heath v. State*, 14 Tex. App. 213; *Butler v. State*, 31 Tex. Crim. 63.

*Wisconsin*.—*Sage v. Strong*, 40 Wis. 575.

1. *Erasing Surety's Name*—*Alabama*.—*King v. State*, 81 Ala. 92.

*Arkansas*.—*State v. Churchill*, 48 Ark. 426.

*Indiana*.—*Allen v. Marney*, 65 Ind. 398.

*Michigan*.—*Hessell v. Johnson*, 63 Mich. 623, 6 Am. St. Rep. 334.

*Mississippi*.—*State v. Allen*, 69 Miss. 508, 30 Am. St. Rep. 563; *State v. Harney*, 57 Miss. 863.

*Missouri*.—*State v. McGonigle*, 101 Mo. 353, 20 Am. St. Rep. 609; *State v. Findley*, 101 Mo. 368.

*Tennessee*.—*Mitchell v. Burton*, 2 Head (Tenn.) 613.

*Texas*.—*Connor v. Thornton*, (Tex. Civ. App. 1899) 51 S. W. Rep. 354.

*Washington*.—*Fairhaven v. Cowgill*, 8 Wash. 686.

But see *Bingham v. Shadle*, 45 Neb. 82; *Cass County v. American Exch. State Bank*, 11 N. Dak. 238; *McAlpin v. Clark*, 5 Ohio Cir. Dec. 364. See generally the title ALTERATION OF INSTRUMENTS, vol. 2, p. 235.

2. *Adding Name of Surety*.—*Anderson v. Bellenger*, 87 Ala. 334, 13 Am. St. Rep. 46; *Owens v. Tague*, 3 Ind. App. 245; *M. Rumley Co. v. Wilcher*, 66 S. W. Rep. 7, 23 Ky. L. Rep. 1745; *State v. Paxton*, (Neb. 1902) 90 N. W. Rep. 983. See also *McVean v. Scott*, 46 Barb. (N. Y.) 379, and the title ALTERATION OF INSTRUMENTS, vol. 2, p. 233. But see *Brey v. Hagan*, 62 S. W. Rep. 1, 23 Ky. L. Rep. 18. *Contra*, *Crandall v. Auburn First Nat. Bank*, 61 Ind. 349.

3. *Altering Penal Sum*.—*Renville County v. Gray*, 61 Minn. 242; *State v. Chick*, 146 Mo. 645; *Schlageck v. Widhalm*, 59 Neb. 541; *Walla Walla County v. Ping*, 1 Wash. Ter. 339.

4. *Changing Interest*—*Indiana*.—*Kountz v. Hart*, 17 Ind. 329; *Hart v. Clouser*, 30 Ind. 210; *Huff v. Cole*, 45 Ind. 300; *Franklin L. Ins. Co. v. Courtney*, 60 Ind. 134; *Stayner v. Joice*, 82 Ind. 35; *Moore v. Hinshaw*, 23 Ind. App. 267.

*Iowa*.—*Marsh v. Griffin*, 42 Iowa 403.

*Kentucky*.—*Blakey v. Johnson*, 13 Bush (Ky.) 197; *Keene v. Miller*, 103 Ky. 628.

*Minnesota*.—*Fillmore County v. Greenleaf*, 80 Minn. 242.

*New York*.—*McGrath v. Clark*, 56 N. Y. 34, 15 Am. Rep. 372.

*Ohio*.—*Jones v. Bangs*, 40 Ohio St. 139, 48 Am. Rep. 664.

*Pennsylvania*.—*Fulmer v. Seitz*, 68 Pa. St. 237; *Neff v. Horner*, 63 Pa. St. 327, 3 Am. Rep. 555.

See also the title ALTERATION OF INSTRUMENTS, vol. 2, p. 239.

5. *Changing the Amount of the Debt*—*California*.—*People v. Kneeland*, 31 Cal. 288.

*Delaware*.—*Hastings v. Clendaniel*, 2 Del. Ch. 165.

*Indiana*.—*Johnston v. May*, 76 Ind. 293; *Busjahn v. McLean*, 3 Ind. App. 281.

*Massachusetts*.—*Wade v. Withington*, 1 Allen (Mass.) 561; *Agawam Bank v. Sears*, 4 Gray (Mass.) 95.

*Michigan*.—*People v. Brown*, 2 Dougl. (Mich.) 9.

*New Hampshire*.—*Goodman v. Eastman*, 4 N. H. 455.

*Ohio*.—*Portage County Branch Bank v. Lane*, 8 Ohio St. 405.

*Pennsylvania*.—*Worrall v. Gheen*, 39 Pa. St. 388.

See also the title ALTERATION OF INSTRUMENTS, vol. 2, p. 237.

6. *Altering Date*.—*Wyman v. Yeomans*, 84 Ill. 403; *Stayner v. Joice*, 82 Ind. 35; *Britton v. Dierker*, 46 Mo. 591, 2 Am. Rep. 553; *Hocker*

adding words to the instrument which alter its scope and effect.<sup>1</sup>

**Bond for Benefit of Several.** — In some instances a bond is given for the protection of more than one person; as where the bond of the principal protects likewise materialmen or subcontractors engaged in furthering the same general object. In such cases a violation of the contract by the chief creditor or contractor which may release the surety may not have that effect as to the other parties.<sup>2</sup>

**Official Bonds.** — The same general principles apply to official as to other bonds. Thus it is a general rule that where an official bond is altered after it has been signed, but before its delivery and approval, by the erasure of the name of one of the sureties thereon, and the alteration is plainly noticeable, all the sureties are released who had no knowledge of or did not consent to the alteration nor ratify it.<sup>3</sup> Moreover, if the penal sum is filled in or the amount thereof is altered after such signature the surety is discharged.<sup>4</sup>

**e. ALTERATION IN LEASE.** — The surety is likewise discharged by a material and unauthorized alteration in a lease.<sup>5</sup>

**f. CHANGE IN OCCUPATION OF PRINCIPAL.** — Sometimes, after the surety

*v. Jamison*, 2 W. & S. (Pa.) 438; *U. S. Bank v. Russel*, 3 Yeates (Pa.) 391; *Stephens v. Graham*, 7 S. & R. (Pa.) 505, 10 Am. Dec. 485; *Miller v. Gilleland*, 19 Pa. St. 119. See also the title ALTERATION OF INSTRUMENTS, vol. 2, p. 236.

**1. Adding Words — England.** — *Ellesmere Brewery Co. v. Cooper*, (1896) 1 Q. B. 75; *Gardner v. Walsh*, 5 El. & Bl. 83, 85 E. C. L. 83.

**United States.** — *U. S. v. O'Neill*, 19 Fed. Rep. 567.

**Colorado.** — *Creede First Nat. Bank v. Miner*, 9 Colo. App. 361.

**Georgia.** — *Hanson v. Crawley*, 41 Ga. 303.

**Illinois.** — *Pahlman v. Taylor*, 75 Ill. 629.

**Indiana.** — *State v. Berg*, 50 Ind. 496; *Eckert v. Louis*, 84 Ind. 99; *Hodge v. Farmers' Bank*, 7 Ind. App. 94.

**Iowa.** — *Robinson v. Reed*, 46 Iowa 219; *Jackson v. Boyles*, 64 Iowa 428.

**Kentucky.** — *Jackson v. Cooper*, (Ky. 1897) 39 S. W. Rep. 39; *Haldeman v. German Security Bank*, (Ky. 1898) 44 S. W. Rep. 383.

**Missouri.** — *Robinson v. Berryman*, 22 Mo. App. 509.

**New Hampshire.** — *Haines v. Dennett*, 11 N. H. 180.

**New York.** — *Woodworth v. Bank of America*, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239; *Church v. Howard*, 17 Hun (N. Y.) 5; *Chappell v. Spencer*, 23 Barb. (N. Y.) 584; *French v. Graves*, 50 N. Y. App. Div. 522.

**Ohio.** — *Kerr v. Iddings*, 3 Ohio Cir. Dec. 607, 6 Ohio Cir. Ct. 604.

**Texas.** — *Bogarth v. Breedlove*, 39 Tex. 561; *Hamblen v. Knight*, 60 Tex. 36.

**Virginia.** — *Batchelder v. White*, 80 Va. 103.

But see *State Solicitors Co. v. Savage*, 39 Fla. 703.

**2. Bond for Benefit of Several — United States.** — *U. S. v. National Surety Co.*, (C. C. A.) 92 Fed. Rep. 549; *U. S. Fidelity, etc., Co. v. Omaha Bldg., etc., Co.*, (C. C. A.) 116 Fed. Rep. 145, following *U. S. v. National Surety Co.*, 92 Fed. Rep. 549.

**Indiana.** — *Conn v. State*, 125 Ind. 514.

**Minnesota.** — *Duluth v. Heney*, 43 Minn. 155.

**Missouri.** — *School Dist. v. Livers*, 147 Mo. 580.

**Nebraska.** — *Lyman v. Lincoln*, 38 Neb. 794; *Doll v. Crume*, 41 Neb. 655; *Kaufmann v. Cooper*, 46 Neb. 644; *Hayden v. Cook*, 34 Neb. 670.

**New York.** — *Henricus v. Englert*, 137 N. Y. 488. See also *Harley v. Mapes Reeves Constr. Co.*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 626.

**North Dakota.** — *Northern Light Lodge No. 1 v. Kennedy*, 7 N. Dak. 146.

**3. Official Bonds — United States.** — *Smith v. U. S.*, 2 Wall. (U. S.) 219; *Dair v. U. S.*, 16 Wall. (U. S.) 1; *Martin v. Thomas*, 24 How. (U. S.) 315; *U. S. v. O'Neil*, 19 Fed. Rep. 567.

**Iowa.** — *State v. Craig*, 58 Iowa 238.

**Massachusetts.** — *Boston v. Benson*, 12 Cush. (Mass.) 61.

**Missouri.** — *State v. Findley*, 101 Mo. 368. But see *State v. Scott*, 104 Mo. 26.

**Nebraska.** — *Hagler v. State*, 31 Neb. 144, 28 Am. St. Rep. 514.

**Washington.** — *King County v. Ferry*, 5 Wash. 536, 34 Am. St. Rep. 880; *Fairhaven v. Cowgill*, 8 Wash. 687.

**4. People v. Kneeland, 31 Cal. 288; *Rose v. Douglass Tp.*, 52 Kan. 451; *Renville County v. Gray*, 61 Minn. 242; *Walla Walla County v. Ping*, 1 Wash. Ter. 339, *disapproving Texira v. Evans*, cited in *Master v. Miller*, 1 Anstr. 228, and cases following it.**

**Addition of Sureties.** — *Stoner v. Keith County*, 48 Neb. 279.

**5. Alteration in Lease — England.** — *Holme v. Brunskill*, 3 Q. B. D. 495.

**Louisiana.** — *Penn v. Collins*, 5 Rob. (La.) 213; *Fasnacht v. Winkelman*, 21 La. Ann. 727.

**Missouri.** — *Farrar v. Kramer*, 5 Mo. App. 167.

**Pennsylvania.** — *Green v. Boyd*, 13 Pa. Super. Ct. 651. But see *Medary v. Cathers*, 161 Pa. St. 87.

**Wisconsin.** — *Nichols v. Palmer*, 48 Wis. 110.

See also *Newcombe v. Eagleton*, (N. Y. City Ct. Gen. T.) 16 Misc. (N. Y.) 285. But see *Preston v. Huntington*, 67 Mich. 139; *Morgan v. Smith*, 70 N. Y. 537.

becomes bound, the duties of the principal are changed to some extent; as by assigning to a bank teller the duties of the cashier, or *vice versa*, or to a bookkeeper the duties of teller, etc. The general principle controlling in such case is that the surety for the performance of the original duties is not discharged unless the new duties materially affect the performance of the old or affect the obligation of the principal in respect of the old, thus increasing the risks of the surety.<sup>1</sup>

*g. ARBITRATION OF DEBT.* — Neither an agreement to arbitrate the debt nor the fact that it is actually arbitrated will release the surety.<sup>2</sup> But where a surety guarantees the performance of an award by certain arbitrators he is discharged from liability if other arbitrators be substituted without his consent.<sup>3</sup>

**4. Extension of Time** — *a. GENERAL RULE.* — Any valid and binding agreement between the principal and creditor by which the time of payment is extended without the consent of the surety releases the surety.<sup>4</sup>

**1. Change in Occupation of Principal** — *England.* — Frank v. Edwards, 8 Exch. 214.

*United States.* — Miller v. Stewart, 9 Wheat. (U. S.) 681.

*Alabama.* — Saint v. Wheeler, etc., Mfg. Co., 95 Ala. 362, 36 Am. St. Rep. 210.

*Georgia.* — Charlotte, etc., R. Co. v. Gow, 59 Ga. 685, 27 Am. Rep. 403.

*Illinois.* — McCartney v. Ridgway, 160 Ill. 160.

*Indiana.* — Wallace v. Exchange Bank, 126 Ind. 265.

*Kentucky.* — Board v. Com., (Ky. 1895) 29 S. W. Rep. 436.

*Maryland.* — Baltimore First Nat. Bank v. Gerke, 68 Md. 449, 6 Am. St. Rep. 453.

*Massachusetts.* — Amicable Mut. L. Ins. Co. v. Sedgwick, 110 Mass. 163; Rollstone Nat. Bank v. Carleton, 136 Mass. 226.

*Missouri.* — Home Sav. Bank v. Traube, 75 Mo. 199, 42 Am. Rep. 402; Home L. Ins. Co. v. Potter, 4 Mo. App. 594; Hibernia Sav. Bank v. McGinnis, 9 Mo. App. 578; Burley v. Hitt, 54 Mo. App. 272; Springfield Lighting Co. v. Hobart, 98 Mo. App. 227. See also Lionberger v. Krieger, 88 Mo. 160. But see Home Sav. Bank v. Traube, 6 Mo. App. 221; Singer Mfg. Co. v. Hibbs, 21 Mo. App. 574.

*Nebraska.* — McAuley v. Cooley, 47 Neb. 165.

*New Jersey.* — Kellogg v. Scott, 58 N. J. Eq. 344; Kellogg v. American Ins. Co., 62 N. J. Eq. 811.

*New York.* — Socialistic Co-operative Pub. Assoc. v. Hoffmann, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 440; Hyde v. Miller, 45 N. Y. App. Div. 396. But see New York v. Kelly, 98 N. Y. 467, 50 Am. Rep. 699.

*Pennsylvania.* — Lane's Appeal, 112 Pa. St. 449; Harrisburg Sav., etc., Assoc. v. U. S. Fidelity, etc., Co., 197 Pa. St. 177. See also Shackamaxon Bank v. Yard, 143 Pa. St. 129, 24 Am. St. Rep. 521.

*Tennessee.* — Mumford v. Memphis, etc., R. Co., 2 Lea (Tenn.) 393, 31 Am. Rep. 616.

*Texas.* — Fuqua v. Pabst Brewing Co., (Tex. Civ. App. 1896) 36 S. W. Rep. 479.

*Wyoming.* — Snyder v. State, 5 Wyo. 318, 63 Am. St. Rep. 60.

See also *infra*, this title, VIII. 4. *b. Pre-existing and Subsequently Imposed Duties.*

**2. Arbitration of Debt.** — Turner v. Stewart,

51 W. Va. 493. But see Coleman v. Wade, 6 N. Y. 44.

**3. MacKay v. McDonald**, 5 Ala. 388.

**4. Extension of Time** — *England.* — Combe v. Woulfe, 1 Moo. & S. 241; Oriental Financial Corp. v. Overend, L. R. 7 Ch. 142; Clarke v. Birley, 41 Ch. D. 422; Newton v. Chorlton, 2 Drew. 333; Samuel v. Howarth, 3 Meriv. 272; Wright v. Simpson, 6 Ves. Jr. 734; Nisbet v. Smith, 2 Bro. C. C. 579; Rees v. Berrington, 2 Ves. Jr. 540; Blake v. White, 1 Y. & C. Exch. 420; Clarke v. Henty, 3 Y. & C. Exch. 187; Hawkshaw v. Parkins, 2 Swanst. 539; Browne v. Carr, 7 Bing. 508, 20 E. C. L. 221; Bailey v. Edwards, 4 B. & S. 761, 116 E. C. L. 761; Moss v. Hall, 5 Exch. 46; Oakeley v. Pasheller, 10 Bligh. N. S. 548; Isaac v. Daniel, 8 Q. B. 500, 55 E. C. L. 500; Davies v. Stainbank, 6 De G. M. & G. 679; Pooley v. Harradine, 7 El. & Bl. 431, 90 E. C. L. 431; Bank of Ireland v. Beresford, 6 Dow. 233; Eyre v. Bartrop, 3 Madd. 224; Howell v. Jones, 1 C. M. & R. 97; Greenough v. McClelland, 2 El. & El. 424, 105 E. C. L. 424.

*United States.* — Suydam v. Vance, 2 McLean (U. S.) 99; U. S. v. Nicholl, 12 Wheat. (U. S.) 505; Sprigg v. Mount Pleasant Bank, 14 Pet. (U. S.) 201; U. S. v. Hillegas, 3 Wash. (U. S.) 70; Uniontown Bank v. Mackey, 140 U. S. 220; Vary v. Norton, 6 Fed. Rep. 808; Hudson v. Bishop, 32 Fed. Rep. 519; U. S. v. Backland, 33 Fed. Rep. 156; American, etc., Mortg., etc., Corp. v. Marquam, 62 Fed. Rep. 960; U. S. v. American Bonding, etc., Co., (C. C. A.) 89 Fed. Rep. 925.

*Alabama.* — Ellis v. Bibb, 2 Stew. (Ala.) 63; Everett v. U. S., 6 Port. (Ala.) 166, 30 Am. Dec. 584; Fletcher v. Gamble, 3 Ala. 335; Chilton v. Robbins, 4 Ala. 223, 37 Am. Dec. 741; Prout v. Branch Bank, 6 Ala. 309; Carpenter v. Devon, 6 Ala. 718; Armstead v. Thomas, 9 Ala. 586; Branch of State Bank v. James, 9 Ala. 949; De Witt v. Bigelow, 11 Ala. 480; Hetherington v. Branch Bank, 14 Ala. 68; Haden v. Brown, 18 Ala. 641; State Bank v. Edwards, 20 Ala. 512; Cox v. Mobile, etc., R. Co., 44 Ala. 611; Buckalew v. Smith, 44 Ala. 638; Mobile, etc., R. Co. v. Brewer, 76 Ala. 135; Elyton Co. v. Hood, 121 Ala. 373; Scott v. Scruggs, 95 Ala. 383.

*Arkansas.* — Stone v. State Bank, 8 Ark. 141; Ferguson v. State Bank, 8 Ark. 416; King v.

*b. CONSIDERATION—(1) General Rule.*—An agreement for extension that will release the surety must be based upon legal and sufficient con-

State Bank, 9 Ark. 185; *Caldwell v. McVicar*, 9 Ark. 418; *Vestal v. Knight*, 54 Ark. 97.

*California.*—*Humphreys v. Crane*, 5 Cal. 173; *Daneri v. Gazzola*, 139 Cal. 416.

*Colorado.*—*Winne v. Colorado Springs Co.*, 3 Colo. 155; *Byers v. Hussey*, 4 Colo. 515.

*Connecticut.*—*Adams v. Way*, 32 Conn. 160; *Continental L. Ins. Co. v. Barber*, 50 Conn. 567; *Boardman v. Larrabee*, 51 Conn. 39.

*Delaware.*—*Hazel v. Sinex*, 6 Del. Ch. 19.

*District of Columbia.*—*Kendall v. Grice*, 1 Mackey (D. C.) 279; *Walker v. Washington Title Ins. Co.*, 19 App. Cas. (D. C.) 575.

*Florida.*—*Pfeiffer v. Knapp*, 17 Fla. 144.

*Georgia.*—*White v. Ault*, 19 Ga. 551; *Worthan v. Brewster*, 30 Ga. 112; *Howell v. Lawrenceville Mfg. Co.*, 31 Ga. 663; *Crawford v. Gaulden*, 33 Ga. 173; *Scott v. Saffold*, 37 Ga. 384; *Stewart v. Parker*, 55 Ga. 656; *Randolph v. Fleming*, 59 Ga. 776; *Burnap v. Robertson*, 75 Ga. 689; *Johnson v. Prater*, 84 Ga. 141.

*Idaho.*—*Maydole v. Peterson*, 7 Idaho 502.

*Illinois.*—*Gardner v. Watson*, 13 Ill. 347; *Flynn v. Mudd*, 27 Ill. 323; *Cunningham v. Wrenn*, 23 Ill. 64; *Farwell v. Meyer*, 35 Ill. 40; *Governor v. Bowman*, 44 Ill. 499; *Galbraith v. Fullerton*, 53 Ill. 126; *Wittmer v. Ellison*, 72 Ill. 301; *Myers v. Fairbury First Nat. Bank*, 78 Ill. 257; *Home Nat. Bank v. Waterman*, 134 Ill. 461; *Reed v. Cramb*, 22 Ill. App. 34; *Kerns v. Ryan*, 26 Ill. App. 177; *Truesdell v. Hunter*, 28 Ill. App. 292; *German Ins., etc., Inst. v. Vahle*, 28 Ill. App. 557; *Wing v. Beach*, 31 Ill. App. 78; *Reynolds v. Barnard*, 36 Ill. App. 218; *Barnard v. Reynolds*, 49 Ill. App. 596.

*Indiana.*—*Musgrave v. Glasgow*, 3 Ind. 31; *Harbert v. Dumont*, 3 Ind. 346; *Shook v. State*, 6 Ind. 113; *Dickerson v. Ripley County*, 6 Ind. 128; *Calvin v. Wiggam*, 27 Ind. 489; *Pierce v. Goldsberry*, 31 Ind. 52; *Jarvis v. Hyatt*, 43 Ind. 163; *Hamilton v. Winterrowd*, 43 Ind. 393; *Abel v. Alexander*, 45 Ind. 523; *White v. Whitney*, 51 Ind. 124; *Hogshead v. Williams*, 55 Ind. 145; *Albright v. Griffin*, 78 Ind. 182; *Lamson v. Vevay First Nat. Bank*, 82 Ind. 31; *Williams v. Scott*, 83 Ind. 405; *Tharp v. Parker*, 86 Ind. 102; *Beach v. Zimmerman*, 106 Ind. 495; *Post v. Losey*, 111 Ind. 74; *Spurgeon v. Smitha*, 114 Ind. 453; *Merriman v. Barker*, 121 Ind. 74; *Davis v. Stout*, 126 Ind. 12; *Brannon v. Irons*, 19 Ind. App. 305; *Voris v. Shotts*, 20 Ind. App. 220; *Bugh v. Crum*, 26 Ind. App. 465.

*Iowa.*—*Christner v. Brown*, 16 Iowa 130; *Hunt v. Postlewait*, 28 Iowa 427; *Bonney v. Bonney*, 29 Iowa 448; *Davis v. Graham*, 29 Iowa 514; *Howard v. Clark*, 36 Iowa 114; *Chickasaw County v. Pitcher*, 36 Iowa 594; *Hancock v. Wilson*, 46 Iowa 352; *Morgan v. Thompson*, 60 Iowa 280; *Lambert v. Shitler*, 62 Iowa 72; *Miller v. McCallen*, 69 Iowa 681; *Citizens Bank v. Barnes*, 70 Iowa 412; *Lambert v. Shetler*, 71 Iowa 463; *Hubbard v. Hart*, 71 Iowa 668.

*Kansas.*—*Rose v. Williams*, 5 Kan. 483; *Horton Bank v. Brooks*, 64 Kan. 285; *Schnitzler v. Wichita Fourth Nat. Bank*, 1 Kan. App. 674.

*Kentucky.*—*Neel v. Harding*, 2 Met. (Ky.) 247; *Blandford v. Barger*, 9 Dana (Ky.) 22;

*Sparks v. Hall*, 4 J. J. Marsh. (Ky.) 35; *Farmer's, etc., Bank v. Cosby*, 4 J. J. Marsh. (Ky.) 366; *Cooper v. Fisher*, 7 J. J. Marsh. (Ky.) 396; *Norton v. Roberts*, 4 T. B. Mon. (Ky.) 491; *Lewis v. Harbin*, 5 B. Mon. (Ky.) 564; *Robinson v. Offutt*, 7 T. B. Mon. (Ky.) 540; *Helm v. Young*, 9 B. Mon. (Ky.) 394; *Dohn v. Bronger*, (Ky. 1898) 47 S. W. Rep. 619.

*Louisiana.*—*Lee v. Sewall*, 2 La. Ann. 940; *Manice v. Duncan*, 12 La. Ann. 715; *Bordelon v. Weymouth*, 14 La. Ann. 93; *Jones v. Fleming*, 15 La. Ann. 522; *Allison v. Thomas*, 29 La. Ann. 732; *Jackson v. Michie*, 33 La. Ann. 723.

*Maine.*—*Kennebec Bank v. Tuckerman*, 5 Me. 130, 17 Am. Dec. 209; *Phillips v. Rounds*, 33 Me. 357; *Stowell v. Goodenow*, 31 Me. 538; *Berry v. Pullen*, 69 Me. 101, 31 Am. Rep. 248.

*Maryland.*—*Lawson v. Snyder*, 1 Md. 71; *Oberndorff v. Union Bank*, 31 Md. 126; *Clagett v. Salmon*, 5 Gill & J. (Md.) 314.

*Massachusetts.*—*Johnson v. Mills*, 10 Cush. (Mass.) 503; *Wilson v. Foot*, 11 Met. (Mass.) 285.

*Michigan.*—*Farmers, etc., Bank v. Kercheval*, 2 Mich. 504; *Todd v. School Dist. No. 1*, 40 Mich. 294; *Walker v. Archer*, 128 Mich. 603.

*Minnesota.*—*Allis v. Ware*, 28 Minn. 166.

*Mississippi.*—*Haynes v. Covington*, 9 Smed. & M. (Miss.) 470; *Wadlington v. Gary*, 7 Smed. & M. (Miss.) 522; *Roberts v. Stewart*, 31 Miss. 664; *Brown v. Prophit*, 53 Miss. 649; *Meggett v. Baum*, 57 Miss. 22.

*Missouri.*—*Smarr v. Schnitter*, 38 Mo. 478; *Springfield First Nat. Bank v. Leavitt*, 65 Mo. 562; *Williams v. Jensen*, 75 Mo. 681; *Barrett v. Davis*, 104 Mo. 549; *Hartman v. Redman*, 21 Mo. App. 124; *Citizens' Bank v. Moorman*, 38 Mo. App. 484; *White v. Middlesworth*, 42 Mo. App. 368; *Wayman v. Jones*, 58 Mo. App. 313; *Steele v. Johnson*, 96 Mo. App. 147.

*Nebraska.*—*Dillon v. Russell*, 5 Neb. 484; *Lee v. Bruggmann*, 37 Neb. 232; *Omaha First Nat. Bank v. Goodman*, 55 Neb. 418; *Shuler v. Hummel*, (Neb. 1901) 95 N. W. Rep. 350.

*New Hampshire.*—*Grafton Bank v. Woodward*, 5 N. H. 99, 20 Am. Dec. 566; *Wheat v. Kendall*, 6 N. H. 504; *Bailey v. Adams*, 10 N. H. 162; *Hoyt v. French*, 24 N. H. 198; *New Hampshire Sav. Bank v. Ela*, 11 N. H. 336; *Watriss v. Pierce*, 32 N. H. 560; *Hutchinson v. Wright*, 61 N. H. 108; *Rochester Sav. Bank v. Chick*, 64 N. H. 410.

*New Jersey.*—*Manning v. Shotwell*, 5 N. J. L. 675; *Grover v. Hoppuck*, 26 N. J. L. 191; *Thompson v. Bowne*, 39 N. J. L. 2; *Haskell v. Burdette*, 35 N. J. Eq. 31.

*New York.*—*Ludlow v. Simond*, 2 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 291; *Coleman v. Wade*, 6 N. Y. 44; *Wilson v. Roberts*, 5 Bosw. (N. Y.) 100; *Miller v. McCan*, 7 Paige (N. Y.) 451; *Delaplaine v. Hitchcock*, 4 Edw. (N. Y.) 321; *Myers v. Welles*, 5 Hill (N. Y.) 463; *Bower v. Tiemann*, 3 Den. (N. Y.) 378; *Wilson v. Edwards*, 6 Lans. (N. Y.) 134; *Holmes v. Dole*, *Clarke* (N. Y.) 71; *Gahn v. Niemcewicz*, 11 Wend. (N. Y.) 312; *Moore v. Paine*, 12 Wend. (N. Y.) 123; *Hubbly v. Brown*, 16 Johns. (N. Y.) 70; *King v. Baldwin*, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415; *Boughton v. Orleans*

sideration, otherwise it may be ignored and the creditor may proceed at once to enforce his rights and remedies.<sup>1</sup>

Bank, 2 Barb. Ch. (N. Y.) 458; Douglass v. White, 3 Barb. Ch. (N. Y.) 621; Wagman v. Hoag, 14 Barb. (N. Y.) 232; Bangs v. Mosher, 23 Barb. (N. Y.) 478; Newsam v. Finch, 25 Barb. (N. Y.) 175; Albany City F. Ins. Co. v. Devendorf, 43 Barb. (N. Y.) 444; Dunham v. Countryman, 66 Barb. (N. Y.) 268; McNulty v. Hurd, 18 Hun (N. Y.) 1; Ross v. Ferris, 18 Hun (N. Y.) 210; Jester v. Sterling, 25 Hun (N. Y.) 344; Thayer v. King, 31 Hun (N. Y.) 437; Clarke v. House, 61 Hun (N. Y.) 624, 16 N. Y. Supp. 777; Blackwell v. Bainbridge, (N. Y. City Ct. Gen. T.) 19 N. Y. Supp. 681; Froude v. Bishop, 25 N. Y. App. Div. 514; Brown v. Mason, 55 N. Y. App. Div. 395; Vilas v. Jones, 1 N. Y. 274; Coleman v. Wade, 6 N. Y. 44; Carr v. Lewis, 20 N. Y. 138; Smith v. Townsend, 25 N. Y. 479; Lowman v. Yates, 37 N. Y. 601; Remsen v. Graves, 41 N. Y. 471; Albion Bank v. Burns, 46 N. Y. 170; Scoville v. Landon, 50 N. Y. 686; Ducker v. Rapp, 67 N. Y. 464; Brown v. Mason, 170 N. Y. 584; Powers v. Silberstein, 108 N. Y. 169.

*North Carolina.*—Shaw v. McFarlane, 1 Ired. L. (23 N. Car.) 216; Pipkin v. Bond, 5 Ired. Eq. (40 N. Car.) 91; Howerton v. Sprague, 64 N. Car. 451; Deal v. Cochran, 66 N. Car. 269; Prairie v. Jenkins, 75 N. Car. 545; Carter v. Duncan, 84 N. Car. 676; Forbes v. Sheppard, 98 N. Car. 111; Hollingsworth v. Tomlinson, 108 N. Car. 245; Scott v. Fisher, 110 N. Car. 311, 28 Am. St. Rep. 688; Salisbury First Nat. Bank v. Swink, 129 N. Car. 255.

*Ohio.*—McComb v. Kittridge, 14 Ohio 348; Reddish v. Watson, 6 Ohio 510; Ide v. Churchill, 14 Ohio St. 372; Blazer v. Bundy, 15 Ohio St. 57; Kugler v. Wiseman, 20 Ohio 361; Kleinhans v. Generous, 25 Ohio St. 667; Farmers', etc., Bank v. Lucas, 26 Ohio St. 385; Bebout v. Bodle, 38 Ohio St. 500; Upington v. May, 40 Ohio St. 247; Miller v. Spain, 41 Ohio St. 376; Slagle v. Pow, 41 Ohio St. 603.

*Pennsylvania.*—Hill v. Witmer, 2 Phila. (Pa.) 72, 13 Leg. Int. (Pa.) 69; Blaine v. Hubbard, 4 Pa. St. 183; Miller v. Stem, 12 Pa. St. 383; Uhler v. Applegate, 26 Pa. St. 140; Henderson v. Ardery, 36 Pa. St. 449; Barnett v. Reed, 51 Pa. St. 190, 88 Am. Dec. 574; Zane v. Kennedy, 73 Pa. St. 182; Shaffer v. Clark, 90 Pa. St. 94; Peoples Bank v. Legrand, 103 Pa. St. 309, 49 Am. Rep. 126; Riddle v. Thompson, 104 Pa. St. 330; Hutchinson v. Woodwell, 107 Pa. St. 509; Garyson's Appeal, 108 Pa. St. 581; Siebeneck v. Anchor Sav. Bank, 111 Pa. St. 187; Neel v. Com., (Pa. 1886) 7 Atl. Rep. 74; Boring's Appeal, (Pa. 1887) 9 Cent. Rep. 394.

*Tennessee.*—Bryant v. Rudisell, 4 Heisk. (Tenn.) 656; Apperson v. Cross, 5 Heisk. (Tenn.) 481; Peay v. Poston, 10 Yerg. (Tenn.) 111; Washington v. Tait, 3 Humph. (Tenn.) 543; White v. Summers, 1 Baxt. (Tenn.) 154.

*Texas.*—Yeary v. Smith, 45 Tex. 59; Lane v. Scott, 57 Tex. 367; Mann v. Brown, 71 Tex. 241; Wylie v. Hightower, 74 Tex. 306; Westbrook v. Belton Nat. Bank, (Tex. Civ. App. 1903) 75 S. W. Rep. 842; Angel v. Miller, 16 Tex. Civ. App. 679; Templeman v. Texas Brewing Co., (Tex. Civ. App. 1896) 35 S. W. Rep. 935.

*Vermont.*—Austin v. Dorwin, 21 Vt. 38; Whittle v. Skinner, 23 Vt. 531; Wilson v. Wheeler, 29 Vt. 484.

*Virginia.*—Harnsberger v. Geiger, 3 Gratt. (Va.) 138; Deveys v. Ross, 10 Gratt. (Va.) 252, 60 Am. Dec. 331; Smith v. Com., 25 Gratt. (Va.) 780; Burson v. Andes, 83 Va. 445; Stuart v. Lancaster, 84 Va. 772.

*Washington.*—Warburton v. Ralph, 9 Wash. 537; Merchants' Bank v. Bussell, 16 Wash. 546; Nelson v. Flagg, 18 Wash. 39.

*West Virginia.*—Sayre v. King, 17 W. Va. 562; Knight v. Charter, 22 W. Va. 422; Glenn v. Morgan, 23 W. Va. 467.

*Wisconsin.*—Riley v. Gregg, 16 Wis. 666; Weed Sewing Mach. Co. v. Oberreich, 36 Wis. 325; American Button-Hole, etc., Co. v. Gurnee, 44 Wis. 49; Jaffray v. Crane, 50 Wis. 349; Omaha Nat. Bank v. Johnson, 111 Wis. 372; Hallock v. Yankey, 102 Wis. 41, 72 Am. St. Rep. 861.

*Wyoming.*—Lawrence v. Thom, 9 Wyo. 414. See also the title *BILLS AND NOTES*, vol. 4, p. 505.

**The Discharge of Accommodation Parties** to negotiable paper as sureties is treated under the title *ACCOMMODATION PAPER*, vol. 1, p. 375 *et seq.*

In *Oriental Financial Corp. v. Overend, L. R. 7 Ch. 142*, it was held that the holder of a security who agreed with the principal to give time to the surety thereby discharged the surety.

Consent by the surety for one extension does not authorize a second unless he subsequently waives his rights. *Oyler v. McMurray*, 7 Ind. App. 645; *Rochester Sav. Bank v. Chick*, 64 N. H. 410; *Parsons v. Harrold*, 46 W. Va. 122.

**Release of Collateral.**—The extension that will release a surety will likewise release property pledged as collateral. *Reed v. Cramb*, 220 Ill. App. 34; *Home Nat. Bank v. Waterman*, 134 Ill. 461.

**1. Consideration.**—*United States.*—*Creath v. Sims*, 5 How. (U. S.) 192.

*Alabama.*—*Agee v. Steele*, 8 Ala. 948; *Wilson v. Orleans Bank*, 9 Ala. 847; *Sawyer v. Patterson*, 11 Ala. 523; *Cox v. Mobile, etc., R. Co.*, 44 Ala. 611; *Howle v. Edwards*, 97 Ala. 649.

*California.*—*Williams v. Covillaud*, 10 Cal. 419.

*Georgia.*—*Goodwyn v. Hightower*, 30 Ga. 249; *Bonner v. Nelson*, 57 Ga. 433; *Vason v. Beall*, 58 Ga. 500; *Carson v. McDaniel*, 79 Ga. 561; *Tatum v. Morgan*, 108 Ga. 336.

*Illinois.*—*Gardner v. Watson*, 13 Ill. 347; *Hinds v. Ingham*, 31 Ill. 400; *Galbraith v. Fullerton*, 53 Ill. 126; *Field v. Brokaw*, 148 Ill. 654; *English v. Landon*, 181 Ill. 614; *Kerns v. Ryan*, 26 Ill. App. 177; *Kriz v. Rad Pokrok*, 46 Ill. App. 418.

*Indiana.*—*Coman v. State*, 4 Blackf. (Ind.) 241; *Harter v. Moore*, 5 Blackf. (Ind.) 367; *Carr v. Howard*, 8 Blackf. (Ind.) 190; *Shook v. State*, 6 Ind. 113; *Shook v. Ripley County*, 6 Ind. 461; *Halstead v. Brown*, 17 Ind. 202; *Coats v. McKee*, 26 Ind. 223; *Montgomery v. Hamilton*, 43 Ind. 451; *Hogshead v. Williams*, 55 Ind.

**New Promise After Extension.** — It has been held in some cases that where, after an extension has been granted to the principal, the surety agrees still to be bound, such agreement need not be based upon a new consideration to make it obligatory.<sup>1</sup>

(2) **Part Payment of Debt.** — Neither part payment of the principal or interest of a debt due, nor the payment of another matured debt, nor a promise to pay interest for the period of extension constitutes a consideration for an agreement for extension.<sup>2</sup>

145; *Brooks v. Allen*, 62 Ind. 401; *Post v. Losey*, 111 Ind. 74.

*Iowa.* — *Hunt v. Postlewait*, 28 Iowa 427; *Bonney v. Bonney*, 29 Iowa 448; *Davis v. Graham*, 29 Iowa 514; *Wendling v. Taylor*, 57 Iowa 354; *Byers v. Harris*, 67 Iowa 685; *Hensler v. Watts*, 113 Iowa 741.

*Kansas.* — *Prather v. Gammon*, 25 Kan. 379; *Rose v. Williams*, 5 Kan. 483; *Eaton v. Whitmore*, 3 Kan. App. 760; *Hall v. Hays City First Nat. Bank*, 5 Kan. App. 493.

*Kentucky.* — *Cooper v. Fisher*, 7 J. J. Marsh. (Ky.) 396; *Peck v. Durett*, 9 Dana (Ky.) 486; *Brinagar v. Phillips*, 1 B. Mon. (Ky.) 283; *Anderson v. Mannon*, 7 B. Mon. (Ky.) 217; *Stout v. Ashton*, 5 T. B. Mon. (Ky.) 251.

*Maine.* — *Leavitt v. Savage*, 16 Me. 72.

*Maryland.* — *Hoye v. Penn*, 1 Bland (Md.) 28; *Oberndorff v. Union Bank*, 31 Md. 126; *Hayes v. Wells*, 34 Md. 512; *Lake v. Thomas*, 84 Md. 608; *Buchanan v. Bordley*, 4 Har. & M. (Md.) 41, 1 Am. Dec. 387.

*Mississippi.* — *Thornton v. Dabney*, 23 Miss. 559; *Wright v. Watt*, 52 Miss. 634; *Payne v. Commercial Bank*, 6 Smed. & M. (Miss.) 24; *Haynes v. Covington*, 9 Smed. & M. (Miss.) 470; *Wadlington v. Gary*, 7 Smed. & M. (Miss.) 522; *Newell v. Hamer*, 4 How. (Miss.) 684, 35 Am. Dec. 415; *Union Bank v. Govan*, 10 Smed. & M. (Miss.) 333.

*Missouri.* — *Harburg v. Kumpf*, 151 Mo. 16; *Nichols v. Douglass*, 8 Mo. 49; *Marks v. State Bank*, 8 Mo. 316; *Ford v. Beard*, 31 Mo. 459; *Seiple v. Atkinson*, 64 Mo. 504; *Williams v. Jensen*, 75 Mo. 681; *Newcomb v. Blakely*, 1 Mo. App. 289; *Brown v. Kirk*, 20 Mo. App. 524; *Aultman, etc., Co. v. Smith*, 52 Mo. App. 351; *Burrus v. Davis*, 67 Mo. App. 210; *J. T. Donovan Real Estate Co. v. Clark*, 84 Mo. App. 163.

*Nebraska.* — *Watts v. Gantt*, 2 Neb. 869; *Smith v. Mason*, 44 Neb. 610; *Maywood Bank v. McAllister*, 56 Neb. 188.

*New Hampshire.* — *Bailey v. Adams*, 10 N. H. 162; *New-Hampshire Sav. Bank v. Downing*, 16 N. H. 187; *New-Hampshire Sav. Bank v. Gill*, 16 N. H. 578; *Rochester Sav. Bank v. Chick*, 64 N. H. 410.

*New Jersey.* — *Grier v. Flitercraft*, 57 N. J. Eq. 556; *Palmer v. White*, 65 N. J. L. 69.

*New York.* — *Mutual L. Ins. Co. v. Davies*, 44 N. Y. Super. Ct. 172; *Olmstead v. Latimer*, 158 N. Y. 313; *Gahn v. Niemcewicz*, 11 Wend. (N. Y.) 312; *Sailly v. Elmore*, 2 Paige (N. Y.) 497; *Vilas v. Jones*, 10 Paige (N. Y.) 76; *King v. Baldwin*, 2 Johns. Ch. (N. Y.) 554; *Draper v. Romeyn*, 18 Barb. (N. Y.) 166; *Boice v. Main*, 4 Den. (N. Y.) 55; *Wilson v. Roberts*, 5 Bosw. (N. Y.) 100; *Thayer v. King*, 31 Hun (N. Y.) 437.

*Ohio.* — *Farmers' Bank v. Raynolds*, 13 Ohio 84; *McComb v. Kittridge*, 14 Ohio 348; *Bramble v. Ward*, 40 Ohio St. 267.

*Pennsylvania.* — *Brubaker v. Okeson*, 36 Pa. St. 519; *Riddle v. Thompson*, 104 Pa. St. 330; *Campbell v. Floyd*, 153 Pa. St. 84; *Haynes v. Synnott*, 160 Pa. St. 180; *Snively v. Fisher*, 21 Pa. Super. Ct. 56.

*South Carolina.* — *Burn v. Poaug*, 3 Desaus. (S. Car.) 596; *Carson v. Hill*, 1 McMull. L. (S. Car.) 76.

*Tennessee.* — *Thompson v. Watson*, 10 Yerg. (Tenn.) 362; *Williams v. Wright*, 9 Humph. (Tenn.) 493.

*Texas.* — *Benson v. Phipps*, (Tex. Civ. App. 1894) 28 S. W. Rep. 359; *Houston v. Braden*, (Tex. Civ. App. 1896) 37 S. W. Rep. 467; *Hunter v. Clark*, 28 Tex. 159; *Hall v. Johnston*, 6 Tex. Civ. App. 110; *Bonnell v. Prince*, 11 Tex. Civ. App. 399.

*Utah.* — *Wallace v. Richards*, 16 Utah 52.

*Vermont.* — *Joslyn v. Smith*, 13 Vt. 353; *Austin v. Curtis*, 31 Vt. 64.

*Virginia.* — *Norris v. Crummey*, 2 Rand. (Va.) 323; *Hunter v. Jett*, 4 Rand. (Va.) 104; *Wells v. Hughes*, 89 Va. 543.

*West Virginia.* — *Cumberland First Nat. Bank v. Parsons*, 45 W. Va. 688; *Knight v. Charter*, 22 W. Va. 422.

*Wisconsin.* — *Fay v. Tower*, 58 Wis. 286.

1. **New Promise After Extension.** — *Smith v. Winter*, 4 M. & W. 454; *Ellis v. Bibb*, 2 Stew. (Ala.) 63; *Rockville Nat. Bank v. Holt*, 58 Conn. 526; *Monmouth First Nat. Bank v. Whitman*, 66 Ill. 331; *Porter v. Hodenpuy*, 9 Mich. 11; *Fowler v. Brooks*, 13 N. H. 240; *Rindskopf v. Doman*, 28 Ohio St. 516.

2. **Part Payment of Debt.** — *Alabama.* — *Hughes v. Southern Warehouse Co.*, 94 Ala. 613.

*Arkansas.* — *King v. State Bank*, 9 Ark. 185.

*California.* — *Stroud v. Thomas*, 139 Cal. 274, 96 Am. St. Rep. 111.

*Georgia.* — *Crawford v. Gaulden*, 33 Ga. 173; *Holliday v. Poole*, 77 Ga. 159.

*Illinois.* — *Kerns v. Ryan*, 26 Ill. App. 177; *Woolford v. Dow*, 34 Ill. 424; *Edmonds v. Thomas*, 41 Ill. App. 505.

*Indiana.* — *Dare v. Hall*, 70 Ind. 545; *Hume v. Mazelin*, 84 Ind. 574; *Davis v. Stout*, 126 Ind. 12.

*Kansas.* — *Ingels v. Sutliff*, 36 Kan. 444.

*Kentucky.* — *Evans v. Partin*, (Ky. 1900) 56 S. W. Rep. 648.

*Massachusetts.* — *Wilson v. Powers*, 130 Mass. 127.

*Mississippi.* — *Roberts v. Stewart*, 31 Miss. 664; *Hunt v. Knox*, 34 Miss. 655.

*Missouri.* — *Petty v. Douglass*, 76 Mo. 70; *Wayman v. Jones*, 58 Mo. App. 313; *La Belle Sav. Bank v. Taylor*, 69 Mo. App. 99.

*Nebraska.* — *Sherman County v. Nichols*, (Neb. 1902) 91 N. W. Rep. 198.

*New Hampshire.* — *Mathewson v. Strafford Bank*, 45 N. H. 104.

**Payment Before Maturity.** — But partial payment of the debt before maturity is sufficient consideration for an agreement for extension such as will release the surety.<sup>1</sup>

**Payment of Interest in Advance.** — And likewise the payment of interest in advance has been held sufficient to support the extension and thus discharge the surety.<sup>2</sup> There are, however, cases holding that the surety is not discharged by the mere receipt of interest in advance, without a contract to that effect,<sup>3</sup> and that the payment of interest in advance is not alone sufficient evidence of an agreement to extend the time.<sup>4</sup>

*New York.* — Gahn v. Niemcewicz, 11 Wend. (N. Y.) 312; Halliday v. Hart, 30 N. Y. 474; Manchester v. Van Brunt, (N. Y. City Ct. Gen. T.) 19 N. Y. Supp. 685; Reynolds v. Ward, 5 Wend. (N. Y.) 501. See also Klein v. Long, 27 N. Y. App. Div. 158.

*Ohio.* — Jenkins v. Clarkson, 7 Ohio (pt. i.) 72.

*Pennsylvania.* — Hall v. Bardwell, 1 C. Pl. Rep. (Pa.) 23.

*South Dakota.* — Bunker v. Taylor, 10 S. Dak. 526.

*Tennessee.* — White v. Summers, 1 Baxt. (Tenn.) 154; Sully v. Childress, 106 Tenn. 109, 82 Am. St. Rep. 875; Howell v. Sevier, 1 Lea (Tenn.) 360, 27 Am. Rep. 771.

*Texas.* — Beasley v. Booth, 3 Tex. Civ. App. 98.

*Vermont.* — Wheeler v. Washburn, 24 Vt. 293.

See also the title CONSIDERATION, vol. 6, p. 754.

**1. Payment Before Maturity** — *Arkansas.* — Vestal v. Knight, 54 Ark. 97.

*Massachusetts.* — Greeley v. Dow, 2 Met. (Mass.) 176.

*New York.* — Newsam v. Finch, 25 Barb. (N. Y.) 175.

*Pennsylvania.* — Uhler v. Applegate, 26 Pa. St. 140.

*South Carolina.* — Smith v. Tunno, 1 McCord Eq. (S. Car.) 443, 16 Am. Dec. 617.

*Vermont.* — Austin v. Dorwin, 21 Vt. 38.

**2. Payment of Interest in Advance** — *Alabama.* — Scott v. Scruggs, 95 Ala. 383.

*Georgia.* — Scott v. Saffold, 37 Ga. 384.

*Illinois.* — Reynolds v. Barnard, 36 Ill. App. 218. But see Crossman v. Wohlleben, 90 Ill. 537.

*Indiana.* — Dickerson v. Ripley County, 6 Ind. 128; Jarvis v. Hyatt, 43 Ind. 163; Abel v. Alexander, 45 Ind. 523; Woodburn v. Carter, 50 Ind. 376; Kaler v. Hise, 79 Ind. 301; Schieber v. Traudt, 19 Ind. App. 349.

*Kentucky.* — Robinson v. Miller, 2 Bush (Ky.) 179.

*Michigan.* — Hitchcock v. Frackelton, 116 Mich. 487.

*Mississippi.* — Keirn v. Andrews, 59 Miss. 39.

*Missouri.* — Springfield First Nat. Bank v. Leavitt, 65 Mo. 562; Merchant's Ins. Co. v. Hauck, 83 Mo. 21; Commercial Bank v. Wood, 56 Mo. App. 214; Owen v. Bray, 80 Mo. App. 526, 2 Mo. App. Rep. 658. But see Russell v. Brown, 21 Mo. App. 51.

*New York.* — Wakefield Bank v. Truesdell, 55 Barb. (N. Y.) 602.

*North Carolina.* — Hollingsworth v. Tomlin-

son, 108 N. Car. 245; Revell v. Thrash, 132 N. Car. 803.

*Ohio.* — Osborn v. Low, 40 Ohio St. 347. But see Vore v. Woodford, 29 Ohio St. 245.

*Pennsylvania.* — Calvert v. Good, 95 Pa. St. 65; Grayson's Appeal, 108 Pa. St. 581.

*South Carolina.* — Gardner v. Gardner, 23 S. Car. 588.

*Tennessee.* — Stone's River Nat. Bank v. Walter, 104 Tenn. 11.

*Vermont.* — Dunham v. Downer, 31 Vt. 249.

*Washington.* — Binnian v. Jennings, 14 Wash. 677; British Columbia Bank v. Jeffs, 15 Wash. 230.

*West Virginia.* — Glenn v. Morgan, 23 W. Va. 467.

*Wyoming.* — Lawrence v. Thom, 9 Wyo. 414.

**Promise to Pay Interest.** — It has even been held in a few cases that the mere promise to pay interest during the extended period is sufficient consideration to support such an agreement, especially if it be interest at an increased rate. Beuter v. Dillon, 63 Ill. App. 517; Pierce v. Goldsberry, 31 Ind. 52 [overruled by Abel v. Alexander, 45 Ind. 523]; Huff v. Cole, 45 Ind. 300; Benson v. Phipps, 87 Tex. 578; Woodall v. Streeter (Tex. Civ. App. 1897) 39 S. W. Rep. 169; State Nat. Bank v. Stratton-White Co., (Tex. Civ. App. 1899) 50 S. W. Rep. 631. *Contra*, Turner v. Williams, 73 Me. 466; Shayler v. Giddins, 122 Mich. 659; and see the title CONSIDERATION, vol. 6, p. 755.

**3. Payment of Interest in Advance No Consideration** — *Maine.* — Freeman's Bank v. Rollins, 13 Me. 202; Williams v. Smith, 48 Me. 135; Turner v. Williams, 73 Me. 466.

*Massachusetts.* — Oxford Bank v. Lewis, 8 Pick. (Mass.) 457; Blackstone Bank v. Hill, 10 Pick. (Mass.) 129; Central Bank v. Willard, 17 Pick. (Mass.) 150, 28 Am. Dec. 284; Agricultural Bank v. Bishop, 6 Gray (Mass.) 317; Wilson v. Powers, 130 Mass. 127; Haydenville Sav. Bank v. Parsons, 138 Mass. 53.

*Michigan.* — Aultman v. Gorham, 87 Mich. 233.

*New Hampshire.* — New-Hampshire Sav. Bank v. Gill, 16 N. H. 578.

*Texas.* — Jameson v. Officer, 15 Tex. Civ. App. 212.

*Virginia.* — Harnsberger v. Kinney, 13 Gratt. (Va.) 511.

**4. Payment of Interest Not Evidence of Extension.** — Springfield First Nat. Bank v. Leavitt, 65 Mo. 562; Abel v. Alexander, 45 Ind. 523; Hume v. Mazelin, 84 Ind. 574; Russell v. Brown, 21 Mo. App. 51; Citizens' Bank v. Moorman, 38 Mo. App. 484; American Nat. Bank v. Love, 62 Mo. App. 378. *Contra*, Jarvis v. Hyatt, 43 Ind. 163; Woodburn v. Carter, 50 Ind. 376; Schieber v. Traudt, 19 Ind. App. 349.

(3) *Payment of Usury.* — Ordinarily the actual payment of usury is sufficient consideration for an extension and will discharge the surety.<sup>1</sup> A mere promise to pay usury is ordinarily regarded as void, and hence will not discharge the surety.<sup>2</sup>

c. *CONTRACT DEFECTIVE ON VARIOUS GROUNDS.* — Likewise where the proposed extension is not accepted by one of the parties,<sup>3</sup> or there is failure to sign the new note,<sup>4</sup> or there is some unperformed condition annexed to the arrangement,<sup>5</sup> or extension is granted by one not authorized to do so,<sup>6</sup> or it is in some way vitiated by fraud,<sup>7</sup> or where some other essential element of a

1. *Payment of Usury* — *Georgia.* — *Camp v. Howell*, 37 Ga. 312; *Small v. Hicks*, 81 Ga. 691; *Knight v. Hawkins*, 93 Ga. 709.

*Illinois.* — *Wittmer v. Ellison*, 72 Ill. 301; *Danforth v. Semple*, 73 Ill. 170; *Myers v. Fairbury First Nat. Bank*, 78 Ill. 257.

*Indiana.* — *Harbert v. Dumont*, 3 Ind. 346; *Calvin v. Wiggam*, 27 Ind. 489; *Cross v. Wood*, 30 Ind. 378; *White v. Whitney*, 51 Ind. 124; *Lemmon v. Whitman*, 75 Ind. 318. But see *Shaw v. Binkard*, 10 Ind. 227.

*Iowa.* — *Coriell v. Allen*, 13 Iowa 289. *Kentucky.* — *Kenningham v. Bedford*, 1 B. Mon. (Ky.) 325; *Duncan v. Reed*, 8 B. Mon. (Ky.) 382. But see *Bartlow v. Boude*, 3 Dana (Ky.) 591.

*Mississippi.* — *Brown v. Prophit*, 53 Miss. 649. But see *Polkinghorne v. Hendricks*, 61 Miss. 366.

*Missouri.* — *Wild v. Howe*, 74 Mo. 551. *New York.* — *Draper v. Trescott*, 29 Barb. (N. Y.) 401; *Froude v. Bishop*, 25 N. Y. App. Div. 514; *Billington v. Wagoner*, 33 N. Y. 31. But see *Denick v. Hubbard*, 27 Hun (N. Y.) 347; *Vilas v. Jones*, 10 Paige (N. Y.) 76.

*Ohio.* — *Blazer v. Bundy*, 15 Ohio St. 57; *Wood v. Newkirk*, 15 Ohio St. 295; *Osborn v. Low*, 40 Ohio St. 347.

*South Dakota.* — *Niblack v. Champeny*, 10 S. Dak. 165.

*Texas.* — *Mann v. Brown*, 71 Tex. 241. *Virginia.* — *Armistead v. Ward*, 2 Patt. & H. (Va.) 504.

*West Virginia.* — *Glenn v. Morgan*, 23 W. Va. 467; *Parsons v. Harrold*, 46 W. Va. 122.

But see *McKamy v. McNabb*, 97 Tenn. 236; *Meiswinkle v. Jung*, 30 Wis. 361, 11 Am. Rep. 572.

2. *Promise to Pay Usury* — *Alabama.* — *Kyle v. Bostick*, 10 Ala. 589; *Gilder v. Jeter*, 11 Ala. 256; *Cox v. Mobile, etc., R. Co.*, 37 Ala. 320.

*District of Columbia.* — *May v. Shepherd*, 1 Mackey (D. C.) 430; *Green v. Lake*, 2 Mackey (D. C.) 162.

*Georgia.* — *Lewis v. Brown*, 89 Ga. 115; *Harrington v. Findley*, 89 Ga. 385.

*Illinois.* — *Stearns v. Sweet*, 78 Ill. 446; *Galbraith v. Fullerton*, 53 Ill. 126.

*Indiana.* — *Shaw v. Binkard*, 10 Ind. 227; *Abel v. Alexander*, 45 Ind. 523.

*Kentucky.* — *Tudor v. Goodloe*, 1 B. Mon. (Ky.) 322; *Scott v. Hall*, 6 B. Mon. (Ky.) 285; *Duncan v. Reed*, 8 B. Mon. (Ky.) 382; *Shutt v. Glass*, 4 Bush (Ky.) 486; *Patton v. Shanklin*, 14 B. Mon. (Ky.) 13.

*Mississippi.* — *Roberts v. Stewart*, 31 Miss. 664.

*New York.* — *Denick v. Hubbard*, 27 Hun (N. Y.) 347.

*Pennsylvania.* — *Hartman v. Danner*, 74 Pa. St. 36; *Calvert v. Good*, 95 Pa. St. 65.

*Tennessee.* — *Wilson v. Langford*, 5 Humph. (Tenn.) 320.

*Texas.* — *Payne v. Powell*, 14 Tex. 600; *Mann v. Brown*, 71 Tex. 241; *Brown v. Fountain*, 3 Tex. Civ. App. 227.

*Vermont.* — *Burgess v. Dewey*, 33 Vt. 618; *Smith v. Hyde*, 36 Vt. 303.

*Wisconsin.* — *Meiswinkle v. Jung*, 30 Wis. 361, 11 Am. Rep. 572.

3. *Unaccepted Proposal* — *United States.* — *Uniontown Bank v. Mackey*, 140 U. S. 220; *Milmine v. Bass*, 29 Fed. Rep. 632.

*Alabama.* — *Branch Bank v. Robinson*, 5 Ala. 623.

*Illinois.* — *Heenan v. Howard*, 81 Ill. App. 629.

*Indiana.* — *Merriman v. Barker*, 121 Ind. 74.

*Kentucky.* — *Alley v. Hopkins*, 98 Ky. 668.

*Massachusetts.* — *Agricultural Bank v. Bishop*, 6 Gray (Mass.) 317.

*Missouri.* — *Harburg v. Kumpf*, 151 Mo. 16.

*North Carolina.* — *National Bank v. Sumner*, 119 N. Car. 591.

4. *Failure to Sign Note.* — *Miller v. McCallen*, 69 Iowa 681.

5. *Condition Unperformed* — *Louisiana.* — *Bordelon v. Weymouth*, 14 La. Ann. 93; *Purdy v. Forstall*, 45 La. Ann. 814.

*Maine.* — *Miller v. Hatch*, 72 Me. 481, 39 Am. Rep. 346; *Thorn v. Pinkham*, 84 Me. 103, 30 Am. St. Rep. 335.

*Oklahoma.* — *Kuhlman v. Leavens*, 5 Okla. 562.

*Virginia.* — *Harnsberger v. Geiger*, 3 Gratt. (Va.) 138.

6. *Extension Not Authorized.* — *Jackson v. Michie*, 33 La. Ann. 723; *Behrns v. Rogers*, (Tex. Civ. App. 1897) 40 S. W. Rep. 419.

7. *Vitiated by Fraud* — *Indiana.* — *Albright v. Griffin*, 78 Ind. 182.

*Iowa.* — *Citizens Bank v. Barnes*, 70 Iowa 412; *Hubbard v. Hart*, 71 Iowa 668; *Dwinnell v. McKibben*, 93 Iowa 331.

*Tennessee.* — *Athens First Nat. Bank v. Buchanan*, 87 Tenn. 32, 10 Am. St. Rep. 617.

*Texas.* — *Officer v. Marshall*, 9 Tex. Civ. App. 428.

*Washington.* — *McDougall v. Walling*, 15 Wash. 78, 55 Am. St. Rep. 871.

An illegal act of the creditor, which does not form an essential element in the claim against the surety, does not discharge him. *Eagle Roller-Mill Co. v. Dillman*, 67 Minn. 232.



completed contract is lacking,<sup>1</sup> the surety is not discharged.<sup>2</sup>

*d. EXTENSION MUST BE FOR DEFINITE TIME.* — An extension between the creditor and principal that will discharge the surety must be an extension for a fixed and definite period of time.<sup>3</sup>

*e. SURETY MUST BE KNOWN AS SUCH.* — A surety is not discharged by an extension unless the creditor knows, actually or constructively, at the time the relation of suretyship is formed, or learns subsequently, that the surety is a surety and not a co-principal.<sup>4</sup>

*f. EXTENSION BY NOTE.* — Where a creditor takes the bill or note of his debtor payable at a future day, it is an extension of credit, and

1. *Miscellaneous Defects* — *England.* — *Oakley v. Pasheller*, 4 Cl. & F. 207; *Overend v. Oriental Financial Corp.*, L. R. 7 H. L. 348; *Rouse v. Bradford Banking Co.*, (1894) A. C. 586, 6 Reports 349.

*Canada.* — *McLaughlin Carriage Co. v. Oland*, 34 Nova Scotia 193.

*United States.* — *Gordon v. Chattanooga Third Nat. Bank*, 144 U. S. 97.

*Illinois.* — *German Ins., etc., Inst. v. Vahle*, 28 Ill. App. 557.

*Kentucky.* — *Krupp v. St. Martinus Ritter Verein*, (Ky. 1899) 53 S. W. Rep. 648.

*Massachusetts.* — *Agricultural Bank v. Bishop*, 6 Gray (Mass.) 317.

*Michigan.* — *Garton v. Union City Nat. Bank*, 34 Mich. 279.

*Missouri.* — *Kincaid v. Yates*, 63 Mo. 45; *Hartman v. Redman*, 21 Mo. App. 124.

*New York.* — *Douglass v. Ferris*, 63 Hun (N. Y.) 413; *Hurst v. Trow's Printing, etc., Co.*, (C. Pl. Gen. T.) 30 Abb. N. Cas. (N. Y.) 1, 2 Misc. (N. Y.) 361.

*Ohio.* — *Bebout v. Bodle*, 38 Ohio St. 500.

*South Carolina.* — *Carson v. Hill*, 1 McMull. L. (S. Car.) 76.

*Vermont.* — *Middlebury Bank v. Bingham*, 33 Vt. 621.

2. It has been held that a surety on a specialty is not discharged by a parol extension. *Tate v. Wymond*, 7 Blackf. (Ind.) 240; *Steptoe v. Harvey*, 7 Leigh (Va.) 501.

3. *Extension Must Be for Definite Time* — *United States.* — *Vary v. Norton*, 6 Fed. Rep. 808.

*Arkansas.* — *King v. Haynes*, 35 Ark. 463; *Kendall v. Milligan*, 62 Ark. 629, 34 S. W. Rep. 78.

*Georgia.* — *Woolfolk v. Plant*, 46 Ga. 422; *Bunn v. Commercial Bank*, 98 Ga. 647.

*Illinois.* — *Truesdell v. Hunter*, 28 Ill. App. 292.

*Indiana.* — *Meniffee v. Clark*, 35 Ind. 304; *Jarvis v. Hyatt*, 43 Ind. 163; *Cates v. Thayer*, 93 Ind. 156.

*Iowa.* — *Morgan v. Thompson*, 60 Iowa 280.

*Maryland.* — *Hayes v. Wells*, 34 Md. 512.

*Mississippi.* — *Rupert v. Grant*, 6 Smed. & M. (Miss.) 433.

*New York.* — *Fallkill Nat. Bank v. Sleight*, 1 N. Y. App. Div. 189.

*North Carolina.* — *Revell v. Thrash*, 132 N. Car. 803; *Deal v. Cochran*, 66 N. Car. 269; *Scott v. Fisher*, 110 N. Car. 311, 28 Am. St. Rep. 688.

*North Dakota.* — *McCormick Harvesting Mach. Co. v. Rae*, 9 N. Dak. 482.

*Ohio.* — *Jenkins v. Clarkson*, 7 Ohio (pt. i.) 72; *Edwards v. Bedford Chair Co.*, 41 Ohio St. 17.

*Oregon.* — *Findley v. Hill*, 8 Oregon 247, 34 Am. Rep. 578.

*Oklahoma.* — *Kuhlman v. Leavens*, 5 Okla. 564.

*Pennsylvania.* — *Miller v. Stem*, 2 Pa. St. 286.

*Tennessee.* — *Watauga Bank v. Matson*, 99 Tenn. 390.

*Texas.* — *Webb v. Pahde*, (Tex. Civ. App. 1897) 43 S. W. Rep. 19.

4. *Surety Must Be Known as Such* — *United States.* — *Scott v. Scruggs*, (C. C. A.) 60 Fed. Rep. 721.

*Georgia.* — *Howell v. Lawrenceville Mfg. Co.*, 31 Ga. 663.

*Illinois.* — *Flynn v. Mudd*, 27 Ill. 323; *Peterson v. Stege*, 67 Ill. App. 147.

*Indiana.* — *Davenport v. King*, 63 Ind. 64; *Mullendore v. Wertz*, 75 Ind. 431; *Lamson v. Vevay First Nat. Bank*, 82 Ind. 21; *Tharp v. Parker*, 86 Ind. 102; *Gipson v. Ogden*, 100 Ind. 20; *Post v. Losey*, 111 Ind. 74; *Olson v. Chism*, 21 Ind. App. 40.

*Iowa.* — *Morgan v. Thompson*, 60 Iowa 280.

*Kentucky.* — *Harris-Seller Banking Co. v. Bond*, (Ky. 1898) 47 S. W. Rep. 764; *Neel v. Harding*, 2 Met. (Ky.) 247.

*Maine.* — *Mariner's Bank v. Abbott*, 28 Me. 280.

*Massachusetts.* — *Wilson v. Foot*, 11 Met. (Mass.) 285.

*Mississippi.* — *McGee v. Metcalf*, 12 Smed. & M. (Miss.) 535, 51 Am. Dec. 122.

*New Hampshire.* — *Nichols v. Parsons*, 6 N. H. 30, 23 Am. Dec. 706.

*New York.* — *Gahn v. Niemcewicz*, 11 Wend. (N. Y.) 312.

*Pennsylvania.* — *Phoenix Brewing Co. v. Rumbarger*, 181 Pa. St. 251, 59 Am. St. Rep. 647.

*South Carolina.* — *State Bank v. Kerr*, 1 McMull. L. (S. Car.) 139.

*Tennessee.* — *Bryant v. Rudisell*, 4 Heisk. (Tenn.) 656; *Peay v. Poston*, 10 Yerg. (Tenn.) 111; *Deberry v. Adams*, 9 Yerg. (Tenn.) 52.

*Texas.* — *Bonnell v. Prince*, 11 Tex. Civ. App. 399; *Zapalac v. Zapp*, 22 Tex. Civ. App. 375; *Victoria First Nat. Bank v. Skidmore*, (Tex. Civ. App. 1895) 30 S. W. Rep. 564.

*West Virginia.* — *Parsons v. Harrold*, 46 W. Va. 122; *Cumberland First Nat. Bank v. Parsons*, 45 W. Va. 688.

*Wisconsin.* — *Gardner v. Van Norstrand*, 13 Wis. 543.

the surety is thereby discharged.<sup>1</sup>

*g.* RESERVATION OF RIGHTS AGAINST SURETY. — Where a creditor in granting extension to the principal expressly or by clear implication reserves his right against the surety, the latter is not discharged. Such reservation preserves to the surety the right to sue the principal at any time.<sup>2</sup>

*h.* ACCEPTANCE OF COLLATERAL SECURITY. — If, without any agreement to extend payment, the creditor accepts from the principal debtor collateral security of any kind which matures after the original debt, the surety is not discharged.<sup>3</sup>

1. *Extension by Note* — *Illinois* — Parlin, etc., *Co. v. Hutson*, 198 Ill. 389; *Reed v. Cramb*, 22 Ill. App. 34.

*Indiana*. — *Baut v. Donly*, 160 Ind. 670.

*Iowa*. — *Hubbard v. Hart*, 71 Iowa 668.

*Massachusetts*. — *Appleton v. Parker*, 15 Gray (Mass.) 173.

*Missouri*. — *Steele v. Johnson*, 96 Mo. App. 147.

*New York*. — *Fellows v. Prentiss*, 3 Den. (N. Y.) 512, 45 Am. Dec. 484; *Delaware*, etc., *R. Co. v. Burkhard*, 36 Hun (N. Y.) 57; *Myers v. Welles*, 5 Hill (N. Y.) 463; *Hubbard v. Gurney*, 64 N. Y. 457.

*North Carolina*. — *Chemical Co. v. Pegram*, 112 N. Car. 614.

*Ohio*. — *People's Ins. Co. v. McDonnell*, 41 Ohio St. 650.

*Pennsylvania*. — *Maples v. Hicks*, Bright. (Pa.) 56; *Bank v. Fulton*, 1 W. N. Cas. (Pa.) 110; *Hanbest v. Krans*, 4 Phila. (Pa.) 119, 17 Leg. Int. (Pa.) 332; *Okie v. Spencer*, 2 Whart. (Pa.) 253, 30 Am. Dec. 251; *Walters v. Swallow*, 6 Whart. (Pa.) 446.

*Virginia*. — *Callaway v. Price*, 32 Gratt. (Va.) 1; *Burson v. Andes*, 83 Va. 445.

It has been held that a contract which binds the debtor to pay money may be discharged by payment in anything which the creditor is willing to accept, and that the acceptance of a note in part payment does not discharge the surety. *Foster v. Gaston*, 123 Ind. 96.

2. *Reservation of Rights Against Surety* — *England*. — *Oriental Financial Corp. v. Overend*, L. R. 7 Ch. 142; *Boulton v. Stubbs*, 18 Ves. Jr. 20; *Owen v. Homan*, 13 Beav. 196; *Boaler v. Mayor*, 19 C. B. N. S. 76, 11 E. C. L. 76; *Kearsley v. Cole*, 16 M. & W. 128; *Wyke v. Rogers*, 1 De G. M. & G. 408; *Ex p. Glendinning*, Buck. 517; *Nichols v. Norris*, 3 B. & Ad. 41, 23 E. C. L. 28; *Thomas v. Courtney*, 1 B. & Ad. 1.

*Canada*. — *Gorman v. Dixon*, 26 Can. Sup. Ct. 87.

*Alabama*. — *Prout v. Branch Bank*, 6 Ala. 309; *Hodges v. Elyton Land Co.*, 109 Ala. 617.

*Connecticut*. — *Rockville Nat. Bank v. Holt*, 58 Conn. 526.

*Iowa*. — *Jones v. Sarchett*, 61 Iowa 520.

*Kansas*. — *Dean v. Rice*, 63 Kan. 691.

*Maryland*. — *Clagett v. Salmon*, 5 Gill & J. (Md.) 314; *Salmon v. Clagett*, 3 Bland (Md.) 125.

*Massachusetts*. — *Sohier v. Loring*, 6 Cush. (Mass.) 537; *Oxford Bank v. Lewis*, 8 Pick. (Mass.) 458.

*Michigan*. — *Bailey v. Gould*, Walk. (Mich.) 478; *Big Rapids Nat. Bank v. Peters*, 120 Mich. 518.

*Mississippi*. — *Hunt v. Knox*, 34 Miss. 655.

*Missouri*. — *Russell v. Brown*, 21 Mo. App. 51; *Rucker v. Robinson*, 38 Mo. 154, 90 Am. Dec. 412.

*New Hampshire*. — *Wright v. Bartlett*, 43 N. H. 548.

*New York*. — *Morgan v. Smith*, 70 N. Y. 537; *Calvo v. Davies*, 73 N. Y. 217, 29 Am. Rep. 130.

*North Carolina*. — *Charlotte First Nat. Bank v. Lineberger*, 83 N. Car. 454, 35 Am. Rep. 582.

*Pennsylvania*. — *Hagey v. Hill*, 75 Pa. St. 108, 15 Am. Rep. 583; *Kaufmann v. Rowan*, 189 Pa. St. 121.

*Vermont*. — *Viele v. Hoag*, 24 Vt. 46.

*Virginia*. — *Exchange Bldg., etc., Co. v. Bayless*, 91 Va. 134.

*Washington*. — *Boston Nat. Bank v. Jose*, 10 Wash. 185.

*Contra*, *Robinson v. Brown*, (Tex. Civ. App. 1900) 57 S. W. Rep. 686.

3. *Acceptance of Collateral Security* — *England*. — *Twopenny v. Young*, 3 B. & C. 208, 10 E. C. L. 54; *Clarke v. Birley*, 41 Ch. D. 422.

*United States*. — *U. S. v. Hodge*, 6 How. (U. S.) 279; *Meguiar v. Groves*, 1 Fed. Rep. 279.

*Alabama*. — *Mobile, etc., R. Co. v. Brewer*, 76 Ala. 135.

*Illinois*. — *German Ins., etc., Inst. v. Vahle*, 28 Ill. App. 557.

*Indiana*. — *Merriman v. Barker*, 121 Ind. 74.

*Maryland*. — *Brengle v. Bushey*, 40 Md. 141, 17 Am. Rep. 586.

*Massachusetts*. — *Sigourney v. Wetherell*, 6 Met. (Mass.) 553.

*Michigan*. — *Big Rapids Nat. Bank v. Peters*, 120 Mich. 518.

*Mississippi*. — *Wade v. Staunton*, 5 How. (Miss.) 631.

*Missouri*. — *Headlee v. Jones*, 43 Mo. 235. But see *Marquardt Sav. Bank v. Freund*, 80 Mo. App. 657, 2 Mo. App. Rep. 693.

*New Jersey*. — *Firemen's Ins. Co. v. Wilkinson*, 35 N. J. Eq. 160; *Dodson v. Taylor*, 56 N. J. L. 11. But see *Bell v. Martin*, 18 N. J. L. 167.

*New York*. — *Remsen v. Graves*, 41 N. Y. 471; *Elwood v. Deifendorf*, 5 Barb. (N. Y.) 398; *Van Etten v. Troudden*, 67 Barb. (N. Y.) 342; *Mack v. Anderson*, (Supm. Ct. Spec. T.) 33 N. Y. Supp. 208. But see *Kane v. Cortesy*, 100 N. Y. 132.

*Pennsylvania*. — *Pennsylvania Bank v. Potius*, 10 Watts (Pa.) 148; *Schlager v. Teal*, 185 Pa. St. 322.

*Rhode Island*. — *Thurston v. James*, 6 R. I. 103.

*Texas*. — *Cruger v. Burke*, 11 Tex. 694.

*Vermont*. — *Austin v. Curtis*, 31 Vt. 64.

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*i.* INDEMNIFIED SURETY. — A surety who holds indemnity or security from the principal is not discharged by an indulgence or extension which otherwise would have that effect.<sup>1</sup> But if the indemnity proves to be of no value he is discharged.<sup>2</sup>

*j.* NO REVIVAL OF OBLIGATION. — The liability of a surety once discharged is not revived by a subsequent arrangement between the principal and creditor.<sup>3</sup>

*k.* STATUTORY EXTENSION. — Where an extension is granted to a principal debtor by statute, it is a general rule that such extension does not release the suretyship.<sup>4</sup>

*l.* AFTER JUDGMENT AGAINST PRINCIPAL. — After recovery of judgment against a debtor and his surety, the relation of principal and surety is generally regarded as still continuing, so that an extension of time granted to the principal will discharge the surety.<sup>5</sup>

*m.* EVIDENCE. — It is not necessary to show an express agreement for extension, but this may be inferred or implied from the circumstances.<sup>6</sup> The surety need not show that he gave notice of his dissent,<sup>7</sup> and proof that the surety knew of the extension is not equivalent to consent on his part.<sup>8</sup> Whether the parties intended to grant and accept an extension is a question for the jury.<sup>9</sup> The burden rests upon the surety to prove the extension of time without his consent,<sup>10</sup> and to prove that he is a surety.<sup>11</sup> It is generally recognized that the acceptance of a new note after the maturity of the guaranteed debt is evidence of an agreement to extend the time of payment.<sup>12</sup> There

1. *Indemnified Surety.* — *Chilton v. Robbins*, 4 Ala. 223, 37 Am. Dec. 741; *Hardester v. Tate*, 85 Mo. App. 624; *First Nat. Bank v. Davis*, 87 Mo. App. 242; *Kleinhaus v. Generous*, 25 Ohio St. 667; *Smith v. Steele*, 25 Vt. 427, 60 Am. Dec. 276; *Turner v. Stewart*, 51 W. Va. 493.

2. *Phelps v. Walkey*, 84 Iowa 120; *Fay v. Tower*, 58 Wis. 286. See also *Citizens Bank v. Barnes*, 70 Iowa 412.

3. *No Revival of Obligation.* — *Elyton Co. v. Hood*, 121 Ala. 373; *Rittenhouse v. Kemp*, 37 Ind. 258.

4. *Statutory Extension.* — *State v. Carleton*, 1 Gill (Md.) 249; *State v. Swinney*, 60 Miss. 39, 45 Am. Rep. 405; *Smith v. Com.*, 25 Gratt. (Va.) 780. But see *State v. Roberts*, 68 Mo. 234, 30 Am. Rep. 788; *Johnson v. Hacker*, 8 Heisk. (Tenn.) 388.

5. *After Judgment Against Principal* — *Alabama*. — *Carpenter v. Devon*, 6 Ala. 718.

*California*. — *Morley v. Dickinson*, 12 Cal. 561.

*Delaware*. — *Hazel v. Sinex*, 6 Del. Ch. 19.

*Georgia*. — *McCrary v. Coley*, 1 Ga. Dec. 104.

*Indiana*. — *Wingate v. Wilson*, 53 Ind. 78; *Gipson v. Ogden*, 100 Ind. 20. See also *Barker v. McClure*, 2 Blackf. (Ind.) 14.

*Iowa*. — *Sherraden v. Parker*, 24 Iowa 28; *Hancock v. Wilson*, 46 Iowa 352.

*Louisiana*. — *Gustine v. Union Bank*, 10 Rob. (La.) 412; *Allison v. Thomas*, 29 La. Ann. 733.

*Minnesota*. — *Moss v. Pettingill*, 3 Minn. 217.

*New York*. — *Storms v. Thorn*, 3 Barb. (N. Y.) 314. See also *Bower v. Tiermann*, 3 Den. (N. Y.) 378. But see *Hubbell v. Carpenter*, 2 Barb. (N. Y.) 484.

*Ohio*. — *Blazer v. Bundy*, 15 Ohio St. 57.

*Pennsylvania*. — *Clippinger v. Creps*, 2 Watts (Pa.) 45; *Manufacturer's, etc., Bank v. State Bank*, 7 W. & S. (Pa.) 335, 42 Am. Dec. 240.

*Tennessee*. — *Williams v. Wright*, 9 Humph. (Tenn.) 493.

*Texas*. — *Pilgrim v. Dykes*, 24 Tex. 383.

But see *Marshall v. Aiken*, 25 Vt. 327.

6. *Agreement for Extension May Be Implied.* — *Kerns v. Ryan*, 26 Ill. App. 177; *Brooks v. Wright*, 13 Allen (Mass.) 72; *Revell v. Thrash*, 132 N. Car. 803.

7. *Notice of Dissent Not Necessary.* — *Riggins v. Brown*, 12 Ga. 271. See also *Pimental v. Marques*, 109 Cal. 406.

8. *Lambert v. Shetler*, 71 Iowa 463.

9. *Question for Jury.* — *Roberson v. Blevins*, 57 Kan. 50; *Moore v. Redding*, 69 Miss. 841; *Powers v. Silberstein*, 108 N. Y. 169; *Robson v. Brown*, (Tex. Civ. App. 1900) 57 S. W. Rep. 83.

10. *Burden upon Surety.* — *Illinois University v. Hayes*, 114 Iowa 690; *Truesdell v. Hunter*, 28 Ill. App. 292; *Stapp v. Hatcher*, 67 S. W. Rep. 819, 23 Ky. L. Rep. 2441; *Eaton v. Waite*, 66 Me. 221; *Washington Slate Co. v. Burdick*, 60 Minn. 270; *Guderian v. Leland*, 61 Minn. 67. But see *Menke v. Gerbracht*, 75 Hun (N. Y.) 181; *Mundy v. Stevens*, (C. C. A.) 61 Fed. Rep. 77.

11. *Turner v. Stewart*, 51 W. Va. 493.

Parol evidence is not admissible to show that the contract guaranteed is different from that conditioned in a writing evidenced in such contract. *Crescent Brewing Co. v. Handley*, 90 Ala. 486.

12. *New Note as Evidence of Extension* — *England*. — *Bellingham v. Freer*, 1 Moo. P. C. 333; *Price v. Price*, 16 M. & W. 232; *Walton v. Mascal*, 13 M. & W. 452; *Baker v. Walker*, 14 M. & W. 465.

*Georgia*. — *Simmons v. Guise*, 46 Ga. 473.

*Iowa*. — *Chickasaw County v. Pitcher*, 36 Iowa 593.

*Maryland*. — *Dixon v. Spencer*, 59 Md. 246.

*Missouri*. — *Springfield First Nat. Bank v. Leavitt*, 65 Mo. 562.

*New York*. — *Myers v. Welles*, 5 Hill (N. Y.)

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is, however, authority for the statement that the taking of such a note does not imply that the creditor agreed to give time.<sup>1</sup>

**5. Indulgence to Principal Debtor — a. IN GENERAL.** — It is fundamental in the law of suretyship that the creditor owes to the surety no duty of active diligence. This principle is, of course, a legal one, but it permeates the entire law of discharge and is rarely violated. One small class of cases presents a real exception to the broad rule. By the weight of authority the failure of a creditor to record a mortgage or register a lien, whereby the security is lost, is an act of such gross and blameworthy negligence as to discharge the surety to the extent of the security thus lost.<sup>2</sup> It is also held by a very few courts that where the creditor suffers the debt to be barred as against the principal or his estate, the surety is discharged.<sup>3</sup> Subject to these unimportant exceptions, it is universally true that a mere nonfeasance on the part of the creditor will not discharge the surety. Mere inaction, indulgence, delay, or forbearance on the part of the creditor to bring suit against the principal debtor,<sup>4</sup> or his failure promptly to subject securities or to apply

463; *Fellows v. Prentiss*, 3 Den. (N. Y.) 518, 45 Am. Dec. 484; *Putnam v. Lewis*, 8 Johns. (N. Y.) 389; *Hubbard v. Gurney*, 64 N. Y. 457; *Greene v. Bates*, 74 N. Y. 333.

*Tennessee*. — *Lea v. Dozier*, 10 Humph. (Tenn.) 447.

*Virginia*. — *Stuart v. Lancaster*, 84 Va. 772.

1. *Vore v. Woodford*, 29 Ohio St. 245; *Weakly v. Bell*, 9 Watts (Pa.) 273, 36 Am. Dec. 116; *Shaw v. First Associated Reformed Presb. Church*, 39 Pa. St. 226; *Hutchinson v. Woodwell*, 107 Pa. St. 509; *Maddox v. Lewis*, 12 Tex. Civ. App. 424. See also *Dyar v. Shenberg*, 93 Iowa 154; *Roberson v. Blevins*, 57 Kan. 50.

**2. Failure to Register Mortgage or Lien.** — *Straton v. Rastall*, 2 T. R. 366; *Evans v. Kister*, (C. C. A.) 92 Fed. Rep. 828; *Sullivan v. State*, 59 Ark. 47; *Toomer v. Dickerson*, 37 Ga. 428; *Atlanta Nat. Bank v. Douglass*, 51 Ga. 205, 21 Am. Rep. 234; *Redlon v. Heath*, 59 Kan. 255; *Burr v. Boyer*, 2 Neb. 265; *Galbraith v. Townsend*, 1 Tex. Civ. App. 447. *Contra*, *Philbrooks v. McEwen*, 29 Ind. 347; *Lang v. Brevard*, 3 Strobb. Eq. (S. Car.) 59; *Hampton v. Levy*, 1 McCord Eq. (S. Car.) 107. And see *Pickens v. Finney*, 12 Smed. & M. (Miss.) 468; *McGee v. Metcalf*, 12 Smed. & M. (Miss.) 535, 51 Am. Dec. 122, holding that sureties on a forthcoming bond are not released by a failure to enroll the bond.

This exception rests upon purely equitable grounds and has taken form in the course of the development of the law pertaining to the subject of dealing with securities. See *infra*, this section, 7. *Dealing with Securities*.

**The Burden of Proof** is on the surety to show that the security was lost by sale to a *bona fide* purchaser. *Burr v. Boyer*, 2 Neb. 265.

**Failure to Procure Deed.** — It has been similarly held that the negligent failure of the creditor to take a deed to property purchased at an execution sale, whereby the lien is lost, will discharge the surety. *Hendryx v. Evans*, (Iowa 1903) 94 N. W. Rep. 853.

**3. See *supra*, this section, 2. b. Operation of Law.**

As will be seen farther on, the surety is discharged from future liability by the retention

of a bonded employee after knowledge of his dishonesty. This, however, is a positive act of bad faith and is not viewed merely as a nonfeasance. See *infra*, this section, 9. *e. Retention of Employee Known to Be Dishonest*.

**4. Passive Indulgence of the Principal Debtor by the Creditor.** — *Strong v. Foster*, 17 C. B. 201, 84 E. C. L. 201; *Samuell v. Howarth*, 3 Meriv. 272; *Wright v. Simpson*, 6 Ves. Jr. 734; *Lysaght v. Walker*, 5 Bligh N. S. 1; *Brickwood v. Anniss*, 5 Taunt. 614, 1 E. C. L. 210; *Price v. Kirkham*, 3 H. & C. 437; *Carter v. White*, 25 Ch. D. 670.

*United States*. — *Hunt v. U. S.*, 1 Gall. (U. S.) 32; *Allen v. O'Donald*, 28 Fed. Rep. 17; *Hagood v. Blythe*, 37 Fed. Rep. 249; *Greenway v. Orthwein Grain Co.*, (C. C. A.) 85 Fed. Rep. 536.

*Alabama*. — *Buckalew v. Smith*, 44 Ala. 638.

*Arkansas*. — *Dawson v. Real Estate Bank*, 5 Ark. 283.

*California*. — *Humphreys v. Crane*, 5 Cal. 173; *Sacramento v. Kirk*, 7 Cal. 419; *Whitting v. Clark*, 17 Cal. 407.

*Connecticut*. — *Ætna Nat. Bank v. Hollister*, 55 Conn. 188.

*Georgia*. — *Crawford v. Gauden*, 33 Ga. 173; *Pittman v. Chisolm*, 43 Ga. 442; *Reid v. Flippen*, 47 Ga. 273.

*Illinois*. — *People v. White*, 11 Ill. 341; *Lyle v. Morse*, 24 Ill. 95; *Andrus v. Carpenter*, 52 Ill. 171; *Huddleston v. Francis*, 26 Ill. App. 224.

*Indiana*. — *Naylor v. Moody*, 3 Blackf. (Ind.) 93; *Kirby v. Studebaker*, 15 Ind. 45; *Owen v. State*, 25 Ind. 107; *Pierce v. Goldsberry*, 31 Ind. 52; *Meniffee v. Clark*, 35 Ind. 304; *Martin v. Orr*, 96 Ind. 491; *Smith v. McKean*, 99 Ind. 101.

*Iowa*. — *Davis v. Graham*, 29 Iowa 514.

*Kansas*. — *Vancil v. Hagler*, 27 Kan. 407.

*Kentucky*. — *Barbee v. Pitman*, 3 Bush (Ky.) 259; *Rankin v. White*, 3 Bush (Ky.) 545; *Wintersmith v. Tabor*, 5 Bush (Ky.) 105; *Bray v. Howard*, 7 B. Mon. (Ky.) 467; *Davies v. Womack*, 8 B. Mon. (Ky.) 383; *Craig v. Gresham*, 12 B. Mon. (Ky.) 401; *Nichols v. McDowell*, 14 B. Mon. (Ky.) 6; *Grayham v. Washington County Ct.*, 9 Dana (Ky.) 182.

*Louisiana*. — *Richard v. Beauchamp*, 21 La.

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funds available for the satisfaction of the debt,<sup>1</sup> furnishes no defense to the surety, unless, by the terms of the contract with him, diligence and promptitude on the part of the creditor are required.<sup>2</sup>

**Laches.** — Expressions are sometimes seen to the effect that the surety may be discharged by the creditor's laches, the term being used in the sense of negligent forbearance.<sup>3</sup> Such expressions are becoming rare, and the defense of laches is admissible in favor of the surety only under the same conditions as make it an effective defense in other relations. Mere failure to proceed,

*Ann.* 635; *Hill v. Bourcier*, 29 *La. Ann.* 841; *Pharr v. McHugh*, 32 *La. Ann.* 1280; *Forstall v. Fussell*, 50 *La. Ann.* 256; *Purdy v. Forstall*, 45 *La. Ann.* 814.

*Maine.* — *Freeman's Bank v. Rollins*, 13 *Me.* 202; *Leavitt v. Savage*, 16 *Me.* 72.

*Maryland.* — *Sasscer v. Young*, 6 *Gill & J.* (Md.) 243; *Jordan v. Trumbo*, 6 *Gill & J.* (Md.) 103; *Obernordff v. Union Bank*, 31 *Md.* 126; *Banks v. State*, 62 *Md.* 88; *State v. Carleton*, 1 *Gill* (Md.) 249; *Freaner v. Yingling*, 37 *Md.* 491.

*Massachusetts.* — *Hunt v. Bridgman*, 2 *Pick.* (Mass.) 581, 13 *Am. Dec.* 458; *McKim v. Williams*, 134 *Mass.* 136.

*Minnesota.* — *Benedict v. Olson*, 37 *Minn.* 431; *Berryhill v. Peabody*, 77 *Minn.* 59.

*Mississippi.* — *Montgomery v. Dillingham*, 3 *Smed. & M.* (Miss.) 647; *Johnson v. Planters' Bank*, 4 *Smed. & M.* (Miss.) 165, 43 *Am. Dec.* 480; *Hunt v. Knox*, 34 *Miss.* 655; *McMullen v. Hinkle*, 39 *Miss.* 142.

*Missouri.* — *Hawkins v. Ridenhour*, 13 *Mo.* 125; *Cain v. Bates*, 35 *Mo.* 427; *Rucker v. Robinson*, 38 *Mo.* 154, 90 *Am. Dec.* 412; *McCune v. Belt*, 38 *Mo.* 281.

*New Hampshire.* — *Townsend v. Riddle*, 2 *N. H.* 448.

*New York.* — *Draper v. Romeyn*, 18 *Barb.* (N. Y.) 166; *Williams v. Townsend*, 1 *Bosw.* (N. Y.) 411; *Valentine v. Farrington*, 2 *Edw.* (N. Y.) 53; *Scott v. Stockwell*, (Supm. Ct. Spec. T.) 65 *How. Pr.* (N. Y.) 249; *King v. Baldwin*, 2 *Johns. Ch.* (N. Y.) 554; *People v. Jansen*, 7 *Johns.* (N. Y.) 332, 5 *Am. Dec.* 275; *Powell v. Waters*, 17 *Johns.* (N. Y.) 176; *King v. Baldwin*, 17 *Johns.* (N. Y.) 384, 8 *Am. Dec.* 415; *Sailly v. Elmore*, 2 *Paige* (N. Y.) 497; *Vilas v. Jones*, 10 *Paige* (N. Y.) 76; *People v. Russell*, 4 *Wend.* (N. Y.) 570; *Utica Bank v. Ives*, 17 *Wend.* (N. Y.) 501; *Schroepell v. Shaw*, 3 *N. Y.* 446; *Lowman v. Yates*, 37 *N. Y.* 601; *Douglass v. Ferris*, 138 *N. Y.* 192, 34 *Am. St. Rep.* 435.

*North Carolina.* — *Bizzell v. Smith*, 2 *Dev. Eq.* (17 *N. Car.*) 27; *Carter v. Jones*, 5 *Ired. Eq.* (40 *N. Car.*) 196, 49 *Am. Dec.* 425; *Neal v. Freeman*, 85 *N. Car.* 441; *Charlotte First Nat. Bank v. Homesley*, 99 *N. Car.* 531; *Shaw v. McFarlane*, 1 *Ired. L.* (23 *N. Car.*) 216.

*Ohio.* — *Washburn v. Holmes*, *Wright* (Ohio) 67.

*Pennsylvania.* — *Berks County v. Ross*, 3 *Binn.* (Pa.) 520, 5 *Am. Dec.* 383; *U. S. v. Simpson*, 3 *P. & W.* (Pa.) 437, 24 *Am. Dec.* 331; *Weaver v. Shryock*, 6 *S. & R.* (Pa.) 262; *Cope v. Smith*, 8 *S. & R.* (Pa.) 110, 11 *Am. Dec.* 582; *Gardner v. Ferree*, 15 *S. & R.* (Pa.) 28, 16 *Am. Dec.* 513; *Johnston v. Thompson*, 4 *Watts* (Pa.) 446; *Mundorff v. Singer*, 5 *Watts*

(Pa.) 172; *Love v. Brown*, 38 *Pa. St.* 307; *Kramph v. Hatz*, 52 *Pa. St.* 525; *Neel's Appeal*, (Pa. 1887) 11 *Atl. Rep.* 636.

*South Carolina.* — *Rutledge v. Greenwood*, 2 *Desaus.* (S. Car.) 389; *Edwards v. Dargan*, 30 *S. Car.* 177; *Watson v. Barr*, 37 *S. Car.* 463.

*Tennessee.* — *Grimes v. Nolen*, 3 *Humph.* (Tenn.) 412; *Johnston v. Searcy*, 4 *Yerg.* (Tenn.) 182; *Nashville Bank v. Campbell*, 7 *Yerg.* (Tenn.) 353.

*Texas.* — *Behrens v. Rogers*, (Tex. Civ. App. 1897) 40 *S. W. Rep.* 419.

*Virginia.* — *Roberts v. Colvin*, 3 *Gratt.* (Va.) 342; *Udike v. Lane*, 78 *Va.* 132; *Alexander v. Byrd*, 85 *Va.* 690.

*Wisconsin.* — *Harris v. Newell*, 42 *Wis.* 687.

1. **Mere Failure to Subject Security or Apply Fund Does Not Discharge.** — *England.* — *Kington-upon-Hull v. Harding*, (1892) 2 *Q. B.* 494.

*Alabama.* — *Branch of State Bank v. Perdue*, 3 *Ala.* 409.

*Arkansas.* — *Grisard v. Hinson*, 50 *Ark.* 229; *Maledon v. Leflore*, 62 *Ark.* 387.

*Connecticut.* — *Phoenix Mut. L. Ins. Co. v. Holloway*, 51 *Conn.* 310.

*Georgia.* — *Souter v. Southwestern Georgia Bank*, 94 *Ga.* 713.

*Iowa.* — *Farmers' Bank v. Arthur*, 75 *Iowa* 129.

*Kentucky.* — *Krupp v. St. Martinus Ritter Verein*, (Ky. 1899) 53 *S. W. Rep.* 648.

*Maryland.* — *Freaner v. Yingling*, 37 *Md.* 491; *Gray v. Farmers' Nat. Bank*, 81 *Md.* 631; *Warner v. Williams*, 93 *Md.* 517.

*Mississippi.* — *Clopton v. Spratt*, 52 *Miss.* 251.

*Missouri.* — *English v. Seibert*, 49 *Mo. App.* 563.

*Nebraska.* — *Greenwood First Nat. Bank v. Wilbern*, (Neb. 1903) 93 *N. W. Rep.* 1002; *Myers v. Farmers State Bank*, 53 *Neb.* 824; *Dillon v. Russell*, 5 *Neb.* 484.

*New York.* — *Hunt v. Purdy*, 82 *N. Y.* 486, 37 *Am. Rep.* 587.

*Ohio.* — *Commonwealth Bldg., etc., Co. v. Fromlet*, 6 *Ohio Dec.* 184.

*Compare* *Harper v. National L. Ins. Co.*, (C. A.) 56 *Fed. Rep.* 281.

**Passive Negligence** on the part of the creditor is not sufficient to discharge the surety even though the mortgage lien be lost. *Wasson v. Hodshire*, 108 *Ind.* 26.

2. **Contract Imposing Duty of Active Diligence.** — *Smith v. McKean*, 99 *Ind.* 101; *Walker v. Goldsmith*, 7 *Oregon* 161.

3. **Laches.** — *Ætna Nat. Bank v. Hollister*, 55 *Conn.* 188 (if misled to his prejudice); *Hill v. Bourcier*, 29 *La. Ann.* 841; *Officer v. Marshall*, 9 *Tex. Civ. App.* 428.

unaccompanied by other equitable circumstances, will not discharge the surety.<sup>1</sup> There must be some act which estops the creditor or is sufficient of itself to discharge the surety apart from the fact that he is surety.<sup>2</sup>

**The Duty of Activity Is Imposed on the Surety**, indeed, rather than on the creditor. As Lord Eldon once said: "The surety has no right to say that he is discharged from the debt \* \* \* if all that he rests upon is the passive conduct of the creditor in not suing. He must himself use diligence and take such effectual means as will enable him to call on the creditor either to sue or to give him, the surety, the means of suing."<sup>3</sup> The rule is the same whether the delay or indulgence be granted to the principal before, after,<sup>4</sup> or during the prosecution of a suit.<sup>5</sup> The liability of the surety is not affected by the fact that the creditor discontinues a suit already instituted,<sup>6</sup> or allows the judgment lien to expire by limitation.<sup>7</sup>

**Holder of Note.** — Further illustration of the general rule is found in decisions to the effect that a surety is not discharged by the failure of the holder of a note to present it for payment at maturity,<sup>8</sup> or to make demand upon the claim<sup>9</sup> within the lifetime of the maker,<sup>10</sup> or to notify the surety of nonpayment within a reasonable time,<sup>11</sup> nor by his mere failure to sue on the note at maturity.<sup>12</sup> The rule is, of course, different where there is an express agreement to bring suit without delay.<sup>13</sup>

**b. FAILURE TO DISTRAIN FOR RENT.** — The failure of a landlord to exercise the right of distraint or to enforce his statutory lien does not release a surety on the rent note,<sup>14</sup> unless the contract with the surety imposes such duty on him.<sup>15</sup> The fact that the surety requests the landlord to seize for his rent is immaterial.<sup>16</sup>

**1. Laches Insufficient as a Defense.** — *Collier v. Leonard*, 69 Ga. 311; *People v. Russell*, 4 Wend. (N. Y.) 570; *Butler v. Hamilton*, 2 Desaus. (S. Car.) 226, 2 Am. Dec. 692; *Alexander v. Byrd*, 85 Va. 690.

**Laches Sufficient.** — *Struss v. Masonic Sav. Bank*, 89 Ky. 61; *Dorsey v. Wayman*, 6 Gill (Md.) 59.

**A Delay of Twenty-eight Years** has been held not sufficient to discharge a surety on a bond not barred by limitations. *Udike v. Lane*, 78 Va. 132.

**2. Hagood v. Blythe**, 37 Fed. Rep. 249.

**3. Eyre v. Everett**, 2 Russ. 381. See also *Bell v. Howerton*, 111 N. Car. 69.

**4. Grimes v. Nolen**, 3 Humph. (Tenn.) 412.

**5. Delay After Suit Brought.** — *Pearl v. Wellman*, 11 Ill. 352; *Willis v. Chowning*, 90 Tex. 617, 59 Am. St. Rep. 842.

**6. Dismissal of Suit.** — *Smith v. Atkinson*, 18 Colo. 255; *McAllister v. People*, 28 Colo. 156; *Starr v. U. S.*, 8 App. Cas. (D. C.) 552; *Hardin v. Johnston*, 58 Ga. 522; *Somerville v. Marbury*, 7 Gill & J. (Md.) 275; *Sasscer v. Young*, 6 Gill & J. (Md.) 243; *Lawson v. Snyder*, 1 Md. 79; *Mitchell v. Williamson*, 6 Md. 217; *Concord Bank v. Rogers*, 16 N. H. 9.

**Non suit of an Action to Enforce a Statutory Lien**, the attachment having been levied, will discharge the surety. *Bell v. Howerton*, 111 N. Car. 69.

**7. Judgment Lien Barred.** — *Lumsden v. Leonard*, 55 Ga. 374; *Hogshead v. Williams*, 55 Ind. 145; *Mundorff v. Singer*, 5 Watts (Pa.) 172; *Morrison v. Hartman*, 14 Pa. St. 55; *Campbell v. Sherman*, 151 Pa. St. 70, 31 Am. St. Rep. 735. *Contra*, *Chowning v. Willis*, (Tex. Civ. App. 1897) 38 S. W. Rep. 1141.

**Failure to Fix Lien on Stock.** — A surety upon

the indebtedness of a stockholder is not released by the failure of the company to exercise its option to refuse to register a transfer of stock, thereby fixing a lien upon the stock and obtaining additional security for the indebtedness. *Perrine v. Fireman's Ins. Co.*, 22 Ala. 575. See *Knighton v. Curry*, 62 Ala. 404; *White v. Life Assoc. of America*, 63 Ala. 419, 35 Am. Rep. 45.

**8. Failure to Present Note.** — *Newman v. Kaufman*, 28 La. Ann. 865, 26 Am. Rep. 114; *McKelvy v. Berry*, 21 Pa. Super. Ct. 276; *Wallace v. Richards*, 16 Utah 52.

**9. Mitchell v. Williamson**, 6 Md. 210.

**10. Death of Maker.** — *Weaver v. Ruhm*, (Tenn. Ch. 1897) 47 S. W. Rep. 171. See also *Carter v. White*, 25 Ch. D. 666; *Hitchcock v. Humphrey*, 5 M. & G. 559, 44 E. C. L. 296.

**11. Notice of Nonpayment Not Necessary.** — *Carter v. White*, 25 Ch. D. 666; *Commercial Bank v. French*, 21 Pick. (Mass.) 486, 32 Am. Dec. 280; *Watson v. Barr*, 37 S. Car. 463; *Officer v. Marshall*, 9 Tex. Civ. App. 428.

**12. Failure to Sue at Maturity.** — *Cochran v. Orr*, 94 Ind. 433; *Hefferlin v. Krieger*, 19 Mont. 123; *Shaffstall v. McDaniel*, 152 Pa. St. 598; *Rice v. Farmers', etc., Nat. Bank*, (Tex. Civ. App. 1897) 42 S. W. Rep. 1023.

**13. Agreement to Sue.** — *Bank of Ireland v. Beresford*, 6 Dow 233; *Holl v. Hadley*, 2 Ad. & El. 758, 29 E. C. L. 206.

**14. Failure to Distrain.** — *Hall v. Hoxsey*, 84 Ill. 616; *Ewing v. Williams*, (Ky. 1897) 39 S. W. Rep. 843; *Donaldson v. Neidlinger*, (N. Y. City Ct. Gen. T.) 2 N. Y. Supp. 737. *Contra*, *Mingus v. Daugherty*, 87 Iowa 56, 43 Am. St. Rep. 354.

**15. Hubbard v. Pace**, 34 Ark. 80.

**16. Miller v. White**, 25 S. Car. 235.

**c. FAILURE TO PROCEED AGAINST ESTATE OF DECEASED OR BANKRUPT PRINCIPAL.** — Where the principal is dead, the surety is not discharged by a failure of the creditor to present the claim and thus procure it to be paid out of his estate,<sup>1</sup> even though the surety requests him to do so.<sup>2</sup> The same is true of a failure to prove in bankruptcy,<sup>3</sup> or in insolvent proceedings.<sup>4</sup>

**Surety's Remedy.** — In the absence of statute, the only course for the creditor to pursue in order to protect himself under such conditions is to pay off the debt and be subrogated to the creditors' rights.<sup>5</sup>

**d. ACTIVE DILIGENCE NOT REQUIRED.** — Further illustrations of the principle that active diligence is not required of the creditor, and that, in the absence of fraud or bad faith, his failure to do an act which would lessen the risk will not discharge the surety, are found in the cases cited below.<sup>6</sup> The following decisions are perhaps worth noting. The failure of the creditor to prevent the debtor from wasting and removing his personalty will not discharge the surety.<sup>7</sup> The same is true of his failure to notify the surety on a bond to secure a balance on a running account when the same is closed,<sup>8</sup> and of his failure to notify the surety on a bond for title of the pendency of a suit involving the question of title.<sup>9</sup> He owes the surety no duty to administer on the estate of the deceased principal;<sup>10</sup> and a surety on an indemnifying bond cannot complain of the failure of the assured to interpose a merely technical defense in the suit which determines liability.<sup>11</sup>

**1. Failure to Proceed Against Estate of Principal.** — *Hooks v. Branch Bank*, 8 Ala. 580; *Pearson v. Gayle*, 11 Ala. 278; *Darby v. Bernay Nat. Bank*, 97 Ala. 643; *Los Angeles County v. Lankershim*, 100 Cal. 525; *Collier v. Leonard*, 69 Ga. 311; *Villars v. Palmer*, 67 Ill. 204; *Vredenburg v. Snyder*, 6 Iowa 39; *Pottawatamie County v. Taylor*, 47 Iowa 520; *Banks v. State*, 62 Md. 88; *Cohea v. Sinking Fund Com'rs*, 7 Smed. & M. (Miss.) 437; *Clark v. Douglas*, 58 Neb. 571; *Sibley v. McAllaster*, 8 N. H. 389; *Baker v. Small*, 17 Pa. Super. Ct. 423. *Contra*, where the estate is solvent, *Dailey v. Robinson*, 86 Ind. 383; *Hill v. Nichols*, 47 Minn. 382; *Siebert v. Quesnel*, 65 Minn. 107, 60 Am. St. Rep. 441; *Ramsey v. Westmoreland Bank*, 2 P. & W. (Pa.) 203; *Cope v. Smith*, 8 S. & R. (Pa.) 110, 11 Am. Dec. 582.

**Negligent Loss of Fund.** — If the claim is presented and allowed, there being sufficient funds to pay it, and the creditor negligently fails for two years to apply for the money, and it is then lost, the surety is discharged. *Gillespie v. Darwin*, 6 Heisk. (Tenn.) 21; *Willis v. Chowning*, 90 Tex. 617, 59 Am. St. Rep. 842.

In Illinois, by statute, the creditor is required to proceed against the estate of the principal, *House v. School Trustees*, 83 Ill. 368; *Huddleston v. Francis*, 124 Ill. 195; *Brockman v. Sieverling*, 6 Ill. App. 512; unless the estate be insolvent, *Watts v. Bolin*, 86 Ill. App. 474.

**2. Hickam v. Hollingsworth**, 17 Mo. 475. *Contra*, *McCollum v. Hinckley*, 9 Vt. 143.

**3. Bankruptcy.** — *Clopton v. Spratt*, 52 Miss. 251; *Levy v. Wagner*, 29 Tex. Civ. App. 98.

**4. Insolvency.** — *Schott v. Youree*, 142 Ill. 233, *St. Louis County v. Security Bank*, 75 Minn. 174. *Compare* *McCollum v. Hinckley*, 9 Vt. 143.

**5. Creditor's Remedy.** — *Nelson v. Killingley First Nat. Bank*, (C. C. A.) 69 Fed. Rep. 798; *Nunemacher v. Ingle*, 20 Ind. 135; *Smith v.*

*Freyler*, 4 Mont. 489, 47 Am. Rep. 358; *Purdy v. Forstall*, 45 La. Ann. 814; *Mitchell v. Williamson*, 6 Md. 210.

**6. Active Diligence Not Required.** — *United States.* — *Jones v. Allen*, (C. C. A.) 85 Fed. Rep. 523.

*Alabama.* — *Pearson v. Gayle*, 11 Ala. 278.

*Arizona.* — *Smith v. U. S.*, (Ariz. 1896) 45 Pac. Rep. 341.

*California.* — *Sacramento v. Kirk*, 7 Cal. 419; *Biggins v. Raisch*, 107 Cal. 210.

*Florida.* — *Robinson v. Epping*, 24 Fla. 237.

*Georgia.* — *Hayes v. Little*, 52 Ga. 555; *Montgomery v. Martin*, 94 Ga. 219.

*Indiana.* — *Wasson v. Hodshire*, 108 Ind. 26.

*Louisiana.* — *Parker v. Alexander*, 2 La. Ann. 188.

*Maryland.* — *Street v. Old Town Bank*, 67 Md. 421; *Forrester v. State*, 46 Md. 154; *Taylor v. State*, 73 Md. 208.

*Minnesota.* — *Traders' Ins. Co. v. Herber*, 67 Minn. 106. See also *State v. Farmers', etc.*, *State Bank*, 66 Minn. 301.

*Missouri.* — *Phoenix Mut. L. Ins. Co. v. Landis*, 50 Mo. App. 116.

*New York.* — *Monroe County v. Otis*, 62 N. Y. 88.

*South Carolina.* — *Jackson v. Patrick*, 10 S. Car. 197; *State v. Scheper*, 33 S. Car. 562; *Stemmermann v. Lilienthal*, 54 S. Car. 440.

*Utah.* — *Jungk v. Reed*, 12 Utah 196.

*Virginia.* — *Bolan v. Com.*, 24 Gratt. (Va.) 31.

**7. Goodacre v. Skinner**, 47 Kan. 575.

**8. Closing of Account.** — *McPhail Piano Co. v. Meservey*, 168 Mass. 209; *McKecknie v. Ward*, 58 N. Y. 541, 17 Am. Dec. 281.

**9. Notice of Suit.** — *Smith v. Martin*, 4 Desaus. (S. Car.) 148. *Compare* *Conner v. Reeves*, 35 Hun (N. Y.) 507.

**10. Creditor Not Bound to Administer.** — *Brown v. Flanders*, 80 Ga. 209; *Grindol v. Rudy*, 14 Ill. App. 439.

**11. Curtis v. Banker**, 136 Mass. 355.

6. **Refusal to Sue upon Request by Surety** — *a. GENERAL RULE.* — The fact that the surety, realizing his situation to be precarious, requests a dilatory creditor to bring suit against the principal,<sup>1</sup> and that the failure of the creditor to sue is followed by the insolvency of the principal debtor<sup>2</sup> or by a loss of remedies against him,<sup>3</sup> does not operate to discharge the surety.

*b. NEW YORK AND PENNSYLVANIA DOCTRINE.* — A different rule prevails in New York, Pennsylvania, and Alabama, and the influence of decisions there made has been felt in various other states. In those jurisdictions it is held, on equitable grounds, that a request by the surety for suit to be brought imposes on the creditor the duty of enforcing his claim at once against the solvent principal, and if he fails to do so and damage results to the surety, as by the subsequent insolvency of the principal, the surety is thereby discharged.<sup>4</sup> This doctrine had its origin in the equitable rule that after the debt was due, the surety, although not yet molested for the debt, might file a bill to have the debt discharged or to have indemnity,<sup>5</sup> or might make a demand for the creditor to sue or to permit the surety to sue in his name.<sup>6</sup>

1. **Request to Sue** — *United States.* — *Ellis v. Jones*, 1 How. (U. S.) 197; *Dennis v. Rider*, 2 McLean (U. S.) 451.

*Alabama.* — *Branch of State Bank v. Perdue*, 3 Ala. 409.

*California.* — *Dane v. Corduan*, 24 Cal. 157, 85 Am. Dec. 53.

*Delaware.* — *Wilds v. Attix*, 4 Del. Ch. 253.

*Georgia.* — *Brown v. Flanders*, 80 Ga. 209.

*Illinois.* — *Taylor v. Beck*, 13 Ill. 376.

*Indiana.* — *Halstead v. Brown*, 17 Ind. 202;

*Conklin v. Conklin*, 54 Ind. 289; *Hogshead v.*

*Williams*, 55 Ind. 145; *Cochran v. Orr*, 94 Ind.

433; *Martin v. Orr*, 96 Ind. 491; *May v. Reed*,

125 Ind. 199.

*Massachusetts.* — *Frye v. Barker*, 4 Pick.

(Mass.) 382; *Bellows v. Lovell*, 5 Pick. (Mass.)

307; *Adams Bank v. Anthony*, 18 Pick. (Mass.)

238.

*Minnesota.* — *Benedict v. Olson*, 37 Minn.

431.

*Missouri.* — *Johnson County v. Gilkeson*, 70

Mo. 645.

*Montana.* — *Smith v. Freyler*, 4 Mont. 489, 47

Am. Rep. 358.

*Nebraska.* — *Huff v. Slife*, 25 Neb. 448, 13

Am. St. Rep. 497; *Maywood Bank v. McAllister*,

56 Neb. 188.

*New Hampshire.* — *Davis v. Huggins*, 3 N.

H. 231.

*New Jersey.* — *Pintard v. Davis*, 21 N. J. L.

632, 47 Am. Dec. 172.

*North Carolina.* — *Charlotte First Nat. Bank*

*v. Homesley*, 99 N. Car. 531.

*Ohio.* — *Morrison v. Equitable Nat. Bank*, 9

Ohio Dec. 31, 6 Ohio N. P. 7; *Jenkins v. Clark-*

*son*, 7 Ohio (pt. i.) 72.

*Oregon.* — *Findley v. Hill*, 8 Oregon 247, 34

Am. Rep. 578.

*South Carolina.* — *Miller v. White*, 25 S. Car.

235.

*Vermont.* — *Hogaboom v. Herrick*, 4 Vt. 131;

*Hickok v. Farmers', etc., Bank*, 35 Vt. 476.

*Virginia.* — *Croughton v. Duval*, 3 Call (Va.)

69.

*Wisconsin.* — *Harris v. Newell*, 42 Wis. 687.

2. **Insolvency of Principal.** — *King v. State*

*Bank*, 9 Ark. 185; *Wilds v. Attix*, 4 Del. Ch.

253; *Bonner v. Nelson*, 57 Ga. 433; *Lyle v.*

*Morse*, 24 Ill. 95; *May v. Reed*, 125 Ind. 199;

*Harrison v. Lane*, 4 Bibb (Ky.) 466; *Smith*

*v. Freyler*, 4 Mont. 489, 47 Am. Rep. 358; *Peo-*

*ple v. Russell*, 4 Wend. (N. Y.) 570.

3. **Loss of Remedies Against Principal.** — *Nelson*

*v. Killingley First Nat. Bank*, (C. C. A.) 69

Fed. Rep. 798; *Eickhoff v. Eickenbary*, 52 Neb.

332; *Townsend v. Riddle*, 2 N. H. 448.

4. **Creditor's Failure to Sue After Request Dis-**

**charges Surety** — *Alabama.* — *Bruce v. Edwards*,

1 Stew. (Ala.) 11, 18 Am. Dec. 33; *Herbert v.*

*Hobbs*, 3 Stew. (Ala.) 9; *Goodman v. Griffin*,

3 Stew. (Ala.) 160; *Howle v. Edwards*, 97 Ala.

649.

*Colorado.* — *Martin v. Skeham*, 2 Colo. 614.

*New York.* — *Pain v. Packard*, 13 Johns. (N.

Y.) 174, 7 Am. Dec. 369; *King v. Baldwin*, 17

*Johns.* (N. Y.) 384, 8 Am. Dec. 415; *Man-*

*chester Iron Mfg. Co. v. Sweeting*, 10 Wend.

(N. Y.) 162; *Merritt v. Lincoln*, 21 Barb. (N.

Y.) 249; *Thompson v. Hall*, 45 Barb. (N. Y.)

214; *Remsen v. Beekman*, 25 N. Y. 552; *Clark*

*v. Sickler*, 64 N. Y. 231, 21 Am. Dec. 606;

*Colgrove v. Tallman*, 67 N. Y. 95, 23 Am. Rep.

90.

*Pennsylvania.* — *Eddowes v. Niell*, 4 Dall.

(Pa.) 133; *Com. v. Wolbert*, 6 Binn. (Pa.)

292, 6 Am. Dec. 452; *Johnston v. Thompson*, 4

*Watts* (Pa.) 446; *Cope v. Smith*, 8 S. & R.

(Pa.) 110, 11 Am. Dec. 582; *Geddis v. Hawk*,

10 S. & R. (Pa.) 33; *Lichtenthaler v. Thomp-*

*son*, 13 S. & R. (Pa.) 157, 15 Am. Dec. 581;

*Gardner v. Ferree*, 15 S. & R. (Pa.) 28, 16 Am.

Dec. 513; *Wetzel v. Sponsler*, 18 Pa. St. 460;

*Conrad v. Foy*, 68 Pa. St. 381; *Chester City*

*Presb. Church v. Conlin*, 7 Del. Co. Rep. (Pa.)

437.

*Tennessee.* — *Hancock v. Bryant*, 2 Yerg.

(Tenn.) 476.

5. **Bill in Equity for Exoneration or Indemnity.**

— *Baker v. Shelbury*, 1 Ch. Cas. 70; *Ranel-*

*laugh v. Hays*, 1 Vern. 189, 2 Ch. Cas. 146;

*Barnesley v. Powell*, 1 Ves. 284; *Flight v. Cook*,

2 Ves. 619; *Padwick v. Stanley*, 9 Hare 627;

*Green v. Wynn*, L. R. 4 Ch. 207; *Wooldridge*

*v. Norris*, L. R. 6 Eq. 410; *Matter of Babcock*,

3 Story (U. S.) 398.

6. **Indemnity Against Costs.** — In such case it

was always required that the surety should ac-

company his demand with an offer to indemnify

the principal against costs. *Ranel laugh v.*



From this principle, the New York courts at an early day deduced the corollary that the surety might impose on the creditor a legal duty to proceed merely by warning him to sue.<sup>1</sup> The same result was reached in Pennsylvania by reason of the fact that the courts of law there administered equitable principles.<sup>2</sup> The adoption of such a rule in the great commercial states just mentioned shows that their courts appreciated the need of some means of protecting the surety against prejudicial delay on the part of the creditor; and many other states would no doubt soon have adopted their conclusions had not legislation provided a satisfactory remedy by the giving of statutory notice. Since the enactment of these statutes the New York and Pennsylvania rule has not met with favor, and apparently a tendency towards its restriction has been shown even by the courts of those states.<sup>3</sup>

c. STATUTORY NOTICE TO SUE — (1) *In General*. — The statutory provisions for notice to sue<sup>4</sup> differ but little in the several states, and inasmuch as such statutes contemplate a forfeiture of the right of action against the surety, where the creditor disregards the notice, they are, as a general rule, construed with some strictness.<sup>5</sup> It has, for instance, been held that a statute authorizing a surety to give notice does not apply to one who becomes such by implication; as where the mortgagor of land conveys to a vendee who assumes the mortgage and thus becomes principal debtor, the original mortgagor thereafter being a surety.<sup>6</sup> The right to give notice does not exist in favor of indorsers on promissory notes, their contract being one of guaranty rather than of suretyship.<sup>7</sup>

(2) *Requisites of Statutory Demand*. — The statutory provisions as to the person to give notice,<sup>8</sup> the person to whom it is to be given,<sup>9</sup> as well as the

Hayes, 1 Vern. 190; Eaton v. Waite, 66 Me. 221; Bellows v. Lovell, 5 Pick. (Mass.) 307; Huey v. Pinney, 5 Minn. 310; Hayes v. Ward, 4 Johns. Ch. (N. Y.) 132, 8 Am. Dec. 554.

1. *New York Doctrine*. — Pain v. Packard, 13 Johns. (N. Y.) 174, 7 Am. Dec. 369; King v. Baldwin, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415. See also the cases cited in the third preceding note.

2. See Warner v. Beardsley, 8 Wend. (N. Y.) 198.

*Requisites of Verbal Request to Sue*. — In Pennsylvania it is held that the verbal request to sue should state that the surety intends to claim his discharge in case of a failure on the part of the creditor to institute suit. Erie Bank v. Gibson, 1 Watts (Pa.) 143; Cope v. Smith, 8 S. & R. (Pa.) 110, 11 Am. Dec. 582. See to the same effect Jackson v. Huey, 10 Lea (Tenn.) 184, 43 Am. Rep. 301.

3. For an account of the trend of decisions on this subject, see Huey v. Pinney, 5 Minn. 310; also Pain v. Packard, 13 Johns. (N. Y.) 174, 7 Am. Dec. 369; King v. Baldwin, 2 Johns. Ch. (N. Y.) 554, 17 Johns. (N. Y.) 384, 8 Am. Dec. 415; Warner v. Beardsley, 8 Wend. (N. Y.) 198; Schroepell v. Shaw, 3 N. Y. 454; Remsen v. Beekman, 25 N. Y. 552.

In Alabama it was held at an early day, contrary to the rule now elsewhere prevailing, that the statutory right of the surety to make demand upon the creditor to sue is merely a cumulative remedy. Herbert v. Hobbs, 3 Stew. (Ala.) 9; Strader v. Houghton, 9 Port. (Ala.) 334.

4. *Right to Give Notice Purely Statutory*. — Dorman v. Bigelow, 1 Fla. 281; Halstead v. Brown, 17 Ind. 202; Driskill v. Washington County, 53 Ind. 532; Scales v. Cox, 106 Ind.

261; Headington v. Neff, 7 Ohio (pt. i.) 229.

5. In Indiana it has been said that the surety must be such at the inception of the contract. Fensler v. Prather, 43 Ind. 119. Compare Hayward v. Fullerton, 75 Iowa 371.

But it is not necessary that the fact of suretyship appear on the contract. Hamrick v. Barnett, 1 Ind. App. 1.

Contra, in Illinois, by statute. Payne v. Webster, 19 Ill. 103.

*Principal Dead*. — In Missouri, it is held that the right of the surety to be discharged does not exist where the principal is dead or dies before the time limited for bringing suit. Davis v. Gillilan, 71 Mo. App. 498.

6. Fish v. Glover, 154 Ill. 86.

In New York, where, as we have seen, a parol request is sufficient to impose duty without the aid of a statute, it is held that the right to make such demand extends to those who are sureties by implication. Remsen v. Beekman, 25 N. Y. 552. Compare Union Mut. L. Ins. Co. v. Hanford, 27 Fed. Rep. 588; Calvo v. Davies, 73 N. Y. 211, 29 Am. Rep. 130; George v. Andrews, 60 Md. 26, 45 Am. Rep. 706.

7. *Indorser for Accommodation*. — Ross v. Jones, 22 Wall. (U. S.) 576; Freligh v. Ames, 31 Mo. 253; Boatmen's Sav. Bank v. Johnson, 24 Mo. App. 316; Rockwell v. Portland Sav. Bank, 39 Oregon 241.

8. *A Personal Representative may give notice*. O'Howell v. Kirk, 41 Mo. App. 523.

*Notice Given by Agent Sufficient*. — Wetzel v. Sponsler, 18 Pa. St. 460.

*Where the Surety Is a Feme Covert*, her husband may give the required notice. Medley v. Tandy, 85 Ky. 566.

9. *To Whom Notice Given*. — Adams v. Roane,

directions as to the time<sup>1</sup> and manner<sup>2</sup> of giving the notice, must be observed, and the notice is effective only when the contract involved is one specified by law.<sup>3</sup> In regard to its form and contents the notice must conform to the requirements of the statute,<sup>4</sup> and the burden of proof is on the surety to show that it does so.<sup>5</sup> It is everywhere required that the statutory notice be in writing,<sup>6</sup> though this requirement, it has been held, may be waived by the creditor,<sup>7</sup> and he may estop himself from objecting to the notice on the ground that it was verbal.<sup>8</sup> The notice must contain a clear and explicit demand upon the creditor to bring suit against the principal,<sup>9</sup> or against all

7 Ark. 360; *School Trustees v. Southard*, 31 Ill. App. 359; *McNeilly v. Cooksey*, 2 Lea (Tenn.) 39.

**Notice to Attorney.**—When notice is given to an attorney, his agency in respect to the particular claim must be shown. *Cummins v. Garretson*, 15 Ark. 133.

**As to Notice to Husband** see *Hellen v. Bryson*, 40 Pa. St. 472.

**Notice to Payees.**—*Kelly v. Matthews*, 5 Ark. 223.

**Notice to Wife.**—*McCoy v. Lockwood*, 71 Ind. 319.

**Notice to Holder.**—*Pickens v. Yarborough*, 26 Ala. 417, 62 Am. Dec. 728; *McCrary v. King*, 27 Ga. 26; *Boyd v. Titzer*, 6 Coldw. (Tenn.) 568; *Gillilan v. Ludington*, 6 W. Va. 128.

**Notice to Agent of Nonresident Creditor.**—*Thornburgh v. Madren*, 33 Iowa 380.

**Where Personal Service Is Required** service upon an agent or attorney is not sufficient. *Sapington v. Jeffries*, 15 Mo. 628.

**1. Notice Before Right of Action Accrues Is Ineffectual.**—*Imming v. Fiedler*, 8 Ill. App. 256; *Root v. Dill*, 38 Ind. 169; *McCoy v. Lockwood*, 71 Ind. 319; *Daily v. Robinson*, 86 Ind. 382; *Cochran v. Orr*, 94 Ind. 433; *Scales v. Cox*, 106 Ind. 261; *Hellen v. Crawford*, 44 Pa. St. 105, 84 Am. Dec. 421.

**Notice Given Before Note Due Is Bad.**—*Hellen v. Crawford*, 44 Pa. St. 105, 84 Am. Dec. 421.

**2. Notice by Post Sufficient** without proof that the creditor received it. *Vancil v. Hagler*, 27 Kan. 407.

**Personal Notice.**—But, under a statute providing for personal notice, notice sent by mail is without effect although the creditor actually receives it. *Conway v. Campbell*, 38 Mo. App. 473.

**Duplicate.**—If the notice is in duplicate, either part may be sent to the creditor though the statute requires a "copy" to be sent. *Sparks v. Munson*, 76 Mo. App. 83.

**3. Sealed Obligation — Penal Bond.**—The right to give notice does not exist where the contract is under seal. *Ellis v. Jones*, 1 How. (U. S.) 197; *Scott v. Bradford*, 5 Port. (Ala.) 443. Nor in case of penal bonds. *Ætna Ins. Co. v. Monaghan*, 38 Mo. 432. Nor in case of bonds payable to the state or county. *Cedar County v. Johnson*, 50 Mo. 225. But see *Monticello v. Cohn*, 48 Ark. 254.

**Unliquidated Demand.**—Nor does the right exist where the claim is unliquidated. *Kauffmann v. Com.*, (Pa. 1887) 8 Atl. Rep. 600.

**4. Notice Must Conform to Statute.**—*Savage v. Carleton*, 33 Ala. 443; *Fensler v. Prather*, 43 Ind. 119; *Barnes v. Mowry*, 129 Ind. 568.

Where the statute requires the surety to give

the creditor notice to sue or allow him (the creditor) to sue, a notice "to sue" is insufficient. *Hill v. Sherman*, 15 Iowa 365. See also *Hayward v. Fullerton*, 75 Iowa 371.

**Apprehension of Insolvency or Removal.**—In *Alabama* the notice need not recite that the surety apprehends the insolvency or removal of the debtor. *Shehan v. Hampton*, 8 Ala. 942.

**5. Burden of Proof.**—*King v. Haynes*, 35 Ark. 463.

**6. Notice to Be in Writing.**—*Imming v. Fiedler*, 8 Ill. App. 256; *Reid v. Cox*, 5 Blackf. (Ind.) 312; *McCoy v. Lockwood*, 71 Ind. 319; *Stevens v. Campbell*, 6 Iowa 538; *Bridges v. Winters*, 42 Miss. 135, 97 Am. Dec. 443; *Keirn v. Andrews*, 59 Miss. 39; *Sapington v. Jeffries*, 15 Mo. 628; *Freligh v. Ames*, 31 Mo. 253; *Petty v. Douglass*, 76 Mo. 70; *Charlotte First Nat. Bank v. Homesley*, 99 N. Car. 531; *Jenkins v. Clarkson*, 7 Ohio (pt. i.) 72; *Headington v. Neff*, 7 Ohio (pt. i.) 229; *Jackson v. Huey*, 10 Lea (Tenn.) 184, 43 Am. Rep. 301. *Contra*, under a statute now obsolete, *Bolton v. Lundy*, 6 Mo. 46.

**Parol Demand.**—The *Alabama* court recognizes a parol demand as sufficient, on equitable principles, to discharge the surety either at law or equity, although the statutory notice is required to be in writing. *Howle v. Edwards*, 97 Ala. 649; *Herbert v. Hobbs*, 3 Stew. (Ala.) 9; *Strader v. Houghton*, 9 Port. (Ala.) 334.

In *Pennsylvania* there is no statutory provision for notice, but the law courts of that state administering equitable principles recognize a parol demand to sue as sufficient. *Conrad v. Foy*, 68 Pa. St. 381.

**7. Waiver of Written Notice.**—*Hamblin v. McCallister*, 4 Bush (Ky.) 418; *Taylor v. Davis*, 38 Miss. 493; *Kittridge v. Stegmier*, 11 Wash. 3.

**8. Estoppel.**—*Clark v. Osborn*, 41 Ohio St. 28; *Leazar v. Menefee*, (Tex. Civ. App. 1901) 61 S. W. Rep. 438. *Compare* *Triplet v. Randolph*, 46 Mo. App. 569.

**9. Demand Must Be Clear and Explicit**—*Alabama*.—*Shehan v. Hampton*, 8 Ala. 942.

*Arkansas*.—*Bates v. State Bank*, 7 Ark. 394.

*Indiana*.—*Kaufman v. Wilson*, 29 Ind. 504.

*Missouri*.—*Lockridge v. Upton*, 24 Mo. 184.

*New York*.—*Denick v. Hubbard*, 27 Hun (N. Y.) 347; *Coykendall v. Constable*, 48 Hun (N. Y.) 360; *Lawson v. Buckley*, 49 Hun (N. Y.) 329.

*Ohio*.—*Baker v. Kellogg*, 29 Ohio St. 663; *Iliff v. Weymouth*, 40 Ohio St. 101; *Porter v. First Nat. Bank*, 54 Ohio St. 155.

*Pennsylvania*.—*Greenawalt v. Kreider*, 3 Pa. St. 264, 45 Am. Dec. 639; *Wilson v. Glover*, 3 Pa. St. 404; *Wolleshare v. Searles*, 45 Pa.

the parties liable.<sup>1</sup> The contract to be sued on must be clearly indicated,<sup>2</sup> though it need not be particularly described.<sup>3</sup>

(3) *Institution of Suit; Time; Diligence.*—The creditor, on receiving notice, must institute suit<sup>4</sup> against the principal<sup>5</sup> in a court where jurisdiction can be obtained over him.<sup>6</sup> In most jurisdictions the statutes fix the time within which the creditor must begin action.<sup>7</sup> If no period is fixed he must proceed with reasonable promptitude,<sup>8</sup> and must prosecute the suit with diligence.<sup>9</sup>

(4) *Nonresidence or Removal of Debtor.*—The fact that the debtor lives in<sup>10</sup> or has moved to another state<sup>11</sup> is a lawful excuse for not instituting an action; unless, as is held in a few states, the debtor has property within the jurisdiction subject to attachment.<sup>12</sup> The fact that at the time notice is given the principal debtor is insolvent will also justify a failure to sue, for in such case the surety is not damaged and is therefore not discharged.<sup>13</sup>

St. 45; *Shimer v. Jones*, 47 Pa. St. 268; *Strickler v. Burkholder*, 47 Pa. St. 476; *Conrad v. Foy*, 68 Pa. St. 381.

*Mere Expression of Desire Insufficient.*—*Shenandoah Nat. Bank v. Hampton*, 8 Ala. 942; *Savage v. Carleton*, 33 Ala. 443.

*Notice to "Collect"* is not sufficient where the statute requires a demand to sue. *Darby v. Berney Nat. Bank*, 97 Ala. 643; *Parrish v. Gray*, 1 Humph. (Tenn.) 88. *Contra*, *Franklin v. Franklin*, 71 Ind. 573; *Sullivan v. Dwyer*, (Tex. Civ. App. 1897) 42 S. W. Rep. 355.

*To Sue Forthwith.*—The notice in *Indiana* and *Tennessee* should admonish the creditor to sue "forthwith." *McMillin v. Deardorff*, 18 Ind. App. 428; *Jackson v. Huey*, 10 Lea (Tenn.) 184, 43 Am. Rep. 301.

*Knowledge of Relationship.*—It is not necessary that the creditor should have knowledge of the suretyship prior to receiving notice. *O'Howell v. Kirk*, 41 Mo. App. 523.

1. *Suit Against All Parties Liable.*—*Harriman v. Egbert*, 36 Iowa 270; *Perry v. Barret*, 18 Mo. 140; *Christy v. Horne*, 24 Mo. 242.

2. *Notice Must Not Be Ambiguous.*—*McMillin v. Deardorff*, 18 Ind. App. 428; *Moore v. Peterson*, 64 Iowa 423; *Hellen v. Bryson*, 40 Pa. St. 472.

3. *Routon v. Lacy*, 17 Mo. 399.

4. It is not sufficient that he give directions to have the process issued. *German-American Bank v. Denmire*, 58 Iowa 137.

5. *Joining Surety.*—The surety who gives the notice may be joined in the action. *Starling v. Buttles*, 2 Ohio 303; *Sullivan v. Dwyer*, (Tex. Civ. App. 1897) 42 S. W. Rep. 355. But this is not necessary even in states where the creditor is notified to begin suit against all parties liable. *Perry v. Barret*, 18 Mo. 140.

6. *Court Having Jurisdiction.*—*Craft v. Dodd*, 15 Ind. 380; *Hardy v. Worthen*, 53 Mo. App. 580; *Cox v. Jeffries*, 73 Mo. App. 412.

Inability to get service on the principal will not discharge the surety. *Cook v. Southwick*, 9 Tex. 615, 60 Am. Dec. 181.

7. *Time When Suit to Be Brought—Ten Days.*—*Newton First Nat. Bank v. Smith*, 25 Iowa 210; *Shenandoah Nat. Bank v. Ayres*, 87 Iowa 526.

8. *Thirty Days.*—*Phillips v. Riley*, 27 Mo. 386; *Cockrill v. McCurdy*, 33 Mo. 365; *Cox v. Jeffries*, 73 Mo. App. 412; *Sisk v. Rosenberger*, 82 Mo. 46.

*Sixty Days.*—*Nichols v. McDowell*, 14 B. Mon. (Ky.) 6; *Letcher v. Yantis*, 3 Dana (Ky.) 160.

*Three Months.*—*Bailey v. New*, 29 Ga. 214.

*At Next Court.*—*Hightower v. Ogletree*, 114 Ala. 94; *Guttery v. Pickett*, 125 Ala. 434; *Craft v. Dodd*, 15 Ind. 380. See also *Hamrick v. Barnett*, 1 Ind. App. 1.

*Return.*—If suit is brought in time, it makes no difference that the process is returnable at a time later than that required. *Patton v. Cooper*, 84 Mo. App. 427; *Collum v. Fahrner*, 83 Mo. App. 110.

8. *Reasonable Time.*—*Peters v. Linenschmidt*, 58 Mo. 464. See also *Hamrick v. Barnett*, 1 Ind. App. 1.

*Ascertaining Residence of Principal.*—The creditor must use reasonable diligence to ascertain the residence of the debtor if he does not know it. *Cox v. Jeffries*, 73 Mo. App. 412.

9. *Diligence in Prosecuting the Suit.*—*Miller v. Gray*, 31 Ill. App. 453; *State Bank v. Matson*, 24 Mo. 333; *Sisk v. Rosenberger*, 82 Mo. 46.

10. *Debtor Nonresident.*—*Conklin v. Conklin*, 54 Ind. 289; *Phillips v. Riley*, 27 Mo. 386.

11. *Removal of Debtor.*—*Hightower v. Ogletree*, 114 Ala. 94; *Conklin v. Conklin*, 54 Ind. 290; *Hayward v. Fullerton*, 75 Iowa 371; *Bostwick v. Norwalk First Nat. Bank*, 6 Ohio Cir. Dec. 682, 13 Ohio Cir. Ct. 675.

12. *Property Subject to Attachment.*—*Hancock v. Bryant*, 2 Yerg. (Tenn.) 476; *Seattle Crockery Co. v. Haley*, 6 Wash. 302, 36 Am. St. Rep. 156. *Contra*, *Hightower v. Ogletree*, 114 Ala. 94.

13. *Debtor Insolvent.*—*Darby v. Berney Nat. Bank*, 97 Ala. 643; *Kendall v. Milligan*, 62 Ark. 629, 34 S. W. Rep. 78; *Pittman v. Chisolm*, 43 Ga. 442; *Marsh v. Dunkel*, 25 Hun (N. Y.) 167; *Merritt v. Lincoln*, 21 Barb. (N. Y.) 249; *Thompson v. Hall*, 45 Barb. (N. Y.) 214; *Warner v. Beardsley*, 8 Wend. (N. Y.) 194; *Huffman v. Hulbert*, 13 Wend. (N. Y.) 377; *Weiler v. Hoch*, 25 Pa. St. 525.

But see, *contra*, *Shenandoah Nat. Bank v. Ayres*, 87 Iowa 526; *Sullivan v. Dwyer*, (Tex. Civ. App. 1897) 42 S. W. Rep. 355. In these cases no proof of the insolvency of the principal at the time notice was given was offered by the creditor.

*Burden on Creditor to Show Insolvency of Principal at the Time of the Notice.*—*Graham v. Rush*, 73 Iowa 451.

(5) *Effect of Failure to Sue.* — The effect of a failure to sue after proper statutory notice has been given is to discharge the surety giving notice from all liability on the contract.<sup>1</sup> If a surety after giving the creditor notice to sue subsequently requests the creditor to grant indulgence to the principal,<sup>2</sup> or acquiesces in the dismissal of the suit,<sup>3</sup> he thereby waives his right to claim a discharge. But a request for indulgence made after the discharge is effected will not operate as a waiver thereof.<sup>4</sup>

7. *Dealing with Securities* — *a. TAKING ADDITIONAL SECURITY.* — The creditor owes no duty to the surety to acquire additional security and thereby decrease the risk. Nor if additional security is preferred is he bound to accept it.<sup>5</sup> Usually, however, the creditor will not be found averse to accepting additional security, and may, of course, do so without discharging the surety,<sup>6</sup> provided he is careful not to take the new security in satisfaction of the original obligation and does not estop himself from enforcing the main contract according to its terms. It is not necessary that the surety should know that additional security has been taken or that he should consent thereto.<sup>7</sup>

*b. RELEASE OR IMPAIRMENT OF SECURITY.* — One of the most vital applications of equitable principle in the law of discharge is found in the rule which prevents the creditor from increasing the surety's risk by an improper disposal of securities. It may be stated as follows: If a creditor without the consent of the surety parts with or renders unavailable any security or fund which he has a right to apply in satisfaction of the debt, the surety is exonerated or discharged to the extent of the value of such security or to the extent of the impairment in its value. This principle is a corollary from the equitable doctrine underlying the surety's right of subrogation, and the law of subrogation therefore both supplies a means of testing the fact of discharge and defines its extent. The creditor is treated as a trustee of all securities in his possession, for the indemnity of the surety as well as for his own protection; and he is in equity bound to apply them to the advantage of both. Accord-

**Disturbance.** — The fact that the community is in commotion will not justify a failure to sue, where the courts are open. *Cockrill v. McCurdy*, 33 Mo. 365.

1. See cases cited in the preceding notes.

**Liability of Cosurety.** — As to the effect of the creditor's failure to sue upon the liability of other sureties than the one giving notice, see *infra*, this section, 10. *Effect of Discharge of Cosurety.*

**Burden of Proof.** — The burden is on the surety to show the failure of the creditor to sue or give permission to him to sue. *Turner v. Hale*, 8 Kan. 38; *Ingels v. Sutliff*, 36 Kan. 444.

2. **Surety Consenting to Indulgence.** — *Simpson v. Blunt*, 42 Mo. 542; *Rotting v. Cleman*, 20 Wash. 116.

3. *Kittridge v. Stegmier*, 11 Wash. 3.

4. **Request for Indulgence After Discharge.** — *Bailey v. New*, 29 Ga. 214; *Medley v. Tandy*, 85 Ky. 566. See also *School Trustees v. Southard*, 31 Ill. App. 359.

5. **Right to Refuse Additional Security.** — *City Bank v. Young*, 43 N. H. 457; *Morrison v. Citizens Nat. Bank*, 65 N. H. 253, 23 Am. St. Rep. 39.

**A Waiver by a Creditor of the Right to insist upon the giving of additional security does not discharge the surety.** *Folk v. Cruikshanks*, 4 Rich. L. (S. Car.) 243.

**Failure to Require Additional Security.** — The sureties on an official bond are not discharged by the negligent failure of the public authorities to take, as required by law, a mortgage on

real property as additional security. *Marion County v. Moffert*, 15 Mo. 604.

6. **Acceptance of Additional Security.** — *Oxley v. Storer*, 54 Ill. 159; *New England Mut. L. Ins. Co. v. Randall*, 42 La. Ann. 260; *Noll v. Oberhellmann*, 20 Mo. App. 336; *English v. Seibert*, 49 Mo. App. 563; *Ladd v. Wiggin*, 35 N. H. 421, 69 Am. Dec. 551; *Fox v. Parker*, 44 Barb. (N. Y.) 541; *Bangs v. Strong*, 10 Paige (N. Y.) 11; *American Surety Co. v. Crow*, (Supm. Ct. Tr. T.) 22 Misc. (N. Y.) 573; *Stallings v. Lane*, 88 N. Car. 214; *Witte v. Wolfe*, 16 S. Car. 256; *Singer Mfg. Co. v. Ponder*, 82 Tex. 653.

**Execution of Mortgage or Deed of Trust by the Principal.** — *Elwood v. Deifendorf*, 5 Barb. (N. Y.) 398; *Mack v. Anderson*, (Supm. Ct. Spec. T.) 33 N. Y. Supp. 208; *Keeler v. Hollweg*, 36 N. Y. App. Div. 490; *Thurston v. James*, 6 R. I. 103; *Scanland v. Settle*, Meigs (Tenn.) 169; *Miller v. Knight*, 7 Baxt. (Tenn.) 127; *Cruger v. Burke*, 11 Tex. 694.

**Principal Debt Barred.** — A surety who has supplied collateral is not released by the fact that after the principal debt is barred the debtor gives the creditor a bond for the debt, the right to subject the collateral not being affected by the fact that the principal debt is barred. *Kulp v. Brant*, 162 Pa. St. 222.

7. **Knowledge and Consent of Surety Immaterial.** — *Citizens' Bank v. Whinery*, 110 Iowa 390; *Green v. Warrington*, 1 Desaus. (S. Car.) 430.

**Additional Security May Be Changed.** — *Young v. Cleveland*, 33 Mo. 126, 82 Am. Dec. 155.

ingly, if the creditor who has the means of satisfaction in his own hands chooses not to retain it and surrenders it to the principal debtor or allows it to pass out of his own hands, or for a consideration agrees to do so, or negligently impairs its value or loses control thereof, so that the right of the surety to be subrogated, should he at any time choose to pay off the indebtedness, is lost, the surety is discharged <sup>1</sup> to the extent of his actual damage.<sup>2</sup>

**1. Discharge of Surety Where the Creditor Parts with Security or Renders It Unavailable**—*England*.—Polak v. Everett, 1 Q. B. D. 669; *Ex p. Wilson*, 11 Ves. Jr. 410.

*United States*.—Wood v. Brown, (C. C. A.) 104 Fed. Rep. 203; Allen v. O'Donald, 23 Fed. Rep. 573.

*Alabama*.—Perrine v. Fireman's Ins. Co., 22 Ala. 575; Allen v. Greene, 19 Ala. 34; Ohio L. Ins., etc., Co. v. Ledyard, 8 Ala. 866; Cullum v. Emanuel, 1 Ala. 23, 34 Am. Dec. 757.

*California*.—Bragg v. Shain, 49 Cal. 131; Kiessig v. Allapaugh, 91 Cal. 231.

*Colorado*.—Thomas v. Wason, 8 Colo. App. 452.

*Connecticut*.—Glazier v. Douglass, 32 Conn. 393; Couch v. Waring, 9 Conn. 264.

*Georgia*.—Lewis v. Armstrong, 80 Ga. 402; Stewart v. Barrow, 55 Ga. 664; Barrett v. Bass, 105 Ga. 421; Jones v. Hawkins, 60 Ga. 52.

*Idaho*.—Hailey First Nat. Bank v. Watt, 7 Idaho 510.

*Illinois*.—Kirkpatrick v. Howk, 80 Ill. 122; Monmouth First Nat. Bank v. Whitman, 66 Ill. 331; Rogers v. School Trustees, 46 Ill. 431; Pfirsing v. Peterson, 98 Ill. App. 70.

*Indiana*.—Crim v. Fleming, 123 Ind. 438; Sample v. Cochran, 84 Ind. 594.

*Iowa*.—Monroe Bank v. Gifford, 79 Iowa 300; Bedwell v. Gephart, 67 Iowa 44; Lucus County v. Roberts, 49 Iowa 159; Port v. Robbins, 35 Iowa 208; Sherraden v. Parker, 24 Iowa 28; Chambers v. Cochran, 18 Iowa 159.

*Louisiana*.—New England Mut. L. Ins. Co. v. Randall, 42 La. Ann. 260; Gay v. Blanchard, 32 La. Ann. 497; Pratt's Succession, 16 La. Ann. 357; Kennedy v. Bossiere, 16 La. Ann. 445; Barrow v. Shields, 13 La. Ann. 57; Armor v. Amis, 4 La. Ann. 192.

*Maine*.—Cummings v. Little, 45 Me. 183; Springer v. Toothaker, 43 Me. 381, 69 Am. Dec. 66.

*Maryland*.—Somerville v. Marbury, 7 Gill & J. (Md.) 275.

*Massachusetts*.—American Bank v. Baker, 4 Met. (Mass.) 177; Baker v. Briggs, 8 Pick. (Mass.) 129, 19 Am. Dec. 311; Bradford v. Hubbard, 8 Pick. (Mass.) 158; Fitchburg Sav. Bank v. Torrey, 134 Mass. 239; Guild v. Butler, 127 Mass. 386.

*Michigan*.—Wendell v. Highstone, 52 Mich. 552; Greenlee v. Lowing, 35 Mich. 63; Ives v. Lansingburg Bank, 12 Mich. 361.

*Minnesota*.—Willis v. Davis, 3 Minn. 17.

*Mississippi*.—Payne v. Commercial Bank, 6 Smed. & M. (Miss.) 24; McGee v. Metcalf, 12 Smed. & M. (Miss.) 535, 51 Am. Dec. 122; Pickens v. Finney, 12 Smed. & M. (Miss.) 468.

*Missouri*.—Ferguson v. Turner, 7 Mo. 497.

*Nebraska*.—Dillon v. Russell, 5 Neb. 484; Burr v. Boyer, 2 Neb. 265; Stewart v. American Exch. Nat. Bank, 54 Neb. 461; Pierce v. Atwood, 64 Neb. 92.

*New Hampshire*.—City Bank v. Young, 43 N. H. 457; New Hampshire Sav. Bank v. Colcord, 15 N. H. 119, 41 Am. Dec. 685.

*New York*.—Hubbell v. Carpenter, 5 Barb. (N. Y.) 520; Bixby v. Barklie, 26 Hun (N. Y.) 275; Wheelwright v. Depeyster, 4 Edw. (N. Y.) 232; Griswold v. Jackson, 2 Edw. (N. Y.) 461; Hayes v. Ward, 4 Johns. Ch. (N. Y.) 123, 8 Am. Dec. 554; Cheesebrough v. Millard, 1 Johns. Ch. (N. Y.) 409, 7 Am. Dec. 494; Malone Third Nat. Bank v. Shields, 55 Hun (N. Y.) 274; Blydenburgh v. Bingham, 38 N. Y. 371, 98 Am. Dec. 49.

*North Carolina*.—Nelson v. Williams, 2 Dev. & B. Eq. (22 N. Car.) 118; Smith v. McLeod, 3 Ired. Eq. (38 N. Car.) 390; Charlotte First Nat. Bank v. Homesley, 99 N. Car. 531.

*Ohio*.—Moore v. Gray, 26 Ohio St. 525; Farmers' Bank v. Reynolds, 13 Ohio 84.

*Oregon*.—Brown v. Rathburn, 10 Oregon 158.

*Pennsylvania*.—Gettysburg Bank v. Thompson, 3 Grant Cas. (Pa.) 114; Lichtenthaler v. Thompson, 13 S. & R. (Pa.) 157, 15 Am. Dec. 581; Com. v. Vanderslice, 8 S. & R. (Pa.) 457; Neff's Appeal, 9 W. & S. (Pa.) 36; Kuhns v. Westmoreland Bank, 2 Watts (Pa.) 136; Hincken v. McGlathery, 8 Pa. Co. Ct. 267; Hutchinson v. Woodwell, 107 Pa. St. 509; Kendt's Appeal, 102 Pa. St. 441; Clow v. Derby Coal Co., 98 Pa. St. 432; Wharton v. Duncan, 83 Pa. St. 40; Richards v. Com., 40 Pa. St. 146; Holt v. Bodey, 18 Pa. St. 207; Schock v. Miller, 10 Pa. St. 401.

*Tennessee*.—Renegar v. Thompson, 1 Lea (Tenn.) 457; Matter of Cator, 14 Lea (Tenn.) 408; Bryan v. Henderson, 88 Tenn. 23; Hoss v. Crouch, (Tenn. Ch. 1898) 48 S. W. Rep. 724.

*Texas*.—Kiam v. Cummings, 13 Tex. Civ. App. 198.

*Vermont*.—Hurd v. Spencer, 40 Vt. 581.

*West Virginia*.—Parsons v. Harrold, 46 W. Va. 122.

**The Fact that the Principal Debtor Is a Married Woman** and therefore not personally liable either to the creditor or surety does not alter the duty of the creditor in respect to maintaining a lien unimpaired. Sample v. Cochran, 82 Ind. 260.

**Surety Becoming a Principal**.—A surety who changes his position and becomes a principal is not discharged by the creditor's release of a lien or waste of collateral. Reade v. Lowndes, 23 Beav. 361; Crim v. Fleming, 123 Ind. 438; Wood v. Motley, 83 Mo. App. 97; Lamoille County Nat. Bank v. Hunt, 72 Vt. 357.

**2. Discharge Pro Tanto**.—The act of the creditor in improperly releasing, losing, or impairing a security operates only as a discharge to the extent of the loss or impairment, a result different from that which follows when the principal contract or duty is altered.

Means of satisfaction, as used in this connection, signifies money or property in the lawful control of the creditor which he may rightfully retain and apply to the satisfaction of the debt without subjecting himself to an action; or funds within his reach which he is in duty bound so to apply.<sup>1</sup> It is often said that the creditor must have an interest in the nature of a mortgage, pledge, or lien upon the securities before a surrender thereof will discharge the surety.<sup>2</sup> But the terms "pledge" and "lien" are here loosely used, and this form of expression should be avoided. The general doctrine is that the duty not to surrender exists whenever the creditor has the money or property in question under his control as security. This generally implies a delivery to and acceptance by the creditor.<sup>3</sup> The principle just stated applies to securities acquired subsequent to the contract of suretyship as well as those obtained at the time the relation is formed; and it is immaterial that the surety may be ignorant of the fact that the securities are in the creditor's hands.<sup>4</sup> Before, however, the surety can be discharged by the act of the creditor in parting with security, it is necessary that the creditor should know of the existence of the relation,<sup>5</sup> and the act complained of must be done without the surety's consent.<sup>6</sup>

**Release of Mortgage or Deed of Trust — Impairment of Lien.** — In accordance with the general principle stated above, a surety is wholly or partially discharged where a mortgage or deed of trust on the debtor's own property is released by the creditor,<sup>7</sup> or where a vendor's lien to which the surety might be subrogated is destroyed or impaired by the creditor,<sup>8</sup> or where he surrenders collateral

*Georgia.* — *Kyle v. Chattahoochee Nat. Bank*, 96 Ga. 693; *Poullain v. Brown*, 80 Ga. 27.

*Indiana.* — *Weik v. Pugh*, 92 Ind. 382.

*Massachusetts.* — *Boston Penny Sav. Bank v. Bradford*, 181 Mass. 199.

*Minnesota.* — *Moss v. Pettingill*, 3 Minn. 217.

*Mississippi.* — *Barkwell v. Swan*, 69 Miss. 907.

*Missouri.* — *Saline County v. Buie*, 65 Mo. 63; *Lafayette County v. Hixon*, 69 Mo. 581; *State Bank v. Bartle*, 114 Mo. 276.

*Nebraska.* — *Bronson v. McCormick Harvesting Mach. Co.*, 52 Neb. 342.

*New York.* — *Underhill v. Palmer*, 10 Daly (N. Y.) 478; *Grow v. Garlock*, 97 N. Y. 81.

*Ohio.* — *Ide v. Churchill*, 14 Ohio St. 386.

*Pennsylvania.* — *Everly v. Rice*, 20 Pa. St. 297.

*Rhode Island.* — *Otis v. Von Storch*, 15 R. I. 41.

*Tennessee.* — *Hoss v. Crouch*, (Tenn. Ch. 1898) 48 S. W. Rep. 724.

*Texas.* — *Durrell v. Farwell*, (Tex. Civ. App. 1894) 27 S. W. Rep. 795; *Burns v. Staacke*, (Tex. Civ. App. 1899) 53 S. W. Rep. 354.

*West Virginia.* — *Cumberland First Nat. Bank v. Parsons*, 42 W. Va. 137.

See also the cases cited in the preceding note.

**Presumption of Injury.** — The burden of proof is upon the creditor to show the contrary. *Allen v. O'Donald*, 23 Fed. Rep. 573. See *Stokes v. Gillis*, 81 Ga. 187.

**1. Definition of Means of Satisfaction.** — *Perrine v. Fireman's Ins. Co.*, 22 Ala. 575; *Henderson v. Huey*, 45 Ala. 276; *Glazier v. Douglass*, 32 Conn. 393.

**The Creditor Cannot Relinquish Any "Hold"** which he has acquired upon the property of the debtor or fund in his hands available for satisfaction of the debt. *Maquoketa v. Willey*, 35 Iowa 323; *Pierce v. Atwood*, 64 Neb. 92.

**2.** *Glazier v. Douglass*, 32 Conn. 393.

**3. Control Implies Delivery and Acceptance.** — *Monroe Bank v. Gifford*, 79 Iowa 300.

**4. Knowledge on Part of Surety Immaterial.** — *Freaner v. Yingling*, 37 Md. 491; *City Bank v. Young*, 43 N. H. 457.

**5. Knowledge of Suretyship Necessary.** — *Cullum v. Emanuel*, 1 Ala. 23, 34 Am. Dec. 757; *Guild v. Butler*, 127 Mass. 386; *Neimcewicz v. Gahn*, 3 Paige (N. Y.) 614; *Otis v. Von Storch*, 15 R. I. 41; *Parsons v. Harrold*, 46 W. Va. 122. *Contra*, *Templeton v. Shakley*, 107 Pa. St. 370; *Holt v. Bodey*, 18 Pa. St. 207.

**6. A Surety Acting as Legal Counsel to the debtor is presumed to consent to acts done in the course of the litigation connected with the claim.** *Jones v. Hawkins*, 60 Ga. 52.

**7. Release of Mortgage or Deed of Trust.** — *Gotzian v. Heine*, 87 Minn. 429; *Chism v. Thomson*, 73 Miss. 410; *White v. Smith*, 174 Mo. 186; *Malone Third Nat. Bank v. Shields*, 55 Hun (N. Y.) 274; *Cumberland First Nat. Bank v. Parsons*, 45 W. Va. 695.

**Surety by Implication of Law.** — In *Iowa* it is held that one who becomes surety by implication of law, *e. g.*, a mortgagor, where the land is sold and the mortgage assumed by the vendee, cannot complain when part of the mortgaged property is released. *James v. Day*, 37 Iowa 164. See also as to the extension of time of payment under such circumstances the title *MORTGAGES*, vol. 20, p. 1058, and *Corbett v. Waterman*, 11 Iowa 87.

**8. Vendor's Lien on Realty.** — *Denson v. Gray*, 113 Ala. 608. This case illustrates the important principle that purely equitable grounds of discharge are available at law, and that consequently a creditor who has subjected other security at less than its value cannot subsequently come upon the surety for the balance, although from a legal standpoint his position is unassailable.

upon the renewal of a note by both principal and surety.<sup>1</sup> If a creditor permits his debtor to collect the money on the securities and apply the proceeds to another purpose than the payment of the debt,<sup>2</sup> or if the creditor misapplies it himself,<sup>3</sup> the surety is discharged.

**Qualifications.** — The surety, however, cannot complain where the property itself<sup>4</sup> or its proceeds are honestly applied to the satisfaction of the debt.<sup>5</sup> The surety is not discharged where the debtor himself surreptitiously or fraudulently reacquires possession of the securities,<sup>6</sup> or is permitted to have possession for a proper purpose;<sup>7</sup> nor where the security parted with is valueless by reason of a defective title.<sup>8</sup> If the creditor is bound by an independent contract entered into before the relation of suretyship is formed, or at the time when new security is taken, to surrender or substitute the same, he may do so without discharging the surety.<sup>9</sup>

**Substitution of Security.** — The substitution of one security for another, although it involves a release of the security parted with, stands upon a somewhat different footing from a naked release. If the exchange be made in good

**Blocking Advantageous Sale.** — A surety is discharged where the creditor blocks an effort to realize on securities and they subsequently become of no value. *Kaufman v. Loomis*, 13 Ill. App. 124.

**Vendor's Privilege or Lien on Personal Property — Resale.** — In *Louisiana* it has been held that the surety on purchase notes for personalty is entitled to be subrogated to the vendor's privilege, and that, as a consequence, he is discharged where the purchaser resells the chattels, or even only part of them, to the original vendor, leaving part of the original purchase money unpaid. *Hereford v. Chase*, 1 Rob. (La.) 212.

In common-law jurisdictions where the vendor's privilege does not amount to a lien this rule is not applied. *Echols v. Head*, 68 Ga. 152.

1. **Surrender of Collateral.** — *Monroe Bank v. Gifford*, 79 Iowa 300.

2. **Debtor Collecting Proceeds of Securities.** — *Crim v. Fleming*, 101 Ind. 154; *Nelson v. Munch*, 28 Minn. 314.

**Whether It Is Negligence** in the debtor to allow the creditor to collect the collateral at all is a question of fact. *Brown v. Farmers, etc.*, Nat. Bank, 88 Tex. 265.

3. **Misapplication of Proceeds of Security** — *California*. — *Eppinger v. Kendrick*, 114 Cal. 620.

*Georgia*. — *Montgomery v. Martin*, 94 Ga. 219.

*Mississippi*. — *McMullen v. Hinkle*, 39 Miss. 142.

*Oregon*. — *Keel v. Levy*, 19 Oregon 450.

*Pennsylvania*. — *Hutchinson v. Woodwell*, 107 Pa. St. 509.

*South Carolina*. — *Rosborough v. McAliley*, 10 S. Car. 235; *Exchange Bank v. McDill*, 56 S. Car. 565.

*Vermont*. — *Hurd v. Spencer*, 40 Vt. 581.

See also *Smith v. London First Nat. Bank*, 107 Ky. 257; *Morrison v. Citizens Nat. Bank*, 65 N. H. 253, 23 Am. St. Rep. 39; *De Caumont v. Rasines*, 38 N. Y. App. Div. 153. *Aliter*, where the surety consents, *Jones v. Hawkins*, 60 Ga. 52.

**Application According to Previous Instructions** known to the surety will not discharge him. *Wilson v. Old Town Bank*. (Md. 1887) 11 Atl. Rep. 759.

**An Accidental Misapplication of Security** result-

ing from an erroneous decree of a competent court, unappealed from, will not discharge the surety. *McCalla v. Knox*, 84 Ga. 291.

4. **Property Applied to Debt.** — *Marshall v. Dixon*, 82 Ga. 435.

5. **Application of Proceeds.** — *Gillon v. Kentucky Nat. Bank*, (Ky. 1888) 8 S. W. Rep. 193.

**A Sale under Judicial Proceedings** is not objectionable where the surety is a party. *Womack v. Paxton*, 84 Va. 9. See also *Denson v. Gray*, 113 Ala. 608.

**The Fact that the Security Brings Less than Its Face Value** is immaterial if the sale is made in good faith. *Denniston v. Hill*, 173 Pa. St. 633.

**Parting with Securities in Compromise of a Doubtful Right** will not discharge the surety where the amount actually received is credited on the debt. *Bedwell v. Gephart*, 67 Iowa 44.

**Fraudulent Sales.** — For instances of sales made in bad faith and consequently operating to release the surety, see *Montgomery v. Sayre*, 100 Cal. 182, 38 Am. St. Rep. 271; *Nichols v. Burch*, 128 Ind. 324; *Whitmore v. Bunt*, 6 Lack. Leg. N. (Pa.) 100. Compare *Peacock v. Chapman*, 8 La. Ann. 87.

**Conversion of Mortgaged Property.** — The failure to proceed to foreclose a mortgage is no defense to the surety, but if the principal has taken possession of sufficient of the mortgaged property to discharge the debt and converted it to his own use, the surety is discharged. *Barrett v. Bass*, 105 Ga. 421.

6. **Release Procured by Fraud.** — *McShane v. Howard Bank*, 73 Md. 135; *Hamlin v. Klein*, 8 N. Y. App. Div. 413; *Sternback v. Friedman*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 173.

7. *Wilson v. Green*, 25 Vt. 450, 60 Am. Dec. 279.

8. **Security Worthless.** — *Benneson v. Savage*, 130 Ill. 352; *Blydenburgh v. Bingham*, 38 N. Y. 371, 98 Am. Dec. 49; *Loomis v. Fay*, 24 Vt. 240; *Cumberland First Nat. Bank v. Parsons*, 45 W. Va. 688.

9. **Canceling Deed of Trust by Prior Agreement.** — *Pearl v. Cortright*, 81 Miss. 300; *Fair Haven First Nat. Bank v. Johnson*, 65 Vt. 382.

**Release of Mortgage by Prior Agreement.** — *Pearl St. Cong. Soc. v. Imlay*, 23 Conn. 10.

**Security Conditionally Accepted** may be released without discharging the surety if the condition is not fulfilled. *Adams v. Dutton*, 57 Vt. 515.

faith and in an honest effort on the part of the creditor to strengthen his position, the surety is not discharged unless he shows actual damage.<sup>1</sup> A release or diversion of security which results in no injury does not affect the liability of the surety.<sup>2</sup>

**c. DUTY OF CREDITOR TO RETAIN AVAILABLE FUNDS.** — An examination of the class of cases under consideration shows that the courts have not infrequently been governed by analogy, and have made decisions in the light of the general principle stated above, rather than under it. This is illustrated in a leading case, where it was held that if a creditor settles with his debtor and without the surety's consent pays to him a balance erroneously supposed to be due, when, as afterwards appears, the balance is on the other side, the surety is discharged.<sup>3</sup> So, also, it has been held that the surety is discharged where the creditor, an insurance company, pays a policy to an insolvent estate without deducting a note for money previously loaned to the insured, although the company has no express lien.<sup>4</sup>

**Bank Applying Deposit to Debt.** — There is some difference of opinion as to whether a bank, the payee or holder of a note, discharges a surety by failing to apply money of the maker which happens to be on deposit at or after the time the note matures.<sup>5</sup>

**Salary — Independent Contract.** — The payment of a salary, or money due on a contract for service, which might be available to offset a secured liability, will not discharge a surety, since the salary is in the nature of a continuing consideration for the performance of service as rendered, and equity will not deprive a man of the means of earning a livelihood merely because he is in debt.<sup>6</sup> The surety on notes for the purchase money of land cannot complain where the vendor delivers the deed without insisting on payment, since the vendor is bound to deliver the deed in order to perfect his right of action on the purchase notes.<sup>7</sup> Similarly, a vendee of land may pay over the purchase money without discharging a surety on a bond given by the vendor as security against incumbrances.<sup>8</sup>

**8. Judgment and Execution Liens — a. THE JUDGMENT AND JUDGMENT LIEN.** — The doctrine that the surety is discharged *pro tanto* by a release of security extends to liens acquired in legal proceedings. If a creditor acquires a lien by judgment or by the levy of an execution, or even, in some jurisdictions, by mesne attachment, he must not release it or negligently impair its value, under the penalty of discharging the surety; for the relation of surety-

1. **Exchange of Security.** — *Coates v. Coates*, 33 Beav. 249; *Young v. Cleveland*, 33 Mo. 126, 82 Am. Dec. 155; *State Bank v. Smith*, 155 N. Y. 185, *affirming* 85 Hun (N. Y.) 200; *Neff's Appeal*, 9 W. & S. (Pa.) 36. See also *Moss v. Pettingill*, 3 Minn. 217; *Moss v. Craft*, 10 Mo. 720; *Monroe v. De Forest*, 53 N. J. Eq. 264; *Commercial Bank v. Western Reserve Bank*, 11 Ohio 444, 38 Am. Dec. 739.

**A Substitution of Securities** which involves a change in the main contract discharges the surety altogether. *Albright v. Allday*, (Tex. Civ. App. 1896) 37 S. W. Rep. 646.

2. *Blydenburgh v. Bingham*, 38 N. Y. 371, 98 Am. Dec. 49.

3. *Law v. East-India Co.*, 4 Ves. Jr. 824. Compare *Walsh v. Colquitt*, 64 Ga. 740.

4. *White v. Life Assoc. of America*, 63 Ala. 419, 35 Am. Rep. 45.

5. See the title **BANKS AND BANKING**, vol. 3, p. 838.

**Bank Not Required to Apply Deposit.** — *Strong v. Foster*, 17 C. B. 217, 84 E. C. L. 217; *Citizens' Bank v. Elliott*, 9 Kan. App. 707; *Martin v. Mechanics Bank*, 6 Har. & J. (Md.)

235; *McShane v. Howard Bank*, 73 Md. 135; *Citizens' Bank v. Booze*, 75 Mo. App. 189; *Houston v. Braden*, (Tex. Civ. App. 1896) 37 S. W. Rep. 467; *Bank of British Columbia v. Jeffs*, 15 Wash. 230.

It has been held no defense to the surety on a note to a bank, that the payee, having funds of the principal on deposit, transfers the note to another after maturity. *Kirkland Land, etc., Co. v. Jones*, 18 Wash. 407, holding further that the fact that the principal debtor in such a case had directed the bank to apply his deposit in part payment of the note does not affect the result.

**Bank Required to Apply Deposit.** — *Kinnaird v. Webster*, 10 Ch. D. 139; *Pursifull v. Pineville Banking Co.*, 97 Ky. 154, 53 Am. St. Rep. 409.

6. **Salary or Money Due upon Independent Contract.** — *Hollingsworth v. Tanner*, 44 Ga. 11; *McShane v. Howard Bank*, 73 Md. 135.

7. **Delivery of Deed Without Payment.** — *Woodward v. Clegge*, 8 Ala. 317; *Coombs v. Parker*, 17 Ohio 289, 49 Am. Dec. 459.

8. *Reed v. McGregor*, 62 Minn. 94.



ship is not terminated by judgment; and whatever will discharge a surety before judgment, while his obligation remains in contract, will discharge him thereafter.<sup>1</sup> In accordance with the foregoing rule, if, after judgment, the creditor extends the time of payment,<sup>2</sup> or permits the judgment to be set aside,<sup>3</sup> or modified so as to give other incumbrances priority,<sup>4</sup> or releases it or acknowledges satisfaction thereof,<sup>5</sup> the surety is discharged. But the assignment of a judgment which does not interfere with the creditor's rights does not release him.<sup>6</sup>

*b. CONTROL OF EXECUTION.* — In conformity with the general doctrine that the creditor owes no duty of active diligence to the surety, it is held that he is not bound to sue out execution after judgment is recovered,<sup>7</sup> in the absence of a statute to such effect.<sup>8</sup> Nor when issued is he bound to have the execution levied. He may withdraw it before levy<sup>9</sup> or suspend the levy, and if there be no binding agreement to give time, the surety, by the weight of authority, is not discharged,<sup>10</sup> since it is the privilege of the surety at any time to pay off the judgment and be subrogated to the creditor's right of

1. *Relation Continuing After Judgment* — *England*. — *Bank of Ireland v. Beresford*, 6 Dow. 233; *Mayhew v. Crickett*, 2 Swanst. 193.

*Delaware*. — *Merriken v. Godwin*, 2 Del. Ch. 236.

*Georgia*. — *Curan v. Colbert*, 3 Ga. 239, 46 Am. Dec. 427; *Brown v. Riggins*, 3 Ga. 405.

*Illinois*. — *Trotter v. Strong*, 63 Ill. 272; *New York Bank Note Co. v. Kerr*, 77 Ill. App. 53.

*Kentucky*. — *Craig v. Cox*, 2 Bibb (Ky.) 309.

*Massachusetts*. — *Betts v. Bagley*, 12 Pick. (Mass.) 572; *Stedman v. Eveleth*, 6 Met. (Mass.) 114; *Carpenter v. King*, 9 Met. (Mass.) 511, 43 Am. Dec. 405; *Davis v. Maynard*, 9 Mass. 242.

*Missouri*. — *Rice v. Morton*, 19 Mo. 263; *Smith v. Rice*, 27 Mo. 505, 72 Am. Dec. 281.

*New York*. — *Wyman v. Mitchell*, 1 Cow. (N. Y.) 320; *Raymond v. Merchant*, 3 Cow. (N. Y.) 147; *Matter of Wendell*, 19 Johns. (N. Y.) 153; *Bangs v. Strong*, 4 N. Y. 315; *La Farge v. Herter*, 9 N. Y. 241, *affirming* 11 Barb. (N. Y.) 159; *Sailly v. Elmore*, 2 Paige (N. Y.) 497; *Bangs v. Strong*, 7 Hill (N. Y.) 250, 42 Am. Dec. 64.

*Ohio*. — *Dixon v. Ewing*, 3 Ohio 280, 17 Am. Dec. 590; *Commercial Bank v. Western Reserve Bank*, 11 Ohio 445, 38 Am. Dec. 739.

*Pennsylvania*. — *Com. v. Vanderslice*, 8 S. & R. (Pa.) 452.

*Rhode Island*. — *Shelton v. Hurd*, 7 R. I. 403, 84 Am. Dec. 564.

*Vermont*. — *Smith v. Day*, 23 Vt. 656.

See, however, *Findlay v. U. S. Bank*, 2 McLean (U. S.) 44, and *Marshall v. Aiken*, 25 Vt. 327.

2. See *supra*, this section, 4. *l. After Judgment Against Principal*.

3. *Cumberland First Nat. Bank v. Parsons*, 42 W. Va. 151.

4. *Middleton v. Marshalltown First Nat. Bank*, 40 Iowa 29.

5. *Release or Satisfaction of Judgment*. — *Hollingsworth v. Tanner*, 44 Ga. 11; *Finnegan v. Janeway*, 85 Minn. 384; *Green v. Dougherty*, 55 Mo. App. 217; *Crook v. Lipscomb*, 30 Tex. Civ. App. 567. See also *Perry v. Saunders*, 36 Iowa 427; *Hempstead v. Hempstead*, 27 Mo. 187.

*Beneficial Application of Proceeds*. — Where the lien is released on part of the land and the money applied in extinguishing a mortgage on

the remainder, the surety is not discharged. *Neff's Appeal*, 9 W. & S. (Pa.) 36.

6. *Assignment of Judgment*. — *Hubbell v. Carpenter*, 5 N. Y. 171; *McDonald v. Pickett*, 2 Bailey L. (S. Car.) 617.

*Marguer of Judgment Lien*. — *Wright v. Knepfer*, 1 Pa. St. 361; *Johnson v. Young*, 20 W. Va. 614.

7. *Issuing Execution*. — *Buckalew v. Smith*, 44 Ala. 638; *Crawford v. Gauden*, 33 Ga. 173; *Patton v. Cooper*, 84 Mo. App. 427; *Charlotte First Nat. Bank v. Homesley*, 99 N. Car. 531; *Koch v. Cornwell*, (Tex. Civ. App. 1897) 40 S. W. Rep. 144. *Contra*, *Martin v. Orr*, 96 Ind. 491.

A covenant not to issue execution against the principal debtor releases the surety. *Evans v. Roper*, 74 N. Car. 639.

8. *Thompson v. Robinson*, 34 Ark. 44; *National Surety Co. v. Arterburn*, (Ky. 1901) 62 S. W. Rep. 862.

In *Kentucky* there is a statute to the effect that the surety on a judgment bond shall be released upon failure of the creditor to procure the issuance of execution against the principal at intervals of less than a year. *National Surety Co. v. Arterburn*, (Ky. 1901) 62 S. W. Rep. 862.

This statute is not applicable to official bonds. *Barbee v. Pitman*, 3 Bush (Ky.) 259.

Nor to bonds payable to a master commissioner, the enforcement of such obligations being under judicial control. *Turner v. Eastin*, (Ky. 1899) 51 S. W. Rep. 567; *Bridgewater v. England*, (Ky. 1901) 62 S. W. Rep. 882.

9. *Withdrawal of Execution*. — *Ambler v. Leach*, 15 W. Va. 677; *Knight v. Charter*, 22 W. Va. 422.

*Jenkins v. McNeese*, 34 Tex. 189, is apparently in conflict, but in this case, it seems, there had been a levy as in *Parker v. Nations*, 33 Tex. 210.

A levy under a defective execution may be abandoned. *Somersworth Sav. Bank v. Worcester*, 76 Me. 327.

10. *Postponing Levy* — *United States*. — See *Findlay v. U. S. Bank*, 2 McLean (U. S.) 44.

*Alabama*. — *Sawyer v. Bradford*, 6 Ala. 572; *Hetherington v. Branch Bank*, 14 Ala. 68; *Royston v. Howie*, 15 Ala. 309; *Summerhill v. Tapp*, 52 Ala. 227.

proceeding with the levy. In a few states a different rule prevails, and it is there held that a recall or suspension of an execution once issued, if done at the instance of the creditor, will discharge the surety where there is sufficient personalty available to satisfy it.<sup>1</sup> This doctrine is placed upon the ground that, in such jurisdictions, the execution is a lien upon personalty from the time of its delivery to the sheriff;<sup>2</sup> and perhaps the courts in these states do not give sufficient weight to the fact that such lien is inchoate and imperfect until a levy has actually been made.

c. DISCHARGE OF LEVY. — By a universal consensus of authority, when a specific lien is once fixed on property real or personal by an actual levy, a surrender of the property thereafter will discharge the surety.<sup>3</sup> It results from this rule that a levy on sufficient property of the principal to satisfy the debt operates as a discharge of the surety.<sup>4</sup> An apparent exception to the principle stated above is found in decisions to the effect that the release or

*Georgia.* — Crawford v. Gauden, 33 Ga. 173; Lumsden v. Leonard, 55 Ga. 374; Lilly v. Roberts, 58 Ga. 363.

*Indiana.* — Jerauld v. Trippet, 62 Ind. 122; Lamb v. Trippet, 64 Ind. 600; Nunemacher v. Ingle, 20 Ind. 135.

*Kentucky.* — Finn v. Stratton, 5 J. J. Marsh. (Ky.) 364; Stringfellow v. Williams, 6 Dana (Ky.) 236.

*Maryland.* — Sasscer v. Young, 6 Gill & J. (Md.) 243.

*Mississippi.* — Union Bank v. Govan, 10 Smed. & M. (Miss.) 333; Caruthers v. Dean, 11 Smed. & M. (Miss.) 178.

*North Carolina.* — Thornton v. Thornton, 63 N. Car. 211.

*Ohio.* — Ide v. Churchill, 14 Ohio St. 372.

*Tennessee.* — Miller v. Porter, 5 Humph. (Tenn.) 294; Grimes v. Nolen, 3 Humph. (Tenn.) 412.

*Texas.* — Brown v. Chambers, 63 Tex. 131.

*Virginia.* — Alcock v. Hill, 4 Leigh (Va.) 622; Humphrey v. Hitt, 6 Gratt. (Va.) 509, 52 Am. Dec. 133.

1. Failure to Make a Levy Discharges Surety. — Robeson v. Roberts, 20 Ind. 155; Sterne v. McKinney, 79 Ind. 578; Sterne v. Vincennes Bank, 79 Ind. 549; Dills v. Cecil, 4 Bush (Ky.) 579; Blandford v. Barger, 9 Dana (Ky.) 22; Miller v. Dyer, 1 Duv. (Ky.) 263; Ferguson v. Turner, 7 Mo. 497. Compare Naylor v. Moody, 3 Blackf. (Ind.) 92.

But in order that the delay should operate as a discharge the creditor must have knowledge of the suretyship. Patterson v. Brock, 14 Mo. 473.

2. Execution a Lien on Personalty After Discharge to Sheriff. — Cones v. Wilson, 14 Ind. 465; Durbin v. Haines, 99 Ind. 463.

In Kentucky the execution is a lien from the time of its delivery on both real and personal property. Whitehead v. Woodruff, 11 Bush (Ky.) 209.

3. Release of Lien Acquired by Actual Seizure — England. — Mayhew v. Crickett, 2 Swanst. 185; Williams v. Price, 1 Sim. & St. 581.

*Alabama.* — Fryer v. Austill, 2 Stew. (Ala.) 119; State Bank v. Edwards, 20 Ala. 512; Winston v. Yeargin, 50 Ala. 340.

*Colorado.* — Thomas v. Wason, 8 Colo. App. 452.

*Connecticut.* — Glazier v. Douglass, 32 Conn. 393.

*Iowa.* — Sherraden v. Parker, 24 Iowa 28.

*Kentucky.* — Glass v. Thompson, 9 B. Mon. (Ky.) 235.

*Maryland.* — State v. Hammond, 6 Gill & J. (Md.) 157.

*Minnesota.* — Moss v. Pettingill, 3 Minn. 217.

*Missouri.* — Ferguson v. Turner, 7 Mo. 497; Lower v. Buchanan Bank, 78 Mo. 67.

*New York.* — Boughton v. Orleans Bank, 2 Barb. Ch. (N. Y.) 458; Bower v. Tiemann, 3 Den. (N. Y.) 378; Spring v. George, 50 Hun (N. Y.) 227.

*North Carolina.* — Nelson v. Williams, 2 Dev. & B. Eq. (22 N. Car.) 118; Cooper v. Wilcox, 2 Dev. & B. Eq. (22 N. Car.) 90, 32 Am. Dec. 695; Bell v. Howerton, 111 N. Car. 69.

*Ohio.* — Dixon v. Ewing, 3 Ohio 280, 17 Am. Dec. 590; Day v. Ramey, 40 Ohio St. 446.

*Pennsylvania.* — Com. v. Vanderslice, 8 S. & R. (Pa.) 452; Clippinger v. Creps, 2 Watts (Pa.) 45; Stephens v. Monongahela Nat. Bank, 88 Pa. St. 157, 32 Am. Rep. 438.

*Tennessee.* — Holt v. Manier, 1 Lea (Tenn.) 488; Hutton v. Campbell, 10 Lea (Tenn.) 170; Lee v. Shanks, (Tenn. Ch. 1898) 52 S. W. Rep. 1091.

*Virginia.* — Chichester v. Mason, 7 Leigh (Va.) 244; Bullitt v. Winston, 1 Munf. (Va.) 269; Shannon v. McMullin, 25 Gratt. (Va.) 211.

*West Virginia.* — McKenzie v. Wiley, 27 W. Va. 658.

See also the title EXECUTIONS, vol. 11, p. 712.

Doubtful Title. — The rule applies notwithstanding release of the levy results from a doubt as to ownership. Brinton v. Gerry, 7 Ill. App. 238.

The Unauthorized Act of the Sheriff in Returning Property taken in execution will not release the surety. State Bank v. Godden, 15 Ala. 616; Leonard v. Giddings, 9 Johns. (N. Y.) 355. Contra, Lumsden v. Leonard, 55 Ga. 374. And see Miller v. Dyer, 1 Duv. (Ky.) 263.

A Sheriff's Return to the effect that an execution has been held up by order of the creditor is no evidence of such fact. Alexander v. Byrd, 85 Va. 690; Shannon v. McMullin, 25 Gratt. (Va.) 211.

4. Levy on Sufficient Property. — People v. Chisholm, 8 Cal. 29; Morley v. Dickinson, 12 Cal. 561; Mulford v. Estudillo, 23 Cal. 94; Thomas v. Wason, 8 Colo. App. 452; Lower v. Buchanan Bank, 78 Mo. 67; Hoffman v. Fleming, 43 W. Va. 762.

dismissal of an execution levied on real property will not discharge the surety,<sup>1</sup> but it will be found in such cases that it is the judgment which gives the lien and that this lien is not strengthened by the levy of the execution nor impaired by its subsequent release.<sup>2</sup>

*d.* DISCHARGE OF ATTACHMENT. — On the question whether the discharge of an attachment will release the surety, there is direct conflict. The better view is that it will not. The lien acquired by attachment differs from ordinary securities in the circumstance that it cannot be preserved without active diligence. The prosecution of an attachment is attended by trouble and expense, and if the ground of attachment is doubtful, serious liability may be incurred. The creditor, it is said, is under no obligation to subject himself to such expense and liability or to continue the action after it has been begun.<sup>3</sup> On the other hand, it is insisted that while the creditor is not bound to attach, when he has once obtained a hold upon the property of the debtor by attachment he becomes trustee for the surety as well as himself, and a release of an attachment is consequently followed with precisely the same consequences as the release of an execution.<sup>4</sup>

**9. Discharge of Surety on Fidelity Bond — *a.* IN GENERAL.** — The rule that the creditor owes no duty of active diligence to the surety is often applied in cases involving the liability of sureties on bonds given as security for the fidelity of officers, agents, and employees. This subject has already been treated from one point of view in this work,<sup>5</sup> and will now be considered in its general aspect only. We shall here find an apt illustration of the distinction between the passive inactivity which does not discharge the surety and the negligent omission which does.

*b.* FAILURE TO DISCOVER SHORTAGE. — Where bonded employees turn out to be unfaithful, it often transpires that their peculation or embezzlement extends over a long period of time, and it has been insisted for the sureties that the employer, who is also the obligee in the bond, should be required to exercise diligence in discovering the dishonesty. This contention has not met with favor, and it is a universal rule that so long as the assured acts in good faith, he is not bound to detect and put an end to crookedness in any of its stages. The object of requiring a bond is to give protection, and the assured may safely repose on its security until something transpires to alter the situation. Mere negligence on the part of the obligee, either in exercising

<sup>1</sup> *Execution Levied on Realty.* — Schofield *v.* Ute Coal, etc., Co., (C. C. A.) 92 Fed. Rep. 269; Wood *v.* Brown, (C. C. A.) 104 Fed. Rep. 203; Wyley *v.* Stanford, 22 Ga. 385; Manry *v.* Shepperd, 57 Ga. 68; Cathcart's Appeal, 13 Pa. St. 415. See also Stephens *v.* Clay, 17 Colo. 489.  
<sup>2</sup> Wood *v.* Brown, 104 Fed. Rep. 203, 43 C. C. A. 474.

<sup>3</sup> *Discontinuance of Attachment Suit or Discharge of the Attachment by Creditor* — *Alabama.* — Caller *v.* Vivian, 8 Ala. 903.

*California.* — Shriver *v.* Lovejoy, 32 Cal. 574.

*Connecticut.* — Glazier *v.* Douglass, 32 Conn. 393.

*Massachusetts.* — Hurd *v.* Little, 12 Mass. 502; Bellows *v.* Lovell, 5 Pick. (Mass.) 307; Curtice *v.* Bothamly, 8 Allen (Mass.) 336.

*New Hampshire.* — Concord Bank *v.* Rogers, 16 N. H. 9; Baker *v.* Davis, 22 N. H. 27; Barney *v.* Clark, 46 N. H. 514; Morrison *v.* Citizens' Nat. Bank, 65 N. H. 253, 23 Am. St. Rep. 39.

*Vermont.* — Montpelier Bank *v.* Dixon, 4 Vt. 587, 24 Am. Dec. 640; Crane *v.* Stickles, 15 Vt.

252; Baker *v.* Marshall, 16 Vt. 522, 42 Am. Dec. 528; Herrick *v.* Orange County Bank, 27 Vt. 584.

<sup>4</sup> *Discharge of Attachment Discharges Surety.* — Maquoketa *v.* Willey, 35 Iowa 323; Springer *v.* Toothaker, 43 Me. 381, 69 Am. Dec. 66; Spring *v.* George, 50 Hun (N. Y.) 227; Twiggs *v.* Augusta Sav. Bank, 26 S. Car. 612.

*The Discharge of an Attachment under a Mistake of Law* will not affect the liability of a surety. Somersworth Sav. Bank *v.* Worcester, 76 Me. 327.

*The Dismissal of an Attachment to Enforce the Statutory Landlord's Lien* will discharge the surety. Bell *v.* Howerton, 111 N. Car. 69; Penn *v.* Collins, 5 Rob. (La.) 213.

*Attaching at Instance of Surety.* — Where suit is begun in response to a request of the surety and sufficient property is attached, but subsequently the suit is voluntarily dismissed, the surety is discharged. State Bank *v.* Matson, 24 Mo. 333.

<sup>5</sup> See the title FIDELITY AND GUARANTY INSURANCE, vol. 13, p. 3; also the title GUARANTY, vol. 14, p. 1127.

supervision over the employee to prevent irregularities or in discovering a shortage after it has occurred, is no defense.<sup>1</sup>

c. **FAILURE TO REQUIRE SETTLEMENTS.** — In harmony with this doctrine it is also established that the surety is not discharged by the failure of the obligee of the bond to examine the accounts of his employee or to require a settlement, although such a precaution would disclose a shortage and thus save the surety from further risk.<sup>2</sup> The rule is of course different where the contract by which the surety is bound expressly provides that an examination or settlement shall be made.<sup>3</sup> But the mere fact that the regulations put in force by the obligee of the bond require an accounting does not alter the situation,<sup>4</sup> and it has been held that the incorporation of the by-laws and regulations of a corporation into the contract by reference will not result in the discharge of the surety where settlement is not made.<sup>5</sup> There is some authority for a more stringent rule. Thus, in *Minnesota* it has been held not to be necessary that the stipulation imposing on the obligee the duty to require a settlement should be expressly inserted. It is enough if the surety knows that the contract between the principal and obligee calls for regular settlements and he enters into the suretyship in contemplation thereof.<sup>6</sup>

**1. Negligence in Supervising Employees or in Detecting Irregularities** — *England*. — *Peel v. Tatlock*, 1 B. & P. 419; *Trent Nav. Co. v. Harley*, 10 East 34; *Shepherd v. Beecher*, 2 P. Wms. 288.

*United States*. — *Phillips v. Bossard*, 35 Fed. Rep. 99; *U. S. v. Kirkpatrick*, 9 Wheat. (U. S.) 720; *Minor v. Mechanics Bank*, 1 Pet. (U. S.) 46.

*Delaware*. — *Sparks v. Farmers' Bank*, 3 Del. Ch. 274; *Lieberman v. Wilmington First Nat. Bank*, 2 Penn. (Del.) 416.

*Iowa*. — *Iowa State Sav. Bank v. Black*, 91 Iowa 490.

*Kansas*. — *McMullen v. Winfield Bldg., etc., Assoc.*, 64 Kan. 298.

*Kentucky*. — *Graves v. Lebanon Nat. Bank*, 10 Bush (Ky.) 23.

*Massachusetts*. — *Amherst Bank v. Root*, 2 Met. (Mass.) 522; *Tapley v. Martin*, 116 Mass. 275; *Winthrop v. Soule*, 175 Mass. 400.

*New Jersey*. — *Bowne v. Mt. Holly Nat. Bank*, 45 N. J. L. 360.

*Texas*. — *Moore v. Waco Bldg. Assoc.*, 19 Tex. Civ. App. 68.

**Mere Negligence, Though Gross**, without concurrence in the defalcation of the employee, will not discharge. *Madden v. M'Mullen*, 13 Ir. C. L. 305.

**2. Failure to Examine Account and to Require Settlement** — *England*. — *Durham v. Fowler*, 22 Q. B. D. 394; *Black v. Ottoman Bank*, 15 Moo. P. C. 472; *Mactaggart v. Watson*, 3 Cl. & F. 536.

*United States*. — *Union Bank v. Forrest*, 3 Cranch (C. C.) 218.

*Delaware*. — *Lieberman v. Wilmington First Nat. Bank*, 2 Penn. (Del.) 416.

*Florida*. — *Mutual Loan, etc., Assoc. v. Price*, 19 Fla. 127.

*Iowa*. — *Iowa State Sav. Bank v. Black*, 91 Iowa 490.

*Kansas*. — *McMullen v. Winfield Bldg., etc., Assoc.*, 64 Kan. 298.

*Massachusetts*. — *Amherst Bank v. Root*, 2 Met. (Mass.) 522.

*Michigan*. — *Dwelling-House Ins. Co. v. Johnston*, 90 Mich. 170.

*Missouri*. — *Chew v. Ellingwood*, 86 Mo. 260, 56 Am. Rep. 429.

*New Jersey*. — *Morris Canal, etc., Co. v. Van Vorst*, 21 N. J. L. 100.

*New York*. — *Monroe County v. Otis*, 62 N. Y. 88; *Albany Dutch Church v. Vedder*, 14 Wend. (N. Y.) 166.

*Pennsylvania*. — *Pittsburg, etc., R. Co. v. Shaeffer*, 59 Pa. St. 350.

*Rhode Island*. — *Atlas Bank v. Brownell*, 9 R. I. 168, 11 Am. Rep. 231.

**Public Officers.** — The rule is the same in the case of public officers. The omission of those in authority to call them to account will not discharge the sureties. *Smith v. U. S.*, 5 Pet. (U. S.) 292; *U. S. v. Kirkpatrick*, 9 Wheat. (U. S.) 720; *U. S. v. Vanzandt*, 11 Wheat. (U. S.) 184; *Moses v. U. S.*, 166 U. S. 571; *People v. Berner*, 13 Johns. (N. Y.) 383; *Monroe County v. Otis*, 62 N. Y. 88; *Crawn v. Com.*, 84 Va. 282, 10 Am. St. Rep. 839.

**Fraudulent Concealment.** — But where the omission of the public authorities to call a defaulting officer to account is coupled with fraudulent concealment of the delinquency whereby the sureties are prevented from averting the evil or saving themselves, they are discharged. *Postmaster Gen. v. Ustick*, 4 Wash. (U. S.) 347, 19 Fed. Cas. No. 11,315.

3. *Mountague v. Tidcombe*, 2 Vern. 518.

4. *Amherst Bank v. Root*, 2 Met. (Mass.) 522; *Richmond, etc., R. Co. v. Kasey*, 30 Gratt. (Va.) 218. And see *Albany Dutch Church v. Vedder*, 14 Wend. (N. Y.) 165.

5. *Pittsburg, etc., R. Co. v. Shaeffer*, 59 Pa. St. 350.

6. **Minnesota Rule.** — *Fidelity Mut. L. Assoc. v. Dewey*, 83 Minn. 389.

**Omission of Monthly Accounting Provided for in Principal Contract.** — *Morrison v. Arons*, 65 Minn. 321.

**Notice that Settlement Is Required.** — Where a surety settles a claim incurred by the shortage of an agent and then gives notice to the employer that he will be no longer bound unless the agent is required to account at stated intervals, he will be discharged thereafter from all liability by a failure of the employer to bring

*d. FAILURE TO NOTIFY SURETY OF DELINQUENCY.* — It is also settled that, in the absence of a provision to that effect,<sup>1</sup> the obligee of a bond is not bound to communicate to the surety the fact of delinquency when it comes to his knowledge,<sup>2</sup> especially where the delinquency does not appear to be of a dishonest or criminal nature.<sup>3</sup> But, of course, if inquiry is at any time made by the surety, the obligee is bound to disclose the true state of the account.<sup>4</sup>

*Contract Imposing Duty to Communicate.* — Where the contract of suretyship calls for the communication of facts increasing the surety's risk subsequently coming to the employer's knowledge, the latter is allowed a reasonable opportunity to ascertain with certainty whether the shortage or delay is of a dishonest nature.<sup>5</sup>

*e. RETENTION OF EMPLOYEE KNOWN TO BE DISHONEST—(1) General Rule.* — Closely connected with the subject just considered is the question whether the surety is discharged by the fact that the employer, having knowledge of a shortage, retains the employee in his place of trust. This brings us to the point where the balance changes in favor of the surety; since, by the weight of authority, the retention of the employee under such conditions is an act of bad faith; certainly so where the delinquency is clearly of a dishonest or criminal character. It follows that if the employee is retained the surety is not liable for defaults thereafter occurring.<sup>6</sup> The rule

the agent to account. *Dwelling-House Ins. Co. v. Johnston*, 90 Mich. 170.

*1. Agreement to Notify of Arrearage.* — *Scarratt v. F. W. Cook Brewing Co.*, 117 Ga. 181. See also *FIDELITY AND GUARANTY INSURANCE*, vol. 13, p. 5.

*2. Failure to Inform Surety of a Shortage.* — *Ætna L. Ins. Co. v. American Surety Co.*, 34 Fed. Rep. 291; *Wilkerson v. Crescent Ins. Co.*, 64 Ark. 80; *Forrester v. State*, 46 Md. 154; *Lake v. Thomas*, 84 Md. 608; *Watertown F. Ins. Co. v. Simmons*, 131 Mass. 85, 41 Am. Rep. 196; *Cumberland Bldg. Loan Assoc. v. Gibbs*, 119 Mich. 318; *Ætna Ins. Co. v. Fowler*, 108 Mich. 557; *Manchester F. Assur. Co. v. Redfield*, 69 Minn. 10. But see *Connecticut Mut. L. Ins. Co. v. Scott*, 81 Ky. 540; *Deposit Bank v. Hearne*, 104 Ky. 819; *Graves v. Lebanon Nat. Bank*, 10 Bush. (Ky.) 23.

*Industrious Concealment.* — In *Peel v. Tatlock*, 1 B. & P. 419, it is suggested that an industrious concealment, by which was doubtless meant a fraudulent concealment, might operate to discharge the surety. The expression has not gained currency. *Phillips v. Foxall*, L. R. 7 Q. B. 675. *Compare Postmaster Gen. v. Ustick*, 4 Wash. (U. S.) 347, 19 Fed. Cas. No. 11,315.

*3. Shortage Not Due to Dishonesty.* — *Caxton, etc., Union v. Dew*, 80 L. T. N. S. 325, 68 L. J. Q. B. 380; *Gilbert v. State Ins. Co.*, 3 Kan. App. 1; *Atlantic, etc., Tel. Co. v. Barnes*, 64 N. Y. 385, 21 Am. Rep. 621; *Richmond, etc., R. Co. v. Kasey*, 30 Gratt. (Va.) 218.

*4. Inquiry Made.* — *Frank Fehr Brewing Co. v. Mullican*, (Ky. 1902) 66 S. W. Rep. 627.

*5. Contract Imposing Duty to Communicate.* — *Ætna L. Ins. Co. v. American Surety Co.*, 34 Fed. Rep. 291; *Pacific F. Ins. Co. v. Pacific Surety Co.*, 93 Cal. 7; *Hurley v. Fidelity, etc., Co.*, 95 Mo. App. 88; *Tarboro Bank v. Fidelity, etc., Co.*, 128 N. Car. 366, 83 Am. St. Rep. 682.

*6. Retention of Dishonest Employee — England.*

— *Sanderson v. Aston*, L. R. 8 Exch. 73; *Burgess v. Eve*, L. R. 13 Eq. 450.

*Canada.* — *Confederation L. Assoc. v. Brown*, 35 Nova Scotia 94.

*Alabama.* — *Saint v. Wheeler, etc., Mfg. Co.*, 95 Ala. 362, 36 Am. St. Rep. 210.

*California.* — *Roberts v. Donovan*, 70 Cal. 108.

*Georgia.* — *Charlotte, etc., R. Co. v. Gow*, 59 Ga. 685, 27 Am. Rep. 403.

*Illinois.* — *Gradle v. Hoffman*, 105 Ill. 147; *Rapp v. Phoenix Ins. Co.*, 113 Ill. 390, 55 Am. Rep. 427; *Donnell Mfg. Co. v. Jones*, 49 Ill. App. 327.

*Iowa.* — *Contra, Ida County Sav. Bank v. Seidensticker*, (Iowa 1902) 92 N. W. Rep. 862.

*Kentucky.* — *Connecticut Mut. L. Ins. Co. v. Scott*, 81 Ky. 540; *Deposit Bank v. Hearne*, 104 Ky. 819.

*Maryland.* — *Lake v. Thomas*, 84 Md. 608. *Contra, McShane v. Howard Bank*, 73 Md. 135.

*Massachusetts.* — *Watertown F. Ins. Co. v. Simmons*, 131 Mass. 85, 41 Am. Rep. 196.

*Michigan.* — *Ætna Ins. Co. v. Fowler*, 108 Mich. 557.

*Minnesota.* — *Lancashire Ins. Co. v. Callahan*, 68 Minn. 277, 64 Am. St. Rep. 475; *Capital F. Ins. Co. v. Watson*, 76 Minn. 387, 77 Am. St. Rep. 657.

*New York.* — *Socialistic Co-operative Pub. Assoc. v. Hoffmann*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 440.

*Pennsylvania.* — *Murry's Estate*, 14 Pa. Co. Ct. 590, 3 Pa. Dist. 278.

*Where the Obligor Does Not Have the Authority to Dismiss the principal, the surety is not discharged by his retention.* *Caxton, etc., Union v. Dew*, 80 L. T. N. S. 325; *Byrne v. Muzio*, 8 L. R. Ir. 396.

*Suggested Reasons for the Rule.* — See *Phillips v. Foxall*, L. R. 7 Q. B. 666, *per Blackburn*, J. See also *Bailey v. Edwards*, 4 B. & S. 770, 116 E. C. L. 770, 34 L. J. Q. B. 41; *Burgess v. Eve*, L. R. 13 Eq. 450.

is different where the default on the part of the employee is the result of oversight, inadvertence, or negligence,<sup>1</sup> or is a mere breach of contract<sup>2</sup> and involves no dishonesty.<sup>3</sup>

(2) *Exception in Favor of Government.* — A qualification of the doctrine just stated exists in the case of sureties on the bonds of public officers. These are not discharged by the negligent failure of those in authority to discharge a defaulting officer upon the discovery of his peculations;<sup>4</sup> nor by their failure to discharge one surety and accept another after agreeing to do so.<sup>5</sup> The reason for this is that the government is not estopped nor its interests affected by the laches or negligence of any of its servants.<sup>6</sup>

(3) *Bonds Given to Private Corporations.* — The exception which certainly exists in favor of the government has also been supposed to apply in favor of private corporations where the corporate authorities negligently fail to discharge a defaulting officer when found to be dishonest. This opinion had its origin in the powerful dictum of Chief Justice Sharswood: "They undertake that he shall be honest though all around him are rogues."<sup>7</sup> His words have often been quoted with approval, but nearly always in cases of negligence merely,<sup>8</sup> and the true doctrine doubtless is that the surety will be discharged from future liability where the corporate authorities retain an embezzler after the wrongful act comes to their knowledge, or the knowledge of their competent agent,<sup>9</sup> unless there appears to be collusion among the wrongdoers to rob the corporation by their joint operations. Where the irregularity complained of is not dishonest or is due merely to the negligence or incompetence of the employee, the surety is not discharged by the fact that those in authority have knowledge of it and do not dismiss him.<sup>10</sup> The same is true where a cashier, with full knowledge on the part of his superiors, habitually borrows money from the bank, depositing his note or debit slip and entering the transaction regularly on the books.<sup>11</sup> So where a bookkeeper obtains money from the bank upon an overdraft with the knowledge of the cashier, the bookkeeper's sureties are liable therefor.<sup>12</sup>

f. LIABILITY OF SURETY AND GUARANTOR DISTINGUISHED. — It should be observed that there is some difference of opinion as to whether the contract

1. *Oversight or Negligence.* — Manchester F. Assur. Co. v. Redfield, 69 Minn. 10; Atlantic, etc., Tel. Co. v. Barnes, 39 N. Y. Super. Ct. 40.

2. *Breach of Contract.* — Home Ins. Co. v. Holway, 55 Iowa 571, 39 Am. Rep. 179; Phenix Ins. Co. v. Findley, 59 Iowa 591; Manchester F. Assur. Co. v. Redfield, 69 Minn. 10; Socialistic Co-operative Pub. Assoc. v. Hoffmann, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 440.

3. *Mere Irregularity.* — Atlantic, etc., Tel. Co. v. Barnes, 64 N. Y. 385, 21 Am. Rep. 621; Bostwick v. Van Voorhis, 91 N. Y. 353.

4. *Retention of Dishonest Officer No Defense to Surety.* — U. S. v. Kirkpatrick, 9 Wheat. (U. S.) 720; U. S. v. Vanzandt, 11 Wheat. (U. S.) 184; Stoeckle v. Lewis, (Del. Ch. 1897) 38 Atl. Rep. 1059; Stern v. People, 102 Ill. 540; Crane v. Newell, 2 Pick. (Mass.) 612, 13 Am. Dec. 461; Andrus v. Bealls, 9 Cow. (N. Y.) 693; Monroe County v. Otis, 62 N. Y. 88; State v. Scheper, 33 S. Car. 562. But see Caxton, etc., Union v. Dew, 80 L. T. N. S. 325, 68 L. J. Q. B. 380; Gradle v. Hoffman, 105 Ill. 147.

5. *Failure to Accept New Surety.* — Wilson v. Glover, 3 Pa. St. 404.

6. *Negligence of Officers Not Imputable to the Government.* — U. S. v. Boyd, 15 Pet. (U. S.) 208; Jones v. U. S., 18 Wall. (U. S.) 662. See also Gibbons v. U. S., 8 Wall. (U. S.) 269;

Hart v. U. S., 95 U. S. 318; Minturn v. U. S., 106 U. S. 444.

7. Pittsburgh, etc., R. Co. v. Shaeffer, 59 Pa. St. 350, the learned judge saying: "The reasons so clearly stated by Story, J. [in U. S. v. Kirkpatrick, 9 Wheat. (U. S.) 720], in regard to officers of government, apply with equal force to the officers of corporations. Corporations can act only by officers and agents." Compare the language of Shaw, C. J., in Amherst Bank v. Root, 2 Met. (Mass.) 540.

8. *Judge Sharswood's Dictum Applied.* — McShane v. Howard Bank, 73 Md. 135. Compare Ida County Sav. Bank v. Seidensticker, (Iowa 1902) 92 N. W. Rep. 862.

9. Saint v. Wheeler, etc., Mfg. Co., 95 Ala. 362, 36 Am. St. Rep. 210. See also Sanderson v. Aston, L. R. 8 Exch. 73; Phillips v. Foxall, L. R. 7 Q. B. 666; McShane v. Howard Bank, 73 Md. 135.

10. *Irregularity Due to Negligence or Incompetence.* — Minor v. Mechanics Bank, 1 Pet. (U. S.) 46; Iowa State Sav. Bank v. Black, 91 Iowa 490; Chew v. Ellingwood, 86 Mo. 260, 56 Am. Rep. 429.

11. *Improper Borrowing.* — Ida County Sav. Bank v. Seidensticker, (Iowa 1902) 92 N. W. Rep. 862.

12. Chew v. Ellingwood, 86 Mo. 260, 56 Am. Rep. 429 (two judges dissenting).

given to secure the fidelity of officers, agents, and employees is a contract of suretyship or of guaranty. The surety is an insurer of the debt, whether present or future; the guarantor, an insurer of the solvency of the debtor. Judged by this test the obligor on such a bond is, it seems, by the weight of authority, a surety.<sup>1</sup> In some jurisdictions, however, he is treated as a guarantor.<sup>2</sup> This results in some conflict, for the law is more favorable to the guarantor than to the surety.<sup>3</sup> The surety is bound from the delivery of the contract, without notice of acceptance, or of the default which fixes liability, and he is not entitled to terminate the relation by giving notice.<sup>4</sup>

**10. Effect of Discharge of Cosurety** — *a. IN GENERAL.* — If the act or circumstance discharging the cosurety impeaches the validity of the main obligation, as where his signature to an official bond is improperly made<sup>5</sup> or the name is erased,<sup>6</sup> the remaining surety is discharged also from all liability.<sup>7</sup>

**Discharge by Operation of Law.** — The liability of a surety is not affected, however, by the fact that a cosurety is discharged by an act of law or by authority of law, as where one surety obtains a discharge under a statute permitting it,<sup>8</sup> or is discharged in bankruptcy or insolvency<sup>9</sup> or by virtue of the statute of limitations.<sup>10</sup> By the weight of authority the same rule prevails where one surety, after giving statutory notice to sue, is discharged by law upon the failure of the creditor to proceed. The surety who is not a party to the notice remains bound,<sup>11</sup> or, if discharged at all, only to the extent to which he would have been entitled to contribution from the surety who gave notice.<sup>12</sup>

*b. ACT OF CREDITOR.* — A surety is only partially discharged where the creditor releases a cosurety, and the result is the same whether the creditor obtains from the surety discharged by him his full proportion of the debt or merely executes the release voluntarily. As generally stated the rule is that the remaining surety is exonerated to the extent to which he would have been entitled to contribution from the released surety.<sup>13</sup> Some of the older

1. **Suretyship.** — *Saint v. Wheeler, etc., Mfg. Co.*, 95 Ala. 362, 36 Am. St. Rep. 210; *Pittsburg, etc., R. Co. v. Shaeffer*, 59 Pa. St. 350; *Campbell v. Sherman*, 151 Pa. St. 70, 31 Am. St. Rep. 735; *Page v. White Sewing Mach. Co.*, 12 Tex. Civ. App. 327.

2. **Guaranty.** — *La Rose v. Logansport Nat. Bank*, 102 Ind. 332; *Singer Mfg. Co. v. Littler*, 56 Iowa 601; *Connecticut Mut. L. Ins. Co. v. Scott*, 81 Ky. 540.

3. **Liability of Surety and Guarantor Compared.** — *Saint v. Wheeler, etc., Mfg. Co.*, 95 Ala. 362, 36 Am. St. Rep. 210; *Wilkins v. Carter*, 84 Tex. 438; *Page v. White Sewing Mach. Co.*, 12 Tex. Civ. App. 327.

4. **Request for Release.** — Where a surety being entitled to obtain a release from a bond makes a request therefor, the bank is entitled to a reasonable time within which to notify the cashier to procure a new bond. *La Rose v. Logansport Nat. Bank*, 102 Ind. 332; *Bostwick v. Van Voorhis*, 91 N. Y. 353. See also the title **GUARANTY**, vol. 14, p. 1227.

5. *Wilson v. Linville*, 96 Ky. 50.

6. **Eraseure of Name.** — *State v. McGonigle*, 101 Mo. 353, 20 Am. St. Rep. 609; *Mitchell v. Burton*, 2 Head (Tenn.) 613; *Fairhaven v. Cowgill*, 8 Wash. 686.

7. **Discharge of Cosurety on Appeal.** — A surety against whom judgment has been taken will be discharged by the successful appeal of his cosurety in the same suit. *Myers v. Farmer*, 52 Iowa 20.

**Coverture of One Cosurety Does Not Operate to Discharge the Others.** — *Warren v. Louisville*

*Leaf Tobacco Exch.*, (Ky. 1900) 55 S. W. Rep. 912.

8. **Discharge of Surety under Statutory Provisions.** — *People v. Otto*, 77 Cal. 45; *Deering v. Moore*, 86 Me. 181, 41 Am. St. Rep. 534; *McKim v. Demmon*, 130 Mass. 404. Compare *People v. Buster*, 11 Cal. 215.

9. *Sacramento County v. Bird*, 31 Cal. 66.

10. *Davis v. Auxier*, (Ky. 1897) 41 S. W. Rep. 767; *Clark v. Douglas*, 58 Neb. 571; *Camp v. Bostwick*, 20 Ohio St. 337, 5 Am. Rep. 669.

11. **Remaining Surety Still Bound.** — *Wilson v. Tebbetts*, 29 Ark. 579; *School Trustees v. Southard*, 31 Ill. App. 359; *Cochran v. Orr*, 94 Ind. 433; *Martin v. Orr*, 96 Ind. 491; *Letcher v. Yantis*, 3 Dana (Ky.) 160; *Barrow v. Shields*, 13 La. Ann. 57; *Ramey v. Purvis*, 38 Miss. 499; *Routon v. Lacy*, 17 Mo. 399; *Klingensmith v. Klingensmith*, 31 Pa. St. 460; *Alford v. Baxter*, 36 Vt. 158.

In **Kentucky**, by statute, the cosurety who gives no notice is not released and is liable for the whole debt. *Letcher v. Yantis*, 3 Dana (Ky.) 160. See to the same effect *Ramey v. Purvis*, 38 Miss. 499.

12. See *Routon v. Lacy*, 17 Mo. 399; *Alford v. Baxter*, 36 Vt. 158.

In **Alabama**, **Georgia**, and **Virginia**, it is held that all the sureties are discharged though only one gave notice. *Towns v. Riddle*, 2 Ala. 694; *Jones v. Whitehead*, 4 Ga. 397; *Wright v. Stockton*, 5 Leigh (Va.) 153.

13. **Release of Cosurety.** — *In re Wolmershausen*, 62 L. T. N. S. 541; *Gordon v. Moore*, 44 Ark. 349, 51 Am. Rep. 606; *Jones v. Whitehead*,

decisions hold or seem to hold that the remaining surety in such case is wholly discharged at law,<sup>1</sup> but the more equitable rule is now settled as stated above.<sup>2</sup> The courts have sometimes been puzzled where the creditor, upon payment by one surety of his proportion of the debt, gives him a release or discharge therefor in full. This in no way prejudices the creditor's right to sue the other surety for his full proportion of the debt.<sup>3</sup> But, of course, the remaining surety is thereby absolved from liability for the part so satisfied, and may be said in a sense to be discharged *pro tanto*. The surety will not be discharged where the release of his cosurety is made under an order of court<sup>4</sup> or in proceedings in equity,<sup>5</sup> even though a reservation of rights against the other sureties be improperly omitted from the decree.<sup>6</sup> An agreement for the extension of time in favor of a surety, as distinguished from an extension of time to the principal, has been held not to release the other surety.<sup>7</sup> But the better view is that such extension discharges the remaining surety from liability for that part of the debt which the other ought to pay.<sup>8</sup> In the present state of the authorities the law concerning the effect of discharging or releasing one of several sureties is obscure. It will, in the end, be found necessary entirely to change our point of view, and instead of saying that such act discharges the remaining surety we must say that, by discharging one surety, the creditor, so far as the contract of suretyship is concerned, thereby treats his proportion of the debt as satisfied and cannot thereafter recover it from the other surety though he might against the principal. In this view the remaining surety cannot be said to be discharged from any part of his personal liability, only the amount of the obligation being reduced.

**11. Consent of Surety.** — A qualification running through the entire subject of discharge is that the surety cannot complain of any act or agreement on the part of the creditor to which he himself gives assent. In conformity with this rule, the time may be extended,<sup>9</sup> or the contract otherwise changed or

4 Ga. 397; *Gunn v. Slaughter*, 83 Ga. 124; *Com. v. Berry*, 95 Ky. 443; *Routon v. Lacy*, 17 Mo. 399; *Dodd v. Winn*, 27 Mo. 501; *Schock v. Miller*, 10 Pa. St. 402.

**Consideration.** — The release must be supported by a consideration, if not under seal. *Deposit Bank v. Peak*, (Ky. 1901) 62 S. W. Rep. 268; *Rouss v. Krauss*, 126 N. Car. 667; *Schock v. Miller*, 10 Pa. St. 402.

Where an injunction bond is given covering the same liability as a previous supersedeas bond, the release of a surety on the bond last given discharges the other where the released surety is solvent. *Lewis v. Armstrong*, 80 Ga. 402. To the same effect see *Chowning v. Willis*, (Tex. Civ. App. 1897) 38 S. W. Rep. 1141.

**Where Sureties Are Bound in Several Separate Sums** and the liability of each is limited to his *pro rata* of the full penalty named in the bond, a release of one will not release the others from any part of their several liability. *Teutonia Nat. Bank v. Wagner*, 33 La. Ann. 732.

**Liability of Principal.** — The release of a surety by the creditor has no effect on the liability of the principal. *Mortland v. Himes*, 8 Pa. St. 265; *Schock v. Miller*, 10 Pa. St. 401; *Ragsdale v. Gossett*, 2 Lea (Tenn.) 729; *Bridges v. Phillips*, 17 Tex. 128; *McIlhenny Co. v. Blum*, 68 Tex. 197.

1. *Smith v. State*, 46 Md. 617; *Thompson v. Adams, Freem.* (Miss.) 225.

2. See opinion of Ranney, J., in *Ide v. Churchill*, 14 Ohio St. 386.

3. **Part Payment by One Surety.** — *Thomason v. Clark*, 31 Ill. App. 404; *Parmelee v.*

*Lawrence*, 44 Ill. 405; *Thompson v. Adams, Freem.* (Miss.) 225; *Schock v. Miller*, 10 Pa. St. 401; *McIlhenny Co. v. Blum*, 68 Tex. 197. See *Hewitt v. Adams*, 1 Patt. & H. (Va.) 34.

4. **Release by Order of Court.** — *State v. Bongard*, (Minn. 1903) 94 N. W. Rep. 1093. *Compare Wynne v. Edwards*, 7 Humph. (Tenn.) 418.

5. *Garey v. Hignutt*, 32 Md. 552.

6. *Ulrich v. Hoefling*, 23 Tex. Civ. App. 289.

7. **Extension of Time to Cosurety.** — *Draper v. Weld*, 13 Gray (Mass.) 580; *Sherman County v. Nichols*, (Neb. 1902) 91 N. W. Rep. 198.

8. *Ide v. Churchill*, 14 Ohio St. 372, pointing out that, if it were otherwise, the remaining surety, paying off the whole debt, could proceed to enforce contribution against the surety to whom time was extended, which would be in violation of the agreement.

**Consent of Surety to Extension of Time to Cosurety.** — Where one surety was discharged by an extension of time, the *Wisconsin* court held that a surety who consented to the extension was also discharged to the extent to which he would have been entitled to contribution. *Hallock v. Yankey*, 102 Wis. 41, 72 Am. St. Rep. 861. *Contra*, *Wolf v. Fink*, 1 Pa. St. 435, 44 Am. Dec. 141.

9. **Consent of Surety to Extension Prevents His Discharge** — *England*. — *Yates v. Evans*, 61 L. J. Q. B. 446, 66 L. T. N. S. 532.

*United States.* — *Creath v. Sims*, 5 How. (U. S.) 192; *Suydam v. Vance*, 2 McLean (U. S.) 99.

*Alabama.* — *Hodges v. Elyton Land Co.*, 109 Ala. 617,



departed from,<sup>1</sup> or securities may be released or substituted in any way,<sup>2</sup> or the principal debtor<sup>3</sup> or a cosurety may be released, without affecting the liability of a surety, who is competent<sup>4</sup> to give consent and does so.

**Consent Inferred from Acquiescence or Course of Business.**—The fact that consent is given may, of course, be shown by circumstantial evidence. Tacit acquiescence is enough,<sup>5</sup> or it may be inferred from the course of business.<sup>6</sup>

*Connecticut.*—*Adams v. Way*, 32 Conn. 160.  
*Georgia.*—*Johnson v. Prater*, 84 Ga. 141.

*Illinois.*—*Farwell v. Meyer*, 35 Ill. 40;  
*Johnston v. Paltzer*, 100 Ill. App. 171; *Williams v. Gooch*, 73 Ill. App. 557.

*Indiana.*—*Hodge v. Farmers' Bank*, 7 Ind. App. 94; *Oyler v. McMurray*, 7 Ind. App. 645.

*Iowa.*—*Lambert v. Shetler*, 71 Iowa 463;  
*Okey v. Sigler*, 82 Iowa 94; *Sawyer v. Campbell*, 107 Iowa 397.

*Maine.*—*Strafford Bank v. Crosby*, 8 Me. 191.

*Minnesota.*—*Hooper v. Pike*, 70 Minn. 84, 68 Am. St. Rep. 512.

*Mississippi.*—*Green v. Brandon*, Walk. (Miss.) 372.

*Missouri.*—*Bruegge v. Bedard*, 89 Mo. App. 543.

*Nebraska.*—*McGavock v. Omaha Nat. Bank*, 64 Neb. 440.

*New Hampshire.*—*Hutchinson v. Wright*, 61 N. H. 108; *Conway Sav. Bank v. Dow*, 69 N. H. 228.

*New Jersey.*—*Solomon v. Gregory*, 19 N. J. L. 112.

*New York.*—*Rice v. Isham*, 4 Abb. App. Dec. (N. Y.) 37; *Wright v. Storrs*, 32 N. Y. 691; *Coykendall v. Constable*, 48 Hun (N. Y.) 360; *Newcombe v. Eagleton*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 603; *Klein v. Long*, 27 N. Y. App. Div. 158.

*North Carolina.*—*Farmers' Bank v. Couch*, 118 N. Car. 436.

*Ohio.*—*Baldwin v. Western Reserve Bank*, 5 Ohio 273; *Reddish v. Watson*, 6 Ohio 510; *Miller v. Spain*, 41 Ohio St. 376.

*Oregon.*—*Rockwell v. Portland Sav. Bank*, 39 Oregon 241.

*Pennsylvania.*—*Van Horne v. Dick*, 151 Pa. St. 341.

*Tennessee.*—*Bowling v. Flood*, 1 Lea (Tenn.) 678.

*Texas.*—*Henderson v. Brooks*, (Tex. Civ. App. 1899) 54 S. W. Rep. 305.

*Washington.*—*Merchants' Bank v. Bussell*, 16 Wash. 546.

*West Virginia.*—*Knight v. Charter*, 22 W. Va. 422; *Glenn v. Morgan*, 23 W. Va. 467; *Parsons v. Harrold*, 46 W. Va. 122.

*Wisconsin.*—*Hallock v. Yankey*, 102 Wis. 41, 72 Am. St. Rep. 861.

**Evidence of Assent to Prior Extension does not prove assent to subsequent delays upon the same note.** *Gray v. Brown*, 22 Ala. 262; *Merrimack County Bank v. Brown*, 12 N. H. 320.

**1. Consent of Surety to Change in Contract Prevents Discharge—United States.**—*Mundy v. Stevens*, (C. C. A.) 61 Fed. Rep. 77; *U. S. v. Walsh*, (C. C. A.) 115 Fed. Rep. 697.

*Georgia.*—*Jackson v. Johnson*, 67 Ga. 167.

*Indiana.*—*Voiles v. Green*, 43 Ind. 374.

*Kentucky.*—*Edwards v. Coleman*, 6 T. B.

*Mon. (Ky.)* 567; *Robertson v. Meredith*, (Ky. 1898) 45 S. W. Rep. 103.

*Minnesota.*—*Renville County v. Gray*, 61 Minn. 242; *Norwegian, etc., Congregation v. U. S. Fidelity, etc., Co.*, 81 Minn. 32.

*Missouri.*—*State v. McGonigle*, 101 Mo. 353, 20 Am. St. Rep. 609; *State v. Findley*, 101 Mo. 368.

*Montana.*—*Hamilton v. Woodworth*, 17 Mont. 327.

*Nebraska.*—*Consaul v. Sheldon*, 35 Neb. 247; *Korty v. McGill*, 44 Neb. 516.

*New York.*—*U. S. v. Hazzard*, 53 N. Y. App. Div. 410; *Sachs v. American Surety Co.*, 72 N. Y. App. Div. 60; *De Remer v. Brown*, 36 N. Y. App. Div. 634; *Lenane v. Mayer*, (Supm. Ct. App. T.) 18 Misc. (N. Y.) 454; *New York v. Brady*, 151 N. Y. 611; *Smith v. Molleson*, 148 N. Y. 241.

*North Carolina.*—*Farmers' Bank v. Couch*, 118 N. Car. 436.

*North Dakota.*—*Cass County v. American Exch. State Bank*, 11 N. Dak. 238.

*Pennsylvania.*—*Slicker v. Schuchert*, 179 Pa. St. 401; *National Bldg., etc., Assoc. v. Fink*, 182 Pa. St. 52; *Blauvelt v. Kemon*, 196 Pa. St. 128.

*Tennessee.*—*Bell v. Trimby*, (Tenn. Ch. 1896) 38 S. W. Rep. 100.

*Texas.*—*Brown Iron Co. v. Templeman*, 30 Tex. Civ. App. 50.

*Washington.*—*Hall, etc., Furniture Co. v. Schmidt*, 7 Wash. 606.

*Wisconsin.*—*Kretschmar v. Bruse*, 108 Wis. 396; *Madison v. American Sanitary Engineering Co.*, (Wis. 1903) 95 N. W. Rep. 1097.

**2. Change of Security.**—*State Loan, etc., Co. v. Cockran*, 130 Cal. 245; *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119, 41 Am. Dec. 685.

**3. Release of Debtor.**—*Osgood v. Miller*, 67 Me. 174; *Everett v. Mitchell*, 23 N. Y. App. Div. 332.

**Conditional Consent.**—If the surety gives consent to a discharge of the principal on the condition that he pay one-fourth of the debt in ten days, the surety is discharged, the *Indiana* court holds, if, after failing to pay the one-fourth within ten days, the creditor accepts it from him at a later day. *Cartmel v. Newton*, 79 Ind. 1.

**4. Consent Given by One Legally Incompetent Is of No Effect.**—*Gaar v. Hulse*, 90 Ill. App. 548.

**5. Acquiescence.**—*Monmouth First Nat. Bank v. Whitman*, 66 Ill. 331; *McHard v. Ives*, 5 Ill. App. 400; *Kerns v. Ryan*, 26 Ill. App. 177; *Williams v. Gooch*, 73 Ill. App. 557; *Johnston v. Paltzer*, 100 Ill. App. 171; *Adle v. Metoyer*, 1 La. Ann. 254.

**6. Course of Business.**—*Chase v. Hathorn*, 61 Me. 505; *Crosby v. Wyatt*, 10 N. H. 318; *New Hampshire Sav. Bank v. Colcord*, 15 N. H. 119, 41 Am. Dec. 685.

**Waiver.** — In like manner, a surety who has been discharged by reason of any act of the creditor, or agreement between the creditor and principal, short of satisfaction of the main obligation, may, by subsequent acquiescence therein, waive his discharge or estop himself from claiming the benefit of it.<sup>1</sup>

**New Promise by Surety.** — A new promise on the part of a discharged surety to pay the debt, although not based upon a new consideration, will operate to restore his liability where he has knowledge of the facts which entitle him to a discharge.<sup>2</sup> The mere fact that the surety takes security from the principal to indemnify him does not operate as a new promise,<sup>3</sup> but he has been held liable in such case to the extent of the value of the security thus taken.<sup>4</sup>

**Consideration for the New Promise.** — An exception to the rule that no additional consideration is required for the new promise of the surety is recognized by some courts in those cases where the discharge results from the alteration of an instrument. These courts have acted upon the theory that the alteration annuls the obligation. Hence there must be a new consideration to revive it.<sup>5</sup>

**12. Reservation of Rights Against Surety.** — A further qualification of the law of discharge to be made in certain cases is found in the rule that the creditor, at the time of entering into an agreement with the principal which would ordinarily discharge the surety, may reserve his rights against the surety and subsequently proceed against him. This qualification is limited

**1. Surety Waiving Ground of Discharge.** — *Decatur Bank v. Johnson*, 9 Ala. 622; *Hinds v. Ingham*, 31 Ill. 400; *Owens v. Tague*, 3 Ind. App. 245.

**Waiver in Original Contract.** — A clause expressly waiving discharge by an extension of time is often inserted in promissory notes. It has been held that the term "any extension" in this connection applies to successive extensions. *Winnebago County State Bank v. Hustel*, 119 Iowa 115. Compare *Hodge v. Farmers' Bank*, 7 Ind. App. 94; *Page v. White Sewing Mach. Co.*, 12 Tex. Civ. App. 327.

**Knowledge of Departure from Contract.** — A ratification of a departure from the main contract will not be inferred as against the surety on a contractor's bond from the fact that he approves orders for the payment of work not included in the original contract, where he is not aware of the departure from the contract. *Erfurth v. Stevenson*, (Ark. 1903) 72 S. W. Rep. 49; *Stillman v. Wickham*, 106 Iowa 597.

**Rights of Third Person.** — But a waiver by the surety will not be effective where the rights of a third person are concerned. Thus, where a mortgage given to secure a debt is released by an unauthorized extension of time by the creditor, the mortgagor cannot waive the discharge to the prejudice of his judgment creditor whose lien has attached to the premises in question. *Campion v. Whitney*, 30 Minn. 177.

**2. Reviving Liability by Means of a New Promise.** — *Mayhew v. Crikett*, 3 Swanst. 185; *Smith v. Winter*, 4 M. & W. 454; *Stevens v. Lynch*, 12 East 38; *Hinds v. Ingham*, 31 Ill. 400; *Monmouth First Nat. Bank v. Whitman*, 66 Ill. 331; *Porter v. Hodenpuyl*, 9 Mich. 11; *Fowler v. Brooks*, 13 N. H. 240; *Parsons v. Harrold*, 46 W. Va. 122.

**Alter**, where the surety does not know of the fact which discharges him. *Tipton v. Carrigan*,

10 Ill. App. 318; *Montgomery v. Hamilton*, 43 Ind. 451; *Merrimack County Bank v. Brown*, 12 N. H. 320; *Mayfield v. McLary*, 3 Head (Tenn.) 159; *Bogart v. McClung*, 11 Heisk. (Tenn.) 105, 27 Am. Rep. 737.

**In Tennessee** it is necessary that the surety, in order to be bound by the new promise, should not only know the facts which constitute the ground of discharge, but he must know that he is in fact discharged. *Hoss v. Crouch*, (Tenn. Ch. 1898) 48 S. W. Rep. 724; *Spurlock v. Union Bank*, 4 Humph. (Tenn.) 336; *Rosson v. Carroll*, 90 Tenn. 133; *Williams v. Union Bank*, 9 Heisk. (Tenn.) 441. *Contra*, *Stevens v. Lynch*, 12 East 38.

**New Promise in Writing.** — In some jurisdictions the new promise is required to be in writing, as in case of a promise to pay a debt barred by limitations. *Mulkey v. Long*, (Idaho 1897) 47 Pac. Rep. 949; *Hooper v. Pike*, 70 Minn. 84, 68 Am. St. Rep. 512.

**In New York** the new promise of the surety must be clearly proved and will not be inferred from the mere recognition of the obligation as a binding one. *Crandall v. Moston*, 24 N. Y. App. Div. 547.

**3. Fowler v. Brooks**, 13 N. H. 240.

**4. Hoss v. Crouch**, (Tenn. Ch. 1898) 48 S. W. Rep. 724.

**5. New Consideration Necessary Where Discharge Results from Alteration.** — *Mulkey v. Long*, (Idaho 1897) 47 Pac. Rep. 949; *Cotton v. Edwards*, 2 Dana (Ky.) 106; *Emmons v. Overton*, 18 B. Mon. (Ky.) 650; *Blakey v. Johnson*, 13 Bush (Ky.) 197; *Warren v. Fant*, 79 Ky. 1. *Contra*, *Owens v. Tague*, 3 Ind. App. 245; *Bell v. Mahin*, 69 Iowa 408. In the *Indiana* case the alteration consisted in adding the name of another surety. In the *Iowa* case it was held that the surety ratified an alteration by requesting and obtaining an extension of time with knowledge of the alteration.

to cases of release without satisfaction<sup>1</sup> and to extensions of time.<sup>2</sup> No reservation could be effectual in cases where the main contract is itself changed or discharged by an accord and satisfaction, or where the discharge results from the improper disposition of securities. It certainly is anomalous that under any circumstances an act or agreement between the creditor and principal, which as a matter of law would ordinarily operate to discharge the surety, can be given an entirely different effect by the mere fact that they agree that such legal consequence shall not follow. The explanation is found in the fact that the discharge of the surety in the ordinary case of release or extension of time is partly based upon the equitable grounds of impairment or postponement of the surety's right of subrogation. Now, when the creditor, by an express agreement with the principal, reserves his right to proceed against the surety, the surety's right of subrogation is not affected. By entering into such an agreement the debtor impliedly consents that whatever remedies his surety has against him shall remain intact. The surety is therefore at liberty to pay the debt at once and proceed against the principal for reimbursement.<sup>3</sup> It would appear that where time is extended this reasoning would not quite suffice, inasmuch as the extension, in addition to postponing the surety in his right of subrogation, also involves a change of the main contract. The exception, however, is fully established. In order to evade the difficulty here indicated, the English as well as some American authorities have often said that an agreement to release the principal, accompanied by a reservation of rights against the surety, is to be given the effect of a covenant not to sue.<sup>4</sup> This view, though plausible enough, is often inconsistent with the plain import of the release, and is now seldom advanced.<sup>5</sup>

**How Reservation to Be Made.** — A parol reservation of rights against a surety is sufficient,<sup>6</sup> but, of course, parol evidence of a prior agreement is not admissible where the subsequent written release contains no reservation,<sup>7</sup> nor is evidence

**1. Reservation of Rights Against Surety upon Discharging or Releasing Principal — England.**

— *Union Bank v. Beech*, 3 H. & C. 672; *Maltby v. Carstairs*, 1 M. & R. 549, 7 B. & C. 735, 14 E. C. L. 113; *Thompson v. Lack*, 3 C. B. 540, 54 E. C. L. 540; *North v. Wakefield*, 13 Q. B. 536, 66 E. C. L. 536; *Nichols v. Norris*, 3 B. & Ad. 41, 23 E. C. L. 28; *Green v. Wynn*, L. R. 7 Eq. 28, affirmed L. R. 4 Ch. 204; *Kearsley v. Cole*, 16 M. & W. 128; *Wyke v. Rogers*, 1 De G. M. & G. 408; *Close v. Close*, 4 De G. M. & G. 176; *Boaler v. Mayor*, 19 C. B. N. S. 76, 115 E. C. L. 76; *Owen v. Homan*, 4 H. L. Cas. 997; *Ex p. Gifford*, 6 Ves. Jr. 807.

*Connecticut.* — *Rockville Nat. Bank v. Holt*, 58 Conn. 526.

*Illinois.* — *Mueller v. Dobschuetz*, 89 Ill. 176.

*Massachusetts.* — *Potter v. Green*, 6 Allen (Mass.) 442; *Sohier v. Loring*, 6 Cush. (Mass.) 537; *Tobey v. Ellis*, 114 Mass. 120.

*Missouri.* — *Boatmen's Sav. Bank v. Johnson*, 24 Mo. App. 316; *Broadway Sav. Bank v. Schmucker*, 7 Mo. App. 171.

*New York.* — *Tombeckbee Bank v. Stratton*, 7 Wend. (N. Y.) 429; *Hood v. Hayward*, 124 N. Y. 1; *Morgan v. Smith*, 70 N. Y. 545; *Calvo v. Davies*, 73 N. Y. 211, 29 Am. Rep. 130; *National Bank v. Bigler*, 83 N. Y. 51; *Shutts v. Fingar*, 100 N. Y. 539, 53 Am. Rep. 231; *Hubbell v. Carpenter*, 5 N. Y. 171.

*North Carolina.* — *Stirewalt v. Martin*, 84 N. Car. 4.

*South Carolina.* — *Massey v. Brown*, 4 S. Car. 85.

*Texas.* — *Ulrich v. Hoefling*, 23 Tex. Civ. App. 289; *Richardson v. Overleese*, 17 Tex. Civ. App. 376.

*Vermont.* — *Morse v. Huntington*, 40 Vt. 488.

*Virginia.* — *Hewitt v. Adams*, 1 Patt. & H. (Va.) 34.

**Ratification.** — Where the cause of action is wholly discharged, as by a ratification of a guardian's unauthorized use of funds, a surety will be released although there is an express reservation of the right to proceed against him. *Tyner v. Hamilton*, 51 Ind. 259.

<sup>2</sup> See *supra*, this section, 4. g. *Reservation of Rights Against Surety.*

**3. Surety's Right of Subrogation Not Impaired.** — *Kearsley v. Cole*, 16 M. & W. 128; *Jones v. Whitaker*, 57 L. T. N. S. 216; *Poole v. Willats*, 9 B. & S. 957; *Boatmen's Sav. Bank v. Johnson*, 24 Mo. App. 316; *Viele v. Hoag*, 24 Vt. 46.

**4. Release Operating as a Covenant Not to Sue.** *Green v. Wynn*, L. R. 4 Ch. 204, affirming L. R. 7 Eq. 28; *Bateson v. Gosling*, L. R. 7 C. P. 9; *Price v. Barker*, 4 El. & Bl. 760, 82 E. C. L. 760; *Kearsley v. Cole*, 16 M. & W. 128; *Perkins v. Gilman*, 8 Pick. (Mass.) 229; *Fullam v. Valentine*, 11 Pick. (Mass.) 156; *Kenworthy v. Sawyer*, 125 Mass. 28; *Hagey v. Hill*, 75 Pa. St. 108, 15 Am. Rep. 583.

<sup>5</sup> See opinion of Thompson, J., in *Boatmen's Sav. Bank v. Johnson*, 24 Mo. App. 316.

<sup>6</sup> *Norman v. Bolt*, 1 Cab. & El. 77.

<sup>7</sup> *Mercantile Bank v. Taylor*, (1893) A. C. 317.

of parol reservation admissible to vary a written release.<sup>1</sup> It is not necessary that the surety should have knowledge of the fact that the release reserving the right of action against him has been executed,<sup>2</sup> but the reservation should be explicitly made.<sup>3</sup>

**13. Discharge of Surety by Estoppel of Creditor.**—A creditor is precluded from enforcing an obligation against a surety where the surety, acting upon an agreement with the creditor or upon representations made by him, foregoes the purpose of seeking relief or of taking indemnity at the time when it may be had.<sup>4</sup> Thus, if the surety withdraws an appeal on the promise of the creditor to look alone to the principal,<sup>5</sup> or releases security already in his hands,<sup>6</sup> or refrains from giving the creditor notice to sue,<sup>7</sup> or gives merely a verbal instead of a written notice,<sup>8</sup> he is in effect discharged, and the creditor cannot thereafter hold him liable. If the creditor tells the surety that the debt is paid or secured and that he need trouble himself no further, the surety may safely act upon the representation,<sup>9</sup> as it would be a fraud on the part of the creditor were he allowed to call on the surety after lulling him into a sense of security and causing him to refrain from exerting himself to get indemnity.<sup>10</sup>

**A Bare Statement or Promise** which does not cause the surety to slumber on his rights or to alter his position for the worse will not estop the principal.<sup>11</sup>

**Some Detriment Must Be Incurred or Benefit Forborne** by the surety or there will be no estoppel. Forbearance to sue when nothing could be recovered is no detriment to the surety. Hence no estoppel arises unless the principal is solvent at the time the surety foregoes the right to proceed against him to obtain indemnity or to compel the payment of the debt.<sup>12</sup>

1. *McClure v. Fraser*, 9 L. J. Q. B. 60. See also *Wyke v. Rogers*, 1 DeG. M. & G. 408.

**Release under Seal.**—*Ex p. Glendinning*, Buck 517; *Ex p. Carstairs*, Buck 560.

2. *Webb v. Hewitt*, 3 Kay & J. 438.

**3. Explicit Agreement Necessary.**—*Overend v. Oriental Financial Co.*, L. R. 7 H. L. 348. See also *Hall v. Hutchons*, 3 Myl. & K. 426.

The words "without prejudice to any security" are not sufficient to reserve a right of action against a surety. *Boultsbee v. Stubbs*, 18 Ves. Jr. 20.

**4. Estoppel of the Creditor.**—*Bullard v. Ledbetter*, 59 Ga. 109; *Auchampaugh v. Schmidt*, 80 Iowa 186; *Wolf v. Madden*, 82 Iowa 114; *Craig v. Cox*, 2 Bibb (Ky.) 309; *Harris v. Brooks*, 21 Pick. (Mass.) 195, 32 Am. Dec. 254; *Heitsch v. Cole*, 47 Minn. 320; *Greenwood First Nat. Bank v. Wilbern*, (Neb. 1903) 93 N. W. Rep. 1002. See also *McCarter v. Turner*, 49 Ga. 309.

**Where a Payee of a Note Causes the Surety to Forego Taking Security** when he would have taken it, the surety is released, without regard to the care or negligence of the payee. *Ft. Scott First Nat. Bank v. Lillard*, 55 Mo. App. 675; *Kesler v. Linker*, 82 N. Car. 456.

**5. Surety Withdrawing Appeal.**—*Wimberly v. Adams*, 51 Ga. 423.

**6. Surety Releasing Security.**—*Mathews v. Everett*, 84 Ga. 472; *Schuff v. Germania Safety-Vault, etc. Co.*, (Ky. 1897) 43 S. W. Rep. 229. See also *Hope v. Eddington*, Hill & D. Supp. (N. Y.) 143.

**Extent of Discharge.**—Where the surety releases indemnity he is discharged only to the extent of his damage. *Rowley v. Jewett*, 56 Iowa 492.

**7. Foregoing an Intention to Give Notice.**—*Casson v. Rasback*, 36 Ill. App. 40; *Chambers v. Cochran*, 18 Iowa 167; *Triplet v. Randolph*, 46 Mo. App. 569; *Beasley v. Boothe*, 3 Tex. Civ. App. 98.

**8. Surety Refraining from Giving Written Notice.**—*Clark v. Osborn*, 41 Ohio St. 28.

**9. Representation that Debt Is Paid or Secured.**—*Brooking v. Farmers Bank*, 83 Ky. 431; *Baker v. Briggs*, 8 Pick. (Mass.) 122, 19 Am. Dec. 311; *Carpenter v. King*, 9 Met. (Mass.) 511, 43 Am. Dec. 405; *Triplet v. Randolph*, 46 Mo. App. 569; *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116, 12 Am. Rep. 67; *Miller v. Knight*, 6 Baxt. (Tenn.) 503. See also *Waters v. Creagh*, 4 Stew. & P. (Ala.) 410; *Schuff v. Germania Safety-Vault, etc. Co.*, (Ky. 1897) 43 S. W. Rep. 229.

**Representation Induced by Fraud of Principal No Estoppel.**—*Central Sav. Bank v. Danckmeyer*, 70 Mo. App. 168.

**10. Sureties are discharged** where the creditor promises to resort to property of the principal for his debt, and thereby induces them to forego their own remedy until the holder is insolvent and the property out of reach. *Bullard v. Ledbetter*, 59 Ga. 109.

**11. Noninjurious Representation.**—*Gillon v. Kentucky Nat. Bank*, (Ky. 1888) 8 S. W. Rep. 193; *Foster v. Walker*, 34 Miss. 365; *Driskell v. Mateer*, 31 Mo. 325, 80 Am. Dec. 105; *Mahurin v. Pearson*, 8 N. H. 539; *Barney v. Clark*, 46 N. H. 514; *Howe Mach. Co. v. Farrington*, 82 N. Y. 121. *Compare* *Blodgett v. Bickford*, 30 Vt. 731, 73 Am. Dec. 334.

**12. Burden of Proof.**—Where the surety alleges that, relying on the statement of the creditor to the effect that the note was paid, he refrained from making an attempt to obtain in-

An Estoppel by Misrepresentation in Favor of One Surety will not be extended so as to release another.<sup>1</sup>

**14. Condition Subsequent — Diversion or Misapplication of Proceeds.** — Not infrequently it is expressly agreed between the surety and the principal debtor, at the time the relation of suretyship is entered into, that money to be raised on their joint obligation shall be used for a specified purpose. Agreements of this kind give the surety a right to insist that the proceeds shall be applied in accordance therewith,<sup>2</sup> and a subsequent holder with notice cannot enforce the obligation against the surety if the condition be not fulfilled. Liability in such cases is, however, usually determined on principles applicable to commercial paper, and the subject is elsewhere fully treated.<sup>3</sup>

**VII. RIGHTS AND REMEDIES AS BETWEEN PRINCIPAL AND CREDITOR.** — The principal is entitled, as against the creditor, to be credited, upon the full amount of the indebtedness, with any sum paid thereon by the surety.<sup>4</sup> But a sum deposited by the surety with the creditor merely as an indemnity and not as a payment will not release the principal *pro tanto*.<sup>5</sup>

A Bill in Equity will lie against the principal, though there be an adequate remedy at law against the surety.<sup>6</sup>

**Effect of Release as Surety.** — Within the familiar principle that the release of one joint debtor will discharge the other only when the effect of the release will be to increase the original responsibilities of the latter, the release of a surety does in no wise increase the legal or equitable responsibilities of the principal and, therefore, does not discharge him from liability to the creditor.<sup>7</sup> Nor is the operation of this rule excluded by the merger of the original contract of indebtedness in a joint judgment against principal and surety.<sup>8</sup>

**VIII. SURETIES ON OFFICIAL BOND — 1. Duration of Liability — a. IN GENERAL.** — A surety is not liable for defaults of the officer prior to the execution of the bond, unless a statute<sup>9</sup> or the bond expressly imposes such obligation.<sup>10</sup>

demnity, he must show that indemnity could in fact have been secured and that he purposed to do so. *Sioux Valley State Bank v. Kellogg*, 81 Iowa 124.

**Receiver of National Bank.** — The receiver of a national bank, being an officer of restricted authority, does not estop himself from collecting the full amount of a note by allowing a set-off contrary to law. *Beckham v. Shackelford*, 8 Tex. Civ. App. 660.

For an instance of estoppel arising from a failure on the part of a creditor to appeal from an order discharging a surety, see *Barton v. Thompson*, 66 Iowa 526.

1. *Casson v. Rasback*, 36 Ill. App. 40.

2. **Application of Proceeds.** — *Bonser v. Cox*, 4 Beav. 379; *Chaffe v. Taliaferro*, 58 Miss. 545; *Lee v. Highland Bank*, 2 Sandf. Ch. (N. Y.) 311; *Denniston v. Bacon*, 10 Johns. (N. Y.) 198; *Eck v. Schuermeyer*, (Tex. Civ. App. 1895) 29 S. W. Rep. 241.

3. See the title ACCOMMODATION PAPER, vol. 1, p. 379 *et seq.*

4. **Principal to Be Credited with Amount Paid by Surety.** — *Morse v. Williams*, 22 Me. 17; *Bancroft v. Pearce*, 27 Vt. 668.

5. *Brown v. Whittington*, 39 Oregon 300.

6. *Middletown Bank v. Russ*, 3 Conn. 135.

7. **Release of Surety Does Not Release Principal.** — *Mortland v. Himes*, 8 Pa. St. 265; *Baldwin v. Ralston*, 6 Pa. Dist. 198.

**Release of Surety by Surrender of Securities.** — *Cummings v. Little*, 45 Me. 183.

**Release of Surety by Change in Contract.** — *Clinton Bank v. Ayres*, 16 Ohio 282.

8. *Mortland v. Himes*, 8 Pa. St. 265.

9. **Defaults Prior to Execution of Bond.** — *U. S. v. Ellis*, 4 Sawy. (U. S.) 590; *McPhillips v. McGrath*, 117 Ala. 549.

10. **United States.** — *U. S. v. Giles*, 9 Cranch (U. S.) 212; *Myers v. U. S.*, 1 McLean (U. S.) 493; *U. S. v. Linn*, 2 McLean (U. S.) 501, 1 How. (U. S.) 104; *Farrar v. U. S.*, 5 Pet. (U. S.) 373; *U. S. v. Boyd*, 15 Pet. (U. S.) 187.

**Alabama.** — *Townsend v. Everett*, 4 Ala. 607; *Governor v. Gibson*, 14 Ala. 326; *McPhillips v. McGrath*, 117 Ala. 549.

**Arkansas.** — *Faulkner v. State*, 9 Ark. 15.

**Illinois.** — *Schoeneman v. Martyn*, 68 Ill. App. 412.

**Iowa.** — *Bessinger v. Dickerson*, 20 Iowa 260; *Warren County v. Ward*, 21 Iowa 84; *Independent School Dist. v. McDonald*, 39 Iowa 564; *Held v. Bagwell*, 58 Iowa 139.

**Kansas.** — *Harvey County v. Munger*, 24 Kan. 205.

**Louisiana.** — *Board of Administrators v. McKowen*, 48 La. Ann. 251, 55 Am. St. Rep. 275.

**Massachusetts.** — *Rochester v. Randall*, 105 Mass. 295, 7 Am. Rep. 519; *Thomas v. Blake*, 126 Mass. 320.

**Montana.** — *Missoula County v. McCormick*, 4 Mont. 115.

**Nevada.** — *State v. Rhoades*, 6 Nev. 352.

**New Jersey.** — *Patterson v. Freehold Tp.*, 38 N. J. L. 255; *State v. Sooy*, 39 N. J. L. 539.

**New York.** — *Bissell v. Saxton*, 66 N. Y. 55.

**Tennessee.** — *State v. Polk*, 14 Lea (Tenn.) 1.

The surety is answerable for moneys received by him of his predecessor, or previously collected by him, if such moneys were actually on hand at the time of the giving of the bond.<sup>1</sup> If the office of the principal is for a definite term,<sup>2</sup>

*Texas.*—Hetten *v.* Lane, 43 Tex. 279; Cole *v.* Crawford, 69 Tex. 124.

When an Act of Congress requires a bond to be given to operate prospectively only, a bond in terms retrospective, given under such a statute, is void so far as it exceeds the statutory requirements. *Armstrong v. U. S.*, Pet. (C. C.) 46. See also *U. S. v. Brown*, Gilp. (U. S.) 155.

**From the Time of Delivery of Bond.**—Green *v.* Wardwell, 17 Ill. 278, 63 Am. Dec. 366; Reilly *v.* Dodge, 42 Hun (N. Y.) 646, 4 N. Y. St. Rep. 446.

**From the Time of Approval of Bond.**—*U. S. v. Le Baron*, 19 How. (U. S.) 73 (under the Act of Congress relating to the particular office). See also *Bruce v. State*, 11 Gill & J. (Md.) 382; *Green v. Wardwell*, 17 Ill. 278, 63 Am. Dec. 366.

**Provisions of the Bond, Executed After the Term of Office Began**, have been held to make surety liable for money previously collected. *Hatch v. Attleborough*, 97 Mass. 533.

**When the Bond Was Antedated**, being given shortly before the expiration of the term, the surety's liability as for the whole term. *Barnet v. Abbott*, 53 Vt. 120.

**1. Money on Hand at Time of Giving Bond.**—*Mendocino County v. Morris*, 32 Cal. 145; *Hartford v. Franey*, 47 Conn. 79; *State v. Sooy*, 39 N. J. L. 539; *Woolard v. Favorite*, 9 Ohio Cir. Dec. 686; *Hart v. Guardians of Poor*, 81\* Pa. St. 466. See *Whitmire v. Langston*, 11 S. Car. 381.

**For Money Which Came into the Officer's Hands Before the Execution of the Bond**, the surety is not liable. *State v. Van Pelt*, 1 Ind. 304. See *Fuller v. Jackson County*, 2 Kan. 440. Unless the failure to pay over, or defalcation, took place after that time. *Warren County v. Ward*, 21 Iowa 84.

**For Money Received on the Day the Bond Was Executed**, the surety was held liable. *Miller v. Com.* 8 Pa. St. 444.

**2. Surety Liable Only for Term of Office.**—*England.*—*Peppin v. Cooper*, 2 B. & Ald. 431; *St. Saviour's v. Bostock*, 2 B. & P. N. R. 179; *Hassell v. Long*, 2 M. & S. 363; *Arlington v. Merricke*, 2 Saund. 412.

*United States.*—*Bryan v. U. S.*, 1 Black (U. S.) 140; *U. S. v. Spencer*, 2 McLean (U. S.) 265; *U. S. v. Kirkpatrick*, 9 Wheat. (U. S.) 720; *U. S. v. Nicholl*, 12 Wheat. (U. S.) 505.

*Alabama.*—*Montgomery v. Hughes*, 65 Ala. 201; *Cuthbert v. Huggins*, 21 Ala. 349.

*Arkansas.*—*Christian v. Ashley County*, 24 Ark. 142.

*Colorado.*—*Bonney v. Robertson*, 6 Colo. App. 485; *People v. Jackson*, 16 Colo. App. 308.

*Delaware.*—*Wilmington v. Horn*, 2 Harr. (Del.) 190.

*Georgia.*—*McDonald v. Bradshaw*, 2 Ga. 248, 46 Am. Dec. 385.

*Illinois.*—*Ladd v. Cook County Tp.* 41, 80 Ill. 233; *People v. Toomey*, 122 Ill. 308; *People v. Foster*, 133 Ill. 496.

*Indiana.*—*Tuley v. State*, 1 Ind. 500; *Rany v. Governor*, 4 Blackf. (Ind.) 2; *Mullikin v. State*, 7 Blackf. (Ind.) 77.

*Iowa.*—*Wapello County v. Bigham*, 10 Iowa 39, 74 Am. Dec. 370.

*Kentucky.*—*Offutt v. Com.*, 10 Bush (Ky.) 212.

*Louisiana.*—*Board of Administrators v. McKowen*, 48 La. Ann. 251, 55 Am. St. Rep. 275.

*Massachusetts.*—*Bigelow v. Bridge*, 8 Mass. 275; *Amherst Bank v. Root*, 2 Met. (Mass.) 536.

*Mississippi.*—*Bennett v. State*, 58 Miss. 556.

*Missouri.*—*Moss v. State*, 10 Mo. 338, 47 Am. Dec. 116; *State v. Dailey*, 4 Mo. App. 172; *State v. Grimsley*, 19 Mo. 171.

*New Hampshire.*—*Dover v. Twombly*, 42 N. H. 59.

*New Jersey.*—*Patterson v. Freehold Tp.*, 38 N. J. L. 255; *Rahway v. Crowell*, 40 N. J. L. 207, 29 Am. Rep. 224; *Conover v. Middletown Tp.*, 42 N. J. L. 382; *People's Bldg., etc., Assoc. v. Wroth*, 43 N. J. L. 70.

*North Carolina.*—*Gregory v. Morisey*, 79 N. Car. 559; *Governor v. Montfort*, 1 Ired. L. (23 N. Car.) 155; *Holloman v. Langdon*, 7 Jones L. (52 N. Car.) 49; *Graham v. Buchanan*, 1 Winst. L. (60 N. Car.) 93.

*Ohio.*—*Stevens v. Allmen*, 19 Ohio St. 485.

*Oregon.*—*Baker City v. Murphy*, 30 Oregon 405.

*Pennsylvania.*—*Hutchinson v. Com.*, 6 Pa. St. 124; *Com. v. Baynton*, 4 Dall. (Pa.) 282; *Com. v. West*, 1 Rawle (Pa.) 29.

*South Carolina.*—*Commissioners of Public Accounts v. Greenwood*, 1 Desaus. (S. Car.) 450.

*Tennessee.*—*Crittenden v. Terrill*, 2 Head (Tenn.) 588.

*Virginia.*—*Com. v. Fairfax*, 4 Hen. & M. (Va.) 208.

*Wisconsin.*—*Fond du Lac v. Moore*, 58 Wis. 170.

But see *Baker v. Baldwin*, 48 Conn. 136; *State v. Wells*, 8 Nev. 105; *State v. Johnson*, 7 Ired. L. (29 N. Car.) 77. And see *Elkin v. People*, 4 Ill. 207, 36 Am. Dec. 541, and *Wooddell v. Bruffy*, 25 W. Va. 465, as to money collected by sheriff after expiration of term for land sold on execution while in office. See also *People v. Ring*, 15 Wend. (N. Y.) 623.

**A Bond for the Official Term and for Any Subsequent Term** for which the principal might thereafter be elected, was held valid and binding on the principal, and not discharged by the acceptance of a new bond for a subsequent term. *Castor's Appeal*, 2 Penny. (Pa.) 337.

**On An Appointment to Fill an Unexpired Term**, the surety on the bond for such term is not liable on the re-election of the principal. *People v. Aikenhead*, 5 Cal. 106; *Riddell v. School Dist. No. 72*, 15 Kan. 168; *Cook v. Clark*, (Ky. 1891) 16 S. W. Rep. 269. See also *Rany v. Governor*, 4 Blackf. (Ind.) 2. But see *People v. Beach*, 77 Ill. 52; *Akers v. State*, 8 Ind. 484.

**Bond of Deputy.**—*Hubert v. Mendheim*, 64 Cal. 213; *Thomas v. Summey*, 1 Jones L. (46

or a definite term is expressed in the obligation, it is generally presumed that the surety intends to guarantee the due performance by the principal of the duties of the office for such term only, and the surety is not liable for acts committed after the expiration of the term.<sup>1</sup> But if the office is for an indefinite and not a fixed period of time, the surety on a bond, which does not contain any stipulation limiting the period for which he shall be liable, is liable so long as the principal shall continuously hold the office.<sup>2</sup>

Where the Term of Office Is Extended by Statute After the Execution of the Bond, the sureties thereon are not liable for the faults occurring during the extended term, though the statutes provide that the officer shall continue in office until his successor is elected and qualified,<sup>3</sup> and though the bond is conditioned for the performance of such additional duties as might thereafter be imposed upon the officer, as such condition only applies to such duties as might be required to be performed during the period of liability fixed by the bond.<sup>4</sup>

Under Statutes Continuing the Term of an Office until a Successor should be elected or appointed and qualified, there is a conflict of authority as to how long the liability of the surety continues. In some jurisdictions, it is held that the liability of the surety continues subsequent to the expiration of the original term, so long as the principal holds over;<sup>5</sup> in other jurisdictions it is held that the liability of the surety under such a statute continues for such a reasonable period as with due diligence would enable the successor to be appointed and qualified.<sup>6</sup>

N. Car.) 554; *Munford v. Rice*, 6 Munf. (Va.) 81.

But see as to Deputy Tax Collector, *Perry v. Campbell*, 63 N. Car. 257.

**1. Surety Liable for Term Expressed in Bond.** — *Oswald v. Berwick-upon-Tweed*, 5 H. L. Cas. 856; *Montgomery v. Hughes*, 65 Ala. 201; *Miller v. Macoupin County*, 7 Ill. 50; *Independent School Dist. v. McDonald*, 39 Iowa 564; *District Tp. v. McCord*, 54 Iowa 346; *State v. Finn*, 98 Mo. 532, 14 Am. St. Rep. 654.

When the Bond Is Conditioned for the Discharge of the Duties till a Successor is elected and qualified, it has been held in the following cases that the liability of the surety continues until that event. *Akers v. State*, 8 Ind. 484; *Laurium v. Mills*, 129 Mich. 536; *Camden v. Greenwald*, 65 N. J. L. 458 (for a reasonable time after the expiration of his term). In the following cases it was held that, notwithstanding such a recital in the bond, it covers only the official acts of the year for which it was given. *Norridgewock v. Hale*, 80 Me. 362; *Com. v. Fairfax*, 4 Hen. & M. (Va.) 208.

**Bond of Deputy.** — *Williams v. Miller, Kirby (Conn.)* 189. See *Royster v. Leake*, 2 Munf. (Va.) 280.

**2. Liability When Term of Office Is Indefinite.** — *Curling v. Chalklen*, 3 M. & S. 502; *Richardson School Fund v. Dean*, 130 Mass. 242; *Camden v. Greenwald*, 65 N. J. L. 458; *State v. Baldwin*, 14 S. Car. 135; *Krutschmitt v. Houck*, 6 Nev. 163; *Coplin v. McCalley*, 1 Leigh (Va.) 280, 19 Am. Dec. 748. See *Lynn v. Cumberland*, 77 Md. 449; *Daly v. Com.*, 75 Pa. St. 331.

*3. King County v. Ferry*, 5 Wash. 536, 34 Am. St. Rep. 880.

**Contra.** — *Com. v. Drewry*, 15 Gratt. (Va.) 1, under a constitutional provision that the officer shall continue to discharge the duties of the office until his successor is qualified.

*4. Brown v. Lattimore*, 17 Cal. 93.

**5. Liability Held to Continue While Principal Holds Over** — *United States*. — *U. S. v. Jameson v. McCrary* (U. S.) 620, 16 Fed. Rep. 331.

*California*. — *People v. Aikenhead*, 5 Cal. 106; *Placer County v. Dickerson*, 45 Cal. 12; *Prief v. De La Montanya*, (Cal. 1889) 22 Pac. Rep. 171.

*Georgia*. — *Cuthbert v. Brooks*, 49 Ga. 179.

*Indiana*. — *Akers v. State*, 8 Ind. 484; *Butler v. State*, 20 Ind. 169; *State v. Berg*, 50 Ind. 496; *Ranly v. Governor*, 4 Blackf. (Ind.) 2.

*Mississippi*. — *Thompson v. State*, 37 Miss. 518.

*Missouri*. — *Long v. Seay*, 72 Mo. 648; *State v. Kurtzeborn*, 78 Mo. 98, affirming 9 Mo. App. 245; *Lionberger v. Krieger*, 13 Mo. App. 313; *St. Louis Union Soc. v. Mitchell*, 26 Mo. App. 206.

*Nevada*. — *State v. Wells*, 8 Nev. 105.

*North Carolina*. — *Gully v. Daniel*, 6 Jones L. (51 N. Car.) 444; *Snuggs v. Stone*, 7 Jones L. (52 N. Car.) 382.

*Oregon*. — *Eddy v. Kincaid*, 28 Oregon 537; *Baker City v. Murphy*, 30 Oregon 405.

*South Carolina*. — *Treasurers v. Lang*, 2 Bailey L. (S. Car.) 430.

*Virginia*. — *Com. v. Drewry*, 15 Gratt. (Va.) 1.

*West Virginia*. — *Wheeling v. Black*, 25 W. Va. 266.

**6. Liability Held to Continue for a Reasonable Time Only** — *Alabama*. — *Montgomery v. Hughes*, 65 Ala. 201.

*Illinois*. — *Hewes v. People*, 48 Ill. App. 439. *Iowa*. — *Wapello County v. Bigham*, 10 Iowa 39, 74 Am. Dec. 370.

*Louisiana*. — *State v. Powell*, 40 La. Ann. 241; *State v. Lake*, 45 La. Ann. 1207; *Board of Administrators v. McKowen*, 48 La. Ann. 251, 55 Am. St. Rep. 275.

*Maryland*. — *Heultt v. State*, 6 Har. & J. (Md.) 95.

On the Resignation, Suspension, or Removal of the principal from the office, his surety ceases to be responsible for any act of his done thereafter.<sup>1</sup>

*b. DIFFERENT BONDS GIVEN DURING SAME TERM — (1) Substitution of New Bond — (a) Liability of Surety on Original Bond.* — When a new bond has been filed by an officer, in compliance with an order made on due application of the surety on the original bond, under statutory provisions, the liability of the surety on the original bond ceases when the officer gives the new bond in accordance with the order or when the office is declared vacant for a failure so to do, for all subsequent acts.<sup>2</sup> To work a release of the surety on the original bond from liability for future defaults, the provisions of the statute must be followed;<sup>3</sup> such surety is not released when a voluntary bond is given for which he has not made application.<sup>4</sup>

*(b) Liability of Surety on Substituted Bond.* — The liability of a surety on a new bond, given in substitution of a prior bond during the same term, follows the general rule that, unless the bond given is retrospective in its terms, it does not cover past delinquencies.<sup>5</sup> A bond given in lieu of a prior bond, in general terms conditioned that the principal shall well and faithfully in all things discharge the duties of the office during his continuance in said office, was held to be retrospective in its operation.<sup>6</sup>

*(2) Additional Bonds — (a) Defaults Prior to Execution of New Bond.* — The general rule is that a surety on an additional bond is not liable for any default occurring before he became surety, unless the bond was specially so drawn as to cover past as well as prospective delinquencies.<sup>7</sup>

*Massachusetts.* — Chelmsford Co. v. Demarest, 7 Gray (Mass.) 1.

*Minnesota.* — Scott County v. Ring, 29 Minn. 398.

*New Jersey.* — Rahway v. Crowell, 40 N. J. L. 207, 29 Am. Rep. 224.

*New Hampshire.* — Dover v. Twombly, 42 N. H. 59.

*Ohio.* — State v. Crooks, 7 Ohio (pt. ii.) 221.

*Washington.* — King County v. Ferry, 5 Wash. 536, 34 Am. St. Rep. 880.

*Wisconsin.* — Omro v. Kaime, 39 Wis. 468.

See *Wilmington v. Horn*, 2 Harr. (Del.) 190; *Riddel v. School Dist. No. 72*, 15 Kan. 168, that the liability ceases with the expiration of the term.

*When the "Reasonable Period" Has Been Fixed by Law*, as, that the bond of the successor must be given within a certain time from the receipt of his commission, the liability of the surety is extended for such time. *State v. Lake*, 45 La. Ann. 1207.

**1. Resignation or Removal of Officer.** — U. S. v. Wright, 1 McLean (U. S.) 509, 28 Fed. Cas. No. 16,775; *Gilbert v. Luce*, 11 Barb. (N. Y.) 91; *Atkins v. Baily*, 9 Yerg. (Tenn.) 111. See *Rochereau v. Jones*, 29 La. Ann. 82; *Larned v. Allen*, 13 Mass. 295; *Colerain v. Bell*, 9 Met. (Mass.) 499, as to a collector of taxes.

**2. Liability of Surety on Original Bond — United States.** — *Alvord v. U. S.*, 13 Blatchf. (U. S.) 279; *U. S. v. Maurice*, 2 Brock. (U. S.) 96; *U. S. v. Wardwell*, 5 Mason (U. S.) 82.

*Alabama.* — *Armstrong v. Pugh*, 19 Ala. 209.

*Ohio.* — *Stevens v. Allmen*, 19 Ohio St. 485.

*Missouri.* — *State v. Nolan*, 99 Mo. 569.

*South Carolina.* — *State v. Moses*, 20 S. Car. 465.

*Texas.* — *Loyd v. Ft. Worth*, 82 Tex. 249.

*Kentucky.* — *Jones v. Gallatin County*, 78 Ky. 491.

*Wyoming.* — *Roberts v. Laramie County*, 8 Wyo. 177.

**For Liability Already Incurred**, the court has no power to release the surety. *Ex p. Talbot*, 32 Ark. 424. See also *Loyd v. Ft. Worth*, 82 Tex. 249.

**Under a Statute** providing that on giving the new bond, the former surety "shall not be bound for any act of his thereafter," such former surety was held released from liability for default prior to the execution of the new bond. *Moore v. Potter*, 9 Bush (Ky.) 357.

**3. Provisions of Statute Must Be Complied with.** — *People v. Evans*, 29 Cal. 429; *Rodes v. Com.*, 6 B. Mon. (Ky.) 359; *Sheeley v. Wiggs*, 32 Mo. 398; *McGhee v. Anderson*, 11 Humph. (Tenn.) 595; *State v. Wells*, 61 Tex. 562. But see *Kempner v. Galveston County*, 73 Tex. 216, that the principal may waive statutory notice.

**4. Hickerson v. Price**, 2 Heisk. (Tenn.) 623.

**5. Liability of Surety on New Bond.** — *Thompson v. Dickerson*, 22 Iowa 360; *Jones v. Gallatin County*, 78 Ky. 491; *State v. Finn*, 23 Mo. App. 290; *State v. Finn*, 98 Mo. 532, 14 Am. St. Rep. 654; *State v. Moses*, 20 S. Car. 465; *Bramley v. Wilds*, 9 Lea (Tenn.) 674. See *Miller v. Moore*, 3 Humph. (Tenn.) 189.

**The Presumption Is** that the default occurred during the life of the last bond. *Woolard v. Favorite*, 9 Ohio Cir. Dec. 686.

**6. Substituted Bonds Given in General Terms.** — *State v. Finn*, 23 Mo. App. 290; *State v. Finn*, 98 Mo. 532, 14 Am. St. Rep. 654.

**7. Defaults Prior to Execution of New Bond.** — *Bessinger v. Dickerson*, 20 Iowa 260; *Warren County v. Ward*, 21 Iowa 84.

See also *State v. McDannel*, (Tenn. Ch. 1900) 59 S. W. Rep. 451, in which the additional bond covered the entire term in express terms; and *Mahaska County v. Ingalls*, 16 Iowa



(b) *Defaults After Execution of New Bond.* — On the giving an additional bond, the liability of the surety on the new bond and of the surety on the original bond is cumulative, and the sureties on the two bonds are liable for subsequent defaults.<sup>1</sup>

(3) *Annual Bonds.* — When an officer, holding for a longer term than one year, is required by statute to give annual bonds, there is conflict in the cases as to the liability of the sureties on the respective bonds. It has been held on the one hand that such bonds are cumulative,<sup>2</sup> and on the other hand that the surety of each year is responsible for the defaults of his principal during the time between giving the bond passed by him and the execution of the next year's bond.<sup>3</sup>

c. *BONDS GIVEN FOR SUCCESSIVE TERMS* — (1) *In General.* — The general rule that a surety on an official bond is only liable for defaults of his principal occurring during the term for which he is surety applies where the principal is an incumbent of the office to which the bond relates for successive terms, and gives successive bonds with different sets of sureties.<sup>4</sup>

(2) *As to Balance in Hands of Officer from Previous Term* — (a) *Where Balance Actually Exists.* — As to moneys or property remaining in the possession of an officer serving for successive terms, at the beginning of a new term, which were, however, received in a previous term, the sureties for the new term and not those for the previous term are generally liable. And this liability continues throughout the new term or until such moneys or property are turned over to the proper authorities.<sup>5</sup>

81, in which case the additional bond was required by reason of additional duties imposed by statute.

But see *Longmire v. Fain*, 89 Tenn. 393, under a statute providing that "every such additional bond is of like force and obligation, \* \* \* and subject to the same remedies as the first official bond;" and *McClaskey v. Barr*, 79 Fed. Rep. 408, an additional bond for costs.

1. *Defaults After Execution of New Bond.* — *U. S. v. Hoyt*, 1 Blatchf. (U. S.) 328; *Postmaster-Gen. v. Munger*, 2 Paine (U. S.) 189; *Gilbert v. Board of Education*, 45 Kan. 31, 23 Am. St. Rep. 700; *Ketler v. Thompson*, 13 Bush. (Ky.) 287; *Stoner v. Keith County*, 48 Neb. 279; *State v. Crooks*, 7 Ohio (pt. ii.) 221; *Harris v. Ferguson*, 2 Bailey L. (S. Car.) 397. See *Holt County v. Scott*, 53 Neb. 176.

2. *Annual Bonds.* — *Schuff v. Pflanz*, 99 Ky. 97; *Moore v. Boudinot*, 64 N. Car. 190; *Poole v. Cox*, 9 Ired. L. (31 N. Car.) 69, 49 Am. Dec. 410; *Maddox v. Shacklett*, (Tenn. Ch. 1895) 36 S. W. Rep. 731.

*On Failure to Renew Bond*, surety on first year's bond was held liable for the whole term, notwithstanding a statute declared that a failure to renew should create a vacancy. *Vann v. Pipkin*, 77 N. Car. 408; *Dunphy v. People*, 25 Mich. 10.

3. *Richardson v. Bean*, 5 Port. (Ala.) 27; *Heuitt v. State*, 6 Har. & J. (Md.) 95.

4. *Surety Not Liable for Defaults in Prior or Subsequent Term* — *United States*. — *Farrar v. U. S.*, 5 Pet. (U. S.) 373; *U. S. v. Boyd*, 15 Pet. (U. S.) 187; *Jones v. U. S.*, 7 How. (U. S.) 681; *Bruce v. U. S.*, 17 How. (U. S.) 437; *U. S. v. Stone*, 106 U. S. 529; *U. S. v. Wardwell*, 5 Mason (U. S.) 82, 28 Fed. Cas. No. 16,640.

*Alabama.* — *Townsend v. Everett*, 4 Ala. 607; *Governor v. Gibson*, 14 Ala. 326; *McPhillips v. McGrath*, 117 Ala. 549.

*Arkansas.* — *State v. Churchill*, 48 Ark. 426.

*California.* — *Hubert v. Mendheim*, 64 Cal. 213.

*Colorado.* — *Bonney v. Robertson*, 6 Colo. App. 485.

*District of Columbia.* — *U. S. v. West*, 8 App. Cas. (D. C.) 59.

*Illinois.* — *Potter v. School Trustees*, 11 Ill. App. 280; *Bogardus v. People*, 52 Ill. App. 179.

*Indiana.* — *Gonser v. State*, 30 Ind. App. 508; *Rogers v. State*, 99 Ind. 218.

*Louisiana.* — *State v. Powell*, 40 La. Ann. 241.

*Massachusetts.* — *Rochester v. Randall*, 105 Mass. 295, 7 Am. Rep. 519; *Egremont v. Benjamin*, 125 Mass. 15.

*Michigan.* — *Paw Paw Tp. v. Eggleston*, 25 Mich. 36; *Detroit v. Weber*, 29 Mich. 24.

*Missouri.* — *State v. Alsup*, 91 Mo. 172.

*Nebraska.* — *Van Sickle v. Buffalo County*, 13 Neb. 103, 42 Am. Rep. 753.

*New Jersey.* — *State v. Sooy*, 39 N. J. L. 542.

*New York.* — *Bissell v. Saxton*, 66 N. Y. 55; *Board of Education v. Fonda*, 77 N. Y. 350; *Kellum v. Clark*, 97 N. Y. 390.

*South Carolina.* — *Commissioners of Public Accounts v. Greenwood*, 1 Desaus. (S. Car.) 450; *Street v. Laurens*, 5 Rich. Eq. (S. Car.) 227.

*Wisconsin.* — *Vivian v. Otis*, 24 Wis. 518, 1 Am. Rep. 199.

5. *Sureties for New Term Liable for Balance on Hand* — *United States*. — *U. S. v. Irving*, 1 How. (U. S.) 250; *U. S. v. Boyd*, 15 Pet. (U. S.) 187; *Bruce v. U. S.*, 17 How. (U. S.) 437; *U. S. v. Stone*, 106 U. S. 529.

*Alabama.* — *Moore v. Madison County*, 38 Ala. 670.

*Arkansas.* — *Haley v. Petty*, 42 Ark. 392.

*Illinois.* — *People v. Shannon*, 10 Ill. App. 355.

*Iowa.* — *Boone County v. Jones*, 54 Iowa 706, 37 Am. Rep. 229; *District Tp. v. Morris*, 91 Iowa 198, 51 Am. St. Rep. 338.

(b) *Previous Misappropriation of Alleged Balance.* — A surety for a new term of an officer serving for successive terms is liable for any balance which is chargeable to such officer at the beginning of the new term as shown by his accounts or otherwise, although in fact such balance does not really exist, but was misappropriated during the previous term. But by the weight of authority such liability is *prima facie* only and may be overcome by evidence showing that such balance never really existed at the beginning of the new term.<sup>1</sup> There is some authority, however, to the effect that where the principal reports at the beginning of his new term a balance on hand from the previous term his surety for the new term will be estopped from afterwards showing that there had been a misappropriation of such alleged balance during the previous term.<sup>2</sup>

(3) *Application of Payments to Defaults of Previous Term — Application Made by Principal.* — Where moneys received by a principal in his subsequent term are applied by him to payment of defaults of his previous term, the sureties of the previous term are released from liability for such defaults and the sureties of the subsequent term are liable for the moneys so received and misapplied, provided such misapplication of moneys was not known to the proper government authorities receiving such payments.<sup>3</sup>

*Application Made by Government.* — But where the moneys received by the principal in the subsequent term are turned over by him to the proper government authorities and are applied by them to the defaults of the previous term a dif-

*Nebraska.* — *State v. Hill*, 47 Neb. 456; *Bush v. Johnson County*, 48 Neb. 1, 58 Am. St. Rep. 673; *Paxton v. State*, 59 Neb. 460, 80 Am. St. Rep. 689.

*New Jersey.* — *State v. Sooy*, 39 N. J. L. 542.

*New York.* — *Board of Education v. Fonda*, 77 N. Y. 350.

*North Carolina.* — *Snuggs v. Stone*, 7 Jones L. (52 N. Car.) 382.

*Tennessee.* — *Yoakley v. King*, 10 Lea (Tenn.) 67.

*West Virginia.* — *Parsons v. Miller*, 46 W. Va. 334.

*Wisconsin.* — *Vivian v. Otis*, 24 Wis. 518, 1 Am. Rep. 199.

1. *Surety for New Term Prima Facie Liable — United States.* — *U. S. v. Irving*, 1 How. (U. S.) 250; *U. S. v. Earhart*, 4 Sawy. (U. S.) 245; *U. S. v. Stone*, 106 U. S. 530; *U. S. v. Earhart*, 4 Sawy. (U. S.) 245, 25 Fed. Cas. No. 15,018; *Bosbyshell v. U. S.*, (C. C. A.) 77 Fed. Rep. 944.

*California.* — *Heppe v. Johnson*, 73 Cal. 265.

*District of Columbia.* — *U. S. v. Dudley*, 21 D. C. 337.

*Florida.* — *Mutual Loan, etc., Assoc. v. Miles*, 19 Fla. 127.

*Illinois.* — *Kagay v. School Trustees*, 68 Ill. 75; *People v. Shannon*, 10 Ill. App. 364; *Pape v. People*, 19 Ill. App. 24.

*Indiana.* — *Goodwine v. State*, 81 Ind. 109.

*Iowa.* — *District Tp. v. Morris*, 91 Iowa 198, 51 Am. St. Rep. 338, *distinguishing* *Boone County v. Jones*, 54 Iowa 699, 37 Am. Rep. 229; *Webster County v. Hutchinson*, 60 Iowa 721; *Carroll County v. Ruggles*, 69 Iowa 269, 58 Am. Rep. 223; *Bockenstedt v. Perkins*, 73 Iowa 23, 5 Am. St. Rep. 652.

*Louisiana.* — *Board of Administrators v. McKowen*, 48 La. Ann. 251, 55 Am. St. Rep. 275.

*Minnesota.* — *Pine County v. Willard*, 39 Minn. 125.

*Mississippi.* — *Lauderdale County v. Alford*, 65 Miss. 63, 7 Am. Rep. 637.

*Missouri.* — *State v. Taylor*, 6 Mo. App. 277; *State v. Lidwell*, 11 Mo. App. 567.

*Nebraska.* — *Stoner v. Keith County*, 48 Neb. 279; *Clark v. Douglas*, 58 Neb. 571; *Paxton v. State*, 59 Neb. 460, 80 Am. St. Rep. 689.

*North Carolina.* — *Snuggs v. Stone*, 7 Jones L. (52 N. Car.) 382.

*Ohio.* — *Kelly v. State*, 25 Ohio St. 567.

*Texas.* — *Arbuckle v. State*, 81 Tex. 191.

*Wisconsin.* — *Clark v. Wilkinson*, 59 Wis. 543.

2. *Surety Estopped from Denying Existence of Balance.* — *Territory v. Cook*, (Ariz. 1888) 17 Pac. Rep. 10; *Pinkstaff v. People*, 59 Ill. 148; *Morley v. Metamora*, 78 Ill. 394, 20 Am. Rep. 266; *Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182.

3. *Sureties for Subsequent Term Liable — England.* — *Gwynne v. Burnell*, 7 Cl. & F. 572; *Saunders v. Taylor*, 9 B. & C. 35, 17 E. C. L. 325.

*Indiana.* — *Cook v. State*, 13 Ind. 154.

*Louisiana.* — *State v. Hayes*, 7 La. Ann. 121; *State v. Powell*, 40 La. Ann. 234, 8 Am. St. Rep. 522; *Board of Administrators v. McKowen*, 48 La. Ann. 251, 55 Am. St. Rep. 275.

*Maryland.* — *Frownfelter v. State*, 66 Md. 80.

*Massachusetts.* — *Colerain v. Bell*, 9 Met. (Mass.) 499; *Egremont v. Benjamin*, 125 Mass. 15.

*Minnesota.* — *Pine County v. Willard*, 39 Minn. 125.

*New Jersey.* — *State v. Sooy*, 39 N. J. L. 539; *Sooy v. State*, 41 N. J. L. 394.

*Virginia.* — *Crawn v. Com.*, 84 Va. 282, 10 Am. St. Rep. 839.

If the misapplication was known, however, by the officer receiving the payments, the sureties of the prior term are not released and the sureties of the subsequent term are not liable for the moneys misapplied. *Metts v. State*, 68 Miss. 126.

ferent rule applies, it being held that such application does not release the sureties for the prior term and charge those for the subsequent term, although the principal concurred in the application.<sup>1</sup>

**2. Voluntary Bonds — a. BOND NOT REQUIRED BY STATUTE.** — There is some diversity of opinion as to the effect of a bond given by a public officer conditioned for the faithful performance of the duties of the office, when no bond is required by statute. According to the weight of authority, a bond so given binds both principal and sureties, provided it was given voluntarily and was not the result of coercion of any sort.<sup>2</sup> There are some decisions, however, to the effect that official bonds are void in the absence of a statute requiring their execution either as a condition precedent to entering on or continuing in the discharge of official duty, or as a duty which the officer is required to perform.<sup>3</sup>

**Coercion as Vitiating Bond.** — The decisions make a clear distinction between official bonds and other obligations in respect to the nature of the coercion that will operate to invalidate a bond. The general rule is that a contract will be regarded as entered into voluntarily and therefore binding on the promisor or obligor, unless he acted under the influence of such threats or physical force as constitute duress in law.<sup>4</sup> But in the case of official bonds the cases lay down the doctrine that an official bond given when no bond is required by law is void, if extorted by compulsion, though the compulsion falls short of duress.<sup>5</sup>

**b. BOND NOT IN CONFORMITY WITH STATUTE — (1) General Rule.** — It has frequently happened in respect to official bonds required by statute that there has been a want of strict conformity with the statutory provisions; and

**1. Sureties for Subsequent Term Liable.** — *Myers v. U. S.*, 1 McLean (U. S.) 493; *U. S. v. Irving*, 1 How. (U. S.) 250; *U. S. v. January*, 7 Cranch (U. S.) 572; *Postmaster Gen. v. Norvell*, Gilp. (U. S.) 107; *U. S. v. Able*, 15 Int. Rev. Rec. 41, 50, 24 Fed. Cas. No. 14,417; *Boring v. Williams*, 17 Ala. 512; *Elliott v. Allen*, (Ky. 1895) 30 S. W. Rep. 986; *Porter v. Stanley*, 47 Me. 515, 74 Am. Dec. 501. But see *McKee v. Com.*, 2 Grant Cas. (Pa.) 25.

**2. Voluntary Bonds — United States.** — *U. S. v. Tingey*, 5 Pet. (U. S.) 127; *U. S. v. Bradley*, 10 Pet. (U. S.) 357; *U. S. v. Howell*, 4 Wash. (U. S.) 623; *U. S. v. Garlinghouse*, 4 Bea. (U. S.) 194; *U. S. v. Humason*, 5 Sawy. (U. S.) 537.

**Connecticut.** — *Montville v. Houghton*, 7 Conn. 543.

**Maine.** — *Morrell v. Sylvester*, 1 Me. 248.

**New Jersey.** — *Sooy v. State*, 38 N. J. L. 324.

**North Carolina.** — *State v. Perkins*, 10 Ired. L. (32 N. Car.) 333.

**Ohio.** — *State v. Bowman*, 10 Ohio 445.

**Pennsylvania.** — *Com. v. Wolbert*, 6 Binn. (Pa.) 292, 6 Am. Dec. 452.

It is sufficient to make the bond a valid obligation that it is voluntarily given, and that the office and the duties assigned to the officer and covered by the bond are duly authorized by law. *U. S. v. Rogers*, 28 Fed. Rep. 607.

**Unauthorized Appointment of Officer.** — If an officer is appointed wholly without authority of law, an official bond given by him is void. Thus where a city court appointed a collector of city taxes when there was no statute authorizing such appointment it was held that a bond given by such collector was not binding on the sureties. *Com. v. Jackson*, 1 Leigh (Va.) 485.

And the same rule was applied to a bond given by a person who had been appointed constable when no authority existed for the appointment of such an officer. In such a case, as well as in a case where the office does not exist, the appointee is not a *de facto* officer but a mere usurper. *Tinsley v. Kirby*, 17 S. Car. 1.

As to the liability in general of the sureties of *de facto* officers, see the title *DE FACTO OFFICERS*, vol. 8, p. 807.

**3. Ex p. Buckley**, 53 Ala. 42; *State v. Heisey*, 96 Iowa 404; *State v. Bartlett*, 30 Miss. 624.

**4. See the title DURESS**, vol. 10, p. 320.

**5. Official Bond Avoided by Coercion.** — *U. S. v. Tingey*, 5 Pet. (U. S.) 115. In this case a bond imposing conditions not authorized by law was required of the officer on pain of removing him from his office, and the court held that the bond was void.

And in *Logan County v. Harvey*, 6 Okla. 629, it was held that there was such coercion as avoided the bond where the officer was required to give it as a condition precedent to his being allowed to enter on and discharge the duties of the office and receive the emoluments thereof.

But in *Moses v. U. S.*, 166 U. S. 571, it was held, where an administrative officer of the United States required of another, as a condition of his remaining in an office from which his superior had a right to remove him and substitute another in his stead, that he should give a bond for the faithful performance of the duties of such office, that a bond given by such officer for the purpose of retaining his office was a valid and binding obligation on him and his sureties though not required by any express statutory provision.

in such cases it has been uniformly held that the bond, though void as a statutory bond, is valid and enforceable as a common-law obligation.<sup>1</sup> The result of such nonconformity is that none of the statutory provisions for the enforcement of the bond are applicable, and no remedy can be had except according to the rules of the common law. Thus, the summary proceedings authorized to be taken in the case of official bonds will not lie,<sup>2</sup> and successive recoveries cannot be had, the liability of the obligors in a common-law bond being exhausted as soon as a recovery is had there.<sup>3</sup> So, too, if the obligee named in the bond is not according to the statute, his successors in office cannot sue on it by virtue of a provision that an official bond may be sued on by the successors of the officer to whom the bond is required to be made payable.<sup>4</sup>

**Instances of Nonconformity.** — According to this rule official bonds have been held to be enforceable as common-law bonds when voluntarily executed though they vary from the statutory directions as to the penalties and conditions imposed,<sup>5</sup> or are given to obligees other than the statute prescribes,<sup>6</sup> or are not given within the time required by law.<sup>7</sup>

(2) **Statutory Provisions.** — In some states it is provided by statute that noncompliance with the statute in executing an official bond required by law shall not affect its validity as such.<sup>8</sup>

**3. General and Special Bonds.** — The general rule is, that where an officer is required to perform a duty which is special in its nature, and he is required to give a special bond for the faithful performance of such duty, in the absence of any declaration that the general bondsmen shall also be liable, no such lia-

**1. Effect of Noncompliance in General with Statute** — *United States*. — *Jessup v. U. S.*, 106 U. S. 147.

*Iowa*. — *State v. Fredericks*, 8 Iowa 553.

*Kentucky*. — *Justices v. Smith*, 2 J. J. Marsh. (Ky.) 472.

*Massachusetts*. — *Sweetser v. Hay*, 2 Gray (Mass.) 49.

*Mississippi*. — *McCrosky v. Riggs*, 9 Smed. & M. (Miss.) 107.

*Missouri*. — *State v. O'Gorman*, 75 Mo. 370.

*North Carolina*. — *Governor v. Twitty*, 1 Dev. L. (12 N. Car.) 153; *Branch v. Elliot*, 3 Dev. L. (14 N. Car.) 86; *Vanhook v. Barnett*, 4 Dev. L. (15 N. Car.) 268; *State v. McAlpin*, 4 Ired. L. (26 N. Car.) 140.

*Tennessee*. — *Governor v. Allen*, 8 Humph. (Tenn.) 176.

**2. Governor v. Twitty**, 1 Dev. L. (12 N. Car.) 153; *Branch v. Elliot*, 3 Dev. L. (14 N. Car.) 86; *Miller v. Montgomery County*, 1 Ohio 271.

**3. Stephens v. Crawford**, 3 Ga. 499.

**4. Calhoun v. Lunsford**, 4 Port. (Ala.) 345; *Stevens v. Hay*, 6 Cush. (Mass.) 229; *Jones v. Wiley*, 4 Humph. (Tenn.) 146.

**5. Unauthorised Penalties and Conditions.** — *Kavanagh v. Saunders*, 8 Me. 422; *Morse v. Hodsdon*, 5 Mass. 314; *Freeman v. Davis*, 7 Mass. 200; *Burroughs v. Lowder*, 8 Mass. 373; *Matthews v. Lee*, 25 Miss. 417; *State v. Rhoades*, 6 Nev. 352; *McGowen v. Deyo*, 8 Barb. (N. Y.) 340; *Claasen v. Shaw*, 5 Watts (Pa.) 468, 30 Am. Dec. 338; *Treasurers v. Bates*, 2 Bailey L. (S. Car.) 376.

**An Excessive Bond** is enforceable to its full amount against both principal and sureties, unless such a construction is forbidden by statute, or a contrary instruction on the part of the obligors is shown. *Philadelphia v. Shallcross*, 14 Phila. (Pa.) 135, 37 Leg. Int. (Pa.) 273;

*M'Caraher v. Com.*, 5 W. & S. (Pa.) 21, 39 Am. Dec. 106.

**Superadded Conditions Regarded as Surplusage.** — Though incorrect recitals in the condition may sometimes vitiate the bond, as in case of the misdescription of a judgment in a writ of error or injunction bond, yet where a statutory bond merely superadds a condition which the statute does not require, its validity even as a statutory bond is not affected by the surplus matter, which will be rejected as surplusage. *Walker v. Chapman*, 22 Ala. 124. See also *Dixon v. U. S.*, 1 Brock. (U. S.) 177; *U. S. v. —*, 1 Brock. (U. S.) 195; *U. S. v. Brown, Gilp.* (U. S.) 155; *Armstrong v. U. S., Pet.* (C. C.) 46; *Howie v. State*, 1 Ala. 113; *Woods v. State*, 10 Mo. 698; *State v. Findley*, 10 Ohio 51; *Com. v. Laub*, 1 W. & S. (Pa.) 261; *Speck v. Com.*, 3 W. & S. (Pa.) 324.

**6. Unauthorised Obligees.** — *Justices v. Smith*, 2 J. J. Marsh. (Ky.) 472; *Thomas v. White*, 12 Mass. 369; *Sweetser v. Hay*, 2 Gray (Mass.) 49; *Farr v. Rouillard*, 172 Mass. 303; *Horn v. Whittier*, 6 N. H. 88; *St. Joseph County v. Coffenbury*, 1 Mich. 355; *Williams v. Ehrlinghaus*, 3 Dev. L. (14 N. Car.) 297; *Vanhook v. Barnett*, 4 Dev. L. (15 N. Car.) 268; *Governor v. Allen*, 8 Humph. (Tenn.) 176.

**7. Bonds Given After Statutory Time.** — *Stephens v. Crawford*, 1 Ga. 574; 44 Am. Dec. 680; *Crawford v. Howard*, 9 Ga. 314; *De Soto County v. Dickson*, 34 Miss. 150; *Dutton v. Kelsey*, 2 Wend. (N. Y.) 615; *Weston v. Sprague*, 54 Vt. 395.

**Thus, a Stay Bond** given after the time allowed by statute is valid and binding as a common-law bond. *Boling v. Young*, 38 Ohio St. 139.

**8. Statutory Provisions.** — *Sprowl v. Lawrence*, 33 Ala. 674; *Fulton County v. Clarke*, 73 Ga. 665; *State v. Taylor*, 10 S. Dak. 182, 66 Am. St. Rep. 707. And see the statutes of the several states.

bility attaches.<sup>1</sup> But if the general bond be so worded as to include in terms special duties, the surety on such general bond will be bound.<sup>2</sup>

**4. Acts or Omissions Rendering Sureties Liable** — *a. ACTS OR OMISSIONS OF PRINCIPAL GENERALLY CONSIDERED* — *Acts of Principal.* — A surety on an official bond is not in every instance liable for the wrongful acts of the principal. There are many instances in which the principal will be liable individually, wherein there is no breach of the surety's contract.<sup>3</sup> The authorities are agreed, however, that for all acts of the principal done *virtute officii*<sup>4</sup> the surety is liable,<sup>5</sup> provided, of course, the surety's undertaking extends to all

**1. Surety on General Bond Not Liable for Special Duty.** — *Milwaukee County v. Ehlers*, 45 Wis. 281 [*citing Crumpler v. Governor*, 1 Dev. L. (12 N. Car.) 52; *Governor v. Barr*, 1 Dev. L. (12 N. Car.) 65; *Governor v. Matlock*, 1 Dev. L. (12 N. Car.) 214; *Waters v. State*, 1 Gill (Md.) 302; *Com. v. Toms*, 45 Pa. St. 408; *State v. Corey*, 16 Ohio St. 17; *People v. Moon*, 4 Ill. 123; *State v. Johnson*, 55 Mo. 80; *U. S. v. Cheeseman*, 3 Sawy. (U. S.) 424; *State v. Young*, 23 Minn. 551; *Henderson v. Coover*, 4 Nev. 429; *Lyman v. Conkey*, 1 Met. (Mass.) 317; *Williams v. Morton*, 38 Me. 52.] See also *Morrow v. Wood*, 56 Ala. 1; *White v. East Saginaw*, 43 Mich. 567; *Redwood County v. Tower*, 28 Minn. 45; *State v. Felton*, 59 Miss. 402; *Board of Education v. Bateman*, 102 N. Car. 52, 11 Am. St. Rep. 708; *Columbia County v. Massie*, 31 Oregon 294; *Com. v. Toms*, 45 Pa. St. 408; *State v. Blakemore*, 7 Heisk. (Tenn.) 638; *State v. Starnes*, 5 Lea (Tenn.) 545; *Britton v. Ft. Worth*, 78 Tex. 227; *Milwaukee County v. Pabst*, 70 Wis. 352.

But see *State v. Watts*, 23 Ark. 304, in which it was held, with much hesitation, that the sheriff, as public administrator, and the sureties on his official bond, were responsible for his misconduct in discharging the duties of public administrator, notwithstanding the execution of a special administration bond in each estate taken by him.

A sheriff gave general bond as tax collector, and special bond for collection of special taxes. The surety on the general bond was held liable for a defalcation in the general taxes, and liable for a ratable part, share and share alike with the sureties on the special bond, for a defalcation in the special taxes. *Cherry v. Wilson*, 78 N. Car. 164; and see *Kempner v. Galveston County*, 73 Tex. 216.

**2. General Bond Includes Special Duties.** — *Hall v. State*, 69 Miss. 529.

**3. Surety Not Liable for All Acts.** — *State v. Conover*, 28 N. J. L. 230, 78 Am. Dec. 54; *Lowe v. Guthrie*, 4 Okla. 300.

**4. See as to the distinction between *virtute officii* and *colore officii*.** *COLOR OF OFFICE*, vol. 6, p. 214. See also the title *SHERIFFS AND CONSTABLES*, vol. 25, p. 724.

**5. Liable for Acts Done Virtute Officii** — *United States*. — *Offut v. Hall*, 2 Cranch (C. C.) 363; *U. S. v. Barnhart*, 17 Fed. Rep. 579; *U. S. v. Morgan*, 28 Fed. Rep. 48; *National Bank v. Rutledge*, 84 Fed. Rep. 400; *Chandler v. Rutherford*, (C. C. A.) 101 Fed. Rep. 774.

*Alabama*. — *Dean v. Governor*, 13 Ala. 526; *Boring v. Williams*, 17 Ala. 510; *Ex p. Buckley*, 53 Ala. 42; *McKee v. Griffin*, 66 Ala. 211; *Collier v. Henderson*, 86 Ala. 279.

*California*. — *Schloss v. White*, 16 Cal. 65; *People v. Gardner*, 55 Cal. 304.

*Colorado*. — *People v. Cobb*, 10 Colo. App. 478.

*Illinois*. — *Henckler v. Monroe County Ct.*, 27 Ill. 39; *Linch v. Litchfield*, 16 Ill. App. 612; *Campbell v. People*, 52 Ill. App. 338.

*Indiana*. — *Jenkins v. Lemonds*, 29 Ind. 294; *Brown v. State*, 78 Ind. 239; *Hawkins v. Thomas*, 3 Ind. App. 399.

*Iowa*. — *Sample v. Davis*, 4 Greene (Iowa) 117; *Strunk v. Ocheltree*, 11 Iowa 158; *Charles v. Haskins*, 11 Iowa 329, 77 Am. Dec. 148; *Fuller v. Calkins*, 22 Iowa 301; *Morgan v. Long*, 29 Iowa 434; *Tieman v. Haw*, 49 Iowa 312; *Clancy v. Kenworthy*, 74 Iowa 740, 7 Am. St. Rep. 508.

*Kentucky*. — *Hardin v. Carrico*, 3 Met. (Ky.) 289.

*Maine*. — *Smith v. Berry*, 37 Me. 298.

*Maryland*. — *O'Neal v. School Com'rs*, 27 Md. 227.

*Massachusetts*. — *Turner v. Sisson*, 137 Mass. 191; *Boston v. Moore*, 3 Allen (Mass.) 126.

*Michigan*. — *People v. Treadway*, 17 Mich. 480; *Mason v. Fractional School Dist.*, 34 Mich. 229; *Berrien County v. Bunbury*, 45 Mich. 79; *Norris v. Mersereau*, 74 Mich. 687; *Cheboygan County v. Erratt*, 110 Mich. 156.

*Mississippi*. — *Brown v. Mosley*, 11 Smed. & M. (Miss.) 354; *Furlong v. State*, 58 Miss. 717.

*Missouri*. — *Nolley v. Callaway County Ct.*, 11 Mo. 447; *Rollins v. State*, 13 Mo. 437, 53 Am. Dec. 151.

*Nebraska*. — *State v. Moore*, 56 Neb. 82; *Blaco v. State*, 58 Neb. 557; *Paxton v. State*, 59 Neb. 472, 80 Am. St. Rep. 689.

*New Jersey*. — *Sooy v. State*, 41 N. J. L. 394.

*New York*. — *People v. Schuyler*, 4 N. Y. 173; *Rensselaer County v. Bates*, 17 N. Y. 242; *People v. Pennock*, 60 N. Y. 421.

*North Carolina*. — *Rogers v. Odom*, 86 N. Car. 432; *Syme v. Bunting*, 91 N. Car. 48.

*Ohio*. — *State v. Medary*, 17 Ohio 554.

*Oklahoma*. — *Lowe v. Guthrie*, 4 Okla. 287.

*Oregon*. — *State v. Chadwick*, 10 Oregon 465.

*Pennsylvania*. — *Wylie v. Gallagher*, 46 Pa. St. 205; *Boehmer v. Schuylkill County*, 46 Pa. St. 452.

*South Carolina*. — *Treasurers v. Temples*, 2 Spears L. (S. Car.) 48; *Lowndes v. Pinckney*, 1 Rich. Eq. (S. Car.) 155; *State v. White*, 10 Rich. L. (S. Car.) 442; *Allen v. Ramey*, 4 Strobb. L. (S. Car.) 30.

*Tennessee*. — *Crittenden v. Terrill*, 2 Head (Tenn.) 588; *Matlock v. State Bank*, 7 Yerg. (Tenn.) 91.

*Texas*. — *Hendrick v. Walton*, 69 Tex. 193.

*Wisconsin*. — *Gerber v. Ackley*, 32 Wis. 233.

the duties of the office.<sup>1</sup> But there is a conflict of authority as to acts done *colore officii*. There are some cases to the effect that the surety is not liable for such acts.<sup>2</sup> But there are other cases to the effect that the surety is liable.<sup>3</sup>

**Omissions of Principal.** — The surety on an official bond is liable for an omission by the principal to perform some duty imposed upon him by law and included within the terms of the surety's undertaking.<sup>4</sup>

**b. PRE-EXISTING AND SUBSEQUENTLY IMPOSED DUTIES — Pre-existing Duties.** — While it may be said generally that the duties of the principal for which the surety is responsible must be determined from the surety's contract as set out in the bond,<sup>5</sup> yet where the bond does not otherwise specify it will be presumed that the surety contracted with reference to the duties of the office as they existed at the time his undertaking was entered into,<sup>6</sup> and the law relating thereto becomes a part of such undertaking, though not expressly referred to.<sup>7</sup>

**Subsequently Imposed Duties.** — In the absence of express provisions in the bond to the contrary, a surety at the time of executing an official bond is presumed to contemplate subsequent changes and additions in the duties of the office to which the bond relates which do not essentially change the nature and character of the office, and to contract with reference to such changes and additions.<sup>8</sup> But he is not presumed to contract with reference to subsequently

1. See *supra*, this title, *General and Special Bonds*.

2. **Not Liable for Acts *Colore Officii* — Alabama.** — Governor *v. Hancock*, 2 Ala. 728; Governor *v. Perrine*, 23 Ala. 807; Governor *v. Pearce*, 31 Ala. 465.

*Illinois.* — Orton *v. Lincoln*, 156 Ill. 502.

*Maryland.* — State *v. Brown*, 54 Md. 318; State *v. Fowler*, 88 Md. 601; State *v. Timmons*, 90 Md. 10.

*Minnesota.* — Dorr *v. Mickley*, 16 Minn. 20.

*Nebraska.* — Huffman *v. Koppelkom*, 8 Neb. 344; Ottenstein *v. Alpaugh*, 9 Neb. 237; Dewey *v. Kavanaugh*, 45 Neb. 238.

*New Jersey.* — State *v. Conover*, 28 N. J. L. 224, 78 Am. Dec. 54.

*North Carolina.* — State *v. Long*, 8 Ired. L. (30 N. Car.) 415; State *v. Brown*, 11 Ired. L. (33 N. Car.) 141.

*Oklahoma.* — Dysart *v. Lurty*, 3 Okla. 601; Lowe *v. Guthrie*, 4 Okla. 299.

*Pennsylvania.* — Com. *v. Swope*, 45 Pa. St. 535.

*Tennessee.* — Turner *v. Collier*, 4 Heisk. (Tenn.) 89.

*Texas.* — Thomas *v. Browder*, 33 Tex. 783.

*Washington.* — Marquis *v. Willard*, 12 Wash. 528, 50 Am. St. Rep. 906; Fish *v. Nethercutt*, 14 Wash. 584, 53 Am. St. Rep. 892.

*Wisconsin.* — State *v. Mann*, 21 Wis. 684.

See also the title *SHERIFFS AND CONSTABLES*, vol. 25, p. 724.

3. **Liable for Acts *Colore Officii* — United States.** — Lamman *v. Feusier*, 111 U. S. 17. But see Chandler *v. Rutherford*, (C. C. A.) 101 Fed. Rep. 774.

*California.* — Van Pelt *v. Littler*, 14 Cal. 194.

*Indiana.* — State *v. Druly*, 3 Ind. 431; Butler *v. State*, 20 Ind. 169; State *v. Walford*, 11 Ind. App. 392; State *v. White*, 88 Ind. 587.

*Iowa.* — Strunk *v. Ocheltree*, 11 Iowa 158; Clancy *v. Kenworthy*, 74 Iowa 740, 7 Am. St. Rep. 508.

*Kentucky.* — Jewell *v. Mills*, 3 Bush (Ky.) 62.

*Louisiana.* — Homer *v. Merritt*, 27 La. Ann. 568.

*Maine.* — Harris *v. Hanson*, 11 Me. 241.

*Massachusetts.* — Lowell *v. Parker*, 10 Met. (Mass.) 309, 43 Am. Dec. 436.

*Michigan.* — People *v. Treadway*, 17 Mich. 480.

*Missouri.* — Rollins *v. State*, 13 Mo. 437, 53 Am. Dec. 151; State *v. Powell*, 44 Mo. 436.

*New York.* — People *v. Schuyler*, 4 N. Y. 173.

*Ohio.* — State *v. Jennings*, 4 Ohio St. 418.

*West Virginia.* — Lucas *v. Locke*, 11 W. Va. 82.

4. **Omissions.** — People *v. Smith*, 123 Cal. 70; State *v. Moore*, 56 Neb. 82; Dysart *v. Lurty*, 3 Okla. 601.

5. **Duties Determined from Surety's Contract.** — Schloss *v. White*, 16 Cal. 65; Mason *v. Road Com'rs*, 104 Ga. 35; People *v. Toomey*, 122 Ill. 308; Orton *v. Lincoln*, 156 Ill. 499; Detroit Sav. Bank *v. Ziegler*, 49 Mich. 157, 43 Am. Rep. 456; People *v. Pennock*, 60 N. Y. 421; Lowe *v. Guthrie*, 4 Okla. 287.

6. Monroe County *v. Clark*, 92 N. Y. 391, affirming 25 Hun (N. Y.) 282.

7. **Law Relating to Pre-existing Duties Part of Surety's Undertaking.** — Ramsay *v. People*, 197 Ill. 572, 90 Am. St. Rep. 177; Davis *v. State*, 44 Ind. 38; State *v. Davis*, 96 Ind. 542; Territory *v. Carson*, 7 Mont. 417; Maddox *v. Rader*, 9 Mont. 135; Lowe *v. Guthrie*, 4 Okla. 287.

8. **Duties Subsequently Imposed — England.** — Malling Union *v. Graham*, L. R. 5 C. P. 201; Berwick-upon-Tweed *v. Oswald*, 1 El. & Bl. 295, 72 E. C. L. 295, 3 El. & Bl. 653, 77 E. C. L. 653; Pybus *v. Gibb*, 6 El. & Bl. 902, 88 E. C. L. 902.

*United States.* — Postmaster-Gen. *v. Munger*, 2 Paine (U. S.) 189; Miller *v. Stewart*, 9 Wheat. (U. S.) 680; U. S. *v. Kirkpatrick*, 9 Wheat. (U. S.) 720; Converse *v. U. S.*, 21 How. (U. S.) 463; Gausson *v. U. S.*, 97 U. S. 584, affirming 2 Woods (U. S.) 92; Chadwick *v. U. S.*, 3 Fed. Rep. 750.

imposed duties which are not fairly appropriate and germane to the office unless the words of his undertaking or the law in force at its date by a fair and reasonable construction bring such duties within its provisions.<sup>1</sup>

By Statute in some states every official bond must bind the principal to perform all duties now or hereafter required of his office by law, and where such a statute exists the surety is liable for the proper performance of subsequently imposed duties though such duties are not appropriate to the office as it existed when the bond was executed.<sup>2</sup>

**Effect of New Duties Not Germane on Surety's Liability.** — Where subsequently imposed duties are not within a surety's undertaking because not germane to the office, the surety is generally held liable nevertheless to the extent of the duties which the bond was given to secure.<sup>3</sup> But the rule in *England* is that the surety ceases to be liable for the duties which he undertook to secure.<sup>4</sup>

*Alabama.* — Walker v. Chapman, 22 Ala. 116; Morrow v. Wood, 56 Ala. 1; Coleman v. Ormond, 60 Ala. 328.

*Arizona.* — Smith v. U. S., (Ariz. 1896) 45 Pac. Rep. 341.

*California.* — Sacramento County v. Bird, 31 Cal. 66.

*Florida.* — State v. Smith, 16 Fla. 175.

*Illinois.* — People v. McHatton, 7 Ill. 638; Governor v. Ridgeway, 12 Ill. 14; Compher v. People, 12 Ill. 290; People v. Leet, 13 Ill. 261; People v. Blackford, 16 Ill. 166; Smith v. Peoria County, 39 Ill. 412; Freudenstein v. McNier, 81 Ill. 208; Prickett v. People, 88 Ill. 115; Ramsay v. People, 197 Ill. 572, 90 Am. St. Rep. 177.

*Indiana.* — Kindle v. State, 7 Blackf. (Ind.) 586; Lafayette v. James, 98 Ind. 240, 47 Am. Rep. 140.

*Iowa.* — Mahaska County v. Ingalls, 14 Iowa 170.

*Kentucky.* — Com. v. Gabbert, 5 Bush (Ky.) 438; Grayham v. Washington County Ct., 9 Dana (Ky.) 182; Colter v. Morgan, 12 B. Mon. (Ky.) 278.

*Louisiana.* — Pearce v. State, 49 La. Ann. 651.

*Maine.* — White v. Fox, 22 Me. 341.

*Maryland.* — State v. Carleton, 1 Gill (Md.) 249.

*Massachusetts.* — Cambridge v. Fifield, 126 Mass. 428; Hatch v. Attleborough, 97 Mass. 533.

*Michigan.* — White Sewing Mach. Co. v. Mullins, 41 Mich. 339; White v. East Saginaw, 43 Mich. 567; Marquette County v. Ward, 50 Mich. 174.

*Minnesota.* — Scott County v. Ring, 29 Minn. 398.

*Mississippi.* — State v. Swinney, 60 Miss. 39, 45 Am. Rep. 405; Denio v. State, 60 Miss. 949.

*Missouri.* — Marney v. State, 13 Mo. 7; Schuster v. Weissman, 63 Mo. 552.

*Montana.* — Territory v. Carson, 7 Mont. 417.

*Nevada.* — Kruttschnitt v. Hauck, 6 Nev. 163.

*New York.* — People v. Vilas, 36 N. Y. 459, 93 Am. Dec. 520; Monroe County v. Clark, 72 N. Y. 395; New York v. Kelly, 98 N. Y. 467, 50 Am. Rep. 699; Board of Education v. Quick, 99 N. Y. 138; People v. Backus, 117 N. Y. 196; New York v. Sibberns, 3 Abb. App. Dec. (N. Y.) 266; New York v. Ryan, (Ct. App.) 35 How. Pr. (N. Y.) 408.

*North Carolina.* — Cameron v. Campbell, 3 Hawks (10 N. Car.) 285; State v. Bradshaw, 10 Ired. L. (32 N. Car.) 229; Prairie v. Worth, 78 N. Car. 169; Daniel v. Grizzard, 117 N. Car. 105.

*Ohio.* — King v. Nichols, 16 Ohio St. 80; Dawson v. State, 38 Ohio St. 1.

*Tennessee.* — Lane v. Howell, 1 Lea (Tenn.) 275.

*Texas.* — Borden v. Houston, 2 Tex. 594; Swan v. State, 48 Tex. 120; Brown v. Sneed, 77 Tex. 471.

*Virginia.* — Com. v. Holmes, 25 Gratt. (Va.) 771.

*Washington.* — Spokane County v. Allen, 9 Wash. 229, 43 Am. St. Rep. 830.

**Subsequently Imposed Duties Must Not Materially Increase Risk of Surety.** — Pybus v. Gibb, 6 El. & Bl. 902, 88 E. C. L. 902; New York v. Ryan, (Ct. App.) 35 How. Pr. (N. Y.) 408.

1. King v. Nichols, 16 Ohio St. 80.

**Nature of Office Changed.** — "If, after an official bond has been signed, the nature of the office be changed by law, the bond ceases to be obligatory. In such a case the office is no longer the same, within the meaning of the bond." Gausson v. U. S., 97 U. S. 584.

**Subsequently Imposed Duties Must Be Germane to Office.** — White v. East Saginaw, 43 Mich. 567. See also Denio v. State, 60 Miss. 949, distinguishing between duties differing in degree merely from those before pertaining to the office and duties not pertinent to the nature of the office as before existing.

2. **Statutes.** — Hubert v. Mendheim, 64 Cal. 213; Priet v. De La Montanya, (Cal. 1889) 22 Pac. Rep. 171; State v. Davis, 96 Ind. 542; State v. Stevens, 103 Ind. 55, 53 Am. Rep. 482; Mahaska County v. Ingalls, 14 Iowa 170.

In *Alabama* every official bond is obligatory on the principal and surety thereon for the faithful discharge of any duties which may be required of such officer by any law passed subsequently to the execution of such bond, although no such condition is expressed therein. Alabama Civ. Code, c. 83, § 3087, p. 882; Norton v. Kumpe, 121 Ala. 446.

3. **Liable for Pre-existing Duties.** — Gausson v. U. S., 97 U. S. 584; State v. Cheaney, 52 Mo. App. 258; Monroe County v. Clark, 92 N. Y. 391, affirming 25 Hun (N. Y.) 282; Com. v. Holmes, 25 Gratt. (Va.) 771.

4. **Rule in England.** — Pybus v. Gibb, 6 El. & Bl. 902, 88 E. C. L. 902, criticised in Com. v.

c. ACTS OR OMISSIONS OF OTHER OFFICERS. — The sureties on the official bond of a public officer are not exempt from liability for any default of their principal by reason of the fact that such default occurred in consequence of the act or omission of another officer, as where such other officer neglected to require a periodical accounting by the principal in the bond according to law, or permitted him to remain in office after knowledge of his incompetency, dishonesty, or dereliction of duty, instead of removing him, and without informing the sureties of the facts.<sup>1</sup> The principle here involved is that the statutory provisions for supervising the conduct of subordinate public officers are solely for the security and convenience of the government, and form no part of the contract of the sureties on the official bonds of such officers.<sup>2</sup> Furthermore, the government is not responsible for the wrongful conduct of its officers, and sureties are presumed to enter on their contract with full knowledge of this rule of law and to consent to be dealt with accordingly.<sup>3</sup>

**5. Liability on Bonds of Particular Officers.** — Matters concerning the liability

Holmes, 25 Gratt. (Va.) 771; Monroe County v. Clarke, 25 Hun (N. Y.) 285.

**1. Sureties Not Discharged by Acts or Omissions of Other Officers** — *England*. — *Durham v. Fowler*, 22 Q. B. D. 394; *Creighton v. Rankin*, 7 Cl. & F. 325.

*Canada*. — *Reg. v. Pringle*, 32 U. C. Q. B. 308.

*United States*. — *U. S. v. Vanzandt*, 11 Wheat. (U. S.) 184; *Dox v. Postmaster-Gen.*, 1 Pet. (U. S.) 318; *U. S. v. Boyd*, 15 Pet. (U. S.) 187; *U. S. v. Buchanan*, 8 How. (U. S.) 83; *Jones v. U. S.*, 18 Wall. (U. S.) 662; *Ryan v. U. S.*, 19 Wall. (U. S.) 514; *Minturn v. U. S.*, 106 U. S. 437; *Williams v. Lyman*, 88 Fed. Rep. 237, 60 U. S. App. 25.

*Alabama*. — *Lewis v. Lee County*, 66 Ala. 480.

*Arkansas*. — *Ex p. Christian*, 23 Ark. 641.

*California*. — *People v. Jenkins*, 17 Cal. 500.

*Delaware*. — *Pickering v. Day*, 2 Del. Ch. 333.

*Illinois*. — *Coons v. People*, 76 Ill. 391; *Cawley v. People*, 95 Ill. 249; *Stern v. People*, 102 Ill. 540.

*Iowa*. — *Boone County v. Jones*, 54 Iowa 699, 37 Am. Rep. 229.

*Kansas*. — *Manley v. Atchison*, 9 Kan. 358.

*Kentucky*. — *Bonta v. Mercer County Ct.*, 7 Bush (Ky.) 576; *Com. v. Tate*, 89 Ky. 587.

*Louisiana*. — *Mayor v. Blache*, 6 La. 500; *Duncan v. State*, 7 La. Ann. 377; *Natchitoches v. Redmond*, 28 La. Ann. 274; *Rochereau v. Jones*, 29 La. Ann. 82; *School Directors v. Brown*, 33 La. Ann. 383; *State v. Powell*, 40 La. Ann. 234, 8 Am. St. Rep. 522.

*Maine*. — *Readfield v. Shaver*, 50 Me. 36, 79 Am. Dec. 592; *Farmington v. Stanley*, 60 Me. 472.

*Maryland*. — *Freaner v. Yingling*, 37 Md. 491; *Frownfelter v. State*, 66 Md. 80.

*Massachusetts*. — *Amherst Bank v. Root*, 2 Met. (Mass.) 522.

*Michigan*. — *Detroit v. Weber*, 26 Mich. 284; *Boardman Tp. v. Flagg*, 70 Mich. 372.

*Minnesota*. — *Waseca County v. Sheehan*, 42 Minn. 57.

*Nebraska*. — *Bush v. Johnson County*, 48 Neb. 1, 58 Am. St. Rep. 673.

*New York*. — *Looney v. Hughes*, 26 N. Y. 514; *Monro v. County v. Otis*, 62 N. Y. 89; *People v. Russell*, 4 Wend. (N. Y.) 570, *overruling* *People v. Jansen*, 7 Johns. (N. Y.) 332, 5 Am. Dec. 275; *Richmond County v. Wandel*, 6 Lans. (N. Y.) 33. See also *Chenango County v. Birdsall*, 4 Wend. (N. Y.) 453.

*Ohio*. — *Goodin v. State*, 18 Ohio 6.

*Pennsylvania*. — *Com. v. Wolbert*, 6 Binn. (Pa.) 292, 6 Am. Dec. 452; *Bower v. Washington County*, 25 Pa. St. 69; *Wylie v. Gallagher*, 46 Pa. St. 205.

*South Carolina*. — *Charleston v. Paterson*, 2 Bailey L. (S. Car.) 165.

*Tennessee*. — *Anderson County v. Hays*, 99 Tenn. 542.

*Texas*. — *Britton v. Ft. Worth*, 78 Tex. 227; *Hallettsville v. Long*, 11 Tex. Civ. App. 180.

*Vermont*. — *State v. Bates*, 36 Vt. 387.

*Virginia*. — *Smith v. Com.*, 25 Gratt. (Va.) 780.

*Wisconsin*. — *Jefferson County v. Jones*, 19 Wis. 51; *Kewaunee County v. Knipfer*, 37 Wis. 496.

In *U. S. Kirkpatrick*, 9 Wheat. (U. S.) 720, it was held that where the laws require quarterly or other periodical accounts and settlements, a mere omission to bring a suit on the neglect of the officer or agent to account, would not discharge his sureties.

In *Crawn v. Com.*, 84 Va. 282, 10 Am. St. Rep. 839, it was held that a failure to require a county treasurer to make prompt settlement did not discharge his sureties.

In *Wilson v. Glover*, 3 Pa. St. 404, it was held that an agreement by county commissioners without authority of law to discharge a surety of a tax collector, and accept another in his place, does not in fact discharge him until the agreement has been performed, and the substituted surety has given a bond, for the new security must be such a one as would have been a good original security.

The General Rule is that the sureties on the official bond of a public officer can make no defense to an action on the bond that could not be made by their principal. *Boone County v. Jones*, 54 Iowa 699, 37 Am. Rep. 229.

**2.** *Stern v. People*, 102 Ill. 540.

**3. Government Not Responsible for Conduct of Officers.** — *Hart v. U. S.*, 95 U. S. 316.



of sureties upon the bonds of particular officials are treated elsewhere in this work under the various titles referred to in the notes.<sup>1</sup>

**SURETY TO KEEP THE PEACE.**—See the title BAIL AND RECOGNIZANCE, vol. 3, p. 729.

**SURFACE.**—See note 2.

**SURFACE WATER.** (See also the title WATERS AND WATERCOURSES.)—See note 3.

1. See the titles CLERKS OF COURTS, vol. 6, p. 141; JUSTICES OF THE PEACE, vol. 18, p. 48; NOTARY PUBLIC, vol. 21, p. 552; SHERIFFS AND CONSTABLES, vol. 25, p. 723; TAXATION—*Collection*—*Liability of Sureties on Bond of Collector, post.* See also generally the title PUBLIC OFFICERS, vol. 23, p. 314.

2. **Surface.**—The *surface* of land has been held to mean that part of the land which is capable of being used for agricultural purposes. *Murray v. Allred*, 100 Tenn. 100. See also *Midland R. Co. v. Checkley*, L. R. 4 Eq. 19; *Hext v. Gill*, L. R. 7 Ch. 699; *Atty.-Gen. v. Tomline*, 5 Ch. D. 750.

**Artificial Surface.**—Under the *Ohio* statute providing that the owner of a city lot should be liable for damages occasioned to buildings on adjoining lots by excavations of more than nine feet below the *surface* of the adjoining lots, it was held that the word *surface* was to be understood as designating the actual existing *surface*, whether the natural *surface* or the result of filling or grading. *Burkhardt v. Hanley*, 23 Ohio St. 558. See the title LATERAL AND SUBJACENT SUPPORT, vol. 18, p. 547.

**Surface Rights—Mining.** (See also the title MINES AND MINING CLAIMS, vol. 20, p. 722.)—In *Keweenaw Assoc. v. Friedrich*, 112 Mich. 442, in a bill for the specific performance of a contract for the sale of the "*surface rights*" to certain land, a decree was refused, on the ground that the minds of the parties had not met upon the meaning of the term "*surface rights*." The court said: "If the term '*surface rights*' has a definite meaning, as used in this agreement, it must be a right to a fee in the lands, subject to a reservation of the minerals in the grantor." Such a sale would carry no right to enter and explore for minerals at all times.

**Subjacent Support.** (See also the title LATERAL AND SUBJACENT SUPPORT, vol. 18, p. 555 *et seq.*)—In *Yandes v. Wright*, 66 Ind. 319, 32 Am. Rep. 114, discussing the right which a *surface* proprietor has to the support of the *surface* from the owners of lower strata in the same land, it was said: "The word *surface*, as used in the books, means not merely the geometrical superficies without thickness, but includes whatever earth, soil, or land lies above and superincumbent on the mine. *Surface*, therefore, includes the appellee's mine which lies above the appellants' mine and below the top *surface*, which still may remain undisturbed and uninjured in the original grantor."

The extent of the right of subjacent support is that enough minerals must be left in their place under the land to support the *surface* in its natural state. *Marvin v. Brewster Iron Min. Co.*, 55 N. Y. 556, 14 Am. Rep. 322.

3. **Surface Water.**—In *Gray v. McWilliams*,

98 Cal. 163, it was said: "*Surface water* is usually defined to be such as falls from the clouds in the form of rain or snow, or rises to the surface in springs."

In *Crawford v. Rambo*, 44 Ohio St. 282, it was said: "*Surface water* is that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to, and does, flow with other waters, whether derived from the surface or springs; and it then becomes the running water of a stream, and ceases to be *surface water*." See also *Case v. Hoffman*, 84 Wis. 444; *Hoyt v. Hudson*, 27 Wis. 656.

**Flood Water from River.**—In *O'Connell v. East Tennessee, etc., R. Co.*, 87 Ga. 247, it was said: "It is contended by defendant's counsel that the overflow from a river in time of flood or freshet is *surface water*, against which, by the common law, a man may protect himself without regard to the consequences to his neighbor. \* \* \* If the flood water becomes severed from the main current, or leaves the stream never to return, and spreads out over the lower ground, it has become *surface water*. But if it forms a continuous body with the water flowing in the ordinary channel, or if it departs from such channel *animo revertendi*, presently to return, as by the recession of the waters, it is to be regarded as still a part of the river."

Accordingly, overflowed waters from a river in time of flood have been held to be *surface water* in a number of cases. *Taylor v. Fickas*, 64 Ind. 167; *Carlo, etc., R. Co. v. Stevens*, 73 Ind. 278; *Shelbyville, etc., Turnpike Co. v. Green*, 99 Ind. 205; *McCormick v. Kansas City, etc., R. Co.*, 57 Mo. 433; *Shane v. Kansas City, etc., R. Co.*, 71 Mo. 237; *Abbott v. Kansas City, etc., R. Co.*, 83 Mo. 271, 20 Am. & Eng. R. Cas. 108.

In the majority of cases, however, it is held that the flood waters of a river are not *surface waters*.

**England.**—*Briscoe v. Drought*, 11 Ir. C. L. 250; *Rex v. Trafford*, 1 B. & Ad. 874, 20 E. C. L. 498; *Menzies v. Breadalbane*, 3 Bligh N. S. 414; *Lawrence v. Great Northern R. Co.*, 16 Q. B. 643, 71 E. C. L. 643.

**Connecticut.**—*Gillett v. Johnson*, 30 Conn. 180.

**Iowa.**—*Sullens v. Chicago, etc., R. Co.*, 74 Iowa 659; *Moore v. Chicago, etc., R. Co.*, 75 Iowa 263.

**Massachusetts.**—*Macomber v. Godfrey*, 108 Mass. 219.

**Minnesota.**—*Rau v. Minnesota Valley R. Co.*, 13 Minn. 442; *Byrne v. Minneapolis, etc., R. Co.*, 38 Minn. 212, 8 Am. St. Rep. 668.

**SURFACING.** — See note 1.

**SURGEONS.** — See the title PHYSICIANS AND SURGEONS, vol. 22, p. 778.

**SURGERY.** (See also the title PHYSICIANS AND SURGEONS, vol. 22, p. 778.) — See note 2.

**SURNAME.** — See the title NAME, vol. 21, p. 305.

**SURPLUS.** — "Surplus" is defined as that which is left from a fund which has been appropriated for a particular purpose; the overplus; the residue.<sup>3</sup>

*Mississippi.* — *Mississippi, etc.*, R. Co. v. Archibald, 67 Miss. 38, 41 Am. & Eng. R. Cas. 4.  
*Missouri.* — *Jones v. Hannovan*, 55 Mo. 462.  
*New York.* — *Wallace v. Drew*, 59 Barb. (N. Y.) 413.

*Ohio.* — *Crawford v. Rambo*, 44 Ohio St. 279.

*Oregon.* — *West v. Taylor*, 16 Oregon 165.

*Tennessee.* — *Carriger v. East Tennessee, etc.*, R. Co., 7 Lea (Tenn.) 388.

*Virginia.* — *Burwell v. Hobson*, 12 Gratt. (Va.) 322.

1. **Surfacing**, in a contract for the construction of a railroad, has been held not to include filling in between the ties or raising the road-bed. *Snell v. Cottingham*, 72 Ill. 162. See also *Western Union R. Co. v. Smith*, 75 Ill. 496.

2. **Surgery.** — In *Hewitt v. Charier*, 16 Pick. (Mass.) 353, it was held that a person who practices bonesetting and reducing sprains, swellings, and contraction of the sinews by friction and fomentation, but no other branch of the healing art, was a person practicing **surgery**, within the meaning of Stat. Mass. 1818, c. 113, § 1, which provided that no person practicing physic or **surgery** should be entitled to the benefit of law for the recovery of his fees unless he should have been licensed by the Massachusetts Medical Society or graduated a doctor in medicine in Harvard University. See also *Bragg v. State*, 134 Ala. 165.

3. **Surplus.** — *Ellis County v. Thompson*, 95 Tex. 22, citing *Bouv. L. Dict.* See also *Page v. Leapingwell*, 18 Ves. Jr. 466; *State v. Parker*, 34 N. J. L. 479; *People v. Tax, etc.*, Com'rs, 76 N. Y. 74.

**Accumulated Surplus.** — See ACCUMULATED SURPLUS (OF A CORPORATION), vol. 1, p. 481, and see *State v. Bank of Commerce*, 95 Tenn. 241.

**Surplus Assets.** — In *In re New Transvaal Co.*, (1896) 2 Ch. 750, it was held that the term "surplus assets" when used in articles of association providing for distribution among the shareholders on winding up, had no such recognized technical meaning that a court was bound to construe it as referring to the assets after providing only for debts, liabilities, and costs, without recouping paid-up capital.

**Corporations.** — When applied to corporations **surplus** includes the entire **surplus** or assets over the liabilities. *Leather Manufacturers Nat. Bank v. Treat*, 116 Fed. Rep. 774.

**Exempt Property.** — In determining for purposes of taxation the **surplus** of a person's ratable personal estate over and above his actual indebtedness, it has been held that exempt shares in a corporation should not be included. *Hall v. Bain*, 18 R. I. 413. See also the title TAXATION (CORPORATE), *post*.

**Insurance.** — In speaking of the **surplus** of a mutual insurance company, the court said: "In a sense, all the funds in the possession of a mutual insurance company, over and above

its immediate and present liabilities, may be regarded as **surplus**. \* \* \* The word **surplus**, like the word 'liabilities,' has acquired a special meaning in this branch of the insurance business. \* \* \* As applied in that class of insurance, the liabilities of a company do not represent the full amount of outstanding policies. So the word **surplus** is used to designate the amount of funds in the hands of the company after deducting its liabilities, as ascertained by certain rules adopted by the insurance department for determining the value of each risk. Obviously, the word **surplus** was not used in the defendant's charter or policy to designate the amount of money in the company's hands which was to be distributed among its policy holders, but to represent the amount which should remain after certain calculated liabilities were deducted." *Greeff v. Equitable L. Assur. Soc.*, 160 N. Y. 33.

Where an insurance company was subject to be taxed on its capital and accumulated **surplus**, the court said: "The term **surplus**, as applied to an insurance company, is the fund it has in excess of its capital stock after payment of its debts." *State v. Parker*, 34 N. J. L. 482.

**Same — Surplus Earnings.** — In *People v. Tax, etc.*, Com'rs, 76 N. Y. 74, it was said: "**Surplus** earnings is an amount owned by the company over and above the capital and actual liabilities."

**Same — Expert Testimony.** — In *Fry v. Provident Sav. L. Assur. Soc.*, (Tenn. Ch. 1896) 38 S. W. Rep. 126, expert testimony was held to be admissible to the effect that the term **surplus**, as applied to life insurance, means a sum of money or assets which has been accumulated over and above all debts and liabilities of any and all kinds whatsoever.

**Surplus Proceeds.** — A statute provided that after a railroad should be completed, equipped, and in operation, it should be required to pay into the treasury of the state the **surplus** proceeds of all land sales. It was held that only so much of such proceeds was to be paid to the state as remained after deducting the amount of all expenses and obligations lawfully incurred by the corporation in completing, equipping, and putting in operation its railroad. *Hannibal, etc.*, R. Co. v. Bartlett, 123 Mass. 100.

**Wills.** — A testator bequeathed all his personality to his wife, "having full confidence that she will leave the **surplus** to be divided at her decease justly amongst my children." It was held that **surplus** in this devise meant what was left of the personal estate unconsumed or undisposed of by the widow in her lifetime, and not the balance left after the payment of the debts of the testator. *Matter of Pennock*, 20 Pa. St. 268.

But in *Coate's Appeal*, 2 Pa. St. 137, upon the construction of a similar clause in a will, it was

**SURPLUSAGE.** (See also the title SURPLUSAGE, IRRELEVANT OR REDUNDANT MATTER, 21 ENCYC. OF PL. AND PR. 223.) — Surplusage is defined as matter which is not necessarily relevant to the case and which may be rejected.<sup>1</sup>

**SURPLUS MONEY.** — See the titles EXECUTORS AND ADMINISTRATORS, vol. 11, p. 720; FORECLOSURE OF MORTGAGES, vol. 13, p. 776; JUDICIAL SALES, vol. 17, p. 948; SHERIFFS' SALES, vol. 25, p. 737.

held that the word *surplus* referred to the amount of money or personal estate which remained after the debts, funeral expenses, and legacies were paid, and hence that the sum to be divided was ascertained at the testator's death.

**Same — Personal or Real Property.** — The fact that the word *surplus* has a more appropriate application to personal property or money than to realty has been held not to be decisive

against construing it to include real estate also. *Lamb v. Lamb*, 131 N. Y. 227. See also *Chandler's Appeal*, 34 Wis. 505.

1. **Surplusage.** — *Adams v. Capital State Bank*, 74 Miss. 307.

"The term *surplusage*, in pleading, comprehends whatever may be stricken from the record without destroying the plaintiff's right of action." *State Bank v. Dent*, 12 Ala. 190. See also *State v. Watson*, 141 Mo. 341.

# SURPRISE.

BY LAWRENCE W. WHITNEY.

## I. SURPRISE IN EQUITY, 548.

1. *Nature and Relations of Subject*, 548.
2. *Rescission*, 549.
3. *Specific Performance*, 549.
4. *Relief Against Forfeitures*, 549.

## II. SURPRISE IN PRACTICE, 549.

**I. SURPRISE IN EQUITY — 1. Nature and Relations of Subject.** — Surprise is sometimes classed as a ground of relief against contracts in equity. But to justify equity in interposing, the surprise must be accompanied with fraud and circumvention, or there must have been some influence or mismanagement to mislead the party asking relief, or at least the circumstances must demonstrate that he had no opportunity to use suitable deliberation.<sup>1</sup> The more correct view seems to be that surprise is but evidence from which a court may conclude that the element of consent is wanting in a contract through mistake,<sup>2</sup> or that the consent was not free because of the presence of fraud, undue influence, or the like vitiating element, and may therefore be warranted in its discretion in declaring the apparent contract rescinded.<sup>3</sup> The term "surprise" has, indeed, no technical legal meaning, and it has been said that the ordinary meanings, namely, "the act of taking unawares, the state of being taken

**1. Surprise as Ground of Equitable Relief.** — 1 Story's Eq. Jur., § 251; *McRae v. Malloy*, 93 N. Car. 163.

In the circumstances mentioned last — no opportunity to use suitable deliberation — undue influence or advantage taken must appear on the other side. See cases cited *infra*.

In *Bath's Case*, 3 Ch. Cas. 115, Lord Somers said that surprise accompanied with fraud and circumvention may be a good ground to set aside a deed in equity, "but any other surprise never was and I hope never will be." To the same effect were the remarks of Baron Powell (p. 56) and Treby, C. J. (p. 74), in the same case.

The view that mere surprise is insufficient ground for rescission unless fraud, mistake, or illegality is present was taken in *Graham v. Pancoast*, 30 Pa. St. 89; *Lynch's Appeal*, 97 Pa. St. 349.

In *Evans v. Llewellyn*, 1 Cox Ch. 333, 2 Bro. C. C. 159, a bill was filed to set aside certain deeds as having been obtained "by fraud and imposition." No actual fraud was shown, but it appeared that the plaintiff, an uneducated man, was induced for a grossly inadequate consideration to deed away rights (of which he had no knowledge until negotiations were begun for the deed) in certain property without consulting his friends, and under moral pressure by the defendant, who reminded him of past favors. Lord Kenyon laid great stress on the position of the parties, and set aside the deed as "improvidently obtained" and because the plaintiff "was taken by surprise; he

had not sufficient time to act with caution; and therefore, though there was no actual fraud, it is something like fraud, for an undue advantage was taken of his situation."

This case, which is the leading authority on surprise, was approved in *Curson v. Belworthy*, 2 H. L. Cas. 742 (Lord Sugden *obiter*); *Baker v. Monk*, 4 De G. J. & S. 392; *Fry v. Lane*, 40 Ch. D. 321.

**2. Surprise but Evidence of Want of Consent.** — See titles MISTAKE, vol. 20, p. 809; RESCISSION, CANCELLATION, AND REFORMATION, vol. 24, p. 618.

All cases of cancellation or rescission for surprise have been said to partake rather of the nature of mistake than of fraud. See title FRAUD AND DECEIT, vol. 14, pp. 94, 95.

**3. Pollock on Contracts** (4th Am. ed.) 590 *et seq.*

The same author says (p. 592): "It seems to follow that what is recorded in such a case as *Evans v. Llewellyn*, 1 Cox Ch. 333, 2 Bro. C. C. 159, is not an enunciation of law, but an inference of fact."

It must be remembered that cases of rescission are always addressed to the discretion of the court. See the title RESCISSION, etc., vol. 24, p. 610. And that in such a case fraud does not mean deceit or circumvention, but an unconscientious use of the power arising out of circumstances, such as weakness on the one side and advantage taken thereof on the other. *Aylesford v. Morris*, L. R. 8 Ch. 490. See also the title FRAUD AND DECEIT, vol. 14, pp. 20, 21.

unawares, sudden confusion or perplexity," sufficiently explain its sense in equity.<sup>1</sup>

**2. Rescission.** — It will be seen from the above discussion that rescission on the ground of surprise is properly included under accident, catching bargains, fraud, mistake, undue influence, and other like subjects of equitable jurisprudence.<sup>2</sup> But instances wherein this element has been conspicuously prominent are collected in the notes.<sup>3</sup>

**3. Specific Performance.** — A court of equity will exercise its discretion in decreeing specific performance where the party seeking the decree has obtained by surprise an unconscionable bargain, or where the other party appears to have entered into the contract rashly and improvidently and the consideration is grossly inadequate.<sup>4</sup> The remedies by specific performance and rescission are not reciprocal, and though relief to one party by specific performance may be denied, rescission may be granted at the suit of the other.<sup>5</sup>

**4. Relief against Forfeitures.** — On the ground of surprise or accident<sup>6</sup> relief against forfeitures may be decreed in equity.<sup>7</sup>

**II. SURPRISE IN PRACTICE.** — In practice, a judgment, verdict, or order may be set aside on the ground of surprise, if the court thinks that substantial injustice has been done.<sup>8</sup> Surprise in this connection is said to denote an

**1. Surprise Defined.** — 1 Story's Eq. Jur., § 120, note, quoting Johnson's Dict. See also Davis v. Steuben School Tp., 19 Ind. App. 706; Pollock on Contracts (4th Am. ed.) 591.

Surprise "is a word of general signification, so general and so uncertain that it is impossible to fix it; a man is surprised in every rash and indiscreet action, or whatsoever is not done with so much judgment and consideration as it ought to be." Lord Somers in Bath's Case, 3 Ch. Cas. 114.

**2. Grounds of Equitable Relief.** — See titles ACCIDENT (IN EQUITY), vol. 1, p. 277; CATCHING BARGAIN, vol. 5, p. 764; FRAUD AND DECEIT, vol. 14, p. 12, especially pp. 20, 94; MISTAKE, vol. 20, p. 805; UNDUE INFLUENCE.

As to the Manner of Equitable Relief and the limits of equitable discretion, see the title RESCISSION, CANCELLATION, AND REFORMATION, vol. 24, p. 604.

**3. Rescission for Surprise — Circumstances Showing Constructive Fraud.** — Evans v. Llewellyn, 1 Cox Ch. 333; 2 Bro. C. C. 150; Willan v. Willan, 16 Ves. Jr. 84; Reese v. Wyman, 9 Ga. 430; Bailey v. Jones, 14 Ga. 384; Newman v. Claffin Co., 107 Ga. 89; Jordan v. Stevens, 51 Me. 78, 81 Am. Dec. 556; Coffman v. Lookout Bank, 5 Lea (Tenn.) 232, 40 Am. Rep. 31. See also the titles CONSTRUCTIVE FRAUDS, vol. 7, p. 3; FRAUD AND DECEIT, vol. 14, pp. 20, 21, 94; RESCISSION, vol. 24, p. 613 *et seq.*

A mistake of law accompanied by surprise, which renders the enforcement of the contract inequitable (which is nothing after all but fraud), will justify a decree for its rescission and cancellation. Willan v. Willan, 16 Ves. Jr. 84; 1 Story's Eq. Jur., § 134.

And see Carley v. Lewis, 24 Ind. 23, where, however, the cancellation seems to have been only on payment of the instrument, and not of the character in view here.

**Use of Undue Persuasion or Influence.** — Wheeler v. Smith, 9 How. (U. S.) 55; Gibbs v. New York L. Ins., etc., Co., (Supm. Ct. Spec. T.) 14 Abb. N. Cas. (N. Y.) 1. See also title UNDUE INFLUENCE.

**Improvidence and Absence of Independent Advice.** — Miller v. Simonds, 72 Mo. 669; Gibbs v. New York L. Ins., etc., Co., (Supm. Ct. Spec. T.) 14 Abb. N. Cas. (N. Y.) 1.

**4. Specific Performance of Tainted Contracts Refused.** — Twining v. Morrice, 2 Bro. C. C. 326; Townshend v. Stangroom, 6 Ves. Jr. 332; Mortlock v. Buller, 10 Ves. Jr. 305; Bowen v. Waters, 2 Paine (U. S.) 1. See also the titles FRAUD AND DECEIT, vol. 14, p. 95; SPECIFIC PERFORMANCE, vol. 26, pp. 22, 45, 68, 69.

**5.** See the title RESCISSION, etc., vol. 24, p. 612.

**Specific Performance Is Often Denied** where the court would not under the circumstances decree rescission. Bowen v. Waters, 2 Paine (U. S.) 1; Graham v. Pancoast, 30 Pa. St. 89; Lynch's Appeal, 97 Pa. St. 349.

**6.** That "accident" and "surprise" are often synonymous, see *infra*, this title, *Surprise in Practice*, and the title ACCIDENT (IN EQUITY), vol. 1, p. 278.

**7. Relief Against Forfeitures.** — Eaton v. Lyon, 3 Ves. Jr. 690; Hill v. Barclay, 18 Ves. Jr. 56; Bamford v. Creasy, 3 Giff. 675; Barrow v. Isaacs, (1891) 1 Q. B. 425. See also the title ACCIDENT (IN EQUITY), vol. 1, p. 279.

**8.** See in this work the title JUDGMENTS, vol. 17, p. 831. See also in the ENCYCLOPÆDIA OF PLEADING AND PRACTICE the following titles: DECREES, vol. 5, p. 1012; DEFAULTS, vol. 6, p. 166; NEW TRIAL, vol. 14, p. 722, 839; OPENING, AMENDING, AND VACATING JUDGMENTS, vol. 15, pp. 234, 245; ORDERS, vol. 15, pp. 324, 354.

**Continuance Granted for Surprise.** — See title CONTINUANCES, 4 ENCYC. PL. AND PR. 863.

**As to Equitable Relief Against Judgments on the ground of surprise,** see in this work the title INJUNCTIONS, vol. 16, p. 374 *et seq.*, especially p. 385. See also the title BILLS TO IMPEACH DECREES, etc., 3 ENCYC. PL. AND PR. 608.

Equity may also grant a new trial, but never where the matter claimed to constitute surprise was known in time to have obtained redress by applying for a new trial in a court of law Harrison v. Harrison, 1 Litt. (Ky.) 137.

unforeseen disappointment in some reasonable expectation against which ordinary prudence would not have afforded protection.<sup>1</sup>

**SURREBUTTER.** — The surrebutter is the plaintiff's answer of fact to the defendant's rebutter.<sup>3</sup>

**SURREJOINDER.** — The surrejoinder is the plaintiff's answer of fact to the defendant's rejoinder.<sup>3</sup>

**SURRENDER.** — To surrender means to cancel or yield up.<sup>4</sup> A surrender is the yielding up of an estate for life or years to him who has the immediate estate in reversion or remainder, wherein the estate for life or years may drown by mutual agreement.<sup>5</sup>

1. **Surprise in Practice Defined.** — *Sheftall v. Clay*, R. M. Charl. (Ga.) 7; *Peers v. Davis*, 29 Mo. 184; *Fretwell v. Laffoon*, 77 Mo. 26; *Patrick v. Boonville Gas Light Co.*, 17 Mo. App. 462. See also *Gidionsen v. Union Depot R. Co.*, 129 Mo. 401.

**Accident and Surprise**, though not strictly synonymous, have been said to be the same in legal practice. *McGuire v. Drew*, 83 Cal. 225; *Zimmerer v. Fremont Nat. Bank*, 59 Neb. 661. And see the title ACCIDENT (IN EQUITY), vol. 1, p. 278.

2. **Surrebutte** — See the title REJOINDERS AND SUBSEQUENT PLEADINGS, 18 ENCYC. OF PL. AND PR. 70.

3. **Surrejoinder.** — See the title REJOINDERS AND SUBSEQUENT PLEADINGS, 18 ENCYC. OF PL. AND PR. 70.

4. **Surrender.** — *Wells v. Vermont L. Ins. Co.*, 28 Ind. App. 620.

**Surrendered** means yielded, rendered, or delivered. *Nolander v. Burns*, 48 Minn. 17.

**Actual Delivery.** — Where a funding act provided that the state treasurer, upon **surrender** to him of outstanding bonds of the state by the holders, might issue new coupon bonds or certificates to the holders, it was held that **surrender** imported that the old bonds should be delivered up to the treasurer, as the legislative intent was to insist upon strict compliance with the requirements of the act. *Lord v. Bates*, 48 S. Car. 95. But in *Ex p. Barnwell*, 8 S. Car. 269, it was said: "When the legislature, through the act, speaks of 'the **surrender**' of such certificates, it meant nothing more than that the holder, on receiving his coupon bonds or certificate 'of stock' to the amount of fifty per centum for his interest due, should deliver to the treasurer an order to fund it as required by the act, so that it might be shown that the interest which had accrued on his old certificate had been paid and satisfied by the delivery of the new one, in conformity with the prescribed directions."

**Return.** — In holding that an officer who had attached chattels and removed them for keeping was not bound, on receiving a forthcoming bond, to return them to the place from which he had removed them, the court said: "The statute only says he shall **surrender** them. To **surrender** means to relinquish or give up, and it means nothing more, unless the meaning is extended by construction." *Clark v. Wilson*, 14 R. I. 13.

**Surrender and Assignment Distinguished.** — See *Scott v. Scott*, 18 Gratt. (Va.) 159, stated under the title ASSIGNMENTS, vol. 2, p. 1010. Compare *Burgwyn v. Hall*, 108 N. Car. 491.

**Surrender of Charter or Franchise.** — See the title DISSOLUTION OF CORPORATIONS, vol. 9, p. 560 *et seq.*

**Surrender and Give Up.** — In *Simpson v. Hartman*, 27 U. C. Q. B. 466, the court said: "We think the words '**surrender** and give up' to said Henry Simmons, his heirs and assigns," may be upheld as equal to the statutable words 'depart with.'"

**Preference — Bankruptcy.** — See *In re Black*, 17 Nat. Bankr. Reg. 399, 3 Fed. Cas. No. 1,459; *In re Stein*, 16 Nat. Bankr. Reg. 569, 22 Fed. Cas. No. 13,352. And see the title INSOLVENCY AND BANKRUPTCY, vol. 16, p. 690.

**Shares of Stock.** — See *In re Dronfield Silkstone Coal Co.*, 17 Ch. D. 76.

**Transfer of Title.** — An indictment charged a defendant with unlawfully procuring the **surrender** and delivery to himself of the funds of a national bank of which he was a director. In holding the indictment sufficient, in *Evans v. U. S.*, 153 U. S. 591, the court said: "The general words of a fraudulent misapplication to the use and benefit of the defendant, and of an intent by so doing to defraud the bank, are of themselves inconsistent with an honest purpose. Indeed, the word **surrender** carries with it something more than a bare delivery, and indicates a transfer of title as well as of possession."

**Surrender Value — Insurance.** — In *Hazen v. Massachusetts Mut. L. Ins. Co.*, 170 Mass. 256, it was said: "The words 'shall be a **surrender** value payable in cash,' in Stat. 1880, c. 232, § 4, and in Pub. Stat., c. 119, § 164, must be held to import an obligation imposed upon the insurer to pay to some one, upon the **surrender** of the policy under the circumstances named in the statute, an amount or 'value' to be fixed in the method directed by the statute." See also the title LIFE INSURANCE, vol. 19, p. 83.

In *In re Welling* (C. C. A.) 113 Fed. Rep. 192, upon the meaning of the words "cash **surrender** value" as applied to the policy of insurance of a bankrupt, the court said: "The term 'cash **surrender** value,' therein employed, has a defined and legal meaning, namely, the cash value — ascertainable by known rules — of a contract of insurance abandoned and given up for cancellation to the insurer by the owner, having contract right to do so."

5. **Surrender of Estate.** — *Fisher v. Edington*, 12 Lea (Tenn.) 193; *Scott v. Scott*, 18 Gratt. (Va.) 159. See also *Dayton v. Craik*, 26 Minn. 133; *Bedford v. Terhune*, 30 N. Y. 462; *Ex p. Gray*, *Bailey Eq.* (S. Car.) 89. And see the titles DEEDS, vol. 9, p. 100; MERGER, vol. 20, p. 590;

**SURRENDER BY BAIL.**—See the titles BAIL (IN CIVIL CASES), vol. 3, pp. 624, 628, 639; BAIL AND RECOGNIZANCE, vol. 3, pp. 708, 725.

**SURRENDER OF CRIMINAL.**—See the title EXTRADITION, vol. 12, p. 590.

**SURROGATE.**—See the title SURROGATE AND PROBATE COURTS, *post*.

REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS, vol. 24, pp. 413, 425, 451.

**By Tenant to Landlord.** (See also the title LANDLORD AND TENANT, vol. 18, p. 355 *et seq.*)—A *surrender* is defined to be a yielding up of an estate to the landlord so that the leasehold interest becomes extinct by mutual agreement between the parties. *Martin v. Stearns*, 52 Iowa 345.

**Surrender and Vacation of Premises Distinguished.**—In *Excelsior Steam Power Co. v.*

*Halstead*, 5 N. Y. App. Div. 125, it was said: "The term *surrender* applies to the termination of a running term before it has expired by the acceptance on the part of the landlord of a *surrender* of the premises. In the case at bar the term was at an end." And it was held that a mere vacation of the premises was all that was required.

**Surrender by Operation of Law.**—See the title LANDLORD AND TENANT, vol. 18, p. 359.

# SURROGATE AND PROBATE COURTS.

## I. DEFINITION AND SCOPE OF TITLE, 552.

## II. EQUITY JURISDICTION, 553.

### CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, titles *EXECUTORS AND ADMINISTRATORS*, vol. 8, p. 650; *PROBATE AND CONTEST OF WILLS*, vol. 16, p. 991; *SETTLEMENT OF DECEDENTS' ESTATES*, vol. 19, p. 819.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *COURTS*, vol. 8, p. 21; *DEBTS OF DECEDENTS*, vol. 8, p. 1003; *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 720; *FOREIGN EXECUTORS AND ADMINISTRATORS*, vol. 13, p. 915; *JOINT EXECUTORS AND ADMINISTRATORS*, vol. 17, p. 616; *JUDGE*, vol. 17, p. 714; *JURISDICTION*, vol. 17, p. 1039; *LEGACIES AND DEVISES*, vol. 18, p. 704; *MARSHALING DECEDENTS' ESTATES*, vol. 19, p. 1382; *PRIVATE INTERNATIONAL LAW*, vol. 22, p. 1314; *PROBATE AND LETTERS OF ADMINISTRATION*, vol. 23, p. 109; *PUBLIC OFFICERS*, vol. 23, p. 314; *SUCCESSION*, *ante*, p. 290; *WILLS*.

**I. DEFINITION AND SCOPE OF TITLE.** — The word "surrogate," in its literal signification, means a substitute, or one who acts for another. In this sense it was applied in English law to the bishop's chancellor, an officer who usually presided in the bishop's diocesan court, and who, as the representative of the ordinary, performed the judicial duties of that official.<sup>1</sup> In the *United States* a surrogate was formerly an officer whose powers and duties were ancillary to those of the tribunal which exercised general probate jurisdiction.<sup>2</sup> But by a process of legislative evolution the surrogate's court has become a tribunal of original probate jurisdiction,<sup>3</sup> and in this latter signification is the subject here under consideration.<sup>4</sup> The general jurisdiction and powers, together with other matters relating to probate courts, have been treated in other titles in this work.<sup>5</sup> There remains the equitable jurisdiction of these courts, which is treated in the succeeding section.

1. *Surrogate*. — Burr. L. Dict.; Bouv. L. Dict.

2. *United States*. — See *Brick's Estate*, (Surrogate Ct.) 15 Abb. Pr. (N. Y.) 12, which contains an interesting and instructive history of the Surrogate's Court of New York, from the earliest colonial period to the date of the opinion. See also 2 Kent's Com. 409; Judge Daly's historical sketch of the judicial tribunals of New York from 1623 to 1846, printed in 1 E. D. Smith (N. Y.) xvii.

In *Wales v. Willard*, 2 Mass. 120, Parsons, C. J., said: "The county courts of probate were never established by any statute until the Act of March 12, 1784. Before the Revolution the judges of probate were considered as surrogates of the governor and council, who derived from the royal charter the authority to prove wills and to grant administrations." See also *Matter of Evans*, 29 N. J. Eq. 571, holding that the Orphans' Court may review the surrogate's acts on appeal.

3. *Surrogate Court*. — 2 Kent's Com. 410; Burr. L. Dict.; Bouv. L. Dict.; *Brick's Estate*, (Surrogate Ct.) 15 Abb. Pr. (N. Y.) 27.

4. *Synonyms*. — Courts of general probate jurisdiction are variously designated as surrogates' courts, orphans' courts, probate courts, parish courts, county courts, superior courts, courts of ordinary, etc.

In *North Carolina* clerks of the Superior Court exercise the powers of probate judges, and when so acting their courts are independent tribunals of original jurisdiction. *Hunt v. Sneed*, 64 N. Car. 176; *Edwards v. Cobb*, 95 N. Car. 4.

5. *Whether Probate Courts Are Courts of Record*, see the title *COURTS*, vol. 8, p. 37, note.

**Filing and Presentation of Claims Against the Estate of a Decedent.** — See the title *DEBTS OF DECEDENTS*, vol. 8, p. 1077.

**Determination and Enforcement of Claims Against Estates of Decedents.** — See the title *DEBTS OF DECEDENTS*, vol. 8, p. 1091.

**Appointment and Qualification of Executors and Administrators.** — See the title *EXECUTORS AND ADMINISTRATORS*, vol. 11, pp. 744, 759.

**Removal of Executors or Administrators by Probate Courts.** — See the title *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 815.



**II. EQUITY JURISDICTION.**—Probate courts are not, generally speaking, courts of equity, and therefore are not possessed of general equity powers.<sup>1</sup> In relation to matters within their limited jurisdiction they possess, however, many of the powers usually exercised by courts of equity,<sup>2</sup> and as to such matters they apply the rules and principles of equity and proceed in some respects after the manner of such courts.<sup>3</sup> In some jurisdictions probate

**Jurisdiction to Order Sale of Real Estate of Decedent.**—See the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1070.

**Jurisdiction in Matters of Accounting of Executors and Administrators.**—See the titles EXECUTORS AND ADMINISTRATORS, vol. 11, p. 1189; FOREIGN EXECUTORS AND ADMINISTRATORS, vol. 13, p. 961; JOINT EXECUTORS AND ADMINISTRATORS, vol. 17, p. 616.

**Jurisdiction to Grant Ancillary Letters.**—See the title FOREIGN EXECUTORS AND ADMINISTRATORS, vol. 13, p. 924.

**Appointment of Guardian.**—See the title GUARDIAN AND WARD, vol. 15, p. 32.

**Removal of Guardian.**—See the title GUARDIAN AND WARD, vol. 15, p. 48.

**Sale of Real Property by Guardian.**—See the title GUARDIAN AND WARD, vol. 15, p. 58.

**Accounting by Guardian.**—See the title GUARDIAN AND WARD, vol. 15, p. 89.

**Jurisdiction in Case of Insanity.**—See the title INSANITY, vol. 16, p. 566.

**Appointment of Joint Executors and Administrators.**—See the title JOINT EXECUTORS AND ADMINISTRATORS, vol. 17, p. 617.

**Removal of Joint Executors and Administrators.**—See the title JOINT EXECUTORS AND ADMINISTRATORS, vol. 17, p. 633.

**Possession of General or Special Jurisdiction.**—See the title JURISDICTION, vol. 17, pp. 1076, 1083. See also PROBATE AND LETTERS OF ADMINISTRATION, vol. 23, p. 116.

**Jurisdiction of Proceedings for Recovery of Legacies.**—See the title LEGACIES AND DEVISES, vol. 18, p. 805, and references there given.

**Jurisdiction in Case of Partition.**—See the title PARTITION, vol. 21, pp. 1145, note, 1179.

**By What Courts Probate Jurisdiction Exercised.**—See the title PROBATE AND LETTERS OF ADMINISTRATION, vol. 23, p. 113.

**Nature and Extent of Probate Jurisdiction.**—See the title PROBATE AND LETTERS OF ADMINISTRATION, vol. 23, p. 116.

**Other Titles Dealing with Matters Concerning Probate Courts** are referred to in the table of cross-references at the beginning of this title.

**1. Not Courts of Equity.**—*Meyers v. Farquharson*, 46 Cal. 190; *McCaulley v. McCaulley*, 7 Houst. (Del.) 102; *Sanders v. Soutter*, 126 N. Y. 193; *Gilliland v. Sellers*, 2 Ohio St. 223; *Brinker v. Brinker*, 7 Pa. St. 55; *Willard's Appeal*, 65 Pa. St. 265; *Ake's Appeal*, 74 Pa. St. 116; *Fidelity Ins., etc., Co. v. Gazzam*, 2 Pa. Dist. 560; *Dundas's Estate*, 8 Phila. (Pa.) 598.

**Without Equitable Powers.**—*Moore v. Winston*, 66 Ala. 296; *Presbyterian Church v. McElhinney*, 61 Mo. 543; *Springfield First Baptist Church v. Robberson*, 71 Mo. 326; *Butler v. Lawson*, 72 Mo. 227; *Burckhardt v. Helfrich*, 77 Mo. 376; *People's Bank v. Scalzo*, 127 Mo. 164.

**2. Extent of Equitable Powers—United States.**—*Farmers' Nat. Bank v. Green*, 4 Fed. Rep. 609.

*California.*—*Matter of Clary*, 112 Cal. 292.

*Connecticut.*—*Beach v. Norton*, 9 Conn. 198;

*American Bible Soc. v. Wetmore*, 17 Conn. 187; *Ashmead's Appeal*, 27 Conn. 241; *Mix's Appeal*, 35 Conn. 123, 95 Am. Dec. 222; *Vail's Appeal*, 37 Conn. 185; *Donovan's Appeal*, 41 Conn. 551; *Hewitt's Appeal*, 53 Conn. 24; *Chase's Appeal*, 57 Conn. 236; *Carter's Appeal*, 59 Conn. 587.

*Delaware.*—*Green v. Saulsbury*, 6 Del. Ch. 371.

*Florida.*—*Ritch v. Bellamy*, 14 Fla. 537.

*Georgia.*—*Wellborn v. Rogers*, 24 Ga. 558.

*Illinois.*—*Hurd v. Slaten*, 43 Ill. 348; *In re Steele*, 65 Ill. 322; *Brandon v. Brown*, 106 Ill. 519; *Doggett v. Dill*, 108 Ill. 560, 48 Am. Rep. 565; *Spencer v. Boardman*, 118 Ill. 553.

*Indiana.*—*Powell v. North*, 3 Ind. 392, 56 Am. Dec. 513.

*Massachusetts.*—*Swasey v. Jaques*, 144 Mass. 135, 59 Am. Rep. 65. See also *Wright v. White*, 136 Mass. 470; *Huntress v. Place*, 137 Mass. 409.

*Mississippi.*—*Blanton v. King*, 2 How. (Miss.) 856; *Carmichael v. Browder*, 3 How. (Miss.) 252; *Simmons v. Henderson*, Freem. (Miss.) 495.

*New Jersey.*—*Wood v. Tallman*, 1 N. J. L. 177; *Sherman v. Lanier*, 39 N. J. Eq. 249; *Phillips v. Phillips*, (N. J. 1889) 18 Atl. Rep. 579.

*Ohio.*—*Matter of Carter*, 2 Ohio Dec. (Reprint) 655, 4 West L. Month. 428.

*Pennsylvania.*—*Snyder's Appeal*, 36 Pa. St. 166, 78 Am. Dec. 372; *Weyand v. Weller*, 39 Pa. St. 443; *Stockton's Appeal*, 64 Pa. St. 58; *Johnson's Appeal*, 114 Pa. St. 132; *Fidelity Ins., etc., Co. v. Gazzam*, 2 Pa. Dist. 569; *Neill's Estate*, 3 Pa. Co. Ct. 197; *Dundas's Estate*, 8 Phila. (Pa.) 598.

*Vermont.*—*Mann v. Mann*, 53 Vt. 48.

*Wisconsin.*—*Tryon v. Farnsworth*, 30 Wis. 577; *Brook v. Chappell*, 34 Wis. 405; *Catlin v. Wheeler*, 49 Wis. 507.

**Power to Make Equitable Preferences Between Different Classes of Creditors.**—*Ashmead's Appeal*, 27 Conn. 241.

**Equity Powers as to Administration and Guardianship of Estates.**—*Powell v. North*, 3 Ind. 392, 56 Am. Dec. 513; *Neill's Estate*, 3 Pa. Co. Ct. 197.

**Power to Determine Whether Deed Void Because of Fraud.**—*Fidelity Ins., etc., Co. v. Gazzam*, 2 Pa. Dist. 569.

**Power to Recognize and Enforce Equitable Estoppel.**—*Brook v. Chappell*, 34 Wis. 405.

**Equitable Election.**—Probate courts having equitable jurisdiction may compel election in some states. See the title EQUITABLE ELECTION, vol. 11, p. 64.

**3. Equity Principles and Practice Followed.**—*McCaulley v. McCaulley*, 7 Houst. (Del.) 102; *Matter of Carter*, 2 Ohio Dec. (Reprint) 655, 4 West L. Month. 428; *Guier v. Kelly*, 2 Binn. (Pa.) 294; *Brinker v. Brinker*, 7 Pa. St. 55; *Willard's Appeal*, 65 Pa. St. 265; *Ake's Appeal*, 74 Pa. St. 116; *York's Appeal*, 110 Pa. St. 69; *Dundas's Estate*, 8 Phila. (Pa.) 598.

## SURROGATE AND PROBATE COURTS—SURVEYED.

courts have the power to compel the specific performance, by the heirs or personal representatives, of contracts made by decedents.<sup>1</sup> Probate courts have not, as a rule, the power to grant injunctions.<sup>2</sup> Their power to issue writs of habeas corpus<sup>3</sup> and certiorari<sup>4</sup> varies in different jurisdictions.

**SURROUNDING THE CASE.**—See note 5.

**SURVEY.** (See also the titles **BOUNDARIES**, vol. 4, p. 756; **DOCUMENTARY EVIDENCE**, vol. 9, p. 877; **REVENUE LAWS**, vol. 24, p. 883; **SEAMEN**, vol. 25, p. 83; **SHIPS AND SHIPPING**, vol. 25, p. 854; **STATE AND PUBLIC LANDS**, vol. 26, p. 197.)—Ordinarily, a survey is the act of making an official examination to determine extent, dimensions, form, situation, topographical features, quantity, condition, or value. The word is used also to denote an exhibit, diagram, or report setting forth the result of such examination.<sup>5</sup>

**SURVEYED.**—See **LAID OUT**, vol. 18, p. 128.

**Not Bound by Chancery Rules.**—*Satterwhite v. Littlefield*, 13 Smed. & M. (Miss.) 302.

1. **Specific Performance.**—*Adams v. Lewis*, 5 Sawy. (U. S.) 229 (Oregon statute); *Aspley v. Murphy*, 50 Fed. Rep. 376 (Texas statute); *Dehart v. Dehart*, 15 Ind. 176; *Luchterhand v. Sears*, 108 Mass. 552; *Lynes v. Hayden*, 119 Mass. 482; *Servis v. Beatty*, 32 Miss. 52; *Weyand v. Weller*, 39 Pa. St. 443; *White v. Patterson*, 139 Pa. St. 429; *Houston v. Kilough*, 80 Tex. 296. And see the title **SPECIFIC PERFORMANCE**, vol. 26, p. 125.

2. **Without Power to Grant Injunction.**—*American Colonization Soc. v. Wade*, 8 Smed. & M. (Miss.) 610; *Wood v. Brown*, 34 N. Y. 337; *Sprinkle v. Hutchinson*, 66 N. Car. 450; *Mann v. Mann*, 53 Vt. 48. *Compare* *Spencer v. Boardman*, 118 Ill. 553. And see the title **INJUNCTIONS**, vol. 26, p. 350.

3. See title **HABEAS CORPUS**, vol. 15, p. 145.

**Without Power in Minnesota.**—*Lee's Case*, 1 Minn. 60.

**When Power Exists in Missouri.**—*State v. McElhanev*, 20 Mo. App. 584.

**Right of Ordinary in Georgia.**—*Moore v. Roberson*, 63 Ga. 506. See also *Barranger v. Baum*, 103 Ga. 471.

4. See the title **CERTIORARI**, 4 ENCYC. OF PL. AND PR. 23.

**Without Power in Mississippi.**—*Barlow v. Esterling*, Walk. (Miss.) 302.

**Right to Issue in Alabama.**—*Wilson v. Scott*, 42 Ala. 348.

5. **Circumstances Surrounding the Case.**—*Dufour v. Central Pac. R. Co.*, 67 Cal. 324. See generally the title **INSTRUCTIONS**, 11 ENCYC. OF PL. AND PR. 47.

6. **A Survey of Land** is the actual measurement of land, ascertaining the contents by running lines and angles, marking them, and fixing corners and boundaries. *Winter v. U. S.*, Hempst. (U. S.) 371.

**A Chamber Survey** is one that has never been made upon the ground; but where a survey has been returned and accepted without a caveat, the presumption after twenty-one years is *juris et de jure* that it was made on the ground. *Packer v. Schrader Min., etc., Co.*, 97 Pa. St. 383.

**Necessity of Map.**—It has been held that the term *survey* does not *ex vi termini* mean a map, but also includes a description in words or figures of the lands located. *Atty-Gen. v. Stevens*, 1 N. J. Eq. 369, 22 Am. Dec. 526.

So in *Vines v. Whitten*, 4 Cal. 230, it was said: "To admit in evidence a *survey* is certainly not confined to the presentation of a map or plat. A *survey* is the result of measurement and calculation, and can be detailed from memory by a witness as well as defined by a diagram."

**One Line Left Open.**—In *Alford v. Dewin*, 1 Nev. 214, it was said: "Now, if the three sides of a quadrilateral *survey* are run, the simple running of a straight line, connecting the extremity of the two side lines, completes the *survey*. This may be done without difficulty by almost any one. All the data for determining the exact location of the land in the *survey* is given. We are not prepared to say it is not a *survey* because one line is left open."

**Fire Insurance.** (See also the title **FIRE INSURANCE**, vol. 13, p. 107.)—In fire insurance, the word *survey* sometimes has been restricted to the plan of the premises which accompanies the application for insurance; but it oftener includes also the regular application, consisting of questions and answers, etc. *Albion Lead Works v. Williamsburg City F. Ins. Co.*, 2 Fed. Rep. 479; *Denny v. Conway Stock, etc., F. Ins. Co.*, 13 Gray (Mass.) 497; *May v. Buckeye Mut. Ins. Co.*, 25 Wis. 307.

**Marine Insurance.** (See also the title **MARINE INSURANCE**, vol. 19, p. 957.)—In *Potter v. Ocean Ins. Co.*, 3 Sumn. (U. S.) 43, it was said: "A *survey* is a common public document, looked to both by underwriters and owners as affording the means of ascertaining upon the very spot, at the very time, the state and condition of the ship and other property at hazard. In some policies, as, for example, when what is technically called the 'rotten clause' is inserted, such a document seems indispensable, as the *survey* may amount to a discharge of the underwriters."

**Survey to Ascertain Damages to Ship.**—See the title **SHIPS AND SHIPPING**, vol. 25, p. 1030.

**Logs and Lumber.** (See also the title **LOGS AND LUMBER**, vol. 19, p. 542 *et seq.*)—In *Antill v. Potter*, 69 Minn. 192, it was held that the word *survey* in the *Minnesota* statute providing that no *survey* of any logs except that of the surveyor-general or his deputy shall be received in any court does not mean the scale bill, or the record thereof, or any other written document or record, but means the act of counting and measuring the logs and ascertaining how many feet they contain.

**SURVEYOR.** — See the title EXPERT AND OPINION EVIDENCE, vol. 12, p. 455.

**SURVIVAL OF ACTIONS.** — The general rule as to the survival of an action after the death of the plaintiff or defendant is that actions of contract survive and that actions of tort do not; but this strictness of the rule and the distinction has been relaxed and modified considerably by statutes and judicial construction, and is now subject to exceptions and explanation.<sup>1</sup>

**SURVIVE — SURVIVING — SURVIVOR.** (See also the titles ISSUE (DESCENDANTS, vol. 17, p. 561; WILLS.) — To survive means simply to remain in life after the death of another, or after a particular date or the happening of a particular event.<sup>2</sup> The primary meaning of the word "survive" is to live beyond the life or existence of; to outlive;<sup>3</sup> but it also has, according to some lexicographers, a secondary meaning, viz., to live after.<sup>4</sup>

**Survivor.** — In its ordinary as well as its legal signification, the word "survivor" means one who outlives another; one of two or more persons who lives after the other or others have died.<sup>5</sup>

1. **Survival of Actions.** — *McConaughey v. Bennett*, 50 W. Va. 186. See the title SURVIVAL OF ACTIONS, 21 ENCYC. OF PL. AND PR. 309. See also in this work the titles ASSIGNMENTS, vol. 2, p. 1020 *et seq.*; DEATH BY WRONGFUL ACT, vol. 8, pp. 854, 858.

2. **Survive.** — *Hawley v. Northampton*, 8 Mass. 31, 5 Am. Dec. 66.

3. *Bailey v. Brown*, 19 R. I. 669.

**Survive** means to live beyond, particularly to live beyond another person. *Nes v. Ramsay*, 155 Pa. St. 633, *quoting* Abb. L. Dict.

In *Jordan v. Roach*, 32 Miss. 613, it was said: "The word *survive*, in its popular signification, may mean 'overliving a specified individual,' or 'living beyond a specific event,' or it may mean 'still living,' or 'living at some designated period of time.'"

**Must Be Living at Happening of Event.** — *Survive* imports that the person who is to *survive* must be living (i. e., born, in being) at the death of the person whom or at the happening of the event which he is to *survive*. See *v. Liddell*, L. R., 2 Eq. 341.

In *Den v. Combs*, 18 N. J. L. 33, it was said: "Now by the word *survivor* it is manifest that the testator contemplated a person who should be in being at the time of the death of the devisee that should first die. He could not have supposed that either of the brothers would *survive* an indefinite failure of issue of the other; an event that might not happen in one hundred years or more."

**Same — Who May Survive Me.** — Where a testator gave the residue of his estate "to my nephews and nieces, the children of my brothers [named] who may *survive* me, \* \* \* to be divided equally among them," it was held that the testator must have had in his mind only those who should be living at his decease, and that his directions were adapted to the distribution of his estate at the end of the usual period of one year from that event. *Worcester v. Worcester*, 101 Mass. 133.

**Surviving Child — Unborn Child.** — It has been held that an unborn child was included in the term "*surviving* child," as used in a statute giving an action for death by wrongful act. See the title DEATH BY WRONGFUL ACT, vol. 8, p. 897, and see *Missouri Pac. R. Co. v. Lehmberg*, 75 Tex. 67.

**Issue Surviving.** — See the title ISSUE (DESCENDANTS), vol. 17, pp. 561, 573.

**Surviving Members — Insurance.** — "*Surviving* members," as used in the *Virginia* Act of May 18, 1887, relating to insurance companies, has been held to designate such as are not deceased, and not those whose policies are not lapsed. *Mutual Ben. L. Ins. Co. v. Marye*, 85 Va. 643.

4. **Live After.** — *Bailey v. Brown*, 19 R. I. 669. In this case, where a testatrix provided: "If either of my said sons should die without leaving any child who shall *survive* me, \* \* \* then, as to the \* \* \* share of him so dying, in trust for the other of my said sons," it was held that grandchildren of the testatrix who were not born at the time of her death were not cut off.

In *Matter of Clark*, 3 De G. J. & S. 111, the testator made a bequest with a limitation over after a life estate to "the children of the said Maria Clark who shall *survive* me," etc. It was held that the words "who shall *survive* me" meant "who shall be living after me," and that, therefore, the children of the life tenant who were born after the death of the testatrix were entitled to share in the estate under the bequest in question.

5. **Survivor.** — *Keating v. Reynolds*, 1 Bay (S. Car.) 87; *Blanton v. Mayes*, 58 Tex. 425.

In *Reynolds v. Iowa*, etc., Ins. Co., 80 Iowa 566, it was said that "the word *survivor* is usually applied to the longest liver of two or more partners or trustees, and has been applied in some cases to the longest liver of joint tenants, legatees, and to others having a joint interest in any thing." See also *Salysers v. Monroe*, 104 Iowa 74; *Brown v. Allen*, 35 Iowa 311.

**Death of Last Survivor Without Issue.** — In *Maden v. Taylor*, 45 L. J. Ch. 569, it was held that a gift to the *survivor* of ten people of a sum of money, or an estate with no previous gift, vests the sum of money or estate absolutely in the last liver, since, though the last liver does not *survive* himself, he *survives* all the rest, and in that sense is a *survivor*. Followed in *Anderson v. Brown*, 84 Md. 261.

**Vesting Legacy.** (See also the titles LEGACIES AND DEVICES, vol. 18, p. 731; WILLS.) — A provision in the will that in case of the death of

**To What Time Words Refer.** — Where the words "survivor," "survive," and "surviving" are used in a will, they are held to refer to the death of the testator, if no intent to the contrary is manifested.<sup>1</sup> But they have been held to refer to the period of distribution, and not to the time of the testator's death.<sup>2</sup>

either of the legatees in the lifetime of A his share shall go to the survivor or survivors does not prevent the vesting of the legacies. *Beatty v. Montgomery*, 21 N. J. Eq. 324.

**Executors.** — It has been held that the term *survivors*, as used in a will authorizing executors or the *survivors* or *survivor* of them to convey land, applied to those who had accepted the trust and qualified. *Herrick v. Carpenter*, 92 Mich. 440; *Weimar v. Fath*, 43 N. J. L. 1.

**Survivors in Sense of Legal Representatives.** — A testator devised all his estate among his seven brothers and sisters, *nominatim*, or their *survivors*. Four of them were dead leaving issue at the time when he made his will, and the fact was known to him. It was held that *survivors* meant legal representatives, though the court conceded that in strict legal sense the word *survivor* means the longest liver of two joint tenants, or of any two persons joined in the right of a thing; he that remains alive after the other is dead. *In re Barr*, 2 Pa. St. 428.

**Survivors in Sense of Heirs of Body in Succession.** — *Warnock v. Wightman*, 1 Brev. (S. Car.) 350.

**Intention.** — The word *survivor* is a flexible term, to be moulded by the context and spirit of the will. *Harris v. Berry*, 7 Bush (Ky.) 113; *Coleman-Bush Invest. Co. v. Figg*, 95 Ky. 409.

**Witnesses.** (See also the title WITNESSES.) — In *Seabright v. Seabright*, 28 W. Va. 468, it was held that the word *survivor*, as used in a statute to designate persons against whom an interested person should not testify in his own behalf as to certain transactions, meant any person who, by reason of his surviving the deceased, would become as such *survivor* interested in the subject of controversy, as, for instance, a widow who claimed as distributee a share of her husband's estate, when the question in controversy was whether her husband in his lifetime had given away a portion of his personal property to one who was his executor, or whether such personal property was her husband's at the time of his death.

In *Reynolds v. Iowa*, etc., Ins. Co., 80 Iowa 563, it was held that a person insured might testify as to transactions between him and the agent of the company, since the company was not a *survivor* of the agent.

In *Salysers v. Monroe*, 104 Iowa 74, it was held that a *surviving* partner was within both the letter and the spirit of the statute which provided that no party to an action should be examined as a witness in regard to any personal transaction or communication between such witness and a person afterwards deceased against the *survivor* of such deceased person.

**1. Refer to Death of Testator — England.** — *Bindon v. Suffolk*, 1 P. Wms. 96; *Stones v. Heurtly*, 1 Ves. 165; *Perry v. Woods*, 3 Ves. Jr. 204; *Russell v. Long*, 4 Ves. Jr. 553; *Brown v. Bigg*, 7 Ves. Jr. 280; *Roebuck v. Dean*, 2 Ves. Jr. 265; *Elliott v. Smith*, 22 Ch. D. 236; *Haws v. Haws*, 3 Atk. 524; *Doe v. Frigg*, 8 B. & C.

231, 15 E. C. L. 206; *Edwards v. Symonds*, 6 Taunt. 213, 1 E. C. L. 361; *Garland v. Thomas*, 1 B. & P. N. R. 82; *Wilson v. Bayly*, 3 Bro. P. C. (Toml. ed.) 195; *Rose v. Hill*, 3 Burr. 1881; *Stringer v. Phillips*, 1 Eq. Cas. Abr. 293, par. 11, 1 P. Wms. 97, note.

*Illinois.* — *Nicoll v. Scott*, 99 Ill. 529.

*New York.* — *Moore v. Lyons*, 25 Wend. (N. Y.) 119.

*Pennsylvania.* — *Buckley v. Reed*, 15 Pa. St. 85; *Johnson v. Morton*, 10 Pa. St. 245; *Ross v. Drake*, 37 Pa. St. 376.

*South Carolina.* — *Drayton v. Drayton*, 1 Desaus. (S. Car.) 324.

*Virginia.* — *Hansford v. Elliott*, 9 Leigh (Va.) 79; *Stone v. Nicholson*, 27 Gratt. (Va.) 1; *Brown v. Brown*, 31 Gratt. (Va.) 502; *Randolph v. Wright*, 81 Va. 608; *Stone v. Lewis*, 84 Va. 474.

See also the title REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS, vol. 24, p. 393.

A testatrix devised property to the *surviving* children of her brothers. It was held that she meant the children of those *surviving* at her death, and not those who were alive when the will was made. *Eberts v. Eberts*, 42 Mich. 406.

**Devise to Wife for Life, Then to Surviving Children.** — In *Martin v. Kirby*, 11 Gratt. (Va.) 67, a testator devised his estate to his wife during her widowhood, and then directed that at her death the whole should be sold and the proceeds equally divided between his *surviving* children or their heirs. It was held that in the absence of evidence to show a special intent on the part of the testator, in using the words "*surviving* children," to refer them to the period of the termination of the particular estate, they must be taken to refer to the testator's death.

**Direction to Sell Real Property and Distribute Proceeds.** — A testator, as to certain lands, declared that, should they not be sold by himself, "then I wish my executors to dispose of them to the best advantage, and when in funds for the same, I wish for them to divide the money among the whole of my *surviving* children, share and share alike, to them and their lawful heirs forever." It was held that by the term *surviving* the testator meant the children who *survived* him, and not those who were living when the funds arising from the sales were in the hands of the executors. *Ballard v. Connors*, 10 Rich. Eq. (S. Car.) 389.

**2. Termination of Previous Estate or Time of Distribution — England.** — *Brograve v. Winder*, 2 Ves. Jr. 634; *Newton v. Ayscough*, 19 Ves. Jr. 534; *Hoghton v. Whitgreave*, 1 Jac. & W. 146; *Daniell v. Daniell*, 6 Ves. Jr. 297; *Wordsworth v. Wood*, 2 Beav. 25; *Cripps v. Wolcott*, 4 Madd. 11; *Gibbs v. Tait*, 8 Sim. 132; *Blewitt v. Stauffers*, 9 L. J. Ch. 209; *Pope v. Whitcombe*, 3 Russ. 124; *Howard v. Collins*, L. R. 5 Eq. 349; *Wordsworth v. Wood*, 1 H. L. Cas. 129; *Young v. Robertson*, 8 Jur. N. S. 825; *Taaffe v. Conmee*, 10 H. L. Cas. 64.

**Child of Survivor — Others.** — The children or issue of a person afterwards deceased who would have taken under the terms "surviving," "survivor," or "survivors" have in a number of cases been held entitled to take such deceased person's share, the words being held in such cases to mean other or others.<sup>1</sup>

**Massachusetts.** — *Hulburt v. Emerson*, 16 Mass. 241; *Olney v. Hull*, 21 Pick. (Mass.) 311.  
**New Jersey.** — *Van Tilburgh v. Hollinshead*, 14 N. J. Eq. 32; *Slack v. Bird*, 23 N. J. Eq. 238.

**South Carolina.** — *Selman v. Robertson*, 46 S. Car. 262.

It has been held that where there is a clause of *survivorship*, *prima facie survivorship* means the time at which the property to be divided comes into enjoyment, that is to say, if there be no previous life estate, at the death of the testator; if there be a previous life estate, then at the termination of that life estate; or, in other words, the words of *survivorship* should be referred to the period for the payment or distribution of the subject-matter of the gift. *Young v. Robertson*, 8 Jur. N. S. 825; *Sinton v. Boyd*, 19 Ohio St. 30, 2 Am. Rep. 369.

Where the form of a gift is after the expiration of a prior interest to distribute a fund to the survivors, the word *survivors* refers to the period of distribution. *Nicoll v. Scott*, 99 Ill. 529.

So in *Cripps v. Wolcott*, 4 Madd. 11, a testatrix bequeathed personal property to her husband for life and directed that after his death it should be divided between her two sons and her daughter and the *survivor* or *survivors* of them, share and share alike. One of the sons died after the testatrix, but in the lifetime of the husband. It was held that the other son and daughter took the whole legacy, the *survivorship* being referred to the death of the tenant for life, and not to the death of the testatrix.

In *Ballard v. Connors*, 10 Rich. Eq. (S. Car.) 392, it was said: "In general, words of survivorship are significant of the death of testator, but when a future period of distribution is fixed by a will, such as the termination of a life estate, or when a legatee shall attain twenty-one years, then for the benefit of the legatees and in increase of the objects of bounty, the terms are referred to the period of distribution."

A devise was to J. and his heirs, and in case J. died before twenty-one or without issue, then the estate to be "equally divided amongst my *surviving* children." It was held that the words "*surviving* children" as here used meant the children *surviving* at the death of J., and not at the death of the testator. *Holcomb v. Lake*, 24 N. J. L. 686.

1. **Child of Survivor — Others — England.** — *Re Corbett*, Johns. Ch. (Eng.) 591; *Doe v. Wainwright*, 5 T. R. 427; *Waite v. Littlewood*, L. R. 8 Ch. 70; *Wake v. Varah*, 2 Ch. D. 355; *Lucena v. Lucena*, 7 Ch. D. 255; *In re Walker*, 12 Ch. D. 205; *In re Bowman*, 41 Ch. D. 530; *In re Beck*, 16 W. R. 189; *Hodge v. Foot*, 34 Beav. 349; *Davidson v. Dallas*, 14 Ves. Jr. 578; *Wilmot v. Wilmot*, 8 Ves. Jr. 10; *Cole v. Sewell*, 2 H. L. Cas. 186; *Smith v. Osborne*, 6 H. L. Cas. 375; *Badger v. Gregory*, L. R. 8 Eq. 78; *In re Arnold*, L. R. 10 Eq. 252; *In re Palmer*, L. R.

19 Eq. 320; *Cross v. Maltby*, L. R. 20 Eq. 378, 15 Moak 384; *Eyre v. Marsden*, 4 Myl. & C. 231; *Aiton v. Brooks*, 7 Sim. 204; *Hawkins v. Hamerton*, 16 Sim. 410.

**Delaware.** — *Cooper v. Cooper*, 7 Houst. (Del.) 488.

**Illinois.** — *Duryea v. Duryea*, 85 Ill. 41.

**Kentucky.** — *Birney v. Richardson*, 5 Dana (Ky.) 429; *Harris v. Berry*, 7 Bush (Ky.) 113; *Graves v. Spurr*, 97 Ky. 651.

**New York.** — *Anderson v. Jackson*, 16 Johns. (N. Y.) 418.

**Pennsylvania.** — *Bacon's Estate*, 202 Pa. St. 535.

**Texas.** — *Blanton v. Mayes*, 58 Tex. 425.

**Wisconsin.** — *Scott v. West*, 63 Wis. 593.

"If \* \* \* property be given to several persons, with a proviso that, in case of the death of any without leaving children at their death, their shares shall go to the *survivors*, but in the case of the death of any leaving children, then their shares to belong to such children; if one of the devisees die leaving issue, and then another die not leaving children, the share of the latter will go as well to the *surviving* objects as to the children of the deceased objects; and, by parity of reasoning, if all the legatees were then dead, leaving children, so that there were in fact no *survivors*, the children would take the whole." *Lapsley v. Lapsley*, 9 Pa. St. 131, quoting 2 *Powell* on Devises 723. See also *Beacon's Estate*, 202 Pa. St. 535.

In *In re Palmer*, L. R. 19 Eq. 320, it was said: "There is no word more flexible than *survivor*. It is a doubtful word, used very often without being understood, and frequently it is obvious from the context that it must have been intended to mean other, and not *survivor*."

"The word *survivors* of her sisters includes the children of a sister not *surviving*." *Naglee's Appeal*, 33 Pa. St. 918.

**Illustrations.** — Where a testator devised property to his three grandchildren and provided that if either of them should die without issue, his share should go to the *survivor* or *survivors*, it was held that if two of the grandchildren died leaving children, and after their death the *surviving* grandchild should die without children, the children of the two who died first would take, this appearing to have been the intent of the testator from a consideration of the whole will. *Louisville Driving, etc., Assoc. v. Louisville Trust Co.*, (Ky.) 1895) 29 S. W. Rep. 866.

A testatrix gave her property to her four children, and if either should die before the testatrix her estate to be "divided among the *survivors* or their legal representatives, share and share alike." One of the children died before the testatrix, leaving two children. It was held that the two grandchildren were entitled to the share of their mother. *Rivenett v. Bourquin*, 53 Mich. 10.

A devise was to the testator's sons equally,

But it is said that the words "survivor," "survivors," etc., are to be confined to their literal signification when it is possible to do so without violating the clear meaning of the rest of the will.<sup>1</sup>

**SURVIVING PARTNER.** — See the title PARTNERSHIP, vol. 22, p. 2.

**SURVIVORSHIP.** — See the title JOINT TENANTS AND TENANTS IN COMMON, vol. 17, p. 649.

**SURVIVORSHIP IN COMMON DISASTER.** — See the title PRESUMPTIONS, vol. 22, p. 1251.

**SUSPECT.** (See also SUSPICION, *post.*) — See note 2.

**SUSPEND — SUSPENSION.** — To suspend means to cause to cease for a time; to interrupt; to delay.<sup>3</sup> Suspension from an office is a deprivation

and if any of them died without issue their share to be divided among the *surviving* brothers. It was held that *surviving* brothers meant the other devisees as well as those who *survived* as the representatives of those dying before the devisees. *Lapsley v. Lapsley*, 9 Pa. St. 130.

**Same — Surviving Heirs.** — A testator devised land to his son for life and then to such son's issue, and upon his death without issue the land was to be sold and the proceeds distributed among the testator's *surviving* heirs. It was held that by *surviving* heirs the testator meant "his 'other' heirs, or rather devisees or legatees." *Passmore's Appeal*, 23 Pa. St. 383.

1. "**Survivor**" Not Read "**Other**" — *England*. — *Twist v. Herbert*, 28 L. T. N. S. 489; *Inderwick v. Tatchell*, (1901) 2 Ch. 738; *In re Bilham*, (1900) 2 Ch. 169; *Doe v. Wainwright*, 5 T. R. 427; *Waite v. Littlewood*, L. R. 8 Ch. 74; *In re Horner*, 19 Ch. D. 186; *Re Corbett*, Johns. Ch. (Eng.) 591; *Crowder v. Stone*, 3 Russ. 223; *In re Keep*, 32 Beav. 122; *Re Ustick*, 23 Beav. 338; *Cripps v. Wolcott*, 4 Madd. 12; *Milsom v. Awdry*, 5 Ves. Jr. 465; *Davidson v. Dallas*, 14 Ves. Jr. 576. ✓

*United States*. — *Abbott v. Essex County*, 2 Curt. (U. S.) 140; *Jackson v. Chew*, 12 Wheat. (U. S.) 153.

*Delaware*. — *Cooper v. Cooper*, 7 Houst. (Del.) 488.

*Kentucky*. — *Coleman-Bush Invest. Co. v. Figg*, 95 Ky. 409. ✓

*Maryland*. — *Turner v. Withers*, 23 Md. 18.

*New Jersey*. — *Seddel v. Wills*, 20 N. J. L. 223.

*South Carolina*. — *Bradley v. Richardson*, 62 S. Car. 494.

In *Anderson v. Brown*, 84 Md. 261, it was said: "All the cases to which we have been referred or [which we have] examined in which *survivor* has been construed as the equivalent of 'other' appear to have been so decided because there was something in the will to make it clear that the testator intended the issue of predeceased children to take, or that some other clearly expressed intention would otherwise be rendered inoperative."

**Illustrations.** — A testator gave legacies to each of his four daughters for life, with remainder to their children, and he provided that if either of the daughters should die without children, her share should go over to the *survivors* of his sons and daughters. It was held that *survivors* could not be read, "others," in consequence of the gift over being to a

different class from those whose shares were to go over. *De Garagnol v. Liardet*, 32 Beav. 608.

A testator gave all his estate to his wife for life, with a direction that after her death it should be equally divided among his children or the *survivors* of them. One of the children died after the testator's death, but before that of the widow, leaving a child. It was held that no interest vested in the deceased child under the will, nor in the grandchild, she being neither one of the "children" nor one of the *survivors*. *Sinton v. Boyd*, 19 Ohio St. 30, 2 Am. Rep. 369. See also *Young v. Robertson*, 8 Jur. N. S. 825.

2. **Suspect and Believe.** — A magistrate authorized to issue a search warrant upon the oath or affirmation of the complainant that he believes that the stolen goods are concealed, etc., cannot issue the warrant upon a complaint stating that the complainant has cause to *suspect* and does *suspect* that the stolen goods are concealed, etc. Suspicion may be upon very slight ground, and imports a less degree of certainty than belief. *Humes v. Taber*, 1 R. I. 464. See also **BELIEF — BELIEVE**, vol. 3, p. 912, and see *Grant v. Monmouth First Nat. Bank*, 97 U. S. 81.

3. **Suspend.** — *Little Rock v. Parish*, 36 Ark. 174; *State v. Melvin*, 166 Mo. 565.

**Patent.** — See **Red Jacket Mfg. Co. v. Davis**, (C. C. A.) 82 Fed. Rep. 438.

**Abeyance in Sense of Suspension.** — See *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 191.

"**Suspend**" and "**Dispense**." — There is no substantial difference between the terms "dispense with" and *suspend*, as applied to the rules governing a legislative body. *Bayard v. Baker*, 76 Iowa 220, 23 Am. & Eng. Corp. Cas. 126.

**Suspended and Postponed.** — Where a contract of sale by which a purchaser agreed to take all the produce manufactured by the vendor provided that the deliveries contracted for might be *suspended* or partially *suspended* in case of strikes, accidents, etc., it was held that the word *suspended* was not synonymous with "postponed." *Hull Coal, etc., Co. v. Empire Coal, etc., Co.*, (C. C. A.) 113 Fed. Rep. 259.

**Suspended and Superseded.** (See also **SUPERSEDE, ante.**) — A statute provided that if there should be pending against the same defendant two indictments for the same offense, the indictment first found should be deemed to be *suspended*. In holding that the first indictment was not quashed by the second, the

## SUSPENSION OF POWER OF ALIENATION — SUSPICION.

of the office for the time being.<sup>1</sup>

**SUSPENSION OF POWER OF ALIENATION.** — See the title RESTRAINTS ON ALIENATION, vol. 24, p. 863, and references there given.

**SUSPENSIVE CONDITION.** — See note 2.

**SUSPICION.** (See also BELIEF — BELIEVE, vol. 3, p. 913; SUSPECT, *ante.*) — Suspicion is defined to be the act of suspecting or the state of being suspected; imagination, generally of something ill; distrust; mistrust; doubt.<sup>3</sup>

court said: "It follows that *State v. Daugherty*, 106 Mo. 182, went too far, and should not be further followed on this point. 'Superse- ded,' in the *New York* statute, is a stronger word than *suspended*, in ours, and yet we have seen the *New York* court hold that the first indictment was only 'liable' to be quashed by the finding of the second, and not in fact quashed—a view which has been three times reasserted since." *State v. Melvin*, 166 Mo. 573. See also *People v. Bransby*, 32 N. Y. 536; *People v. Barry*, (Supm. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 661; *People v. Monroe Oyer* and T. Ct., 20 Wend. (N. Y.) 108.

**Suspension and Extinguishment — Appointment of Debtor as Executor or Administrator.** — In *Kelsey v. Smith*, 1 How. (Miss.) 84, it was said: "A material difference is made in the authorities between an extinguishment and a *suspension*, according to the common-law doctrine on this subject, and this will be found to be the only difference between an executor and an administrator, a *suspension* being considered a temporary privation of the remedy, while an extinguishment is a total destruction of it. One arises by act of the party, and the other by operation of law from the necessity of the case." See also *Loekier v. Smith*, 1 Sid. 79, and see EXTINGUISH — EXTINGUISHMENT, vol. 12, p. 574, and the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 787.

**Operation of General Law.** (See also the title STATUTES, vol. 26, p. 715.) — In *Little Rock v. Parish*, 36 Ark. 174, it was said: "The act in question paralyzes, with regard to the city, the force of section 5, with regard to all the territory belonging to it when the general act was passed, and which lies outside the line prescribed by the Act of 1877. We cannot resist the conclusion that the latter act *suspends* the operation of the former."

**Statute of Limitations.** (See also the title LIMITATION OF ACTIONS, vol. 19, p. 212.) — In *Hicks v. Pouncey*, 1 Brev. (S. Car.) 118, it was said: "On examination of the limitation acts relative to personal actions, I think the word *suspend* does not destroy such time as began to run, and which continued to run, between any of the said acts. The Act of 1784 declares that no time past shall be counted; but the remaining acts only declare the time which has begun to run to be *suspended*." And accordingly it was held that where a statute of limitations had been *suspended*, the time which elapsed prior to the *suspension* might be added to that which had elapsed since the *suspension* ceased, in order to complete the period requisite to the bar of the statute.

**Suspension of Payment.** (See also the title INSOLVENCY AND BANKRUPTCY, vol. 16, p. 672.) — Under a bankruptcy act providing that a banker, trader, etc., who *suspended* payment of his commercial paper might be adjudged a

bankrupt, it was held that a general *suspension* of payment was not necessary, but that the *suspension* of payment of a single piece of commercial paper was sufficient. *In re Wilson*, 5 Biss. (U. S.) 390. Compare *In re Clemens*, 5 Chicago Leg. N. 511, 5 Fed. Cas. No. 2,878.

**Suspension of Right in Estate.** — The *suspension* of a right in an estate is a partial extinguishment thereof, or an extinguishment for a time. It differs from an extinguishment in that a *suspended* right may be revived, while one extinguished is absolutely dead. *Dyer v. Dyer*, 17 R. I. 550, citing *Bac. Abr.*, tit. Extinguishment, A.

**Suspension of Sentence.** (See also the titles REPRIEVE, PARDON, AND AMNESTY, vol. 24, p. 547; SENTENCE AND PUNISHMENT, vol. 25, p. 313.) — In *Matter of Buchanan*, 146 N. Y. 273, it was said: "The distinction between a 'reprieve' and a '*suspension* of sentence,' although the words are sometimes used interchangeably, is that a reprieve postpones the execution of the sentence to a day certain, whereas a *suspension* is for an indefinite time. See opinion of Edmonds, J., in *Carnal v. People*, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 262."

**Severance of Connection.** — The presbytery of the Reformed Presbyterian church resolved to *suspend* its relations to the synod. Upon the effect of such *suspension* the court said: "That act did not operate to sever the connection of either of these bodies from the general organization; neither was it intended so to do. *Suspension* is 'temporary' cessation; delay; intermission; stay. Worcester's Dictionary. It but intermitted the relations of the presbytery and church with the synod, but it worked no dissolution of the organic connection." *McAuley's Appeal*, 77 Pa. St. 418.

**1. Suspension of Officer.** (See also the title PUBLIC OFFICERS, vol. 23, p. 428 *et seq.*) — *Ex p. Diggs*, 52 Ala. 383.

A *suspension* is an interruption in the exercise of an officer's duties, of his authority. *State v. Richmond*, 29 La. Ann. 706.

**Suspension in Sense of Discharge or Removal.** — See the title PUBLIC OFFICERS, vol. 23, pp. 432, 433, and see REMOVE — REMOVAL, vol. 24, p. 462.

**Same — Clergyman.** — See *Stack v. O'Hara*, 98 Pa. St. 213, stated under the title RELIGIOUS SOCIETIES, vol. 24, p. 336, and see *Martin v. Mackonochie*, 4 Q. B. D. 726.

**2. A Suspensive Condition,** within the meaning of Civ. Code La., art. 2043, is the equivalent of the condition precedent at common law. *New Orleans v. Texas, etc.*, R. Co., 171 U. S. 312. See also *W. T. Adams Mach. Co. v. Newman*, 107 La. 702, and see generally the title CONDITIONS, vol. 6, p. 499.

**3. Suspicion.** — *McCalla v. State*, 66 Ga.

**SUSTAIN.**—See ACCRUE—ACCRUED—ACCRUING, vol. 1, p. 479.

**SUSTENANCE.** (See also the title PARENT AND CHILD, vol. 21, p. 1034.)—See note 1.

**S. W.**—See note 2.

**SWAMP LANDS.**—See note 3.

**SWAP.**—See note 4.

**SWEAR, SWORN, ETC.** (See also FALSE SWEARING, vol. 12, p. 865, and see the titles OATHS AND AFFIRMATIONS, vol. 21, p. 743; PERJURY, vol. 22, p. 680.)—To swear is to take an oath administered by some officer duly empowered.<sup>5</sup> The term also means to use such profane language as is forbidden by law.<sup>6</sup>

**SWEARING THE PEACE.**—See note 7.

348, in which case it was held that a charge of the trial court that the jury might find a verdict against the defendant upon the testimony of an accomplice, if the corroborating circumstances were such as to cast on the defendant a grave *suspicion* of guilt, was erroneous.

Of a statute in relation to the removal of cloud on title, the court said in *Huntington v. Allen*, 44 Miss. 662: "The terms used in the statute expressive of the scope of the jurisdiction, viz., 'cloud,' 'doubt,' *suspicion*, quite distinctly imply that the instrument which creates them is apparent rather than real; is semblance rather than substance; obscures rather than destroys or defeats." See generally the title CLOUD ON TITLE, vol. 6, p. 149.

1. **Sustenance.**—In *Justice v. State*, 116 Ga. 606, it was said: "In our opinion, there is a very great difference between depriving a child of *sustenance* and refusing to permit medicine to be administered to him. *Sustenance* is 'that which supports life; food; victuals; provisions;' while medicine is defined to be 'any substance administered in the treatment of diseases; a remedial agent; a remedy; physic.' Our statute, in the use of the word *sustenance*, means that necessary food and drink which is sufficient to support life and maintain health. And evidence that while a father fully provides for the wants of his children as to food he refuses to permit them to take medicine will not support a conviction under this statute; and we know of no provision in our penal laws enacted to meet a case of this character."

2. **S. W.**—Abbreviation of *Southwest*.—See the title ABBREVIATIONS, vol. 1, p. 101, and see *Frazer v. State*, 106 Ind. 473. See also generally the title JUDICIAL NOTICE, vol. 17, p. 897.

3. **Swamp and Overflowed Lands.**—See the title STATE AND PUBLIC LANDS, vol. 26, p. 343 *et seq.*

**Used in Contradistinction to "Tide Lands."**—See *State v. Forrest*, 11 Wash. 227. And see the title TIDE LANDS.

4. **Swap.**—See *Moseley v. Gordon*, 16 Ga. 394, stated under the title EXCHANGE OF PROPERTY, vol. 11, p. 570, and see *BARTER*, vol. 3, p. 860, and the title SALES, vol. 24, p. 1018.

5. **Swear.**—An allegation that the defendant did "depose and *swear*" to the truth of the answers contained in a deposition does not show that the defendant was *sworn* to the truth of said answers. One may *swear* who is not *sworn*, and in such case the oath is not

administered, but self-imposed, and the swearer incurs no legal liability thereon. *U. S. v. McConaughy*, 33 Fed. Rep. 168.

**Formalities.**—A record reciting that the jury was "*sworn* and charged well and truly the issue joined to try," etc., *ex vi termini* imports that the jury was *sworn* according to the formula observed in the courts of justice of the state. *Washington v. State*, 60 Ala. 16.

**Evidence of Oath.**—In *Wilson v. Wheeler*, 55 Vt. 452, it was held that under the *Vermont* statute a copy of the record of the election of a public officer in which the word *sworn* appeared immediately after his name was sufficient to show that he was *sworn* as the law required. See also *Brock v. Bruce*, 58 Vt. 268. But *contra* in *New Hampshire*. See the title PUBLIC OFFICERS, vol. 23, p. 361.

**Sworn To.**—In *Powers v. Bryant*, 7 Port. (Ala.) 15, it was said: "The words '*sworn* to' clearly refer to the plea, and must be taken to mean that the testator declared on oath the facts it set forth were true."

**Sworn and Sworn To.**—In *Com. v. Bennett*, 7 Allen (Mass.) 534, it was held that a certificate of a magistrate that a complaint was "taken and *sworn*" before him was sufficient. The court said: "That *sworn* legally means '*sworn* to' seems to have been denied for the first time in the present case."

**Written Statement.**—"To *swear* in and by a written statement can only mean to make a written statement under oath." *Com. v. Carel*, 105 Mass. 585.

**"Swear" or "Sworn" Includes Affirmation.**—See *Riddles v. State*, (Tex. Crim. 1898) 46 S. W. Rep. 1058.

**Duly Sworn.**—See DULY, vol. 10, p. 316, and see *Bowman v. Van Kuren*, 29 Wis. 214; *Sydnor v. Palmer*, 29 Wis. 226.

**Sworn and Deposed.**—See DEPOSE, vol. 9, p. 278.

**Sworn and Qualified.**—See QUALIFICATION—QUALIFY—QUALIFIED, vol. 23, p. 531.

6. See the title BLASPHEMY AND PROFANITY, vol. 4, p. 580.

7. **Swearing the Peace.**—"At common law, \* \* \* whenever a private person had just cause to fear that another would do him injury, he might demand surety of the peace against such person, on making oath that he was actually under fear of death or bodily harm, and showing just cause for such apprehension, and that he was not doing this out of malice or mere vexation; and this was termed *swear-*



**SWEAT.**—See note 1.

**SWEATING SYSTEM.**—See note 2.

**SWEEPSTAKES.**—A sweepstake is defined as a race for which the prize is the sum of the stakes which the subscribers agree to pay for each horse nominated.<sup>3</sup>

**SWEETMEAT.**—A sweetmeat is a fruit preserved with sugar, but not necessarily dried.<sup>4</sup>

**SWIFT.**—See note 5.

**SWINDLE—SWINDLER—SWINDLING.** (See also the titles FALSE PRETENSES AND CHEATS, vol. 12, p. 792; FRAUD AND DECEIT, vol. 14, p. 12; and see CHEAT, vol. 5, p. 1025.)—To "swindle" implies no more than to "cheat."<sup>5</sup>

ing the peace against another." *State v. Sargent*, 74 Minn. 244. See generally the title BAIL AND RECOGNIZANCE, vol. 3, p. 729.

1. **Sweat—Ships.** (See generally the titles CARRIERS OF GOODS, vol. 5, p. 154; CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES, vol. 7, p. 156.)—In *Adrian v. The Live Yankee*, 1 Fed. Cas. No. 88, it was said: "It was proved that the goods were stowed in the usual and proper manner, but on the top of the between-decks cargo, and immediately under the upper deck, and that the damage was caused by moisture in the hold of the vessel, or what is usually called *sweat*. On the general principle by which this cause must be determined this court has already expressed its opinion. In the case of *Levy v. The Caroline*, 15 Fed. Cas. No. 8,301, it was considered that the carrier is not liable for damage arising from *sweat* unless he is proved to have been guilty of negligence."

In *La Motte v. Angel*, 1 Hawaii 244, it was said: "A large portion of the damaged goods on board the 'Perla,' it appears, were injured by what is termed *sweating*, which may arise from various causes, such as the confinement, closeness, or newness of the ship and the nature of the goods conveyed. Where goods become deteriorated in value from any intrinsic principle of decay naturally inherent in the goods themselves, or the *sweat* of the hold, where there has been proper stowage and no negligence on the part of the carrier, the merchant must bear the loss, as well as pay the freight, for the master and owners of the vessel are in no fault, nor does their contract contain any insurance or warranty against such an event."

2. **Sweating System.**—In *Collard v. Marshall*, (1892) 1 Ch. 576, Chitty, J., said: "There may be, as the select committee of the House of Lords seems to have found, a difficulty in framing a precise and exhaustive definition of the term *sweating system*. It is obviously a figurative expression. It involves a system oppressive to the workman, whereby an unconscionable or unjust profit is wrung from the sweat of his brow by paying him insufficient wages for his work. There is generally a middleman taking advantage of the circumstances in which the workman is placed, and grinding down for his own profit the wages of those employed below the fair rate."

3. **Sweepstakes.**—*Stone v. Clay*, (C. C. A.) 61 Fed. Rep. 890. See generally the titles GAMBLING CONTRACTS, vol. 14, p. 614 *et seq.*; GAMING, vol. 14, p. 671; HORSE RACING, vol. 15, p. 746.

4. **Sweetmeat.**—*Levy v. Robertson*, 38 Fed. Rep. 715. This was upon a construction of the term in a tariff act.

5. **Swift.**—In holding that *Swift & Co.*, an old established firm of meat packers, were entitled to an injunction restraining another firm from applying the name of *Swift* to its products, the court said that the name *Swift* in the combination "*Swift Packing Company*" or "*Swift Union Stock Company*" was likely to be understood as taken from a proper name and was not a very apt adjective to apply to any of the products manufactured. "The word goes further than 'quick' or 'rapid.' It gives the idea of continuance of a very rapid motion. \* \* \* I am rather inclined to the impression that the name was used with the idea of taking advantage of the fact that the complainant company was a well-known company and largely engaged in business, and therefore it was an improper appropriation of the name of that concern." *Swift v. Groff*, 114 Fed. Rep. 606. See also the title TRADEMARKS.

6. **Swindle.**—*Savile v. Jardine*, 2 H. Bl. 531; *Stevenson v. Hayden*, 2 Mass. 408; *Weil v. Altenhofen*, 26 Wis. 710.

In *Cunningham v. Baker*, 104 Ala. 171, 53 Am. St. Rep. 34, it was said: "The word *swindling* has no legal or technical meaning; and commonly it implies that there has been 'recourse to petty and mean artifices for obtaining money which may or may not be strictly illegal.'"

**Does Not Import Crime.**—In *Hall v. Rogers*, 2 Blackf. (Ind.) 430, it was said: "The term *swindling*, the charge made in the affidavit and in the warrant, is vague and indefinite. It does not import a crime. Such a charge is not actionable, not being a punishable offense."

**Libel and Slander.**—See the title LIBEL AND SLANDER, vol. 18, pp. 882, 928, and see *Barnett v. Allen*, 3 H. & N. 376; *Odiorne v. Bacon*, 6 Cush. (Mass.) 185.

**Minnesota.**—It is provided by statute in Minnesota that "whoever, by the means of three-card monte, so called, or of any other form or device, sleight of hand, or other means whatever, by use of cards or instruments of like character, or by any other instrument, trick, or device, obtains from another person any money or other property of any description, shall be deemed guilty of the crime of *swindling*." Stat. Minn. 1894, § 6595; *State v. Gray*, 29 Minn. 142.

**Texas.**—By Pen. Code Tex. (1895), art. 943, *swindling* is defined as "the acquisition of

**SWIPE.** — To swipe is defined as "to pluck, to snatch, to steal."<sup>1</sup>

**SWISS MUSLINS.** — See note 2.

**SWITCH.** (See also SIDETRACK — SIDING, vol. 25, p. 1063, and see the title RAILROADS, vol. 23, p. 667.) — See note 3.

**SWORN.** — See SWEAR, SWORN, ETC., *ante*.

**SYMBOLIC DELIVERY.** — See CONSTRUCTIVE DELIVERY, vol. 7, p. 3, and the titles FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 374; GIFTS, vol. 14, pp. 1021, 1059; SALES, vol. 24, p. 1084.

**SYNALLAGMATIC CONTRACT.** — A contract by which each of the contracting parties binds himself to the other, such as contracts of sale, hire, etc.<sup>4</sup>

**SYNDIC.** — In the civil law a syndic is an assignee of a bankrupt.<sup>5</sup>

**SYNDICATE.** — A syndicate is a combination of persons united for the purposes of an enterprise too large for successful management by a single individual; also a number of persons who buy all of an issue of stock or bonds, in order, by advancing the market value, to make a profit to themselves as members of the company.<sup>6</sup>

**SYNONYMOUS.** — "Synonymous" means conveying the same or approximately the same meaning.<sup>7</sup>

any personal or movable property, money, or instrument of writing conveying or securing a valuable right by means of some false or deceitful pretense or device, or fraudulent representation with intent to appropriate the same to the use of the party so acquiring, or of destroying or impairing the rights of the party justly entitled to the same." In *Blum v. State*, 20 Tex. App. 590, 54 Am. Rep. 530, it was held that to constitute the offense thus described, four things were necessary: first, the intent to defraud; second, an act of fraud committed; third, false pretenses; and, fourth, the fraud committed or accomplished by means of false pretenses made use of for the purpose — that is, they must be the cause which induced the owner to part with his property. See also *Cummings v. State*, 36 Tex. Crim. 152; *White v. State*, 11 Tex. 771; *Stringer v. State*, 13 Tex. App. 521; *May v. State*, 15 Tex. App. 436; *Frank v. State*, 30 Tex. App. 382; *Cline v. State*, 43 Tex. 497.

1. *Swipe.* — *State v. Lee*, 101 Iowa 390, *quoting* Webst. Dict. and holding that where a defendant charged with stealing a watch admitted that he had *swiped* it, this might be considered by the jury a confession, as the court could not instruct as a matter of law that the word *swipe* did not mean steal.

2. *Swiss Muslins — Customs Duties.* — See *U. S. v. Albert*, (C. C. A.) 60 Fed. Rep. 1013.

3. "A Switch is, in general terms, 'a device for opening and closing a single circuit in some regular and systematic manner.'" *Thomson-Houston Electric Co. v. Nassau Electric R. Co.*, (C. C. A.) 107 Fed. Rep. 278.

*Flying Switch.* — See *FLYING SWITCH*, vol. 13, p. 725, and see the title *CROSSINGS*, vol. 8, p. 419.

*Kicking Switch.* — See *KICKING CARS*, vol. 18, p. 59.

*Block Switch or Frog.* — See *Lane v. Missouri Pac. R. Co.*, 64 Kan. 755. See also the title *COUPLING CARS (INJURIES BY)*, vol. 7, p. 1052, and see *FROG*, vol. 14, p. 552.

*Switch Yard.* — In Baltimore, etc., *R. Co. v. Little*, 149 Ind. 173, it was said: "'Railroad yard' and 'switch yard' we have no doubt are

synonymous, and the latter term was used in the act under consideration as descriptive of the former. The term found its place in the allegations of the second paragraph of complaint, and was doubtless understood by the draughtsman of the pleading to describe a yard where switching is done by a railroad company." In this case the court had under consideration an exemption from the fellow-servant rule of servants in charge of *switch* yards.

4. *Synallagmatic Contract.* — *Bouv. L. Dict.*; *Zacharie v. Franklin*, 12 Pet. (U. S.) 151, in which case it was held that a contract in which only the vendor speaks and which contains no stipulations, either express or implied, by the vendee, requiring nothing to be done by him, is not a *synallagmatic contract* under the laws of Louisiana.

5. *Syndic.* — In Louisiana all the property and rights of property of an insolvent who makes a cession pass to the *syndic*. *Arnold v. Danziger*, 30 Fed. Rep. 898; *Tennessee Bank v. Horn*, 17 How. (U. S.) 157; *Adams v. Preston*, 22 How. (U. S.) 488; *Dwight v. Simon*, 4 La. Ann. 490; *West v. His Creditors*, 8 Rob. (La.) 128.

*Executors and Administrators.* — See the title *EXECUTORS AND ADMINISTRATORS*, vol. 11, pp. 752, 780.

6. *Syndicate.* — *And. L. Dict.*, *citing* *Whelen's Appeal*, 108 Pa. St. 162.

*Land Syndicate.* — In *Horner v. Meyers*, 4 Ohio Dec. 405, it was said: "The motion raises the question as to the nature of the interests of owners of shares in a land *syndicate* of this character, where the land is vested in trustees with power of subdivision and sale, and division of the proceeds when they reach a certain amount. The arrangement between the shareholders and trustees never contemplated that the shareholders should be entitled to an interest in the land, but only to an interest in the proceeds of the sale thereof, and it therefore necessarily follows that no shareholder is entitled to a partition of the land."

7. *Synonymous.* — *Fritz v. Williams*, (Miss. 1894) 16 So. Rep. 360; *Hoffine v. Ewings*, 60 Neb. 735.

**SYNOPSIS.**—A synopsis is a brief or partial statement; less than the whole; an epitome.<sup>1</sup>

**SYRUP.**—Syrup is defined as "a thick and viscid liquid, made from the juice of fruits, herbs, etc., boiled with sugar."<sup>2</sup>

**SYSTEM.**—See note 3.

**TACKING.**—See the titles ADVERSE POSSESSION, vol. 1, p. 842 *et seq.*; MORTGAGES, vol. 20, p. 1050 *et seq.*

**TAKE, TAKING, ETC.** (See also the titles LARCENY, vol. 18, p. 468; ROBBERY, vol. 24, p. 990; TROVER AND CONVERSION; and see DEEM, vol. 9, p. 165.)—To take an article signifies to lay hold of, seize, or grasp it with the hands or otherwise;<sup>4</sup> to get into one's possession or power; to acquire; to

1. *Synopsis.*—Barker v. Barker, 43 Kan. 93. In this case, where a case made recited that it contained a substantial *synopsis* of the evidence only, and it was claimed that the evidence did not sustain the findings of fact as found by the court below, it was held that the record was not sufficient to entitle the plaintiff to have the evidence reviewed in the appellate court. See also Ritchie v. Kinney, 46 Mo. 300.

2. *Syrup.*—California Fig Syrup Co. v. Stearns, 67 Fed. Rep. 1011, (C. C. A.) 73 Fed. Rep. 815, quoting Webst. Dict. This was a trademark case.

*Revenue Law.*—See U. S. v. One Hundred and Twelve Casks Sugar, 8 Pet. (U. S.) 279.

3. *Funding System.*—See FUND—FUNDS, vol. 14, p. 566.

*System of Numbering.*—In Davis v. Pacific Imp. Co., 137 Cal. 248, it was said: "There was no evidence before the court that any *system* of numbering the lots and blocks had been adopted or was at any time in existence in San Francisco, and it appears that the land described in the tax deeds was for many years assessed under the same description as in the deeds. The fact that a single block has been subdivided into lots would not constitute a *system* of numbering, or indicate that other blocks were subdivided or numbered." See also Klumpke v. Baker, 131 Cal. 80.

*Schools.*—The Constitution of Texas enjoined upon the legislature the establishment of a *system* of free schools. The court said: "The word *system* as used in the constitution means an organized plan, an institution, something established for the use and benefit of the people so long as the want of public education will continue." Peay v. Talbot, 39 Tex. 346.

In Kennedy v. Miller, 97 Cal. 432, it was said: "The term *system* itself imports a unity of purpose as well as an entirety of operation, and the direction to the legislature to provide 'a' *system* of common schools means one *system* which shall be applicable to all the common schools within the state."

*Uniform System of Government.*—The Constitution of Wisconsin provided that the legislature should establish but one *system* of town and county government, which should be as nearly uniform as practical. It was held that a statute providing for a county board of eight supervisors in a certain county which, under the general statute relative to county government, would have had only three, was in conflict with this provision; that the word *system* was not synonymous with "plan." State v. Riordan, 24

Wis. 488. See also McConihe v. State, 17 Fla. 238; Enterprise v. State, 29 Fla. 128; State v. Stark, 18 Fla. 255; Lake v. State, 18 Fla. 501; Ex p. Wells, 21 Fla. 280.

4. *Take.*—Gettinger v. State, 13 Neb. 308; State v. Chambers, 22 W. Va. 789.

*Statute Forbidding Abduction.*—In Couch v. Com., (Ky. 1895) 29 S. W. Rep. 29, the word *take* in a statute forbidding *taking* or detaining any woman against her will, etc., was defined as "to seize; lay hold upon; to catch."

Persuasion, enticements, and devices without force constitute a *taking* under these statutes. People v. Marshall, 59 Cal. 388. See the title ABDUCTION, vol. 1, p. 174.

*Embezzlement at Post Office.*—The expression "*take* the mail or any letter or packet therefrom" has been held to mean a wrongful and unlawful *taking*. In re Burkhard, 33 Fed. Rep. 27; U. S. v. Smith, 11 Utah 433. See generally the title EMBEZZLEMENT, vol. 10, p. 1023.

"*Take*" in Sense of "Arrest."—*Take* is the technical word used in all writs and precepts by which a sheriff or other officer is commanded to arrest the body. As thus used, the term is synonymous with "arrest." Com. v. Hall, 9 Gray (Mass.) 267, 69 Am. Dec. 285. Compare Hamilton v. Com., 3 P. & W. (Pa.) 148, *infra*, this note.

*Taken, capiatur*, in the twenty-ninth chapter of Magna Charta, which reads: *Nullus liber homo capiatur, vel imprisonetur \* \* \* nisi per legale iudicium parium suorum, vel per legem terra* (see the title DUE PROCESS OF LAW, vol. 10, p. 290, note 3), is used in the sense of "arrested," "restrained of liberty." The expression does not include the service of a process by which no imprisonment, no restraint of liberty, no bail is required, but which consists in notice merely. Legrand v. Bedinger, 4 T. B. Mon. (Ky.) 540. See also the title ARREST, vol. 2, p. 834 *et seq.*

*Game Is taken* when it is snared, though it is neither killed nor removed. Rex v. Glover, R. & R. C. C. 269.

*Taking Fish Spawn or Fry.*—In the statute 3 James I., c. 12, which prohibited "*taking*, destroying, or spoiling any spawn, fry," etc., of sea fish, a *taking* for destruction was prohibited, and not a removal of oyster spawn from one bed to another for further growth. Bridger v. Richardson, 2 M. & S. 568.

*Take Is Not Synonymous with 'Steal.'* and so facts sufficient to induce a reasonable man to believe that another has *taken* certain articles do not constitute probable cause warranting his

obtain; to procure.<sup>1</sup> "Take" and its inflections have in many phrases in law a meaning but little apart from the vernacular;<sup>2</sup> but in the law of eminent

prosecution for theft. *Stone v. Stevens*, 12 Conn. 219, 30 Am. Rep. 611.

And a charge of *taking* property does not *per se* impute larceny within the law of libel and slander. See the title *LIBEL AND SLANDER*, vol. 18, pp. 890, 891, and see *Robertson v. Lea*, 1 Stew. (Ala.) 141; *Linville v. Earlywine*, 4 Blackf. (Ind.) 469; *Coleman v. Playsted*, 36 Barb. (N. Y.) 26, *appeal dismissed* 40 N. Y. 341.

**Take and Carry Away.**—In *Larceny*, these are the technical words used in charging the offense. See the title *LARCENY*, 12 ENCYC. OF PL. AND PR. 95 *et seq.*, and see in this work the title *LARCENY*, vol. 18, p. 468 *et seq.*; *CARRY*, vol. 5, p. 724.

**Same—Trespass.**—In *State v. Porter*, 25 W. Va. 689, it was said: "The words '*take* and *carry away*,' though not necessarily words of trespass, may be such, and when employed, as they are here, with other words importing acts of trespass, it is fair and reasonable that they should also be so construed. In fact, the technical meaning of these words '*take* and *carry away*' in criminal law implies a trespass, and can only be supported by proof that the property was taken against the owner's will, and not by his consent."

**Taken In—English Agricultural Holdings Act 1883.**—See *Masters v. Green*, 20 Q. B. D. 807.

**Taken in Execution.**—A sheriff seized under a *fi. fa.* the goods of a judgment debtor who was liable to pay to the vestry, as the rating authority of the parish, a certain rate made up of a poor rate by virtue of the local act and a general rate under the Metropolis Management Act, 1855. A demand was made on the sheriff by the rate collector for the amount of the rate; but the sheriff, having subsequently received from the debtor the amount of the judgment debt, withdrew from possession without having paid the rate. It was held that the goods had been *taken* in execution. *St. Marylebone v. London*, (1900) 2 Q. B. 591.

1. *Hallenbeck v. Getz*, 63 Conn. 388.

**Transfer of Possession or Control.**—In *Jersey City v. Morris Canal, etc., Co.*, 41 N. J. L. 70, it was said: "In its usual signification, the word *taken* implies a transfer of possession, dominion, or control. A thing is not *taken* unless such a change of status is effected. In trespass, trover, or replevin the *taking* is not accomplished until the goods are within the power or control of the defendant. A devisee *takes* under a will only when the possession and control of the deviser has ceased."

**Authority to Take Includes Power to Sell.**—*Jackson v. Brown*, 5 Wend. (N. Y.) 590, stated under the title *BANKS AND BANKING*, vol. 3, p. 800, note.

**Taken Possession of and Administered—Executor de Son Tort.**—See *New York Breweries Co. v. Atty.-Gen.*, (1899) A. C. 62.

**Take and Convert** in a statute authorizing arrest has been held applicable to personality only. See the title *IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS*, vol. 16, p. 22.

**Sale or Bailment.**—In *Norton v. Woodruff*, 2 N. Y. 153, the defendant, the owner of a

flour mill, contracted to *take* the plaintiffs' wheat and to give them one barrel of flour for every four and thirty-six sixtieths bushels. In holding that this contract imported a sale, and not a bailment, the court said: "If the word *take*, as it seems in this contract, is equally applicable to a bailment as to a sale or exchange, and therefore equivocal, the term '*give*' requires some act of the defendant which should pass the property in the flour to the plaintiffs."

**Agreement to Take Shares.**—In *Buffalo, etc., R. Co. v. Dudley*, 14 N. Y. 336, it was held that an agreement to *take* a certain number of shares of a corporation created, if not an express, certainly an implied promise to pay for the shares.

**Take, Own, and Hold.**—An agreement preparatory to the formation of a corporation provided that associates in the undertaking should each *take*, own, and hold a certain number of shares. In construing this provision the court said: "The words '*take*, own, and hold' are here, obviously, used synonymously. They only mean that the stock shall be issued to the two brothers and to Arts in the proportions therein provided, and are not intended as a restraint upon the power of alienation." *Burden v. Burden*, 8 N. Y. App. Div. 168, *affirmed* 159 N. Y. 287.

**Take Held to Include Purchase.**—*Spencer v. Metropolitan Board of Works*, 22 Ch. D. 142. Compare *Com. v. Coleman*, 157 Mass. 460.

**Take and Obtain.**—See *OBTAIN*, vol. 21, p. 764.

2. See *Abb. L. Dict.*; *And. L. Dict.*

**"Take Such Action as May Be Necessary" to Secure Employment of Veterans.**—See *Johnson v. Kimball*, 170 Mass. 62, leaving undetermined whether this provision is mandatory and enforceable, and, if so, whether on complaint of one who has no further interest therein than as a veteran.

**"Taken" Equivalent to "Taken in Invitum."**—A statute provided that an estate by curtesy should not "be liable to be attached or in any way *taken* for the debts of the husband." It was held that *taken* meant "*taken in invitum*." *Briggs v. Titus*, 13 R. I. 136.

**"Take" in Sense of "Require."**—An averment that it will *take* all of specified property to pay the debts of a decedent is a sufficient averment of a necessity of ordering a sale. *Take* in this sense is equivalent to "*require*." *King v. Kent*, 29 Ala. 542.

**"Taking Poison."**—See the title *ACCIDENT INSURANCE*, vol. 1, p. 314. And that an accident policy exempting the company from liability for *taking* poison included only the voluntary taking of poison, see *Traveller's Ins. Co. v. Dunlap*, 160 Ill. 642; 52 Am. St. Rep. 357; *Metropolitan Acc. Assoc. v. Froiland*, 161 Ill. 30, 52 Am. St. Rep. 359.

**Death from Anything Accidentally Taken, Administered, or Inhaled.**—An exception to this effect in an accident policy has been held to imply voluntary action on the part of the insured or some other person. "The insured must *take* or *inhale*, or another must administer. The manifest purpose of the provision is

domain, wills, etc., they are used in technical or quasi-technical senses.<sup>1</sup>

**TAKE CARE.**—See note 2.

**TAKE CHARGE.**—See note 3.

**TAKE EFFECT.**—See EFFECT, vol. 10, p. 448.

**TAKE HIS OWN LIFE.**—See note 4.

**TAKEN AS TRUE.**—See note 5.

**TAKEN IN ADULTERY.** (See also the title MURDER AND MANSLAUGHTER, vol. 21, pp. 187, 209.)—See note 6.

to exempt the insurer from liability where the insured has voluntarily and consciously, but accidentally, *taken* or inhaled or something has been voluntarily administered which was injurious or destructive of life." *Menneiley v. Employers' Liability Assur. Corp.*, 148 N. Y. 596, 51 Am. St. Rep. 716. See also the title ACCIDENT INSURANCE, vol. 1, p. 315.

**Taking Down Testimony.**—In *Henderson v. Parry*, 93 Ga. 775, it was held that the phrase "*taking down the testimony*," as used in the Georgia statutes providing for the compensation of official stenographic reporters, embraced both the making of stenographic notes by the reporter and the translation of these notes in ordinary language. See also the title STENOGRAPHERS, vol. 26, p. 773, note 3.

**Taken in Sense of to Be Taken.**—In *Saffold v. Horne*, 72 Miss. 470, it was held that an agreement of counsel that "any and all testimony *taken in*" another case "may be used in this" embraced a deposition *taken* in such other case after the date of the agreement, it appearing that this was the construction acted on by the counsel then engaged in the cause.

**Taking and Entering Appeals.** (See generally the title APPEALS, 2 ENCYC. OF PL. AND PR. 237 *et seq.*)—The Maryland statute providing that an appeal from a decree in equity should be *taken* and entered within two months is not complied with by filing an appeal bond. *Humphreys v. Simons*, 78 Md. 606.

**Appeal Taken.**—An appeal cannot be said to be *taken* until it is in some way presented to the court, as by filing the papers, viz., the petition and allowance of appeal (where there is such a petition and allowance), the appeal bond, and the citation. *Credit Co. v. Arkansas Cent. R. Co.*, 128 U. S. 261. See also *Chow Loy v. U. S.*, (C. C. A.) 112 Fed. Rep. 356.

An appeal is *taken* by filing and serving the notice, but the appeal so *taken* does not become effectual until the undertaking is filed. *Peran v. Monroe*, 1 Nev. 487.

**Taken Down.**—English Public Health Act, § 155. —See *Atty.-Gen. v. Hatch*, (1893) 3 Ch. 36.

**Usury Taken or Reserved.** (See also the title USURY.)—See *Boag v. Lewis*, 1 U. C. Q. B. 357, wherein it was said that the word *taken* is not necessarily equivalent to paid. And see as to a statute forbidding pawnbrokers to *take* excessive interest, *Hallenbeck v. Getz*, 63 Conn. 388, stated under the title PAWN AND PAWNBROKER, vol. 22, p. 509, note 5.

**Taking** in a statute against usury has been held to include cases of merely reserving interest. *U. S. Bank v. Owens*, 2 Pet. U. S.) 538. See also *Bandel v. Isaac*, 13 Md. 219.

The "*taking*, receiving, reserving, or charging" of usury has been held to imply something more to be done, to the loss or detriment of the

debtor, than the mere presentation of an illegal claim which was neither recognized nor paid. *Grant v. Morris*, 81 N. Car. 150. See also *Churchill v. Turnage*, 122 N. Car. 426, where the facts were held to constitute such a *taking* or charging of usury.

1. As to What Constitutes a Taking for Public Use within the law of eminent domain, see the title EMINENT DOMAIN, vol. 10, p. 1102 *et seq.*

**Taken and Graded.**—Exception from Mortgage. —A mortgage contained this clause: "This mortgage excepts from the within description all that part already *taken* and graded for Dakota avenue." This provision was held to exempt from the mortgage a strip of land along the avenue which the city had condemned for the purpose of widening it, and which the public was using, although the condemnation proceedings were afterwards abandoned. *Lawrence v. London, etc., Mortg. Co.*, 71 Minn. 535.

**Wills.**—See the title WILLS.

2. **Take Care.**—Agent to Take Care Of. —In *Brisbane v. Adams*, 3 N. Y. 129, it was held that an agent to *take care* of property and to give to his principal notice of the existence of liens upon it had no authority to make an agreement with a third person to purchase the property on account of his principal, at a sale to which it was exposed to satisfy rent under a distress warrant.

**Live-stock Shipments.**—See *Humphreus v. Fremont, etc., R. Co.*, 8 S. Dak. 103. And see the title CARRIERS OF LIVE STOCK, vol. 5, p. 427.

3. **Take Charge.**—A provision that a commissioner shall *take charge* of an insolvent bank has been held to mean that the commissioner shall take actual charge of the bank by going to the institution and there assuming control. *Dodson v. Wightman*, 6 Kan. App. 835.

4. **Take His Own Life.**—In *Supreme Lodge, etc., v. Gelbke*, 198 Ill. 365, it was said: "The word 'suicide' and the words 'to die by his own hand' or 'by his own act' or 'to take his own life' mean the same thing, and each conveys the idea of voluntary, intentional self-destruction." See also *Pierce v. Travelers' L. Ins. Co.*, 34 Wis. 394, and see SUICIDE, *ante*, and the title LIFE INSURANCE, vol. 19, p. 77.

5. **Taken as True.**—An instruction, where the accused is examined on his own behalf, that what he testified to against his interest is to be "*taken as true*" is not prejudicial error. The court said: "To say that they are to be '*taken as true*,' as was done in this instance, is saying no more than that they are '*presumed to be true*' or are conclusive for the purposes of the case in hand." *State v. Brooks*, 99 Mo. 137, citing 1 Greenl. Ev., §§ 27, 32; *Webst. Dict.*, tit. Presume.

6. **Taken in Act of Adultery.**—Under the Texas statute which provides that "homicide is

**TAKERS.**— See note 1.

**TAKE UP.** (See also SECTIONAL, vol. 25, p. 177.)— See note 2.

**TAKING SAMPLES.**— See note 3.

**TALC.**— See note 4.

**TALES—TALESMAN.** (See also the title JURY AND JURY TRIAL, vol. 17, p. 1191 *et seq.*)—"If by means of challenges or other cause a sufficient number of unexceptionable jurors doth not appear at the trial, either party may pray a tales. A tales is a supply of such men as are summoned upon the first panel in order to make up the deficiency."<sup>5</sup> A talesman is a juror summoned to fill up a panel, for the trial of a particular cause.<sup>6</sup>

**TALLAGE.**—"Tallage" is a general word and includes all subsidies, taxes, tenths, fifteenths, impositions, or other burdens or charges put or set upon any man.<sup>7</sup>

**TANGIBLE.**— See the titles SUCCESSION TAXES, *ante*; TAXATION, *post*.

**TANNING.**— Tanning is the art or process of converting hides and skins into leather.<sup>8</sup>

**TARE.**— See DRAFT, vol. 10, p. 218.

**TARIFF.** (See also the title REVENUE LAWS, vol. 24, p. 883.)— The term "tariff" is applied to customs duties, tolls, or tribute payable upon merchandise to the general government; the rate of customs, etc., also bears this name, and the list of articles liable to duties is also called the tariff.<sup>9</sup>

**TAVERN.**— See note 10.

justifiable when committed by the husband upon the person of any one *taken* in the act of adultery with the wife, provided the killing take place before the parties to the act of adultery have separated," it is held that in order to avail himself of the protection afforded by the statute the husband need not be an eye witness to the physical act of coition between his wife and her paramour, but it will be sufficient if he sees the paramour in bed with his wife, or leaving it, or in such a position as indicates with a reasonable certainty to a rational mind that they had just then committed the adulterous act, or were then about to commit it. *Price v. State*, 18 Tex. App. 474, 51 Am. Rep. 322. See also *Massie v. State*, 30 Tex. Crim. 64; *Morrison v. State*, 39 Tex. Crim. 519.

1. **Takers—Prize.**— In *The Vryheid*, 2 C. Rob. 21, Sir William Scott said that by the word *takers* in an Act of Parliament giving a prize to the *takers* are naturally to be understood those who actually take possession or those affording an actual contribution of endeavor to that event; any of these persons are naturally included under the denomination of *takers*. But the courts of law have gone further, and have extended the term *taker* to another description of persons—to those who, not having contributed actual service, are still supposed to have rendered a constructive assistance. See also *The Iron-Clad Ram Atlanta*, 2 Sprague (U. S.) 251, 2 Fed. Cas. No. 619; *The Cherokee*, 2 Sprague (U. S.) 235, 3 Am. L. Reg. N. S. 301.

2. **The Phrase "Take Up and Use"** in *Texas* statutes making it an offense to *take up* and *use* any "dumb animal the property of another" (Pen. Code Tex., art. 788) "or any animal coming within the meaning of an estray" (Pen. Code Tex., art. 918) has a definite meaning and was intended to prevent the *taking up* and

using of such animals as are not confined in actual possession. *Cochran v. State*, 36 Tex. Crim. 115; *Davis v. State*, 30 Tex. 352.

For construction of other statutes regulating the *taking up* of estrays, see the title ANIMALS, vol. 2, pp. 379, 380.

One who pays negotiable paper, at the same time receiving the instrument into his own hands, is said to "*take up* the instrument." See the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 496.

3. **Taking Samples.**— See the title ADULTERATION, vol. 1, pp. 742, 743, and see *Spencer v. Metropolitan Board of Works*, 22 Ch. D. 142.

4. **Talc.**— See *Severance v. New England Talc Co.*, 72 Vt. 181.

5. **Tales.**— 3 Black. Com. 364, *followed* in *O'Connor v. State*, 9 Fla. 225.

**Octo Tales and Decem Tales** were the names at common law of the writs issued to summon such bodies of jurors. In the case of *octo tales*, eight, and in the case of *decem tales*, ten men, were summoned. See 3 Black. Com. 364.

6. **Talesman.**— *Shields v. Niagara Sav. Bank*, 3 Hun (N. Y.) 479.

7. **Tallage.**— *People v. Brooklyn*, 9 Barb. (N. Y.) 550, *quoting* 2 Co. Inst. 532.

8. **Tanning.**— *Tannage Patent Co. v. Donallan*, 93 Fed. Rep. 817. This was a patent case.

9. **Tariff.**— *Bouv. L. Dict.*

10. See the titles GAMING, vol. 14, p. 673; GAMBLING HOUSES, vol. 14, p. 699; INNS AND INNKEEPERS, vol. 16, p. 508; INTOXICATING LIQUORS, vol. 17, p. 354. See also *Thomson v. Lacy*, 3 B. & Ald. 283, 5 E. C. L. 285; *Com. v. Kamp*, 14 B. Mon. (Ky.) 309; *State v. Fletcher*, 5 N. H. 258; *Curtis v. State*, 5 Ohio 324; *Matter of Schneider*, 11 Oregon 288; *Comer v. State*, 26 Tex. App. 509; *Wortham v. Com.*, 5 Rand. (Va.) 669; *Lincons v. Com.*, 9 Leigh (Va.) 608.

# TAXATION.

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### CROSS-REFERENCES.

*For matters of PROCEDURE, see the* ENCYCLOPÆDIA OF PLEADING AND PRACTICE, *titles* INTERNAL REVENUE, vol. 11, p. 439; TAXATION, vol. 21, p. 361.

*As to Customs Duties and Internal Revenue Taxes, see in this work the title* REVENUE LAWS, vol. 24, p. 883.

*As to Exemptions from Taxation, see the title* EXEMPTIONS (FROM TAXATION), vol. 12, p. 266, and the cross-references there given.

*As to License and Privilege Taxes, see the title* OCCUPATION, BUSINESS, AND PRIVILEGE TAXES, vol. 21, p. 770.

*As to Taxation for Local Improvements, see the title* SPECIAL OR LOCAL ASSESSMENTS, vol. 25, p. 1166.

*As to Taxation of Corporations, see the title* TAXATION (CORPORATE), *post*.

*As to Taxation of Successions, see the title* SUCCESSION TAXES, *ante*, p. 337.

*As to Taxation in Canada, see* DOMINION OF CANADA, vol. 10, p. 42.

*As to Taxes as Incumbrances, see the titles* COVENANTS, vol. 8, p. 126; FIRE INSURANCE, vol. 13, p. 261.

*As to the Titles of Purchasers at Tax Sales, see the title* TAX TITLES, *post*.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ALIENS*, vol. 2, p. 84; *ANNUITIES*, vol. 2, p. 392; *ASSIGNMENTS FOR THE BENEFIT OF CREDITORS*, vol. 3, p. 1; *AUCTIONS AND AUCTIONEERS*, vol. 3, p. 496; *BICYCLES*, vol. 4, p. 31; *BUILDING AND LOAN ASSOCIATIONS*, vol. 4, p. 1012; *CONSTITUTIONAL LAW*, vol. 6, p. 882; *CORPORATIONS (PRIVATE)*, vol. 7, p. 620; *COUNTIES*, vol. 7, p. 898; *COUNTY COMMISSIONERS*, vol. 7, p. 1002; *COUNTY SEAT*, vol. 7, p. 1011; *DOWER*, vol. 10, p. 122; *DUE PROCESS OF LAW*, vol. 10, p. 287; *ELECTIONS*, vol. 10, p. 552; *ELECTRIC-LIGHT COMPANIES*, vol. 10, p. 861; *EX POST FACTO LAWS*, vol. 12, p. 525; *FOREIGN CORPORATIONS*, vol. 13, p. 834; *FREEMASONS*, vol. 14, p. 539; *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 15, p. 1042; *INDIANS*, vol. 16, p. 236; *INSURANCE*, vol. 16, p. 886; *INTERSTATE COMMERCE*, vol. 17, p. 108; *INTOXICATING LIQUORS*, vol. 17, p. 189; *JOINT STOCK COMPANIES*, vol. 17, p. 639; *LEASES*, vol. 18, p. 651; *MUNICIPAL AID*, vol. 20, p. 1082; *MUNICIPAL SECURITIES*, vol. 21, p. 13; *POOR AND POOR LAWS*, vol. 22, p. 965; *RECEIVERS*, vol. 23, p. 992; *SHIPS AND SHIPPING*, vol. 25, p. 870; *STATUTES*, vol. 26, p. 520; *WHARVES AND WHARFINGERS*.

**I. SCOPE OF TITLE.** — The subject as treated in this article is exclusive of those matters of taxation which have been specifically treated elsewhere in this work, and are enumerated in the cross-references given above.

**II. DEFINITIONS AND GENERAL PRINCIPLES** — 1. **Taxes.** — Taxes are generally defined as burdens or charges imposed by legislative authority on persons or property to raise money for public purposes,<sup>1</sup> or, more briefly, "an imposition for the supply of the public treasury."<sup>2</sup> Some cases give a narrower definition, in respect that the purpose of the burden or charge is stated to be the support

1. **Taxes Defined** — *United States*. — *Lane County v. Oregon*, 7 Wall. (U. S.) 71; *U. S. v. Baltimore, etc., R. Co.*, 17 Wall. (U. S.) 322; *Citizens' Sav., etc., Assoc. v. Topeka*, 20 Wall. (U. S.) 655; *Meriwether v. Garrett*, 102 U. S. 472; *Duer v. Small*, 4 Blatchf. (U. S.) 263.

*Alabama*. — *Mobile v. Dargan*, 45 Ala. 310.  
*California*. — *Perry v. Washburn*, 20 Cal. 318; *People v. McCreery*, 34 Cal. 433.

*Connecticut*. — *New London v. Miller*, 60 Conn. 112.

*Illinois*. — *Blake v. People*, 109 Ill. 504.

*Indiana*. — *De Pauw v. New Albany*, 22 Ind. 206; *Mitchell v. Williams*, 27 Ind. 63.

*Iowa*. — *Hanson v. Vernon*, 27 Iowa 47, 1 Am. Rep. 215.

*Kansas*. — *Judd v. Driver*, 1 Kan. 462.

*Louisiana*. — *Hale v. New Orleans*, 13 La. Ann. 499; *Geren v. Gruber*, 26 La. Ann. 697; *Mercier's Succession*, 42 La. Ann. 1135; *Morris v. Lalaurie*, 39 La. Ann. 47.

*Maine*. — *Opinion of Justices*, 58 Me. 590; *Allen v. Jay*, 60 Me. 127, 11 Am. Rep. 185; *State v. Western Union Tel. Co.*, 73 Me. 518.

*Maryland*. — *Baltimore v. Green Mt. Cemetery*, 7 Md. 517.

*Massachusetts*. — *Peirce v. Boston*, 3 Met. (Mass.) 520.

*Michigan*. — *People v. Salem Tp.*, 20 Mich. 452, 4 Am. Rep. 400; *Van Horn v. People*, 46 Mich. 185, 41 Am. Rep. 159.

*Minnesota*. — *Davidson v. Ramsey County*, 18 Minn. 482.

*Mississippi*. — *Green v. Craft*, 28 Miss. 70; *Hawkins v. Carroll County*, 50 Miss. 757.

*Missouri*. — *Glasgow v. Rowse*, 43 Mo. 479.

*Nevada*. — *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 250.

*New Jersey*. — *Camden v. Allen*, 26 N. J. L. 398.

*New York*. — *Matter of New York*, 11 Johns. (N. Y.) 77; *New York v. McLean*, 57 N. Y. App. Div. 601, affirmed 170 N. Y. 374; *Roosevelt Hospital v. New York*, 84 N. Y. 108.

*Oregon*. — *Whiteaker v. Haley*, 2 Oregon 128.

*Pennsylvania*. — *Hilbish v. Catherman*, 64 Pa. St. 154.

*South Carolina*. — *Morton v. Comptroller Gen.*, 4 S. Car. 430.

*Texas*. — *Clegg v. State*, 42 Tex. 608.

*West Virginia*. — *Board of Education v. Old Dominion Iron, etc., Co.*, 18 W. Va. 444.

*Wisconsin*. — *Hale v. Kenosha*, 29 Wis. 605; *Dalrymple v. Milwaukee*, 53 Wis. 178.

Taxes are the proportional and reasonable assessments and duties which may, by virtue of the constitution, be imposed from time to time on the inhabitants of the commonwealth, for the necessary defense and support of the government, and for the protection and preservation of the rights and to promote the interests of the people. *Peirce v. Boston*, 3 Met. (Mass.) 520.

2. *Philadelphia Assoc. v. Wood*, 39 Pa. St. 82. See also *State v. New Orleans Nav. Co.*, 11 Mart. (La.) 309; *Worsley v. Second Municipality*, 9 Rob. (La.) 324, 41 Am. Dec. 333.

of the government;<sup>1</sup> but this is obviously too narrow, since many purposes for which taxes are levied, while of a public nature, that is, for the benefit of the public generally, are not governmental, and it has been expressly held that the "support of the government" is not an essential element of the definition of the word "taxes."<sup>2</sup>

The Word "Taxes" is very comprehensive, and properly includes, as indicated in the foregoing definition, all burdens, charges, and impositions by virtue of the taxing power with the object of raising money for public purposes.<sup>3</sup> It is commonly used, however, to designate those taxes which are based on value and are subject to the constitutional rule of uniformity; and to this extent such taxes are distinguishable from special assessments for local improvements,<sup>4</sup> license taxes,<sup>5</sup> excise, customs duties, and the like.<sup>6</sup>

1. *Camden v. Allen*, 26 N. J. L. 398; *Northern Liberties v. St. John's Church*, 13 Pa. St. 104; *Pray v. Northern Liberties*, 31 Pa. St. 69; *Philadelphia Assoc. v. Wood*, 39 Pa. St. 73.

2. **Public Purposes Distinguished from Governmental Purposes.**—*Davidson v. Ramsey County*, 18 Minn. 482.

**What Is Public Purpose.**—An object is public, in the sense that it will contribute to the convenience, prosperity, and general advantage of the "local public." *Hawkins v. Carroll County*, 50 Miss. 757. And see generally *infra*, this title, *Purpose of Taxation*.

3. **Great Variety and Extent of Meaning** are attached to the word "tax" or "taxes." It has been at different times applied to nearly if not quite every burden imposed on person, property, or business for the support of the government, and in acts for raising a revenue for public purposes it seems to be used as meaning the same thing as impost, duty, or excise. *State v. Western Union Tel. Co.*, 73 Me. 527.

**Water Rates** paid to a city by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity, though by statute such rates are made liens on the property occupied by the consumer. No one can be compelled to take water unless he chooses, and the lien, though enforced in the same way as a lien for taxes, is really a lien for an indebtedness. *Jones v. Water Com'rs*, 34 Mich. 273; *Dixon v. Kennett Square*, 19 Pa. Co. Ct. 414.

4. **Taxes as Distinguished from Special Assessments.**—*Baltimore v. Green Mt. Cemetery*, 7 Md. 517; *People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Astor v. New York*, 37 N. Y. Super. Ct. 539; *Hill v. Higdon*, 5 Ohio St. 248; *King v. Portland*, 2 Oregon 155; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308.

It is now well settled that special assessments for local improvements are a species of taxes, being a burden on property for public purposes. The only substantial distinction between a special assessment and a general tax is that general taxes are based on value and subject to the constitutional rule of uniformity, which is not the case with special assessments. *Dalrymple v. Milwaukee*, 53 Wis. 185, *disapproving Hale v. Kenosha*, 29 Wis. 605. To the same effect see *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701; *White v. People*, 94 Ill. 604; *Jones v. Water Com'rs*, 34 Mich. 273. And see generally the title *SPECIAL OR LOCAL ASSESSMENTS*, vol. 25, p. 1166.

5. See generally the title *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*, vol. 21, p. 775.

6. **Excise, Customs, etc.**—See the titles *INTOXICATING LIQUORS*, vol. 17, p. 189; *REVENUE LAWS*, vol. 24, p. 883.

An **Excise** differs from a tax as the word "tax" is ordinarily used. The ordinary meaning of the word "tax" is a charge apportioned either among the whole people of the state, or those residing within certain districts, municipalities, or sections, and is proportionate to the amount of property owned by them. An excise, on the other hand, is a fixed, absolute, and direct charge laid on merchandise, products, or commodities, without any regard to the amount of property belonging to those on whom it is levied. *Oliver v. Washington Mills*, 11 Allen (Mass.) 274. See also *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 433; *Woodruff v. Parham*, 8 Wall. (U. S.) 123; *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581; *Portland Bank v. Athorp*, 12 Mass. 252; *Com. v. People's Five Cents Sav. Bank*, 5 Allen (Mass.) 431; *Connecticut Mut. L. Ins. Co. v. Com.*, 133 Mass. 161; *Durach's Appeal*, 62 Pa. St. 491. And see *Excise*, vol. 11, p. 579.

A tax which corporations were required to pay on the interest on their indebtedness (14 U. S. Stat. at Large 138) was held an excise tax on the business of the corporations, to be paid by them out of their earnings, income, and profits. *Michigan Cent. R. Co. v. Collector*, 100 U. S. 595, *affirming Holmes (U. S.)* 231, 17 Fed. Cas. No. 9,527a.

The Term "Duties" in its widest significance is hardly less comprehensive than "taxes." It is applied in its most restricted meaning to customs, and in that sense it is nearly the synonym of "imposts." See *Duty*, vol. 10, p. 351; *Impost*, vol. 16, p. 3; and the title *REVENUE LAWS*, vol. 24, p. 883. See also *Sheffield v. Parsons*, 3 Stew. & P. (Ala.) 302.

**Customs Are Duties** charged on commodities on their being imported into or exported from a country. *Marriott v. Brune*, 9 How. (U. S.) 619.

**Tolls** for the navigation of an improved stream are not taxes, duties, or imposts on the use of the stream, but are tolls for the enjoyment of improvements by which the stream has acquired a new value and increased navigability. *Benjamin v. Manistee River Imp. Co.*, 42 Mich. 628. And see *TOLLS*.

The **Distinction Between a Tax and a Toll** is this: a tax is a demand of sovereignty, while a toll is a demand of proprietorship. *State*

Volume XXVII.

**Taxes Distinguished from Debts.** — A tax, in its essential characteristics, is almost universally held not to be a debt or in the nature of a debt. The distinction between a debt and a tax is that the one rests on the contract and the other does not. A debt is a sum of money due by contract, express or implied, while a tax is a charge on person or property to raise money for public purposes, and operates *in invitum*.<sup>1</sup> Accordingly, taxes are neither the subject of nor liable to set-off;<sup>2</sup> they are not provable in bankruptcy,<sup>3</sup> and are not assignable as debts.<sup>4</sup> Unless it is so provided by statute, taxes do not bear

Freight Tax Case, 15 Wall. (U. S.) 278; *St. Louis v. Western Union Tel. Co.*, 148 U. S. 97.

1. **Distinguished from Debts.** — See the title DEBT, vol. 8, pp. 995, 996. See also *People v. Seymour*, 16 Cal. 340, 76 Am. Dec. 521; *New York v. McLean*, 57 N. Y. App. Div. 601, affirmed 170 N. Y. 374; *Danforth v. McCook County*, 11 S. Dak. 264, 74 Am. St. Rep. 808.

There is none of the mutuality in the case of a tax that enters into a contract, and none of the legal incidents of a debt. A tax is not subject to attachment, is not an offset, bears no interest, and needs no solemn act of any court to enforce it. *Whiteaker v. Haley*, 2 Oregon 139.

Thus, an act which appropriates money for seed grain loans to farmers, provides for the levy of a tax against the land for which a seed grain loan may be granted, and declares the loan to be a lien on such land, is not taxation, but merely a statutory method of foreclosing a statutory lien for money borrowed from the state. *Deering v. Peterson*, 75 Minn. 118.

**As to Taxes Due from a Decedent**, see the title DEBTS OF DECEDENTS, vol. 8, p. 1048.

**Statutes Relating to Imprisonment for Debt Not Applicable to Taxes.** — Since taxes are not debts, they are not affected by statutes relating to imprisonment for debt, so that a statute abolishing imprisonment for debt does not prevent imprisonment for nonpayment of taxes. *San Antonio v. Mehaffy*, 96 U. S. 312; *Appleton v. Hopkins*, 5 Gray (Mass.) 530; *Charleston v. Oliver*, 16 S. Car. 47; *Board of Education v. Old Dominion Iron, etc., Co.*, 18 W. Va. 441. And see *Webster v. Seymour*, 8 Vt. 135.

**The Repeal of a Statute Imposing a Tax does not impair the obligation of a contract.** *Lane County v. Oregon*, 7 Wall. (U. S.) 71; *Ketchum v. Pacific R. Co.*, 4 Dill. (U. S.) 41; *Mount v. State*, 6 Blackf. (Ind.) 25; *McQuilkin v. Doe*, 8 Blackf. (Ind.) 581; *Abbott v. Britton*, 23 La. Ann. 511; *Augusta v. North*, 57 Me. 392, 2 Am. Rep. 55. *Howe v. Starkweather*, 17 Mass. 240; *Ross v. Lane*, 3 Smed. & M. (Miss.) 695; *Mitchell v. Township No. 8*, 71 N. Car. 400; *Fenelon's Petition*, 7 Pa. St. 173.

**But the Repeal of a Statute Exempting Property from Taxation may impair the obligation of a contract.** See the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 271 *et seq.*; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1042.

2. **Taxes Not Subject of or Liable to Set-off** — *United States*. — *Apperson v. Memphis*, 2 Flipp. (U. S.) 363; *Crabtree v. Madden*, (C. C. A.) 54 Fed. Rep. 426.

*Arkansas*. — *Fitzhugh v. Cotton Belt Levee Dist. No. 1*, 54 Ark. 224.

*California*. — *Himmelmänn v. Spanagel*, 39 Cal. 389.

*Colorado*. — *Morgan v. Pueblo, etc., R. Co.*, 6 Colo. 478.

*Georgia*. — *Wayne v. Savannah*, 56 Ga. 448; *Hawkins v. Sumter County*, 57 Ga. 166.

*Kentucky*. — *Com. v. Owensboro, etc., R. Co.*, 81 Ky. 572, 17 Am. & Eng. R. Cas. 428.

*Louisiana*. — *Morris v. Lalaurie*, 39 La. Ann. 47.

*Maine*. — *Augusta v. North*, 57 Me. 392, 2 Am. Rep. 55.

*Maryland*. — *State v. Baltimore, etc., R. Co.*, 34 Md. 344.

*Massachusetts*. — *Peirce v. Boston*, 3 Met. (Mass.) 520; *Home Sav. Bank v. Boston*, 131 Mass. 280.

*Nebraska*. — *Nebraska City v. Nebraska City Hydraulic Gas Light, etc., Co.*, 9 Neb. 339.

*New Hampshire*. — *Hibbard v. Clark*, 56 N. H. 155, 22 Am. Rep. 432.

*New Jersey*. — *Camden v. Allen*, 26 N. J. L. 398.

*North Carolina*. — *Battle v. Thompson*, 65 N. Car. 406; *Weinstein v. Newbern*, 71 N. Car. 535; *Cobb v. Elizabeth City*, 75 N. Car. 1.

*Pennsylvania*. — *McCracken v. Elder*, 34 Pa. St. 239.

*South Carolina*. — *Trenholm v. Charleston*, 3 S. Car. 349, 16 Am. Rep. 732.

*Vermont*. — *Johnson v. Howard*, 41 Vt. 122, 98 Am. Dec. 568.

*West Virginia*. — *Board of Education v. Old Dominion Iron, etc., Co.*, 18 W. Va. 441; *Humphreys v. Patton*, 21 W. Va. 220.

See also the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM, vol. 25, pp. 504, 507.

**The Principle on Which This Rule Rests** is largely one of public policy, in that it would be subversive of the power of government, and destructive of the very end of taxation, were taxes subject to set-off like debts. *Camden v. Allen*, 26 N. J. L. 398.

**In the Case of Taxes Due to the State**, there is also another principle applicable, viz., that the government cannot be sued without its consent, and that it does not abandon its sovereignty in this respect even by coming into court as a plaintiff. See the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM, vol. 25, p. 608.

3. **Taxes Not Debts Provable in Bankruptcy.** — *In re Duryce*, 2 Fed. Rep. 68. See also the title INSOLVENCY AND BANKRUPTCY, vol. 16, pp. 680, 681. But the bankruptcy statutes generally provide that taxes due by the bankrupt shall be paid out of the estate in preference to his other liabilities. See the title INSOLVENCY AND BANKRUPTCY, vol. 16, p. 693 *et seq.*

4. **Taxes Not Assignable.** — *McInerney v. Reed*, 23 Iowa 410.

The rule that taxes are not assignable seems to involve the proposition that such an important power of government as the taxing

interest,<sup>1</sup> and cannot be enforced by means of an action of debt.<sup>2</sup>

**2. Taxation.** — Taxation is the act of laying a tax or imposing burdens or charges on persons or property for public purposes. It is the process or means by which the taxing power is exercised.<sup>3</sup>

**3. Theory of Taxation.** — The theory of all taxation is that taxes are imposed as a compensation for something received by the taxpayer. General taxes are paid for the support of the government in return for the protection of life, liberty, and property which the government gives. Assessment for benefits accruing to property by reason of public improvements rests on the same principle, and the only substantial distinction between the two forms is that general taxation is based on value and subject to the constitutional rule of uniformity, which is not the case with special assessments.<sup>4</sup>

**III. SEVERAL KINDS OF TAXES** — **1. Purpose of Tax.** — Taxes, with respect to the purpose for which they are levied, are either general, that is, imposed throughout the state or some civil division thereof, and having in view the raising of a revenue for the support of the government and for public purposes generally;<sup>5</sup> or they are special or local, that is, for the benefit of a part only of the body politic.<sup>6</sup>

power cannot be delegated to individuals. But this does not mean that an individual or corporation for whose use a tax has been laid, *e. g.*, a tax in aid of a railroad company, may not assign the right to such tax. No reason is perceived why an assignment of such right may not be made in furtherance of the purpose for which the tax was laid, and this right has been expressly recognized by statute. *Merrill v. Welsher*, 50 Iowa 61. See also *Sully v. Drennan*, 113 U. S. 287.

**1. Taxes Not Interest Bearing.** — *Crabtree v. Madden*, (C. C. A.) 54 Fed. Rep. 426; *Haskell v. Bartlett*, 34 Cal. 281; *People v. Hagar*, 52 Cal. 171; *Augusta v. North*, 57 Me. 392, 2 Am. Rep. 55; *Danforth v. Williams*, 9 Mass. 324; *Camden v. Allen*, 26 N. J. L. 398; *Warren R. Co. v. Belvidere*, 35 N. J. L. 584; *Western Union Tel. Co. v. State*, 55 Tex. 314; *Shaw v. Peckett*, 26 Vt. 482; *Board of Education v. Old Dominion Iron, etc., Co.*, 18 W. Va. 441.

**Statutory Provisions.** — In some states it is provided by statute that taxes shall bear interest. *Galveston, etc., R. Co. v. Galveston*, (Tex. 1903) 74 S. W. Rep. 537. And see generally the statutes of the several states.

**2. Action of Debt.** — *Perry v. Washburn*, 20 Cal. 318; *Richards v. Stogsdel*, 21 Ind. 74; *Packard v. Tisdale*, 50 Me. 376; *Augusta v. North*, 57 Me. 392, 2 Am. Rep. 55; *Crapo v. Stetson*, 8 Met. (Mass.) 394; *Andover, etc., Turnpike Corp. v. Gould*, 6 Mass. 44; *Hibbard v. Clark*, 56 N. H. 155, 22 Am. Rep. 432; *Camden v. Allen*, 26 N. J. L. 398; *Rochester v. Gleichauf*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 446; *Dreake v. Beasley*, 26 Ohio St. 315; *Shaw v. Peckett*, 26 Vt. 482; *Johnson v. Howard*, 41 Vt. 122, 98 Am. Dec. 568; *Board of Education v. Old Dominion Iron, etc., Co.*, 18 W. Va. 441. And see generally *infra*, this title, *Collection*.

**Federal Taxes.** — But it has been held that an action at law will lie to recover taxes due the United States, though such action is not authorized by act of Congress. *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 227; *Garrett v. Memphis*, 5 Fed. Rep. 860.

**Action Authorized by Statute.** — A statute authorizing an action to recover taxes does not affect the nature of the tax as such. *Meri-*

*wether v. Garrett*, 102 U. S. 472; *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220.

**3. Taxation Defined.** — *Allen v. Jay*, 60 Me. 128, 11 Am. Rep. 185; *Van Horn v. People*, 46 Mich. 185, 41 Am. Rep. 159; *Matter of New York*, 11 Johns. (N. Y.) 77; *Sharpless v. Philadelphia*, 21 Pa. St. 169, 59 Am. Dec. 759; *Knowlton v. Rock County*, 9 Wis. 418.

**4. Theory of Taxation.** — *Duer v. Small*, 4 Blatchf. (U. S.) 263; *Dalrymple v. Milwaukee*, 53 Wis. 185.

**5. General Taxes.** — *Emery v. San Francisco Gas Co.*, 28 Cal. 345; *Clark v. Atchison, etc., R. Co.*, 8 Kan. App. 733; *State v. Parsons*, 40 N. J. L. 123; *Roosevelt Hospital v. New York*, 84 N. Y. 108; *Matter of Church*, 92 N. Y. 1; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308; *Dalrymple v. Milwaukee*, 53 Wis. 185.

A tax levied on the property in a township for the prevention of prairie fires is a general tax, being imposed throughout a civil division of the state, and its character as such is not affected by the fact that the township, for convenience, is divided up into fire districts. *Clark v. Atchison, etc., R. Co.*, 8 Kan. App. 733.

**6. Special Taxes** — *California*. — *Burnett v. Sacramento*, 12 Cal. 76, 73 Am. Dec. 518; *Hart v. Gaven*, 12 Cal. 477.

*Connecticut*. — *Nichols v. Bridgeport*, 23 Conn. 206, 60 Am. Dec. 636.

*Louisiana*. — *Municipality Number Two v. White*, 9 La. Ann. 452.

*Maryland*. — *Baltimore v. Green Mt. Cemetery*, 7 Md. 536.

*Michigan*. — *Williams v. Detroit*, 2 Mich. 560.

*Mississippi*. — *Williams v. Cammack*, 27 Miss. 222, 61 Am. Dec. 508.

*Missouri*. — *Newby v. Platte County*, 25 Mo. 259; *Garrett v. St. Louis*, 25 Mo. 508, 69 Am. Dec. 475.

*New Jersey*. — *State v. Newark*, 27 N. J. L. 185.

*New York*. — *People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Brewster v. Syracuse*, 19 N. Y. 118.

*Ohio*. — *Scovill v. Cleveland*, 1 Ohio St. 135; *Hill v. Higdon*, 5 Ohio St. 245; *Reeves v. Wood County*, 8 Ohio St. 335; *North Indiana R. Co.*

**2. Manner of Imposition.** — With reference to the manner of imposition, taxes may be divided into two classes, viz., direct taxes which are demanded from the person,<sup>1</sup> and indirect taxes or those which are laid on commodities before they reach the consumer, such as import and export duties and excise taxes.<sup>2</sup>

**3. Determination of Amount.** — Taxes may also be classified as *ad valorem* and specific, according to the mode of determining the amount to be paid by each person.

An *Ad Valorem Tax* is a tax or duty on the value of the article or thing subject to taxation, the amount of the tax being fixed by a percentage of such value.<sup>3</sup>

A *Specific Tax*, on the other hand, is a tax of a certain amount on each and every article or thing taxed, without regard to value.<sup>4</sup>

**4. Manner of Payment.** — Taxes, according to the manner of payment, are either money taxes<sup>5</sup> or taxes in kind.<sup>6</sup>

**5. Subjects of Taxation.** — Finally, there are various kinds of taxes with reference to the subjects of taxation, as property taxes,<sup>7</sup> income taxes,<sup>8</sup> capitation taxes,<sup>9</sup> succession taxes,<sup>10</sup> privilege taxes,<sup>11</sup> taxes on corporations and corporate franchises,<sup>12</sup> taxes on consumable commodities and

*v. Connelly*, 10 Ohio St. 162; *Maloy v. Marietta*, 11 Ohio St. 638.

*Wisconsin.* — *Weeks v. Milwaukee*, 10 Wis. 256; *Dalrymple v. Milwaukee*, 53 Wis. 185.

And see generally the title SPECIAL OR LOCAL ASSESSMENTS, vol. 25, p. 116.

**1. Direct Taxes.** — *Pollock v. Farmers' L. & T. Co.*, 157 U. S. 429. And see DIRECT TAX, vol. 9, p. 461.

There are three general classes of direct taxes: capitation, having effect solely on persons; *ad valorem*, having effect solely on property; and income, having a mixed effect on persons and property. *Glasgow v. Rowse*, 43 Mo. 479.

A tax on property holders in respect of their estates, whether real or personal, or of the income yielded by such estates, and the payment of which cannot be avoided, are direct taxes within the general meaning of those words. *Pollock v. Farmers' L. & T. Co.*, 157 U. S. 558. See also *Springer v. U. S.*, 102 U. S. 586; *Scholey v. Rew*, 23 Wall. (U. S.) 331; *Hylton v. U. S.*, 3 Dall. (U. S.) 171; *People v. Worthington*, 21 Ill. 171, 74 Am. Dec. 86.

**Direct Taxes Within Meaning of Constitution of United States.** — The term "direct taxes" as used in the Constitution of the United States, which provides that "no capitation or other direct tax shall be laid unless in proportion to the census or enumeration," includes, besides the capitation tax expressly named, only taxes on land and its appurtenances. *Hylton v. U. S.*, 3 Dall. (U. S.) 171; *Loughborough v. Blake*, 5 Wheat. (U. S.) 317; *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 433; *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533; *Scholey v. Rew*, 23 Wall. (U. S.) 331; *Springer v. U. S.*, 102 U. S. 586; *Seabrook v. U. S.*, 21 Ct. Cl. 39; *Clark v. Sickel*, 14 Int. Rev. Rec. 6, 5 Fed. Cas. No. 2,862.

**2. Indirect Taxes.** — Ordinarily, all taxes paid primarily by persons who can shift the burden on some one else, or who are under no legal compulsion to pay them, are considered indirect taxes. *Pollock v. Farmers' L. & T. Co.*, 157 U. S. 558.

**3. Ad Valorem Tax.** — *Bailey v. Fuqua*, 24 Miss. 497.

Thus, an act requiring telegraph and telephone companies to pay a tax levied on an assessment of their lines at the true cash value thereof, in lieu of all other taxes, imposes an *ad valorem* and not a specific tax. *Pingree v. Auditor Gen.*, 120 Mich. 95.

**4. Specific Tax.** — *Jones v. Water Com'rs*, 34 Mich. 273; *Bailey v. Fuqua*, 24 Miss. 497.

**5. Money Taxes.** — Taxes are usually payable in money. *State v. Halifax*, 4 Dev. L. (15 N. Car.) 345; *Bryan v. Sundberg*, 5 Tex. 418; *Davis v. Burney*, 58 Tex. 364; *Sawyer v. Springfield*, 40 Vt. 305.

But the medium of payment may be prescribed by statute. *Wallis v. Smith*, 29 Ark. 354; *Davis v. Burney*, 58 Tex. 364; *Marinette v. Oconto County*, 47 Wis. 216. And see *infra*, this title, *Payment and Tender*.

**6. Taxes in Kind.** — See *infra*, this title, *Payment and Tender*. As to taxes payable in labor, see *Fox v. Rockford*, 38 Ill. 451; *Moore v. Jarron*, 9 U. C. Q. B. 233; *Dickson v. Galt*, 9 U. C. Q. B. 257; *In re Bannerman*, 15 U. C. Q. B. 14; *Streetsville Plank Road Co. v. Streetsville*, 19 U. C. Q. B. 62; *Robinson v. Stratford*, 23 U. C. Q. B. 99.

**7. Property Taxes.** — The word "property" as used in a statute imposing taxes on property has been held to mean such as is visible and tangible and capable of assessment. *People v. Hibernia Sav., etc., Soc.*, 51 Cal. 243, 21 Am. Rep. 704. See also *People v. Park*, 23 Cal. 138; *Primm v. Belleville*, 59 Ill. 142.

**8. Income Taxes.** — *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 433; *Pollock v. Farmers' L. & T. Co.*, 157 U. S. 429; *State v. Philadelphia, etc., R. Co.*, 45 Md. 361, 24 Am. Rep. 511. And see *infra*, this title, *Persons and Things Taxable*.

**9. Capitation Taxes.** — *Hylton v. U. S.*, 3 Dall. (U. S.) 171; *Head-Money Cases*, 18 Fed. Rep. 135; *Glasgow v. Rowse*, 43 Mo. 480. And see *infra*, this title, *Persons and Things Taxable*.

**10.** See the title SUCCESSION TAXES, *ante*, p. 337.

**11.** See the title OCCUPATION, BUSINESS, AND PRIVILEGE TAXES, vol. 21, p. 775.

**12.** See the title TAXATION (CORPORATE), *post*.

luxuries,<sup>1</sup> taxes on amusements,<sup>2</sup> taxes on exports,<sup>3</sup> and taxes on imports.<sup>4</sup>

**IV. POWER OF TAXATION — 1. Nature and Extent of Taxing Power — a. IN GENERAL — Inherent in Sovereignty.** — The power of taxation is one of the essential attributes of sovereignty, and is inherent in and necessary to the existence of every government.<sup>5</sup> Except so far as restrained by the provisions of the Federal Constitution, the power of the state as to the mode, form, and extent of taxation is unlimited where the subject to which it applies is within the jurisdiction of the state.<sup>6</sup>

**Extent of Power.** — Since the power to tax is an attribute of sovereignty, it is, in the absence of constitutional restrictions, plenary and without any limit except the discretion of those who use it,<sup>7</sup> for the very obvious reason that no bounds can be set to the needs of the public or the necessities of the gov-

1. See the title *REVENUE LAWS*, vol. 24, p. 883, and cross-references there given.

2. **Taxes on Amusements** may be imposed either as a police regulation or as an exercise of the general taxing power. *Germania v. State*, 7 Md. 1; *Boston v. Schaffer*, 9 Pick. (Mass.) 415; *St. Louis v. Green*, 7 Mo. App. 468; *Wallack v. New York*, 3 Hun (N. Y.) 84; *Sears v. West*, 1 Murph. (5 N. Car.) 291, 3 Am. Dec. 694; *Trapp v. White*, 35 Tex. 387.

**Taxes on Amusements Not Taxes on Property.** — *Meriam v. New Orleans*, 14 La. Ann. 318; *Orton v. Brown*, 35 Miss. 426; *Baker v. Cincinnati*, 11 Ohio St. 534.

3. **Taxes on Exports.** — *Clarke v. Clarke*, 3 Woods (U. S.) 408; *Blount v. Munroe*, 60 Ga. 61.

4. **Taxes on Imports.** — See the title *REVENUE LAWS*, vol. 24, p. 883.

5. **Power of Taxation an Inherent Attribute of Sovereignty — United States.** — *Weston v. Charleston*, 2 Pet. (U. S.) 449; *Providence Bank v. Billings*, 4 Pet. (U. S.) 514; *McCulloch v. Maryland*, 4 Wheat. (U. S.) 316; *North Missouri R. Co. v. Maguire*, 20 Wall. (U. S.) 46; *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 273.

*Florida.* — *Young v. Thomas*, 17 Fla. 171, 35 Am. Rep. 93.

*Illinois.* — *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561.

*Iowa.* — *Hanson v. Vernon*, 27 Iowa 28, 1 Am. Rep. 215; *Stewart v. Polk County*, 30 Iowa 9, 1 Am. Rep. 238.

*Kentucky.* — *Louisville, etc., R. Co. v. Com.*, 10 Bush (Ky.) 43.

*Maine.* — *Allen v. Jay*, 60 Me. 128, 11 Am. Rep. 185.

*Missouri.* — *Glasgow v. Rowse*, 43 Mo. 479.

*Nebraska.* — *Tillotson v. Small*, 13 Neb. 202.

*Nevada.* — *Ex p. Robinson*, 12 Nev. 263, 28 Am. Rep. 794.

*New Jersey.* — *State v. Jackson*, 31 N. J. L. 189; *State v. Parker*, 32 N. J. L. 426.

*New York.* — *Guilford v. Chenango County*, 13 N. Y. 143; *Clarke v. Rochester*, 24 Barb. (N. Y.) 446.

*Ohio.* — *Board of Education v. McLandsborough*, 36 Ohio St. 232.

*Pennsylvania.* — *Com. v. Mann*, 5 W. & S. (Pa.) 416; *Kirby v. Shaw*, 19 Pa. St. 258.

*South Carolina.* — *Ex p. Lynch*, 16 S. Car. 37.

*Texas.* — *Clegg v. State*, 42 Tex. 608.

*Virginia.* — *Eyre v. Jacob*, 14 Gratt. (Va.) 422, 73 Am. Dec. 367.

*Wisconsin.* — *Knowlton v. Rock County*, 9

Wis. 418; *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 53.

The sovereign right to levy and collect taxes grows out of the necessities of government — an urgent necessity, which admits no property in the citizen while it remains unsatisfied. The right to tax is coequal with all governments. It springs out of organization of the government. All property is a pledge to pay the necessary debts and expenses of government. *Parham v. Justices*, 9 Ga. 352. See also *Philadelphia v. Tryon*, 35 Pa. St. 401, in which it was said that every man holds his property subject to the taxing power.

6. **Power of State Unrestricted Except by Federal Constitution.** — *State Tax on Foreign-held Bonds*, 15 Wall. (U. S.) 300; *Hutcheson v. Storrie*, (Tex. Civ. App. 1898) 48 S. W. Rep. 785.

7. **Taxing Power Unlimited Unless Restricted by Constitution — United States.** — *Weston v. Charleston*, 2 Pet. (U. S.) 449; *Providence Bank v. Billings*, 4 Pet. (U. S.) 514; *Lane County v. Oregon*, 7 Wall. (U. S.) 77; *State Tax on Foreign-held Bonds*, 15 Wall. (U. S.) 319; *North Missouri R. Co. v. Maguire*, 20 Wall. (U. S.) 62; *Kirtland v. Hotchkiss*, 100 U. S. 497; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 709; *Railroad Tax Case*, 8 Sawy. (U. S.) 248, 13 Fed. Rep. 731; *Forbes v. Gracey*, 9 Fed. Cas. No. 4,924.

*California.* — *Machay v. San Francisco*, 113 Cal. 399.

*Colorado.* — *Hall v. American Refrigerator Transit Co.*, 24 Colo. 291, 65 Am. St. Rep. 223.

*Illinois.* — *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561; *Greenleaf v. Board of Review*, 184 Ill. 226, 75 Am. St. Rep. 168.

*Kansas.* — *Newton v. Atchison*, 31 Kan. 153, 47 Am. Rep. 487.

*Kentucky.* — *Lexington v. McQuillan*, 9 Dana (Ky.) 516, 35 Am. Dec. 159; *Cincinnati, etc., R. Co. v. Com.*, 81 Ky. 300.

*Louisiana.* — *Second Municipality v. Duncan*, 2 La. Ann. 182.

*Maine.* — *State v. Western Union Tel. Co.*, 73 Me. 526.

*New Hampshire.* — *Berry v. Windham*, 59 N. H. 288, 47 Am. Rep. 202.

*New Jersey.* — *Rudderow v. State*, 31 N. J. L. 512; *Standard Underground Cable Co. v. Atty.-Gen.*, 46 N. J. Eq. 270, 19 Am. St. Rep. 394.

*New York.* — *Chenango Bank v. Brown*, 26 N. Y. 467; *People v. Flagg*, 46 N. Y. 401; *People v. Home Ins. Co.*, 92 N. Y. 328; *Lawton v. Steele*, 119 N. Y. 232, 16 Am. St. Rep. 813;

ernment.<sup>1</sup> The theory of government in the United States is that socially and politically all are equal, and that the burden of supporting the government should be borne equally by all the individuals composing it, in proportion to the benefits conferred. This principle of justice and equality which requires each person to contribute towards the public expense his proportionate share according to the advantage which he receives lies at the foundation of our political system, and is usually expressed in the constitutions of the states by various provisions limiting the taxing power.<sup>2</sup> Such provisions, however, are not grants of power, but are restrictions or limitations of an existing power.<sup>3</sup>

The Power of Taxation as Regards Its Territorial Extent is necessarily limited to subjects, that is, persons, property, and business within the jurisdiction of the state; but it includes all persons within such jurisdiction, and embraces foreigners residing therein as well as citizens,<sup>4</sup> except so far as the subject may

*Astor v. New York*, 37 N. Y. Super. Ct. 560; *People v. Molloy*, 35 N. Y. App. Div. 136, affirmed 161 N. Y. 621.

*Oregon*.—*Crawford v. Linn County*, 11 Oregon 488.

*Pennsylvania*.—*Kirby v. Shaw*, 19 Pa. St. 260; *Pullman's Palace Car Co. v. Com.*, 107 Pa. St. 155.

*Tennessee*.—*South Nashville St. R. Co. v. Morrow*, 87 Tenn. 432.

*Texas*.—*Hutcheson v. Storrie*, (Tex. Civ. App. 1898) 48 S. W. Rep. 789.

*Virginia*.—*Com. v. Maury*, 82 Va. 888.

*West Virginia*.—*State v. Sponaugle*, 45 W. Va. 419.

*Wisconsin*.—*State v. Thorne*, 112 Wis. 81.

"The power to tax," says Chief Justice Marshall, "involves the power to destroy;" that is, by the levy of a tax equal in amount to the value of the property taxed. *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 431.

Taxation is an incident of sovereign power which acknowledges no limits except the discretion of those who use it, unless it be as to those objects of taxation which have been withdrawn from the general power. *Com. v. Mann*, 5 W. & S. (Pa.) 416.

**Enforcing Payment.**—For the nonpayment of a lawful tax, the property of the citizen may, without any judicial proceedings, and without personal notice to him, be sold to pay it. Proceedings so rigorous are anomalous in the law, and justify the remark of the Supreme Court of *Pennsylvania*, that the divestiture of ownership by tax laws and sales thereunder exhibits "the instance in which a constitutional government approaches most near to an unrestrained tyranny." *Gault's Appeal*, 33 Pa. St. 97.

**Subjects of Taxation.**—Since the constitution contains no restriction on the power to levy taxes except as to "property" as such, the legislature has plenary power in the levy of taxes as to other subjects of taxation, such as occupations, privileges, etc. *Capital City Water Co. v. Board of Revenue*, 117 Ala. 303.

1. **Reason of Rule.**—*Hanson v. Vernon*, 27 Iowa 28, 1 Am. Rep. 215, in which it was said that, unless there is some limit fixed in the constitution, the state may, for any legitimate purpose, tax property to its full value.

2. **Limited by Constitutional Provisions.**—*Citizens' Sav., etc., Assoc. v. Topeka*, 20 Wall. (U. S.) 655; *C. N. Nelson Lumber Co. v. Loraine*, 22 Fed. Rep. 54; *Oliver v. Washington Mills*, 11

*Allen (Mass.)* 278; *Knowlton v. Rock County*, 9 Wis. 419. And see *infra*, this section, *Constitutional Restrictions*.

3. **Constitutional Provisions Merely Restrictive.**—*Capital City Water Co. v. Board of Revenue*, 117 Ala. 303; *People v. McCreery*, 34 Cal. 433; *Glasgow v. Rowse*, 43 Mo. 479; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *Clegg v. State*, 42 Tex. 608.

"We do not go to our constitution to see what powers of taxation are given to the legislature, but to ascertain what restrictions and limitations upon its general sovereign power are imposed by its provisions. If, therefore, the power to tax any subject whatever is not excluded by the terms of the constitution or by necessary and inevitable implication, it must exist in the general assembly to be exercised at the discretion of that body as wisdom and a proper sense of justice shall direct." *Eyre v. Jacob*, 14 Gratt. (Va.) 427, 73 Am. Dec. 367.

As to the nature and extent in general of restrictions imposed by state constitutions on the power of taxation, see *infra*, this section, *Constitutional Restrictions—Restrictions in State Constitutions*.

**No Implied Restrictions.**—No limitation of restriction on the exercise of power to tax will be raised by implication. *State v. Parker*, 32 N. J. L. 435.

4. **Taxing Power Not Extraterritorial—United States.**—*New York, etc., R. Co. v. Pennsylvania*, 153 U. S. 646; *State v. Pullman Palace Car Co.*, 16 Fed. Rep. 198; *San Francisco v. Mackey*, 22 Fed. Rep. 605.

*California*.—*People v. Naglee*, 1 Cal. 238.

*Illinois*.—*Dutton v. Board of Review*, 188 Ill. 386.

*Louisiana*.—*Liverpool, etc., Ins. Co. v. Assessors*, 51 La. Ann. 1028, 72 Am. St. Rep. 483.

*New York*.—*Matter of Swift*, 137 N. Y. 85.

*Ohio*.—*Grant v. Jones*, 39 Ohio St. 514; *Hawk v. Bonn*, 3 Ohio Cir. Dec. 535, 6 Ohio Cir. Ct. 452.

In *State Tax on Foreign-held Bonds*, 15 Wall. (U. S.) 300, it was held, in accordance with the rule stated in the text, that bonds issued by a domestic railroad company and owned by nonresident aliens were not taxable in *Pennsylvania*, because such bonds had their situs as property at the domicile of the owners.

But in *Maltby v. Reading, etc., R. Co.*, 52 Pa. St. 140, the court, though recognizing the



be regulated by treaty stipulations.<sup>1</sup>

*b. DISTINGUISHED FROM EMINENT DOMAIN.* — It has been observed that it is by no means easy to trace the dividing line between the power of taxation and the right of eminent domain,<sup>2</sup> and it is true that both rest on substantially the same foundation, that is, both are exercises of the sovereign power to take private property for public use.<sup>3</sup> In other respects, however, there is a very clear distinction which may readily be pointed out. Taxation exacts money or services from individuals as and for their respective shares of contribution to any burden; operates on a community or on a class of persons in a community; and is governed by some rule of apportionment. On the other hand, private property taken for public use by virtue of the right of eminent domain is taken, not as the owner's share or contribution to the public burden, but as so much beyond his share, and the exercise of this right operates on an individual and has no reference to the amount or value exacted from any other individual or class of individuals.<sup>4</sup> And, again, special compensation is required to be made when property is taken in the exercise of the right of eminent domain, because the government is the debtor to the amount of the value of the property thus taken; but the payment of taxes is a duty of the citizen, and creates no obligation on the part of the government, otherwise than to make a proper application of the taxes paid.<sup>5</sup>

*Requirement of Compensation Not a Limitation of Taxing Power.* — The clause of the Constitution requiring compensation to be made when private property is taken for public use is not a limitation on the taxing power,<sup>6</sup> but it is held to

principle stated in the text, held that such bonds were taxable in *Pennsylvania* though owned by nonresident aliens. The reasoning by which the court reached this conclusion was that the bonds were made valuable by the franchise which the railroad company derived from the commonwealth, were secured by mortgages on property and franchises within the commonwealth, and could be enforced only in the courts of the commonwealth. This view, however, is not sustainable, as was pointed out by the Supreme Court of the United States in *State Tax on Foreign-held Bonds*, 15 Wall. (U. S.) 300, cited *supra*, this note.

*Taxation of Aliens.* — See the title ALIENS, vol. 2, p. 84.

1. See *infra*, this section, *Restriction by Treaty*.

2. *People v. Brooklyn*, 6 Barb. (N. Y.) 214.

3. *Power of Taxation and Right of Eminent Domain Rest on Same Foundation.* — *People v. Brooklyn*, 4 N. Y. 422, 55 Am. Dec. 266.

4. *Distinction Between Taxation and Right of Eminent Domain* — *Connecticut*. — *Booth v. Woodbury*, 32 Conn. 118.

*Idaho*. — *Haas v. Misner*, 1 Idaho 176.

*Indiana*. — *Goodrich v. Winchester, etc.*, Turnpike Co., 26 Ind. 119.

*Iowa*. — *Hanson v. Vernon*, 27 Iowa 28, 1 Am. Rep. 215.

*Maryland*. — *Baltimore v. Green Mt. Cemetery*, 7 Md. 517.

*Massachusetts*. — *Parks v. Boston*, 8 Pick. (Mass.) 228, 19 Am. Dec. 322.

*Michigan*. — *Woodbridge v. Detroit*, 8 Mich. 278.

*Minnesota*. — *Sanborn v. Rice County*, 9 Minn. 273.

*Nebraska*. — *Turner v. Althaus*, 6 Neb. 77.

*New York*. — *People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Wynehamer v. People*,

13 N. Y. 404; *Astor v. New York*, 37 N. Y. Super. Ct. 539.

*Ohio*. — *Ridenour v. Saffin*, 1 Handy (Ohio) 472.

*Pennsylvania*. — *Hammitt v. Philadelphia*, 65 Pa. St. 146, 3 Am. Rep. 615.

*Tennessee*. — *Taylor v. Chandler*, 9 Heisk. (Tenn.) 358, 24 Am. Rep. 308.

5. *Astor v. New York*, 37 N. Y. Super. Ct. 539. See generally the title EMINENT DOMAIN, vol. 10, p. 1043.

6. *Provision for Compensation Not a Limitation of Taxing Power* — *United States*. — *Gilman v. Sheboygan*, 2 Black (U. S.) 510.

*Connecticut*. — *Nichols v. Bridgeport*, 23 Conn. 189, 60 Am. Dec. 636; *Booth v. Woodbury*, 32 Conn. 118.

*Illinois*. — *Hessler v. Drainage Com'rs*, 53 Ill. 105; *White v. People*, 94 Ill. 609.

*Indiana*. — *Logansport v. Seybold*, 59 Ind. 225.

*Iowa*. — *Stewart v. Polk County*, 30 Iowa 26, 1 Am. Rep. 238; *Warren v. Henly*, 31 Iowa 31.

*Kentucky*. — *Slack v. Maysville, etc.*, R. Co., 13 B. Mon. (Ky.) 1; *Justices v. Paris, etc.*, Turnpike Co., 11 B. Mon. (Ky.) 143.

*Massachusetts*. — *Com. v. Alger*, 7 Cush. (Mass.) 53.

*Michigan*. — *Williams v. Detroit*, 2 Mich. 560.

*Mississippi*. — *Martin v. Dix*, 52 Miss. 53, 24 Am. Rep. 661.

*Nebraska*. — *Hanscom v. Omaha*, 11 Neb. 37; *Kittle v. Shervin*, 11 Neb. 81.

*New York*. — *People v. Brooklyn*, 4 N. Y. 423, 55 Am. Dec. 266; *Guilford v. Cornell*, 18 Barb. (N. Y.) 615; *Guilford v. Chenango County*, 13 N. Y. 147; *Litchfield v. Vernon*, 41 N. Y. 123.

*Pennsylvania*. — *McMasters v. Com.*, 3 Watts (Pa.) 292; *Matter of Pittsburgh*, 2 W.

guard against illegal exactions disguised under the name of taxation.<sup>1</sup>

*c. DISTINGUISHED FROM POLICE POWER.* — The distinction between the taxing power and the police power has been stated elsewhere in this work.<sup>2</sup>

**2. Constitutional Restrictions** — *a. ENACTMENT OF TAX LAWS IN GENERAL.* — The Constitution of the United States provides that "all bills for raising revenue shall originate in the House of Representatives,"<sup>3</sup> and the state constitutions generally contain similar provisions.<sup>4</sup> A "bill for raising revenue," within this clause, is one that has for its chief object the raising of revenue for the purposes of the government, as distinguished from a bill under which revenue may incidentally arise.<sup>5</sup> Accordingly a bill for reducing taxation has been held a bill for raising revenue where it provided for the collection of taxes.<sup>6</sup> But an appropriation bill is not a bill for raising revenue, though it may lead to the necessity of taxation.<sup>7</sup>

*b. TAXATION BY UNITED STATES.* — The comprehensive power given by the Constitution of the United States to Congress "to lay and collect taxes, duties, imposts, and excises,"<sup>8</sup> is subject to but one restriction, namely, that "no tax or duty shall be laid on any articles exported from any state."<sup>9</sup>

& S. (Pa.) 320; *Sharpless v. Philadelphia*, 21 Pa. St. 147, 59 Am. Dec. 739; *Fenelon's Petition*, 7 Pa. St. 173; *Extension of Hancock St.*, 18 Pa. St. 26; *Kirby v. Shaw*, 19 Pa. St. 258; *Schenley v. Allegheny*, 25 Pa. St. 128.

*Texas.* — *Norris v. Waco*, 57 Tex. 635.

*Utah.* — *Kimball v. Grantsville City*, 19 Utah 368.

*Vermont.* — *Allen v. Drew*, 44 Vt. 175.

1. *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *Lexington v. McQuillan*, 9 Dana (Ky.) 513, 35 Am. Dec. 159; *Livingston v. Paducah*, 80 Ky. 656; *Second Municipality v. Duncan*, 2 La. Ann. 182; *Howell v. Essex County Road Board*, 32 N. J. Eq. 672; *State v. Readington Tp.*, 36 N. J. L. 66; *State v. Chamberlin*, 37 N. J. L. 388; *State v. Newark*, 37 N. J. L. 415; *State v. Fuller*, 39 N. J. L. 576; *Durach's Appeal*, 62 Pa. St. 491; *Hammett v. Philadelphia*, 65 Pa. St. 146, 3 Am. Rep. 615; *Weber v. Reinhard*, 73 Pa. St. 373, 13 Am. Rep. 747.

In *Gordon v. Cornes*, 47 N. Y. 612, *Rapallo, J.*, says: "It would be going too far to deny that the provisions of the Constitution which declare that no person shall be deprived of property without due process of law, and that private property shall not be taken for public use without just compensation, would afford protection to the citizen against impositions made nominally in the form of taxes but which were in fact forced levies upon individuals or confiscations of private property, as, for instance, if the general expenses of the government of the state, or of one of its municipal divisions, should be levied upon the property of an individual or set of individuals, or perhaps upon a particular district."

**2. Taxation Distinguished from Police Power.** — See the title *POLICE POWER*, vol. 22, p. 917.

An act requiring all landowners to remove from the running streams of water on their land all trash, trees, rafts, and timber during certain months of the year is not an exercise of the taxing power, but is a mere police regulation. *State v. Tucker*, 56 S. Car. 516.

3. Const. U. S., art. 1, § 7, par. 1.

4. See the constitutions of the several states. See also the title *STATUTES*, vol. 26, p. 539.

5. "Bill for Raising Revenue" Defined. — The

*Nashville*, 4 Biss. (U. S.) 188; *U. S. v. James*, 13 Blatchf. (U. S.) 207; *Perry County v. Selma, etc.*, R. Co., 58 Ala. 546; *Curryer v. Merrill*, 25 Minn. 1, 33 Am. Rep. 450.

The Term "Money Bills," sometimes used in this connection, is the equivalent of "bills for raising revenue." Opinion of Justices, 126 Mass. 593.

**Revenue for State Purposes Distinguished from Municipal Purposes.** — This provision of the Constitution applies only to the state or the revenue that goes into or properly belongs to the state treasury; therefore a bill authorizing a city to impose a license tax on certain occupations, the object of which is to raise revenue for municipal purposes, may properly originate in either house of the legislature. *Rankin v. Henderson*, (Ky. 1888) 7 S. W. Rep. 174.

**6. Bill to Reduce Taxes Held a Bill for Raising Revenue.** — *Perry County v. Selma, etc.*, R. Co., 58 Ala. 546.

**7. Appropriation Bill Not a Bill for Raising Revenue.** — Opinion of Justices, 126 Mass. 593; *Curryer v. Merrill*, 25 Minn. 1.

**8. Taxing Power Conferred on Congress.** — Const. U. S., art. 1, § 8, par. 1; *Ward v. Maryland*, 12 Wall. (U. S.) 427; *Whiteaker v. Haley*, 2 Oregon 135.

**Excise Distinguished from Export Duty.** — In *Pace v. Burgess*, 92 U. S. 372, the court had under consideration a statute exempting from excise taxes manufactured tobacco intended for export, but requiring a twenty-five-cent stamp to be placed on each package of the tobacco so intended for export and forbidding such tobacco to be removed from the factory without being stamped. It was held that this statute did not impose an export duty, but required the stamp merely to separate and identify the tobacco intended for export, and thereby, instead of taxing it, to relieve it from the taxation to which the other tobacco was subjected, and that this was a means devised to prevent evasion of the excise law. See also *Turpin v. Burgess*, 117 U. S. 504.

**9. Restrictions of Federal Power — Taxation of Exports.** — Const. U. S., art. 1, § 9, par. 5; *License Tax Cases*, 5 Wall. (U. S.) 471; *Lane County v. Oregon*, 7 Wall. (U. S.) 77; *Veazie*

There are several other provisions relating to the exercise by Congress of the power of taxation. These are that "all duties, imposts, and excises shall be uniform throughout the United States;"<sup>1</sup> that "no capitation or other direct tax shall be laid unless in proportion to the census;"<sup>2</sup> and that "no preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another."<sup>3</sup> These provisions, it is to be observed, do not restrict or limit the power to tax, but merely regulate in some particulars the exercise of the power.<sup>4</sup>

c. TAXATION BY STATES—(1) *In General*.—It has already been seen that the power of the states to impose taxes is an attribute of sovereignty which they all possess. The constitutional provisions on the subject are not grants of power, but limitations of a power already existing.<sup>5</sup>

(2) *Restrictions in Constitution of United States*—(a) *Duties on Imports and Exports*—aa. CONSTITUTIONAL PROVISIONS STATED.—The Constitution of the United States forbids the states, without the consent of Congress, to lay any duty on imports or exports.<sup>6</sup>

bb. WHAT ARE EXPORTS AND IMPORTS.—The constitutional provision referred to above is too plain and positive to admit of any claim that the states have power to impose duties on imports and exports as such; but many cases have arisen involving the question whether particular articles taxed by state authority were exports or imports within the meaning of those words as used in the Constitution, so as to bring the particular taxes within the prohibition.

*Exports*.—It is plain that a state has no authority to tax any goods by reason of their exportation or intended exportation, because that would amount to laying a duty on exports, which would violate the express terms of the Constitution.<sup>7</sup> In the majority of cases, however, the question has arisen in regard to property taxed, not because of its exportation or intended exportation, but as a part of the general mass of taxable property in the state. Under these circumstances it becomes necessary to determine the precise point of time at which goods intended for exportation cease to be a part of the general mass of taxable property in the state, and it has been held that this segregation does not occur until the goods are actually started in the course of transportation.<sup>8</sup>

*Bank v. Fenno*, 8 Wall. (U. S.) 540; *Turpin v. Burgess*, 117 U. S. 504. And see generally the title REVENUE LAWS, vol. 24, p. 883.

1. *Geographical Uniformity as to Duties, etc.*—Const. U. S., art. 1, § 8, par. 1. And see generally the title REVENUE LAWS, vol. 24, p. 883.

This provision of the Constitution has no application to the powers of taxation of a state or territorial legislature. It is a rule only for taxation by the United States. *Peacock v. Pratt*, (C. C. A.) 121 Fed. Rep. 772.

2. *Direct Taxation Must Be in Proportion to Census*.—Const. U. S., art. 1, § 9, par. 4; *Seabrook v. U. S.*, 21 Ct. Cl. 39.

The District of Columbia is subject to direct taxation according to the census enumeration. *Loughborough v. Blake*, 5 Wheat. (U. S.) 317.

3. *Preference of Ports of One State over Those of Another Prohibited*.—Const. U. S., art. 1, § 9, par. 6.

4. *Regulation as Distinguished from Restriction*.—*Lane County v. Oregon*, 7 Wall. (U. S.) 77; *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 541.

5. See *supra*, this section, *Nature and Extent of Taxing Power*—*In General*, paragraph *Extent of Power*.

6. *Restriction as to Imports*.—The full text of the constitutional provision in question is as

follows: "No state shall, without the consent of the Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws: and the net produce of all duties and imposts laid by any state on imports or exports shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress." Const. U. S., art. 1, § 10, par. 2.

7. *Taxes on Exports as Such*.—*Coe v. Errol*, 116 U. S. 517.

A Stamp Tax Imposed on Bills of Lading by a state law for the transportation of gold or silver to any place out of the state is an export duty on gold and silver. *Almy v. California*, 24 How. (U. S.) 169. See also *Ex p. Martin*, 7 Nev. 140, 8 Am. Rep. 707.

8. *Exports Defined*.—*Coe v. Errol*, 116 U. S. 517; *Turpin v. Burgess*, 117 U. S. 504. And see EXPORT—EXPORTATION, vol. 12, p. 320. Compare *Blount v. Monroe*, 60 Ga. 61, in which it was held that timber in the hands of an exporter engaged in that business alone was within the term "exports," where it was ready and waiting for shipment out of the state, though it was not actually in transit at the time fixed by law for the return of all property for taxation.

**Imports** are things imported; they are the articles themselves which are brought into the country. And though the duties on the articles are usually secured before the importer is allowed to exercise his right of ownership, this is merely to prevent evasion of the law, and not because the articles lose their character as imports by coming into the possession of the importer.<sup>1</sup> But such goods retain their character as imports only so long as they remain the property of the importer and are held by him in the original packages. As soon as the importer parts with his ownership or breaks up the packages, the goods become a part of the general mass of property in the state and cease to be exempt from state taxation.<sup>2</sup> As long, however, as imported goods are "imports" within the meaning of that word as used in the Federal Constitution, they are wholly exempt from state taxation in any form, and the courts will not permit the use of any device whereby the exemption may be defeated.<sup>3</sup>

**A Tax on the Occupation of an Importer** is a tax on imports and therefore violates the constitutional provision in question.<sup>4</sup>

**Termination of Character as Importer.** — When goods which have been imported lose their character as imports and become a part of the general mass of property in the state, they become subject to taxation like any other property;<sup>5</sup>

1. **Imports Defined.** — *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *U. S. v. Vowell*, 5 Cranch (U. S.) 368; *Arnold v. U. S.*, 9 Cranch (U. S.) 104; *License Cases*, 5 How. (U. S.) 504. See also **IMPORT — IMPORTATION — IMPORTER**, vol. 16, p. 1.

**Persons Not Included.** — The terms "imports" and "exports" apply only to personal property and do not include persons. *Henderson v. New York*, 92 U. S. 259; *New York v. Miln*, 11 Pet. (U. S.) 102.

**Taxation of Foreign Vessel Not Prohibited.** — *Aguirre v. Maxwell*, 3 Blatchf. (U. S.) 140. And see the title **SHIPS AND SHIPPING**, vol. 25, p. 870.

2. **When Character as "Imports" Ceases.** — *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *License Cases*, 5 How. (U. S.) 504; *Pervear v. Com.*, 5 Wall. (U. S.) 479; *Low v. Austin*, 13 Wall. (U. S.) 29; *May v. New Orleans*, 51 La. Ann. 1064; *State v. Pinckney*, 10 Rich. L. (S. Car.) 474.

**When Imported Merchandise Is Sold by the Importer**, it thereby loses its distinctive character as an import and becomes subject to state taxation like other property of the purchaser, though it is still in the original packages. *Waring v. Mobile*, 8 Wall. (U. S.) 110.

3. **Imports Not Taxable in Any Form.** — A tax on insurance premiums is not a tax on the goods insured, because it is not a necessity to any dealing with the goods, and therefore it is immaterial that the insured goods are imports stored in bonded warehouses. *People v. National F. Ins. Co.*, 27 Hun (N. Y.) 188, *reversing* 61 How. Pr. (N. Y.) 334.

**Taxing the Sale of Imported Goods** is the same in effect as taxing the goods specifically. *Cook v. Pennsylvania*, 97 U. S. 566; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Bank Tax Case*, 2 Wall. (U. S.) 200; *Pervear v. Com.*, 5 Wall. (U. S.) 478; *Savings Soc. v. Coite*, 6 Wall. (U. S.) 594; *Waring v. Mobile*, 8 Wall. (U. S.) 110; *License Cases*, 5 How. (U. S.) 504; *Lin Sing v. Washburn*, 20 Cal. 534; *Daniel v. Richmond*, 78 Ky. 542.

A tax in any shape on imports is a tax on

the consumer, by enhancing the price of the commodity. And if a state is permitted to levy it in any form, it will put it into the power of a maritime importing state to raise a revenue for the support of its government from citizens of other states, as certainly and effectually as if the tax was laid openly and without disguise as a duty on imports. Such a power in a state would defeat one of the principal objects of forming and adopting the Constitution. It cannot be done directly, in the shape of a duty on imports, for that is expressly prohibited. And as it cannot be done directly, it could hardly be a just and sound construction of the Constitution which would enable a state to accomplish precisely the same thing under another name and in a different form. *License Cases*, 5 How. (U. S.) 576.

4. **Tax on Occupation of Importer.** — *Welton v. Missouri*, 91 U. S. 275; *Howe Mach. Co. v. Gage*, 100 U. S. 676; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Waring v. Mobile*, 8 Wall. (U. S.) 110; *Low v. Austin*, 13 Wall. (U. S.) 29; *American Fertilizing Co. v. Board of Agriculture*, 43 Fed. Rep. 609; *State v. North*, 27 Mo. 464.

5. **Taxation After Character as Imports Ceases** — *United States*. — *Brown v. Houston*, 114 U. S. 622; *Coe v. Errol*, 116 U. S. 517; *Pervear v. Com.*, 5 Wall. (U. S.) 475; *Waring v. Mobile*, 8 Wall. (U. S.) 110; *License Cases*, 5 How. (U. S.) 504. See also *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 282; *Hays v. Pacific Mail Steamship Co.*, 17 How. (U. S.) 596; *C. N. Nelson Lumber Co. v. Loraine*, 22 Fed. Rep. 54.

*Georgia*. — *Kenny v. Harwell*, 42 Ga. 416; *Cumming v. Savannah*, R. M. Charlt. (Ga.) 26.

*Louisiana*. — *Pittsburg, etc., Coal Co. v. Bates*, 40 La. Ann. 226, 8 Am. St. Rep. 519.

*Missouri*. — *Tracy v. State*, 3 Mo. 3.

*New York*. — *Sharp v. Speir*, 4 Hill (N. Y.) 76.

*North Carolina*. — *Wynne v. Wright*, 1 Dev. & B. L. (18 N. Car.) 19; *Cowles v. Brittain*, 2 Hawks (9 N. Car.) 204.

but such goods cannot be taxed merely because they have been brought from a foreign country.<sup>1</sup>

**Articles Brought from Another State.** — Articles brought from one state into another are not imports within the meaning of the provision of the Federal Constitution forbidding the states to tax imports.<sup>2</sup>

cc. EXCEPTIONS IN CONSTITUTIONAL PROVISIONS — (aa) *Inspection Laws.* — The Constitution of the United States expressly excepts from the prohibition of state taxation of imports and exports such taxes as it may be absolutely necessary to impose in order to execute the state inspection laws,<sup>3</sup> that is, the Constitution in terms excludes from the category of duties on imports and exports such fees or exactions as a state may impose merely to pay for services performed in inspecting commodities.<sup>4</sup>

**Test of Legality.** — Since the charges imposed under inspection laws are unauthorized only for the purpose of paying the expenses of the inspection and not for the purpose of raising revenue, the test of legality in all cases where inspection is necessary or proper is the reasonableness of the charges.<sup>5</sup>

**Jurisdiction to Determine Question of Legality.** — Some doubt has been entertained as to whether it is not exclusively within the province of Congress, and not at all within that of a court, to decide whether a charge under an inspection law is or is not excessive;<sup>6</sup> but in the later cases the courts have passed on the question without any suggestion of want of jurisdiction.<sup>7</sup> The courts, however, will not go into an examination of the question whether the imposition is excessive, unless for the purpose of deciding whether the tax is only colorably an inspection charge.<sup>8</sup>

(bb) *Consent of Congress.* — The Constitution also permits the states, with the consent of Congress, to levy duties on imports and exports, with the qualifi-

*Pennsylvania.* — *Biddle v. Com.*, 13 S. & R. (Pa.) 405.

*South Carolina.* — *State v. Pinckney*, 10 Rich. L. (S. Car.) 474.

*Tennessee.* — *State v. Crawford*, 2 Head (Tenn.) 460.

1. **Goods Not Taxable Because of Foreign Origin.** — *Welton v. Missouri*, 91 U. S. 275; *Guy v. Baltimore*, 100 U. S. 434; *State v. North*, 27 Mo. 464; *People v. Moring*, 47 Barb. (N. Y.) 642.

2. **Goods Brought from Other State** — *United States.* — *Brown v. Houston*, 114 U. S. 622; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *Pervear v. Com.*, 5 Wall. (U. S.) 479; *Woodruff v. Parham*, 8 Wall. (U. S.) 123.

*Alabama.* — *Hinson v. Lott*, 40 Ala. 123.

*Indiana.* — *Standard Oil Co. v. Combs*, 96 Ind. 179, 49 Am. Rep. 156.

*Louisiana.* — *Hay Inspectors v. Pleasants*, 23 La. Ann. 349; *Brown v. Houston*, 33 La. Ann. 843, 39 Am. Rep. 284; *State v. Pittsburg, etc., Coal Co.*, 41 La. Ann. 465.

*New Hampshire.* — *Pierce v. State*, 13 N. H. 536.

*South Carolina.* — *State v. Charleston*, 10 Rich. L. (S. Car.) 240; *State v. Pinckney*, 10 Rich. L. (S. Car.) 474.

**For a Full Discussion** of the subject of taxation as affecting interstate commerce, see the title INTERSTATE COMMERCE, vol. 17, p. 108 *et seq.*

3. Const. U. S., art. 1, § 10, par. 2. For a full discussion of the subject of inspection laws generally, see the title INTERSTATE COMMERCE, vol. 17, p. 78 *et seq.*

4. **Inspection Fees Distinguished from Revenue** — *United States.* — *Turner v. Maryland*, 107

U. S. 38; *Patapsco Guano Co. v. Board of Agriculture*, 52 Fed. Rep. 690; *Neilson v. Garza*, 2 Woods (U. S.) 287; *Clarke v. Clarke*, 3 Woods (U. S.) 408.

*California.* — *Addison v. Saulnier*, 19 Cal. 82. *Georgia.* — *Green v. Savannah, R. M. Charlt.* (Ga.) 368.

*Kentucky.* — *Vanmeter v. Spurrier*, 94 Ky. 22.

*Louisiana.* — *New Orleans v. Ship Martha J. Ward*, 14 La. Ann. 287.

*New York.* — *Clintman v. Northrop*, 8 Cow. (N. Y.) 45.

The imposition of fees for inspection, if intended as a mode of raising revenue for the state, cannot be sustained. It can be held only as a mode of making the particular business pay the expense of its proper police regulation. *Willis v. Standard Oil Co.*, 50 Minn. 297.

5. **Test of Legality.** — *Turner v. Maryland*, 107 U. S. 38; *Willis v. Standard Oil Co.*, 50 Minn. 290. And see *Brimmer v. Rebman*, 138 U. S. 78; *In re Rebman*, 41 Fed. Rep. 867; *Neilson v. Garza*, 2 Woods (U. S.) 287; *Minnesota v. Barber*, 136 U. S. 313.

**What Is a Reasonable Fee for Inspection** must depend largely on the sound discretion of the legislature, and unless it is manifestly unreasonable, in view of the purpose of the law as a police regulation, it will not be adjudged a tax. *Willis v. Standard Oil Co.*, 50 Minn. 290.

6. **Jurisdiction to Determine Question of Legality.** — *Neilson v. Garza*, 2 Woods (U. S.) 287; *Turner v. Maryland*, 107 U. S. 38.

7. *Minnesota v. Barber*, 136 U. S. 313; *Brimmer v. Rebman*, 138 U. S. 78.

8. *Patapsco Guano Co. v. Board of Agriculture*, 52 Fed. Rep. 690.

cation that the net produce of all such duties shall be for the use of the treasury of the United States, and that all such laws shall be subject to the revision and control of Congress.<sup>1</sup>

(b) **Regulation of Commerce.** — The subject of the provisions of the Constitution of the United States relating to the regulation of commerce as affecting state taxation is fully treated in another part of this work.<sup>2</sup>

(c) **Equal Privileges, Immunities, and Protection of Law.** — The Fourteenth Amendment of the Constitution of the United States, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or deny to any person within its jurisdiction the equal protection of the law, imposes a limitation on the exercise of all the powers of the state, including among them that of taxation.<sup>3</sup> This prohibition against the denial by any state to citizens within its jurisdiction of the equal protection of the laws forbids, in a sense, the imposition of unequal taxes. The rule is that unequal taxes may not be imposed on property of the same kind in the same situation and used for the same purpose. But the protection afforded by the Fourteenth Amendment has never been carried to the extent of requiring that the same taxes shall be imposed in the same manner on every class of property irrespective of its nature or condition or class.<sup>4</sup> This provision, however, was not intended to protect a citizen of any state against discrimination made by his own state in favor of the citizens of other states,<sup>5</sup> or to prohibit discrimination between different classes of citizens of

1. **Consent of Congress.** — Const. U. S., art. 1, § 10, par. 2; *Neilson v. Garza*, 2 Woods (U. S.) 287.

**Consent Implied from Legislation.** — *Green v. Biddle*, 8 Wheat. (U. S.) 1.

2. See the title **INTERSTATE COMMERCE**, vol. 17, p. 108 *et seq.*

3. **Equal Privileges, Immunities, Etc.** — *Railroad Tax Cases*, 13 Fed. Rep. 722; *Santa Clara County v. Southern Pac. R. Co.*, 18 Fed. Rep. 385. See also the titles **CIVIL RIGHTS**, vol. 5, p. 78; **CONSTITUTIONAL LAW**, vol. 6, p. 970.

As to taxation of the products of other states, see the title **INTERSTATE COMMERCE**, vol. 17, p. 108 *et seq.*

As to taxes or license charges on business or privileges imposed on traders from other states, see the title **OCCUPATION, BUSINESS, AND PRIVILEGE TAXES**, vol. 21, p. 770.

As to taxation of corporations, see the title **TAXATION (CORPORATE)**, *post*.

As to exemptions as affected by the constitutional provision in question, see the title **EXEMPTIONS (FROM TAXATION)**, vol. 12, p. 266.

**State May Tax Citizens of Other States Equally with Its Own Citizens.** — The constitution does not exempt citizens of other states or of the United States from any burden which the law of the state imposes on its own citizens. *Ex p. Thornton*, 12 Fed. Rep. 538; *Woodruff v. Parham*, 8 Wall. (U. S.) 123; *Paul v. Virginia*, 8 Wall. (U. S.) 169; *Jackson v. Bulloch*, 12 Conn. 38; *Com. v. Milton*, 12 B. Mon. (Ky.) 212, 54 Am. Dec. 522; *Harrison v. Vicksburg*, 3 Smed. & M. (Miss.) 581, 41 Am. Dec. 633; *Leemon v. People*, 20 N. Y. 607.

**Taxation of Unnaturalized Foreigners.** — An act imposing a tax on the employers of foreign unnaturalized male persons over twenty-one years of age imposes on such persons burdens which are not laid on others in the same calling and condition, and therefore operates to deny to them the equal protection of the laws. *Juniata*

*Limestone Co. v. Fagley*, 187 Pa. St. 193, 67 Am. St. Rep. 579, *affirming* 7 Pa. Dist. 201. See also *Fraser v. McConway, etc.*, Co., 6 Pa. Dist. 555; *Ade v. Philadelphia County*, 7 Pa. Dist. 199.

4. **Effect of Fourteenth Amendment as to Unequal Taxation.** — *Railroad Tax Cases*, 115 U. S. 337; *Bells Gap R. Co. v. Pennsylvania*, 134 U. S. 232; *Home Ins. Co. v. New York*, 134 U. S. 394; *Pacific Express Co. v. Seibert*, 142 U. S. 339; *Western Union Tel. Co. v. Indiana*, 165 U. S. 304; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452; *Peacock v. Pratt*, (C. C. A.) 121 Fed. Rep. 777. And see *Davidson v. New Orleans*, 96 U. S. 97.

**Inequality of Burden.** — A tax which imposes inequality of burden operates as a denial of the equal protection of the laws, but the mere fact that inequality may result does not necessarily bring the statute within the constitutional prohibition. Thus, a state law which permits banks at their election to pay four mills on each dollar of the actual value of the shares of stock, or to collect from the shareholders a tax of eight mills on the dollar on the par value of all the shares, does not violate the constitutional provision, because any inequality of burden that may follow results from a privilege offered to all. *Merchants' Bank v. Pennsylvania*, 167 U. S. 461.

But equal protection of the law is denied by a statute providing for the levy of a fire tax on all property, but excluding the property of railroad companies on which the tax is levied from the benefit and protection which the law should afford. *Atchison, etc., R. Co. v. Clark*, 60 Kan. 826.

5. **Discrimination in Favor of Citizens of Other States Not Prohibited.** — *Slaughter-House Cases*, 16 Wall. (U. S.) 36; *Bradwell v. State*, 16 Wall. (U. S.) 136; *Com. v. Griffin*, 3 B. Mon. (Ky.) 208. And see *Downham v. Alexandria*, 10 Wall. (U. S.) 173.

the same state.<sup>1</sup>

(d) **Impairment of Obligation of Contracts.** — The provision of the Constitution of the United States that no state shall pass any law impairing the obligation of contracts<sup>2</sup> constitutes a limitation on the taxing power of the states.<sup>3</sup>

**Contracts of Individuals and Private Corporations.** — The general principle is that a law which directly deprives a party to a contract of any portion of the benefits to which he was by its terms entitled, or which indirectly produces the same result by subtracting from the effectiveness of the remedy, is a law impairing the obligation of the contract.<sup>4</sup> Thus, a law imposing a tax on the interest stipulated to be paid on loans within the state, and requiring the debtor to deduct the amount of the tax from each instalment of interest or dividend, as it matures, impairs the obligation of the contract as to nonresident creditors so far as the law is applicable to loans made before its enactment, because it diminishes the amount of interest to which the creditors are entitled by the terms of their contract.<sup>5</sup> But a contract between individuals is not impaired by being taxed, when the tax can be regarded as a tax on income derived from the contract or an excise tax, and not a tax on the creditor.<sup>6</sup>

**Contracts of State.** — The prohibition against laws impairing the obligation of contracts applies not only to the contracts of individuals and private corporations, but also to contracts to which the state is a party.<sup>7</sup>

1. **Different Classes of Citizens of Same State.** — *Bradwell v. State*, 16 Wall. (U. S.) 130; *Com. v. Griffin*, 3 B. Mon. (Ky.) 208.

The local policy of a state government as to its own citizens is not interfered with. *Kincaid v. Francis, Cooke* (Tenn.) 49.

2. Const. U. S., art. 1, § 10, par. 1.

As to this subject in general, see the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 15, p. 1030.

3. **Taxation as Impairing Obligation of Contracts.** — *Murray v. Charleston*, 96 U. S. 432; *Louisville, etc., R. Co. v. Gaines*, 3 Fed. Rep. 266; *Home of Friendless v. Rouse*, 8 Wall. (U. S.) 430; *State Tax on Foreign-held Bonds*, 15 Wall. (U. S.) 300; *Piqua Branch of State Bank v. Knoop*, 16 How. (U. S.) 369; *State v. New Orleans*, 29 La. Ann. 863; *Com. v. Western Union Tel. Co.*, 2 Dauphin Co. Rep. (Pa.) 40.

**Repeal of Statute.** — The repeal of a statute which is in the nature of a contract exempting from taxation or fixing a particular mode or rate of taxation will not operate to divest a right which accrued under it.

*United States.* — *Yazoo, etc., R. Co. v. Levee Com'rs*, 37 Fed. Rep. 24, affirmed 132 U. S. 190; *McGee v. Mathis*, 4 Wall. (U. S.) 143; *Piqua Branch of State Bank v. Knoop*, 16 How. (U. S.) 369.

*California.* — *English v. Sacramento*, 19 Cal. 172.

*Connecticut.* — *Osborne v. Humphrey*, 7 Conn. 335.

*Kentucky.* — *Maguiar v. Henry*, 84 Ky. 1, 4 Am. St. Rep. 182.

*Nebraska.* — *State v. Walsh*, 31 Neb. 469.

*Tennessee.* — *State v. Butler*, 11 Lea (Tenn.) 493.

See also the title **STATUTES**, vol. 26, p. 750.

4. See the title **IMPAIRMENT OF OBLIGATION OF CONTRACTS**, vol. 15, p. 1030.

5. **Taking Interest on Loans Made by Nonresidents.** — *Murray v. Charleston*, 96 U. S. 432; *Dewey v. Des Moines*, 173 U. S. 204; *De Vignier*

*v. New Orleans*, 16 Fed. Rep. 11; *South Nashville St. R. Co. v. Morrow*, 87 Tenn. 438.

**The Distinction Between Resident and Nonresident Creditors** is this: in the case of the resident creditor the debt due him is property in the state, which the state may lawfully tax, and the collection of the tax may be secured by requiring the debtor to pay the amount of the tax out of the interest as it accrues; but in the case of a nonresident creditor the debt is not property within the state, and the requirement that the debtor shall withhold a part of the interest money operates to deprive the creditor of a part of the benefits to which he is entitled under the contract. *State Tax on Foreign-held Bonds*, 15 Wall. (U. S.) 300, *disapproving Maltby v. Reading, etc., R. Co.*, 52 Pa. St. 140. See also *Com. v. New York, etc., R. Co.*, 129 Pa. St. 463, 15 Am. St. Rep. 724.

6. **Taxing Contracts—United States.** — *Murray v. Charleston*, 96 U. S. 432; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Michigan Cent. R. Co. v. Collector*, 100 U. S. 595; *U. S. v. Erie R. Co.*, 106 U. S. 327.

*Michigan.* — *Robertson v. State Land Office Com'r*, 44 Mich. 274.

*New Jersey.* — *Cook v. Smith*, 30 N. J. L. 387.

*Vermont.* — *Catlin v. Hull*, 21 Vt. 152.

**Taxation on Mortgages.** — *Detroit v. Assessors*, 91 Mich. 78.

**Taxing Bill and Note Brokers.** — In *McGahey v. Virginia*, 135 U. S. 662, it was held that an undue restraint was imposed on the negotiability of bills and notes by requiring the payment of a license tax by bill and note brokers.

7. **Contracts of State—United States.** — *Home of Friendless v. Rouse*, 8 Wall. (U. S.) 430; *Fletcher v. Peck*, 6 Cranch (U. S.) 135; *New Jersey v. Wilson*, 7 Cranch (U. S.) 164; *Piqua Branch of State Bank v. Knoop*, 16 How. (U. S.) 369.

*Michigan.* — *Robertson v. State Land Office Com'r*, 44 Mich. 274.

**Charters of Private Corporations.** — The charter of a private corporation operates as a contract between the stockholder and the state that there shall be no revocation or impairment of any valuable right or privilege which constitutes the consideration in whole or in part for the acceptance of the charter.<sup>1</sup> Therefore, where such a charter provides that the corporation shall be taxed only as therein specified, and there is no revocation of power to alter or repeal the charter, a subsequent statute prescribing a different rule of taxation which does or may impose a greater burden on the corporation violates the constitutional prohibition of laws impairing the obligation of contracts.<sup>2</sup> The same rule applies to the case of a charter exempting the corporation from taxation. The exemption being the consideration, in whole or in part, for the acceptance of the charter, the contract obligation of the state is impaired by afterwards requiring the corporation to pay taxes.<sup>3</sup>

But a Mere Change in the Method of Taxation is not an impairment of the contract.<sup>4</sup>

**Payment of Bonus for Charter.** — The fact that a corporation has paid to the state a bonus for granting a charter of incorporation does not protect the grantee of the franchise from all taxation except such as the state has reserved the right to impose in the charter itself.<sup>5</sup>

*Minnesota.* — *State v. Young*, 29 Minn. 474.

*Mississippi.* — *O'Donnell v. Bailey*, 24 Miss. 386.

*New York.* — *Danolds v. State*, 89 N. Y. 36, 42 Am. Rep. 277.

And see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1033 *et seq.*

The language in which the surrender of the right of taxation is made by a state must be clear and unmistakable. The covenant or enactment must distinctly express that there shall be no further taxation. A state cannot strip herself of this essential power by doubtful words. *Memphis Gas-Light Co. v. Taxing Dist.*, 109 U. S. 398; *Erie R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492; *Bradley v. McAtee*, 7 Bush (Ky.) 667, 3 Am. Rep. 309; *Louisville, etc., R. Co. v. Com.*, 10 Bush (Ky.) 43.

A Reasonable Doubt as to the Existence of a Contract must be resolved in favor of the state.

*United States.* — *Hoge v. Richmond, etc., R. Co.*, 99 U. S. 348; *North Missouri R. Co. v. Maguire*, 20 Wall. (U. S.) 46; *Bailey v. Maguire*, 22 Wall. (U. S.) 215; *Piqua Branch of State Bank v. Knoop*, 16 How. (U. S.) 369.

*Maryland.* — *Buchanan v. Talbot County*, 47 Md. 286.

*Michigan.* — *Detroit v. Detroit, etc., Plank Road Co.*, 43 Mich. 140; *Detroit City St. R. Co. v. Guthard*, 51 Mich. 180.

*Mississippi.* — *Holly Springs Sav., etc., Co. v. Marshall County*, 52 Miss. 281, 24 Am. Rep. 668.

*Pennsylvania.* — *Pennsylvania R. Co. v. Canal Com'rs*, 21 Pa. St. 22.

*Virginia.* — *Richmond, etc., R. Co. v. Richmond*, 26 Gratt. (Va.) 83.

**Consideration — Public Purpose.** — When a statute has in view the accomplishment of some object for the advantage of the public, as for instance the establishment of a charitable institution, such purpose constitutes a sufficient consideration for exempting the property of the institution from taxation. *Home of Friendless v. Rouse*, 8 Wall. (U. S.) 430.

And the rule is the same where the public purpose in view is the establishment of an in-

stitution of learning. *Washington University v. Rouse*, 8 Wall. (U. S.) 439.

But a statute declaring that property theretofore or thereafter conveyed for pious uses should be forever exempt from taxation has been held not to constitute a contract so as to prevent the legislature from afterwards subjecting such property to taxation. *Osborne v. Humphrey*, 7 Conn. 339; *Parker v. Redfield*, 10 Conn. 490; *Landon v. Litchfield*, 11 Conn. 260; *Brainard v. Colchester*, 31 Conn. 407; *Lord v. Litchfield*, 36 Conn. 116, *overruling Atwater v. Woodbridge*, 6 Conn. 223, 16 Am. Dec. 46; *First Ecclesiastical Soc. v. Hartford*, 38 Conn. 274.

1. **Charters as Contracts.** — See the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1034. See also the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 356 *et seq.*

2. **Rule of Taxation Prescribed by Charter.** — *King v. Madison*, 17 Ind. 48; *O'Donnell v. Bailey*, 24 Miss. 386.

3. **Charter Exemption from Taxation.** — *Home of Friendless v. Rouse*, 8 Wall. (U. S.) 430; *Tomlinson v. Jessup*, 15 Wall. (U. S.) 454. And see the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 380.

4. **Change in Method of Taxation.** — *New Orleans v. New Orleans Water Works Co.*, 142 U. S. 78; *U. S. v. Knox County*, 51 Fed. Rep. 880; *Gilman v. Sheboygan*, 2 Black (U. S.) 510; *Bailey v. Maguire*, 22 Wall. (U. S.) 215.

The establishment of the mode of ascertaining the value of the road and property of a railway company is not a legislative contract which cannot be altered by subsequent legislation. *Moore v. Holliday*, 4 Dill. (U. S.) 52.

5. **Payment of Bonus for Charter.** — *Minot v. Philadelphia, etc., R. Co.*, 2 Abb. (U. S.) 323, *affirmed* 18 Wall. (U. S.) 206; *New Orleans City, etc., R. Co. v. New Orleans*, 143 U. S. 193; *Erie R. Co. v. Com.*, 66 Pa. St. 84, 5 Am. Rep. 351.

But if the bonus is the consideration of an agreement not to tax, then the grantee is by such payment protected from taxation. *Gordon v. Appeal Tax Ct.*, 3 How. (U. S.) 133; *Franklin County Ct. v. Deposit Bank*, 87 Ky. 370;



A Change in the Character or Objects of the Corporation will not preclude it from claiming the benefits of an exemption;<sup>1</sup> but if, by a change in its character, a corporation has disqualified itself to comply with the conditions on the performance of which the exemption was granted, it must be considered as having waived the exemption.<sup>2</sup>

**Exemptions from Taxation.** — It is well settled that a grant of exemption from taxation may constitute a contract within the meaning of the provision of the Federal Constitution forbidding the state to pass any law impairing the obligation of contracts. The distinctive feature of such a grant is a consideration to support it. The necessity for a consideration is the same that exists in the case of contracts between private persons. If there is no consideration for the grant of exemption, it is a mere offer of a bounty which may be withdrawn at any time, though the recipient of the bounty may have incurred expense on the faith of the offer.<sup>3</sup>

**State or Municipal Obligations Made Receivable for Taxes.** — Where obligations of a state or municipality are issued pursuant to a statute which makes them receivable in payment of taxes, such statute constitutes a contract between the state or municipality and the holders of the obligations so issued that the holders may use them in the payment of taxes; and any subsequent statute passed for the purpose of preventing or obstructing such use violates the contract clause of the Federal Constitution and is void.<sup>4</sup>

(e) **Due Process of Law.** — The power of the state to levy and collect taxes is also limited by that clause of the Fourteenth Amendment of the Federal Constitution which forbids any state to deprive any person of his property "without due process of law." This limitation, however, is not in the nature of a restriction on the power itself, but merely regulates its exercise so as to avoid

*Assessors v. Morris, etc., R. Co.*, 49 N. J. L. 193.

The rule stated in the text is analogous to the purchase of land from the state. The payment of a price for the grant of land certainly implies that the grantee shall not be called on to pay any more purchase money, but it does not imply that his land shall not be subject to general taxation. *Erie R. Co. v. Com.*, 66 Pa. St. 84, 5 Am. Rep. 351.

1. **Change in Charter or Objects of Corporation.** — *Nichols v. New Haven, etc., Co.*, 42 Conn. 103; *State v. Hannibal, etc., R. Co.*, (Mo. 1889) 11 S. W. Rep. 746; *State v. Society, etc.*, 43 N. J. Eq. 410; *Cheraw, etc., R. Co. v. Anson County*, 88 N. Car. 519.

2. *Maine Cent. R. Co. v. Maine*, 96 U. S. 499; *Chicago, etc., R. Co. v. Guffey*, 122 U. S. 561. And see *State v. Minnesota Cent. R. Co.*, 36 Minn. 246. But see *International, etc., R. Co. v. State*, 75 Tex. 356.

3. **For a Full Discussion** of this subject, see the title **EXEMPTIONS (FROM TAXATION)**, vol. 12, p. 384 *et seq.*

As to what constitutes a sufficient consideration in general to support a contract, see the title **CONSIDERATION**, vol. 6, p. 667.

**Grant as Distinguished from License.** — See *Derby Turnpike Co. v. Parks*, 10 Conn. 522, 27 Am. Dec. 700.

4. **Statute Making State or Municipal Obligations Receivable for Taxes.** — *Keith v. Clark*, 97 U. S. 454; *Antoni v. Greenhow*, 107 U. S. 769; *Poin-dexter v. Greenhow*, 114 U. S. 270; *White v. Greenhow*, 114 U. S. 307; *Chaffin v. Taylor*, 114 U. S. 309, 116 U. S. 567; *Allen v. Baltimore, etc., R. Co.*, 114 U. S. 311; *McGahey v. Virginia*, 135 U. S. 662, *overruling Com. v.*

*Weller*, 82 Va. 721; *Willis v. Miller*, 29 Fed. Rep. 238; *Com. v. Booker*, 82 Va. 964; *Antoni v. Wright*, 22 Gratt. (Va.) 833.

In *McGahey v. Virginia*, 135 U. S. 663, the commonwealth of Virginia issued coupon bonds for the purpose of refunding its debt. The refunding statute provided that the coupons should be receivable in payment of taxes. Afterwards a statute was passed which imposed on taxpayers, at the time of offering the coupons in evidence in court, the duty of producing the bond from which the coupons tendered by them in payment of taxes were cut, and declared that expert evidence should not be receivable as to the genuineness of such coupons. It was held that such provision imposed a condition so unreasonable and onerous as not only to affect but to destroy the value of the bonds in the hands of persons who had purchased them, and was therefore a violation of the obligation of contracts.

In *Edwards v. Williamson*, 70 Ala. 145, a statute provided for the issuance of county bonds in aid of a railroad and placed the holders of such bonds on equality with the state and county in the assessment and collection of the necessary and proper taxes, and gave the same remedies against the tax collectors for any neglect or breach of duty. A later statute authorized tax collectors to give separate bonds for the collection of the general state and county taxes, and for the collection of any special tax "authorized by law or required by the judgment of any court," and provided that when a collector should give a bond conditioned for the collection of the general tax only, a collector might be appointed for the special taxes. It was held that the latter

injustice to individuals. It is a principle of natural justice, which this constitutional provision is designed to secure, that every person on whom the burden of taxation is laid shall have notice of the assessment and an opportunity to be heard.<sup>1</sup> This subject has special relation to the assessment of taxes, and will be fully considered in that connection.<sup>2</sup>

(3) *Restrictions in State Constitutions* — (a) *Equality and Uniformity* — *aa. NATURE AND OBJECT OF CONSTITUTIONAL PROVISIONS.* — The constitutions of the various states usually contain provisions designed to secure equality of burden in the matter of taxation, and these constitutional provisions vary much in the different states.<sup>3</sup> The most usual provisions found in state constitutions are that taxation shall be "uniform,"<sup>4</sup> or shall be equal and

statute impaired the remedies of the holders of such county bonds and therefore violated the constitutional provision against laws impairing the obligation of contracts.

1. *Notice and Opportunity to Be Heard* — *United States.* — *Hagar v. Reclamation Dist.* No. 108, 111 U. S. 701; *Santa Clara County v. Southern Pac. R. Co.*, 18 Fed. Rep. 385; *Exchange Bank Tax Cases*, 21 Fed. Rep. 99; *Railroad Tax Case*, 8 Sawy. (U. S.) 238.

*Maryland.* — *Baltimore v. Johns Hopkins Hospital*, 56 Md. 1.

*New York.* — *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Remsen v. Wheeler*, 105 N. Y. 573; *Matter of Union College*, 129 N. Y. 308.

*Texas.* — *McFadden v. Longham*, 58 Tex. 579.

*Wisconsin.* — *Plumer v. Marathon County*, 46 Wis. 163.

*Forfeiture for Failure to Enter for Taxation.* — The provision of Const. W. Va., art. 13, § 6, forfeiting land for failure of the owner to enter it for taxation, is not in violation of that clause of the Fourteenth Amendment to the Federal Constitution restraining states from depriving any person of life, liberty, or property without due process of law. *State v. Sponaugle*, 45 W. Va. 415.

2. See *infra*, this title, IX. *Assessment*; X. *Levy*.

3. *Provisions for Equality of Burden in General* — *United States.* — *Gilman v. Sheboygan*, 2 Black (U. S.) 510; *Louisiana v. Pilsbury*, 105 U. S. 278; *Nashville, etc., R. Co. v. Taylor*, 86 Fed. Rep. 168.

*Arkansas.* — *Hutchinson v. Ozark Land Co.*, 57 Ark. 554.

*California.* — *People v. San Francisco, etc., R. Co.*, 35 Cal. 606.

*Illinois.* — *People v. Bradley*, 39 Ill. 130; *Primm v. Belleville*, 59 Ill. 142.

*Indiana.* — *Louisville, etc., R. Co. v. State*, 25 Ind. 177, 87 Am. Dec. 358; *Bright v. McCullough*, 27 Ind. 223.

*Iowa.* — *Dubuque v. Chicago, etc., R. Co.*, 47 Iowa 196.

*Kansas.* — *Francis v. Atchison, etc., R. Co.*, 19 Kan. 303.

*Kentucky.* — *German Nat. Ins. Co. v. Louisville, (Ky. 1900)* 54 S. W. Rep. 732.

*Louisiana.* — *Wintz v. Girardey*, 31 La. Ann. 381.

*Maine.* — *Dyar v. Farmington*, 70 Me. 515.  
*Michigan.* — *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654.

*Minnesota.* — *Sanborn v. Rice County*, 9 Minn. 273.

*Missouri.* — *State v. Western Union Tel. Co.*, 165 Mo. 502.

*Nebraska.* — *Pleuler v. State*, 11 Neb. 547.

*Nevada.* — *Ex p. Robinson*, 12 Nev. 263, 28 Am. Rep. 794.

*New York.* — *People v. Brooklyn*, 4 N. Y. 419; *Gordon v. Cornes*, 47 N. Y. 608.

*North Carolina.* — *University R. Co. v. Holden*, 63 N. Car. 410; *Gatlin v. Tarboro*, 78 N. Car. 119.

*Ohio.* — *Exchange Bank v. Hines*, 3 Ohio St. 1.

*Oklahoma.* — *Gay v. Thomas*, 5 Okla. 1.

*Oregon.* — *East Portland v. Multnomah County*, 6 Oregon 62.

*Pennsylvania.* — *Roup's Case*, 81\* Pa. St. 211; *Lehigh Iron Co. v. Lower Macungie Tp.*, 81 Pa. St. 482.

*Tennessee.* — *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349.

*Vermont.* — *Colton v. Montpelier*, 71 Vt. 413.

*Virginia.* — *Day v. Roberts*, (Va. 1903) 43 S. E. Rep. 362.

*West Virginia.* — *Douglass v. Harrisville*, 9 W. Va. 162, 27 Am. Rep. 548.

*Wisconsin.* — *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37.

In *Maine* the provision is that taxes on real and personal estate imposed by the state shall be assessed and apportioned equally. *Dyar v. Farmington*, 70 Me. 515.

In *North Carolina* there is an equation of taxation between property and poll taxes provided. *University R. Co. v. Holden*, 63 N. Car. 410.

In *Rhode Island* it is provided that the burdens of state ought to be fairly distributed among the citizens. *Dyer v. Osborne*, 11 R. I. 321, 23 Am. Rep. 460; *Crafts v. Ray*, 22 R. I. 179.

Provisions for uniformity and equality of taxation do not exist in some states, nor is Congress in legislating for the District of Columbia controlled by such provisions. *State v. Travelers Ins. Co.*, 73 Conn. 258; *Coite v. Savings Soc.*, 32 Conn. 173; *Townsend v. New York*, 16 Hun (N. Y.) 352; *Gibbons v. District of Columbia*, 116 U. S. 406.

4. *Requirement of Uniformity* — *United States.* — *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461; *Western Union Tel. Co. v. Norman*, 77 Fed. Rep. 13.

*Colorado.* — *Denver v. Knowles*, 17 Colo. 204.  
*Georgia.* — *Johnston v. Macon*, 62 Ga. 645;

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uniform,<sup>1</sup> or reasonable and proportional,<sup>2</sup> or that there shall be an equal and uniform rate.<sup>3</sup>

The Object of the constitutional provisions referred to is to regulate taxation so as to protect the taxpayer against unjust, arbitrary, or biased action by the legislature.<sup>4</sup>

**Local Variations.**—Such restrictions, however, do not mean that there is one fixed and unvarying rule of taxation for all purposes throughout the state.<sup>5</sup> Thus, a tax for state purposes must rest uniformly upon all parts of

Columbus Southern R. Co. v. Wright, 89 Ga. 576.

*Michigan.*—Taggart v. Sanilac County, 71 Mich. 16; Standard L., etc., Ins. Co. v. Assessors, 95 Mich. 466; Pingree v. Auditor Gen., 120 Mich. 95.

*New Jersey.*—Vreeland v. Jersey City, 43 N. J. L. 135; Trenton Sav. Fund v. Richards, 52 N. J. L. 156.

*Ohio.*—Fields v. Highland County, 36 Ohio St. 476; Cleveland v. Heisley, 41 Ohio St. 670.

*Pennsylvania.*—Lehigh Iron Co. v. Lower Macungie Tp., 81 Pa. St. 482; Com. v. Fall Brook Coal Co., 156 Pa. St. 488.

*Wisconsin.*—Weeks v. Milwaukee, 10 Wis. 242; Wisconsin Cent. R. Co. v. Taylor County, 52 Wis. 37.

**Uniformity Provision Self-executing.**—German Nat. Ins. Co. v. Louisville, (Ky. 1900) 54 S. W. Rep. 732.

**1. Equality and Uniformity—United States.**—Railroad Companies v. Gaines, 97 U. S. 697. *California.*—People v. McCreery, 34 Cal. 448.

*Maryland.*—State v. Cumberland, etc., R. Co., 40 Md. 22.

*Minnesota.*—State v. Weyerhauser, 68 Minn. 358; Rice County v. Citizens' Nat. Bank, 23 Minn. 280.

*Mississippi.*—Mississippi Mills v. Cook, 56 Miss. 40.

*Nevada.*—State v. Carson City Sav. Bank, 17 Nev. 146.

*Oregon.*—Crawford v. Linn County, 11 Oregon 482; Ellis v. Frazier, 38 Oregon 462.

*South Carolina.*—Morton v. Comptroller Gen., 4 S. Car. 476; State v. Tucker, 56 S. Car. 516.

*South Dakota.*—Turner v. Hand County, 11 S. Dak. 348.

*Tennessee.*—Union Bank v. State, 9 Yerg. (Tenn.) 490; Taylor v. Chandler, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308; Memphis v. Ensley, 6 Baxt. (Tenn.) 553, 32 Am. Rep. 532; Jones v. Memphis, 101 Tenn. 188.

*Utah.*—Judge v. Spencer, 15 Utah 242.

*Virginia.*—Eyre v. Jacob, 14 Gratt. (Va.) 422, 73 Am. Dec. 367; Day v. Roberts, (Va. 1903) 43 S. E. Rep. 362.

*Washington.*—State v. Whittlesey, 17 Wash. 447; Eureka Dist. Gold Min. Co. v. Ferry County, 28 Wash. 250.

*West Virginia.*—Powell v. Parkersburg, 28 W. Va. 698.

*Wyoming.*—Kelley v. Rhoads County, 7 Wyo. 273, 75 Am. St. Rep. 904.

**2. Reasonable and Proportional Taxation.**—Provident Inst. v. Massachusetts, 6 Wall. (U. S.) 611; Hamilton Mfg. Co. v. Massachusetts, 6 Wall. (U. S.) 632; Oliver v. Washington Mills, 11 Allen (Mass.) 277; Com. v. Hamilton

Mfg. Co., 12 Allen (Mass.) 298; Com. v. New England Slate, etc., Co., 13 Allen (Mass.) 391; Berry v. Windham, 59 N. H. 288, 47 Am. Rep. 202; Cheshire County Telephone Co. v. State, 63 N. H. 167.

**3. Uniform and Equal Rate.**—State Bank v. New Albany, 11 Ind. 139; Louisville, etc., R. Co. v. State, 25 Ind. 180, 87 Am. Dec. 358; Bright v. McCullough, 27 Ind. 223; Loftin v. Citizens Nat. Bank, 85 Ind. 341; Cleveland, etc., R. Co. v. Backus, 133 Ind. 513; Hines v. Leavenworth, 3 Kan. 186; Missouri River, etc., R. Co. v. Morris, 7 Kan. 222; *In re* Page, 60 Kan. 842; Hamilton v. Wilson, 61 Kan. 511; Missouri, etc., R. Co. v. Labette County, 9 Kan. App. 545.

**4. United States.**—Pine Grove Tp. v. Talcott, 19 Wall. (U. S.) 666.

*Alabama.*—Mobile v. Stonewall Ins. Co., 53 Ala. 570; Clark v. Mobile, 67 Ala. 217.

*Colorado.*—People v. Henderson, 12 Colo. 369.

*Connecticut.*—Osborn v. New York, etc., R. Co., 40 Conn. 491.

*Georgia.*—Johnston v. Macon, 62 Ga. 645.

*Illinois.*—O'Kane v. Treat, 25 Ill. 557; Primm v. Belleville, 59 Ill. 142.

*Indiana.*—Bright v. McCullough, 27 Ind. 223.

*Kansas.*—*In re* Page, 60 Kan. 842; Hamilton v. Wilson, 61 Kan. 511.

*Kentucky.*—Lexington v. McQuillan, 9 Dana (Ky.) 513, 35 Am. Dec. 159.

*Maryland.*—State v. Cumberland, etc., R. Co., 40 Md. 22.

*Massachusetts.*—Northampton v. Hampshire County, 145 Mass. 108.

*Ohio.*—Western Union Tel. Co. v. Mayer, 28 Ohio St. 524.

*Wisconsin.*—Knowlton v. Rock County, 9 Wis. 410; Lumsden v. Cross, 10 Wis. 282; Weeks v. Milwaukee, 10 Wis. 242; State v. Winnebago Lake, etc., Plankroad Co., 11 Wis. 35; Wisconsin Cent. R. Co. v. Taylor County, 52 Wis. 37.

**Bank Stock Taxed at Cost Price.**—Under such provisions bank stock cannot be taxed at cost price. Memphis v. Ensley, 6 Baxt. (Tenn.) 553, 32 Am. Rep. 532. See also Western Union Tel. Co. v. State, 9 Baxt. (Tenn.) 509, 40 Am. Rep. 99.

**Additional Tax to Cover Delinquency.**—Kan. Gen. Stat. 1897, c. 158, § 224, providing for an additional levy of one-half mill to pay the delinquent state tax in all counties where there is a deficiency, does not violate Const., art. 11, § 1, requiring a uniform and equal rate of assessment and taxation. McIntire v. Williamson, 8 Kan. App. 711; Atchison, etc., R. Co. v. Clark, 60 Kan. 831.

**5. Local Variations—Georgia.**—Verdery v.

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the state; if for county purposes, upon all parts of the county; if for township or city purposes, upon the entire township or city; if for a special or local purpose, then the tax must be laid with due regard to the proportionate interests of the taxpayers in the locality benefited or affected.<sup>1</sup> In each locality the rate may vary, but for public local purposes all property not exempt under the constitution must be taxed.<sup>2</sup>

Summerville, 82 Ga. 138; Columbus Southern R. Co. v. Wright, 89 Ga. 574; Haney v. Bartow County, 91 Ga. 770.

*Illinois.*—Chicago, etc., R. Co. v. Boone County, 44 Ill. 240; Bureau County v. Chicago, etc., R. Co., 44 Ill. 229.

*Indiana.*—State Bank v. New Albany, 11 Ind. 139; Bright v. McCullough, 27 Ind. 223; Richmond v. Scott, 48 Ind. 568; Loftin v. Citizens Nat. Bank, 85 Ind. 341.

*Kansas.*—Ottawa County v. Nelson, 19 Kan. 234, 27 Am. Rep. 101.

*Maryland.*—Public Schools v. Allegany County, 20 Md. 460.

*Massachusetts.*—Merrick v. Amherst, 12 Allen (Mass.) 500; Northampton v. Hampshire County, 145 Mass. 108.

*Mississippi.*—Daily v. Swope, 47 Miss. 367; Chrisman v. Brookhaven, 70 Miss. 477.

*Missouri.*—State v. Hannibal, etc., R. Co., 101 Mo. 120.

*New Jersey.*—Stratton v. Collins, 43 N. J. L. 562.

*Oregon.*—East Portland v. Multnomah County, 6 Oregon 62.

*Pennsylvania.*—Lackawanna Iron, etc., Co. v. Luzerne County, 42 Pa. St. 424; Com. v. Macferron, 152 Pa. St. 244.

**What Is Uniform and Equal Rate.**—"Of course, every one knows that the constitution does not mean (although it may seem to say so) that the 'rate of assessment and taxation' shall be so 'uniform and equal' throughout the state that if the aggregate rate of taxation in any one school district or township in the state should be just two per cent. on the valuation, that the aggregate rate of assessment and taxation in every other part and portion of the state should also be just two per cent." *Ottawa County v. Nelson*, 19 Kan. 240, 27 Am. Rep. 101.

**1. Must Be Uniform Over Territory Affected.**—*United States.*—Gilman v. Sheboygan, 2 Black (U. S.) 510; Pine Grove Tp. v. Talcott, 19 Wall. (U. S.) 666.

*Alabama.*—Mobile v. Dargan, 45 Ala. 310; Keene v. Jefferson County, 135 Ala. 466.

*Arkansas.*—Hutchinson v. Ozark Land Co., 57 Ark. 554; Davis v. Gaines, 48 Ark. 370.

*Colorado.*—Denver v. Knowles, 17 Colo. 204. *Illinois.*—Primm v. Belleville, 59 Ill. 142; Allhands v. People, 82 Ill. 234.

*Indiana.*—Bright v. McCullough, 27 Ind. 223; Lafayette, etc., R. Co. v. Geiger, 34 Ind. 185; Loftin v. Citizens' Nat. Bank, 85 Ind. 341; Jackson County v. State, 155 Ind. 604.

*Kansas.*—Francis v. Atchison, etc., R. Co., 19 Kan. 303. See also Hines v. Leavenworth, 3 Kan. 186.

*Maine.*—Dyar v. Farmington, 70 Me. 515.

*Massachusetts.*—Oliver v. Washington Mills, 11 Allen (Mass.) 268; Dorgan v. Boston, 12 Allen (Mass.) 223; Merrick v. Amherst, 12 Allen (Mass.) 500.

*Minnesota.*—Sanborn v. Rice County, 9 Minn. 273.

*Mississippi.*—Southern R. Co. v. Jackson, 38 Miss. 334; Daily v. Swope, 47 Miss. 367; Vasser v. George, 47 Miss. 713; Adams v. Mississippi State Bank, 75 Miss. 701; Chrisman v. Brookhaven, 70 Miss. 477; Murray v. Lehman, 61 Miss. 283.

*Nebraska.*—Turner v. Althaus, 6 Neb. 54; Hanscom v. Omaha, 11 Neb. 37.

*New Jersey.*—Stratton v. Collins, 43 N. J. L. 562.

*New York.*—People v. New York Floating Dry Dock Co., (Supm. Ct.) 93 How. Pr. (N. Y.) 451; People v. Brooklyn, 6 Barb. (N. Y.) 209.

*Ohio.*—Exchange Bank v. Hines, 3 Ohio St. 1; Zanesville v. Richards, 5 Ohio St. 590; Hill v. Higdon, 5 Ohio St. 243, 67 Am. Dec. 289; Reeves v. Treasurer, 8 Ohio St. 333; Baker v. Cincinnati, 11 Ohio St. 534; Pittsburgh, etc., R. Co. v. State, 49 Ohio St. 189.

*Oregon.*—Cook v. Portland, 20 Oregon 580.

*Pennsylvania.*—Lackawanna Iron, etc., Co. v. Luzerne County, 42 Pa. St. 424.

*Tennessee.*—Taylor v. Chandler, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308; Reelfoot Lake Levee Dist. v. Dawson, 97 Tenn. 151; Jones v. Memphis, 101 Tenn. 188.

*Virginia.*—Day v. Roberts, (Va. 1903) 43 S. E. Rep. 362.

*Wisconsin.*—State v. Froehlich, (Wis. 1903) 94 N. W. Rep. 50; Weeks v. Milwaukee, 10 Wis. 258; State v. Sauk County, 70 Wis. 485.

And see generally the title SPECIAL OR LOCAL ASSESSMENTS, vol. 25, p. 1174.

**A State or County Burden cannot be imposed upon a less district than the entire state or county.** *Merrick v. Amherst*, 12 Allen (Mass.) 500; *State v. Chamberlin*, 37 N. J. L. 388; *State v. Fuller*, 39 N. J. L. 583; *Vreeland v. Jersey City*, 43 N. J. L. 135; *Day v. Roberts*, (Va. 1903) 43 S. E. Rep. 362; *Hale v. Kenosha*, 29 Wis. 599; *State v. Sauk County*, 70 Wis. 485; *Southern R. Co. v. St. Clair County*, 124 Ala. 491.

**A Limited Portion of a Community cannot be compelled to bear a tax which benefits the whole community, when there are no special benefits received by such portion.** *Grim v. Weissenberg School Dist.*, 57 Pa. St. 433, 98 Am. Dec. 237.

**Apportionment of Public Burdens Unequally Amounts to Confiscation of Property.**—*Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634.

**2. United States.**—*Pine Grove Tp. v. Talcott*, 19 Wall. (U. S.) 666.

*California.*—*People v. Whyler*, 41 Cal. 355.

*Georgia.*—*Haney v. Bartow County*, 91 Ga.

770.

*Indiana.*—*Adamson v. Auditor*, 9 Ind. 174; *State Bank v. New Albany*, 11 Ind. 139; *Conwell v. O'Brien*, 11 Ind. 419; *Covington Draw-bridge Co. v. Auditor*, 14 Ind. 331; *Bright v.*

**Different Rates in Different Districts.** — A constitutional provision requiring equality and uniformity does not prevent the legislature from establishing taxing districts<sup>1</sup> without regard to existing political or territorial divisions,<sup>2</sup> and imposing different rates of taxation in different districts, where there is reasonable ground for so doing.<sup>3</sup> But when the effect of such legislative action will clearly lead to gross inequality the courts will interfere to prevent injustice.<sup>4</sup>

**Conformity to Constitutional Requirements.** — A law must, in its nature, formation, and purpose, conform to the constitutional requirements,<sup>5</sup> but the mere fact

McCullough, 27 Ind. 223; Loftin v. Citizens' Nat. Bank, 85 Ind. 341; Gilson v. Rush County, 128 Ind. 65.

Maryland. — Daly v. Morgan, 69 Md. 460.

Michigan. — Pingree v. Auditor Gen., 120 Mich. 95.

Missouri. — Hamilton v. St. Louis County Ct., 15 Mo. 3.

New Hampshire. — State v. U. S., etc., Express Co., 60 N. H. 243.

New York. — State v. Readington Tp., 36 N. J. L. 70; State v. Newark, 37 N. J. L. 417, 18 Am. Rep. 729; Stratton v. Collins, 43 N. J. L. 562.

Oregon. — East Portland v. Multnomah County, 6 Oregon 62.

Pennsylvania. — Lackawanna Iron, etc., Co. v. Luzerne County, 42 Pa. St. 426.

Texas. — Fahey v. State, 27 Tex. App. 146, 11 Am. St. Rep. 182.

West Virginia. — Douglass v. Harrisville, 9 W. Va. 162, 27 Am. Rep. 548.

Wisconsin. — Weeks v. Milwaukee, 10 Wis. 242.

**Town Tax for County Purposes.** — A tax imposed on a township for the erection and maintenance of a jail in the county seat, which was to be located in such township, was unconstitutional, since under Const., art. 10, § 1, a tax for county purposes must be uniform and equal throughout the county. Jackson County v. State, 155 Ind. 604.

**School Taxes a Public Burden.** — Where an act of the legislature provided that where pupils in the county outside of the district should attend the district school, the district should be reimbursed for the expense thereof at the rate of seventy-five cents a week drawn from the county treasury, such act was held invalid, since such public burden should rest on the entire county. High-School Dist. No. 137 v. Lancaster County, 60 Neb. 147, 83 Am. St. Rep. 525.

**1. Power to Establish Taxing Districts** — United States. — Reclamation Dist. No. 108 v. Hagar, 6 Sawy. (U. S.) 567.

California. — People v. Central Pac. R. Co., 43 Cal. 398; Turlock Irrigation Dist. v. Williams, 76 Cal. 360.

Maryland. — Public Schools v. Allegany County, 20 Md. 449; Daly v. Morgan, 69 Md. 460.

Massachusetts. — Merrick v. Amherst, 12 Allen (Mass.) 500.

Minnesota. — Maltby v. Tautges, 50 Minn. 248.

Mississippi. — Williams v. Cammack, 27 Miss. 209; Alcorn v. Hamer, 38 Miss. 652.

Missouri. — Elting v. Hickman, 172 Mo. 237.

New Jersey. — Paterson v. Society, etc., 24

N. J. L. 385; State v. Readington Tp., 36 N. J. L. 66; State v. Collector, 39 N. J. L. 78.

New York. — People v. Brooklyn, 4 N. Y. 419.

North Carolina. — Greene County v. Lenoir County, 92 N. Car. 180.

Ohio. — Fields v. Highland County, 36 Ohio St. 476; Bowles v. State, 37 Ohio St. 36.

Oregon. — Cook v. Portland, 20 Oregon 580.

Wisconsin. — State v. Sauk County, 70 Wis. 485; Weeks v. Milwaukee, 10 Wis. 242.

As to extension of municipal limits, see the title MUNICIPAL CORPORATIONS, vol. 20, p. 1152.

**2. Existing Lines Need Not Be Followed.** — Gibson v. Rush County, 128 Ind. 65; Bowles v. State, 37 Ohio St. 35; Langhorne v. Robinson, 20 Gratt. (Va.) 661.

**3. Different Rates in Different Districts.** — Maltby v. Tautges, 50 Minn. 248; Elting v. Hickman, 172 Mo. 237; State v. Readington Tp., 36 N. J. L. 70; State v. Newark, 37 N. J. L. 417, 18 Am. Rep. 729.

**4. Interference by Court.** — Cheaney v. Hooser, 9 B. Mon. (Ky.) 331; Dyar v. Farmington, 70 Me. 515; Portland Bank v. Aphorpe, 12 Mass. 252; McCormack v. Patchin, 53 Mo. 33, 14 Am. Rep. 440; Turner v. Althaus, 6 Neb. 54; Hanscom v. Omaha, 11 Neb. 37. See also Mayo v. Dover, etc., Village Fire Co., 96 Me. 539.

**5. Conformity to Constitutional Requirements** — Georgia. — Athens v. Long, 54 Ga. 330; Johnston v. Macon, 62 Ga. 645.

Kentucky. — Howell v. Bristol, 8 Bush (Ky.) 493.

Maryland. — State v. Cumberland, etc., R. Co., 40 Md. 22.

Massachusetts. — Northampton v. Hampshire County, 145 Mass. 108; Com. v. Hamilton Mfg. Co., 12 Allen (Mass.) 298; Oliver v. Washington Mills, 11 Allen (Mass.) 268; Com. v. People's Five Cents Sav. Bank, 5 Allen (Mass.) 428.

Michigan. — Standard L., etc., Ins. Co. v. Assessors, 95 Mich. 466.

Missouri. — Brookfield v. Tooev, 141 Mo. 619.

Nebraska. — Turner v. Althaus, 6 Neb. 54; High School Dist. No. 137 v. Lancaster County, 60 Neb. 147, 83 Am. St. Rep. 525.

Nevada. — State v. Carson City Sav. Bank, 17 Nev. 146.

New Jersey. — Assessors v. Central R. Co., 48 N. J. L. 146.

Ohio. — Northern Indiana R. Co. v. Connelly, 10 Ohio St. 160.

Oregon. — Cook v. Portland, 20 Oregon 580.

Pennsylvania. — Banger's Appeal, 109 Pa. St. 79.

Tennessee. — Taylor v. Chandler, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308.

Texas. — Daugherty v. Thompson, 71 Tex. 192.

that it results in some cases in individual hardship does not make it invalid.<sup>1</sup> Statutes will be avoided under such requirements where they are imposed on false and unjust principles, where they operate to produce gross inequality, or where they are passed in manifest disregard of constitutional limitations.<sup>2</sup>

**Practical Equality Sufficient.** — Since it is universally conceded that absolute equality is unattainable under any human law, it is sufficient if there is an approximation thereto or "practical equality."<sup>3</sup>

**Penalties for Nonpayment of Taxes.** — The imposing of penalties for the nonpay-

*Wisconsin.* — *Knowlton v. Rock County*, 9 Wis. 410; *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37.

While such provisions as that taxation shall be uniform, etc., technically speaking, do not restrict the absolute power to tax, yet they are indispensable requisites of a valid tax. *People v. Coleman*, 4 Cal. 46; *Beals v. Amador County*, 35 Cal. 624; *People v. Worthington*, 21 Ill. 171, 74 Am. Dec. 86; *State v. Cumberland, etc.*, R. Co., 40 Md. 51; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *Lackawanna Iron, etc., Co. v. Luzerne County*, 42 Pa. St. 426.

**Unfair Discrimination Forbidden.** — In *Mississippi* a statute was declared void, on the ground of unfair discrimination, which provided that no city or town should collect a greater tax on banks than the annual tax on the same. *Adams v. Mississippi State Bank*, 75 Miss. 701.

**Equality and Uniformity Conditions Precedent.** — *Torrey v. Millbury*, 21 Pick. (Mass.) 64.

**1. Absolute Equality Not Required** — *United States*. — *State Railroad Tax Cases*, 92 U. S. 575; *German Nat. Bank v. Kimball*, 103 U. S. 732.

*California.* — *People v. Coleman*, 4 Cal. 46; *People v. Whyler*, 41 Cal. 351.

*Colorado.* — *People v. Henderson*, 12 Colo. 369.

*Illinois.* — *People v. Worthington*, 21 Ill. 171, 74 Am. Dec. 86.

*Indiana.* — *State v. Smith*, 158 Ind. 543.

*Iowa.* — *Warren v. Henly*, 31 Iowa 31; *Cook v. Burlington*, 59 Iowa 251, 44 Am. Rep. 679; *Pringhar State Bank v. Rerick*, 96 Iowa 238.

*Kentucky.* — *Howell v. Bristol*, 8 Bush (Ky.) 493.

*Massachusetts.* — *Oliver v. Washington Mills*, 11 Allen (Mass.) 268; *Cheshire v. Berkshire County*, 118 Mass. 386.

*Minnesota.* — *Comer v. Folsom*, 13 Minn. 219; *Sanborn v. Rice County*, 9 Minn. 273.

*Mississippi.* — *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508.

*Nebraska.* — *Turner v. Althaus*, 6 Neb. 54.

*Nevada.* — *State v. Carson City Sav. Bank*, 17 Nev. 146.

*New York.* — *People v. New York Floating Dry Dock Co.*, (Supm. Ct.) 63 How. Pr. (N. Y.) 451.

*Pennsylvania.* — *Weber v. Reinhard*, 73 Pa. St. 370, 13 Am. Rep. 747.

*Rhode Island.* — *Crafts v. Ray*, 22 R. I. 179.

*Texas.* — *Norris v. Waco*, 57 Tex. 635.

**Unequal Results Are Inevitable** — The best devised system of taxation based upon the values of property must, of necessity, produce unequal results, so long as the attempt is made to tax all property including real estate, personal chattels, and moneys and credits. *Cook v. Burlington*, 59 Iowa 251, 44 Am. Rep.

679; *Dubuque v. Chicago, etc.*, R. Co., 47 Iowa 196.

**2. United States.** — *People v. Weaver*, 100 U. S. 539; *Pelton v. Commercial Nat. Bank*, 101 U. S. 143; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153; *German Nat. Bank v. Kimball*, 103 U. S. 732. And see *Exchange Nat. Bank v. Miller*, 19 Fed. Rep. 372.

*Colorado.* — *People v. Henderson*, 12 Colo. 369.

*Illinois.* — *Bureau County v. Chicago, etc.*, R. Co., 44 Ill. 229; *Chicago, etc., R. Co. v. Boone County*, 44 Ill. 240; *Chicago v. Collins*, 175 Ill. 445, 67 Am. St. Rep. 224.

*Iowa.* — *Warren v. Henly*, 31 Iowa 31; *Pringhar State Bank v. Rerick*, 96 Iowa 238.

*Kentucky.* — *Howell v. Bristol*, 8 Bush (Ky.) 493.

*Massachusetts.* — *Com. v. People's Five Cents Sav. Bank*, 5 Allen (Mass.) 428; *Oliver v. Washington Mills*, 11 Allen (Mass.) 268.

*Michigan.* — *Standard L., etc., Ins. Co. v. Assessors*, 95 Mich. 466.

*Minnesota.* — *Sanborn v. Rice County*, 9 Minn. 273; *Rice County v. Citizens' Nat. Bank*, 23 Minn. 280.

*Nebraska.* — *Turner v. Althaus*, 6 Neb. 54.

*Oklahoma.* — *Gay v. Thomas*, 5 Okla. 1.

*Oregon.* — *Cook v. Portland*, 20 Oregon 580.

*Wisconsin.* — *State v. Mann*, 76 Wis. 469.

And see *State v. Cumberland, etc.*, R. Co., 40 Md. 22.

**Test of the Validity of a Statute in Such Cases.** — The test of the validity of a statute is that the aim is towards equality and uniformity; there must not be a wilful intention to violate constitutional requirements; mere mistakes and omissions not necessarily violating the tax. *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153; *Exchange Nat. Bank v. Miller*, 19 Fed. Rep. 372; *Cheshire v. Berkshire County*, 118 Mass. 386; *Sanborn v. Rice County*, 9 Minn. 273; *State v. Weyerhauser*, 68 Minn. 353; *People v. New York Floating Dry Dock Co.*, (Supm. Ct.) 63 How. Pr. (N. Y.) 451.

Where a public hotel was purposely exempted from taxation, the whole tax was held void. *Weeks v. Milwaukee*, 10 Wis. 242.

**Gross Inequalities.** — "It has been held, and we think correctly, that inequalities in valuation may be so great as to authorize the court to conclude that they are the result of intention." *Exchange Nat. Bank v. Miller*, 19 Fed. Rep. 372.

**3. Practical Equality Sufficient** — *United States.* — *Savings Soc. v. Coite*, 6 Wall. (U. S.) 596; *Tappan v. Merchants' Nat. Bank*, 19 Wall. (U. S.) 490; *State Railroad Tax Cases*, 92 U. S. 575; *German Nat. Bank v. Kimball*, 103 U. S. 732; *Henderson Bridge Co. v. Henderson*, 173 U. S. 592.

ment of taxes does not conflict with equality and uniformity provisions.<sup>1</sup> Such penalties must, however, rest uniformly upon like classes of property.<sup>2</sup>

**Maladministration in the Enforcement of a Tax**, when the statute providing for the tax is itself proper, does not generally vitiate such tax.<sup>3</sup>

**Application of Rule to Municipal Taxation.** — The requirements of equality and uniformity regulate the power to tax, in whatever form of government such power exists, whether state or municipal,<sup>4</sup> unless the constitutional provision

*Alabama.* — *Southern R. Co. v. St. Clair County*, 124 Ala. 491.

*California.* — *People v. Whyler*, 41 Cal. 351; *People v. Coleman*, 4 Cal. 46.

*Colorado.* — *Denver v. Knowles*, 17 Colo. 204.

*Connecticut.* — *Savings Bank v. New London*, 20 Conn. 111; *Carrington v. Farmington*, 21 Conn. 65.

*Georgia.* — *Athens v. Long*, 54 Ga. 330; *Warren v. Savannah*, 60 Ga. 93.

*Illinois.* — *Sawyer v. Alton*, 4 Ill. 127; *Shaw v. Dennis*, 10 Ill. 419; *People v. Worthington*, 21 Ill. 171, 74 Am. Dec. 86; *Bureau County v. Chicago*, etc., R. Co., 44 Ill. 229; *Chicago*, etc., R. Co. v. *Boone County*, 44 Ill. 240; *Porter v. Rockford*, etc., R. Co., 76 Ill. 561.

*Indiana.* — *Richmond v. Scott*, 48 Ind. 568; *State v. Smith*, 158 Ind. 543.

*Iowa.* — *McGregor v. Vanel*, 24 Iowa 436; *Warren v. Henley*, 31 Iowa 31; *Dubuque v. Chicago*, etc., R. Co., 47 Iowa 196; *Pringhar State Bank v. Rerick*, 96 Iowa 238.

*Kentucky.* — *Howell v. Bristol*, 8 Bush (Ky.) 493; *Lexington v. McQuillan*, 9 Dana (Ky.) 513, 35 Am. Dec. 159; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *Livingston v. Paducah*, 80 Ky. 656; *Com. v. E. H. Taylor Jr. Co.*, 101 Ky. 325.

*Louisiana.* — *Second Municipality v. Duncan*, 2 La. Ann. 182.

*Maine.* — *Augusta Bank v. Augusta*, 36 Me. 255.

*Massachusetts.* — *Com. v. People's Five Cents Sav. Bank*, 5 Allen (Mass.) 428; *Cheshire v. Berkshire County*, 118 Mass. 386.

*Michigan.* — *People v. Salem Tp. Board*, 20 Mich. 452, 4 Am. Rep. 400.

*Minnesota.* — *Sanborn v. Rice County*, 9 Minn. 273; *Comer v. Folsom*, 13 Minn. 219; *State v. Weyerhauser*, 68 Minn. 353.

*Mississippi.* — *Daily v. Swope*, 47 Miss. 367.

*Nebraska.* — *Turner v. Althaus*, 6 Neb. 54.

*Nevada.* — *State v. Carson City Sav. Bank*, 17 Nev. 146.

*New Jersey.* — *State v. Runyon*, 41 N. J. L. 98.

*Ohio.* — *Exchange Bank v. Hines*, 3 Ohio St. 1; *Zanesville v. Richards*, 5 Ohio St. 590; *Shotwell v. Moore*, 45 Ohio St. 632.

*Oklahoma.* — *Gay v. Thomas*, 5 Okla. 1.

*Pennsylvania.* — *Kirby v. Shaw*, 19 Pa. St. 258; *Finley v. Philadelphia*, 32 Pa. St. 381; *Grim v. Weissenberg School Dist.*, 57 Pa. St. 433, 98 Am. Dec. 237; *Weber v. Reinhard*, 73 Pa. St. 370, 13 Am. Rep. 747.

*Virginia.* — *Ould v. Richmond*, 23 Gratt. (Va.) 464, 14 Am. Rep. 139.

1. **Penalties for Nonpayment.** — *People v. Central Pac. R. Co.*, 43 Cal. 399; *Galusha v. Wendt*, 114 Iowa 597; *Missouri*, etc., R. Co. v. *Miami County*, (Kan. 1903) 73 Pac. Rep. 103; *Missouri*, etc., R. Co. v. *Labette County*, 9 Kan. App. 545; *Galveston*, etc., R. Co. v. *Galveston*,

(Tex. 1903) 74 S. W. Rep. 537; *State v. Whittlesley*, 17 Wash. 447.

2. **Penalties Must Operate Uniformly.** — *Missouri*, etc., R. Co. v. *Miami County*, (Kan. 1903) 73 Pac. Rep. 103; *State v. Whittlesley*, 17 Wash. 447.

**Need Not Be Same as to Realty and Personalty.** — *Missouri*, etc., R. Co. v. *Miami County*, (Kan. 1903) 73 Pac. Rep. 103.

3. **Inequality in Enforcement of Tax Laws.** — *United States.* — *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153; *German Nat. Bank v. Kimball*, 103 U. S. 732; *Exchange Nat. Bank v. Miller*, 19 Fed. Rep. 372; *Dundee Mortg.*, etc., Co. v. *School Dist. No. 1*, 21 Fed. Rep. 151.

*Colorado.* — *People v. Henderson*, 12 Colo. 369.

*Illinois.* — *Chicago*, etc., R. Co. v. *Boone County*, 44 Ill. 240; *Bureau County v. Chicago*, etc., R. Co., 44 Ill. 229; *Illinois*, etc., R., etc., Co. v. *Stookey*, 122 Ill. 358.

*Indiana.* — *Cleveland*, etc., R. Co. v. *Backus*, 133 Ind. 513.

*Massachusetts.* — *Cheshire v. Berkshire County*, 118 Mass. 386.

*Rhode Island.* — *Dyer v. Osborn*, 11 R. I. 321, 23 Am. Rep. 460.

And see *State v. Maxwell*, 27 La. Ann. 723. A conspiracy or illegal collusion on the part of assessors might lead to such gross results that the court would interfere. *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153; *German Nat. Bank v. Kimball*, 103 U. S. 732.

4. *United States.* — *Gilman v. Sheboygan*, 2 Black (U. S.) 510; *Pine Grove Tp. v. Talcott*, 19 Wall. (U. S.) 666.

*Arkansas.* — *Fletcher v. Oliver*, 25 Ark. 289.

*Colorado.* — *Palmer v. Way*, 6 Colo. 106.

*Georgia.* — *Livingston v. Albany*, 41 Ga. 21; *Augusta v. National Bank*, 47 Ga. 562; *Johnston v. Macon*, 62 Ga. 645.

*Illinois.* — *Chicago v. Larned*, 34 Ill. 203; *Ottawa v. Spencer*, 40 Ill. 211; *Updike v. Wright*, 81 Ill. 49; *Lee v. Ruggles*, 62 Ill. 427.

*Indiana.* — *Bright v. McCullough*, 27 Ind. 223; *Loftin v. Citizens Nat. Bank*, 85 Ind. 341; *Jackson County v. State*, 155 Ind. 604.

*Kansas.* — *Missouri River*, etc., R. Co. v. *Morris*, 7 Kan. 210.

*Maine.* — *Brewer Brick Co. v. Brewer*, 62 Me. 62, 16 Am. Rep. 395.

*Maryland.* — *Daly v. Morgan*, 69 Md. 460.

*Mississippi.* — *Southern R. Co. v. Jackson*, 38 Miss. 334; *Vasser v. George*, 47 Miss. 713; *Daily v. Swope*, 47 Miss. 367; *Adams v. Mississippi State Bank*, 75 Miss. 701.

*Missouri.* — *State v. Hannibal*, etc., R. Co., 75 Mo. 208.

*Nebraska.* — *Pleuler v. State*, 11 Neb. 547.

*New Jersey.* — *State v. Reimensneider*, 39 N. J. L. 625.

*Ohio.* — *Exchange Bank v. Hines*, 3 Ohio St.

is limited by its terms to state taxation, in which case it will not operate as a restriction on municipalities.<sup>1</sup>

*bb. EQUALITY AND UNIFORMITY DISTINGUISHED — (aa) In General.* — There has been much discussion in the courts about the meaning of the words "equal" and "uniform." The true distinction would seem to be that "uniformity" requires all property, similarly situated, to be taxed at the same rate and in the same manner,<sup>2</sup> while "equality" requires a fair and equitable distribution of the burden of taxation, so that each taxpayer shall contribute in proportion to his property.<sup>3</sup>

*(bb) Uniformity Clause Construed.* — Where the constitution requires uniformity in distributing the burden of taxation the legislature is generally permitted to divide property into classes and impose different rates on the different classes.<sup>4</sup> The constitutional provisions respecting uniformity are variously expressed,

1; *Zanesville v. Richards*, 5 Ohio St. 589; *Wasson v. Wayne County*, 49 Ohio St. 622.

*Pennsylvania.* — *Lackawanna Iron, etc., Co. v. Luzerne County*, 42 Pa. St. 424.

*Tennessee.* — *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308.

*Utah.* — *Ogden City v. Crossman, etc., Bell Telephone Co.*, 17 Utah 66; *Cache County v. Jensen*, 21 Utah 207.

*Virginia.* — *Virginia, etc., R. Co. v. Washington County*, 30 Gratt. (Va.) 484.

*Wisconsin.* — *Knowlton v. Rock County*, 9 Wis. 410; *Weeks v. Milwaukee*, 10 Wis. 242; *Lumsden v. Cross*, 10 Wis. 282; *State v. Winnebago Lake, etc., Plankroad Co.*, 11 Wis. 35; *Milwaukee First Dept. v. Helfenstein*, 16 Wis. 137; *Johnson v. Milwaukee*, 40 Wis. 315; *Donnelly v. Decker*, 58 Wis. 461, 46 Am. Rep. 637.

**Taxing Power the Same No Matter by Whom Exercised.** — And the taxing power, therefore, when exercised by the city or county authorities, is but the exercise of the taxing power of the legislature delegated to them, and is subject to every constitutional limitation to which the taxing power of the legislature is subject. And if so, a tax levied for public purposes, whether levied by the state, county, or city authorities, must be equal and uniform throughout the state, county, city, or taxing district to which it applies. *Daly v. Morgan*, 69 Md. 460. See *Weeks v. Milwaukee*, 10 Wis. 256.

1. See *infra*, this title, *Municipal Taxation — Power to Tax — Limitations on Power — Constitutional Restrictions*. See also *Selby v. Levee Com'rs*, 14 La. Ann. 437; *Gilkeson v. Frederick County*, 13 Gratt. (Va.) 577; *Norfolk v. Ellis*, 26 Gratt. (Va.) 234; *Douglass v. Harrisville*, 9 W. Va. 162, 27 Am. Rep. 548; *Powell v. Parkersburg*, 28 W. Va. 698. Compare *Danville v. Shelton*, 76 Va. 325.

2. **Uniformity.** — *Weaver v. State*, 89 Ga. 639; *Warren v. Henly*, 31 Iowa 31; *Pringhar State Bank v. Rerick*, 96 Iowa 238; *Kansas City v. Whipple*, 136 Mo. 475, 58 Am. St. Rep. 657; *State v. Whittlesey*, 17 Wash. 447.

3. **Equality.** — "If the rate of assessment and taxation be equal, it is conceived it will be uniform; that is, that no meaning can be attached to the word 'uniform' which is not conveyed by the word 'equal.' If the rate is everywhere equal, or the same, it will be uniform necessarily. If the rate is varied so that property of different kinds or in different localities is valued or taxed at different rates, the rate will be unequal, and so not uniform; and so far as

it is equal it will also be uniform." *Crawford v. Linn County*, 11 Oregon 485.

A state statute which permits banks at their election to pay taxes at a certain rate on each dollar of the actual value of their capital, or to collect annually from the shareholders a tax at a certain other rate on the par value of the shares, does not violate the constitutional requirement of uniformity. It is possible under the operation of this law that one bank may pay at a less rate on the actual value of its banking property than another, but this inequality in the burden results from a privilege offered to all, and in order to induce prompt payment of taxes and a payment without litigation. The inequality of result comes from the election of certain taxpayers to avail themselves of privileges offered to all. *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461.

**What Is Absolute Equality and Uniformity.** — Absolute equality and uniformity is declared by the *Minnesota* court to be where every piece of property bears its just and proportionate share of the public burden at the exact ratio of its cash value to that of the entire taxable property of the state. *Rice County v. Citizens' Nat. Bank*, 23 Minn. 280.

**The Effect of Both Is to Require a Uniform Rate.** — "The requirement of uniformity means that all property belonging to the same class shall be taxed alike, so that all horses shall be taxed at the same rate, and all lands or stocks or merchandise. There is to be no discrimination between property of the same class, and it shall not be competent to levy one rate upon country lands and another upon city lands, or one rate upon horses of one breed and another upon horses of a different breed. If the uniformity requirement stood alone, it would be competent to affix different rates to different kinds of property, and so to impose one rate upon all lands, and another upon all horses, and still another upon all stocks, and still another upon all merchandise. But this kind of discrimination is prohibited by the requirement of equality, by which it is made obligatory that the same rate shall be imposed on every kind and species of property that is subject to taxation." *Adams v. Mississippi State Bank*, 75 Miss. 701.

4. **Uniformity Clause Construed.** — *State Railroad Tax Cases*, 92 U. S. 575; *Kentucky Railroad Tax Cases*, 115 U. S. 322; *Gibbons v. District of Columbia*, 116 U. S. 404; *Davenport Bank v. Davenport Board of Equalization*, 123 U. S. 83; *Singer Mfg. Co. v. Wright*, 33 Fed.



but they are generally construed to permit such classification by the legislature. The most usual provisions are that property shall be taxed by uniform rules,<sup>1</sup> that all laws imposing taxes for general purposes shall be uniform in their operation throughout the state,<sup>2</sup> and that all taxes shall be uniform on the same class of subjects.<sup>3</sup>

cc. REQUIREMENT OF EQUALITY AND UNIFORMITY. — The requirement of equality and uniformity does not mean that all property in the state shall be taxed,<sup>4</sup> but it

Rep. 121; *Pacific Express Co. v. Seibert*, 44 Fed. Rep. 310, 142 U. S. 339; *Gatlin v. Tarboro*, 78 N. Car. 119; *State v. Powell*, 100 N. Car. 525; *Cobb v. Durham County*, 122 N. Car. 307; *Roup's Case*, 81\* Pa. St. 211; *Com. v. Macferon*, 152 Pa. St. 244. See *infra*, this section, *Power of Legislature to Classify Property*.

In *Florida*, under former constitutional provisions for an equal and uniform mode of assessment and valuation, such classification was permitted by legislation. *Levy v. Smith*, 4 Fla. 154.

**Requirement of Uniformity Does Not Prohibit Specific Taxes.** — *Warren v. Henly*, 31 Iowa 31; *Davenport v. Chicago, etc., R. Co.*, 38 Iowa 633; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *Herriott v. Potter*, 115 Iowa 648.

**1. Uniformity Clause — Taxation by Uniform Rules.** — *State v. Parker*, 32 N. J. L. 426; *State v. Underground Cable Co.*, (N. J. 1889) 18 Atl. Rep. 581; *State v. Readington Tp.*, 36 N. J. L. 70; *State v. Newark*, 37 N. J. L. 417, 18 Am. Rep. 729; *State v. Runyon*, 41 N. J. L. 98; *Stratton v. Collins*, 43 N. J. L. 562; *Trenton Sav. Fund v. Richards*, 52 N. J. L. 156.

The constitutional provision does not take away from the legislature the power of selecting the subjects of taxation. It does require that all the members of the class selected shall be included in the taxing law, and that the rule applied thereto shall be uniform as to the whole of the class, and that the assessment shall be made at the true value of the property constituting the class. *Assessors v. Central R. Co.*, 48 N. J. L. 146.

**2.** *Warren v. Henly*, 31 Iowa 31; *Davenport v. Chicago, etc., R. Co.*, 38 Iowa 633; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *Herriott v. Potter*, 115 Iowa 648; *Primghar State Bank v. Rerick*, 96 Iowa 238; *U. S. Express Co. v. Ellyson*, 28 Iowa 370; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654; *Rosenbloom v. State*, 64 Neb. 342; *State v. Mann*, 76 Wis. 469; *Black v. State*, 113 Wis. 205.

In *Ohio* it is held that taxation by a uniform rule requires that the rate of taxation shall be uniform, and such uniformity coextensive with the territory to which it applies, whether the tax is a state, county, township, or city tax; and that every species of property not exempt from taxation, whether lands, goods, money, or choses in action, and however used or employed, shall go upon the tax duplicate at its true value in money. *State v. Jones*, 51 Ohio St. 492; *Exchange Bank v. Hines*, 3 Ohio St. 1. *affirmed* *Bright v. McCullough*, 27 Ind. 232.

**3. Uniformity as to Class** — *Colorado*. — *People v. Scott*, 9 Colo. 422; *People v. Henderson*, 12 Colo. 369.

*Illinois*. — *Hunsaker v. Wright*, 30 Ill. 146; *Coal Run Coal Co. v. Finlen*, 124 Ill. 666; *Ottawa Gas Light, etc., Co. v. Downey*, 127 Ill.

201; *Sterling Gas Co. v. Higby*, 134 Ill. 557; *Raymond v. Hartford F. Ins. Co.*, 196 Ill. 329; *State Railroad Tax Cases*, 92 U. S. 575.

*Missouri*. — *St. Louis v. Spiegel*, 75 Mo. 145; *Kansas City v. Whipple*, 136 Mo. 475, 58 Am. St. Rep. 657; *Elting v. Hickman*, 172 Mo. 237; *State v. Switzler*, 143 Mo. 287, 65 Am. St. Rep. 653; *Northwestern Masonic Aid Assoc. v. Waddill*, 138 Mo. 628. As to the earlier rule in *Missouri*, see *Glasgow v. Rowse*, 43 Mo. 479; *American Union Express Co. v. St. Joseph*, 66 Mo. 675, 27 Am. Rep. 382; *St. Louis v. Freivogel*, 95 Mo. 533.

*Nebraska*. — *Rosenbloom v. State*, 64 Neb. 342.

*Pennsylvania*. — *Hammett v. Philadelphia*, 65 Pa. St. 146, 3 Am. Rep. 615; *Weber v. Reinhard*, 73 Pa. St. 370, 13 Am. Rep. 747; *Fox's Appeal*, 112 Pa. St. 337; *Roup's Case*, 81\* Pa. St. 211; *Banger's Appeal*, 109 Pa. St. 79; *Com. v. Lehigh Valley R. Co.*, 129 Pa. St. 429; *Com. v. Germania Brewing Co.*, 145 Pa. St. 83; *Com. v. Anderson*, 178 Pa. St. 171; *Com. v. Muir*, 180 Pa. St. 47.

*Texas*. — *Fahey v. State*, 27 Tex. App. 146, 11 Am. St. Rep. 182.

The *Georgia* constitution provides that all taxation shall be uniform on the same class of subjects, and *ad valorem* on all property subject to be taxed, and it is held that taxation of classes by varying rates is forbidden by the constitution, and that taxation must be of one uniform rate upon all species of property. *Georgia State Bldg., etc., Assoc. v. Savannah*, 109 Ga. 63; *Atlanta Nat. Bldg., etc., Assoc. v. Stewart*, 109 Ga. 80; *Wells v. Savannah*, 87 Ga. 400; *Savannah v. Weed*, 84 Ga. 686; *Verdery v. Summerville*, 82 Ga. 138; *Athens City Waterworks Co. v. Athens*, 74 Ga. 413.

**4. Meaning of Uniformity and Equality — United States.** — *Kentucky Railroad Tax Cases*, 115 U. S. 322; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232; *Home Ins. Co. v. New York*, 134 U. S. 594; *Pacific Express Co. v. Seibert*, 142 U. S. 351.

*Alabama*. — *Clark v. Mobile*, 67 Ala. 217.

*Indiana*. — *State v. Smith*, 158 Ind. 543.

*Kansas*. — *Ottawa County v. Nelson*, 19 Kan. 242, 27 Am. Rep. 101.

*Kentucky*. — *Cincinnati, etc., R. Co. v. Com.*, 81 Ky. 492.

*Louisiana*. — *New Orleans v. Fourchy*, 30 La. Ann. 910.

*Maine*. — *Brewer Brick Co. v. Brewer*, 62 Me. 62, 16 Am. Rep. 395.

*Mississippi*. — *Mississippi Mills v. Cook*, 56 Miss. 66; *Murray v. Lehman*, 61 Miss. 283; *Adams v. Mississippi State Bank*, 75 Miss. 701.

*Oregon*. — *Crawford v. Linn County*, 11 Ore-gon 482.

*West Virginia*. — *Chesapeake, etc., R. Co. v. Miller*, 19 W. Va. 408.

is construed as meaning that whenever property has been selected for taxation, the rate of taxation on the different species of property shall be the same according to its value when such standard is presented.<sup>1</sup> Whether the constitutional provision requires uniformity in the imposition of taxes, in which case taxing classes at different rates is permitted, or whether such provisions provide for equality and uniformity, in which case the rate imposed on each class selected for taxation must be identical, such provisions unite in requiring that each member of a class in the one case, or each member of the classes in the other case, must proportionately bear its burden with each and every other member of the class or classes respectively as the case may be;<sup>2</sup> that is, no member of a class taxed can escape taxation.<sup>3</sup>

*Wyoming.*—*Kelley v. Rhoades County*, 7 Wyo. 237, 75 Am. St. Rep. 904.

The question whether under such requirements property may be exempted from taxation is discussed elsewhere. See the title EXEMPTIONS (FROM TAXATION), vol. 12, pp. 275, 282.

1. *Alabama.*—*Clark v. Mobile*, 67 Ala. 217; *Mobile v. Dargan*, 45 Ala. 310.

*Arkansas.*—*Little Rock, etc., R. Co. v. Worthen*, 46 Ark. 312.

*California.*—*People v. McCreery*, 34 Cal. 432; *People v. Hibernia Sav., etc., Soc.*, 51 Cal. 243.

*Indiana.*—*Loftin v. Citizens Nat. Bank*, 85 Ind. 346; *Gilson v. Rush County*, 128 Ind. 65; *Cleveland, etc., R. Co. v. Backus*, 133 Ind. 535; *State v. Smith*, 158 Ind. 599.

*Kansas.*—*Missouri River, etc., R. Co. v. Morris*, 7 Kan. 222; *In re Page*, 60 Kan. 842; *Hamilton v. Wilson*, 61 Kan. 511.

*Louisiana.*—*St. Anna's Asylum v. Parker*, 109 La. 592.

*Maine.*—*State v. Western Union Tel. Co.*, 73 Me. 518.

*Maryland.*—*Daly v. Morgan*, 69 Md. 460; *State v. Cumberland, etc., R. Co.*, 40 Md. 22.

*Massachusetts.*—*Portland Bank v. Apthorp*, 12 Mass. 252.

*Minnesota.*—*State v. Rand*, 39 Minn. 502; *State v. Weyerhaeuser*, 68 Minn. 353.

*Mississippi.*—*Mississippi Mills v. Cook*, 56 Miss. 40; *Adams v. Mississippi State Bank*, 75 Miss. 701.

*Missouri.*—*Hamilton v. St. Louis County Ct.*, 15 Mo. 5; *Glasgow v. Rowse*, 43 Mo. 479; *American Union Express Co. v. St. Joseph*, 66 Mo. 675, 27 Am. Rep. 382; *St. Louis v. Freivogel*, 95 Mo. 533.

*Nebraska.*—*State v. Osborn*, 60 Neb. 415.

*Nevada.*—*Sawyer v. Dooley*, 21 Nev. 390.

*New Hampshire.*—*Amoskeag Mfg. Co. v. Manchester*, 70 N. H. 200.

*Ohio.*—*Exchange Bank v. Hines*, 3 Ohio St. 1; *Hill v. Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289; *Pittsburgh, etc., R. Co. v. State*, 49 Ohio St. 189.

*Oklahoma.*—*Gay v. Thomas*, 5 Okla. 1.

*Utah.*—*Judge v. Spencer*, 15 Utah 242; *State v. Armstrong*, 17 Utah 166.

*Virginia.*—*Day v. Roberts*, (Va. 1903) 43 S. E. Rep. 362.

*Wisconsin.*—*Knowlton v. Rock County*, 9 Wis. 410; *State v. Winnebago Lake, etc., Plankroad Co.*, 11 Wis. 36.

2. *United States.*—*Louisiana v. Pilsbury*, 105 U. S. 278; *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. (U. S.) 632.

*California.*—*People v. Whyler*, 41 Cal. 351.

*Georgia.*—*Johnston v. Macon*, 62 Ga. 645.

*Illinois.*—*O'Kane v. Treat*, 25 Ill. 557; *People v. Worthington*, 21 Ill. 171, 74 Am. Dec. 86; *Chicago, etc., R. Co. v. Miller*, 72 Ill. 144; *Primm v. Belleville*, 59 Ill. 142.

*Indiana.*—*Bright v. McCullough*, 27 Ind. 223; *Palmer v. Stumph*, 29 Ind. 329; *Cleveland, etc., R. Co. v. Backus*, 133 Ind. 513; *Indianapolis, etc., R. Co. v. Backus*, 133 Ind. 609.

*Iowa.*—*Warren v. Henly*, 31 Iowa 31; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *Primghar State Bank v. Rerick*, 96 Iowa 238; *Herriott v. Potter*, 115 Iowa 648.

*Kentucky.*—*Cheaney v. Hooser*, 9 B. Mon. (Ky.), 330; *Howell v. Bristol*, 8 Bush (Ky.) 493.

*Maine.*—*Dyar v. Farmington*, 70 Me. 515.

*Maryland.*—*State v. Cumberland, etc., R. Co.*, 40 Md. 22.

*Massachusetts.*—*Oliver v. Washington Mills*, 11 Allen (Mass.) 268; *Dorgan v. Boston*, 12 Allen (Mass.) 223; *Merrick v. Amherst*, 12 Allen (Mass.) 500; *Com. v. Hamilton Mfg. Co.*, 12 Allen (Mass.) 298; *Com. v. New England Slate, etc., Co.*, 13 Allen (Mass.) 391.

*Michigan.*—*Standard L., etc., Ins. Co. v. Assessors*, 95 Mich. 466.

*Mississippi.*—*Smith v. Aberdeen*, 25 Miss. 458; *Daily v. Swope*, 47 Miss. 37.

*Missouri.*—*Brookfield v. Tooley*, 141 Mo. 619; *Kansas City v. Whipple*, 136 Mo. 475, 58 Am. St. Rep. 657; *Elting v. Hickman*, 172 Mo. 237; *State v. Switzler*, 143 Mo. 287, 65 Am. St. Rep. 653. And see *McCormack v. Patchin*, 53 Mo. 33, 14 Am. Rep. 440.

*Nebraska.*—*Rosenbloom v. State*, 64 Neb. 342.

*New Hampshire.*—*State v. U. S., etc., Express Co.*, 60 N. H. 219.

*New Jersey.*—*Shotwell v. Dalrymple*, 49 N. J. L. 530; *State v. Elizabeth*, 64 N. J. L. 502; *Cox v. Truitt*, 57 N. J. L. 635.

*Ohio.*—*Zanesville v. Richards*, 5 Ohio Ct. 589.

*Oregon.*—*Crawford v. Linn County*, 11 Oregon 482; *East Portland v. Multnomah County*, 6 Oregon 63.

*Pennsylvania.*—*Lackawanna Iron, etc., Co. v. Luzerne County*, 42 Pa. St. 424.

*Texas.*—*Norris v. Waco*, 57 Tex. 635.

*Wisconsin.*—*Knowlton v. Rock County*, 9 Wis. 410; *Weeks v. Milwaukee*, 10 Wis. 242; *State v. Winnebago Lake, etc., Plankroad Co.*, 11 Wis. 35; *Black v. State*, 113 Wis. 205. But see *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37.

3. *United States.*—*People v. Weaver*, 100

**Discrimination Between Classes Prohibited.** — The constitutions of some states expressly forbid the taxation of any class or species of property at a higher rate than that imposed upon other species or classes.<sup>1</sup>

*dd.* **POWER OF LEGISLATURE TO CLASSIFY PROPERTY.** — Arbitrary classification by the legislature of property or persons for the purpose of taxation, without regard to any system, is not generally permitted, and any separation into classes must rest on reasonable grounds.<sup>2</sup> All property or premises of like nature or conditions naturally falling into a particular class must, of course, be included in such class in the imposition of a tax.<sup>3</sup>

U. S. 539; *Pelton v. Commercial Nat. Bank*, 101 U. S. 143; *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153; *German Nat. Bank v. Kimball*, 103 U. S. 732; *Coe v. Errol*, 116 U. S. 517.

*Arkansas.* — *Fletcher v. Oliver*, 25 Ark. 289.  
*Colorado.* — *People v. Henderson*, 12 Colo. 369.

*Illinois.* — *O'Kane v. Treat*, 25 Ill. 557; *Primm v. Belleville*, 59 Ill. 142.

*Iowa.* — *Cook v. Burlington*, 59 Iowa 257, 44 Am. Rep. 679.

*Kentucky.* — *Lexington v. McQuillan*, 9 Dana (Ky.) 513, 35 Am. Dec. 159.

*Maryland.* — *State v. Cumberland, etc.*, R. Co., 40 Md. 22.

*Massachusetts.* — *Oliver v. Washington Mills*, 11 Allen (Mass.) 268.

*Michigan.* — *Standard L., etc., Ins. Co. v. Assessors*, 95 Mich. 466.

*Missouri.* — *Brookfield v. Tooley*, 141 Mo. 619.

*Nevada.* — *State v. Carson City Sav. Bank*, 17 Nev. 146.

*New Jersey.* — *Dunham v. Cox*, 44 N. J. Eq. 273.

*Pennsylvania.* — *Com. v. Edgerton Coal Co.*, 164 Pa. St. 284.

*Tennessee.* — *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308.

1. *Northern Pac. R. Co. v. Walker*, 47 Fed. Rep. 683; *Gay v. Thomas*, 5 Okla. 1; *Nashville v. Althrop*, 5 Coldw. (Tenn.) 554; *Union Bank v. State*, 9 Yerg. (Tenn.) 490; *Memphis v. Ensley*, 6 Baxt. (Tenn.) 553, 32 Am. Rep. 532; *Jones v. Memphis*, 101 Tenn. 188; *Powell v. Parkersburg*, 28 W. Va. 698; *Wells, etc., Co.'s Express v. Crawford County*, 63 Ark. 576.

2. **Arbitrary Classification Not Permissible — United States.** — *Singer Mfg. Co. v. Wright*, 33 Fed. Rep. 121; *Northern Pac. R. Co. v. Walker*, 47 Fed. Rep. 686; *Nashville, etc., R. Co. v. Taylor*, 86 Fed. Rep. 168.

*California.* — *Darcy v. San Jose*, 104 Cal. 642; *Ex p. Jentzsch*, 112 Cal. 468.

*Indiana.* — *State v. Smith*, 158 Ind. 543.

*Iowa.* — *Warren v. Henly*, 31 Iowa 41; *Herriott v. Potter*, 115 Iowa 648.

*Kentucky.* — *Com. v. Taylor*, (Ky. 1896) 38 S. W. Rep. 10.

*Michigan.* — *Standard L., etc., Ins. Co. v. Assessors*, 95 Mich. 467.

*Missouri.* — *Kansas City v. Whipple*, 136 Mo. 475, 58 Am. St. Rep. 657; *Northwestern Masonic Aid Assoc. v. Waddill*, 138 Mo. 628; *State v. Switzler*, 143 Mo. 287, 65 Am. St. Rep. 653.

*Nebraska.* — *Rosenbloom v. State*, 64 Neb. 342.

*New Jersey.* — *Central R. Co. v. Assessors*, 48 N. J. L. 1, 57 Am. Rep. 516.

*Pennsylvania.* — *Banger's Appeal*, 109 Pa. St. 79; *Com. v. Delaware Div. Canal Co.*, 123 Pa. St. 621; *Com. v. Bush Electric Light Co.*, 145 Pa. St. 147; *Juniata Limestone Co. v. Fagley*, 187 Pa. St. 193, 67 Am. St. Rep. 579; *Com. v. Edgerton Coal Co.*, 164 Pa. St. 284; *Williamsport v. Wenner*, 172 Pa. St. 173.

*Tennessee.* — *Nashville v. Althrop*, 5 Coldw. (Tenn.) 554.

*Wisconsin.* — *State v. Sauk County*, 70 Wis. 485; *State v. Pierce County*, 71 Wis. 321; *Battles v. Doll*, 113 Wis. 357; *Black v. State*, 113 Wis. 205. And see *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 84.

**Foreign-born Unnaturalised Persons Cannot Be Formed into a Class** and a tax levied on them alone. *Juniata Limestone Co. v. Fagley*, 187 Pa. St. 193, 67 Am. St. Rep. 579, *affirming* 7 Pa. Dist. 201.

3. **Property Naturally Falling in Same Class — California.** — *Darcy v. San Jose*, 104 Cal. 648. *Iowa.* — *Warren v. Henly*, 31 Iowa 31; *Davenport v. Chicago, etc., R. Co.*, 38 Iowa 633; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *Pringhar State Bank v. Rerick*, 96 Iowa 238; *Herriott v. Potter*, 115 Iowa 648.

*Kentucky.* — *Lexington v. McQuillan*, 9 Dana (Ky.) 517, 35 Am. Dec. 159.

*Louisiana.* — *New Orleans v. Davidson*, 30 La. Ann. 554.

*Mississippi.* — See *Daily v. Swope*, 47 Miss. 367.

*Missouri.* — *Elting v. Hickman*, 172 Mo. 237; *Kansas City v. Whipple*, 136 Mo. 475, 58 Am. St. Rep. 657.

*Nebraska.* — *State v. Farmers, etc., Irrigation Co.*, 59 Neb. 1; *Rosenbloom v. State*, 64 Neb. 342.

*New Jersey.* — *Trenton Sav. Fund Bank v. Richards*, 52 N. J. L. 156.

*Ohio.* — *State v. Gardner*, 58 Ohio St. 599, 65 Am. St. Rep. 785.

*Pennsylvania.* — *Com. v. Edgerton Coal Co.*, 164 Pa. St. 284; *Ade v. Philadelphia County*, 20 Pa. Co. Ct. 672, 7 Pa. Dist. 199.

*West Virginia.* — *Arnold v. Kelley*, 5 W. Va. 446.

*Wisconsin.* — *Black v. State*, 113 Wis. 205.

**Mortgages.** — Where a law was passed taxing mortgages in the hands of the chancellor in chancery courts, such taxation as held invalid because it did not include mortgages in the hands of officials of other courts. *Dunham v. Cox*, 44 N. J. Eq. 273; *Shotwell v. Dalrymple*, 49 N. J. L. 530; *Cox v. Truitt*, 57 N. J. L. 635; *State v. Elizabeth*, 64 N. J. L. 502.

**Judgments.** — In *Kansas* the division of

**Proper Bases of Classification.** — Such classification may properly be based upon inherent difference in the nature of various classes,<sup>1</sup> or upon the want of adaptability to the same methods of taxation,<sup>2</sup> or it may be based upon well-grounded considerations of public policy.<sup>3</sup> And where the classification rests upon such grounds the courts will not interfere.<sup>4</sup>

“**TAXATION OF DIFFERENT CLASSES BY DIFFERENT MODES.** — The taxation of different classes of property or persons by different modes is not forbidden by the requirements of equality and uniformity; the object sought being uniformity of burden rather than identity of method of enforcement.<sup>5</sup> Thus,

judgments into classes and the exempting of mortgage judgments were held to invalidate the tax. *Hamilton v. Wilson*, 61 Kan. 511.

1. **Based on Difference in Nature** — *United States*. — *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Pacific Express Co. v. Seibert*, 142 U. S. 339; *Dundee Mortg., etc., Co. v. School Dist. No. 1*, 21 Fed. Rep. 151; *Singer Mfg. Co. v. Wright*, 33 Fed. Rep. 121.

*Illinois*. — *Coal Run Coal Co. v. Finlen*, 124 Ill. 666.

*Kentucky*. — *Com. v. Taylor*, (Ky. 1896) 38 S. W. Rep. 10.

*Louisiana*. — *New Orleans v. People's Bank*, 32 La. Ann. 82.

*Missouri*. — *Kansas City v. Whipple*, 136 Mo. 475, 58 Am. St. Rep. 657.

*Nebraska*. — *Rosenbloom v. State*, 64 Neb. 343.

*New Jersey*. — *Shotwell v. Dalrymple*, 49 N. J. L. 530; *State v. Elizabeth*, 64 N. J. L. 502; *Cox v. Truitt*, 57 N. J. L. 635.

*Pennsylvania*. — *Com. v. Delaware Div. Canal Co.*, 123 Pa. St. 594.

*Tennessee*. — *Nashville v. Althrop*, 5 Coldw. (Tenn.) 554.

*Wisconsin*. — *State v. Mann*, 76 Wis. 469; *Black v. State*, 113 Wis. 205.

**Railroad Property May Be Separately Classified.** — *Northern Pac. R. Co. v. Walker*, 47 Fed. Rep. 686.

**Court Officers' Fees May Be Divided into Two Classes** and varying rates imposed according to whether the same incumbent holds one or more offices. *Com. v. Anderson*, 178 Pa. St. 171.

**Peddlers of Foreign Goods May Be Taxed as a Distinct Class.** — *Rosenbloom v. State*, 64 Neb. 342.

2. **Want of Adaptability to Same Methods.** — *American Refrigerator Transit Co. v. Adams*, 28 Colo. 119; *Com. v. E. H. Taylor Jr. Co.*, 101 Ky. 325; *Northwestern Masonic Aid Assoc. v. Waddill*, 138 Mo. 628; *Com. v. Delaware Div. Canal Co.*, 123 Pa. St. 621; *Kelley v. Rhoads County*, 7 Wyo. 237, 75 Am. St. Rep. 904.

**Live Stock Brought into the State to Graze** furnish an instance where the ordinary methods of procedure would not reach such property for the purpose of taxation. Therefore the legislature can make a special class of them for purposes of taxation. *Wright v. Stinson*, 16 Wash. 368; *Kelley v. Rhoads County*, 7 Wyo. 237, 75 Am. St. Rep. 904. See also *Charleston, etc., Bridge Co. v. Kanawha County Ct.*, 41 W. Va. 658.

**Nonresidents May Be Classed by Themselves** for the purpose of taxation. *C. N. Nelson Lumber Co. v. Loraine*, 22 Fed. Rep. 54; *Lee v. Sturges*, 46 Ohio St. 153; *Mechanics Nat. Bank v. Baker*, 65 N. J. L. 113. But there must

be no unfair discrimination against nonresidents. *Duer v. Small*, 4 Blatchf. (U. S.) 266; *C. N. Nelson Lumber Co. v. Loraine*, 22 Fed. Rep. 54; *San Francisco v. Mackey*, 22 Fed. Rep. 602; *Marshalltown v. Blum*, 58 Iowa 184, 43 Am. Rep. 116; *In re Page*, 60 Kan. 842; *Simrall v. Covington*, 90 Ky. 444, 29 Am. St. Rep. 398, 34 Am. & Eng. Corp. Cas. 190; *Halloway v. Police Jury*, 16 La. Ann. 203; *Oliver v. Washington Mills*, 11 Allen (Mass.) 268; *Mechanics Nat. Bank v. Baker*, 65 N. J. L. 113; *Farris v. Henderson*, 1 Okla. 384; *Nashville v. Althrop*, 5 Coldw. (Tenn.) 554. But see *Jones v. Columbus*, 25 Ga. 610.

3. **Based on Public Policy.** — *People v. Henderson*, 12 Colo. 369; *Northwestern Masonic Aid Assoc. v. Waddill*, 138 Mo. 628; *State v. Farmers, etc., Irrigation Co.*, 59 Neb. 1; *Rosenbloom v. State*, 64 Neb. 342; *Com. v. Delaware Div. Canal Co.*, 123 Pa. St. 621.

4. **Courts Will Not Interfere.** — *Singer Mfg. Co. v. Wright*, 33 Fed. Rep. 121; *People v. Henderson*, 12 Colo. 369; *Levy v. Smith*, 4 Fla. 154; *Lexington v. McQuillan*, 9 Dana (Ky.) 513, 35 Am. Dec. 159; *New Orleans v. People's Bank*, 32 La. Ann. 82; *Mississippi Mills v. Cook*, 56 Miss. 40; *Rosenbloom v. State*, 64 Neb. 362; *People v. Brooklyn*, 4 N. Y. 419; *Roup's Case*, 81\* Pa. St. 211; *Black v. State*, 113 Wis. 205.

5. **Classes May Be Taxed by Different Modes** — *United States*. — *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153; *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Apperson v. Memphis*, 2 Flipp. (U. S.) 363; *Exchange Nat. Bank v. Miller*, 19 Fed. Rep. 372; *C. N. Nelson Lumber Co. v. Loraine*, 22 Fed. Rep. 54.

*Arkansas*. — *Wells, etc., Co.'s Express v. Crawford County*, 63 Ark. 576.

*Colorado*. — *People v. Henderson*, 12 Colo. 369; *American Refrigerator Transit Co. v. Adams*, 28 Colo. 119.

*Georgia*. — *Columbus Southern R. Co. v. Wright*, 89 Ga. 574.

*Illinois*. — *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561; *Coal Run Coal Co. v. Finlen*, 124 Ill. 666; *Sterling Gas Co. v. Higby*, 134 Ill. 557.

*Indiana*. — *Louisville, etc., R. Co. v. State*, 25 Ind. 177, 87 Am. Dec. 358; *State v. Smith*, 158 Ind. 559.

*Iowa*. — *Dubuque v. Chicago, etc., R. Co.*, 47 Iowa 196; *Central Iowa R. Co. v. Supervisors*, 67 Iowa 199; *Galusha v. Wendt*, 114 Iowa 597.

*Kansas*. — *Missouri River, etc., R. Co. v. Morris*, 7 Kan. 210; *Francis v. Atchison, etc., R. Co.*, 19 Kan. 303; *Ottawa County v. Nelson*, 19 Kan. 234, 27 Am. Rep. 101.

*Kentucky*. — *Com. v. E. H. Taylor Jr. Co.*, 101 Ky. 325.

different classes may be taxed by different agents or officers.<sup>1</sup>

(b) **Taxation by Valuation — In General.** — Constitutional provisions requiring taxation by valuation exist in most states of the Union,<sup>2</sup> being based on the

*Minnesota.* — *State v. Weyerhaeuser*, 68 Minn. 353.

*Missouri.* — *State v. Severance*, 55 Mo. 378.

*Nevada.* — *Board of Aldermen v. Chollar-Potosi Gold, etc.*, Min. Co., 2 Nev. 86; *Sawyer v. Dooley*, 21 Nev. 390.

*New Hampshire.* — *Amoskeag Mfg. Co. v. Manchester*, 70 N. H. 200.

*New York.* — *People v. New York Floating Dry Dock Co.*, (Supm. Ct.) 63 How. Pr. (N. Y.) 451; *People v. New York, etc., Floating Dry Dock Co.*, (Supm. Ct.) 11 Abb. N. Cas. (N. Y.) 40.

*Ohio.* — *Wagoner v. Loomis*, 37 Ohio St. 571; *Shotwell v. Moore*, 45 Ohio St. 632; *Lee v. Sturges*, 46 Ohio St. 153.

*Oregon.* — *Smith v. Kelly*, 24 Oregon 464.

*Pennsylvania.* — *Com. v. Delaware Div. Canal Co.*, 123 Pa. St. 594; *Com. v. Chester*, 123 Pa. St. 626.

*Tennessee.* — *Louisville, etc., R. Co. v. State*, 8 Heisk. (Tenn.) 663.

*Utah.* — *State v. Thomas*, 16 Utah 86.

*Virginia.* — *Shenandoah Valley R. Co. v. Clarke County*, 78 Va. 269.

*Wisconsin.* — *Wisconsin Cent. R. Co. v. Lincoln County*, 57 Wis. 137.

**Different Methods of Valuation for Realty and Personalty.** — *McLendon v. La Grange*, 107 Ga. 356.

**Different Classes Taxable at Different Times of Year.** — *C. N. Nelson Lumber Co. v. Loraine*, 22 Fed. Rep. 54; *Central Iowa R. Co. v. Supervisors*, 67 Iowa 199; *Com. v. E. H. Taylor Jr. Co.*, 101 Ky. 325; *Wagoner v. Loomis*, 37 Ohio St. 571; *Shotwell v. Moore*, 45 Ohio St. 632; *Gay v. Thomas*, 5 Okla. 1.

**1. Different Classes Taxed by Different Officers**

— *United States.* — *Cummings v. Merchants' Nat. Bank*, 101 U. S. 153.

*California.* — *San Francisco, etc., R. Co. v. State Board of Equalization*, 60 Cal. 12.

*Georgia.* — *Georgia Midland, etc., R. Co. v. State*, 89 Ga. 597; *Columbus Southern R. Co. v. Wright*, 89 Ga. 574.

*Illinois.* — *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561; *Coal Run Coal Co. v. Finlen*, 124 Ill. 666; *Sterling Gas Co. v. Higby*, 134 Ill. 557; *Ottawa Gas Light, etc., Co. v. People*, 138 Ill. 336.

*Indiana.* — *Indianapolis, etc., R. Co. v. Backus*, 133 Ind. 609; *Pittsburgh, etc., R. Co. v. Backus*, 133 Ind. 625.

*Iowa.* — *Dubuque v. Chicago, etc., R. Co.*, 47 Iowa 196; *Central Iowa R. Co. v. Supervisors*, 67 Iowa 199; *Missouri Valley, etc., R., etc., Co. v. Harrison County*, 74 Iowa 283.

*Kansas.* — *Missouri River, etc., R. Co. v. Morris*, 7 Kan. 210; *Francis v. Atchison, etc., R. Co.*, 19 Kan. 303.

*Kentucky.* — *Cincinnati, etc., R. Co. v. Com.*, 81 Ky. 492; *Com. v. E. H. Taylor Jr. Co.*, 101 Ky. 325.

*Nevada.* — *Sawyer v. Dooley*, 21 Nev. 390.

*Ohio.* — *Wagoner v. Loomis*, 37 Ohio St. 571.

*Pennsylvania.* — *Com. v. Delaware Div. Canal Co.*, 123 Pa. St. 594; *Coal Ridge Imp., etc., Co. v. Jennings*, 127 Pa. St. 397.

*Virginia.* — *Shenandoah Valley R. Co. v. Clarke County*, 78 Va. 269.

*Wyoming.* — *Kelley v. Rhoads County*, 7 Wyo. 237, 75 Am. St. Rep. 904.

**2. Provisions Requiring Taxation by Valuation** — *Alabama.* — *Mobile v. Dargan*, 45 Ala. 310; *Mobile v. Royal St. R. Co.*, 45 Ala. 322; *Board of Revenue v. Montgomery Gas-Light Co.*, 64 Ala. 269; *Clark v. Mobile*, 67 Ala. 217.

*California.* — *Lick v. Austin*, 43 Cal. 590; *Savings, etc., Soc. v. Austin*, 46 Cal. 415; *Hyatt v. Allen*, 54 Cal. 353.

*Georgia.* — *Johnston v. Macon*, 62 Ga. 645.

*Illinois.* — *People v. Worthington*, 21 Ill. 171, 74 Am. Dec. 86; *O'Kane v. Treat*, 25 Ill. 557; *Chicago v. Larned*, 34 Ill. 203; *People v. Bradley*, 39 Ill. 130; *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561.

*Indiana.* — *State Bank v. New Albany*, 11 Ind. 139; *Louisville, etc., R. Co. v. State*, 25 Ind. 180, 87 Am. Dec. 358; *Cleveland, etc., R. Co. v. Backus*, 133 Ind. 513.

*Kentucky.* — *Livingston v. Paducah*, 80 Ky. 656; *Com. v. E. H. Taylor Jr. Co.*, 101 Ky. 325.

*Maryland.* — *State v. Sterling*, 20 Md. 502; *State v. Cumberland, etc., R. Co.*, 40 Md. 62; *State v. Philadelphia, etc., R. Co.*, 45 Md. 361.

*Michigan.* — *Taggart v. Sanilac County*, 71 Mich. 16.

*Minnesota.* — *Rice County v. Citizens' Nat. Bank*, 23 Minn. 280.

*Mississippi.* — *Daily v. Swope*, 47 Miss. 367; *Mississippi Mills v. Cook*, 56 Miss. 40.

*Missouri.* — *State v. North*, 27 Mo. 464; *St. Louis Mut. L. Ins. Co. v. Assessors*, 56 Mo. 503; *Creamer v. Allen*, 3 Mo. App. 545; *Adams v. Lindell*, 5 Mo. App. 197; *St. Louis v. Green*, 7 Mo. App. 468; *Brookfield v. Tooley*, 141 Mo. 619.

*Nebraska.* — *Pleuler v. State*, 11 Neb. 547.

*Nevada.* — *State v. Carson City Sav. Bank*, 17 Nev. 146.

*New Jersey.* — *Trenton Sav. Fund v. Richards*, 52 N. J. L. 156.

*North Dakota.* — *Minneapolis, etc., Elevator Co. v. Traill County*, 9 N. Dak. 213.

*Ohio.* — *Cincinnati College v. Yeatman*, 30 Ohio St. 276.

*Oregon.* — *Crawford v. Linn County*, 11 Oregon 482; *Ellis v. Frazier*, 38 Oregon 462.

*South Carolina.* — *State v. Railroad Corp'ns*, 4 S. Car. 376; *Thomas v. Moultrieville*, 52 S. Car. 181.

*South Dakota.* — *Turner v. Hand County*, 11 S. Dak. 348.

*Tennessee.* — *Taylor v. Chandler*, 9 Heisk. (Tenn.) 350, 24 Am. Rep. 308; *Memphis v. Ensley*, 6 Baxt. (Tenn.) 553, 32 Am. Rep. 532; *Union Bank v. State*, 9 Yerg. (Tenn.) 490; *Adams v. Somerville*, 2 Head (Tenn.) 363.

*Texas.* — *Daugherty v. Thompson*, 71 Tex. 192.

*Utah.* — *Judge v. Spencer*, 15 Utah 242; *State v. Thomas*, 16 Utah 86.

*Virginia.* — *Eyre v. Jacob*, 14 Gratt. (Va.) 422, 73 Am. Dec. 367.

*West Virginia.* — *Douglass v. Harrisville*, 9 W. Va. 162, 27 Am. Rep. 548.

principle that the benefit which each person derives from the government has direct relation to the amount of property which he possesses and enjoys under its protection.<sup>1</sup> Such provisions preserve equality and uniformity by prescribing a fixed, unvarying basis for the levy of taxes.<sup>2</sup> They are mandatory<sup>3</sup> and cannot be evaded by any legislative subterfuge,<sup>4</sup> and the substitution in the imposition of a tax of any requirement, in lieu of valuation, will render such tax void.<sup>5</sup> But such a provision does not apply to the levying of special assessments,<sup>6</sup> or to occupation, business, and privilege taxes;<sup>7</sup> nor does it apply to a valid exercise of the police power.<sup>8</sup>

**Valuation Cannot Be Arbitrary.** — Where such a provision exists the legislature may not adopt arbitrary rules for estimation of values, nor may arbitrary values be attached to property.<sup>9</sup> In whatever form a tax may be imposed,

*Wyoming.* — *Kelley v. Rhoads County*, 7 Wyo. 273, 75 Am. St. Rep. 904.

As to the mode of making the valuation, see *infra*, this title, *Assessment*.

**Provision Self-Executing.** — *Hyatt v. Allen*, 54 Cal. 353. And see in this connection *Mobile v. Dargan*, 45 Ala. 310; *German Nat. Ins. Co. v. Louisville*, (Ky. 1900) 54 S. W. Rep. 732; *State v. Sterling*, 20 Md. 502; *State v. Cumberland, etc.*, R. Co., 40 Md. 22; *Life Assoc. of America v. Assessors*, 49 Mo. 512; *State v. Hannibal, etc.*, R. Co., 75 Mo. 208.

**How Taxation by Valuation Effected.** — See *Morton v. Comptroller Gen.*, 4 S. Car. 430.

1. **Basis of Provision.** — *Oliver v. Washington Mills*, 11 Allen (Mass.) 275.

2. **Preserves Equality and Uniformity** — *United States*. — *Nashville, etc.*, R. Co. v. *Taylor*, 86 Fed. Rep. 168.

*Alabama.* — *Elyton Land Co. v. Birmingham*, 89 Ala. 477.

*Arkansas.* — *State v. Crittenden County Ct.*, 19 Ark. 360; *McGehee v. Mathis*, 21 Ark. 40.

*California.* — *Savings, etc., Soc. v. Austin*, 46 Cal. 415.

*Colorado.* — *Taxation of Min. Claims*, 9 Colo. 635.

*Georgia.* — *Augusta v. National Bank*, 47 Ga. 562.

*Illinois.* — *O'Kane v. Treat*, 25 Ill. 557.

*Kansas.* — *Hines v. Leavenworth*, 3 Kan. 186.

*Louisiana.* — *Laycock v. Baton Rouge*, 36 La. Ann. 328; *New Orleans v. Fourchy*, 30 La. Ann. 910.

*Maryland.* — *State v. Sterling*, 20 Md. 502; *State v. Cumberland, etc.*, R. Co., 40 Md. 62; *State v. Philadelphia, etc.*, R. Co., 45 Md. 361.

*Mississippi.* — *Adams v. Mississippi State Bank*, 75 Miss. 701.

*Missouri.* — *St. Louis v. Green*, 7 Mo. App. 468; *State v. North*, 27 Mo. 464.

*New Hampshire.* — *Amoskeag Mfg. Co. v. Manchester*, 70 N. H. 200.

*Ohio.* — *Exchange Bank v. Hines*, 3 Ohio St. 1.

*Tennessee.* — *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308; *Jones v. Memphis*, 101 Tenn. 188.

**Uniform Rate Required.** — Taxation by valuation requires a uniform rate in the locality where the tax is levied. *Cheshire v. Berkshire County*, 118 Mass. 386; *State v. Osborn*, 60 Neb. 415.

3. **Provision Mandatory.** — *Life Assoc. of America v. Assessors*, 49 Mo. 512; *State v. Hannibal, etc.*, R. Co., 75 Mo. 208.

4. **Legislature Cannot Evade Requirement.** — *Little Rock, etc.*, R. Co. v. *Worthen*, 46 Ark. 312.

**Unconstitutional Tax Cannot Be Disguised as a Succession Tax.** — *Fatjo v. Pfister*, 117 Cal. 83.

**Communtation Taxes Forbidden.** — Under the taxation by valuation clause the legislature may not impose a commutation tax. *State v. Lakeside Land Co.*, 71 Minn. 283; *Louisiana Cotton Mfg. Co. v. New Orleans*, 31 La. Ann. 440.

5. **Tax Not Based on Valuation Void** — *Alabama.* — *Mobile v. Dargan*, 45 Ala. 310.

*Arkansas.* — *Peay v. Little Rock*, 32 Ark. 31.

*Connecticut.* — *Coite v. Savings Soc.*, 32 Conn. 173.

*Georgia.* — *Livingston v. Albany*, 41 Ga. 21; *Augusta v. National Bank*, 47 Ga. 562; *Atlanta Nat. Bldg., etc., Assoc. v. Stewart*, 109 Ga. 80; *Georgia State Bldg., etc., Assoc. v. Savannah*, 109 Ga. 63.

*Kansas.* — *Doster v. Sterling*, 33 Kan. 381.

*Maryland.* — *State v. Cumberland, etc.*, R. Co., 40 Md. 22.

*Massachusetts.* — *Com. v. Hamilton Mfg. Co.*, 12 Allen (Mass.) 298.

*Michigan.* — *Pingree v. Auditor Gen.*, 120 Mich. 95.

*Missouri.* — *State v. North*, 27 Mo. 464; *Life Assoc. of America v. Assessors*, 49 Mo. 512; *Brookfield v. Tooev*, 141 Mo. 619; *St. Louis v. Green*, 7 Mo. App. 468.

*New Jersey.* — *Williams v. Bettie*, 51 N. J. L. 512.

*Ohio.* — *Pittsburgh, etc.*, R. Co. v. *State*, 49 Ohio St. 189; *State v. Jones*, 51 Ohio St. 492.

*South Carolina.* — *State v. Railroad Corp'ns*, 4 S. Car. 376; *State v. Tucker*, 56 S. Car. 516.

*Virginia.* — *Danville v. Shelton*, 76 Va. 325.

**Specific Property Taxes Forbidden.** — *Capital City Water Co. v. Board of Revenue*, 117 Ala. 307; *New Orleans v. Fourchy*, 30 La. Ann. 910; *Louisiana Cotton Mfg. Co. v. New Orleans*, 31 La. Ann. 440; *Oliver v. Washington Mills*, 11 Allen (Mass.) 278; *Portland Bank v. Apthorp*, 12 Mass. 252; *Pingree v. Auditor Gen.*, 120 Mich. 95.

6. See the title SPECIAL OR LOCAL ASSESSMENTS, vol. 25, p. 1174.

7. See the title OCCUPATION, BUSINESS, AND PRIVILEGE TAXES, vol. 21, p. 770.

8. **Does Not Affect Valid Exercise of Police Power.** — *Thomas v. Moultrieville*, 52 S. Car. 181.

9. **Valuation Cannot Be Arbitrary** — *Alabama.* — *Board for Assessment, etc., v. Alabama Cent. R. Co.*, 59 Ala. 551.

where property interests are affected, the scaling or grading of the tax should be on an *ad valorem* basis.<sup>1</sup> From the nature of the subject-matter, however, exact valuation is often impossible; in such cases reasonable approximation thereto is all that is required.<sup>2</sup>

**Different Modes of Valuation Permissible.** — Such provision does not forbid the listing and valuation of different classes of property in different modes and by different agencies. Different methods are often necessary to reach the value of property, on account of its nature and situation.<sup>3</sup>

**The Power of the Legislature to Exempt Property** from taxation where such provisions exist has already been discussed under another title.<sup>4</sup>

(c) **Double Taxation** — *aa.* **POWER TO IMPOSE.** — Since the power of the legislature to tax is limited only by constitutional restrictions, it follows that the courts cannot declare void a statute imposing double taxation unless it be in contravention of some constitutional provision. In some states the requirements that taxation shall be equal and uniform, according to valuation, or the like, are held to forbid double taxation;<sup>5</sup> but in other jurisdictions such provisions

*Arkansas.* — Wells, etc., Co.'s Express v. Crawford County, 63 Ark. 576.

*Georgia.* — Johnston v. Macon, 62 Ga. 645; Georgia State Bldg., etc., Assoc. v. Savannah, 109 Ga. 63.

*Kansas.* — Doster v. Sterling, 33 Kan. 381.

*Massachusetts.* — Cheshire v. Berkshire County, 118 Mass. 386.

*Minnesota.* — State v. Lakeside Land Co., 71 Minn. 283; State v. Schoenig, 72 Minn. 528.

*Missouri.* — Brookfield v. Tooev, 141 Mo. 619.

*New Jersey.* — State v. Chamberlin, 37 N. J. L. 388; State v. Newark, 37 N. J. L. 415, 18 Am. Rep. 729.

*North Carolina.* — Atlantic, etc., R. Co. v. Carteret County, 75 N. Car. 474.

*Tennessee.* — Western Union Tel. Co. v. State, 9 Baxt. (Tenn.) 509, 40 Am. Rep. 99.

And see Taxation of Min. Claims, 9 Colo. 635; Taggart v. Sanilac County, 71 Mich. 16; Mississippi Mills v. Cook, 56 Miss. 40; Williams v. Bettle, 51 N. J. L. 512; Ellis v. Frazier, 38 Oregon 462; State v. Smith, 158 Ind. 559.

**Legislature Cannot Impose Certain Amount.** — Taxation of Min. Claims, 9 Colo. 635.

**Credits Taxed at Face Value.** — A statute requiring all credits payable in money to be taxed at face value is void, since the insolvency of the debtor would render such credits worthless. McCurdy v. Prugh, 59 Ohio St. 465; State v. Smith, 158 Ind. 575.

**1. Ad Valorem Basis Must Be Adopted.** — Johnston v. Macon, 62 Ga. 645; Livingston v. Paducah, 80 Ky. 656; Com. v. Hamilton Mfg. Co., 12 Allen (Mass.) 298; Pingree v. Auditor Gen., 120 Mich. 95; State v. Switzler, 143 Mo. 287, 65 Am. St. Rep. 653; Brookfield v. Tooev, 141 Mo. 619. But see in this connection Aurora v. McGannon, 138 Mo. 38.

**Water Power an Element of Property.** — In Massachusetts a statute which provided that reservoirs of water, and lands and dams connected therewith, should be taxed at the place where the reservoir was located, at the rate of valuation at which the land there situated was taxed, was held unconstitutional, the power and improvements not being taken into consideration. Cheshire v. Berkshire County, 118 Mass. 386.

**2. Exact Valuation Not Required.** — Taxation of Min. Claims, 9 Colo. 635; People v. Hender-

son, 12 Colo. 369; Porter v. Rockford, etc., R. Co., 76 Ill. 561; Detroit v. Assessors, 91 Mich. 78; Shotwell v. Moore, 45 Ohio St. 632; State v. Jones, 51 Ohio St. 492; State v. Thomas, 16 Utah 86.

**3. Different Methods of Valuation Not Forbidden.** — Northern Pac. R. Co. v. Walker, 47 Fed. Rep. 681; Wells, etc., Co.'s Express v. Crawford County, 63 Ark. 576; Taxation of Min. Claims, 9 Colo. 635; Georgia State Bldg., etc., Assoc. v. Savannah, 109 Ga. 63; McLendon v. La Grange, 107 Ga. 356; Porter v. Rockford, etc., R. Co., 76 Ill. 584; Louisville, etc., R. Co. v. State, 25 Ind. 180, 87 Am. Dec. 358; Com. v. E. H. Taylor Jr. Co., 101 Ky. 325; Minneapolis, etc., Elevator Co. v. Trail County, 9 N. Dak. 213; Wagoner v. Loomis, 37 Ohio St. 571; State v. Jones, 51 Ohio St. 492. See generally *infra*, this title, *Assessment*.

**4.** See the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 272 *et seq.*

**5. Double Taxation Not Allowed** — *Taxation by Valuation Clause.* — State v. Sterling, 20 Md. 502; State v. Cumberland, etc., R. Co., 40 Md. 22; Frederick County v. Farmers, etc., Nat. Bank, 48 Md. 117; State v. Central Sav. Bank, 67 Md. 290; Southwestern Tel., etc., Co. v. Meerscheidt, (Tex. Civ. App. 1901) 65 S. W. Rep. 381; State v. Austin, etc., R. Co., 94 Tex. 530.

*Taxation by Uniform Rule Clause.* — Comstock v. Grand Rapids, 54 Mich. 641; Taggart v. Sanilac County, 71 Mich. 16; Detroit v. Assessors, 91 Mich. 78; Standard L., etc., Ins. Co. v. Assessors, 95 Mich. 468; Detroit Citizens St. R. Co. v. Detroit, 125 Mich. 675, 84 Am. St. Rep. 589; Stroh v. Detroit, (Mich. 1902) 90 N. W. Rep. 1029, 9 Detroit Leg. N. 228.

*Equality and Uniformity Clause.* — San Francisco v. Mackey, 21 Fed. Rep. 539, 22 Fed. Rep. 602; Savings, etc., Soc. v. Austin, 46 Cal. 416; Burke v. Badlam, 57 Cal. 594; Germania Trust Co. v. San Francisco, 128 Cal. 589; Chicago v. Collins, 175 Ill. 445, 67 Am. St. Rep. 224; Ellis v. Frazier, 38 Oregon 462; Fulkerson v. Bristol, 95 Va. 1.

*Uniform and Equal Rate Clause.* — State v. Carson City Sav. Bank, 17 Nev. 146.

*Reasonable and Proportional Clause.* — Smith v. Burley, 9 N. H. 423; Nashua Sav. Bank v. Nashua, 46 N. H. 389; Berry v. Windham, 59

are regarded as not prohibiting double taxation so long as no real and substantial inequality of burden is occasioned thereby.<sup>1</sup>

*bb. CONSTRUCTION OF STATUTES IMPOSING DOUBLE TAXATION.*—The courts always frown upon double taxation, and even in those jurisdictions where the legislature is held to have power to impose it, such a construction will be given to the statutes as to avoid double taxes if possible.<sup>2</sup> A purpose to impose double taxes will not be presumed,<sup>3</sup> and to produce such effect the legislative intent must be clear and unmistakable.<sup>4</sup>

N. H. 288, 47 Am. Rep. 202; *Cheshire County Telephone Co. v. State*, 63 N. H. 167; *Amoskeag Mfg. Co. v. Manchester*, 70 N. H. 200.

**Double Taxation Not Valid under Congressional Laws.**—U. S. *v. Benzon*, 2 Cliff. (U. S.) 512.

**1. Double Taxation Not Forbidden.**—*United States*.—*Davidson v. New Orleans*, 96 U. S. 97; *Tennessee v. Whitworth*, 117 U. S. 129; *New Orleans v. Houston*, 119 U. S. 265; *Reclamation Dist. No. 108 v. Hagar*, 6 Sawy. (U. S.) 567; U. S. *v. Benzon*, 2 Cliff. (U. S.) 512.

*Alabama*.—*Board of Revenue v. Montgomery Gas-Light Co.*, 64 Ala. 269.

*Connecticut*.—*Savings Bank v. New London*, 20 Conn. 111; *Bridgeport v. Bishop*, 33 Conn. 187; *Toll-Bridge Co. v. Osborn*, 35 Conn. 7.

*Georgia*.—*Georgia State Bldg., etc., Assoc. v. Savannah*, 109 Ga. 63.

*Indiana*.—*State v. Smith*, 158 Ind. 543.

*Iowa*.—*Cook v. Burlington*, 59 Iowa 251, 44 Am. Rep. 679.

*Kentucky*.—*Livingston v. Paducah*, 80 Ky. 656.

*Maine*.—*Holton v. Bangor*, 23 Me. 264; *Augusta Bank v. Augusta*, 36 Me. 255.

*Massachusetts*.—*Com. v. New England State, etc., Co.*, 13 Allen (Mass.) 391.

*Minnesota*.—*Rice County v. Citizens' Nat. Bank*, 23 Minn. 280. *Compare State v. Rand*, 39 Minn. 502.

*Missouri*.—*State v. Hannibal, etc., R. Co.*, 37 Mo. 265; *St. Louis Mut. L. Ins. Co. v. Assessors*, 56 Mo. 503.

*New Jersey*.—*State v. Collectors*, 25 N. J. L. 315; *State v. Collector*, 37 N. J. L. 258.

*North Carolina*.—*Raleigh, etc., R. Co. v. Reid*, 64 N. Car. 155; *Wilmington, etc., R. Co. v. Reid*, 64 N. Car. 226.

*Pennsylvania*.—*School Directors v. Carlisle Bank*, 8 Watts (Pa.) 289; *Kirby v. Shaw*, 19 Pa. St. 258; *West Chester Gas Co. v. Chester County*, 30 Pa. St. 232; *Lackawanna Iron, etc., Co. v. Luzerne County*, 42 Pa. St. 424; *Pittsburg, etc., R. Co. v. Com.*, 66 Pa. St. 73, 5 Am. Rep. 344; *Jones, etc., Mfg. Co. v. Com.*, 69 Pa. St. 137; *Ebervale Coal Co. v. Com.*, 91 Pa. St. 47; *Com. v. Fall Brook Coal Co.*, 156 Pa. St. 488.

*Washington*.—*Pacific Nat. Bank v. Pierce County*, 20 Wash. 675; *Lewiston Water, etc., Co. v. Asotin County*, 24 Wash. 371.

**A Question of Expediency, Not of Power.**—The question of double taxation, says the *New York* court, is one of expediency for the consideration of the legislature, and not of power for the consideration of the courts. *People v. Roberts*, 157 N. Y. 677.

**2. Double Taxation Avoided if Possible.**—*Monticello Distilling Co. v. Baltimore*, 90 Md. 416; *Com. v. Provident Life, etc., Co.*, 9 Pa. Dist. 479.

**3. Purpose to Impose Double Tax Not Presumed.**—*Louisville, etc., R. Co. v. Wright*, 116 Fed. Rep. 669; *Lee v. Sturges*, 46 Ohio St. 153.

**4. Statutes Construed Against Double Taxation.**—*United States*.—*Tennessee v. Whitworth*, 117 U. S. 129; *New Orleans v. Houston*, 119 U. S. 265.

*Alabama*.—*Board of Revenue v. Montgomery Gas-Light Co.*, 64 Ala. 269.

*Connecticut*.—*Savings Bank v. New London*, 20 Conn. 111; *Toll-Bridge Co. v. Osborn*, 35 Conn. 7; *Osborn v. New York, etc., R. Co.*, 40 Conn. 491.

*Georgia*.—*State Bank v. Savannah, Dudley (Ga.)* 130; *Rome R. Co. v. Rome*, 14 Ga. 275; *Columbus Southern R. Co. v. Wright*, 89 Ga. 579.

*Illinois*.—*Chicago, etc., R. Co. v. Miller*, 72 Ill. 144.

*Indiana*.—*Conwell v. Conersville*, 15 Ind. 150.

*Iowa*.—*Tallman v. Treasurer*, 12 Iowa 531; *U. S. Express Co. v. Ellyson*, 28 Iowa 378; *Branch v. Marengo*, 43 Iowa 600; *Cook v. Burlington*, 59 Iowa 251, 44 Am. Rep. 679.

*Kentucky*.—*Livingston v. Paducah*, 80 Ky. 656.

*Maine*.—*Gardiner Cotton, etc., Factory Co. v. Gardiner*, 5 Me. 133.

*Maryland*.—*Gordon v. Baltimore*, 5 Gill (Md.) 231.

*Massachusetts*.—*Salem Iron Factory Co. v. Danvers*, 10 Mass. 514; *Amesbury Woollen, etc., Mfg. Co. v. Amesbury*, 17 Mass. 461; *Boston, etc., Glass Co. v. Boston*, 4 Met. (Mass.) 181; *Boston Water Power Co. v. Boston*, 9 Met. (Mass.) 202; *Worcester County Sav. Inst. v. Worcester*, 10 Cush. (Mass.) 128.

*Michigan*.—*Stroh v. Detroit*, (Mich. 1902) 90 N. W. Rep. 1029.

*Minnesota*.—*Rice County v. Citizens' Nat. Bank*, 23 Minn. 280; *Hennepin County v. St. Paul, etc., R. Co.*, 33 Minn. 534; *State v. St. Paul Union Depot Co.*, 42 Minn. 142.

*Missouri*.—*State v. Hannibal, etc., R. Co.*, 37 Mo. 265.

*New Hampshire*.—*Nashua Sav. Bank v. Nashua*, 46 N. H. 389.

*New Jersey*.—*State v. Ross*, 23 N. J. L. 517; *State v. Branin*, 23 N. J. L. 484; *State v. Collector*, 37 N. J. L. 258; *Jersey City Gaslight Co. v. Jersey City*, 46 N. J. L. 196.

*New York*.—*People v. Tax Com. Yrs.* 95 N. Y. 554; *People v. Barker*, 29 N. Y. App. Div. 325; *People v. Roberts*, 32 N. Y. App. Div. 113, affirmed 157 N. Y. 677.

*Pennsylvania*.—*School Directors v. Carlisle Bank*, 8 Watts (Pa.) 289; *Coatesville Gas Co. v. Chester County*, 97 Pa. St. 476; *Com. v. Fall Brook Coal Co.*, 156 Pa. St. 488; *Com. v. Provident Life, etc., Co.*, 3 Dauph. Co. Rep.



*cc. WHAT DOUBLE TAXATION INVALID — (aa) In General — Imposing Unequal Burdens.* — Whatever diversity of opinion may exist as to the general power of the legislature to impose duplicate taxation, there can be no doubt that to tax twice the same property in the same hands for the same purpose, while other property belonging to the same class is taxed but once in the same period, is entirely subversive of the principle of equality of burden, and cannot be allowed where such constitutional requirements exist.<sup>1</sup> Thus, property held in trust cannot be taxed to both the trustee and the *cestui que trust*, since their title is identical, the *cestui* being the sole owner and responsible for all taxes on the property.<sup>2</sup>

**Different Interests in Same Thing.** — But where two persons hold different interests in the same thing each may properly be taxed, as they do not hold by the same title.<sup>3</sup> Thus, the legislature has power to tax a debtor in the full value of all the property owned by him, without deducting the amount of his indebtedness, and at the same time to tax the creditor on the amount due him;<sup>4</sup> or to tax mortgages at their face value, while the property upon which

(Pa.) 130, 6 Lack Leg. N. (Pa.) 140, 9 Pa. Dist. 479.

*Rhode Island.* — *American Bank v. Mumford*, 4 R. I. 483; *Providence Sav. Inst. v. Gardiner*, 4 R. I. 484.

*Texas.* — *Daugherty v. Thompson*, 71 Tex. 192.

*Virginia.* — *Fulkerson v. Bristol*, 95 Va. 1.

*Washington.* — *Lewiston Water, etc., Co. v. Asotin County*, 24 Wash. 371.

**1. Must Preserve Equality of Burden.** — *Sheibley v. Rome*, 107 Ga. 384; *Chicago v. Collins*, 175 Ill. 445, 67 Am. St. Rep. 224; *Taggart v. Sanilac County*, 71 Mich. 16; *State v. Carson City Sav. Bank*, 71 Nev. 146; *Kennard v. Manchester*, 68 N. H. 61; *Fulkerson v. Bristol*, 95 Va. 1; *Lewiston Water, etc., Co. v. Asotin County*, 24 Wash. 371. See also *Lick v. Austin*, 43 Cal. 590; *Fitzgerald v. Rhode Island, etc., Co.*, (R. I. 1902) 52 Atl. Rep. 814.

**Violates Equality and Uniformity Rule.** — *Board of Revenue v. Montgomery Gas-Light Co.*, 64 Ala. 269; *Burke v. Badlam*, 57 Cal. 594; *Germania Trust Co. v. San Francisco*, 128 Cal. 590; *Cook v. Burlington*, 59 Iowa 251, 44 Am. Rep. 679; *Livingston v. Paducah*, 80 Ky. 656; *Rice County v. Citizens' Nat. Bank*, 23 Minn. 280; *Robinson v. Dover*, 59 N. H. 521; *Cincinnati College v. Yeatman*, 30 Ohio St. 276.

**A Tax on Vehicles in Addition to a Property Tax** already levied on such property is void. *Livingston v. Paducah*, 80 Ky. 656.

**2. Trust Property Not Taxable Twice.** — *Savings, etc., Soc. v. Austin*, 46 Cal. 415; *Burke v. Badlam*, 57 Cal. 594; *Savings Bank v. New London*, 20 Conn. 111; *Coite v. Savings Soc.*, 32 Conn. 173; *Augusta Sav. Bank v. Augusta*, 56 Me. 176; *State v. Central Sav. Bank*, 67 Md. 290; *Berry v. Windham*, 59 N. H. 288, 47 Am. Rep. 202; *Robinson v. Dover*, 59 N. H. 521; *Com. v. Fall Brook Coal Co.*, 156 Pa. St. 488.

**A Deposit in a Savings Bank** is not taxable to both the bank and the depositor, where they occupy the relation of trustee and *cestui que trust*. *State v. Sterling*, 20 Md. 502; *State v. Central Sav. Bank*, 67 Md. 290; *Com. v. People's Five Cents Sav. Bank*, 5 Allen (Mass.) 428; *Simpson v. City Sav. Bank*, 56 N. H. 466, 22 Am. Rep. 491; *Cogswell v. Rockingham*

*Ten Cents Sav. Bank*, 59 N. H. 43; *Hall v. Paris*, 59 N. H. 71. See also *Mercantile Bank v. New York*, 121 U. S. 138; *Davenport Bank v. Board of Equalization*, 123 U. S. 83.

**3. Not Double Taxation When Property Held by Different Titles.** — *People v. Worthington*, 21 Ill. 171, 74 Am. Dec. 86; *International Bldg., etc., Assoc. v. Marion County*, 30 Ind. App. 12; *U. S. Express Co. v. Ellyson*, 28 Iowa 370; *Cook v. Burlington*, 59 Iowa 251, 44 Am. Rep. 679; *Taggart v. Sanilac County*, 71 Mich. 16; *Com. v. Fall Brook Coal Co.*, 156 Pa. St. 488. See also *Sheibley v. Rome*, 107 Ga. 384.

**Taxation of Annuities Not Double Taxation.** — *Chisholm v. Shields*, 11 Ohio Cir. Dec. 361, 21 Ohio Cir. Ct. 231.

**4. Both Debtor and Creditor May Be Taxed.** — *Jefferson County Sav. Bank v. Hewitt*, 112 Ala. 546; *Lick v. Austin*, 43 Cal. 590; *Cook v. Burlington*, 59 Iowa 251, 44 Am. Rep. 679; *People v. Worthington*, 21 Ill. 171, 74 Am. Dec. 86; *Griffin v. Board of Review*, 184 Ill. 275; *Augusta Bank v. Augusta*, 36 Me. 255; *State v. Rand*, 39 Minn. 502; *St. Louis Mut. L. Ins. Co. v. Assessors*, 56 Mo. 515; *Exchange Bank v. Hines*, 3 Ohio St. 1; *Philadelphia Sav. Fund Soc. v. Yard*, 9 Pa. St. 361.

"It would be difficult to give one good reason why a man who sells his store and goods, or his farm and stock, and invests his money in securities, ought not to bear his just proportion of the public burdens; and it cannot be denied that if he does not so there is an unjust discrimination in favor of a class that is already strong. He is protected by the laws in his person, and their aid may be invoked at any time to enforce payment of his demands. The courts are open for his benefit, just as they were when his property consisted of store or farm." *State v. Carson City Sav. Bank*, 17 Nev. 159.

**Tax on Credits Is Tax on Capital.** — "The goods and wares of the merchant require his unremitting care and labor to make them profitable; a farm with all its implements and stock would be wholly unproductive without the unceasing toil of the agriculturist; and the materials, machinery, etc., of the mechanic and the manufacturer are made productive only by their being accompanied with the labor of the

they are secured is also fully taxed;<sup>1</sup> or to tax bank deposits to both the bank and the depositor, where the ordinary relationship of debtor and creditor exists between them.<sup>2</sup>

**Corporate Stock.** — The question whether the taxation of shares of stock to the stockholder and of corporate property to the corporation constitutes double taxation is treated elsewhere.<sup>3</sup>

**Rule Applies to Property Taxes Only.** — The rule against double taxation applies only to property taxes based on value,<sup>4</sup> and not to income taxes,<sup>5</sup> succession taxes,<sup>6</sup> or privilege taxes;<sup>7</sup> nor does the imposition of a burden which is not a tax, as, for example, an inspection fee or a toll, in addition to the general tax, constitute double taxation.<sup>8</sup>

**Taxation for Special Purposes** is not prohibited, although the same property is also taxed for general purposes,<sup>9</sup> and the restriction has no application to special assessments.<sup>10</sup>

(bb) **Taxation in Different States.** — Each state has the power to tax property within its limits, although such property may be subject to taxation in another state.<sup>11</sup>

(d) **Restrictions on Rate** — aa. **IN GENERAL.** — Provisions are found in some con-

operatives. A tax upon all those classes of property which derive their productiveness from labor is, to some extent, a tax upon labor. But a tax upon credits is a tax upon capital alone, in its most productive form, unmingled with labor. To exempt credits from taxation, and throw the whole burden upon those forms of property which derive their productiveness from labor, would afford a most unfair and unjust advantage to capital over labor, oppressive in its consequences to the productive interests of the country." *Exchange Bank v. Hines*, 3 Ohio St. 26. See also *Judge v. Spencer*, 15 Utah 242; *People v. Worthington*, 21 Ill. 171, 74 Am. Dec. 86.

1. **Taxation of Mortgages** — *Connecticut.* — *Toll Bridge Co. v. Osborn*, 35 Conn. 7.

*Illinois.* — *People v. Rhodes*, 15 Ill. 304; *People v. Worthington*, 21 Ill. 171, 74 Am. Dec. 86; *Porter v. Rockford, etc.*, R. Co., 76 Ill. 561.

*Iowa.* — *McGregor v. Vampel*, 24 Iowa 436; *Cook v. Burlington*, 59 Iowa 251, 44 Am. Rep. 679.

*Maine.* — *Augusta Bank v. Augusta*, 36 Me. 255.

*Michigan.* — *Taggart v. Sanilac County*, 71 Mich. 16; *Detroit v. Assessors*, 91 Mich. 78.

*Missouri.* — *St. Louis Mut. L. Ins. Co. v. Assessors*, 56 Mo. 515.

*Nevada.* — *State v. Carson City Sav. Bank*, 17 Nev. 146.

*New Hampshire.* — *Nashua Sav. Bank v. Nashua*, 46 N. H. 389.

*New York.* — *People v. Feitner*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 216, affirmed 51 N. Y. App. Div. 178.

*Ohio.* — *Exchange Bank v. Hines*, 3 Ohio St. 1.

*Pennsylvania.* — *Philadelphia Sav. Fund Soc. v. Yard*, 9 Pa. St. 359; *West Chester Gas Co. v. Chester County*, 30 Pa. St. 232.

**Legislature May Fix Situs of Mortgage.** — *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 84; *Judge v. Spencer*, 15 Utah 242.

2. **Bank Deposits.** — *Yuba County v. Adams*, 7 Cal. 35; *Savings Bank v. New London*, 20 Conn. 111; *New Orleans v. New Orleans Canal, etc.*, Co., 29 La. Ann. 851, 32 La. Ann. 157; *State v. Carson City Sav. Bank*, 17 Nev. 146; *Ex-*

*change Bank v. Hines*, 3 Ohio St. 28. But see *Burke v. Badlam*, 57 Cal. 594.

3. See the title **TAXATION (CORPORATE)**, *post*.

4. **Applies Only to Taxes Based on Value.** — *Chicago v. Collins*, 175 Ill. 445, 67 Am. St. Rep. 224; *Livingston v. Paducah*, 80 Ky. 656; *Taggart v. Sanilac County*, 71 Mich. 16; *Detroit v. Assessors*, 91 Mich. 78; *Ellis v. Frazier*, 38 Oregon 462; *Daugherty v. Thompson*, 71 Tex. 192; *State v. Taylor*, 72 Tex. 297.

5. **Taxation of Incomes Not Affected.** — *Lott v. Hubbard*, 44 Ala. 593; *Board of Revenue v. Montgomery Gas-Light Co.*, 64 Ala. 269; *Johnston v. Macon*, 62 Ga. 645; *Wilcox v. Middlesex County*, 103 Mass. 544; *Memphis v. Ensley*, 6 Baxt. (Tenn.) 553, 32 Am. Rep. 532; *Union Bank v. State*, 9 Yerg. (Tenn.) 490. But see *Robinson v. Dover*, 59 N. H. 521.

6. *Eyre v. Jacob*, 14 Gratt. (Va.) 422, 73 Am. Dec. 367. See the title **SUCCESSION TAXES**, *ante*, p. 337.

7. **Privilege Taxes.** — *Livingston v. Paducah*, 80 Ky. 656; *Drysdale v. Pradat*, 45 Miss. 445; *Western Union Tel. Co. v. State*, 9 Baxt. (Tenn.) 509, 40 Am. Rep. 99; *Morgan v. Com.*, 98 Va. 812. See the title **OCCUPATION, BUSINESS, AND PRIVILEGE TAXES**, vol. 21, p. 770.

8. *Matter of Yturburru*, 134 Cal. 567; *Vanmeter v. Spurrier*, 94 Ky. 22. And see *State v. Charleston*, 4 Rich. L. (S. Car.) 286.

9. **May Tax for General and Also Special Purposes.** — *Hilgenberg v. Wilson*, 55 Ind. 210; *Drysdale v. Pradat*, 45 Miss. 445; *St. Joseph v. Hannibal, etc.*, R. Co., 39 Mo. 477.

A Tax upon a County for the Support of an Insane Asylum is not objectionable, although the asylum is a state institution and general taxes are levied for the support of state institutions. *State v. Douglas County*, 18 Neb. 601; *Bon Homme County v. Berndt*, 15 S. Dak. 494.

10. See the title **SPECIAL OR LOCAL ASSESSMENTS**, vol. 25, p. 1174.

11. **Taxation by Different States** — *United States.* — *Coe v. Errol*, 116 U. S. 517; *C. N. Nelson Lumber Co. v. Loraine*, 22 Fed. Rep. 54; *Duer v. Small*, 4 Blatchf. (U. S.) 263.

*California.* — *Mackay v. San Francisco*, 113 Cal. 392;

stitutions restricting the exercise of the taxing power by providing that the rate imposed shall not exceed a certain amount.<sup>1</sup> And where there is a provision limiting the amount of indebtedness that may be incurred, this also operates as a restriction on the power of taxation.<sup>2</sup> But provisions which merely restrict the manner or mode of taxation do not affect the rate.<sup>3</sup>

*bb. WHETHER RESTRICTIONS SELF-EXECUTING.* — Where the constitution itself sets a limit upon the rate of taxation, the provision is self-executing.<sup>4</sup> But a constitutional provision merely permitting or requiring the legislature to restrict the power of taxation is not self-executing; legislative action is necessary to enforce it,<sup>5</sup> and if the legislature fail to fix a limit, or provide inefficient

*Indiana.* — *Hilgenberg v. Wilson*, 55 Ind. 210; *Indianapolis, etc., R. Co. v. Backus*, 133 Ind. 609.

*Louisiana.* — *Griggsby Constr. Co. v. Freeman*, 108 La. 435.

*Maine.* — *Holton v. Bangor*, 23 Me. 264.

*Maryland.* — *Gordon v. Baltimore*, 5 Gill (Md.) 231.

*Massachusetts.* — *Leonard v. New Bedford*, 16 Gray (Mass.) 292; *Frothingham v. Shaw*, 175 Mass. 59, 78 Am. St. Rep. 475.

*Michigan.* — *Taggart v. Sanilac County*, 71 Mich. 16; *Detroit v. Assessors*, 91 Mich. 78; *Bacon v. State Tax Com'rs*, 126 Mich. 22, 86 Am. St. Rep. 524.

*Missouri.* — *St. Joseph v. Hannibal, etc., R. Co.*, 39 Mo. 476.

*New York.* — *People v. Davenport*, 25 Hun (N. Y.) 630; *People v. Tax, etc., Com'rs*, 26 Hun (N. Y.) 446.

*Pennsylvania.* — *Com. v. Provident Life, etc., Co.*, 9 Pa. Dist. 479, affirming *Com. v. Westinghouse Air Brake Co.*, 151 Pa. St. 276.

*Rhode Island.* — *Dyer v. Osborne*, 11 R. I. 321, 23 Am. Rep. 460.

*Wyoming.* — *Kelley v. Rhoads County*, 7 Wyo. 237, 75 Am. St. Rep. 904.

But see *Berry v. Windham*, 59 N. H. 288, 47 Am. Rep. 202; *Robinson v. Dover*, 59 N. H. 526.

**1. Constitutional Limitations on Rate of Taxation.** — *Elyton Land Co. v. Birmingham*, 89 Ala. 477; *Alabama G. S. R. Co. v. Reed*, 124 Ala. 253; *Graham v. Parham*, 32 Ark. 676; *People v. Scott*, 9 Colo. 422; *People v. Ames*, 24 Colo. 422; *Thomas v. Burlington*, 69 Iowa 140; *State v. Weir*, 33 Neb. 35; *Dakota County v. Chicago, etc., R. Co.*, 63 Neb. 405; *State v. Tomahawk*, 96 Wis. 73. See also as to the rate of taxation, and as to the restrictions upon the amount imposed, *infra*, this title, *Levy; Municipal Taxation*.

**Such Restrictions Operate as a Safeguard** against excessive taxation. *Elyton Land Co. v. Birmingham*, 89 Ala. 477; *Keene v. Jefferson County*, 135 Ala. 465; *State v. St. Louis, etc., R. Co.*, 74 Mo. 163; *Grand Island, etc., R. Co. v. Dawes County*, 62 Neb. 44.

**Restriction on Taxation for "State Purposes" Only.** — *People v. Scott*, 9 Colo. 422.

**A Property Tax, in Whatever Form Levied,** must be confined within the limits of the prescribed rule. *State v. Stephens*, 146 Mo. 662, 69 Am. St. Rep. 625.

**Since a Poll Tax Is Not a Tax on Property,** such a tax may be levied regardless of the constitutional limitation. *People v. Ames*, 24 Colo. 422.

**A Tax Will Always Be Presumed Within the Rate** unless it is distinctly shown to be in excess of the limit. *Alabama G. S. R. Co. v. Reed*, 124 Ala. 253; *Francis v. Southern R. Co.*, 124 Ala. 544.

**Tax Assessed Before but Levied After Limitation.** — The levying of a tax subsequent to the adoption of constitutional restrictions, although assessed prior to such restrictions, must be controlled by the rate prescribed therein. *St. Joseph Board of Public Schools v. Patten*, 62 Mo. 444; *Overall v. Ruenzi*, 67 Mo. 203.

**State Taxes Superior to County Taxes.** — In *County Board of Education v. Currituck County*, 107 N. Car. 110, it was held that where the sheriff had collected taxes in the name of the county, although within the constitutional limit, and thereby infringed upon the state levy in that the amount remaining was insufficient for state purposes, such collection was invalid so far as the state was concerned, and the state was entitled to be satisfied from such taxes.

**2. Limitation of Indebtedness.** — *Kimball v. Grant County*, 21 Fed. Rep. 145; *Graham v. Parham*, 32 Ark. 676; *Nougues v. Douglass*, 7 Cal. 65; *Miller v. Dunn*, 72 Cal. 462, 1 Am. St. Rep. 67; *Holland v. State*, 15 Fla. 455; *Read v. Atlantic City*, 49 N. J. L. 558; *Brothers v. Currituck County*, 70 N. Car. 726; *Neale v. Wood County Ct.*, 43 W. Va. 90; *State v. Froehlich*, (Wis. 1903) 94 N. W. Rep. 50.

As to limitation of indebtedness of municipal corporations, see the title **MUNICIPAL CORPORATIONS**, vol. 20, p. 1171.

**3. Provisions as to Mode Do Not Affect Rate.** — *Binkert v. Jansen*, 94 Ill. 283; *Cicero v. McCarthy*, 172 Ill. 279; *Maloy v. Marietta*, 11 Ohio St. 636; *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37.

**4. Self-executing Limitations** — *Arkansas.* — *Graham v. Parham*, 32 Ark. 676.

*Colorado.* — *People v. Scott*, 9 Colo. 422.

*Louisiana.* — *Laycock v. Baton Rouge*, 36 La. Ann. 328.

*Missouri.* — *St. Joseph Board of Public Schools v. Patten*, 62 Mo. 444; *State v. Holladay*, 66 Mo. 385; *State v. St. Louis, etc., R. Co.*, 74 Mo. 163.

*North Carolina.* — See *Russell v. Ayer*, 120 N. Car. 180.

*Utah.* — *Judge v. Spencer*, 15 Utah 242.

As to self-executing in general, see the title **CONSTITUTIONAL LAW**, vol. 6, p. 912.

**5. Legislative Action Required** — *Kansas.* — *Hines v. Leavenworth*, 3 Kan. 186.

*Missouri.* — *St. Joseph Board of Public Schools v. Patten*, 62 Mo. 444.

restraints on the taxing power, the judiciary is without power to declare a tax illegal for noncompliance with the constitutional provision.<sup>1</sup>

cc. TO WHAT TAXES LIMITATIONS APPLY. — Contractual obligations incurred by a state or municipality while the restriction is in force are controlled thereby, the restriction being deemed to have entered into the formation of the contract.<sup>2</sup>

The Obligation of Pre-existing Contracts cannot be impaired by any limitation on the rate of taxation, and taxes for the payment of debts contracted prior to the adoption of the restriction may be laid without regard to the constitutional limitation.<sup>3</sup>

d. EFFECT OF TAXATION IN EXCESS OF LIMIT. — A tax in excess of the prescribed limit except for the purpose of meeting pre-existing contracts is void.<sup>4</sup>

How Far Excessive Tax Void. — A tax in excess of the prescribed limit is void only as to the excess, provided such excess can be legally separated from the valid portion of the tax;<sup>5</sup> but where the illegality permeates the whole tax, so

*New York.* — *Rome Bank v. Rome*, 18 N. Y. 38; *Tift v. Buffalo*, 82 N. Y. 204.

*Ohio.* — *Hill v. Higdon*, 5 Ohio St. 248, 67 Am. Dec. 289.

*Virginia.* — *Virginia, etc., R. Co. v. Washington County*, 30 Gratt. (Va.) 471.

*Wisconsin.* — *Weeks v. Milwaukee*, 10 Wis. 242; *Lumsden v. Cross*, 10 Wis. 282.

1. Courts Cannot Interfere — *California.* — *Nouques v. Douglass*, 7 Cal. 65.

*Kansas.* — *Hines v. Leavenworth*, 3 Kan. 186.

*Michigan.* — *People v. Mahaney*, 13 Mich. 481.

*Missouri.* — *St. Joseph Board of Public Schools v. Patten*, 62 Mo. 444.

*New York.* — *Rome Bank v. Rome*, 18 N. Y. 38; *Clarke v. Rochester*, 28 N. Y. 605; *Tift v. Buffalo*, 82 N. Y. 205.

*Ohio.* — *Hill v. Higdon*, 5 Ohio St. 248, 67 Am. Dec. 289; *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 159; *Maloy v. Marietta*, 11 Ohio St. 636; *Gest v. Cincinnati*, 26 Ohio St. 275.

*Wisconsin.* — *Weeks v. Milwaukee*, 10 Wis. 242; *Lumsden v. Cross*, 10 Wis. 282.

Sufficient Compliance by Legislature. — See *Tift v. Buffalo*, 82 N. Y. 204; *Townsend v. New York*, 16 Hun (N. Y.) 362.

2. Applies to Subsequent Contracts — *United States.* — *Louisiana v. Pilsbury*, 105 U. S. 278. And see *Stewart v. Jefferson Police Jury*, 116 U. S. 135.

*Louisiana.* — *Shields v. Pipes*, 31 La. Ann. 765.

*Missouri.* — *State v. Shortridge*, 56 Mo. 126.

*Nebraska.* — *Chase County v. Chicago, etc., R. Co.*, 58 Neb. 274.

*North Carolina.* — *Street v. Craven County*, 70 N. Car. 644; *Mauney v. Montgomery County*, 71 N. Car. 486; *Clifton v. Wynne*, 80 N. Car. 145.

*Wisconsin.* — *State v. Tomahawk*, 96 Wis. 73.

Power to Tax Co-extensive with Power to Incur Debt. — *Nouques v. Douglass*, 7 Cal. 65; *Alcorn v. Hamer*, 38 Miss. 652; *Com. v. Allegheny County*, 37 Pa. St. 277; *Com. v. Perkins*, 43 Pa. St. 400. And see *Louisville v. Murphy*, 86 Ky. 53; *State v. Milwaukee*, 25 Wis. 122.

Party Presumed to Know Limitation. — *Wallace v. San Jose*, 29 Cal. 181.

3. Restriction Does Not Apply to Existing Contracts — *Arkansas.* — *Vance v. Little Rock*, 30 Ark. 435.

*Illinois.* — *Chiniquy v. People*, 78 Ill. 570; *Pope County v. Sloan*, 92 Ill. 177.

*Iowa.* — *Clark v. Davenport*, 14 Iowa 494.

*Louisiana.* — *State v. New Orleans*, 29 La. Ann. 863; *State v. New Orleans*, 32 La. Ann. 709; *Saloy v. New Orleans*, 33 La. Ann. 79.

*Missouri.* — *State v. Hannibal, etc., R. Co.*, 101 Mo. 120.

*North Carolina.* — *Pegram v. Cleveland County*, 64 N. Car. 557; *Haughton v. Jones County*, 70 N. Car. 466; *Brothers v. Currituck County*, 70 N. Car. 726; *Street v. Craven County*, 70 N. Car. 644; *Mauney v. Montgomery County*, 71 N. Car. 486; *Trull v. Madison County*, 72 N. Car. 388; *French v. New Hanover County*, 74 N. Car. 692; *Clifton v. Wynne*, 80 N. Car. 145.

And see *infra*, this title, *Municipal Taxation*.

For the Purpose of Paying Off Bonds, taxation is governed by the constitutional restrictions in force at the time of the vote of the people to issue such bonds, and not at the date of their issuance. *Chiniquy v. People*, 78 Ill. 570.

A Judgment Based on a Tort is not a contract within the meaning of this rule. *State v. New Orleans*, 32 La. Ann. 709; *Saloy v. New Orleans*, 33 La. Ann. 79.

4. Tax in Excess of Limit Void — *Arkansas.* — *Vance v. Little Rock*, 30 Ark. 435.

*California.* — *Nouques v. Douglass*, 7 Cal. 65.

*Florida.* — *Holland v. State*, 15 Fla. 455.

*Illinois.* — *Springfield v. Edwards*, 84 Ill. 626.

*Nebraska.* — *Chase County v. Chicago, etc., R. Co.*, 58 Neb. 274.

*New York.* — *People v. Kings County*, 52 N. Y. 556.

*North Carolina.* — *Mauney v. Montgomery County*, 71 N. Car. 486; *Trull v. Madison County*, 72 N. Car. 388.

An Injunction is the Proper Remedy to prevent the collection of a tax levied in excess of the legal limit. *Overall v. Ruenzi*, 67 Mo. 203; *Black v. McGonigle*, 103 Mo. 192; *Trull v. Madison County*, 72 N. Car. 388; *Cleveland v. Heislev*, 41 Ohio St. 670.

5. Void as to Excess Only Where Separable — *Alabama.* — *Elyton Land Co. v. Birmingham*, 89 Ala. 477; *Francis v. Southern R. Co.*, 124 Ala. 544.

*Arkansas.* — *Graham v. Parham*, 32 Ark. 676.

*Colorado.* — *People v. Scott*, 9 Colo. 422.

that such separation cannot be made, the entire tax must fail.<sup>1</sup>

**3. Restriction by Treaty.** — The Constitution of the United States provides that all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.<sup>2</sup> Therefore, the imposition of taxes by a state law which is repugnant to the stipulations of any treaty made under the authority of the United States is void.<sup>3</sup> The Federal Constitution makes no distinction, however, between treaties made under authority of the United States and the statutes enacted by Congress, but both are declared to be the supreme law of the land. Therefore, the power of Congress to impose taxes is not restricted by any existing treaty, though a subsequent treaty, as the latest expression of the law-making power, may operate to repeal a previous tax law.<sup>4</sup>

**4. Exercise of Power — a. LEGISLATIVE FUNCTION.** — The power to tax is essentially legislative in its nature,<sup>5</sup> and it is vested in the legislature of every state by a general grant of legislative power, whether specifically enumerated

*Illinois.* — *Baltimore, etc., R. Co. v. People*, 200 Ill. 541.

*Massachusetts.* — *Libby v. Burnham*, 15 Mass. 144.

*Missouri.* — *State v. St. Louis, etc., R. Co.*, 74 Mo. 163; *Brookfield v. Tooley*, 141 Mo. 619; *State v. Stephens*, 146 Mo. 662, 69 Am. St. Rep. 625.

*Nebraska.* — *State v. Gosper County*, 14 Neb. 22; *Chicago, etc., R. Co. v. Nemaha County*, 50 Neb. 393; *Grand Island, etc., R. Co. v. Dawes County*, 62 Neb. 44; *Dakota County v. Chicago, etc., R. Co.*, 63 Neb. 405; *Union Pac. R. Co. v. Howard County*. (Neb. 1902) 92 N. W. Rep. 579.

*North Carolina.* — *Trull v. Madison County*, 72 N. Car. 388; *Clifton v. Wynne*, 80 N. Car. 149; *County Board of Education v. Carrituck County*, 107 N. Car. 110.

*Ohio.* — *Kemper v. McClelland*, 19 Ohio 308; *Cleveland v. Heisley*, 41 Ohio St. 670.

*Pennsylvania.* — *Moore v. Alleghany City*, 18 Pa. St. 55.

*Texas.* — *Ex p. Schmidt*, 2 Tex. App. 196.

**1. Whole Tax Void.** — *Young v. Henderson*, 76 N. Car. 420; *Russell v. Ayer*, 120 N. Car. 180.

**2.** Const. of U. S., art. 6, § 3. And see generally the title TREATIES.

**3. Treaties as Restricting State Power of Taxation.** — *Cherokee Tobacco Case*, 11 Wall. (U. S.) 616; *People v. Naglee*, 1 Cal. 232, 52 Am. Dec. 312; *Fellows v. Denniston*, 23 N. Y. 420.

**4. Federal Power of Taxation Not Restricted by Treaties.** — *Ropes v. Clinch*, 8 Blatchf. (U. S.) 304; *Taylor v. Morton*, 2 Curt. (U. S.) 454, *affirmed* 2 Black (U. S.) 481; *Cherokee Tobacco Case*, 11 Wall. (U. S.) 616, *affirming* 1 Dill. (U. S.) 264; *Edye v. Robertson*, 112 U. S. 580; *Whitney v. Robertson*, 124 U. S. 190. And see generally the title TREATIES.

**5. Taxation Exclusively a Legislative Power — United States.** — *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 419; *Savings Soc. v. Colte*, 6 Wall. (U. S.) 606; *Heine v. Levee Com'rs*, 19 Wall. (U. S.) 655; *State Railroad Tax Cases*, 92 U. S. 615; *U. S. v. New Orleans*, 98 U. S. 381; *Meriwether v. Garrett*, 102 U. S. 472; *Wolff v. New Orleans*, 103 U. S. 358; *New Orleans Waterworks Co. v. Louisiana Sugar Refining*

*Co.*, 125 U. S. 18; *U. S. v. New Orleans*, 2 Woods (U. S.) 230.

*Alabama.* — *Perry County v. Selma, etc., R. Co.*, 58 Ala. 546.

*California.* — *People v. Coleman*, 4 Cal. 46, 60 Am. Dec. 581; *People v. Seymour*, 16 Cal. 332, 76 Am. Dec. 521; *Houghton v. Austin*, 47 Cal. 646; *San Jose v. San Jose, etc., R. Co.*, 53 Cal. 475.

*Illinois.* — *Sawyer v. Alton*, 4 Ill. 130; *People v. Worthington*, 21 Ill. 174, 74 Am. Dec. 86; *People v. Salomon*, 51 Ill. 37; *McVeagh v. Chicago*, 49 Ill. 318; *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561; *Eurigh v. People*, 79 Ill. 214; *People v. Morgan*, 90 Ill. 558.

*Iowa.* — *Hanson v. Vernon*, 27 Iowa 46, 1 Am. Rep. 215; *Stewart v. Polk County*, 30 Iowa 9, 1 Am. Rep. 238; *Davenport v. Chicago, etc., R. Co.*, 38 Iowa 643; *State v. Des Moines*, 103 Iowa 76, 64 Am. St. Rep. 157.

*Kansas.* — *Auditor v. Atchison, etc., R. Co.*, 6 Kan. 500, 7 Am. Rep. 575.

*Kentucky.* — *Lexington v. McQuillan*, 9 Dana (Ky.) 513, 35 Am. Dec. 159.

*Maryland.* — *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572.

*Michigan.* — *Warren v. Grand Haven*, 30 Mich. 24; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654.

*Minnesota.* — *Sanborn v. Rice County*, 9 Minn. 273.

*Missouri.* — *Glasgow v. Rowse*, 43 Mo. 479; *St. Louis v. Laughlin*, 49 Mo. 559; *American Union Express Co. v. St. Joseph*, 66 Mo. 675, 27 Am. Rep. 382.

*Nebraska.* — *Turner v. Althaus*, 6 Neb. 54.

*Nevada.* — *Gibson v. Mason*, 5 Nev. 283; *State v. Central Pac. R. Co.*, 21 Nev. 260.

*New Jersey.* — *Munday v. Assessors*, 43 N. J. L. 338.

*New York.* — *People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *People v. Flagg*, 46 N. Y. 401; *Gordon v. Cornes*, 47 N. Y. 608; *Astor v. New York*, 37 N. Y. Super. Ct. 560; *Matter of Curren*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 432, *affirmed* 38 N. Y. App. Div. 82.

*Ohio.* — *Scovill v. Cleveland*, 1 Ohio St. 126; *Cass Tp. v. Dillon*, 16 Ohio St. 38; *State v. Harris*, 17 Ohio St. 608; *State v. Wilkesville Tp.*, 20

in the constitution among the powers to be exercised by the legislature or not.<sup>1</sup> According to this principle, it is exclusively within the province of the legislature to determine all questions of time, occasion, and extent in regard to the imposition of taxes,<sup>2</sup> and also the subjects on which the power of taxation may be exercised.<sup>3</sup> In the absence of constitutional limitations and

Ohio St. 288; *State v. Richland Tp.*, 20 Ohio St. 362; *Lima v. McBride*, 34 Ohio St. 338; *State v. Franklin County*, 35 Ohio St. 458; *Board of Education v. McLandsborough*, 36 Ohio St. 227, 38 Am. Rep. 582.

*Pennsylvania*.—*Kirby v. Shaw*, 19 Pa. St. 258; *Sharpless v. Philadelphia*, 21 Pa. St. 147, 59 Am. Dec. 759; *Philadelphia v. Tryon*, 35 Pa. St. 401.

*South Carolina*.—*Morton v. Comptroller Gen.*, 4 S. Car. 430; *State v. Hagood*, 13 S. Car. 46.

*Tennessee*.—*Luehrman v. Taxing Dist.*, 2 Lea (Tenn.) 443; *Waterhouse v. Cleveland Public Schools*, 9 Baxt. (Tenn.) 398; *Hope v. Deaderick*, 8 Humph. (Tenn.) 1, 47 Am. Dec. 597; *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308; *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 151.

*West Virginia*.—*Wells v. Board of Education*, 20 W. Va. 157.

**Territory Attached to a County for Judicial Purposes** is not by reason of that fact within the taxing power of the county. *Foster v. Pryor*, 189 U. S. 325; *Yellowstone County v. Northern Pac. R. Co.*, 10 Mont. 414.

**In a Despotism** the power of taxation is exercised at the will of a monarch, but in a republic it must be in accordance with the organic law. *Kirby v. Shaw*, 19 Pa. St. 260.

**1. Grant of Legislative Power Includes Taxation**.—*Glasgow v. Rowse*, 43 Mo. 479; *Board of Education v. State*, 51 Ohio St. 531, 46 Am. St. Rep. 588.

The provision of the organic act of *Hawaii* that the legislative power shall extend to "all rightful subjects of legislation" includes full and comprehensive power to legislate in the matter of taxation. *Peacock v. Pratt*, (C. C. A.) 121 Fed. Rep. 772.

**2. Determination as to Time, Occasion, and Extent**—*United States*.—*Martin v. Hunter*, 1 Wheat. (U. S.) 326; *Lane County v. Oregon*, 7 Wall. (U. S.) 71; *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 433; *Ex p. McCardle*, 7 Wall. (U. S.) 514; *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284; *Foreign-held Bonds Case*, 15 Wall. (U. S.) 300; *Union Pac. R. Co. v. Peniston*, 18 Wall. (U. S.) 6; *Erie R. Co. v. Pennsylvania*, 21 Wall. (U. S.) 492.

*California*.—*Ex p. Newman*, 9 Cal. 502; *People v. Burr*, 13 Cal. 343; *People v. Seymour*, 16 Cal. 332, 76 Am. Dec. 521.

*Georgia*.—*Lyon v. Morris*, 15 Ga. 480; *Loughbridge v. Harris*, 42 Ga. 500; *Linton v. Athens*, 53 Ga. 588.

*Illinois*.—*Shaw v. Dennis*, 10 Ill. 418; *Bank of Republic v. Hamilton County*, 21 Ill. 53; *Cleghorn v. Postlewaite*, 43 Ill. 428; *Darling v. Gunn*, 50 Ill. 424; *Porter v. Rockford, etc., R. Co.*, 76 Ill. 576.

*Indiana*.—*Wright v. Defrees*, 8 Ind. 298.

*Iowa*.—*Bankhead v. Brown*, 25 Iowa 540.

*Kentucky*.—*Lexington v. McQuillan*, 9 Dana

(Ky.) 513, 35 Am. Dec. 159; *Anderson v. Mayfield*, 93 Ky. 230.

*Louisiana*.—*State v. Maxwell*, 27 La. Ann. 722.

*Maryland*.—*Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572.

*Massachusetts*.—*Com. v. People's Five Cents Sav. Bank*, 5 Allen (Mass.) 428; *Lowell v. Oliver*, 8 Allen (Mass.) 247; *Cushing v. Newburyport*, 10 Met. (Mass.) 508; *Coburn v. Richardson*, 16 Mass. 213.

*Michigan*.—*Sears v. Cottrell*, 5 Mich. 251; *Robertson v. State Land Office Com'r*, 44 Mich. 274; *Sheley v. Detroit*, 45 Mich. 431.

*Missouri*.—*Hamilton v. St. Louis County Ct.*, 15 Mo. 5; *State v. St. Louis County Ct.*, 34 Mo. 546; *Glasgow v. Rowse*, 43 Mo. 489; *State v. Hays*, 49 Mo. 604; *Hannibal v. Marion County*, 69 Mo. 571.

*Nebraska*.—*Bradshaw v. Omaha*, 1 Neb. 16; *Turner v. Althaus*, 6 Neb. 54.

*Nevada*.—*Gibson v. Mason*, 5 Nev. 283; *Ex p. Spinney*, 10 Nev. 323; *State v. Central Pac. R. Co.*, 21 Nev. 260.

*New Hampshire*.—*Concord R. Co. v. Greely*, 17 N. H. 47.

*New York*.—*Guilford v. Chenango County*, 13 N. Y. 143; *People v. Draper*, 15 N. Y. 545; *Matter of Townsend*, 39 N. Y. 174; *Genet v. Brooklyn*, 99 N. Y. 296; *Matter of McPherson*, 104 N. Y. 306, 58 Am. Rep. 502; *De Camp v. Eveland*, 19 Barb. (N. Y.) 81; *Clarke v. Rochester*, 24 Barb. (N. Y.) 446; *Astor v. New York*, 37 N. Y. Super. Ct. 560.

*North Carolina*.—*Cowles v. Brittain*, 2 Hawks (9 N. Car.) 204.

*Ohio*.—*Hill v. Higdon*, 5 Ohio St. 248, 67 Am. Dec. 289; *Northern Indiana R. Co. v. Connelly*, 10 Ohio St. 165; *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521.

*Oregon*.—*King v. Portland*, 2 Oregon 154.

*Pennsylvania*.—*Henry v. Horstick*, 9 Watts (Pa.) 412; *McGregor v. Montgomery*, 4 Pa. St. 237; *Kirby v. Shaw*, 19 Pa. St. 261; *Philadelphia v. Field*, 58 Pa. St. 320; *Durach's Appeal*, 62 Pa. St. 491.

*South Carolina*.—*State v. Allen*, 2 McCord L. (S. Car.) 55.

*Vermont*.—*In re Powers*, 25 Vt. 265.

*Virginia*.—*Goddin v. Crump*, 8 Leigh (Va.) 154.

*West Virginia*.—*Lusher v. Scites*, 4 W. Va. 11.

*Wisconsin*.—*Plumer v. Marathon County*, 46 Wis. 164; *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37.

The reasonableness, justice, and expediency of an act are questions for legislative determination. *Ex p. Spinney*, 10 Nev. 323.

**3. Determination as to Subjects of Taxation**—*United States*.—*Lane County v. Oregon*, 7 Wall. (U. S.) 71; *St. Louis v. Wiggins Ferry Co.*, 11 Wall. (U. S.) 429; *Union Pac. R. Co. v. Peniston*, 18 Wall. (U. S.) 5; *North Missouri*

restrictions,<sup>1</sup> the power of the legislature is plenary and absolute, and the only security against its abuse is to be found in the integrity and sense of justice of the members of the legislature and their responsibility to the people.<sup>2</sup>

**Executive and Ministerial officers** may enforce tax laws, but they do not possess and may not exercise the power of taxation, and therefore they cannot add to or vary any tax lawfully levied.<sup>3</sup>

**Judicial Functions Respecting Taxation.**—The exercise of the taxing power is sometimes committed to a judicial body, but the action of such body in that respect is *quasi*-legislative and not judicial.<sup>4</sup> The courts cannot, by virtue of their judicial power, interfere with the legislature in the exercise of the taxing power so long as no constitutional provisions are violated.<sup>5</sup> Even a

R. Co. v. Maguire, 20 Wall. (U. S.) 46; Kirtland v. Hotchkiss, 100 U. S. 491.

California.—Beals v. Amador County, 35 Cal. 624.

Georgia.—Athens v. Long, 54 Ga. 330; Waring v. Savannah, 60 Ga. 97.

Iowa.—Tallman v. Treasurer, 12 Iowa 531; Dubuque v. Chicago, etc., R. Co., 47 Iowa 196.

Kentucky.—Lexington v. McQuillan, 9 Dana (Ky.) 513, 35 Am. Dec. 159.

Michigan.—Woodbridge v. Detroit, 8 Mich. 274.

Nebraska.—Turner v. Althaus, 6 Neb. 54.

New York.—De Camp v. Eveland, 19 Barb. (N. Y.) 81.

North Carolina.—Pullen v. Wake County, 66 N. Car. 361.

Pennsylvania.—Extension of Hancock St., 18 Pa. St. 30; State Bank v. Com., 19 Pa. St. 144.

Vermont.—Catlin v. Hull, 21 Vt. 161.

Wisconsin.—Wisconsin Cent. R. Co. v. Taylor County, 52 Wis. 37.

**Property Temporarily Within the State.**—The right of a state to tax all subjects within its jurisdiction is unquestionable; and this right may, in the discretion of the legislature, be exercised with respect to property coming temporarily within its territory, whether for trade, business, or convenience, unless such exercise conflicts with some constitutional limitation. Hall v. American Refrigerator Transit Co., 24 Colo. 291, 65 Am. St. Rep. 223. See also Ames v. People, 26 Colo. 83; American Refrigerator Transit Co. v. Adams, 28 Colo. 119.

1. As to limitations and restrictions by constitutional provisions, see *supra*, this section, *Constitutional Restrictions*.

**2. Security Against Abuse of Power—United States.**—Nathan v. Louisiana, 8 How. (U. S.) 82; Providence Bank v. Billings, 4 Pet. (U. S.) 561; McCulloch v. Maryland, 4 Wheat. (U. S.) 419; Osborn v. U. S. Bank, 9 Wheat. (U. S.) 738; Meriwether v. Garrett, 102 U. S. 472; Railroad Tax Cases, 13 Fed. Rep. 726.

Georgia.—Johnston v. Macon, 62 Ga. 652.

Illinois.—Shaw v. Dennis, 10 Ill. 418.

Iowa.—Tallman v. Treasurer, 12 Iowa 531; Dubuque v. Chicago, etc., R. Co., 47 Iowa 201.

Missouri.—State v. Rainey, 74 Mo. 236.

Nevada.—Ex p. Robinson, 12 Nev. 263, 28 Am. Rep. 794.

New York.—People v. Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; People v. Flagg, 46 N. Y. 401; Astor v. New York, 37 N. Y. Super. Ct. 539.

North Carolina.—Brodnax v. Groom, 64 N. Car. 244.

Oregon.—King v. Portland, 2 Oregon 147.

Pennsylvania.—Felty v. Uhler, 10 Phila. (Pa.) 512, 30 Leg. Int. (Pa.) 330; Sharpless v. Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759; Wharton v. School Directors, 42 Pa. St. 358; Philadelphia v. Field, 58 Pa. St. 320.

Wisconsin.—Knowlton v. Rock County, 9 Wis. 410.

The power will not be presumed to have been abused. Kneeder v. Lane, 45 Pa. St. 238; Metropolitan Bank v. Van Dyck, 27 N. Y. 400; Cowles v. Brittain, 2 Hawks (9 N. Car.) 204.

**3. Function of Ministerial Officers.**—State v. Bentley, 23 N. J. L. 532; State v. Flavell, 24 N. J. L. 370. And see Bragg v. Tuffits, 49 Ark. 554.

**4. Judicial Functions Respecting Taxation.**—Delaware Railroad Tax, 18 Wall. (U. S.) 206; Heine v. Levee Com'rs, 19 Wall. (U. S.) 655; State Railroad Tax Cases, 92 U. S. 575; St. Louis, etc., R. Co. v. State, 47 Ark. 323; Baldwin v. Shine, 84 Ky. 502; Houseman v. Montgomery, 58 Mich. 364; Reynolds v. Paterson, 49 N. J. L. 380; Philadelphia Assoc., etc., v. Wood, 39 Pa. St. 73.

In Tennessee the power to make tax levies is conferred by the legislature on the county courts. Felton v. Hamilton County, 38 C. C. A. 432, 97 Fed. Rep. 823.

**5. Courts Cannot Interfere with Legislature Acting Within Constitutional Limits—United States.**—Cooper v. Telfair, 4 Dall. (U. S.) 14; State Tax on Railway Gross Receipts, 15 Wall. (U. S.) 284; Delaware Railroad Tax, 18 Wall. (U. S.) 206; Kirtland v. Hotchkiss, 100 U. S. 491; Exchange Bank Tax Cases, 21 Fed. Rep. 99.

California.—Beals v. Amador County, 35 Cal. 624.

Colorado.—People v. Lothrop, 3 Colo. 465; Price v. Kramer, 4 Colo. 546.

Georgia.—White v. State, 51 Ga. 254; Athens v. Long, 54 Ga. 330; Decker v. McGowan, 59 Ga. 806; Burke v. Speer, 59 Ga. 353; Wright v. Southwestern R. Co., 64 Ga. 790.

Iowa.—Stewart v. Polk County, 30 Iowa 9, 1 Am. Rep. 238.

Massachusetts.—Norris v. Boston, 4 Met. (Mass.) 282.

Michigan.—Sears v. Cottrell, 5 Mich. 251; Upton v. Kennedy, 36 Mich. 215.

Nebraska.—State v. Lancaster County, 4 Neb. 537, 19 Am. Rep. 641; Turner v. Althaus, 6 Neb. 54; Wheeler v. Plattsmouth, 7 Neb. 270; Pleuler v. State, 11 Neb. 547.

failure on the part of the legislature to perform the duty imposed on it by the constitution of the state in respect to taxation ordinarily lays no foundation for judicial correction,<sup>1</sup> though the levy of the taxes is a legal duty, the performance of which may be enforced by judicial action.<sup>2</sup>

**Legislature Exceeding Constitutional Limits of Power.**—The courts have the power in particular cases, to determine whether the legislature has exceeded the constitutional limits of its power and to declare a tax law void in case such limits have been transgressed,<sup>3</sup> and when a tax has been judicially declared to exceed the constitutional limits, no subsequent statute can nullify such decision.<sup>4</sup> But a tax law cannot be declared void merely because it is opposed to the spirit of the constitution;<sup>5</sup> the conflict with the constitution must be clear.<sup>6</sup>

*Ohio.*—Maloy v. Marietta, 11 Ohio St. 639; State v. McCann, 21 Ohio St. 210.

*Oregon.*—King v. Portland, 2 Oregon 147.

*Pennsylvania.*—Wharton v. School Directors, 42 Pa. St. 358; Maltby v. Reading, etc., R. Co., 52 Pa. St. 145; Durach's Appeal, 62 Pa. St. 491.

*Wisconsin.*—Mills v. Charleiton, 29 Wis. 400, 9 Am. Rep. 578; Philleo v. Hiles, 42 Wis. 527; Schettler v. Ft. Howard, 43 Wis. 48; Goff v. Outagamie County, 43 Wis. 55; Plumer v. Marathon County, 46 Wis. 175.

If the legislature keeps within its proper sphere of action, and does not impose burdens under the name of taxation which are not taxation in fact, its decisions as to what is proper, just, and politic, both in respect to the subjects of taxation and the kind and amount of taxes, must be final and conclusive. Turner v. Althaus, 6 Neb. 54; Providence Bank v. Billings, 4 Pet. (U. S.) 561; Shaw v. Dennis, 10 Ill. 418; Wynehamer v. People, 13 N. Y. 404.

In doubtful cases the courts should not interfere with the legislative discretion, and in all cases the legislative determination is entitled to great respect. Hanson v. Vernon, 27 Iowa 28, 1 Am. Rep. 215; Board of Education v. State, 51 Ohio St. 531, 46 Am. St. Rep. 588; Brodhead v. Milwaukee, 19 Wis. 624, 88 Am. Dec. 711.

**The Burden of Proof** is on him who assails the action of the legislature, and to warrant judicial interference he must make out a clear case of violation of constitutional provisions. Brown v. Denver, 3 Colo. 169.

**1. Inaction of Legislature Not Ground for Judicial Interference.**—State v. Board of Revenue, 73 Ala. 65; McLean County v. Deposit Bank, 81 Ky. 254; Turner v. Althaus, 6 Neb. 54; Hill v. Higdon, 5 Ohio St. 248, 67 Am. Dec. 289; Maloy v. Marietta, 11 Ohio St. 636. And see Cannon County v. Hoodenpyle, 7 Humph. (Tenn.) 147; Munday v. Assessors, 43 N. J. L. 338; State Railroad Tax Cases, 92 U. S. 575.

**2. Exercise of Taxing Power as a Duty Enforceable at Law.**—See *infra*, this title, *Levy*. See also MANDAMUS, vol. 19, pp. 864, 892.

**3. Legislature Exceeding Constitutional Limits of Power.**—United States.—Ketchum v. Pacific R. Co., 4 Dill. (U. S.) 41; Cummings v. Merchants' Nat. Bank, 101 U. S. 153.

*California.*—People v. Eddy, 43 Cal. 331, 13 Am. Rep. 143.

*Kansas.*—Kansas Pac. R. Co. v. Ellis County, 19 Kan. 584.

*Kentucky.*—Howell v. Bristol, 8 Bush (Ky.) 493.

*Maine.*—Perkins v. Milford, 59 Me. 315.

*Maryland.*—Waters v. State, 1 Gill (Md.)

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*Massachusetts.*—Com. v. People's Five Cents Sav. Bank, 5 Allen (Mass.) 428; Lowell v. Oliver, 8 Allen (Mass.) 247.

*New York.*—People v. Brooklyn, 4 N. Y. 419, 55 Am. Dec. 266; Weismer v. Douglas, 64 N. Y. 91, 21 Am. Rep. 586; Bloomfield, etc., Gas Light Co. v. Richardson, 63 Barb. (N. Y.) 437; Matter of Straus, 44 N. Y. App. Div. 428.

*North Carolina.*—Pullen v. Wake County, 66 N. Car. 361.

*Ohio.*—Board of Education v. State, 51 Ohio St. 531, 46 Am. St. Rep. 588.

*Pennsylvania.*—Pennsylvania Bank v. Com., 19 Pa. St. 144; Sharpless v. Philadelphia, 21 Pa. St. 147, 59 Am. Dec. 759; New York, etc., R. Co. v. Sabin, 26 Pa. St. 242; Gault's Appeal, 33 Pa. St. 94; Wharton v. School Directors, 42 Pa. St. 358; Maltby v. Reading, etc., R. Co., 52 Pa. St. 140; Weber v. Reinhard, 73 Pa. St. 370, 13 Am. Rep. 747.

*Tennessee.*—Taylor v. Chandler, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308.

*Virginia.*—Ould v. Richmond, 23 Gratt. (Va.) 473, 14 Am. Rep. 139.

4. See the title CONSTITUTIONAL LAW, vol. 6, p. 1041.

**5. Violation of Spirit of Constitution.**—State v. Traders' Bank, 41 La. Ann. 329; Weber v. Reinhard, 73 Pa. St. 370, 13 Am. Rep. 747; Luehrman v. Taxing Dist., 2 Lea (Tenn.) 440; *In re Powers*, 25 Vt. 265. But see People v. Gallagher, 4 Mich. 244.

**6. Clear Conflict with Constitution.**—United States.—Cooper v. Telfair, 4 Dall. (U. S.) 14; Fletcher v. Peck, 6 Cranch (U. S.) 128; Livingston County v. Darlington, 101 U. S. 407.

*Arkansas.*—Cairo, etc., R. Co. v. Parks, 32 Ark. 131.

*Illinois.*—Lane v. Doe, 4 Ill. 238, 36 Am. Dec. 543; People v. Marshall, 6 Ill. 672; Chicago, etc., R. Co. v. Smith, 62 Ill. 268, 14 Am. Rep. 99; Richards v. Raymond, 92 Ill. 612, 34 Am. Rep. 151.

*Kentucky.*—Lexington v. McQuillan, 9 Dana (Ky.) 513, 35 Am. Dec. 159.

*Maryland.*—Baltimore v. State, 15 Md. 376, 74 Am. Dec. 572.

*Massachusetts.*—Fisher v. McGirr, 1 Gray (Mass.) 1, 61 Am. Dec. 381; Adams v. Howe, 14 Mass. 340, 7 Am. Dec. 216.

*Michigan.*—Sears v. Cottrell, 5 Mich. 251; Tyler v. People, 8 Mich. 333.

*Nebraska.*—Turner v. Althaus, 6 Neb. 54; Pleuler v. State, 11 Neb. 547.



**b. MODE OF EXERCISE.** — The mode of exercising the power of taxation is vested exclusively in the legislature subject only to such limitations as may be imposed by constitutional provisions,<sup>1</sup> and therefore the legislature may at any time change the mode of imposing taxes, and may change the mode of collecting taxes already imposed.<sup>2</sup> It may classify property for the purpose of taxing it,<sup>3</sup> and it may create a new system of taxation so as to bring in property of a new character theretofore untaxed with some other property incidental thereto and worthless without it.<sup>4</sup>

**Retrospective Legislation.** — As a general rule tax laws should be prospective in their operation,<sup>5</sup> and they are to be so construed whenever it is possible to do so.<sup>6</sup> But retrospective tax laws are valid, unless legislation of that char-

*Pennsylvania.* — *Felty v. Uhler*, 10 Phila. (Pa.) 513, 30 Leg. Int. (Pa.) 330; *Wharton v. School Directors*, 42 Pa. St. 358; *Durach's Appeal*, 62 Pa. St. 491; *Roup's Case*, 81\* Pa. St. 211; *Zimmerman v. Perkiomen, etc.*, *Turnpike Co.*, 81\* Pa. St. 96.

**1. Mode of Exercise of Taxing Power** — *United States.* — *New York v. Tax Com'rs*, 2 Black (U. S.) 620; *Lane County v. Oregon*, 7 Wall. (U. S.) 71; *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 433; *St. Louis v. Wiggins Ferry Co.*, 11 Wall. (U. S.) 429; *Foreign-held Bonds Case*, 15 Wall. (U. S.) 300; *Union Pac. R. Co. v. Peniston*, 18 Wall. (U. S.) 5; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Williams v. Albany*, 122 U. S. 154.

*California.* — *People v. Eddy*, 43 Cal. 331, 13 Am. Rep. 143.

*Dakota.* — *Frost v. Flick*, 1 Dak. 131.

*Georgia.* — *Athens v. Long*, 54 Ga. 330; *Waring v. Savannah*, 60 Ga. 97.

*Illinois.* — *Porter v. Rockford, etc.*, R. Co., 76 Ill. 561; *Eurigh v. People*, 79 Ill. 214.

*Iowa.* — *Tallman v. Treasurer*, 12 Iowa 531.

*Kentucky.* — *Lexington v. McQuillan*, 9 Dana (Ky.) 513, 35 Am. Dec. 159; *Louisville, etc.*, R. Co. v. Com., 10 Bush (Ky.) 43.

*Louisiana.* — *Slack v. Ray*, 26 La. Ann. 675; *Morrison v. Larkin*, 26 La. Ann. 699.

*Massachusetts.* — *Oliver v. Washington Mills*, 11 Allen (Mass.) 268.

*Michigan.* — *Robertson v. State Land Office Com'r*, 44 Mich. 274.

*Mississippi.* — *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508; *Vaughan v. Swayzie*, 56 Miss. 705.

*Nebraska.* — *Wheeler v. Plattsmouth*, 7 Neb. 270.

*Nevada.* — *State v. Consolidated Virginia Min. Co.*, 16 Nev. 432; *State v. Central Pac. R. Co.*, 21 Nev. 260.

*New Jersey.* — *Public School Trustees v. Trenton*, 30 N. J. Eq. 667.

*New York.* — *People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Clarke v. Rochester*, 24 Barb. (N. Y.) 446; *People v. New York Floating Dry Dock Co.*, (Supm. Ct.) 63 How. Pr. (N. Y.) 451.

*North Carolina.* — *Cowles v. Brittain*, 2 Hawks (9 N. Car.) 204.

*Oregon.* — *King v. Portland*, 2 Oregon 154.

*Tennessee.* — *Lipscomb v. Dean*, 1 Lea (Tenn.) 550; *Luehrman v. Taxing Dist.*, 2 Lea (Tenn.) 444.

*Wisconsin.* — *Warden v. Fond du Lac County*, 14 Wis. 618.

**2. Change of Mode.** — *Bank of Republic v.*

*Hamilton County*, 21 Ill. 53; *Hosmer v. People*, 96 Ill. 58; *Louisville, etc.*, R. Co. v. Com., 10 Bush (Ky.) 43; *Detroit v. Detroit, etc.*, *Plank Road Co.*, 43 Mich. 140; *Weister v. Hade*, 52 Pa. St. 479; *Bellos v. Weeks*, 41 Vt. 590; *Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578.

**3. Classification of Property for Taxation.** — The legislature has the power to classify property as personal and real for the purpose of taxation, and in such classification it is not controlled by common-law distinctions between these classes of property. *Missouri, etc.*, R. Co. v. *Miami County*, (Kan. 1903) 73 Pac. Rep. 103. See generally *supra*, this section, *Constitutional Restrictions* — *Restrictions in State Constitutions* — *Power of Legislature to Classify Property*.

**4. Subjecting New Property to Taxation.** — *People v. Tax Com'rs*, 174 N. Y. 444, reversing 79 N. Y. App. Div. 183. This case holds that the home rule provision of the constitution of New York, that "all city, town, and village officers whose election or appointment is not provided for by this constitution shall be elected by the electors of such cities, towns, and villages, or of some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose," when invoked in relation to taxation should be considered in connection with the supreme taxing power of the legislature, and that therefore such provision does not deprive the legislature of power to appoint a state board of tax commissioners for the purpose of general taxation of all special franchises, and declaring such franchises to be real estate and "to include the value of the tangible property \* \* \* situated in, upon, under, or above any street, highway, public place, or public waters in connection with the special franchise."

**5. Tax Laws Generally Prospective.** — *Clark v. Hall*, 19 Mich. 356; *Smith v. Humphrey*, 20 Mich. 398; *Auditor Gen. v. Monroe County*, 36 Mich. 70; *Com. v. Pennsylvania Ins. Co.*, 13 Pa. St. 165; *Price v. Mott*, 52 Pa. St. 315.

As to retrospective laws generally, see the title *STATUTES*, vol. 26, p. 692 *et seq.*

In *Locke v. New Orleans*, 4 Wall. (U. S.) 172, it was held that a statute which simply authorized the imposition of a tax accrued on a previous assessment was not a retrospective tax.

**6. Prospective Construction Favored** — *United States.* — *Sturges v. Carter*, 114 U. S. 511.

*Alabama.* — *Boyce v. Holmes*, 2 Ala. 54; *Barnes v. Mobile*, 19 Ala. 707; *New England Mortg. Security Co. v. Board of Revenue*, 81 Ala. 110.

acter is prohibited by constitutional provision,<sup>1</sup> or unless the effect of the particular enactment is to divest rights or to impair contract obligations.<sup>2</sup> Accordingly, defects in a law authorizing a tax may be remedied by amendment, so as to validate a tax levied under it;<sup>3</sup> and so, too, defective or irregular proceedings in the exercise of a valid authority to levy, assess, or collect taxes, and even the lack of such authority, may be cured retrospectively by an act of the legislature.<sup>4</sup>

**Strict Construction of Tax Laws** — The general rule is that laws imposing taxes are to be strictly construed.<sup>5</sup> But a law open to more than one construction

*California*. — *Oakland v. Whipple*, 44 Cal. 303.

*Connecticut*. — *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550.

*Illinois*. — *Marsh v. Chesnut*, 14 Ill. 223; *Conway v. Cable*, 37 Ill. 82, 87 Am. Dec. 240; *People v. Thatcher*, 95 Ill. 109; *People v. Peacock*, 98 Ill. 172.

*Michigan*. — *Clark v. Hall*, 19 Mich. 356; *Smith v. Humphrey*, 20 Mich. 398; *Auditor Gen. v. Monroe County*, 36 Mich. 70; *Finn v. Haynes*, 37 Mich. 63; *Fuller v. Grand Rapids*, 40 Mich. 396.

*New Jersey*. — *Warren R. Co. v. Belvidere*, 35 N. J. L. 584; *State v. Newark*, 40 N. J. L. 92; *Citizens' Gas Light Co. v. State*, 44 N. J. L. 648.

*New York*. — *People v. Spring Valley Hydraulic Gold Co.*, 92 N. Y. 383; *People v. Albany Ins. Co.*, 92 N. Y. 458.

*Pennsylvania*. — *Drexel v. Com.*, 46 Pa. St. 31; *Philadelphia v. Philadelphia*, etc., *Pass. R. Co.*, 52 Pa. St. 177; *Price v. Mott*, 52 Pa. St. 315.

*Virginia*. — *Peters v. Auditor*, 33 Gratt. (Va.) 368.

**It Is a Fundamental Rule** for the construction of statutes that they will be considered as having a prospective operation only unless a legislative intention to the contrary is expressed or necessarily implied. See the title *STATUTES*, vol. 26, p. 693.

**Constitutional Provisions** are subject to the same rule. *New Orleans v. Vergnole*, 33 La. Ann. 35; *New Orleans v. Meister*, 33 La. Ann. 646; *New Orleans v. Eclipse Tow-Boat Co.*, 33 La. Ann. 647, 39 Am. Rep. 279.

**1. Validity of Retrospective Laws** — *United States*. — *Locke v. New Orleans*, 4 Wall. (U. S.) 172; *Exchange Bank Tax Cases*, 21 Fed. Rep. 99.

*California*. — *People v. Seymour*, 16 Cal. 332, 76 Am. Dec. 521; *San Luis Obispo v. Pettit*, 87 Cal. 499.

*Illinois*. — *Cowgill v. Long*, 15 Ill. 202; *Fairfield v. People*, 94 Ill. 244; *Hosmer v. People*, 96 Ill. 58.

*Louisiana*. — *New Orleans v. Day*, 29 La. Ann. 416; *New Orleans v. Rhenish Westphalian Lloyds*, 31 La. Ann. 781.

*Nebraska*. — *State v. Graham*, 16 Neb. 74, 8 Am. & Eng. Corp. Cas. 500.

*New York*. — *People v. Schoharie County*, 49 Hun (N. Y.) 308; *People v. Spring Valley Hydraulic Gold Co.*, 92 N. Y. 383.

*North Carolina*. — *State v. Bell*, 1 Phila. L. (61 N. Car.) 76.

*Pennsylvania*. — *Gault's Appeal*, 33 Pa. St. 94; *Weister v. Hade*, 52 Pa. St. 474.

*Tennessee*. — *State v. Memphis*, etc., *R. Co.*, 14 Lea (Tenn.) 56.

*Wisconsin*. — *Bagnall v. State*, 25 Wis. 112.

In *North Carolina*, retroactive taxes by towns are forbidden by constitutional provisions. *Young v. Henderson*, 76 N. Car. 420.

As to the constitutional prohibition of retrospective laws, see the title *CONSTITUTIONAL LAW*, vol. 6, pp. 937-957.

2. *People v. Moore*, 1 Idaho 662; *Conway v. Cable*, 37 Ill. 82, 87 Am. Dec. 240; *Hosmer v. People*, 95 Ill. 58; *Gault's Appeal*, 33 Pa. St. 94; *Weister v. Hade*, 52 Pa. St. 474; *Grim v. Weissenberg School Dist.*, 57 Pa. St. 435, 98 Am. Dec. 237.

As to the effect of retrospective laws as impairing the obligation of contracts, see the title *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 15, p. 1030.

**3. Defects Cured by Amendment of Law**. — *Cowgill v. Long*, 15 Ill. 202; *Boardman v. Beckwith*, 18 Iowa 292. See also the title *CONSTITUTIONAL LAW*, vol. 6, p. 945; *STATUTES*, vol. 26, p. 699.

Under its taxing power, which is plenary except as limited by the constitution, the legislature may revise and correct its enactments so as to accomplish what it may be presumed it would have provided for had the results of its first enactments been foreseen. *People v. Mollo*, 35 N. Y. App. Div. 136, *affirmed* 161 N. Y. 621.

**4. Curing Defects in Levy**. — As to power of the legislature to pass retrospective statutes curing defects in the levy of taxes, see *infra*, this title, IX. *Assessment*; X. *Levy*.

**5. Tax Laws Strictly Construed** — *United States*. — *U. S. v. Watts*, 1 Bond (U. S.) 583; *U. S. v. Wigglesworth*, 2 Story (U. S.) 369; *Powers v. Barney*, 5 Blatchf. (U. S.) 202.

*Alabama*. — *State v. Brewer*, 64 Ala. 287.

*Colorado*. — *People v. Lothrop*, 2 Colo. 467.

*Florida*. — *Moseley v. Tift*, 4 Fla. 403.

*Indiana*. — *Williams v. State*, 6 Blackf. (Ind.) 36; *Barnes v. Doe*, 4 Ind. 133; *Smith v. Waters*, 25 Ind. 397.

*Maine*. — *Williamsburg v. Lord*, 51 Me. 599.

*Massachusetts*. — *Sewall v. Jones*, 9 Pick. (Mass.) 412.

*Mississippi*. — *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508.

*New Hampshire*. — *Cahoon v. Coe*, 57 N. H. 557.

*New York*. — *Queens County Water Co. v. Monroe*, 83 N. Y. App. Div. 105.

*Pennsylvania*. — *Boyd v. Hood*, 57 Pa. St. 98.

*South Carolina*. — *State v. Hodges*, 14 Rich. L. (S. Car.) 256.

*Vermont*. — *Culver v. Hayden*, 1 Vt. 359.

will be given that construction which will most reasonably tend to effectuate the legislative intent.<sup>1</sup>

**5. Delegation of Power — a. GENERAL RULE.** — The general rule is that since the legislative power has by the constitution been committed to the legislature as a distinct department of government, such power cannot be delegated by the legislature to any other department of the government, or to any citizen or citizens in either a private or official capacity.<sup>2</sup> It is accordingly held that the power of taxation cannot be delegated to the judicial department,<sup>3</sup> to ministerial or administrative officers,<sup>4</sup> or to individuals or private corporations.<sup>5</sup>

**What Constitutes Delegations of Taxing Power.** — It is not a delegation of the taxing power where the legislature commits to executive or administrative officers the merely administrative details that are involved in the exercise of the power of taxation. Such details relate only to the execution of the law as distinguished from the power to make the law.<sup>6</sup>

See also the title *STATUTES*, vol. 26, p. 520.

**But Tax Laws Are Not Penal**, and therefore are not construed with the same degree of strictness as penal laws. *U. S. v. Hodson*, 10 Wall. (U. S.) 395; *U. S. v. Olney*, 1 Abb. (U. S.) 275; *U. S. v. One Hundred Barrels Spirits*, 2 Abb. (U. S.) 305; *U. S. v. Twenty-five Cases Cloths*, Crabb (U. S.) 356; *Cornwall v. Todd*, 38 Conn. 443.

**1. Law Open to More than One Construction** — *United States*. — *U. S. v. Hodson*, 10 Wall. (U. S.) 395; *U. S. v. Olney*, 1 Abb. (U. S.) 275; *Twenty-eight Cases, etc.*, 2 Ben. (U. S.) 63; *Kelly v. Herrall*, 20 Fed. Rep. 364.

*Connecticut*. — *Hubbard v. Brainard*, 35 Conn. 563; *Cornwall v. Todd*, 38 Conn. 443.

*Georgia*. — *Savannah v. Hartridge*, 8 Ga. 23.

*Kentucky*. — *Bleight v. Auditor*, 2 T. B. Mon. (Ky.) 25; *Louisville v. Murphy*, 86 Ky. 53.

*Louisiana*. — *New Orleans v. Salamander Ins. Co.*, 25 La. Ann. 650.

*Maine*. — *State v. Western Union Tel. Co.*, 73 Me. 518.

*Maryland*. — *Baltimore v. Hughes*, 1 Gill & J. (Md.) 480, 19 Am. Dec. 243; *Green v. State*, 59 Md. 123, 43 Am. Rep. 542.

*Massachusetts*. — *Com. v. Hamilton Mfg. Co.*, 12 Allen (Mass.) 302.

*Mississippi*. — *Hawkins v. Carroll County*, 50 Miss. 735.

*New York*. — *Matter of Metropolitan Gas Light Co.*, 23 Hun (N. Y.) 327.

*Ohio*. — *Lima v. McBride*, 34 Ohio St. 338.

*Texas*. — *Higgins v. Rinker*, 47 Tex. 393.

**2.** For a full discussion of the rule stated in the text, with the limitations and modifications thereof, see the title *CONSTITUTIONAL LAW*, vol. 6, p. 1021 *et seq.*

**3. Taxing Power Cannot Be Delegated to Judicial Department.** — *Meriwether v. Garrett*, 102 U. S. 472; *Hardenburgh v. Kidd*, 10 Cal. 402; *Munday v. Assessors*, 43 N. J. L. 338.

**4. Ministerial and Administrative Officers** — *California*. — *Houghton v. Austin*, 47 Cal. 646; *San Francisco, etc., R. Co. v. State Board of Equalization*, 60 Cal. 12.

*Indiana*. — *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 185.

*Iowa*. — *State v. Des Moines*, 103 Iowa 76, 64 Am. St. Rep. 157.

*Kentucky*. — *Hydes v. Joyes*, 4 Bush (Ky.) 464, 96 Am. Dec. 311; *Mercer County Ct. v.*

*Kentucky River Nav. Co.*, 8 Bush (Ky.) 300; *Louisville v. Murphy*, 86 Ky. 53.

*Maryland*. — *Maxwell v. State*, 40 Md. 273.

*Michigan*. — *Scofield v. Lansing*, 17 Mich. 437.

*New Jersey*. — *State v. Sickles*, 24 N. J. L. 125; *Bernards Tp. v. Allen*, 61 N. J. L. 239.

*New York*. — *Trumbull v. White*, 5 Hill (N. Y.) 46; *Robinson v. Dodge*, 18 Johns. (N. Y.) 351; *People v. Kings County*, 52 N. Y. 556.

*Ohio*. — *Cincinnati, etc., R. Co. v. Clinton County*, 1 Ohio St. 77.

*Pennsylvania*. — *Keele v. Westgate*, 10 Pa. Dist. 240.

A *Kansas* statute which provides that when real estate has been bid in by the county at a tax sale and has remained undeemed and the certificates of sale untransferred for three or four years it shall be the duty of the county attorney, when so ordered by the board of county commissioners, to institute a proceeding for the sale of such real estate or so much thereof as the commissioners may direct, is not a delegation of the taxing power to the board of commissioners. It merely authorizes sales and gives the board of commissioners discretion to determine when a sale should be made. *Baker v. Atchison County*, (Kan. 1903) 73 Pac. Rep. 70.

**5. Individuals and Private Corporations.** — *Board of Directors v. Houston*, 71 Ill. 318; *Cypress Pond Draining Co. v. Hooper*, 2 Met. (Ky.) 350.

A law taxing foreign corporations doing business in the state, to an amount equal to that imposed by the "existing or future laws" of the state of the origin of such corporations, does not delegate to such state any legislative discretion. The law is merely made to depend on the action of that state. *People v. Fire Assoc.*, 92 N. Y. 311, 44 Am. Rep. 380.

**6. Conferring Administrative Functions Not Delegation of Power.** — *Field v. Clark*, 143 U. S. 649; *Houghton v. Austin*, 47 Cal. 646; *State v. Gadsden County*, 17 Fla. 418; *Warren v. Grand Haven*, 30 Mich. 24; *Cincinnati, etc., R. Co. v. Clinton County*, 1 Ohio St. 88; *Moers v. Reading*, 21 Pa. St. 188; *Locke's Appeal*, 72 Pa. St. 491, 13 Am. Rep. 716. And see *infra*, this title, *Assessment; Levy*.

Some of the earlier cases held that the legislature cannot delegate to the people of a state

**b. POLITICAL DIVISIONS OF STATE.** — The rule that the power to tax cannot be delegated relates only to other departments of government, private corporations, and individuals either in their private capacities or as public officers. Political subdivisions of the state, such as cities, counties, and towns, are instrumentalities for the convenient administration of local government, and on them the legislature may, subject to constitutional restrictions and limitations, confer the power to tax to such an extent as the necessities of government may require;<sup>1</sup> and the imposition of taxes by cities, counties, or towns for their support is as much an exercise of the taxing power of the state as a tax imposed directly by the state.<sup>2</sup>

or of a municipality the power to determine whether or not a law shall be operative either within the state or some part of it. See *Rice v. Foster*, 4 Harr. (Del.) 479; *Barto v. Himrod*, 8 N. Y. 483, 59 Am. Dec. 506; *Parker v. Com.*, 6 Pa. St. 507, 47 Am. Dec. 480. See *LOCAL OPTION*, vol. 19, p. 486.

**1. Delegation to Municipalities** — *United States*. — *Gilman v. Sheboygan*, 2 Black (U. S.) 510; *U. S. v. New Orleans*, 98 U. S. 381; *Meriwether v. Garrett*, 102 U. S. 511.

*Alabama*. — *Battle v. Mobile*, 9 Ala. 234; *Osborne v. Mobile*, 44 Ala. 493; *Farley v. Dowe*, 45 Ala. 324; *Mobile v. Dargan*, 45 Ala. 310; *Baldwin v. Montgomery*, 53 Ala. 439.

*Arkansas*. — *Washington v. State*, 13 Ark. 752.

*California*. — *People v. Kelsey*, 34 Cal. 470; *Houghton v. Austin*, 47 Cal. 646.

*Colorado*. — *Palmer v. Way*, 6 Colo. 106.

*Florida*. — *Doggert v. Walter*, 15 Fla. 355.

*Georgia*. — *Wilkinson v. Cheatham*, 43 Ga. 258.

*Illinois*. — *Sawyer v. Alton*, 4 Ill. 127; *Fitch v. Pinckard*, 5 Ill. 69; *Shaw v. Dennis*, 10 Ill. 405; *East St. Louis v. Wehrung*, 46 Ill. 392; *Binkert v. Jansen*, 94 Ill. 283.

*Indiana*. — *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 185; *Logansport v. Seybold*, 59 Ind. 225; *Robinson v. Schenck*, 102 Ind. 307.

*Kentucky*. — *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *Talbot v. Dent*, 9 B. Mon. (Ky.) 526; *Justices v. Paris, etc., Turnpike Co.*, 11 B. Mon. (Ky.) 150; *Slack v. Mayville, etc., R. Co.*, 13 B. Mon. (Ky.) 1; *Kniper v. Louisville*, 7 Bush (Ky.) 599; *Paris v. Berry*, 2 J. J. Marsh. (Ky.) 483; *Louisville v. Murphy*, 86 Ky. 53.

*Louisiana*. — *Slack v. Ray*, 26 La. Ann. 674; *New Orleans v. Kaufman*, 29 La. Ann. 283, 29 Am. Rep. 328.

*Maryland*. — *Burgess v. Pue*, 2 Gill (Md.) 11; *Alexander v. Baltimore*, 5 Gill (Md.) 383, 46 Am. Dec. 630; *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572; *Public Schools v. Allegany County*, 20 Md. 449; *Watts v. Port Deposit*, 46 Md. 500.

*Massachusetts*. — *Norwich v. Hampshire County*, 13 Pick. (Mass.) 60.

*Michigan*. — *People v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103.

*Mississippi*. — *Harrison v. Vicksburg*, 3 Smed. & M. (Miss.) 585, 41 Am. Dec. 633; *Smith v. Aberdeen*, 25 Miss. 458; *Daily v. Swope*, 47 Miss. 367; *Beck v. Allen*, 58 Miss. 143.

*Missouri*. — *Wells v. Weston*, 22 Mo. 384, 66 Am. Dec. 627; *State v. St. Louis County*

*Ct.*, 34 Mo. 546; *St. Louis v. Laughlin*, 49 Mo. 559; *St. Louis v. Manufacturers' Sav. Bank*, 49 Mo. 574; *State v. Leffingwell*, 54 Mo. 458.

*Nebraska*. — *Hamlin v. Meadville*, 6 Neb. 227.

*New Hampshire*. — *State v. Noyes*, 30 N. H. 279.

*New York*. — *People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Townsend v. New York*, 16 Hun (N. Y.) 362; *Terrel v. Wheeler*, 49 Hun (N. Y.) 262; *Thomas v. Leland*, 24 Wend. (N. Y.) 65; *Vanderbilt v. Adams*, 7 Cow. (N. Y.) 349.

*North Carolina*. — *Taylor v. Newberne*, 2 Jones Eq. (55 N. Car.) 141, 64 Am. Dec. 566; *Caldwell v. Burke County*, 4 Jones Eq. (57 N. Car.) 323; *Thompson v. Floyd*, 2 Jones L. (47 N. Car.) 313; *Wingate v. Sluder*, 6 Jones L. (51 N. Car.) 552.

*Ohio*. — *Cincinnati, etc., R. Co. v. Clinton County*, 1 Ohio St. 77; *Hill v. Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289; *Ridenour v. Saffin*, 1 Handy (Ohio) 464.

*Pennsylvania*. — *Grim v. Weissenberg School Dist.*, 57 Pa. St. 433, 98 Am. Dec. 237; *Butler's Appeal*, 73 Pa. St. 448.

*South Carolina*. — *Cruikshanks v. Charleston*, 1 McCord L. (S. Car.) 360.

*Tennessee*. — *Newman v. Scott County*, 5 Sneed (Tenn.) 695; *Hope v. Deaderick*, 8 Humph. (Tenn.) 1, 47 Am. Dec. 597.

*Texas*. — *Kinney v. Zimpleman*, 36 Tex. 554; *Blessing v. Galveston*, 42 Tex. 642.

*Virginia*. — *Goddin v. Crump*, 8 Leigh (Va.) 120; *Bull v. Read*, 13 Gratt. (Va.) 78; *Levy County Case*, 5 Call (Va.) 139.

*West Virginia*. — *Kuhn v. Board of Education*, 4 W. Va. 499; *Douglass v. Harrisville*, 9 W. Va. 162, 27 Am. Rep. 548.

See also the title *BOROUGHs*, vol. 4, p. 730.

**For a Full Discussion of the subject of taxation by municipalities, see *infra*, this title, *Municipal Taxation*.**

**A Territorial Legislature may delegate the power of taxation to municipalities.** *Burnes v. Atchison*, 2 Kan. 454.

**Cannot Be Given to Part of Municipality.** — In *Illinois* the power to assess and collect taxes for corporate purposes cannot be given to or exercised by a fractional portion of a municipality. *Madison County v. People*, 58 Ill. 456.

**Power Vested in Private Corporation.** — Although a power to tax vested in a private corporation is illegal and void, when it is transferred to a municipal corporation it is not so. *Allentown v. Henry*, 73 Pa. St. 404.

**2. United States.** — *Gilman v. Sheboygan*, 2

Volume XXVII.

**Extent of Delegation.** — The state cannot authorize a municipal corporation to lay a tax which the state could not itself impose,<sup>1</sup> and an unlimited power to lay taxes and raise money, aside from and beyond what may be necessary and proper for legitimate municipal purposes, cannot be conferred.<sup>2</sup> Nor can the power to tax be delegated for any except local or corporate purposes.<sup>3</sup>

**Constitutional Limitations.** — Constitutional provisions authorizing corporate authorities of municipalities to lay taxes for corporate purposes constitute a limitation on the power of the legislature to grant the right to lay taxes to any other than the local authorities of the municipality or district to be taxed,<sup>4</sup> or for any other than corporate purposes.<sup>5</sup> So provisions limiting the rate of taxation operate as a limitation on the legislative power to authorize municipal taxation.<sup>6</sup> Constitutional prohibitions against local and special tax laws, and against special acts conferring corporate powers, preclude the legislature from delegating the power to tax by special or local enactment.<sup>7</sup>

**Creation of Political Divisions.** — The legislature has full power, unless restricted by the constitution, to create political divisions of the state for the purpose of taxation; but it cannot establish a taxing district within an existing political corporation or division of the state in which to impose taxes without regard to the special benefits, unless such district is itself made a political division with appropriate powers of self-government.<sup>8</sup> The legislature may, however,

Black (U. S.) 510; Chicago, etc., R. Co. v. Otoe County, 16 Wall. (U. S.) 667.

Illinois. — Will County v. People, 110 Ill. 511.

Mississippi. — Daily v. Swope, 47 Miss. 367; Beck v. Allen, 58 Miss. 143.

New Jersey. — Camden, etc., R. Co. v. Hillegas, 18 N. J. L. 11.

Wisconsin. — Knowlton v. Rock County, 9 Wis. 410; Lumsden v. Cross, 10 Wis. 282.

1. **Taxes Which State Could Not Impose.** — Haywood v. Savannah, 12 Ga. 404; Illinois Conference Female College v. Corper, 25 Ill. 148; Lexington v. McQuillan, 9 Dana (Ky.) 513, 35 Am. Dec. 159; O'Donnell v. Bailey, 24 Miss. 386; Stuyvesant v. New York, 7 Cow. (N. Y.) 588; Nashville v. Thomas, 5 Coldw. (Tenn.) 600; Memphis v. Hernando Ins. Co., 6 Baxt. (Tenn.) 527; Union Bank v. State, 9 Yerg. (Tenn.) 490.

But this does not mean that the state may not permit municipalities to tax that which it does not tax. The rule applies to the power. See *Ex p.* Montgomery, 64 Ala. 463; Johnston v. Macon, 62 Ga. 645. See also *infra*, this title, *Municipal Taxation*.

2. **Necessity for Municipal Purposes.** — Hooper v. Emery, 14 Me. 375; Foster v. Kenosha, 12 Wis. 618; Brodhead v. Milwaukee, 19 Wis. 624, 88 Am. Dec. 711.

3. Livingston County v. Darlington, 101 U. S. 407; Foster v. Kenosha, 12 Wis. 618.

4. **Constitutional Limitations.** — Elmwood Tp. v. Marcy, 92 U. S. 289; Livingston County v. Darlington, 101 U. S. 411; People v. Chicago, 51 Ill. 17; People v. Salomon, 51 Ill. 37; Harward v. St. Clair, etc., Levee, etc., Co., 51 Ill. 130; Hessler v. Drainage Com'rs, 53 Ill. 105; Lovington v. Wider, 53 Ill. 302; Gage v. Graham, 57 Ill. 144; School Trustees v. People, 63 Ill. 299; Board of Directors v. Houston, 71 Ill. 318; Updike v. Wright, 81 Ill. 49; People v. McAdams, 82 Ill. 356; Cornell v. People, 107 Ill. 372.

5. Livingston County v. Darlington, 101 U. S. 411; Johnson v. Campbell, 49 Ill. 317; Har-

ward v. St. Clair, etc., Levee, etc., Co., 51 Ill. 130; Madison County v. People, 58 Ill. 463; School Trustees v. People, 63 Ill. 299; People v. Dupuyt, 71 Ill. 651.

6. **Rate of Taxation.** — State v. Van Every, 75 Mo. 530; Hebard v. Ashland County, 55 Wis. 145.

Under the North Carolina constitution, taxation for state and county purposes, combined for the current and necessary expenses of the county government and new debts, cannot exceed the constitutional limitation. French v. New Hanover County, 74 N. Car. 692.

The New York constitutional provision prohibiting the creation of debts except to a limited extent, unless the laws authorizing them are submitted to the people, does not apply to municipal debts. People v. Flagg, 46 N. Y. 401.

7. Hallo v. Helmer, 12 Neb. 87; Hammer v. State, 44 N. J. L. 667.

Constitutional provisions authorizing the legislature to confer the power to tax upon certain municipalities do not prohibit it from conferring the same power upon other municipalities. State v. Dodge County, 8 Neb. 124, 30 Am. Rep. 819; Darst v. Griffin, 31 Neb. 668.

8. **Power to Create Taxing Districts.** — People v. Salomon, 51 Ill. 37; State v. Fuller, 39 N. J. L. 576, 40 N. J. L. 615; State v. Drainage, etc., Com'rs, 41 N. J. L. 154; Vreeland v. Jersey City, 43 N. J. L. 135; Morgan v. Comptroller, 44 N. J. L. 571; Auryansen v. Hackensack Imp. Commission, 45 N. J. L. 113; Peck v. Raritan Tp., 52 N. J. L. 319; McLaughlin v. Newark, 57 N. J. L. 298.

In Carter v. Wade, 59 N. J. L. 119, it was held that the Act of April 4, 1873, was unconstitutional because it erected a part of a township into a taxing district for the improvement and repair of public roads therein without constituting the district a political corporation or division of the state and without endowing it with any power of local government.

**Constitutional Restrictions.** — Thus the con-

without regard to the special benefits, create a taxing district for specified purposes out of a part of an existing political district, provided such part is itself made a political district with powers of local government.<sup>1</sup>

**Construction of Statute.** — It is well settled that statutes delegating the power to levy taxes are to be strictly construed.<sup>2</sup>

**Legislature Forbidden to Impose Municipal Taxes.** — The constitutions of some of the states forbid the legislature to impose taxes for municipal purposes. Under such provisions the only power of the legislature is to authorize the local authorities to act, or to provide for submitting the question of taxation to the people of the locality.<sup>3</sup> And in some states taxation for works of internal improvement is prohibited and local interests are required to be left in the hands of the proper local officers.<sup>4</sup>

**6. Waiver or Relinquishment.** — It is well settled that the legislature may waive or relinquish the power to tax in particular instances, unless restricted in that respect by constitutional provisions.<sup>5</sup> Such waiver or relinquishment may be accomplished by an act operating as a contract,<sup>6</sup> and any subsequent act in derogation thereof will be invalid as impairing the obligation of the contract.<sup>7</sup>

**Expression of Legislative Intent.** — There can be no relinquishment of the taxing power of the state unless the intention to relinquish is declared in clear and

stitution of *Tennessee*, authorizing the legislature to delegate the power of taxation to counties and incorporated towns, is held impliedly to exclude delegation to any other agency, and, therefore, a levee district cannot be endowed with power to levy taxes. *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 151.

1. *Street Lighting Dist. No. One v. Drummond*, 63 N. J. L. 493.

2. **Strict Construction of Statutes Delegating Power of Taxation.** — See the title *STATUTES*, vol. 26, p. 667.

3. **Legislature Forbidden to Impose Municipal Taxes — California.** — *People v. Martin*, 60 Cal. 153; *Fatjo v. Pfister*, 117 Cal. 83.

*Illinois.* — *Will County v. People*, 110 Ill. 511.

*Kentucky.* — *South Covington, etc., St. R. Co. v. Bellevue*, 105 Ky. 283; *Paducah St. R. Co. v. McCracken County*, 105 Ky. 472.

*Minnesota.* — *State v. District Ct.*, 33 Minn. 235.

*Missouri.* — *State v. Ashbrook*, 154 Mo. 375, 77 Am. St. Rep. 765.

*Utah.* — *Kimball v. Grantsville City*, 19 Utah 368.

*Wisconsin.* — *Hasbrouck v. Milwaukee*, 13 Wis. 37, 80 Am. Dec. 718; *Mills v. Charleton*, 29 Wis. 400, 9 Am. Rep. 578; *State v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622.

4. *Ryerson v. Utley*, 16 Mich. 274; *People v. State Treasurer*, 23 Mich. 499; *Hubbard v. Springwells Tp. Board*, 25 Mich. 153; *People v. Detroit*, 28 Mich. 228, 15 Am. Rep. 202; *People v. Detroit*, 29 Mich. 343; *Anderson v. Hill*, 54 Mich. 477.

**What Are Internal Improvements.** — *McGehee v. Mathis*, 21 Ark. 40; *Dawson County v. McNamar*, 10 Neb. 276.

5. As to the power in general of the legislature to exempt property from taxation, see the title *EXEMPTIONS (FROM TAXATION)*, vol. 12, p. 271 *et seq.*

The waiver or relinquishment may be in the

form of a limitation as to the rate of taxation. *Gordon v. Appeal Tax Ct.*, 3 How. (U. S.) 133; *Piqua Branch of Ohio Bank v. Knopp*, 16 How. (U. S.) 369; *Dodge v. Woolsey*, 18 How. (U. S.) 331; *Mechanics', etc., Bank v. Thomas*, 18 How. (U. S.) 384.

6. **Act Operating as Contract — United States.** — *New Jersey v. Wilson*, 7 Cranch (U. S.) 164; *Armstrong v. Athens County*, 16 Pet. (U. S.) 281; *Jefferson Branch Bank v. Skelly*, 1 Black (U. S.) 436; *Home of Friendless v. Rouse*, 8 Wall. (U. S.) 430; *Humphrey v. Pegues*, 16 Wall. (U. S.) 244; *Delaware Railroad Tax*, 18 Wall. (U. S.) 206; *Pacific R. Co. v. Maguire*, 20 Wall. (U. S.) 36; *Tucker v. Ferguson*, 22 Wall. (U. S.) 527; *New Jersey v. Yard*, 95 U. S. 104; *Hoge v. Richmond, etc., R. Co.*, 99 U. S. 348; *Wells v. Central Vermont R. Co.*, 14 Blatchf. (U. S.) 426; *Louisville, etc., R. Co. v. Gaines*, 3 Fed. Rep. 266.

*Alabama.* — *Mobile, etc., R. Co. v. Kennerly*, 74 Ala. 566.

*California.* — *English v. Sacramento*, 19 Cal. 172.

*Connecticut.* — *East Hartford v. Hartford Bridge Co.*, 17 Conn. 93; *Seymour v. Hartford*, 21 Conn. 486.

*Illinois.* — *State Bank v. People*, 5 Ill. 303.

*Kentucky.* — *Louisville, etc., R. Co. v. Com.*, 10 Bush (Ky.) 43.

*North Carolina.* — *State v. Petway*, 2 Jones Eq. (55 N. Car.) 396.

*Pennsylvania.* — *New York, etc., R. Co., v. Sabin*, 26 Pa. St. 242.

*Tennessee.* — *State v. Butler*, 86 Tenn. 614.

*Virginia.* — *Com. v. Richmond, etc., R. Co.*, 81 Va. 355.

7. *Franklin Branch Bank v. Ohio*, 1 Black (U. S.) 474; *McGee v. Mathis*, 4 Wall. (U. S.) 143; *Osborne v. Mobile*, 16 Wall. (U. S.) 481; *Northwestern University v. People*, 99 U. S. 309; *Stevens County v. St. Paul, etc., R. Co.*, 36 Minn. 467; *State v. Butler*, 86 Tenn. 614. And see the title *IMPAIRMENT OF OBLIGATION OF CONTRACTS*, vol. 15, p. 1030.

unambiguous terms,<sup>1</sup> or unless it appears by necessary implication from the terms used.<sup>2</sup>

**No Presumption of Relinquishment.** — A relinquishment by the state of the power to tax is not to be presumed in any case,<sup>3</sup> nor can a surrender be extended by implication;<sup>4</sup> on the contrary, every reasonable intendment must be made that it was not designed to surrender the power.<sup>5</sup>

**1. Expression of Legislative Intent** — *United States*. — *Providence Bank v. Billings*, 4 Pet. (U. S.) 561; *Philadelphia, etc., R. Co. v. Maryland*, 10 How. (U. S.) 393; *Ohio L. Ins., etc., Co. v. Dobolt*, 16 How. (U. S.) 416; *Jefferson Branch Bank v. Skelly*, 1 Black (U. S.) 456; *Wilmington, etc., R. Co. v. Reid*, 13 Wall. (U. S.) 264; *Delaware Railroad Tax*, 18 Wall. (U. S.) 206, *affirming* 2 Abb. (U. S.) 323; *Pacific R. Co. v. Maguire*, 20 Wall. (U. S.) 36; *North Missouri R. Co. v. Maguire*, 20 Wall. (U. S.) 46; *Morgan v. Louisiana*, 93 U. S. 217; *Hoge v. Richmond, etc., R. Co.*, 99 U. S. 348; *Southwestern R. Co. v. Wright*, 116 U. S. 231.

*Illinois*. — *Presbyterian Theological Seminary v. People*, 101 Ill. 580.

*Kentucky*. — *Bradley v. McAtee*, 7 Bush (Ky.) 667, 3 Am. Rep. 309; *Louisville, etc., R. Co. v. Com.*, 10 Bush (Ky.) 43.

*Maryland*. — *Anne Arundel County v. Annapolis, etc., R. Co.*, 47 Md. 592.

*Michigan*. — *East Saginaw Mfg. Co. v. East Saginaw*, 19 Mich. 259, 2 Am. Rep. 82.

*Missouri*. — *Scotland County v. Missouri, etc., R. Co.*, 65 Mo. 123.

*North Carolina*. — *State v. Petway*, 2 Jones Eq. (55 N. Car.) 396.

*Pennsylvania*. — *Com. v. Easton Bank*, 10 Pa. St. 451; *New York, etc., R. Co. v. Sabin*, 26 Pa. St. 242; *Jones, etc., Mfg. Co. v. Com.*, 69 Pa. St. 137; *Union Pass. R. Co. v. Philadelphia*, 83 Pa. St. 429.

*Virginia*. — *Richmond v. Richmond, etc., R. Co.*, 21 Gratt. (Va.) 604.

*West Virginia*. — *Probasco v. Moundsville*, 11 W. Va. 501.

*Wisconsin*. — *Weston v. Shawano County*, 44 Wis. 256.

**2.** *Memphis Gas Light Co. v. Taxing Dist.*, 109 U. S. 398; *Minot v. Philadelphia, etc., R. Co.*, 2 Abb. (U. S.) 323; *Baltimore v. Baltimore, etc., R. Co.*, 6 Gill (Md.) 288, 48 Am. Dec. 531; *Buchanan v. Talbot County*, 47 Md. 286; *Frederick County v. Sisters of Charity*, 48 Md. 34; *Appeal Tax Ct. v. Gill*, 50 Md. 377.

**3. No Presumption of Relinquishment** — *United States*. — *Providence Bank v. Billings*, 4 Pet. (U. S.) 561; *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 421; *Philadelphia, etc., R. Co. v. Maryland*, 10 How. (U. S.) 393; *Ohio L. Ins., etc., Co. v. Dobolt*, 16 How. (U. S.) 416; *Jefferson Branch Bank v. Skelly*, 1 Black (U. S.) 436; *Savings Soc. v. Coite*, 6 Wall. (U. S.) 594; *Delaware Railroad Tax*, 18 Wall. (U. S.) 206; *North Missouri R. Co. v. Maguire*, 20 Wall. (U. S.) 46; *Bailey v. Magwire*, 22 Wall. (U. S.) 215; *Tucker v. Ferguson*, 22 Wall. (U. S.) 527; *Central R., etc., Co. v. Georgia*, 92 U. S. 665; *Morgan v. Louisiana*, 93 U. S. 217; *Bank of Commerce v. Tennessee*, 104 U. S. 493; *Memphis Gas Light Co. v. Tax-*

*ing Dist.*, 109 U. S. 398; *Southwestern R. Co. v. Wright*, 116 U. S. 231; *Minot v. Philadelphia, etc., R. Co.*, 2 Abb. (U. S.) 323; *Insurance Co. v. New Orleans*, 1 Woods (U. S.) 85.

*Illinois*. — *Bank of Republic v. Hamilton County*, 21 Ill. 53.

*Kentucky*. — *Bradley v. McAtee*, 7 Bush (Ky.) 667, 3 Am. Rep. 309; *Louisville, etc., R. Co. v. Com.*, 10 Bush (Ky.) 43.

*Maine*. — *Bangor v. Rising Virtue Lodge No. 10*, 73 Me. 428, 40 Am. Rep. 369.

*Maryland*. — *Buchanan v. Talbot County*, 47 Md. 286.

*Massachusetts*. — *Harvard College v. Board of Aldermen*, 104 Mass. 470.

*Michigan*. — *East Saginaw Mfg. Co. v. East Saginaw*, 19 Mich. 259, 2 Am. Rep. 82.

*Missouri*. — *Glasgow v. Rowse*, 43 Mo. 479; *St. Louis v. Boatmen's Ins., etc., Co.*, 47 Mo. 150; *St. Louis v. Manufacturers' Sav. Bank*, 49 Mo. 574.

*Washington*. — *Puget Sound Agricultural Co. v. Pierce County*, 1 Wash. Ter. 159.

*Wisconsin*. — *Weston v. Shawano County*, 44 Wis. 242.

**4.** *Tomlinson v. Branch*, 15 Wall. (U. S.) 469; *Vicksburg, etc., R. Co. v. Dennis*, 116 U. S. 665; *Chicago, etc., R. Co. v. Guffey*, 120 U. S. 569; *Louisville, etc., R. Co. v. Gaines*, 3 Fed. Rep. 266; *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572; *St. Louis v. Boatmen's Ins. etc., Co.*, 47 Mo. 150; *Jones, etc., Mfg. Co. v. Com.*, 69 Pa. St. 137; *Bourguignon Bldg. Assoc. v. Com.*, 98 Pa. St. 64; *Weston v. Shawano County*, 44 Wis. 242.

**Exemption from State Taxes Not an Exemption from Municipal Taxes.** — *Gordon v. Baltimore*, 5 Gill (Md.) 231. *Compare* *Gardner v. State*, 21 N. J. L. 557.

**Exemption from Village Taxes Not an Exemption from Town, County, and State Taxes.** — *People v. Forrest*, 29 Hun (N. Y.) 548.

**5.** *Philadelphia, etc., R. Co. v. Maryland*, 10 How. (U. S.) 393; *Tucker v. Ferguson*, 22 Wall. (U. S.) 575; *Chicago, etc., R. Co. v. Guffey*, 122 U. S. 561; *Kentucky Cent. R. Co. v. Bourbon County*, 82 Ky. 497, 6 Ky. L. Rep. 495; *Gordon v. Baltimore*, 5 Gill. (Md.) 231; *Baltimore v. Baltimore, etc., R. Co.*, 6 Gill (Md.) 288, 48 Am. Dec. 531; *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572; *Buchanan v. Talbot County*, 47 Md. 286; *Weston v. Shawano County*, 44 Wis. 242.

Before any exemption or limitation can be admitted, the intent of the legislature to confer immunity or prescribe the limitation must be clear beyond a reasonable doubt. All public grants are strictly construed. Nothing can be taken against the state by presumption or inference. The established rule of construction in such cases is, that rights, privileges, and immunities not expressly granted are reserved. *Delaware Railroad Tax*, 18 Wall. (U. S.) 225.

**Personal Nature of Privilege.** — The general rule is that a grant of exemption from taxation is a personal privilege, and not transferable, though the legislature may authorize a transfer or may attack the exemption to specific property. This subject is fully discussed elsewhere in this work.<sup>1</sup>

**V. PURPOSE OF TAXATION — 1. For Revenue.** — The general object of taxation is the raising of revenue for governmental purposes.<sup>2</sup> Revenue has been defined as the annual produce of taxes, excise, customs, duties, rents, etc., which a nation or state collects and receives into the treasury for public use.<sup>3</sup> Technically, therefore, taxation is only a method of raising revenue, but revenue must be the purpose of taxation, and it has been said to be possible that a statute might be violative of constitutional rights if it were so flagrantly beyond revenue purposes as to indicate other objects under the guise of revenue.<sup>4</sup> It will be seen that the limitation of taxation to revenue is largely synonymous with its limitation to public purposes.

**2. For Public Purposes — a. NECESSITY OF PUBLIC PURPOSE.** — The power to tax is subject to the limitation that a tax must be laid for a public purpose only, and an imposition in the form of a tax for purposes of private interest is void and unconstitutional.<sup>5</sup> This limitation of the taxing power has been based on the ground that its public purpose is inherent in the very definition

**1. Personal Nature of Privilege.** — See the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 298 *et seq.*

**2. Object — Revenue.** — *People v. Doe*, 36 Cal. 222; *Frost v. Flick*, 1 Dak. 129; *Palmer v. Stumph*, 29 Ind. 329. See also *King v. Portland*, 2 Oregon 146.

Taxes are the revenue collected from the people for objects in which they are interested; the contributions of the people for things useful and conducive to their welfare. *Hilbish v. Catherman*, 64 Pa. St. 154.

**For Current Expenses Only.** — In *Michigan* it has been said to be "contrary to all our system to levy taxes for the purpose of accumulating funds for the future." *Midland Tp. v. Roscommon Tp.*, 39 Mich. 424.

But that contingent expenses not yet incurred may justify taxation, see *infra*, this section.

**Where the Object Is Not Revenue but Regulation,** the police power is involved, and the restrictions upon the taxing power do not apply. See the title POLICE POWER, vol. 22, p. 917; and *supra*, this section, 1. c. *Distinguished from Police Power.* See also *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654.

**3. Revenue Defined.** — *Fletcher v. Oliver*, 25 Ark. 300, quoting Webster's Dict. See further REVENUE, vol. 24, p. 881.

**4. Mason v. Lancaster**, 4 Bush (Ky.) 408, where the court, continuing, said: "But before this court would determine such, it would have to appear palpable and unmistakable; for without such, this court would not presume such unworthy motives in a co-ordinate branch of the government." See also *Durach's Appeal*, 62 Pa. St. 492.

**5. Purpose Must Be Public — United States.** — *Olcott v. Fond du Lac County*, 16 Wall. (U. S.) 678; *Citizens Sav., etc., Assoc. v. Topeka*, 20 Wall. (U. S.) 655, *affirming* 3 Dill. (U. S.) 376; *McMillen v. Anderson*, 95 U. S. 37; *Jarrolt v. Moberly*, 103 U. S. 580; *Kelly v. Pittsburg*, 104 U. S. 81; *Osborne v. Adams County*, 106 U. S. 181, 109 U. S. 1; *Parkersburg v. Brown*, 106 U. S. 487; *Cole v. La Grange*, 113 U. S. 1, *affirming* 19 Fed. Rep. 871; *Barb v.*

*Augusta*, 30 Fed. Rep. 906; *Sutherland-Innes Co. v. Ewart*, (C. C. A.) 86 Fed. Rep. 597; *Dodge v. Mission Tp.*, (C. C. A.) 107 Fed. Rep. 827; *Commercial Nat. Bank v. Iola*, 2 Dill. (U. S.) 353, 9 Kan. 689, *affirmed* 154 U. S. 617; *Kimball v. Mobile County*, 3 Woods (U. S.) 555.

*Alabama.* — *Mobile v. Dargan*, 45 Ala. 310. *California.* — *Stockton, etc., R. Co. v. Stockton*, 41 Cal. 173; *Matter of Madera Irrigation Dist.*, 92 Cal. 296, 27 Am. St. Rep. 113.

*Connecticut.* — *Bradley v. New York, etc., R. Co.*, 21 Conn. 305.

*Illinois.* — *Gurnee v. Chicago*, 40 Ill. 165; *Scammon v. Chicago*, 44 Ill. 269; *Bissell v. Kankakee*, 64 Ill. 249, 16 Am. Rep. 554; *English v. People*, 96 Ill. 566.

*Indiana.* — *Anderson v. Kerns Draining Co.*, 14 Ind. 202, 77 Am. Dec. 63.

*Iowa.* — *Clark v. Des Moines*, 19 Iowa 199, 87 Am. Dec. 423; *Hanson v. Vernon*, 27 Iowa 28, 1 Am. Rep. 215; *Warren v. Henly*, 31 Iowa 31.

*Kansas.* — *State v. Osawkee Tp.*, 14 Kan. 418, 19 Am. Rep. 99; *Spencer v. Joint School Dist. No. 6*, 15 Kan. 262; *Central Branch Union Pac. R. Co. v. Smith*, 23 Kan. 745.

*Kentucky.* — *Cypress Pond Draining Co. v. Hooper*, 2 Met. (Ky.) 350; *Covington v. Southgate*, 15 B. Mon. (Ky.) 498; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 344.

*Louisiana.* — *State v. Clinton*, 26 La. Ann. 561.

*Maine.* — *Opinion of Justices*, 58 Me. 590; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185; *State v. Western Union Tel. Co.*, 73 Me. 518.

*Massachusetts.* — *Lowell v. Oliver*, 8 Allen (Mass.) 247; *Freeland v. Hastings*, 10 Allen (Mass.) 570; *Dorgan v. Boston*, 12 Allen (Mass.) 223; *Jenkins v. Andover*, 103 Mass. 94; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39. *Opinions of Justices*, 155 Mass. 598; *Prince v. Crocker*, 166 Mass. 347.

*Michigan.* — *People v. Salem Tp. Board*, 20 Mich. 452, 4 Am. Rep. 400; *People v. State Treasurer*, 23 Mich. 499; *People v. Saginaw County*, 26 Mich. 22; *Silsbee v. Stockle*, 44



and nature of a tax, so that a law authorizing a tax for merely private purposes would be an act of spoliation under legislative form and not within the legitimate scope of legislative authority.<sup>1</sup> For all taxation, whether local or general, is based upon the theory that it is in return for the benefit received by the person who pays the tax or by the property which is assessed.<sup>2</sup> Sometimes, however, this principle is explicitly stated in the constitution,<sup>3</sup> and it has been held to be implicit in various provisions regulating taxation, as in those specifying the purposes for which the power to tax may be exercised, or for which the revenue collected may be employed, as well as in provisions which guard the liberty and property of the individual.<sup>4</sup>

*b. DETERMINATION OF CHARACTER OF PURPOSE* — (1) *General Principles.*  
— The Essential Character of the Direct Object of the Expenditure of a tax determines its

Mich. 561; *Clee v. Sanders*, 74 Mich. 692; *Michigan Sugar Co. v. Auditor-Gen.*, 124 Mich. 674, 83 Am. St. Rep. 354.

*Minnesota.* — *Davidson v. Ramsey County Com'rs*, 18 Minn. 482; *State v. Foley*, 30 Minn. 350; *Coates v. Campbell*, 37 Minn. 498; *Minneapolis v. Janney*, 86 Minn. 111.

*Missouri.* — *Hitchcock v. St. Louis*, 49 Mo. 484.

*Nebraska.* — *Bradshaw v. Omaha*, 1 Neb. 16; *State v. Cornell*, 53 Neb. 559, 68 Am. St. Rep. 631.

*New Hampshire.* — *Gove v. Epping*, 41 N. H. 539; *Perry v. Keene*, 56 N. H. 514.

*New Jersey.* — *Taylor v. Smith*, 50 N. J. L. 101; *Elizabethtown Water Co. v. Wade*, 59 N. J. L. 78.

*New York.* — *People v. Flagg*, 46 N. Y. 401; *People v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480; *Weismer v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *People v. Kelly*, 76 N. Y. 489, 5 Abb. N. Cas. (N. Y.) 383; *Spencer v. Merchant*, 100 N. Y. 585; *Bush v. Supervisors*, 159 N. Y. 212, *affirming* 10 N. Y. App. Div. 542; *Matter of New York*, 11 Johns. (N. Y.) 80; *Bloodgood v. Mohawk, etc., R. Co.*, 18 Wend. (N. Y.) 9, 31 Am. Dec. 313.

*North Carolina.* — *Wood v. Oxford*, 97 N. Car. 227; *Brown v. Hertford*, 100 N. Car. 92.

*Ohio.* — *Reeves v. Wood County*, 8 Ohio St. 333.

*Oregon.* — *Seely v. Sebastian*, 4 Oregon 25.

*Pennsylvania.* — *Sharpless v. Philadelphia*, 21 Pa. St. 157, 59 Am. Dec. 759; *Philadelphia Assoc. v. Wood*, 39 Pa. St. 73; *Grim v. Weissenberg School Dist.*, 57 Pa. St. 433, 98 Am. Dec. 237; *Hammett v. Philadelphia*, 65 Pa. St. 152, 3 Am. Rep. 615.

*South Carolina.* — *Feldman v. Charleston*, 23 S. Car. 57, 55 Am. Rep. 6.

*Tennessee.* — *Louisville, etc., R. Co. v. Davidson County Ct.*, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424.

*Vermont.* — *Atkins v. Randolph*, 31 Vt. 247; *Williams v. School Dist. No. 6*, 33 Vt. 271; *Tyler v. Beacher*, 44 Vt. 651, 8 Am. Rep. 398; *Bennington v. Park*, 50 Vt. 178; *St. Johnsbury First Nat. Bank v. Concord*, 50 Vt. 257.

*Wisconsin.* — *Knowlton v. Rock County*, 9 Wis. 410; *Soens v. Racine*, 10 Wis. 271; *Hasbrouck v. Milwaukee*, 13 Wis. 37, 80 Am. Dec. 718; *Brodhead v. Milwaukee*, 19 Wis. 624, 88 Am. Dec. 711; *Curtis v. Whipple*, 24 Wis. 350, 1 Am. Rep. 187; *Whiting v. Sheboygan, etc., R.*

*Co.*, 25 Wis. 167, 3 Am. Rep. 30; *Wauwatosa v. Gunyon*, 25 Wis. 271; *State v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622; *Atty.-Gen. v. Eau Claire*, 37 Wis. 436; *Donnelly v. Decker*, 58 Wis. 461, 46 Am. Rep. 637; *Wisconsin Keeley Co. v. Milwaukee County*, 95 Wis. 153, 60 Am. St. Rep. 105; *State v. Froehlich*, (Wis. 1903) 94 N. W. Rep. 50.

**Whether a Purpose Is Public or Private Is a Question of General Jurisprudence**, upon which federal courts will not be bound by the decisions of state courts. *Olcott v. Fond du Lac County* 16 Wall. (U. S.) 678; *Pine Grove Tp. v. Talcott*, 19 Wall. (U. S.) 666; *Bradley v. Fallbrook Irrigation Dist.*, 68 Fed. Rep. 948.

**With Regard to Local Taxes** the line of demarcation between public and private purposes is said to be more easily drawn than with regard to general taxes. *Lent v. Tillson*, 72 Cal. 428; *People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266.

**1. Inherent in Definition of Tax.** — *Citizens' Sav., etc., Assoc. v. Topeka*, 20 Wall. (U. S.) 664, *affirming* 3 Dill. (U. S.) 376; *Cole v. La Grange*, 19 Fed. Rep. 871, *affirmed* 113 U. S. 1; *State v. Wapello County*, 13 Iowa 388; *Hanson v. Vernon*, 27 Iowa 47, 1 Am. Rep. 215; *Opinion of Justices*, 58 Me. 590; *Northern Liberties v. St. John's Church*, 13 Pa. St. 104; *Sharpless v. Philadelphia*, 21 Pa. St. 147, 59 Am. Dec. 759.

This principle "underlies all government that is based upon reason rather than upon force." *Lowell v. Boston*, 111 Mass. 461, 15 Am. Rep. 39.

**2. Matter of Madera Irrigation Dist.**, 92 Cal. 296, 27 Am. St. Rep. 106.

**3. Constitutional Provisions.** — See, for instance, *State v. Switzler*, 143 Mo. 314, 65 Am. St. Rep. 658, holding that the provision of the *Missouri* constitution applies to all taxes by whatever name levied.

**4. Lowell v. Boston**, 111 Mass. 461, 15 Am. Rep. 39, when these various constitutional provisions were quoted as underlying the principle stated in the text. But *compare*, as to some of these provisions, *Sharpless v. Philadelphia*, 21 Pa. St. 147, 59 Am. Dec. 759.

In *Kentucky* the constitutional provision that private property shall not be taken for public use without just compensation has been held to render void taxes for other than public purposes. *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 342; *Covington v. Southgate*, 15 B. Mon. (Ky.) 498. In *New York* the same reasoning has been

validity, and not the magnitude of the interests to be affected, nor the degree to which the general advantage of the community, and thus the public welfare, may be ultimately benefited by their promotion.<sup>1</sup>

**Course and Usage of Government.** — The solution of the question must be governed, it has been said, mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation levied, what objects or purposes have been considered necessary to the support and for the use of the government, whether state or municipal.<sup>2</sup>

**Courts Should Not Approach This Question in a Narrow or Illiberal Spirit,** or condemn whatever is not absolutely needful for the continued existence of organized government, for wise statesmanship must look beyond immediate needs and embrace objects which tend to make the government subserve the general well-being of society and advance the present and prospective happiness and prosperity of the people.<sup>3</sup>

(2) **Benefits Merely Incidental.** — Merely incidental benefits to the public or to the state from the promotion of private enterprises do not render the purposes of a tax public.<sup>4</sup> But any direct public benefit, no matter how slight, as distinguished from such merely incidental benefits, will sustain the tax,<sup>5</sup> and the fact that private interests are incidentally benefited<sup>6</sup> or incidentally injured<sup>7</sup> cannot render it void.

used. *People v. Brooklyn*, 4 N. Y. 422, 55 Am. Dec. 266; *Astor v. New York*, 37 N. Y. Super. Ct. 559.

1. *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Minneapolis v. Janney*, 86 Minn. 111.

**A Public Purpose Within the Law of Eminent Domain** has been held not necessarily within the law of taxation. *People v. Salem Tp. Board*, 20 Mich. 452, 4 Am. Rep. 400; *Whiting v. Sheboygan, etc., R. Co.*, 25 Wis. 167, 3 Am. Rep. 30.

In the former case *Cooley, J.*, distinguishes the two powers. The important consideration in eminent domain is the necessity of accomplishing some public good which is otherwise impracticable, the power being akin to the police power rather than to that of taxation. In respect to taxation the criterion is not necessity but public policy, for while some taxes are strictly matters of necessity, others are purely matters of policy and enlightened discretion.

But in *Stewart v. Polk County*, 30 Iowa 24, 1 Am. Rep. 238, it was said that the taxing power may be exercised "for any object that will justify the exercise of the right of eminent domain," thus making a public purpose to be the same in each case.

These cases all arose on the question of municipal aid to railways, and the question with these and other authorities is discussed in the title *MUNICIPAL AID*, vol. 20, pp. 1087, 1088.

**That the Public Must Pay for a Use** in aid of which taxation is imposed, does not render the use private; the test is not enjoyment wholly at the public expense, but a common and equal right free from unreasonable discrimination. *Perry v. Keene*, 56 N. H. 514; *Holt v. Antrim*, 64 N. H. 284.

Instances are grist mills, schools, and turnpikes. See the title *MUNICIPAL AID*, vol. 20, pp. 1085, 1086.

2. *Citizens' Sav., etc., Assoc. v. Topeka*, 20 Wall. (U. S.) 655.

**Public Purposes in the Law of Taxation Defined.** — The term "public purposes" in the law of

taxation "has no relation to the urgency of the public need [as in the law of eminent domain] or to the extent of the public benefit which is to follow. It is, on the other hand, merely a term of classification to distinguish the objects for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private inclination, interest, or liberality." *People v. Salem Tp. Board*, 20 Mich. 485, 4 Am. Rep. 400, *per Cooley, J.*

3. *People v. Salem Tp. Board*, 20 Mich. 475, 4 Am. Rep. 400. See also *Norris v. Waco*, 57 Tex. 635.

**4. Incidental Public Benefits.** — *Citizens' Sav., etc., Assoc. v. Topeka*, 20 Wall. (U. S.) 655; *Commercial Nat. Bank v. Iola*, 2 Dill. (U. S.) 353, 9 Kan. 689, *affirmed* 154 U. S. 617; *People v. Parks*, 58 Cal. 624; *Matter of Madera Irrigation Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106; *People v. Salem Tp. Board*, 20 Mich. 452, 4 Am. Rep. 400; *Lowell v. Boston*, 111 Mass. 454, 15 Am. Rep. 39; *Weismer v. Douglass*, 64 N. Y. 91, 21 Am. Rep. 586; *Feldman v. Charleston*, 23 S. Car. 57, 55 Am. Rep. 6; *Curtis v. Whipple*, 24 Wis. 350, 1 Am. Rep. 187. See also the title *MUNICIPAL AID*, vol. 20, p. 1084.

**Where the Purposes Are Partly Private and Partly Public**, the act must wholly fall, unless, perhaps, where the part to be raised for the private purpose can be distinguished and severed. *Coates v. Campbell*, 37 Minn. 498. And see *MacKenzie v. Wooley*, 39 La. Ann. 944, where such purposes were held separable.

5. *Sharpless v. Philadelphia*, 21 Pa. St. 147, 59 Am. Dec. 759; *Soens v. Racine*, 10 Wis. 281.

6. *Soens v. Racine*, 10 Wis. 271.

7. *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654.

**The Power to Tax Is the Power to Destroy.** — *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 431; *Citizens' Sav., etc., Assoc. v. Topeka*, 20 Wall. (U. S.) 663. And the national government in the exercise of the taxing power has driven out

(3) *Functions of Legislature and Judiciary.* — The question whether the interests of the public are sufficiently involved to justify the exercise of the taxing power is in the first instance for the legislature to decide; but, since the requirement of a public purpose in taxation is a limitation upon the power of the legislature, the courts must ultimately decide whether the legislature has overstepped its constitutional powers and whether the purpose is public or private.<sup>1</sup> The wisdom or policy of a tax is entirely in the determination of the legislature,<sup>2</sup> and the least possibility that it will promote the public welfare renders the question one of policy beyond the sphere of the courts.<sup>3</sup> All doubts are to be resolved in favor of the legislature,<sup>4</sup> and an exercise of the taxing power will be declared unconstitutional only when the absence of all possible public interest is clear and palpable.<sup>5</sup>

c. PURPOSES HELD TO BE PUBLIC OR OTHERWISE. — Applying the statement already made, that the question of the public nature of a purpose is to be determined less by the application of principles than by the settled usage of government, there is given in the notes a list of many subjects which have been held to be private,<sup>6</sup> as well as a more numerous list of purposes which

or existence state banks of issue. *Veazie Bank v. Fenno*, 8 Wall. (U. S.) 533, the court saying that even though the prohibitory purpose of the tax was plain, the judiciary could not prescribe to the legislature limitations on the exercise of its acknowledged powers. See the title NATIONAL BANKS, vol. 21, p. 326.

1. *Functions of Legislature and Judiciary* — *United States*. — *Citizens' Sav., etc., Assoc. v. Topeka*, 20 Wall. (U. S.) 655; *Dodge v. Mission Tp.*, (C. C. A.) 107 Fed. Rep. 827.

*California*. — *Matter of Madera Irrigation Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106.

*Iowa*. — *Hanson v. Vernon*, 27 Iowa 28, 1 Am. Rep. 215.

*Kansas*. — *Shawnee County v. Carter*, 2 Kan. 131.

*Louisiana*. — *State v. Clinton*, 26 La. Ann. 561; *Tulane Education Fund v. Assessors*, 38 La. Ann. 292.

*Maine*. — *Hooper v. Emery*, 14 Me. 375; *Allen v. Jay*, 60 Me. 124, 11 Am. Rep. 185.

*Massachusetts*. — *Denny v. Mattoon*, 2 Allen (Mass.) 361, 79 Am. Dec. 784; *Holden v. James*, 11 Mass. 396, 6 Am. Dec. 174; *Prince v. Boston*, 148 Mass. 285.

*Michigan*. — *People v. State Treasurer*, 23 Mich. 499.

*Nebraska*. — *Bradshaw v. Omaha*, 1 Neb. 16; *Turner v. Althaus*, 6 Neb. 54; *State v. Cornell*, 53 Neb. 559, 68 Am. St. Rep. 631.

*New Jersey*. — *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634.

*Ohio*. — *Good v. Zercher*, 12 Ohio 367.

*Pennsylvania*. — *Norman v. Heist*, 5 W. & S. (Pa.) 171, 40 Am. Dec. 493; *Greenough v. Greenough*, 11 Pa. St. 494, 51 Am. Dec. 567; *Hammett v. Philadelphia*, 65 Pa. St. 146, 3 Am. Rep. 615.

*South Carolina*. — *Feldman v. Charleston*, 23 S. Car. 57, 55 Am. Rep. 6.

*Texas*. — *Norris v. Waco*, 57 Tex. 635.

*Vermont*. — *Allen v. Drew*, 44 Vt. 174.

2. *Broadway Baptist Church v. McAtee*, 8 Bush (Ky.) 508, 8 Am. Rep. 480; *Thomas v. Leland*, 24 Wend. (N. Y.) 65. See the title STATUTES, vol. 26, p. 569.

3. *Booth v. Woodbury*, 32 Conn. 118.

4. See the title STATUTES, vol. 26, p. 641.

5. *Unconstitutionality Must Be Clear* — *Arkansas*. — *English v. Oliver*, 28 Ark. 317.

*California*. — *Stockton, etc., R. Co. v. Stockton*, 41 Cal. 173.

*Illinois*. — *Chicago, etc., R. Co. v. Smith*, 62 Ill. 268, 14 Am. Rep. 99.

*Kentucky*. — *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 345.

*Minnesota*. — *Minneapolis v. Janney*, 86 Minn. 111.

*Missouri*. — *Wells v. Weston*, 22 Mo. 384, 66 Am. Dec. 627.

*Nebraska*. — *State v. Cornell*, 53 Neb. 559, 68 Am. St. Rep. 631.

*New York*. — *Guilford v. Chenango County*, 13 N. Y. 149; *Weismer v. Douglas*, 64 N. Y. 91, 21 Am. Rep. 586; *People v. Kelly*, (Ct. App.) 5 Abb. N. Cas. (N. Y.) 383, 76 N. Y. 489.

*Ohio*. — *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24.

*Pennsylvania*. — *Sharpless v. Philadelphia*, 21 Pa. St. 174, 59 Am. Dec. 759; *Speer v. School Directors*, 50 Pa. St. 150; *Ahl v. Gleim*, 52 Pa. St. 432; *Morgan v. Com.*, 55 Pa. St. 456; *Hammett v. Philadelphia*, 65 Pa. St. 146, 3 Am. Rep. 615; *Kelly v. Pittsburgh*, 85 Pa. St. 170, 27 Am. Rep. 633.

*South Carolina*. — *Feldman v. Charleston*, 23 S. Car. 57, 55 Am. Rep. 6.

*Vermont*. — *Pennington v. Park*, 50 Vt. 178.

*Wisconsin*. — *Brodhead v. Milwaukee*, 19 Wis. 624, 88 Am. Dec. 711.

6. *The Fostering of Private Manufactures* or other merely individual enterprises does not justify taxation. *Dodge v. Mission Tp.*, (C. C. A.) 107 Fed. Rep. 827; *Scuffletown Fence Co. v. McAllister*, 12 Bush (Ky.) 312; *Cushing v. Newburyport*, 10 Met. (Mass.) 510; *Clee v. Sanders*, 74 Mich. 602; *Michigan Sugar Co. v. Auditor Gen.*, 124 Mich. 674, 83 Am. St. Rep. 354; *Coates v. Campbell*, 37 Minn. 498. See also the titles MUNICIPAL AID, vol. 20, p. 1084; MUNICIPAL CORPORATIONS, vol. 20, p. 1144; and illustrations in the note following, under the headings *Charities*; *Drainage*, *Irrigation*, and *Reclamation of Land*; *Public Education*.

*Celebrations and Entertainments* are private purposes without express legislative authority. *New London v. Brainard*, 22 Conn. 553; *Hodges*

have been held public within the taxing power.<sup>1</sup> It will be noted that the validity of taxes for many purposes of a local nature depends on valid delegation of the taxing power to the political division of the state where the tax is levied.

*v. Buffalo*, 2 Den. (N. Y.) 110. See also the next note *infra*, and the title MUNICIPAL CORPORATIONS, vol. 20, p. 1145.

**Indigent Inebriates.**—Laws Wis., 1895, c. 203, providing for the treatment of indigent inebriates at county expense, involves the imposition of a tax for private purposes and is unconstitutional. *State v. Froehlich*, (Wis. 1903) 94 N. W. Rep. 50.

For other cases holding such acts either constitutional or unconstitutional, see the title HABITUAL DRUNKARDS, vol. 15, p. 243.

**Rebuilding a Burnt District in a City** is a private purpose. See the title MUNICIPAL AID, vol. 20, p. 1084.

**Defraying the Expenses of Needy Students** while attending the state university is a private purpose not within the taxing power. *State v. Switzler*, 143 Mo. 287, 65 Am. St. Rep. 658; *Simmons Medicine Co. v. Ziegenheim*, 145 Mo. 368.

**Taxing for Distribution Among Inhabitants.**—A town cannot raise money by taxation to be divided again among its inhabitants. *Hooper v. Emery*, 14 Me. 379.

**When Individuals Have Made Voluntary Improvements** or voluntary incurred other expenses which could only become a public charge by legislative authority, a tax cannot be levied to reimburse such individuals without legislative authority. *Pease v. Chicago*, 21 Ill. 500. See also the next note *infra*, and the title PENSIONS AND BOUNTIES, vol. 22, p. 673.

**1. Agricultural Societies.**—*Hixon v. Eagle River*, 91 Wis. 649. See the title AGRICULTURAL SOCIETIES, vol. 2, p. 20.

**Charities.**—Charity, such as aid to unfortunate classes, constitutes a public purpose. *Booth v. Woodbury*, 32 Conn. 118; *St. Mary's Industrial School v. Brown*, 45 Md. 310; *People v. Glowacki*, 2 Thomp. & C. (N. Y.) 436. See also the titles HOSPITALS AND ASYLUMS, vol. 15, p. 761; MUNICIPAL AID, vol. 20, p. 1085.

Aid by taxation to purely private institutions, though charitable, is invalid. *Hitchcock v. St. Louis*, 49 Mo. 484; *Philadelphia Assoc. v. Wood*, 39 Pa. St. 82.

**Support of Poor.**—See *Louisville, etc., R. Co. v. Harrison County*, (Ky. 1895) 29 S. W. Rep. 639; *Louisville, etc., R. Co. v. Pendleton County*, 96 Ky. 491; *Knowlton v. Rock County*, 9 Wis. 410. See also the title POOR AND POOR LAWS, vol. 22, p. 1000.

In *New York* municipalities may provide for the support of their poor by taxation in aid of private institutions. *Shepherd's Fold v. New York*, 96 N. Y. 137.

**Insane Poor.**—See *People v. Fitch*, 148 N. Y. 71.

**Furnishing Seed to Needy Farmers.**—See the title MUNICIPAL AID, vol. 20, p. 1085.

**Contingent Expenses** may be a proper item of taxation under delegated powers, where this item covers matters which cannot be enumerated or exactly foreseen; but not where it embraces a large part of the annual expendi-

tures, unaccompanied by explanation of the purposes of its levy. *Webster v. Baltimore County*, 51 Md. 395; *Freeland v. Hastings*, 10 Allen (Mass.) 577. See also *Culbertson v. H. Witbeck Co.*, 127 U. S. 326.

**Debts Not Yet Incurred or Not Yet Due.**—*Spring v. Collector*, 78 Ill. 101; *Marion County v. Louisville, etc., R. Co.*, 91 Ky. 388; *Louisville, etc., R. Co. v. School Dist. No. 108*, (Ky. 1895) 29 S. W. Rep. 340; *Lowell v. Oliver*, 8 Allen (Mass.) 247; *Hilbish v. Catherman*, 64 Pa. St. 154; *Morton v. Comptroller Gen.*, 4 S. Car. 453.

**Drainage, Irrigation, and Reclamation of Land.**—*Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701; *Boro v. Phillips County*, 4 Dill. (U. S.) 216; *People v. Parks*, 58 Cal. 634; *Dingley v. Boston*, 100 Mass. 544; *Talbot v. Hudson*, 16 Gray (Mass.) 417; *Tide-water Co. v. Coster*, 18 N. J. Eq. 518, 90 Am. Dec. 634; *People v. Nearing*, 27 N. Y. 306; *Chesbrough v. Putnam County*, 37 Ohio St. 508; *Holtz v. Henry County*, 41 Ohio St. 423; *Seely v. Sebastian*, 4 Oregon 25; *Donnelly v. Decker*, 58 Wis. 461, 46 Am. Rep. 637. See the titles DRAINS AND SEWERS, vol. 10, pp. 222, 223, 228 *et seq.*, 253 *et seq.*; IRRIGATION, vol. 17, p. 490; MUNICIPAL SECURITIES, vol. 21, pp. 30, 42; SPECIAL OR LOCAL ASSESSMENTS, vol. 25, p. 1181, 1182.

**Taxation for Drains in Which the Public Are Not Concerned** is unconstitutional. *Anderson v. Kerns Draining Co.*, 14 Ind. 199, 77 Am. Dec. 63; *People v. Saginaw County*, 26 Mich. 22; *Matter of Church of Holy Sepulchre*, (Supm. Ct. Gen. T.) 61 How. Pr. (N. Y.) 315. And see the title DRAINS AND SEWERS, vol. 10, pp. 224, 226.

**Drainage to Preserve Public Health** is an exercise of the police power. See the titles DRAINS AND SEWERS, vol. 10, pp. 223, 226; POLICE POWER, vol. 22, p. 923.

**Exhibits at Fairs and Expositions** constitute a public purpose, when by legislative authority. *Daggett v. Colgan*, 92 Cal. 53, 27 Am. St. Rep. 95; *Norman v. Kentucky Board of Managers*, 93 Ky. 537; *State v. Cornell*, 53 Neb. 556, 68 Am. St. Rep. 629; *Shelby County v. Tennessee Centennial Exposition Co.*, 96 Tenn. 653. See also *Minneapolis v. Janney*, 86 Minn. 111. *Compare Hayes v. Douglas County*, 92 Wis. 429, 53 Am. St. Rep. 926.

**Fire Departments.**—*Phoenix Assur. Co. v. Fire Dept.*, 117 Ala. 631; *Allen v. Taunton*, 19 Pick. (Mass.) 485; *Torrey v. Millbury*, 21 Pick. (Mass.) 64; *Van Sicklen v. Burlington*, 27 Vt. 70. See also *Coates v. Campbell*, 37 Minn. 498.

**Power to Tax Cannot Be Delegated to a Fire Department**, since it is not a political subdivision of the state nor a political corporation. *Taylor v. Smith*, 50 N. J. L. 101.

**Moral Obligations and Equitable Claims** for which an equivalent has been received, or the payment of which might be avoided only on some technical ground, have been held to justify taxation. *New Orleans v. Clark*, 95 U. S. 644; *People v. Burr*, 13 Cal. 343; *Beals v.*

*d. LOCAL BURDENS REQUIRE LOCAL BENEFITS — (1) In General.* — It is necessary that a tax should benefit the community on which it is imposed, that is, local taxes must not only be public in purpose, but must be of advan-

*Amador County*, 35 Cal. 625; *Guilford v. Chenango County*, 13 N. Y. 143; *Brewster v. Syracuse*, 19 N. Y. 116; *Exempt Firemen's Benev. Fund v. Roome*, 93 N. Y. 313, 45 Am. Rep. 217; *Wrought Iron Bridge Co. v. Attica*, 119 N. Y. 204; *Thomas v. Leland*, 24 Wend. (N. Y.) 65; *State v. Richland Tp.*, 20 Ohio St. 362; *State v. Hoffman*, 35 Ohio St. 435; *State v. Board of Education*, 38 Ohio St. 3; *Warder v. Clark County*, 38 Ohio St. 639; *Lycoming County v. Union County*, 15 Pa. St. 166, 53 Am. Dec. 575; *Vacation of Howard St.*, 142 Pa. St. 601; *Briggs v. Whipple*, 6 Vt. 95; *Bradhead v. Milwaukee*, 19 Wis. 624, 88 Am. Dec. 711; *Curtis v. Whipple*, 24 Wis. 354, 1 Am. Rep. 187; *State v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622. See also the title COUNTRIES, vol. 7, p. 970. *Compare Osgood v. Conway*, 67 N. H. 100, holding that a town has no authority to impose a tax to pay for services voluntarily rendered without express or implied contract. There is no legal and "at most only a moral obligation to pay."

*A Tax to Compensate Land Owners for the Removal of the County Seat* has been held valid. *Wilkinson v. Cbeatham*, 43 Ga. 258.

*A Tax May Be Levied to Indemnify Public Officers* against liabilities incurred or damages sustained in the *bona fide* discharge of their duties. *Nelson v. Milford*, 7 Pick. (Mass.) 18; *Bancroft v. Lynnfield*, 18 Pick. (Mass.) 568, 29 Am. Dec. 623; *Hadsell v. Hancock*, 3 Gray (Mass.) 526; *Fuller v. Groton*, 11 Gray (Mass.) 340; *Friend v. Gilbert*, 108 Mass. 408; *Briggs v. Whipple*, 6 Vt. 95. And see *Louisville, etc., R. Co. v. School Dist. No. 108*, (Ky. 1895) 29 S. W. Rep. 340.

Such are taxes to indemnify a resident of a town against costs in a suit conducted with the advice of the town authorities, *Baker v. Windham*, 13 Me. 74; or to indemnify a public officer for expenses incurred in a suit for acts done in the course of his duty, *Sherman v. Carr*, 8 R. I. 431; *compare Matter of Jensen*, 44 N. Y. App. Div. 509, *affirming* 28 Misc. (N. Y.) 378 (holding unconstitutional an act authorizing municipal and state officers to obtain reimbursement from the municipal or state treasury for expenses incurred in defending suits brought to remove them from office or on criminal charges for acts done in office); *Chapman v. New York*, 168 N. Y. 80, *affirming* 57 N. Y. App. Div. 583; *Rockerfeller v. Taylor*, 69 N. Y. App. Div. 183; or to indemnify a public official against the loss of public funds, where the loss was without his fault, *Mount v. State*, 90 Ind. 29, 46 Am. Rep. 192; *Board of Education v. McLandsborough*, 36 Ohio St. 227, 38 Am. Rep. 582. *Compare Bristol v. Johnson*, 34 Mich. 123. An act requiring a county to pay the personal debt of an ex-official against its consent is unconstitutional, and payment is founded on neither a moral nor equitable obligation on the part of the county. *Faas v. Warner*, 96 Pa. St. 215.

Pensions and Bounties constitute public uses for which money may be raised by taxation.

*Kunkle v. Franklin*, 13 Minn. 127, 97 Am. Dec. 226; *Bradhead v. Milwaukee*, 19 Wis. 624, 88 Am. Dec. 711; *State v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622. And see the titles MUNICIPAL SECURITIES, vol. 21, p. 39; PENSIONS AND BOUNTIES, vol. 22, p. 657; and see BOUNTIES, vol. 4, p. 869. *Compare Ferguson v. Landram*, 1 Bush (Ky.) 548, 5 Bush (Ky.) 230, 96 Am. Dec. 350, holding a bounty act unconstitutional, and *Bush v. Orange County*, 159 N. Y. 212, *affirming* 10 N. Y. App. Div. 542, holding not within the taxing power an act of 1892, providing that certain counties, upon a petition by the majority of the taxpayers, might provide for refunding to drafted men or their heirs, under the Act of Congress of 1863, certain sums.

*Firemen's Pensions.* — *Exempt Firemen's Benev. Fund v. Roome*, 93 N. Y. 313, 45 Am. Rep. 217. See also the title FIRE DEPARTMENT, vol. 13, p. 77.

*Teachers' Pensions.* — *Mahon v. Board of Education*, 68 N. Y. App. Div. 154, *affirmed* 171 N. Y. 263 (statute unconstitutional so far as applied to teachers who resign before its passage).

*Sugar Bounties.* — A law providing for the payment of bounties to the manufacturers of beet sugar has been held unconstitutional. *Michigan Sugar Co. v. Auditor-Gen.*, 124 Mich. 674, 83 Am. St. Rep. 354. See also BOUNTIES, vol. 4, p. 869 *et seq.*

*Public Education — Schools, etc.* — *United States.* — *Kelly v. Pittsburg*, 104 U. S. 78.

*Alabama.* — *Horton v. Mobile School Com'rs*, 43 Ala. 598.

*Georgia.* — *Board of Public Education v. Barlow*, 49 Ga. 232.

*Illinois.* — *Burr v. Carbondale*, 76 Ill. 456.

*Iowa.* — *Hanson v. Vernon*, 27 Iowa 28, 1 Am. Rep. 215.

*Kentucky.* — *Marshall v. Donovan*, 10 Bush (Ky.) 681; *Collins v. Henderson*, 11 Bush (Ky.) 74.

*Maine.* — *Opinion of Justices*, 68 Me. 582.

*Massachusetts.* — *Dillingham v. Snow*, 5 Mass. 547; *Cushing v. Newburyport*, 10 Met. (Mass.) 508.

*Missouri.* — *State v. Miller*, 65 Mo. 50; *St. Louis, etc., R. Co. v. Gracy*, (Mo. 1894) 28 S. W. Rep. 736.

*New York.* — *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543.

*Pennsylvania.* — *Com. v. Hartman*, 17 Pa. St. 118; *Smith v. McCarthy*, 56 Pa. St. 359; *Felty v. Uhler*, 10 Phila. (Pa.) 512, 30 Leg. Int. (Pa.) 330.

*Tennessee.* — *Luehrman v. Taxing Dist.*, 2 Lea (Tenn.) 442.

*Vermont.* — *Williams v. School Dist. No. 6*, 33 Vt. 271; *Bennington v. Park*, 50 Vt. 178. *Virginia.* — *Antoni v. Wright*, 22 Gratt. (Va.) 857.

*Canada.* — *Munson v. Collingwood*, 9 U. C. C. P. 497.

See also the titles DOMINION OF CANADA, vol. 10, pp. 113, 114; MUNICIPAL AID, vol. 20, p. 1085; UNIVERSITIES AND COLLEGES.

tage to the locality, and a tax cannot be laid on one organized community for the sole benefit of another.<sup>1</sup> But that each individual taxpayer should be

Schools teaching languages other than English may be maintained. *Stuart v. School Dist. No. 1*, 30 Mich. 69.

*Normal Schools.*—*Briggs v. Johnson County*, 4 Dill. (U. S.) 148; *Gordon v. Cornes*, 47 N. Y. 608.

*Private and Sectarian Schools* are not a proper subject for taxation. *People v. McAdams*, 82 Ill. 356; *Hanson v. Verndt*, 27 Iowa 28, 1 Am. Rep. 215; *Atchison, etc., R. Co. v. Atchison*, 47 Kan. 712. See also the title MUNICIPAL AID, vol. 20, p. 1085.

*Schoolhouses, Erection or Provision of.*—*Baltimore, etc., R. Co. v. People*, 195 Ill. 423; *Benton v. Scott*, 168 Mo. 378; *Holt v. Antrim*, 64 N. H. 284; *Eddy v. Wilson*, 43 Vt. 362.

*Public Health.*—*Solomon v. Tarver*, 52 Ga. 405; *Anderson v. Kerns Draining Co.*, 14 Ind. 199, 77 Am. Dec. 63; *Baltimore v. Hughes*, 1 Gill & J. (Md.) 480, 19 Am. Dec. 243; *Miller v. Craig*, 11 N. J. Eq. 175. See the titles COUNTIES, vol. 7, p. 957; DRAINS AND SEWERS, vol. 10, p. 222 *et seq.*

The preservation of public health is peculiarly within the police power. See the title POLICE POWER, vol. 22, p. 922. See also the title EMINENT DOMAIN, vol. 10, p. 1082.

*Public Improvement and Public Works.*—See the title MUNICIPAL SECURITIES, vol. 21, p. 39. See also INTERNAL IMPROVEMENT, vol. 16, p. 1119; PUBLIC IMPROVEMENTS, vol. 23, p. 313; PUBLIC WORKS, vol. 23, p. 459. But see, as to *Michigan*, *Hubbard v. Springwells*, 25 Mich. 153.

*Bridges.*—*Will County v. People*, 110 Ill. 511; *People v. Kelly*, 76 N. Y. 475, 5 Abb. N. Cas. (N. Y.) 383. See the titles BRIDGES, vol. 4, p. 918; MUNICIPAL SECURITIES, vol. 21, p. 40; SPECIAL OR LOCAL ASSESSMENTS, vol. 25, p. 1183.

*Canals.*—*Thomas v. Leland*, 24 Wend. (N. Y.) 65. See the title MUNICIPAL AID, vol. 20, p. 1086.

*Electricity or Gas.*—Unless the constitution forbid, providing light by electricity or gas is a public purpose justifying taxation. Opinion of Justices, 150 Mass. 592; *Mitchell v. Ne-gaunee*, 113 Mich. 359, 67 Am. St. Rep. 468. See the titles ELECTRIC-LIGHT COMPANIES, vol. 10, p. 865; GAS COMPANIES, vol. 14, p. 917; MUNICIPAL CORPORATIONS, vol. 20, p. 1147; MUNICIPAL SECURITIES, vol. 21, p. 42; SPECIAL ASSESSMENTS, vol. 25, p. 1184.

*Gristmills* grinding for toll are a public use. See INTERNAL IMPROVEMENT, vol. 16, p. 1119; and the title MUNICIPAL AID, vol. 20, p. 1085.

*Harbors.*—*Revenue Com'rs v. State*, 45 Ala. 399; *State v. Milwaukee*, 25 Wis. 122.

*Highways and Turnpikes.*—*O'Kane v. Treat*, 25 Ill. 557; *Ricketts v. Spraker*, 77 Ind. 371; *Atty.-Gen. v. Bay County*, 34 Mich. 46; *Elting v. Hickman*, (Mo. 1903) 72 S. W. Rep. 700; *People v. Flagg*, 46 N. Y. 400; *State v. Fayette County*, 37 Ohio St. 526. See the titles MUNICIPAL AID, vol. 20, p. 1086; SPECIAL ASSESSMENTS, vol. 25, p. 1183.

*Levees.*—*New Orleans, etc., R. Co. v. Ellerman*, 105 U. S. 166; *People v. Whyler*, 41 Cal. 351. See also the title SPECIAL ASSESSMENTS, vol. 25, p. 1182.

Levees are not an internal improvement

under the *Arkansas* constitution. *McGehee v. Mathis*, 21 Ark. 40.

*Markets and Market Houses.*—*Spaulding v. Lowell*, 23 Pick. (Mass.) 71. See the title MARKETS, vol. 19, p. 1146.

*Parks for Public Enjoyment.*—*Atty.-Gen. v. Burrell*, 31 Mich. 25. See also the titles PARKS AND PUBLIC SQUARES, vol. 21, p. 1067 *et seq.*; SPECIAL ASSESSMENTS, vol. 25, p. 1182.

*Piers, Breakwaters, and the Like* are public purposes for which the legislature may authorize special taxes. *Soens v. Racine*, 10 Wis. 271.

*Public Buildings.*—*Habersham County v. Porter Mfg. Co.*, 103 Ga. 613; *Harris v. Dubuclet*, 30 La. Ann. 662. See the title MUNICIPAL SECURITIES, vol. 21, pp. 39, 40.

*Public Clock.*—*Willard v. Newburyport*, 12 Pick. (Mass.) 227.

*Railroads.*—See the title MUNICIPAL AID, vol. 20, p. 1086 *et seq.*

*Subway for Transporting Passengers.*—*Prince v. Crocker*, 166 Mass. 347.

*Water.*—Securing a water supply is a public use. *Burden v. Stein*, 27 Ala. 104, 62 Am. Dec. 758; *Rome v. Cabot*, 28 Ga. 50; *Wells v. Atlanta*, 43 Ga. 67; *Nelson v. La Porte*, 33 Ind. 258; *Grant v. Davenport*, 36 Iowa 396; *Burlington Water Co. v. Woodward*, 49 Iowa 63; *Reddall v. Bryan*, 14 Md. 444, 74 Am. Dec. 550; *Lumbard v. Stearns*, 4 Cush. (Mass.) 60; *Hardy v. Waltham*, 3 Met. (Mass.) 163; *Allentown v. Henry*, 73 Pa. St. 404, *Chadwick v. Maginnes*, 94 Pa. St. 117; *Atty.-Gen. v. Eau Claire*, 37 Wis. 400. See the titles MUNICIPAL SECURITIES, vol. 21, p. 41; SPECIAL OR LOCAL ASSESSMENTS, vol. 25, p. 1182.

*Wharves.*—*New Orleans, etc., R. Co. v. Ellerman*, 105 U. S. 166. See also the title WHARVES AND WHARFAGE.

**1. Benefit Must Be Local as Well as Public.**—*United States.*—*U. S. v. Memphis*, 97 U. S. 284; *Livingston County v. Darlington*, 101 U. S. 407; *Harter v. Kernochan*, 103 U. S. 562; *Louisiana v. Pilsbury*, 105 U. S. 295.

*Alabama.*—*Mobile v. Dargan*, 45 Ala. 310.

*Arkansas.*—*Hutchinson v. Ozark Land Co.*, 57 Ark. 554, 38 Am. St. Rep. 258.

*California.*—*People v. Parks*, 58 Cal. 624.

*Dakota.*—*Farris v. Vannier*, 6 Dak. 186.

*Illinois.*—*Livingston County v. Weider*, 64 Ill. 427; *Sleight v. People*, 74 Ill. 47; *People v. School Trustees*, 78 Ill. 136; *Allhands v. People*, 82 Ill. 234; *Drake v. Ogden*, 128 Ill. 603.

*Indiana.*—*Anderson v. Kerns Draining Co.*, 14 Ind. 199, 77 Am. Dec. 63; *Marks v. Purdue University*, 37 Ind. 155.

*Kentucky.*—*Belle Point v. Pence*, (Ky. 1891) 17 S. W. Rep. 197; *Arbegust v. Louisville*, 2 Bush (Ky. 271); *Howell v. Bristol*, 8 Bush (Ky.) 493; *Lexington v. McQuillan*, 9 Dana (Ky.) 513, 35 Am. Dec. 159.

*Maryland.*—*Baltimore v. Hughes*, 1 Gill & J. (Md.) 480, 19 Am. Dec. 243; *Talbot County v. Queen Anne's County*, 50 Md. 260; *Prince George's County v. Laurel*, 70 Md. 443.

*Massachusetts.*—*Parsons v. Goshen*, 11 Pick. (Mass.) 396.

*Michigan.*—*Ryerson v. Utley*, 16 Mich. 276;

directly benefited by the expenditure of a tax is an ideal impossible in the very nature of things, and the promotion of the general welfare and prosperity of the community is all that can be expected.<sup>1</sup>

(2) *Benefits Need Not Be Entirely Local.* — The benefits need not accrue entirely to the locality or community taxed. The primary expenditure may be within the community<sup>2</sup> or elsewhere,<sup>3</sup> but it is sufficient that direct, and appreciable benefit results to the locality, though a wider area may be benefited.

(3) *Functions of Legislature and Courts.* — The question whether or not the benefit is local, like the related question of the public purpose of a tax, rests primarily in the determination of the legislature in its discretion, and in considering the exercise of so indefinite and extended a power the courts will

*People v. Salem Tp. Board*, 20 Mich. 452, 4 Am. Rep. 400; *Atty-Gen. v. Bay County*, 34 Mich. 46.

*Mississippi.* — *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508.

*Missouri.* — *Wells v. Weston*, 22 Mo. 384, 66 Am. Dec. 627; *Lockwood v. St. Louis*, 24 Mo. 20; *State v. Leffingwell*, 54 Mo. 458.

*New Hampshire.* — *Concord v. Boscawen*, 17 N. H. 465.

*New York.* — *Riley v. Rochester*, 9 N. Y. 64; *Gordon v. Cornes*, 47 N. Y. 608; *Matter of Prospect Park*, 60 N. Y. 398; *People v. Dutchess County*, 1 Hill (N. Y.) 50.

*Ohio.* — *Zanesville v. Richards*, 5 Ohio St. 589.

*Pennsylvania.* — *Durach's Appeal*, 62 Pa. St. 491.

*Tennessee.* — *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308.

*Utah.* — *Bromley v. Reynolds*, 2 Utah 525.

*Vermont.* — *Bennington v. Park*, 50 Vt. 178.

*Wisconsin.* — *State v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622.

See also *infra*, this title, *Municipal Taxation*, and the title *SPECIAL OR LOCAL ASSESSMENTS*, vol. 25, p. 1176.

It is wrong that a few should be taxed for the benefit of the whole; and it is equally wrong that the whole should be taxed for the benefit of a few. *People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266.

**Special Constitutional Provisions** may require local taxation to be for local purposes. *Bush v. Orange County*, 159 N. Y. 212, *affirming* 10 N. Y. App. Div. 542; and see *infra*, this title, *Municipal Taxation*.

1. **Promotion of General Welfare Enough** — *Colorado.* — *Brown v. Denver*, 3 Colo. 169.

*Illinois.* — *Taylor v. Thompson*, 42 Ill. 9.

*Kentucky.* — *County Judge v. Shelby R. Co.*, 5 Bush (Ky.) 225; *Howell v. Bristol*, 8 Bush (Ky.) 493.

*Louisiana.* — *New Orleans v. Cazelar*, 27 La. Ann. 156.

*Massachusetts.* — *Patton v. Springfield*, 99 Mass. 627.

*New Jersey.* — *Van Giesen v. Bloomfield*, 47 N. J. L. 442.

*Ohio.* — *Cleveland, etc., R. Co. v. Marion County*, 48 Ohio St. 249.

*Pennsylvania.* — *Kirby v. Shaw*, 19 Pa. St. 258; *Kelly v. Pittsburgh*, 85 Pa. St. 170, 27 Am. Rep. 633.

*Vermont.* — *Bennington v. Park*, 50 Vt. 178.

**Inequality of Benefits** among those upon whom a local tax is imposed by statute is no ground

for annulling the statute. *Norris v. Waco*, 57 Tex. 635.

**Injury to the Property of Some Persons** may even result from a valid local tax. *People v. Whyler*, 41 Cal. 351.

2. **Tax Expended Within Community.** — *Livingston County v. Darlington*, 101 U. S. 407; *Burr v. Carbondale*, 76 Ill. 455; *Hensley Tp. v. People*, 84 Ill. 544; *Marks v. Purdue University*, 37 Ind. 155; *Merrick v. Amherst*, 12 Allen (Mass.) 500; *Gordon v. Cornes*, 47 N. Y. 608; *Wasson v. Wayne County*, 11 Ohio Dec. (Reprint) 475, 27 Cinc. L. Bul. 134; *Kirby v. Shaw*, 19 Pa. St. 258; *Philadelphia v. Field*, 58 Pa. St. 320.

**A City May Be Authorized to Erect a Court House** within the municipality for the use of a county and to provide for its cost by city taxation only. *Callam v. Saginaw*, 50 Mich. 7.

**Benefits from Special Assessments.** — See the title *SPECIAL ASSESSMENTS*, vol. 25, p. 1184.

3. **Expenditure May Be Without Community** — *United States.* — *Van Hostrup v. Madison*, 1 Wall. (U. S.) 291; *Chicago, etc., R. Co. v. Otoe County*, 16 Wall. (U. S.) 667; *Montclair v. Ramsdell*, 107 U. S. 152; *Otoe County v. Baldwin*, 111 U. S. 1; *Moulton v. Evansville*, 25 Fed. Rep. 382.

*Alabama.* — *Stein v. Mobile*, 24 Ala. 591.

*California.* — *Matter of Madera Irrigation Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106.

*Illinois.* — *Halsey v. People*, 84 Ill. 89; *Quincy, etc., R. Co. v. Morris*, 84 Ill. 410.

*Maryland.* — *Talbot County v. Queen Anne's County*, 50 Md. 245.

*Massachusetts.* — *Com. v. Newburyport*, 103 Mass. 129; *Carter v. Cambridge, etc., Bridge*, 104 Mass. 236.

*Missouri.* — *St. Joseph, etc., R. Co. v. Buchanan County Ct.*, 39 Mo. 485.

*New York.* — *People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *People v. Kelly*, (Ct. App.) 5 Abb. N. Cas. (N. Y.) 383, 76 N. Y. 489; *Thomas v. Leland*, 24 Wend. (N. Y.) 65.

*Ohio.* — *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24.

*South Carolina.* — *Copes v. Charleston*, 10 Rich. L. (S. Car.) 491; *Charleston v. Wentworth St. Baptist Church*, 4 Strobb. L. (S. Car.) 306.

*Tennessee.* — *McCallie v. Chattanooga*, 3 Head (Tenn.) 317; *Louisville, etc., R. Co. v. Davidson County Ct.*, 1 Sneed (Tenn.) 637, 62 Am. Dec. 424; *Adams v. Memphis, etc., R. Co.*, 2 Coldw. (Tenn.) 645; *Shelby County v. Tennessee Centennial Exposition Co.*, 96 Tenn. 661.

*Vermont.* — *Bennington v. Park*, 50 Vt. 178.

rarely find a ground for judicial interposition.<sup>1</sup> But where it is palpably and clearly apparent that a statute has imposed a local burden on a community for purposes in which the community has no interest, the statute may be annulled.<sup>2</sup>

(4) *Apportionment of Burdens* — Between State and Taxing Districts or Between Taxing Districts. — As the power of taxation and the power of apportioning taxation are identical and inseparable,<sup>3</sup> the apportionment of the tax between the general public and the local division of the state, and between different local divisions, is a matter entirely in the discretion of the legislature.<sup>4</sup>

**VI. PERSONS AND THINGS TAXABLE** — 1. *In General* — The Taxing Power of a State Extends to All Persons and Property within the state, except so far as the power is limited by the constitution either by express words or by necessary implication.<sup>5</sup> Taxes may be imposed directly on persons, in the form of capitation or poll taxes; on property directly, as revenue taxes and assessments<sup>6</sup> on the owner in respect of his property,<sup>7</sup> or on business or the owner in respect of

1. *Legislature and Courts* — *United States*. — *Livingston County v. Darlington*, 101 U. S. 407; *Kelly v. Pittsburgh*, 104 U. S. 78; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701; *Boro v. Phillips County*, 4 Dill. (U. S.) 216.

*California*. — *Matter of Madera Irrigation Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106.

*Georgia*. — *Linton v. Athens*, 53 Ga. 588.

*Illinois*. — *Shaw v. Dennis*, 10 Ill. 405.

*Louisiana*. — *Stoner v. Flournoy*, 28 La. Ann. 850.

*Massachusetts*. — *Oliver v. Washington Mills*, 11 Allen (Mass.) 268; *Atty.-Gen. v. Cambridge*, 16 Gray (Mass.) 247.

*Minnesota*. — *Sanborn v. Rice County*, 9 Minn. 273.

*Mississippi*. — *Martin v. Dix*, 52 Miss. 53, 24 Am. Rep. 661.

*Missouri*. — *Uhrig v. St. Louis*, 44 Mo. 458; *St. Joseph v. Farrell*, 106 Mo. 437.

*Nebraska*. — *Chicago, etc., R. Co. v. Klein*, 52 Neb. 258.

*New York*. — *People v. Richmond County*, 20 N. Y. 252; *Litchfield v. Vernon*, 41 N. Y. 123.

*Pennsylvania*. — *Grim v. Weissenberg School Dist.*, 57 Pa. St. 433, 98 Am. Dec. 237; *Philadelphia v. Field*, 58 Pa. St. 326; *Hammett v. Philadelphia*, 65 Pa. St. 146, 3 Am. Rep. 615; *Weber v. Reinhard*, 73 Pa. St. 370, 13 Am. Rep. 747; *Hewitt's Appeal*, 88 Pa. St. 55.

*Settled Legislative Usage of Great Weight*. — *Hawkins v. Carroll County*, 50 Miss. 735.

The Power to Apportion Taxes is closely related to the question of their local nature. See *infra*, this section, *Apportionment of Burdens*.

2. *When Purpose Is Clearly Not Local* — *Illinois*. — *Taylor v. Thompson*, 42 Ill. 9.

*Kentucky*. — *Malchus v. Highlands Dist.*, 4 Bush (Ky.) 547; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *Slack v. Maysville, etc., R. Co.*, 13 B. Mon. (Ky.) 1.

*Louisiana*. — *New Orleans v. Cazelar*, 27 La. Ann. 156; *Minor v. Daspit*, 43 La. Ann. 337.

*Maine*. — *Waterville v. Kennebec County*, 59 Me. 80.

*Massachusetts*. — *Oliver v. Washington Mills*, 11 Allen (Mass.) 268.

*Michigan*. — *People v. East Saginaw*, 33 Mich. 164.

*Pennsylvania*. — *Weister v. Hade*, 52 Pa. St. 474.

3. *People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266.

4. *Apportionment* — *United States*. — *Briggs v. Johnson County*, 4 Dill. (U. S.) 148.

*Alabama*. — *President, etc., of Revenue v. State*, 45 Ala. 399.

*Illinois*. — *Burr v. Carbondale*, 76 Ill. 455; *Hensley Tp. v. People*, 84 Ill. 544; *Will County v. People*, 110 Ill. 511.

*Maryland*. — *Talbot County v. Queen Anne's County*, 50 Md. 245.

*Massachusetts*. — *Salem Turnpike, etc., Bridge Corp. v. Essex County*, 100 Mass. 282; *Com. v. Newburyport*, 103 Mass. 129; *Carter v. Cambridge, etc., Bridge*, 104 Mass. 236; *Hingham, etc., Bridge, etc., Corp. v. Norfolk County*, 6 Allen (Mass.) 353; *Norwich v. Hampshire County*, 13 Pick. (Mass.) 60.

*Missouri*. — *Hamilton v. St. Louis County Ct.*, 15 Mo. 5; *State v. St. Louis County Ct.*, 34 Mo. 546; *Hannibal v. Marion County*, 69 Mo. 571.

*New Jersey*. — *Pierson v. Newark*, 44 N. J. L. 424.

*New York*. — *Spencer v. Merchant*, 100 N. Y. 585; *People v. Dutchess County*, 1 Hill (N. Y.) 50; *Thomas v. Leland*, 24 Wend. (N. Y.) 65.

*North Carolina*. — *Greene County v. Lenoir County*, 92 N. Car. 180.

*Pennsylvania*. — *Kirby v. Shaw*, 19 Pa. St. 258; *Serrill v. Philadelphia*, 38 Pa. St. 355.

*Vermont*. — *Bennington v. Park*, 50 Vt. 178.

*Wisconsin*. — *State v. Sauk County*, 70 Wis. 485.

See also the title SPECIAL ASSESSMENTS, vol. 25, p. 1197 *et seq.*

**Constitutional Provisions May Prohibit** local impositions for general purposes. *Hubbard v. Fittsimmons*, 57 Ohio St. 436.

5. *Taxing Power Includes All Persons and Property in State*. — *Harrison v. Vicksburg*, 3 Smed. & M. (Miss.) 585, 41 Am. Dec. 633; *Pullen v. Wake County*, 66 N. Car. 361; *Catlin v. Hull*, 21 Vt. 152.

**That a Corporation Is a Person**, see PERSON, vol. 22, p. 741 *et seq.*

6. See the titles REVENUE LAWS, vol. 24, p. 883; SPECIAL OR LOCAL ASSESSMENTS, vol. 25, p. 1166; SUCCESSION TAXES, *ante*, p. 337.

7. In *Maryland*, property taxes are levied not on things, but on the owners of things; and the



his business.<sup>1</sup> Thus taxes may be imposed on every person residing or owning property or doing business in the state<sup>2</sup> or on property employed in business in the state.<sup>3</sup>

**The Right to Tax a Person** does not depend upon the possession of the electoral franchise by that person,<sup>4</sup> or even upon his citizenship.<sup>5</sup>

**Liability Created by Tax.**—In general, a tax on property creates a personal liability on the part of the owner of the property.<sup>6</sup> But it has been held that

value of the things owned fixes the measure of the owner's liability. *Monticello Distilling Co. v. Baltimore*, 90 Md. 416; *Carstairs v. Cochran*, 95 Md. 488.

1. See the title **OCCUPATION, BUSINESS, AND PRIVILEGE TAXES**, vol. 21, p. 770.

2. **Persons Residing, Owning Property, or Doing Business in State**—*United States*.—*Duer v. Small*, (U. S. Cir. Ct.) 17 How. Pr. (N. Y.) 201.

*Georgia*.—*Padelford v. Savannah*, 14 Ga. 438; *Jones v. Columbus*, 25 Ga. 610.

*Massachusetts*.—*Turner v. Burlington*, 16 Mass. 208; *Coburn v. Richardson*, 16 Mass. 213.

*Michigan*.—*Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654.

*Mississippi*.—*Harrison v. Vicksburg*, 3 Smed. & M. (Miss.) 581, 41 Am. Dec. 633.

*New York*.—*People v. Tax Com'rs*, 23 N. Y. 224; *Hilton v. Fonda*, 86 N. Y. 339; *People v. Barker*, 141 N. Y. 118.

*North Carolina*.—*Worth v. Fayetteville*, Winst. Eq. (60 N. Car.) 70.

*Pennsylvania*.—*Bennett v. Birmingham*, 31 Pa. St. 15; *Shriver v. Pittsburg*, 66 Pa. St. 446.

*South Carolina*.—*State v. Charleston*, 2 Spears L. (S. Car.) 623.

*Vermont*.—*Catlin v. Hull*, 21 Vt. 152.

See further *infra*, this title, *Assessment*.

**As to Who Is a "Resident"** under tax laws, see *Tazewell County v. Davenport*, 40 Ill. 197, holding domicile on the one hand, or a transient visit on the other, unnecessary, but a residence for business purposes sufficient. See generally the title **RESIDENCE**, vol. 24, p. 692.

**As to What Constitutes Doing Business in a state**, see **BUSINESS**, vol. 5, p. 74; **DOING BUSINESS**, vol. 10, p. 1; and the titles **FOREIGN CORPORATIONS**, vol. 13, p. 869; **OCCUPATION, ETC.**, **TAXES**, vol. 21, p. 811.

**Nonresidents** may be included as property owners, or may be designated specially. *Walker v. Jack*, (C. C. A.) 88 Fed. Rep. 576, reversing 79 Fed. Rep. 138; *Duer v. Small*, (U. S. Cir. Ct.) 17 How. Pr. (N. Y.) 201, 7 Fed. Cas. No. 4,116; *Tax Cases*, 12 Gill & J. (Md.) 117; *U. S. Bank v. State*, 12 Smed. & M. (Miss.) 456; *Moore v. Fayetteville*, 80 N. Car. 154, 30 Am. Rep. 75 ("nonresidents pursuing their ordinary avocations" made specially taxable); *Ahl v. Gleim*, 52 Pa. St. 432; *State v. Charleston*, 4 Strohh. L. (S. Car.) 217. And see the title **TAXATION (CORPORATE)**, *post*.

A tax may be levied in the state on one who has charge of the personal property therein of a nonresident. *Carstairs v. Cochran*, 95 Md. 488.

3. *McCutchen v. Rice County*, 7 Fed. Rep. 558.

4. **Right to Vote**.—*Loughborough v. Blake*, 5 Wheat. (U. S.) 317; *Wheeler v. Wall*, 6 Allen

(Mass.) 558; *Moore v. Fayetteville*, 80 N. Car. 154, 30 Am. Rep. 75.

5. **Aliens** as owners of property, or as inhabitants, may be taxable. *Tazewell County v. Davenport*, 40 Ill. 204; *Frantz's Appeal*, 52 Pa. St. 367. See also the title **ALIENS**, vol. 2, p. 84.

**Indians Who Preserve Their Tribal Relations** cannot be taxed. *State v. Ross*, 7 Yerg. (Tenn.) 74. Otherwise of civilized Indians whose tribal relations are dissolved. *Hilgers v. Quinney*, 51 Wis. 62.

6. **Tax a Personal Charge**—*United States*.—*Meredith v. U. S.*, 13 Pet. (U. S.) 486.

*Alabama*.—*Perry County v. Selma, etc.*, R. Co., 58 Ala. 564; *Winter v. Montgomery*, 79 Ala. 481.

*California*.—*Kelsey v. Abbott*, 13 Cal. 609.

*Indiana*.—*Smith v. Eigerman*, 5 Ind. App. 269, 51 Am. St. Rep. 281.

*Kansas*.—*State v. Leavenworth County*, 2 Kan. 61.

*Louisiana*.—*Geren v. Gruber*, 26 La. Ann. 694; *New Orleans v. Day*, 29 La. Ann. 416; *Mercier's Succession*, 42 La. Ann. 1135.

*Massachusetts*.—*Cochran v. Guild*, 106 Mass. 29, 8 Am. Rep. 296; *Sherwin v. Boston Five Cents Sav. Bank*, 137 Mass. 444; *Richardson v. Boston*, 148 Mass. 508; *Burr v. Wilcox*, 13 Allen (Mass.) 269.

*Mississippi*.—*Green v. Craft*, 28 Miss. 70.

*Missouri*.—*State v. Snyder*, 139 Mo. 552.

*New Jersey*.—*State v. Vanderbilt*, 33 N. J. L. 38.

*New York*.—*Bennett v. Buffalo*, 17 N. Y. 383; *Chapman v. Brooklyn*, 40 N. Y. 377; *Rundell v. Lakey*, 40 N. Y. 517; *Hilton v. Fonda*, 86 N. Y. 346.

*Pennsylvania*.—*McKibbin v. Charlton*, 14 Pa. St. 128; *Ellis v. Hall*, 19 Pa. St. 296; *Miller v. Gorman*, 38 Pa. St. 309; *Harbeson v. Jack*, 2 Watts (Pa.) 124; *Sheaffer v. McKabe*, 2 Watts (Pa.) 421; *Kennedy v. Daily*, 6 Watts (Pa.) 269; *Stokely v. Boner*, 10 S. & R. (Pa.) 254.

In *Dobbins v. Erie County*, 16 Pet. (U. S.) 446, it is said those who pay taxes are called taxable persons, "because they are under an obligation to contribute from their means to the necessities of the state. The obligation, however, only becomes a charge upon the person in consequence of the power in the state to enforce the payment of taxes by coercion."

**This Liability Can Be Enforced**, however, as a general rule, only in the specific manner pointed out by the statute. *State v. Snyder*, 139 Mo. 553.

**But Debt or Assumpsit** has been held to lie, where no remedy is provided, *Camden v. Allen*, 26 N. J. L. 398; or even when the remedy provided is not by the statute made exclusive, *State v. Fleming*, 112 Ala. 179; *Anniston v. Southern R. Co.*, 112 Ala. 557.

only a liability *in rem* and not a personal liability is created by a local or special assessment,<sup>1</sup> and the same has been held as to taxes on "nonresident" or "unseated lands."<sup>2</sup>

**2. Polls.** — A poll tax or capitation tax is a tax of a specific sum laid upon the individual simply, without reference to his property, business, or employment.<sup>3</sup> The imposition of poll taxes is not prohibited by a constitutional requirement that taxes shall be in proportion to the value of property owned.<sup>4</sup> The constitutions of two states declare the imposition of poll taxes grievous and oppressive,<sup>5</sup> but in many states they are provided for by constitutional provision,<sup>6</sup> and the application of the proceeds may be directed.<sup>7</sup>

**Liability to Poll Tax.** — The right to levy a poll tax depends on residence and not on citizenship.<sup>8</sup>

**3. Property in General** — *a.* **MEANING AND CONSTRUCTION OF "PROPERTY."** — The term "property," standing unqualified in constitutions or statutes designating subjects of taxation, includes both real and personal prop-

erty. As to whether a tax is a debt, a question involved in the above decisions, see the title **DEBT**, vol. 8, p. 995. And see further on this debated question the titles **OCCUPATION, ETC., TAXES**, vol. 21, p. 818; **TAXATION**, 21 **ENCYC. OF PL. AND PR.** 381 *et seq.*

**1. Special Assessments.** — *Clinton v. Henry County*, 115 Mo. 557, 37 Am. St. Rep. 415; *State v. Angert*, 127 Mo. 456.

But the authority on this point is much divided and many jurisdictions hold that a personal liability is created. See the title **SPECIAL ASSESSMENTS**, vol. 25, pp. 1237, 1238.

**2. Nonresident and Unseated Lands.** — *Rising v. Granger*, 1 Mass. 47; *Dewey v. Stratford*, 42 N. H. 286; *Cocheco Mfg. Co. v. Strafford*, 54 N. H. 471; *Bowles v. Clough*, 55 N. H. 389; *New York, etc., R. Co. v. Lyon*, 16 Barb. (N. Y.) 651; *Fager v. Campbell*, 5 Watts (Pa.) 288; *Strauch v. Shoemaker*, 1 W. & S. (Pa.) 166; *Reading v. Finney*, 73 Pa. St. 467; *Franklin Coal Co. v. Bertels*, 109 Pa. St. 552. And see *infra*, this title, IX. 6. *c.* (2) (e) *Resident and Nonresident, Seated and Unseated Lands*, and **SEATED LANDS**, vol. 25, p. 156. But see *State v. Vanderbilt*, 33 N. J. L. 38.

**3. Poll Tax.** — *Hylton v. U. S.*, 3 Dall. (U. S.) 171; *Head-Money Cases*, 18 Fed. Rep. 135; *Glasgow v. Rowse*, 43 Mo. 480; *Gardner v. Hall*, Phil. L. (61 N. Car.) 21. See also **CAPITATION**, vol. 5, p. 142.

**Municipal Poll Taxes.** — *Faribault v. Misener*, 20 Minn. 396.

**County Poll Tax — Collection.** — *Labadie v. Dean*, 47 Tex. 90 (no order of County Court required before collection of poll tax imposed by legislature).

**Distinguished from Occupation or Business Taxes.** — See the title **OCCUPATION, ETC., TAXES**, vol. 21, p. 776.

**No Capitation or Other Direct Tax** can, under the Federal Constitution, be laid by the United States except in proportion, unless apportioned among the states according to population. Const. U. S., art. 1, § 9. And see **DIRECT TAX**, vol. 9, p. 461.

**The Poll Taxes of Minors in the Employ of a Corporation** cannot be assessed against the corporation. *Boston, etc., Glass Co. v. Boston*, 4 Met. (Mass.) 181.

**The Assessment of Road Labor** is not a poll tax. See *infra*, this title, XIX. 10. *c.* (5) (a) *In General*.

**4. Sawyer v. Alton**, 4 Ill. 127. Nor, it seems, by the requirement of uniformity and equality. *Ottawa County v. Nelson*, 19 Kan. 241, 27 Am. Rep. 101.

**Exemption from Poll Tax Valid.** — *Faribault v. Misener*, 20 Minn. 396.

**Per Capita Tax for Support of Militia Imposed on Persons Liable to Military Duty Who Failed to Perform It.** — *Armstrong County v. Coleman*, 99 Pa. St. 6.

**5. Const. Md. 1867, Declaration of Rights**, art. 14; *Const. Ohio 1851*, art. 12, § 1.

**6. Constitutional Directions.** — See 1 *Stim. Am. St. Law*, § 338, and the constitutions of the various states.

The provision of the *North Carolina* constitution does not require the levy of a poll tax except when taxes are levied for the ordinary purposes of the state and county. *Jones v. Person County*, 107 N. Car. 248.

When the constitution declares the amount of the poll tax as equal to the tax on three hundred dollars in cash, a law imposing a poll tax without regard to this equation is void. *Russell v. Ayer*, 120 N. Car. 180.

**7. Purposes for Which Poll Tax to Be Used.** — *Shaver v. Robinson*, 59 Ala. 195; *Sawyer v. Alton*, 4 Ill. 127; *State v. Cobb*, 8 S. Car. 123; *Woodard v. Isham*, 43 Vt. 123.

**Division Between State and County Required.** — *Hassett v. Walls*, 9 Nev. 387.

**8. Residence Determines Liability.** — *On Yuen Hai Co. v. Ross*, 8 Sawy. (U. S.) 384; *Herriman v. Stowers*, 43 Me. 497; *Hartland v. Church*, 47 Me. 169; *Parsons v. Bangor*, 61 Me. 457; *Thorndike v. Boston*, 1 Met. (Mass.) 242; *Cabot v. Boston*, 12 Cush. (Mass.) 52; *Lee v. Boston*, 2 Gray (Mass.) 484; *Carnoe v. Freetown*, 9 Gray (Mass.) 357; *State v. Ross*, 23 N. J. L. 517; *State v. Casper*, 36 N. J. L. 367; *Kuntz v. Davidson County*, 6 Lea (Tenn.) 65; *Woodard v. Isham*, 43 Vt. 123.

**Alien Liable to Tax.** — See the title **ALIENS**, vol. 2, p. 84.

**Persons Residing on Lands Belonging to the United States** and used for government purposes, such as naval yards, forts, etc., are exempt from poll taxes to the state in the community where the lands are situated. *Opinion of Justices*, 1 Met. (Mass.) 580.

**Assessment in Two Towns Illegal.** — *Preston v. Boston*, 12 Pick. (Mass.) 7.

erty or estate, and intangible as well as tangible rights of value.<sup>4</sup> But it has been said that the word "property" must receive a construction in accordance with its context, and whether a specific right is subject to taxation may depend upon whether it is capable of valuation bearing a definite relation to other things and property<sup>5</sup> or whether the legislature has provided a method for its valuation.<sup>6</sup>

**Nonuser.** — The fact that no use is made of property by the owner does not affect its character as taxable.<sup>4</sup>

**b. PROPERTY WITHIN JURISDICTION OF STATE.** — Tax laws have no extraterritorial force,<sup>5</sup> and the taxing power of the state is generally limited in terms to property within the state. The question of what property is taxable within such a power is considered elsewhere in this title.<sup>6</sup> It may be stated generally that debts and credits, as to which controversy has frequently arisen, are not property within the state of the debtor's domicile or residence, but in that of the creditor's domicile only.<sup>7</sup> Yet such debts when evidenced by mortgages, bonds, notes, etc., may be taxable in the state where such choses in action are found, when proper provision is made therefor in the statutes.<sup>8</sup>

**c. REAL OR PERSONAL PROPERTY.** — Whether particular property is taxable as realty or personalty must depend on the tax statutes of the state, for

**1. What Property Includes.** — *Carroll v. Perry*, 4 McLean (U. S.) 25; *People v. Worthington*, 21 Ill. 171, 74 Am. Dec. 86; *Primm v. Belleville*, 59 Ill. 142; *Tallman v. Treasurer*, 12 Iowa 534; *State v. Savage*, (Neb. 1902) 91 N. W. Rep. 716. See also ESTATE, vol. 11, p. 359; and the title PROPERTY, vol. 23, pp. 260, 262.

When words of general description, such as "all property made taxable by law," are used, they include everything of that kind not expressly or by necessary implication excepted. *State v. Keokuk*, etc., R. Co., 153 Mo. 157, 77 Am. St. Rep. 704.

**Property, in Its Broad Sense**, as used in the Constitution of *Colorado*, art. 10, § 3, relative to taxation, includes not only the right of use and enjoyment, but the exclusive right to alienate or transfer. *Arapahoe County v. Rocky Mountain News Printing Co.*, 15 Colo. App. 189.

**Term Held to Be Confined to Tangible Things.** — See *infra*, this section, 4. *Personal Property*.

**As to Corporate Property**, see the title TAXATION (CORPORATE), *post*.

**2. Construction of Term.** — *People v. Hibernia Sav., etc., Soc.*, 51 Cal. 243, 21 Am. Rep. 704, construing a provision providing for the taxation of "all property," with the qualification that the taxation must be in proportion to value, equal, and uniform.

**3. State Board of Tax Com'rs v. Holliday**, 150 Ind. 216.

**Where Property Is Expressly Exempted** it has been held that it cannot be presumed that it was intended to tax it indirectly by taking money invested in such property. *State v. Moore*, 12 Cal. 56.

**4. Nonuser.** — *Sullivan v. State*, 110 Ala. 95.

**5. Bonaparte v. Tax Ct.**, 104 U. S. 592, *affirming* 50 Md. 354; *People v. Coleman*, 135 N. Y. 231.

**6. See *infra*, this title, Place of Taxation.**

**Money in the Hands of a Receiver** in a state is within the jurisdiction of the state. *Schmidt v.*

*Failley*, 148 Ind. 150; *Walters v. Western*, etc., R. Co., 68 Fed. Rep. 1002; *State v. Railroad Com'rs*, 41 N. J. L. 235.

**7. Debts and Credits.** — *State Tax Case*, 151 Wall. (U. S.) 300; *Murray v. Charleston*, 96 U. S. 432; *Mackay v. San Francisco*, 128 Cal. 678; *Arapahoe County v. Cutter*, 3 Colo. 349; *Senour v. Ruth*, 140 Ind. 318; *Thomas v. Mason County Ct.*, 4 Bush (Ky.) 135; *Baltimore v. Hussey*, 67 Md. 112. But see *U. S. Bank v. State*, 12 Smed. & M. (Miss.) 456.

**8. Walker v. Jack**, (C. C. A.) 88 Fed. Rep. 576, *reversing* 79 Fed. Rep. 138; *Buck v. Miller*, 147 Ind. 586, 62 Am. St. Rep. 436.

In *Mecartney v. Caskey*, 66 Kan. 412, after deciding that a tax-sale certificate owned by a nonresident of the state was not taxable, the court said that this doctrine admitted of exception: "An owner may separate his certificates from himself, attach them to some locality apart from his residence, and employ them there in such manner as to effect a permanent submission of them to the latter jurisdiction; or the legislature may express a purpose to regard the presence in the state of tax-sale certificates belonging to a nonresident as a submission of them to the jurisdiction, and therefore require a contribution upon them to the support of the government."

**Evidences of Debt**, such as bank notes, bills of exchange, or bonds, when situated in the state, the legislature has power to tax; but the legislature has no power to tax debts reduced to no such concrete form except at the domicile of the creditor. *Rayley v. Assessors*, 44 La. Ann. 769; *Liverpool, etc., Ins. Co. v. Assessors*, 51 La. Ann. 1031, 72 Am. St. Rep. 483.

**Nonresidents Owning Tangible and Movable Property** in a state may be taxed therein, though not upon debts and intangible property. *Clason v. New Orleans*, 46 La. Ann. 1.

**Mortgages Held Taxable Where Mortgaged Property Is.** — *Savings, etc., Soc. v. Multnomah County*, 169 U. S. 421; *Allen v. National State*

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the legislature has the right to classify property for the purpose of taxation.<sup>1</sup> Where the machinery of the statutes permits agreements between parties as to the nature of particular interests, for instance growing trees or houses, such agreements may control,<sup>2</sup> but they cannot work a change in the nature of the property so as to prejudice the state's claim thereon for taxation.<sup>3</sup>

**Good Will.** — In *New York* the good will of a business is not taxable either as real or personal property under the general tax law,<sup>4</sup> but under the corporation franchise tax law it is taxable with the franchise as forming a part of the value of the shares.<sup>5</sup> In *Indiana* it has been held that good will is not *per se* property and that its taxation has not been authorized by statute.<sup>6</sup>

**4. Personal Property — a. IN GENERAL.** — The state has a right to tax all personal property within its jurisdiction without regard to the place of the owner's domicile.<sup>7</sup>

**Visible Property Only Held to Be Taxable.** — Under some grants of authority to tax property or personal property, or enumerating *nominatim* the subjects to be taxed, it has been held that only visible, tangible property was taxable, the term not embracing debts, money, or choses in action.<sup>8</sup> The power of selecting the subjects of taxation is purely legislative, and whether special articles or rights are taxable depends on the construction of the statute.<sup>9</sup> The position

Bank, 92 Md. 509, 84 Am. St. Rep. 517; *Mumford v. Sewall*, 11 Oregon 67, 50 Am. Rep. 462. See also *Adams v. Colonial, etc., Mortg. Co.*, (Miss. 1903) 34 So. Rep. 482.

1. **Whether Realty or Personalty.** — *Smith v. New York*, 68 N. Y. 554; *Herkimer County Light, etc., Co. v. Johnson*, 37 N. Y. App. Div. 257.

Thus, as to fixtures, it has been said that whatever their nature as between grantor and grantee or at common law, the legislature may, "for the purposes of taxation, require any portion of real estate, or any of its parts or accessories, to be listed, taxed, and sold \* \* \* as personal property, and authorize the person purchasing to detach and remove the parts, whether it be standing trees, crops, or even windows or doors of houses or dwellings." *Johnson v. Roberts*, 102 Ill. 655.

**A Right to Collect Wharfage and Dockage** for a term of years has been held taxable neither as real estate nor as personal property. *De Witt v. Hays*, 2 Cal. 463, 56 Am. Dec. 352.

2. See *infra*, this section, 5. **Real Property — Several Distinct Interests in the Same Land; Buildings, Structures, and Improvements.**

3. *Williams v. Triche*, 107 La. 92; *McGee v. Salem*, 149 Mass. 238.

4. **Taxation of Good Will.** — *People v. Dederick*, 161 N. Y. 195, *modifying* 41 N. Y. App. Div. 617. See also *Detroit Citizens' St. R. Co. v. Detroit*, 125 Mich. 684, 84 Am. St. Rep. 589, where, however, it is held that considering the favorable location of a building for a specific purpose is not taxing good will.

5. *People v. Roberts*, 154 N. Y. 101, *affirming* 19 N. Y. App. Div. 574; *People v. Roberts*, 159 N. Y. 70, *reversing* 35 N. Y. App. Div. 624.

6. *Hart v. Smith*, 159 Ind. 182, 95 Am. St. Rep. 280.

7. **Personal Property Taxable.** — *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; *Denver, etc., R. Co. v. Church*, 17 Colo. 1, 31 Am. St. Rep. 252; *Appeal Tax Ct. v. Patterson*, 50 Md. 366. See also *supra*, this section, 1. **Generally.**

**Retrospective Effect of Tax Law.** — A loan of

money made before the passage of a tax law, which renders loans taxable, is within the law, since it "operates upon all property within the state which comes within its provisions." *U. S. Bank v. State*, 12 Smed. & M. (Miss.) 461.

A so-called "Dog Tax," laid as a police regulation to discourage keeping dogs, does not recognize dogs as property. *Ex p. Cooper*, 3 Tex. App. 489, 30 Am. Rep. 152. And see *Crawford v. Ligonier*, 20 Pa. Co. Ct. 369, and the title **POLICE POWER**, vol. 22, p. 918. But see *Mullaly v. People*, 86 N. Y. 365; *People v. McMaster*, (Supm. Ct. Gen. T.) 10 Abb. Pr. N. S. (N. Y.) 132.

8. **Confined to Tangible Property.** — *U. S. Bank v. Huth*, 4 B. Mon. (Ky.) 444; *Johnson v. Lexington*, 14 B. Mon. (Ky.) 521; *Covington v. Powell*, 2 Met. (Ky.) 226; *Louisville v. Henning*, 1 Bush (Ky.) 381; *Pullen v. Raleigh*, 68 N. Car. 451. These were all cases of municipal taxation and turned on the construction of clauses in the charter.

Under the Borough Act of 1851 in *Pennsylvania*, conferring the power to tax "all property," it was held that only property capable of manual occupation was included. *Goepp v. Bethlehem*, 28 Pa. St. 249; *Mifflintown v. Jacobs*, 69 Pa. St. 151. See, for discussion of the cases in this note, the title **PROPERTY**, vol. 23, p. 266.

9. **Articles Used in Performance of Public Contract.** — Lanterns owned and used by a foreign corporation in connection with the performance of a contract to light streets for a term of years (the contract being primarily a contract to render service) have been held not "personal property within the commonwealth leased for profit," under the *Massachusetts* statute rendering such property taxable. *Rising Sun Lighting Co. v. Boston*, 181 Mass. 211.

**Associated Press Membership.** — A contract of membership in the Associated Press is not taxable property within the laws of *Colorado*. *Arapahoe County v. Rocky Mountain News Printing Co.*, 15 Colo. App. 189.

**Insurance Premiums** are not taxable as personalty in *Iowa*, being in the nature of income.

of personal property as within the sphere of state or national laws<sup>1</sup> or the connection of such property with realty<sup>2</sup> may sometimes raise a question of the right to tax or of the category within which a thing falls.

**b. ABSTRACT BOOKS.**—Abstract books containing valuable information as to the history of real property titles, and having a market value, have been held taxable as personal property although in manuscript,<sup>3</sup> though a contrary conclusion has been reached in *Michigan*.<sup>4</sup>

**c. CREDITS, DEBTS, AND SECURITIES.**—Credits, debts, and securities are, under one form of expression or another, universally rendered taxable as personal property.<sup>5</sup>

*Dubuque v. Northwestern L. Ins. Co.*, 29 Iowa 9; *Burlington v. Putnam Ins. Co.*, 31 Iowa 102.

**Insurance Policies** are not taxable in *Indiana*, no method of valuation having been provided. *State Board of Tax Com'rs v. Holliday*, 150 Ind. 216.

**Intoxicating Liquors** not kept for sale illegally are taxable as personal property. *Dunbar v. Board of Aldermen*, 101 Mass. 317.

**Money** as a subject of taxation is defined in the statutes of *Ohio*. See *Patton v. Commercial Bank*, 7 Ohio N. P. 401, 10 Ohio Dec. 321.

**Money Invested in Tax-sale Certificates** is taxable under the statutes of *Indiana*. *State v. Halter*, 149 Ind. 292; *Miller v. Vollmer*, 153 Ind. 26.

**Seats in Stock Exchange.**—See the title STOCK AND PRODUCE EXCHANGES, vol. 26, p. 794, and *Austen v. Brigham*, (Supm. Ct. Spec. T.) 67 N. Y. Supp. 891.

**1. Vessels** are subject to state taxation, but not as instrumentalities of interstate commerce. See the title INTERSTATE COMMERCE, vol. 17, pp. 111, 112, and *infra*, this title, *Place of Taxation*. See also *Yost v. Lake Erie Transp. Co.*, (C. C. A.) 112 Fed. Rep. 746; *Oteri v. Parker*, 42 La. Ann. 379. See generally as to exemptions of government property, *infra*, this subdivision, *g. Investments in Federal Securities*; *h. Patent Rights and Copyrights*; and *infra*, this section, *Public Property and Instrumentalities of Government*. See generally *infra*, this section, *Real Property*.

**2. Grain Elevators** owned by other parties, situated on the right of way of a railroad company, are, under the *Minnesota* statutes, for purposes of taxation, personal property. *State v. Red River Valley Elevator Co.*, 69 Minn. 131, overruling *Minneapolis, etc., Elevator Co. v. Clay County*, 60 Minn. 522. But see as to elevators owned by the railroad company, *Chicago, etc., R. Co. v. Houston County*, 38 Minn. 531.

**Mineral Ores** after being detached from the land are personalty and taxable as such. *Forbes v. Gracey*, 94 U. S. 762. See also *infra*, this section, *Real Property*; and ORE, vol. 21, p. 1007.

**Rent.**—Rent arrear is a chose in action and taxable as a credit, but rent to grow due is a part of the land and not taxable as personalty. *Scully v. People*, 104 Ill. 349; *People v. McComber*, (Supm. Ct. Spec. T.) 7 N. Y. Supp. 71.

**3. Abstract Books.**—*Leon Loan, etc., Co. v. Board of Equalization*, 86 Iowa 127, 41 Am. St. Rep. 486; *Booth, etc., Abstract Co. v. Phelps*, 8 Wash. 549, 40 Am. St. Rep. 921 (though the books were largely in cipher).

**4. Perry v. Big Rapids**, 67 Mich. 146, 11 Am. St. Rep. 570; *Loomis v. Jackson*, 130 Mich. 594.

**5. Credits** are often rendered taxable to the creditor. *Hamersley v. Franey*, 39 Conn. 176 ("Moneys, credits, choses in action, bonds, notes," etc.); *Buck v. Miller*, 147 Ind. 586, 62 Am. St. Rep. 436; *Perrine v. Jacobs*, 64 Iowa 79; *Albia First Nat. Bank v. Albia*, 86 Iowa 28 (shares of national bank stock are "credits"); *Liverpool, etc., Ins. Co. v. Assessors*, 51 La. Ann. 1028, 72 Am. St. Rep. 483; *State v. Rand*, 39 Minn. 502; *Redmond v. Rutherford*, 87 N. Car. 122; *Cameron v. Cappeller*, 41 Ohio St. 533 (judgments taxable as credits). See also CREDIT, vol. 8, pp. 233, 234; *Adams v. Clarke*, 80 Miss. 134 (solvent credits).

And credits are taxable as "property." *San Francisco v. Lux*, 64 Cal. 483; *Irvin v. Turner*, 47 Ga. 382; *Carreker v. Walton*, 47 Ga. 394; *People v. Worthington*, 21 Ill. 171, 74 Am. Dec. 86; *Goldgart v. People*, 106 Ill. 25; *New Orleans v. Mechanics, etc., Ins. Co.*, 30 La. Ann. 876, 31 Am. Rep. 232; *State v. Carson City Sav. Bank*, 17 Nev. 146; *Hayne v. Deliesseline*, 3 McCord L. (S. Car.) 374. See also PROPERTY, vol. 23, p. 265 (solvent credits).

*Where the Vendor Retains the Title* to the property as security, the vendee's note for the price is still taxable as a credit, *Marquette v. Michigan Iron, etc., Co.*, (Mich. 1903) 92 N. W. Rep. 934; *Rheinboldt v. Raine*, 52 Ohio St. 160, affirming 3 Ohio Cir. Dec. 577, 6 Ohio Cir. Ct. 544; or even the vendee's debt not evidenced by a note, *Griffin v. Board of Review*, 184 Ill. 275.

*The Interest of a Special Partner* in a firm has been held not taxable as a "credit." *Hunter v. Newman*, 3 Ohio Dec. 350, 1 Ohio N. P. 307.

*A Membership in the Associated Press* is not in *Colorado* taxable as a "credit." *Arapahoe County v. Rocky Mountain News Printing Co.*, 15 Colo. App. 189.

**Debts**, money owing by solvent debtors, and the like, are sometimes enumerated as taxable property. *People v. Hibernia Sav., etc., Soc.*, 51 Cal. 244, 21 Am. Rep. 704 (evidence of debt); *Lamar v. Palmer*, 18 Fla. 155 (stated under SOLVENCY—SOLVENT, vol. 25, p. 115-116); *Hunter v. Supervisors*, 33 Iowa 376, 11 Am. Rep. 132; *Deane v. Hathaway*, 136 Mass. 129; *People v. Coleman*, 119 N. Y. 137; *Johnson v. Oregon City*, 3 Oregon 13; *Blickensderfer v. School Directors*, 20 Pa. St. 38; *Com. v. Lehigh Valley R. Co.*, 104 Pa. St. 89; *Perry County v. Troutman*, 144 Pa. St. 161, affirming 8 Pa. Co. Ct. 427; *Catlin v. Hull*, 21 Vt. 152; *State v. Gaylord*, 73 Wis. 324. And see *Liverpool, etc.,*

**Property Only as to Creditors.** — Debts and securities are taxable only to the creditor or holder and not to the debtor, for as to him they are not property.<sup>1</sup>

**Security Given for Debts and Credits.** — The fact that debts and credits in the state are secured by property without the state does not affect their liability to taxation in the state,<sup>2</sup> and if debts are owing to nonresidents they are not rendered taxable as mere debts or credits by the fact that they are secured by mortgages of property within the state,<sup>3</sup> although laws specially framed for the taxation of the security in the state of its situs will not be unconstitutional.<sup>4</sup>

**Debts Secured by Non-Taxable Property.** — Debts or credits are none the less taxable because secured by pledges of property which is by law exempt from taxation.<sup>5</sup>

**Meaning of "Debt."** — The word "debt" in an enumeration of taxable property includes as well sums the payment of which is promised at a future day, as sums already due and payable, but it does not extend to money payable upon a future contingency.<sup>6</sup> Thus mere claims for damages are not

*Ins. Co. v. Assessors*, 51 La. Ann. 1031, 72 Am. St. Rep. 483.

**Things in Action** are sometimes declared taxable. *People v. Hibernia Sav., etc., Soc.*, 51 Cal. 244, 21 Am. Rep. 704; *Easton v. Board of Review*, 183 Ill. 255. And see *Lick v. Austin*, 43 Cal. 590; *State v. Earl*, 1 Nev. 395; *Johnson v. Oregon City*, 3 Oregon 13.

**Moneys at Interest.** — *U. S. Bank v. State*, 12 Smed. & M. (Miss.) 456 (money loaned at interest); *Sawyer v. Nashua*, 59 N. H. 404 (money invested in bonds of a railroad); *Philadelphia Sav. Fund Soc. v. Yard*, 9 Pa. St. 359 (mortgages and loans by a corporation); *Fire Ins. Co. v. County*, 9 Pa. St. 413 (interest bearing deposit notes of the members of mutual insurance company held by the company).

**Merchants' Statements** are taxable in *Missouri*. *State v. Kinney*, 48 Mo. 373.

**1. Debts Are Not Debtor's Property.** — *State Tax Case*, 15 Wall. (U. S.) 300; *Murray v. Charleston*, 96 U. S. 432; *Arapahoe County v. Cutter*, 3 Colo. 349; *Collins v. Miller*, 43 Ga. 336; *Gibbons v. Adamson*, 5 Kan. App. 90; *Railey v. Assessors*, 44 La. Ann. 765; *Liverpool, etc., Ins. Co. v. Assessors*, 51 La. Ann. 1028, 72 Am. St. Rep. 483; *Baltimore v. Hussey*, 67 Md. 112; *State v. Smith*, 68 Miss. 79; *State v. Earl*, 1 Nev. 395. See also *supra*, this section, *Property in General — Property Within Jurisdiction of State*.

**2. Security for Debts.** — *Mackay v. San Francisco*, 113 Cal. 392; *Germania Trust Co. v. San Francisco*, 128 Cal. 596; *Bullock v. Guilford*, 59 Vt. 516.

**3. State v. Smith, 68 Miss. 79; *Adams v. Colonial, etc., Mortg. Co.*, (Miss. 1903) 34 So. Rep. 482.**

**4. Savings, etc., Soc. v. Multnomah County, 169 U. S. 421; *Adams v. Colonial, etc., Mortg. Co.*, (Miss. 1903) 34 So. Rep. 482.**

**5. Secured by Exempt Collateral.** — *Savings, etc., Soc. v. San Francisco*, 131 Cal. 356; *San Francisco v. La Societe Francaise, etc.*, 131 Cal. 612; *Security Sav. Bank v. San Francisco*, 132 Cal. 599.

**6. Debt.** — *People v. Arguello*, 37 Cal. 524; *Equitable L. Ins. Co. v. Board of Equalization*, 74 Iowa 181; *Allegheny County v. Kelly*, 8 Pa. Dist. 290. And see the title *DEBT*, vol. 8, p. 982.

The right of an owner of land under an agreement by which a city occupies the land and may acquire title by completing certain payments, but is under no obligation to make such payments, is not taxable as a "debt." *Perrigo v. Milwaukee*, 92 Wis. 236.

**An Annuity** is a debt under a tax law only so far as payments are actually due, future payments depending on the contingency of life or death. *State v. Cornell*, 31 N. J. L. 374; *State v. Shurts*, 41 N. J. L. 279. But see *Wetmore v. State*, 18 Ohio 77 (*distinguished* in *Chisholm v. Shields*, 67 Ohio St. 374, *reversing* 11 Ohio Cir. Dec. 361, 21 Ohio Cir. Ct. 231), estimating taxation upon the basis of the calculated present value of an annuity. See also *infra*, this title, IX. 6. e. (2) (f) *Separate Estates or Interests in Same Property*.

**A Certificate of Purchase under a Foreclosure Sale** is taxable, since the only contingency is whether the purchaser shall receive a deed or his bid with interest. *Wedgbury v. Cassell*, 164 Ill. 622.

**Debts Due** are taxable as credits.

*United States.* — *New Orleans Canal, etc., Co. v. New Orleans*, 99 U. S. 97.

*California.* — *People v. Arguello*, 37 Cal. 524. *Illinois.* — *Jacksonville v. McConnel*, 12 Ill. 138.

*Nebraska.* — *Jones v. Seward County*, 10 Neb. 154.

*Pennsylvania.* — *Maltby v. Reading, etc., R. Co.*, 52 Pa. St. 140.

*Texas.* — *Connor v. Waxahachie*, (Tex. 1889) 13 S. W. Rep. 30; *Ferris v. Kimble*, 75 Tex. 476.

**An Award by the Court of Commissioners of the Alabama Claims** is not taxable as a "debt due" until Congress has made a specific appropriation for its payment. *Bucksport v. Woodman*, 68 Me. 33.

**Debts, etc., Not Due** are so taxable. *New Jersey Hedge Co. v. Craig*, 51 N. J. L. 437; *People v. McComber*, (Supm. Ct. Spec. T.) 7 N. Y. Supp. 71; *Rheinboldt v. Raine*, 52 Ohio St. 160, 3 Ohio Cir. Dec. 577.

**Money Due or Owing for Sale of Realty.** — *Ouachita County v. Rumph*, 43 Ark. 525; *Perrine v. Jacobs*, 64 Iowa 79; *State v. Rand*, 39 Minn. 502; *People v. Ogdensburgh*, 48 N. Y. 390; *Rheinboldt v. Raine*, 52 Ohio St. 160,

taxable,<sup>1</sup> but a specific award for damages for lands taken under eminent domain may be taxed, although the property owner declined to accept the award for inadequacy.<sup>2</sup>

*d.* **MONEY DEPOSITED IN BANK.** — Cash on deposit with a bank is usually regarded as a chose in action, the relation between bank and depositor being merely that of debtor and creditor,<sup>3</sup> and deposits are so taxable;<sup>4</sup> but in some states deposits are, under the tax laws, held assessable as money on hand or cash.<sup>5</sup>

*e.* **MORTGAGES.** — Under some statutes a mortgage is considered as a mere security for money loaned, and is taxed to the mortgagee as personal property,<sup>6</sup> but in other states it is regarded for purposes of taxation as an interest in the realty.<sup>7</sup>

*f.* **STATE AND MUNICIPAL BONDS.** — State and municipal bonds have been held not to be embraced in a general enumeration of things taxable in a statute of the state wherein such bonds were issued,<sup>8</sup> but they may be specifically included.<sup>9</sup> Bonds of another state and of municipalities situated in

*affirming* 3 Ohio Cir. Dec. 577. But an option to purchase is not taxable as a "debt." *Perrigo v. Milwaukee*, 92 Wis. 236.

1. **Claims for Damages.** — *Arnold v. Middletown*, 41 Conn. 206; *Lowell v. Street Com'rs*, 106 Mass. 540.

2. *People v. Halsted*, 26 N. Y. App. Div. 316, *affirmed* 159 N. Y. 533.

3. **Bank Deposits.** — See the title **BANKS AND BANKING**, vol. 3, p. 826.

4. **General Deposits Taxable as Debts.** — *San Francisco v. Lux*, 64 Cal. 481; *Pacific Coast Sav. Soc. v. San Francisco*, 133 Cal. 14; *Clason v. New Orleans*, 46 La. Ann. 1; *Grundy County v. Tennessee Coal, etc., Co.*, 94 Tenn. 316.

A **Deposit of United States Legal Tender Notes** in a bank was, if the deposit was special, not taxable before the act of Congress rendering them taxable (28 U. S. Stat. L. 278), but if the deposit was general, the bank mingling them with its other funds, though agreeing to repay in legal notes, they were taxable even before the act. *Carpenter v. Lewis*, 9 Ohio Dec. 498.

**Money Deposited in Saving Banks** is sometimes made an exception to this rule. *Burke v. Badlam*, 57 Cal. 602. And see the title **SAVINGS BANKS**, vol. 24, p. 1246.

5. *Gray v. Street Com'rs*, 138 Mass. 414; *City National Bank v. Charles Baker Co.*, 180 Mass. 42; *Campbell v. Wiggins*, 2 Tex. Civ. App. 1; *Campbell v. Riviere*, (Tex. Civ. App. 1893) 22 S. W. Rep. 993. See also *Richmond, etc., R. Co. v. Com'rs*, 84 N. Car. 504.

**Money Employed in Business.** — When sums deposited represent the capital with which a nonresident business concern carries on a business within the state, it has been held that they may be taxed within the state as personal property. *Parker v. Strauss*, 49 La. Ann. 1173; *Bluefields Banana Co. v. Assessors*, 49 La. Ann. 43; *Comptoir National D'Escompte v. Assessors*, 52 La. Ann. 1319.

6. **Mortgages—California.** — *People v. Whartenby*, 38 Cal. 461 (Stat. "all money at interest secured by mortgage or otherwise" — the debt, not mortgage as chose in action, taxed).

*Iowa.* — *Davenport v. Mississippi, etc., R. Co.*, 12 Iowa 539 (Stat., "mortgages and other like securities").

*Maryland.* — Tax Cases, 12 Gill & J. (Md.) 117; *Appeal Tax Ct. v. Patterson*, 50 Md. 354.

*Michigan.* — *Atty.-Gen. v. Sanilac County*, 71 Mich. 16 (Stat., "all indebtedness due to inhabitants of this state").

*Minnesota.* — *State v. Redwood Falls Bldg., etc., Assoc.*, 45 Minn. 154 (Stat., "all claims and demands secured by deed or mortgage").

*Mississippi.* — *Adams v. Colonial, etc., Mortg. Co.*, (Miss. 1903) 34 So. Rep. 482.

*Montana.* — *Gallatin County v. Beattie*, 3 Mont. 173.

*Pennsylvania.* — *Philadelphia Sav. Fund Soc. v. Yard*, 9 Pa. St. 359; *Com. v. Lehigh Valley R. Co.*, 104 Pa. St. 89; *Perry County v. Troutman*, 144 Pa. St. 361, *affirming* 8 Pa. Co. Ct. 427.

*Utah.* — *Judge v. Spencer*, 15 Utah 242.

*Wisconsin.* — *State v. Gaylord*, 73 Wis. 316. See also *State v. Massaker*, 25 N. J. L. 531.

A mortgage to a trustee has been held taxable as personal property to the trustee. *Latrobe v. Baltimore*, 19 Md. 18. *Compare People v. Coleman*, 119 N. Y. 137, *reversing* 53 Hun (N. Y.) 482.

**As to Mortgage Exemption under Maryland statute**, see *Appeal Tax Ct. v. Gill*, 50 Md. 377, and the title **EXEMPTIONS (FROM TAXATION)**, vol. 12, p. 353.

**A Reservation by the Vendor of the Right to Repurchase** does not make him liable to taxes as mortgagee. *Thomas v. Holmes County*, 67 Miss. 754.

**When a Mortgage Has Been Settled and Cancelled**, the debt it represented no longer exists, and an attempt to tax it is improper. *Earles v. Ramsay*, 61 N. J. L. 194.

7. See *infra*, this section, 5. *h. Mortgages.*

8. **State and Municipal Bonds.** — See the title **EXEMPTIONS (FROM TAXATION)**, vol. 12, p. 373. But see *State v. Keokuk, etc., R. Co.*, 153 Mo. 157, 77 Am. St. Rep. 704.

9. *Hall v. Middlesex County*, 10 Allen (Mass.) 100 ("public stocks and securities"); *Com. v. Maury*, 82 Va. 883. And see under **PUBLIC**, vol. 23, p. 305, the paragraph *Public Stocks and Securities*.

Where a statute made taxable "all public loans whatsoever, except those issued by this commonwealth or the United States," municipal bonds were held taxable. *Wilkes-Barre Deposit, etc., Bank v. Wilkes-Barre*, 148 Pa. St. 601.

another state, however, are subject to taxation without regard to whether they are taxable or not in the latter state.<sup>1</sup>

*g.* INVESTMENTS IN FEDERAL SECURITIES. — Investments in securities of the United States are free from taxes by the states.<sup>2</sup>

*h.* PATENT RIGHTS AND COPYRIGHTS. — Tangible articles produced under letters patent of the United States are subject to taxation by the several states, but the incorporeal right conferred by the patent is not subject to state taxation.<sup>3</sup> Capital invested in United States patent rights has been held not liable to state taxation.<sup>4</sup> Copyrights stand on the same basis as patent rights with reference to the subject of state taxation, and are exempt.<sup>5</sup>

**5. Real Property** — *a.* DEFINITION. — Real property, within the meaning of a statute providing for taxation, has been held to embrace every species of title, whether inchoate or complete.<sup>6</sup>

The Term "Property in Lands" is not confined to title in fee, but is sufficiently comprehensive to include any usufructory interest, whether it be a leasehold or a mere right of possession.<sup>7</sup>

Several Distinct Interests in the Same Land. — Several persons may have in one tract of land distinct interests<sup>8</sup> which are the subject of taxation, such as

1. *Bonaparte v. Tax Ct.*, 104 U. S. 592, affirming *Appeal Tax Ct. v. Patterson*, 50 Md. 354; *Appeal Tax Ct. v. Gill*, 50 Md. 377.

2. See the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 371. See also *Howard Sav. Inst. v. Newark*, 63 N. J. L. 547, reversing 63 N. J. L. 65, and applying Act of Cong. 1894, 28 U. S. Stat. L. 278, permitting taxation of certain securities; *Cleveland Trust Co. v. Lauder*, 62 Ohio St. 266.

Taxation of an Annuity Derived from Investments in Government Bonds has been held not a tax on the bonds. *Chisholm v. Shields*, 21 Ohio Cir. Ct. 231, 11 Ohio Cir. Dec. 361.

3. See the titles EXEMPTIONS (FROM TAXATION), vol. 12, p. 376; *HAWKERS AND PEDDLERS*, vol. 15, p. 297; *PATENTS*, vol. 22, p. 447. See also *Com. v. Petty*, 96 Ky. 452.

4. See references in the last note.

In *New York*, *People v. Campbell*, 138 N. Y. 543, followed in *People v. Wemple*, 148 N. Y. 690, would seem to lead to a contrary conclusion. The question was alluded to but not decided in *People v. Barker*, 139 N. Y. 55. In *People v. Assessors*, 156 N. Y. 417, affirming 19 N. Y. App. Div. 599, it was held that the value of patent rights owned by a corporation may not be included in assessing the same, the question being left open whether when "the capital stock of an electric company is used to pay for the use of methods and appliances of a parent company, protected by patents, [it] can be said that this stock is invested in patent rights within the general principles that patents are not taxable."

**Maryland.** — In *Crown Cork, etc., Co. v. State*, 87 Md. 687, 67 Am. St. Rep. 371, it is held that a tax upon shares of a corporation whose capital represents patent rights is in no sense a tax upon such patent rights, and is constitutional. In its opinion the court goes further, and declares that it fails "to see how a state tax upon patent rights themselves would directly or indirectly conflict with the power conferred upon the federal government" to grant and control patents. U. S. Const., art. 1, § 8

**5. Copyrights.** — *People v. Roberts*, 159 N. Y.

70, reversing 35 N. Y. App. Div. 624. See also the title COPYRIGHT, vol. 7, p. 515.

**6. Definition.** — *Puget Sound Agricultural Co. v. Pierce County*, 1 Wash. Ter. 159. See the titles PROPERTY, vol. 23, p. 259; REAL PROPERTY, vol. 23, p. 934. Also LAND, vol. 18, p. 149; REAL ESTATE, vol. 23, p. 893.

**Real Property in Tax Laws** is said to mean land with its fixtures and inherent and existing accessories. It must be capable of description by metes and bounds and be conveyable by deed. *Hughes v. Vail*, 57 Vt. 44.

**Land under Water Including Structures Annexed.** — *Lowell v. Middlesex County*, 6 Allen (Mass.) 131; *Pingree v. Berkshire County*, 102 Mass. 76; *Lowell v. Middlesex County*, 152 Mass. 372. And see LAND, vol. 18, p. 147, note.

**Land Between the Levee and the River** is subject to taxation when used by the front proprietor for purposes of revenue or otherwise. *Mathis v. Assessors*, 46 La. Ann. 1570.

**Right of Way**, in a tax act, may apply to the strip of land appropriated by the railway company, and not relate to the mere intangible right. *Keener v. Union Pac. R. Co.*, 31 Fed. Rep. 126. See RIGHT OF WAY, vol. 24, p. 969, note.

**A Tax on a Building in Which Theatrical and Other Performances Are Given**, under a *Pennsylvania* act, is not a tax on real property, but on the occupation of players and showmen. *Oellers v. Ritter*, 5 Pa. Dist. 149, affirmed 3 Pa. Super. Ct. 537.

7. "Property in Lands." — *State v. Moore*, 12 Cal. 56; *Los Angeles v. Los Angeles City Water Works Co.*, 49 Cal. 638; *People v. Donnelly*, 58 Cal. 144.

**For Taxation of Possessory Claims to Public Lands**, see *infra*, this section, 6. *Public Property and Instrumentalities of Government*.

**A Railroad Tunnel under a Highway** has been held, under a special act authorizing the railway, to be not merely an easement but an interest in land, a "hereditament" subject to a land tax. *Metropolitan R. Co. v. Fowler*, (1893) A. C. 416, affirming (1892) 1 Q. B. 165.

8. See *Ashe Carson Co. v. State*, (Ala. 1903) 35 So. Rep. 38, quoting Code Ala. 1896, § 3911.

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land and mineral rights,<sup>1</sup> or land and growing trees,<sup>2</sup> or land and structures thereon.<sup>3</sup>

*b. BUILDINGS, STRUCTURES, AND IMPROVEMENTS.* — Buildings, structures, and improvements affixed to land become a part thereof and are taxable as land or real property.<sup>4</sup>

**Title to Structure Severed from Soil.** — Under the definitions of land or real property in some statutes, one person may be taxed as the owner of the fee of the land, and another for the buildings and other structures thereon as realty,<sup>5</sup> while under other statutes structures and buildings can be taxed as realty only in connection with the land upon which they are situated.<sup>6</sup> When the owner-

providing for the taxation to the owner thereof of "every separate or special interest in any land."

**Log-ditch Through Other's Lands Taxable.** — *Sullivan v. State*, 117 Ala. 214.

1. See *infra*, this subdivision, *Mining and Mineral Rights*.

2. **Growing Trees.** — *Globe Lumber Co. v. Lockett*, 106 La. 414; *Fox v. Pearl River Lumber Co.*, 80 Miss. 1.

A contract changing title to growing timber only as it is cut down and becomes personalty has been held not to sever the timber from the soil for the purposes of taxation and the trees are still taxable to the owner of the land as realty. *Williams v. Triche*, 107 La. 92. But the notes given for such a purchase have been held taxable as "credits." *Marquette v. Michigan Iron, etc., Co.*, (Mich. 1903) 92 N. W. Rep. 934.

In *Alabama a Timber Lease* giving the lessee a right to enter and cut timber of a specified size only, and transferring the property in the trees when and as they are cut, is taxable, under the statute providing for taxation of "every separate or special interest in any land" to the lessee. *Freeman v. State*, 115 Ala. 208.

**Growing Trees Have Been Taxed as Personalty** to the vendee in *Kentucky*. *Coldiron v. Kentucky Lumber Co.*, (Ky. 1895) 32 S. W. Rep. 224.

See further, *infra*, this subdivision, *License to Use Land*.

3. See *infra*, this subdivision, *Buildings, Structures, and Improvements*.

4. **Buildings, Structures, and Improvements.** — *Consolidated Coal Co. v. Baker*, 135 Ill. 545; *Pennsylvania R. Co. v. Pittsburg*, 104 Pa. St. 522; *Hughes v. Vail*, 57 Vt. 44. See also *House*, vol. 15, pp. 770, 771; *LAND*, vol. 18, pp. 142, 144; *REAL ESTATE*, vol. 23, pp. 893, 894.

**Bridges** are taxable as real estate. *Alexandria Canal R., etc., Co. v. District of Columbia*, 1 Mackey (D. C.) 217; *State v. Hannibal, etc., R. Co.*, 89 Mo. 98; *State v. Mississippi River Bridge Co.*, 109 Mo. 253; *Hudson River Bridge Co. v. Patterson*, 74 N. Y. 365 (toll bridge). See *LAND*, vol. 18, p. 146. See also *Quincy R. Bridge Co. v. Adams County*, 88 Ill. 615.

As to whether a bridge is within the term "roadbed," "right of way," and "superstructure" in a tax statute, see *ROADBED*, vol. 24, p. 989, note.

**Piers** are real property. *Smith v. New York*, 68 N. Y. 552.

**Pipes and Mains for Water, Gas, etc.** — *Iowa*. — *Matter of Des Moines Water Co.*, 48 Iowa 324; *Capital City Gas Light Co. v. Charter Oak*

*Ins. Co.*, 51 Iowa 32; *Oskaloosa Water Co. v. Board of Equalization*, 84 Iowa 407.

*Kentucky*. — *Covington Gas-light Co. v. Covington*, 84 Ky. 94.

*Maine*. — *Paris v. Norway Water Co.*, 85 Me. 330, 35 Am. St. Rep. 371.

*Michigan*. — *Monroe Water Co. v. Frenchtown Tp.*, 98 Mich. 431.

*New York*. — *People v. Martin*, 48 Hun (N. Y.) 193. See also *LAND*, vol. 18, p. 145; *REAL ESTATE*, vol. 23, p. 894.

In *Herkimer County Light, etc., Co. v. Johnson*, 37 N. Y. App. Div. 257, machinery used in connection with such mains, etc., was held taxable as realty.

**Railroads**, either in streets or elsewhere, are taxable as lands. *Neary v. Philadelphia, etc., R. Co.*, 7 Houst. (Del.) 419; *Union Trust Co. v. Weber*, 96 Ill. 346; *Appeal Tax Ct. v. Western Maryland R. Co.*, 50 Md. 274; *People v. Cassidy*, 46 N. Y. 46; *People v. Tax, etc., Com'rs*, 101 N. Y. 322, *reversing* 23 Hun (N. Y.) 687; *Pennsylvania R. Co. v. Pittsburgh*, 104 Pa. St. 522; *South Nashville St. R. Co. v. Morrow*, 87 Tenn. 406. See also *LAND*, vol. 18, pp. 145, 146; *REAL ESTATE*, vol. 23, p. 894.

**Structures for Elevated Railroads.** — *People v. Tax, etc., Com'rs*, 82 N. Y. 459.

**Telegraph Lines** may be taxed as real property, although paying a privilege tax. *Western Union Tel. Co. v. State*, 9 Baxt. (Tenn.) 509, 40 Am. Rep. 99. And see *LAND*, vol. 18, p. 146.

5. **Buildings and Fixtures as Realty.** — *Smith v. New York*, 68 N. Y. 552; *People v. Cassidy*, 46 N. Y. 46; *Union Compress Co. v. State*, 64 Ark. 136.

**Different Stories in House.** — *Cincinnati College v. Yeatman*, 30 Ohio St. 276. And see *South Cong. Meetinghouse v. Lowell*, 1 Met. (Mass.) 538.

**Building on Exempt Land.** — A building may be taxed as realty, though the land on which it stands is exempt. *Russell v. New Haven*, 51 Conn. 259; *State v. Mission Free School*, 162 Mo. 332; *People v. Tax, etc., Com'rs*, 82 N. Y. 459 (elevated railroad structure); *People v. Assessors*, 93 N. Y. 308.

**An Agreement that a Structure Is to Become the Property of the Lessor** at the end of the term has been held to negative an intention to sever it from the land, and to exempt it, where the land itself is exempt as city property. *People v. Barker*, 153 N. Y. 98, *affirming* 15 N. Y. App. Div. 628. *Compare* *Burbank v. Assessors*, 52 La. Ann. 1506.

6. **Taxable as Realty Only in Connection with the Land.** — *McGee v. Salem*, 149 Mass. 238 [*citing* *Milligan v. Drury*, 130 Mass. 428;

ship is severed, they may become personalty and taxable as such.<sup>1</sup>

c. **EASEMENTS.** — Easements, if appurtenant, are a part of the realty to which they are attached, and in general are taxable as such; but easements in gross are taxable apart from the land.<sup>2</sup>

d. **FIXTURES.** — In Determining Whether an Article Is a Fixture under a tax law, and therefore whether it is taxable as realty or as personalty, the principles to be applied have been declared to be as rigid as those which determine the question of fixtures between vendor and vendee.<sup>3</sup> But it has been said that the determination of what are fixtures between various classes of persons can be of little aid on questions of taxation, "because the tax law has set up a standard of its own which must govern the case."<sup>4</sup>

e. **LEASEHOLDS.** — Leaseholds, though not properly real estate, may by statute become such and be so taxable.<sup>5</sup>

f. **LICENSE TO USE LAND.** — A License to Go on Land and Sever and Remove the Products Thereof has been held to be not such an interest in the land as is taxable as real property.<sup>6</sup>

*Flanders v. Cross*, 10 Cush. (Mass.) 514]. See also *Gray's Harbor Co. v. Chehalis County*, 23 Wash. 369.

1. **An Agreement for the Removal** of a building erected on leased land at the end of the term has been held to render it taxable as personal and not as real property. *Parker v. Redfield*, 10 Conn. 490; *East Tennessee, etc., R. Co. v. Morristown*, (Tenn. Ch. 1895) 35 S. W. Rep. 771; *Clove Spring Iron Works v. Cone*, 56 Vt. 603. But see *LAND*, vol. 18, p. 142; *REAL ESTATE*, vol. 23, p. 893; and the title *PERSONAL RIPARIAN RIGHTS*, vol. 24, p. 981.

**Building on Exempt Land Taxed as Personality.** — *Percival v. Thurston County*, 14 Wash. 586 (special statute).

2. **Easements.** — *Winnipeg Lake Cotton, etc., Mfg. Co. v. Gilford*, 64 N. H. 337. See also *LAND*, vol. 18, p. 143; *PROPERTY*, vol. 23, p. 264; and the title *EASEMENTS*, vol. 10, p. 398.

An easement, it has been held, cannot be taxed independently, but only as enhancing the value of the dominant tenement. *Fall River v. Bristol County*, 125 Mass. 567; *Detroit v. Detroit City R. Co.*, 76 Mich. 427. But see *Flax Pond Water Co. v. Lynn*, 147 Mass. 31; *Detroit Citizens' St. R. Co. v. Detroit*, 125 Mich. 682, 84 Am. St. Rep. 589.

**Riparian Rights**, such as the use of water power, are incident to the land, and taxable as real estate. *State v. Minneapolis Mill Co.*, 26 Minn. 229; *Winnipeg Lake Cotton, etc., Mfg. Co. v. Gilford*, 64 N. H. 337. See also *REAL ESTATE*, vol. 23, p. 895; and the title *PERSONAL RIPARIAN RIGHTS*, vol. 24, p. 981.

**Exemption — Separate Existence.** — Before such rights are actually severed from the parent estate by the act of the owner thereof, they have no separate existence for purposes of taxation, and an exemption of the parent estate attaches to them. *State v. St. Paul, etc., R. Co.*, 81 Minn. 422.

**Water Power**, until applied to mills, is potential, not actual in the sense that it is property subject to taxation; when applied to mills it becomes a part of the property, thereby giving them value, the proper subject of taxation. *Union Water Power Co. v. Auburn*, 90 Me. 60, 60 Am. St. Rep. 240.

3. **Fixtures.** — *People v. Waldron*, 26 N. Y. App. Div. 527, holding machinery affixed by a manufacturing corporation to be real property. See also the title *FIXTURES*, vol. 13, p. 594.

4. *Herkimer County Light, etc., Co. v. Johnson*, 37 N. Y. App. Div. 257. See also *Richmond, etc., R. Co. v. Alamance*, 84 N. Car. 506.

In *West Virginia* the statutes provide that "personal property" includes "all fixtures attached to land, if not included in the valuation of such land entered in the proper land book." *Carter v. Tyler County Ct.*, 45 W. Va. 806.

**Electric Wires and Poles, Dynamos, and an Electric Switch-board** have been held taxable as personal property in *Rhode Island*, being removable without injury to the freehold. *Newport Illuminating Co. v. Tax Assessors*, 19 R. I. 632.

**An Engine, Boiler, Belting, etc.**, under Rev. Stat. Ill., c. 120, § 25, were held personally though affixed to the realty. *Johnson v. Roberts*, 102 Ill. 655.

5. See *LAND*, vol. 18, p. 144; *REAL ESTATE*, vol. 23, p. 894. See also title *GROUND RENT*, vol. 14, p. 1122.

**Leases for Ninety-nine Years Held to Be Taxable as Realty.** — *Washington Market Co. v. District of Columbia*, 4 Mackey (D. C.) 416. Compare *Wilgus v. Com.*, 9 Bush (Ky.) 556.

**Lease Renewable Forever Is Realty.** — *Street v. Columbus*, 75 Miss. 822; *Cincinnati College v. Yeatman*, 30 Ohio St. 276.

**Rent Charges or Ground Rents** are included in "land" as taxable property under the *Virginia Code*, but the statutes make no provision for its assessment otherwise than as income. *Willis v. Com.*, 97 Va. 667.

**Lease of Water Works and Right to Use.** — *Los Angeles v. Los Angeles City Water Works Co.*, 49 Cal. 638.

**Lease of Timber Rights.** — *Freeman v. State*, 115 Ala. 208.

6. **Licenses.** — *Ashe Carson Co. v. State*, (Ala. 1903) 35 So. Rep. 38 (turpentine lease); *Clove Spring Iron Works v. Cone*, 56 Vt. 603 (license to cut and remove timber); *Hughes v. Vail*, 57 Vt. 41 (license to quarry and manufacture slate). See also *supra*, this subdivision, a. *Definition*. As to license generally, see the title *LICENSE*, vol. 18, p. 1127.

**g. MINING AND MINERAL RIGHTS.** — Mining claims and the right to minerals beneath the surface of land are capable of ownership separate from the surface soil.<sup>1</sup> The interest of an occupant of a mining claim or a right to minerals lying *in situ* is property in lands and may be subjected to taxation as such.<sup>2</sup> An interest in ores actually separated from the soil is taxable as personalty<sup>3</sup> in accordance with its nature. A grant of a freehold interest in minerals *in situ* has been held to render the grantee taxable for realty, while under a lease for years of mineral rights he is not so taxable.<sup>4</sup>

**h. MORTGAGES.** — A Mortgage on Real Estate in some states is taxable as an interest in the property covered thereby.<sup>5</sup>

**6. Public Property and Instrumentalities of Government** — **a. GENERALLY EXEMPT FROM TAXATION.** — The right of public property and of the various instrumentalities of government to be free from taxes has been treated in another title.<sup>6</sup>

**b. TAXATION WITH ASSENT OF GOVERNMENT.** — The property of the United States is absolutely exempt from taxation, except with the consent of Congress. A state may, however, if it sees fit, subject its own property and

1. See the title MINES AND MINING CLAIMS, vol. 20, p. 677.

2. Mining Claims Taxable as Realty. — State v. Moore, 12 Cal. 56; People v. Shearer, 30 Cal. 645; People v. Frisbie, 31 Cal. 146; People v. Cohen, 31 Cal. 210; People v. Black Diamond Coal Min. Co., 37 Cal. 54; People v. Donnelly, 58 Cal. 144; *In re Major*, 134 Ill. 19; Consolidated Coal Co. v. Baker, 135 Ill. 545; Stuart v. Com., 94 Ky. 595; Logan v. Washington County, 29 Pa. St. 373; Sanderson v. Scranton, 105 Pa. St. 469; Delaware, etc., R. Co. v. Sanderson, 109 Pa. St. 583, 58 Am. Rep. 743; Miles v. Delaware, etc., Canal Co., 140 Pa. St. 623; Powell v. Lantzy, 173 Pa. St. 543. See also Ridgway Light, etc., Co. v. Elk County, 191 Pa. St. 469; LAND, vol. 18, p. 145; REAL ESTATE, vol. 23, p. 494.

Under the provisions of the *Arizona* code it was held that mines to which patents had been issued were taxable as real estate, but that previous to the issuance of patents mining rights or claims were taxable as personal property. Waller v. Hughes, (Ariz. 1886) 11 Pac. Rep. 122.

**Grant of Mineral Rights Contrasted with License.** — The grant of coal underlying land, with the right of mining the same, is a conveyance of an interest in the land itself which falls within the designation of real estate for the purposes of taxation and is to be distinguished from a mere license to enter and mine the coal. Consolidated Coal Co. v. Baker, 135 Ill. 545. See also Sanderson v. Scranton, 105 Pa. St. 469.

3. Ores When Separated Taxable as Personalty. — Forbes v. Gracey, 94 U. S. 762, affirming 9 Fed. Cas. No. 4,924; Consolidated Coal Co. v. Baker, 135 Ill. 545.

The Prospective Product of Oil Wells cannot be taxed to the lessee as personal property. Carter v. Tyler County Ct., 45 W. Va. 806.

The Annual Proceeds of Mines and Mining Claims are taxable in some states. Mercur Gold Min., etc., Co. v. Spry, 16 Utah 222; Centennial Eureka Min. Co. v. Juab County, 22 Utah 395.

4. State v. South Penn. Oil Co., 42 W. Va. 80.

A Mining Lease terminable at the option of the lessee, conveying merely "an incorporeal hereditament" and not the ownership of the

minerals *in situ*, cannot be taxed as real property. Jones v. Wood, 6 Ohio Cir. Dec. 538, 9 Ohio Cir. Ct. 560 (affirmed without opinion 54 Ohio St. 627), reversing 2 Ohio Dec. 75, 1 Ohio N. P. 155.

5. Real Estate Mortgages. — Const. Cal., art. 13, § 3; Doland v. Mooney, 72 Cal. 34; Germania Trust Co. v. San Francisco, 128 Cal. 592; Sanford v. Saving, etc., Soc., 80 Fed. Rep. 54 (applying California statutes); Knight v. Boston, 159 Mass. 551 (statute requiring mortgagee's interest to be assessed against him as real property); Detroit v. Assessors, 91 Mich. 78.

In *New Jersey* the entire tax on mortgaged premises is to be assessed against the mortgagor unless he claims a deduction on account of the mortgage, in which case he is taxable for the value of the land less the mortgage, and the "debt secured" is to be taxed to the mortgagee in the place where the mortgaged premises are situated. State v. Runyon, 41 N. J. L. 98; Appleby v. East Brunswick, 44 N. J. L. 153; State v. Gano, (N. J. 1897) 37 Atl. Rep. 434; Dilts v. Taylor, 57 N. J. L. 369. See also Darcy v. Darcy, 51 N. J. L. 145; Merchants' Ins. Co. v. Newark, 54 N. J. L. 143.

6. See the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 367. And see the titles INTERSTATE COMMERCE, vol. 17, p. 108 *et seq.*; OCCUPATION, ETC., TAXES, vol. 21, p. 778; TAXATION (CORPORATE), *post*.

Property Which a City Occupies under an Option to acquire title by paying certain sums named, but which it is not bound to pay, is not exempt as belonging to the city, but is taxable to the owner. Milwaukee v. Milwaukee County, 95 Wis. 424.

Bridges Between Two States Taxable by States Granting Franchises. — Henderson Bridge Co. v. Henderson, 173 U. S. 592; Keokuk, etc., Bridge Co. v. Illinois, 175 U. S. 626, affirming 176 Ill. 267.

Lands Held in Trust by the Chancellor of the state for certain persons are not the property of the state and are taxable. State v. Elizabeth, 65 N. J. L. 479.

So Property Held by City in Trust. — St. Louis v. Wencker, 145 Mo. 230.

the property of its municipal divisions to taxation in common with other property in its territory, but general expressions in statutes enumerating subjects of taxation will not be construed as intended to include public property.<sup>1</sup>

c. PUBLIC LANDS — (1) *General Principles*. — Public Lands of the United States are not subject while in the ownership of the United States to taxation by the states,<sup>2</sup> but such lands become taxable to an individual when he has acquired a complete legal title thereto by the issuance of a patent, or even before a patent is issued when his right to the patent is complete and he has the full equitable title, although the United States still holds the dry legal title as trustee.<sup>3</sup> So long as the equitable title is incomplete, the state cannot tax such lands.<sup>4</sup>

The Date at Which the Right to Tax Grants of United States Lands begins is when

1. *Exemption of United States — State Tax on State Property*. — *Van Brocklin v. Tennessee*, 117 U. S. 151; *Louisville v. Com.*, 1 Duv. (Ky.) 295, 85 Am. Dec. 624; *Worcester County v. Worcester*, 116 Mass. 193, 17 Am. Rep. 159; *Public Schools v. Trenton*, 30 N. J. Eq. 681; *Com. v. Maury*, 82 Va. 883. See also *supra*, this section, *Personal Property*, and the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 368.

The Expression "All Property in This State" in a tax statute will not include public property. *People v. McCreery*, 34 Cal. 432.

But the Words "All Property Not Expressly Exempted" have been held to include public lands not mentioned as exempted. *Oswalt v. Hallowell*, 15 Kan. 154.

Taxation of Public Lands of the United States Is in Control of Congress. — *State v. Central Pac. R. Co.*, 21 Nev. 247, affirmed 162 U. S. 512.

Congress Has Permitted the Taxation of national banks under certain limitations. *Talbott v. Silver Bow County*, 139 U. S. 438; *McHenry v. Downer*, 116 Cal. 25. And see the title TAXATION (CORPORATE), *post*.

National Bank Notes and United States Treasury Notes were subjected to state taxation by Act of Congress, Aug. 13, 1894, 28 U. S. Stat. L. 278. *Howard Sav. Inst. v. Newark*, 63 N. J. L. 547, reversing 63 N. J. L. 65; *Carpenter v. Lewis*, 9 Ohio Dec. 498; *Patton v. Commercial Bank*, 7 Ohio N. P. 401, 10 Ohio Dec. 321.

2. *Public Domain Not Taxable*. — *Van Brocklin v. Tennessee*, 117 U. S. 151; *Durkee v. Greenwood County*, 29 Kan. 697; *Dixon v. Doe*, 23 Miss. 84. As to the meaning of "public domain" see DOMAIN, vol. 10, p. 3.

Grants of Land from the United States to a State in Trust for works of internal improvement are not taxable. *Wisconsin Cent. R. Co. v. Taylor County*, 52 Wis. 37.

Possessory Rights Founded on Mere Occupation and Improvements on United States Public Lands have been held taxable. *State v. Central Pac. R. Co.*, 21 Nev. 247 (quoted under CLAIM, vol. 6, p. 105), affirmed 162 U. S. 512. See also *Maish v. Arizona*, 164 U. S. 609, and the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 375. But see *Parker v. Winsor*, 5 Kan. 362.

3. *Acquisition of Equitable Title to Public Lands Renders Person Taxable as to Them — United States*. — *Carroll v. Safford*, 3 How. (U. S.) 441; *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210, affirming 21 Ark. 240; *Kansas Pac. R. Co. v. Prescott*, 16 Wall. (U. S.) 603, reversing 9 Kan. 38; *Union Pac. R. Co. v. McShane*, 22 Wall. (U. S.) 444, affirming 3 Dill. (U. S.) 303.

*Wisconsin Cent. R. Co. v. Price County*, 133 U. S. 496, reversing 64 Wis. 594; *Northern Pac. R. Co. v. Patterson*, 154 U. S. 132; *Hussman v. Durham*, 165 U. S. 144, affirming 88 Iowa 29; *Northern Pac. R. Co. v. Walker*, 47 Fed. Rep. 681; *Astrom v. Hammond*, 3 McLean (U. S.) 107; *Carroll v. Perry*, 4 McLean (U. S.) 25.

*Arkansas*. — *Smith v. Hollis*, 46 Ark. 17; *Burcham v. Terry*, 55 Ark. 398, 29 Am. St. Rep. 42.

*California*. — *Robinson v. Gaar*, 6 Cal. 273; *Hall v. Dowling*, 18 Cal. 619; *Central Pac. R. Co. v. Howard*, 52 Cal. 227.

*Florida*. — *Mundee v. Freeman*, 23 Fla. 536.

*Indiana*. — *State v. Miami County*, 63 Ind. 497.

*Iowa*. — *Stockdale v. Webster County*, 12 Iowa 536; *Dubuque, etc., R. Co. v. Webster County*, 21 Iowa 235; *Stryker v. Polk County*, 22 Iowa 131; *Moriarty v. Boone County*, 39 Iowa 634.

*Kansas*. — *McMahon v. Welsh*, 11 Kan. 280; *Oswalt v. Hallowell*, 15 Kan. 154; *Prescott v. Beebe*, 17 Kan. 320; *Saline County v. Young*, 18 Kan. 440; *Logan v. Clark County*, 51 Kan. 747.

*Louisiana*. — *Jopling v. Chachere*, 107 La. 522.

*Minnesota*. — *Wheeler v. Merriman*, 30 Minn. 372; *St. Paul, etc., R. Co. v. Robinson*, 40 Minn. 360; *St. Paul, etc., R. Co. v. Shanks*, 40 Minn. 369, note; *Polk County v. Hunter*, 42 Minn. 312.

*Nebraska*. — *Graff v. Ackerman*, 38 Neb. 720.

*Oregon*. — *Oregon, etc., R. Co. v. Lane County*, 23 Oregon 386.

*Washington*. — *Puget Sound Agricultural Co. v. Pierce County*, 1 Wash. Ter. 159.

*Wisconsin*. — *Ross v. Outagamie County*, 12 Wis. 26; *West Wisconsin R. Co. v. Trempealeau County*, 35 Wis. 257; *Wisconsin Cent. R. Co. v. Comstock*, 71 Wis. 88; *Farnham v. Sherry*, 71 Wis. 568.

Rule Applied to Mexican Land Grant. — *Maish v. Arizona*, 164 U. S. 599; *Territory v. Delinquent Tax List*, (N. Mex. 1903) 73 Pac. Rep. 621.

As to When the Equitable or Legal Title Becomes Perfect, see the title STATE AND PUBLIC LANDS, vol. 26, p. 197, especially p. 403 *et seq.*

4. *Robertson v. Sewell*, (C. C. A.) 87 Fed. Rep. 536; *Central Pac. R. Co. v. Howard*, 51 Cal. 229, 52 Cal. 227; *Duncan v. Newcomer*, 9 S. W. Dak. 375. See also the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 379.

beneficial title to the lands taxed passes from the United States,<sup>1</sup> and a prior patent or warrant vitiated by fraud or mistake does not render the lands taxable from its date.<sup>2</sup> So public lands are not taxable so long as a condition precedent to the acquisition of title by the grantee remains unfulfilled.<sup>3</sup>

**Defeasible Title.** — The owner's right of property in lands granted by the government is taxable, although he may be excluded by the happening of some future contingency, as the discovery of minerals in a section of land granted to a railroad,<sup>4</sup> the avoidance of an unconfined Mexican land grant,<sup>5</sup> or the happening of a condition subsequent which is to revest the United States with title.<sup>6</sup>

**The Taxation of State Lands Is Governed by the Same Principles,** and so long as the legal or the equitable title remains in the state such lands are not taxable.<sup>7</sup>

**1. Date When Lands Taxable.** — *Bronson v. Kukuk*, 3 Dill. (U. S.) 490; *Scott v. Chickasaw County*, 46 Iowa 253; *Reynolds v. Plymouth County*, 55 Iowa 90; *Kohn v. Barr*, 52 Kan. 269; *Donovan v. Kloeke*, 6 Neb. 124; *Duncan v. Newcomer*, 9 S. Dak. 375; *Danforth v. McCook County*, 11 S. Dak. 258, 74 Am. St. Rep. 808; *Calder v. Keegan*, 30 Wis. 126. *Compare Wheeler v. Merriman*, 30 Minn. 372; *Polk County v. Hunter*, 42 Minn. 312 (stated under the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 378).

**From Reinstatement of Entry.** — *Davis v. Magoun*, 109 Iowa 308.

**From the Time at Which Right to Patent Perfected.** — *Hoskins v. Illinois Cent. R. Co.*, 78 Miss. 768, 84 Am. St. Rep. 644 (homestead grant).

**A Mere Relocation Without Declaring the Prior Patent Invalid** does not affect the validity of the date of the original patent. *Vinton v. Cerro Gordo County*, 72 Iowa 155.

**A Trust Deed to a Railway Land Grant** for the full value of the property, the *cestuis que trustent* being empowered to appropriate the whole property, warrants taxation by the state. *Chippewa County v. St. Paul, etc.*, R. Co., 42 Minn. 295.

**2. A Land Warrant Procured on False and Fraudulent Papers** does not divest the title of the *United States* and confers on the state no right of taxation. *Bronson v. Kukuk*, 3 Dill. (U. S.) 493; *Kohn v. Barr*, 52 Kan. 269 (forged assignment).

**3. Payment of Purchase Price** is such condition. *Hussman v. Durham*, 165 U. S. 144, *affirming* 88 Iowa 29; *U. S. v. Milwaukee*, 100 Fed. Rep. 828; *Dyer v. Friedheim*, 43 Ark. 203; *Page v. Pierce County*, 25 Wash. 6 (Indian lands assigned in severalty); unless the purchase price is payable by instalments and no instalments are overdue. See the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 379, note.

**Payment of Costs of Survey** may be such condition precedent. *Union Pac. R. Co. v. McShane*, 22 Wall. (U. S.) 444 [*modifying* *Kansas Pac. R. Co. v. Prescott*, 16 Wall. (U. S.) 603]; *Colorado Co. v. Pueblo County*, 95 U. S. 259, *reversing* 2 Colo. 628; *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600; *White v. Burlington, etc.*, R. Co., 5 Neb. 393; *Montgomery v. Cowlitz County*, 14 Wash. 230. But see *Cass County v. Morrison*, 28 Minn. 257.

**Railroad Land Grants.** — But Act Cong. July 10, 1886 (24 U. S. Stat. L. 143), has rendered

railroad land grants subject to this condition taxable by the state. *Central Pac. R. Co. v. Nevada*, 162 U. S. 512, *affirming* 21 Nev. 247; *Northern Pac. R. Co. v. Myers*, 172 U. S. 589, *affirming* 48 U. S. App. 620; *State v. Central Pac. R. Co.*, 20 Nev. 372. See also *Wells County v. McHenry*, 7 N. Dak. 246.

**Indemnity Lands** (see STATE AND PUBLIC LANDS, vol. 26, p. 325) are not taxable by the state until a selection is made by which they are pointed out and ascertained and the selection approved by the secretary of the interior, but they then become taxable. *Chicago, etc., R. Co. v. Hemenway*, 117 Iowa 598; *New Orleans Pac. R. Co. v. Kelly*, 52 La. Ann. 1741; *State v. Sage*, 75 Minn. 448 [*citing* *Sioux City, etc., R. Co. v. Chicago R. Co.*, 117 U. S. 406]; *Wells County v. McHenry*, 7 N. Dak. 246; *Oregon, etc., R. Co. v. Lane County*, 23 Oregon 386.

**Railroad Land Grants.** — Where lands have been granted by the *United States* to a state, to be granted by the state to railroads which should comply with certain conditions, a tax may be imposed on a portion of such lands which have been earned by a railroad, and for which the state has issued a patent, before the *United States* has approved the selection. *Elkhorn Land, etc., Co. v. Dixon County*, 35 Neb. 426.

**4. Title Liable to Be Defeated.** — *Northern Pac. R. Co. v. Myers*, 172 U. S. 589, *affirming* *Northern Pac. R. Co. v. Patterson*, 154 U. S. 130; *Central Pac. R. Co. v. Nevada*, 162 U. S. 512; *Northern Pac. R. Co. v. Wright*, 7 U. S. App. 502, 54 Fed. Rep. 67; *Northern Pac. R. Co. v. McGinnis*, 4 N. Dak. 494.

**5. Maish v. Arizona**, 164 U. S. 599.

**6. Baltimore Shipbuilding, etc., Co. v. Baltimore**, (Md. 1903) 54 Atl. Rep. 623.

**7. State Lands.** — *Abney v. State*, 20 Tex. Civ. App. 101. See also *Taylor v. Robinson*, 34 Fed. Rep. 678, applying Rev. Stat. Tex., art. 4691.

**State Lands Held under a Contract of Purchase** are taxable in some states though all the purchase price has not been paid. *People v. Donnelly*, 58 Cal. 144; *Courtney v. Missoula Co.*, 21 Mont. 591; *State v. Tucker*, 38 Neb. 56; *Hindes v. State*, 28 Tex. Civ. App. 531 (school lands); *Washington Iron Works Co. v. King County*, 20 Wash. 150; *Gray's Harbor Co. v. Chehalis County*, 23 Wash. 369. *Compare* *Meyers v. Akins*, 4 Ohio Cir. Dec. 425, 8 Ohio Cir. Ct. 228.

**Exemption of Land Granted until "Sold and Conveyed."** — Where by act of the legislature

(2) *Indian Lands.* — The taxation and exemption of Indian lands have been treated in other connections.<sup>1</sup>

*Becoming Citizens.* — Generally Indians become taxable by becoming citizens and by receiving allotments in severalty under the laws of the *United States*.<sup>2</sup> But where these acts provide for a term during which the title is held in trust by the United States for the Indians, allotments and improvements thereon and personal property issued by the government to allottees are not taxable until the expiration of such term.<sup>3</sup>

*Personalty on Indian Lands.* — The exemption of Indian lands from taxation does not apply to personal property found thereon, in which the Indians are not interested, unless used in such a manner as to make it an agency of the government.<sup>4</sup>

d. AGENCIES OF GOVERNMENT. — Under the complex system of government in the United States, the federal government and the governments of the states are reciprocally forbidden to employ the power of taxation so as to hinder the exercise of any powers belonging to each other. Taxes cannot be imposed, therefore, on the agencies of the state or of the national government which deprive them of the power to serve the government as they were intended to do, or hinder the efficient exercise of their powers. But this principle is observed if a tax on the operation of such agencies is forbidden, while a tax on their property, leaving them free to discharge their duties, may be rightfully laid.<sup>5</sup>

7. *Incomes.* — An income tax, whether on real or personal property, has been held by the Supreme Court of the *United States* to be a direct tax within that clause of the Federal Constitution which requires direct taxes to be apportioned

lands were granted to a railroad, and they were rendered exempt from taxation until "sold and conveyed," it was held that the exemption was continued only until the full equitable title was transferred, and that the railroad company could not thereafter, by neglecting to convey the legal title, postpone the exemption indefinitely. *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 526, 40 Minn. 512; *State v. Winona, etc., R. Co.*, 21 Minn. 472.

*Lands Below High Water Mark Not Taxable.* — *State v. Jersey City*, 42 N. J. L. 349.

*Leasehold Interests in State Lands Taxable.* — *Carrington v. People*, 195 Ill. 484.

*When Property Belonging to a Charitable Institution or other exempt body is alienated by it, such property becomes taxable.* *Meyers v. Akins*, 4 Ohio Cir. Dec. 425, 8 Ohio Cir. Ct. 227. And see the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 377.

1. See the titles EXEMPTIONS (FROM TAXATION), vol. 12, p. 375; INDIANS, vol. 16, p. 236. See also *Auditor Gen. v. Williams*, 94 Mich. 180.

2. *Miami County v. Godfroy*, 27 Ind. App. 610; *Keokuk v. Ulam*, 4 Okla. 5. See also the titles CITIZENSHIP, vol. 6, pp. 18, 28; INDIANS, vol. 16, p. 232 *et seq.*

3. *Allotments in Trust.* — *U. S. v. Rickert*, 188 U. S. 432 (construing 24 U. S. Stat. L. 388, Act Cong. Feb. 8, 1887, and reversing in effect 106 Fed. Rep. 1); *Frazee v. Spokane County*, 29 Wash. 278.

4. *Cattle Which Are Kept on an Indian Reservation*, but which are the property of persons not residing thereon, may be taxed by the state. *Thomas v. Gay*, 169 U. S. 264, reversing in part 5 Okla. 1; *Wagoner v. Evans*, 170 U. S. 588; *Truscott v. Hurlbut Land, etc., Co.*, (C. C.

A.) 73 Fed. Rep. 60; *Gay v. Thomas*, 7 Okla. 184; *Torrey v. Baldwin*, 8 Wyo. 430 [overruling *Moore v. Sweetwater County*, 2 Wyo. 8; *Freemont County v. Moore*, 3 Wyo. 200].

*Indian Post Traders' stock and personalty are not exempt from state taxation, they being licensees and not agents of the government, and such tax not a regulation of commerce with Indian tribes.* *Cosier v. McMillan*, 22 Mont. 484; *Cherry County v. Thacher*, 32 Neb. 350; *Moore v. Beason*, 7 Wyo. 292; *Noble v. Amoretti*, (Wyo. 1903) 71 Pac. Rep. 879. *Contra*, *Foster v. Blue Earth County*, 7 Minn. 140.

5. *Agencies of Government.* — *Union Pac. R. Co. v. Peniston*, 18 Wall. (U. S.) 5; *Western Union Tel. Co. v. Atty.-Gen.*, 125 U. S. 551; *Linton v. Childs*, 105 Ga. 567 (specific state tax on bank presidents void as to presidents of national banks); *Baltimore Shipbuilding, etc., Co. v. Baltimore*, (Md. 1903) 54 Atl. Rep. 623 (tax on property of dry dock company upheld though under contract to dry dock vessels of the United States free of charge). See also the titles EXEMPTIONS (FROM TAXATION), vol. 12, p. 374; INTERSTATE COMMERCE, vol. 17, p. 44 *et seq.*; OCCUPATION, ETC., TAXES, vol. 21, p. 792 *et seq.*

The United States has no power to tax either the instrumentalities or the properties of a state or of a municipality of the state. *Pollock v. Farmers' L. & T. Co.*, 157 U. S. 584.

*State Tax on the Offices of Postal Clerks Unconstitutional.* — *Ulsh v. Perry County*, 7 Pa. Dist. 488.

*State Tax on Lands of Another State.* — A land grant by the *United States* for school purposes to the state of *Alabama* within the territorial limits of *Nebraska* cannot be taxed by the latter when a state, the public purpose of the grant

among the states in proportion to population.<sup>1</sup> Taxes on incomes are an ordinary form of taxation by the states,<sup>2</sup> and have been held not to infringe constitutional provisions requiring taxation of property to be uniform or in proportion to its value.<sup>3</sup> Under the former United States income tax law the income must have accrued during the year for which the tax was imposed.<sup>4</sup>

The Measure of the Income upon which the tax is to be imposed is frequently held to be the income of the preceding and not of the current year.<sup>5</sup>

**8. Occupation, Business, and Privileges.**—The discussion of taxation in relation to these matters has been fully considered elsewhere.<sup>6</sup>

**9. Litigation.**—Statutes imposing a tax of a certain amount on each person procuring the issue of an original writ or an execution have been held not to impose taxes within the meaning of a constitutional clause requiring property to be taxed *ad valorem*.<sup>7</sup> Such statutes merely impose and regulate

exempting such lands "to the same extent as if they were within the state of Alabama." *Stoutz v. Brown*, 3 Dill. (U. S.) 445.

**1. Income Tax of United States.**—*Pollock v. Farmers' L. & T. Co.*, 158 U. S. 601, 157 U. S. 429, *distinguishing or overruling* *Springer v. U. S.*, 102 U. S. 586, supposed to sustain a previous income tax of the United States. As to the construction of former acts, see *Northern Cent. R. Co. v. Jackson*, 7 Wall. (U. S.) 262; *U. S. v. Smith*, 1 Sawy. (U. S.) 277 (perjury in taxpayer's return); *Doll v. Evans*, 15 Int. Rev. Rec. 143, 7 Fed. Cas. No. 3,969 (assessor may declare penalty provided by the act for false return).

**2. Income, What Is.**—See generally *INCOME*, vol. 16, p. 147.

**Income and Property Distinguished.**—*Waring v. Savannah*, 60 Ga. 93 (quoted under *INCOME*, vol. 16, p. 150); *Glasgow v. Rowse*, 43 Mo. 479.

**Mere Advance in Value** in no sense constitutes gains, profits, or income. *Gray v. Darlington*, 15 Wall. (U. S.) 63.

**English Income Tax.**—*Tennant v. Smith*, (1892) A. C. 150. See *GAINS*, vol. 14, p. 575; *PROFITS*, vol. 23, p. 189.

**Delegation of Power to Impose.**—A city charter authorizing property taxation does not confer the right to tax incomes. *Savannah v. Hart-ridge*, 8 Ga. 23.

**Double Taxation.**—A tax on income, *e. g.*, wages, commissions, brokerage, etc., derived from certain personal services and from dividends, etc., "upon stocks in money corporations not taxable under this act," was not intended to institute double taxation, and property already taxed is not taxable thereunder. *New Orleans v. Fassman*, 14 La. Ann. 878.

**Foreign Sources of Income.**—A person residing in *England* who receives income from sources entirely abroad is liable to the income tax upon such profits as are received in *England*. *Colquhoun v. Brooks*, 14 App. Cas. 493.

**Salaries of Public Officers** are not included under city ordinances taxing incomes arising from the "pursuit of any faculty, profession, occupation, trade, or employment." *City Council v. Lee*, 1 Treadw. (S. Car.) 57.

**3. Constitutionality.**—*Waring v. Savannah*, 60 Ga. 93; *Glasgow v. Rowse*, 43 Mo. 480.

**An Exemption of Incomes Below a Certain Amount** does not invalidate the tax. *New Orleans v. Fourchy*, 30 La. Ann. 910.

**Income Tax on Property Already Taxed Sustained.**—*Memphis v. Ensley*, 6 Baxt. (Tenn.)

553, 32 Am. Rep. 532. But see *Wilcox v. Middlesex County*, 103 Mass. 545 (quoted under *INCOME*, vol. 16, p. 152).

An application of income to the purchase price of realty already taxed creates no right to exemption from income tax. *Lott v. Hubbard*, 44 Ala. 593.

**Income Tax on Profits of Business Which Has Paid License Upheld.**—*Burch v. Savannah*, 42 Ga. 596; *Drexel v. Com.*, 46 Pa. St. 71.

**A State Cannot Tax the Income of a United States Official, nor vice versa.** *Dobbins v. Erie County*, 16 Pet. (U. S.) 435; *Collector v. Day*, 11 Wall. (U. S.) 113. And see the title *EXEMPTIONS (FROM TAXATION)*, vol. 12, p. 373.

**An Income Tax on Judges** does not diminish their compensation during office within the prohibition of the constitution. *Northumberland County v. Chapman*, 2 Rawle (Pa.) 73.

**4. Annual Gains, etc., Taxed.**—When an act taxes only annual gains, profits, and incomes, profits on bonds purchased and sold after retention for four years are not taxable for the year in which they are sold, for the advance in value represents fluctuation extending over the whole period. *Gray v. Darlington*, 15 Wall. (U. S.) 63.

**Promissory Notes, Account Books, etc.**, becoming due during the year, which are available and convertible into money, should be included. *U. S. v. Frost*, 9 Int. Rev. Rec. 41, 25 Fed. Cas. No. 15,172.

Otherwise as to notes not to become due during such year. *U. S. v. Schillinger*, 14 Blatchf. (U. S.) 71.

**Bad Debts** made during the year may be deducted. *U. S. v. Mayer, Deady* (U. S.) 127.

**The Income Tax of a Person Dying Within the Year** may be collected from his estate for the time preceding his death. *Mandell v. Pierce*, 3 Cliff. (U. S.) 134.

**5. How Income Determined.**—*Drexel v. Com.*, 46 Pa. St. 31; *State v. Elfe*, 3 Strobb. L. (S. Car.) 395.

**6. See the title OCCUPATION, BUSINESS, AND PRIVILEGE TAXES**, vol. 21, p. 770, and cross-references.

**7. Tax on Writs, etc.**—*Lee County v. Abrahams*, 34 Ark. 166; *State v. Lancaster County*, 4 Neb. 537, 19 Am. Rep. 641.

A tax on criminal convictions was held likewise to be a fee to the public and not a tax within the above clause. *Murphy v. State*, 38 Ark. 514.

**As to Stamp Taxes**, see titles *BILLS AND* *VOLUME XXVII*.

fees and costs, and are not obnoxious to constitutional provisions that justice shall be without purchase.<sup>1</sup> A tax of a specified amount on the parties to every suit in the Supreme Court is not properly collected from litigant counties, municipalities, and subdivisions of the state.<sup>2</sup>

**VII. PLACE OF TAXATION — 1. Property Must Be in Jurisdiction — a. IN GENERAL.** — The taxing power of the state is limited to property within the state, and all such property may generally be taxed.<sup>3</sup> The same is generally true of subdivisions of the state, such as municipalities, counties, school districts, etc.<sup>4</sup>

**b. DATE WHEN PRESENCE NECESSARY.** — The date at which the presence of personal property in a jurisdiction or taxing district determines its taxability is generally regulated by statutes which provide for the day of assessment.<sup>5</sup> So where the rule that personal property follows the person is applicable, the residence or the owner at that time is decisive as to whether his personalty is taxable or not.<sup>6</sup>

**2. Real Property.** — Real estate is taxable in the state, town, ward, or other subdivision in which it is actually situated, whether belonging to a resident or a nonresident.<sup>7</sup>

NOTES, vol. 4, p. 157; REVENUE LAWS, vol. 24, p. 934.

**As to Costs Generally,** see the title COSTS, 5 ENCYC. OF PL. AND PR. 100.

**A Succession Tax** is not sustainable as "a tax on all civil suits," nor as an exaction of probate fees. *State v. Mann*, 76 Wis. 469, 498. See also *State v. Gorman*, 40 Minn. 232.

**A Tax on "Criminal Cases"** does not impose a tax on proceedings to enforce a municipal ordinance. *State v. Mason*, 3 Lea (Tenn.) 649. And see CRIME—CRIMINAL, vol. 8, p. 253.

**A Tax on Law Suits Becomes Due** when the suit is begun, and the fact that no issue was reached does not excuse payment. *Elliston v. Winstead*, 10 Lea (Tenn.) 472; *Nashville v. Davis*, 10 Lea (Tenn.) 474.

1. See the title CONSTITUTIONAL LAW, vol. 6, p. 973.

2. *Bishop, etc., v. Arapahoe County*, 28 Colo. 483.

3. **Property Must Be in Jurisdiction — United States.** — *Northern Cent. R. Co. v. Jackson*, 7 Wall. (U. S.) 262; *State R. Tax Case*, 15 Wall. (U. S.) 300.

*Illinois.* — *Maxwell v. People*, 189 Ill. 546.

*Maine.* — *Rockland v. Farnsworth*, 83 Me. 228.

*Maryland.* — *Baltimore v. Hussey*, 67 Md. 112.

*Michigan.* — *State Treasurer v. Auditor Gen.*, 46 Mich. 224.

*Minnesota.* — *St. Paul v. Merritt*, 7 Minn. 258.

*New Hampshire.* — *Berlin Mills Co. v. Wentworth*, 60 N. H. 156.

*New Jersey.* — *State v. Rahway*, 24 N. J. L. 56.

*Ohio.* — *Grant v. Jones*, 39 Ohio St. 506.

*Pennsylvania.* — *Com. v. Standard Oil Co.*, 101 Pa. St. 119.

See also *Matter of Swift*, 137 N. Y. 77, and *supra*, this title, *Persons and Things Taxable*.

4. **Subdivision of State.** — *People v. Townsend*, 56 Cal. 633; *Ham v. Sawyer*, 38 Me. 37; *Wells v. Weston*, 22 Mo. 384, 66 Am. Dec. 627;

*St. Charles v. Nolle*, 51 Mo. 122, 11 Am. Rep. 440; *Corn v. Cameron*, 19 Mo. App. 573; *Matter of Prospect Park*, 60 N. Y. 398.

5. **Property in the State on Such Day** is liable to taxation, although it is the intention of the owner to remove it from the state. *McCutchen v. Rice County*, 2 McCrary (U. S.) 337.

Property in the state at the time the levy is made is taxable there, although it may be removed before the value thereof was ascertained by assessment. *State v. Eastabrook*, 3 Nev. 173.

6. **Residence at Listing or Assessment Decisive.** — *Kilburn v. Bennett*, 3 Met. (Mass.) 199.

One who removes from his domicile on the afternoon of listing day is still taxable there. *McCutchen v. Rice County*, 2 McCrary (U. S.) 337; *Moore v. Wilkins*, 10 N. H. 452.

Where one is assessed at his residence and subsequently removes to another before his property is actually listed, he is nevertheless liable for the taxes so assessed. *Hilgenberg v. Wilson*, 55 Ind. 210; *Boyd v. Wiggins*, 7 Okla. 85; *Warren v. Werner*, 14 Wis. 367. But see *Templeton v. Levee Com'rs*, 16 La. Ann. 117; *De Arman v. Williams*, 93 Mo. 158; *Barber v. Potter*, 8 R. I. 15.

Conversely, one who comes into the state after the listing day is not taxable in the state that year. *White v. State*, 51 Ga. 252.

7. **Real Property — Maine.** — *Hartland v. Church*, 47 Me. 169; *Desmond v. Machias Port*, 48 Me. 478.

*Massachusetts.* — *Salem Iron Factory Co. v. Danvers*, 10 Mass. 514.

*Michigan.* — *Mitchell v. Lake Tp.*, 126 Mich. 367.

*New Hampshire.* — *Nashua Sav. Bank v. Nashua*, 46 N. H. 389; *Cocheco Mfg. Co. v. Strafford*, 51 N. H. 455; *Bowles v. Clough*, 55 N. H. 389; *Weeks v. Gilmanton*, 60 N. H. 500; *Amoskeag Mfg. Co. v. Concord*, 66 N. H. 562.

*New Jersey.* — *State v. Ross*, 23 N. J. L. 517; *State v. Grey*, 29 N. J. L. 380; *State v. Jones*, 39 N. J. L. 246; *Delaware, etc., R. Co. v. Newark*, 60 N. J. L. 60.

But see *State v. Massaker*, 26 N. J. L. 564 (for a special provision relating to the city of



**Lands Transferred to New County.** — Land lying in one county when taxes accrue does not change its taxable situs for that year by being thrown into a new county cut off from the old after the assessment.<sup>1</sup>

**Lands Owned by Nonresidents** are taxed according to statutory provision either to the owner or the occupant.<sup>2</sup>

**Land Lying Partly in Each of Two Districts.** — Where land is separated by a line between adjoining towns or other taxing subdivisions, it is the general rule that the whole body of land is taxable in the subdivision in which the owner or occupant of the land resides, or in which the mansion house is located.<sup>3</sup> If unoccupied, each part of such body of land is assessed in the town or other subdivision where it lies.<sup>4</sup>

**Where Land Lies in Doubtful or Disputed Territory** over which two counties claim jurisdiction, both of which have assessed the property, the owner may pay taxes in either county, provided he can show that the land lies in the county in which he pays the taxes, and such payment will bar an action in the other county.<sup>5</sup>

**Water Power** may be taxed either at the place where it is created by a dam,<sup>6</sup> or where it is applied to machinery, as a part of the plant.<sup>7</sup>

**Water Works and Appurtenances.** — A system of water works in a city, including buildings, machinery, mains, pipes, hydrants, etc., has been held taxable as real estate as an entirety in the township where the main works are located.<sup>8</sup>

**Bridge Between Two States.** — Where a bridge extends over a river which separates two states, the taxing power of each state extends only to the middle of the current or channel.<sup>9</sup>

### 3. Personal Property — a. GENERAL PRINCIPLES. — The location of per-

Paterson, N. J.); *Van Rensselaer v. Cottrell*, 7 Barb. (N. Y.) 127; *Ahl v. Gleim*, 52 Pa. St. 432.

**A Portion of One County Attached to an Adjoining County for Judicial Purposes**, on account of its peculiar shape and position, is taxable in the county to which it belongs and not in the county to which it is attached. *Yellowstone County v. Northern Pac. R. Co.*, 10 Mont. 414.

**Property in an Unorganized County** is taxable under the *South Dakota* statutes in the nearest organized county. *Dupree v. Stanley County*, 8 S. Dak. 30; *Meade County v. Hoehn*, 12 S. Dak. 468.

**1. Creation of New County.** — *Morgan County v. Hendricks County*, 32 Ind. 234; *Collins v. Storm*, 75 Iowa 36; *Waldron v. Lee*, 5 Pick. (Mass.) 323; *Harman v. New Marlborough*, 9 Cush. (Mass.) 525; *Barnett Tp. v. Jefferson County*, 9 Watts (Pa.) 166.

**2. Lands of Nonresidents.** — *Newburyport Turnpike Corp. v. Upton*, 12 Mass. 575; *Bowles v. Clough*, 55 N. H. 389; *Van Rensselaer v. Cottrell*, 7 Barb. (N. Y.) 127. See *infra*, this title, *Assessment; Levy*.

**3. Lands Lying in Two Districts** — *New Jersey*. — *State v. Hoffman*, 30 N. J. L. 346; *State v. Reinhardt*, 31 N. J. L. 218; *State v. Jewell*, 34 N. J. L. 259; *State v. Britton*, 42 N. J. L. 103; *Compton v. Dally*, 47 N. J. L. 84; *Ackerson v. Washer*, 51 N. J. L. 122; *Potter v. Orange*, 62 N. J. L. 192. See also *Stewart v. Flummerfelt*, 53 N. J. L. 540.

*New York*. — *Saunders v. Springsteen*, 4 Wend. (N. Y.) 429; *People v. Gaylord*, 52 Hun (N. Y.) 335; *People v. Wilson*, 52 Hun (N. Y.) 388, 125 N. Y. 367; *Gordon v. Becker*, 71 Hun (N. Y.) 282; *Dorn v. Backer*, 61 N. Y. 261,

*reversing* 61 Barb. (N. Y.) 597; *Tebo v. Brooklyn*, 134 N. Y. 341.

*North Carolina*. — *Hairston v. Stinson*, 13 Ired. L. (35 N. Car.) 479.

*Ohio*. — *Hughey v. Horrel*, 2 Ohio 231; *Barger v. Jackson*, 9 Ohio 163.

*Pennsylvania*. — *Bausman v. Lancaster County*, 50 Pa. St. 208; *Patton v. Long*, 68 Pa. St. 260; *Com. v. Wheelock*, 13 Pa. Super. Ct. 282.

Where the dividing line between a city and township passes through the mansion house, the owner can choose the place of taxation, as between the two. *Lancaster v. Bare*, 8 Pa. Dist. 472.

**4. Unoccupied Land.** — *People v. Wilson*, 52 Hun (N. Y.) 388, 125 N. Y. 367.

**Under the Georgia Code** such land is taxable where the improvements or most of the improvements are, and where the county line is not definitely ascertained the land may be returned for taxes in either of the counties which the owner may elect. If such land is parceled out to tenants, it does not constitute one plantation, and each portion is then taxable in the county where it lies. *Robson v. Du Bose*, 79 Ga. 721. See also *State v. Hay*, 31 N. J. L. 275.

**5. Land in Doubtful Territory.** — *People v. Wilkerson*, 1 Idaho 619.

**6. Water Power.** — *Quinebaug Reservoir Co. v. Union*, 73 Conn. 294; *Cocheco Mfg. Co. v. Strafford*, 51 N. H. 455; *Amoskeag Mfg. Co. v. Concord*, 66 N. H. 562.

**7. Union Water Power Co. v. Aulurn**, 90 Me. 60, 60 Am. St. Rep. 240.

**8. Water Works.** — *Oskaloosa Water Co. v. Board of Equalization*, 84 Iowa 407.

**9. Keokuk, etc., Bridge Co. v. People**, 145 Ill. 596.

sonal property for purposes of taxation depends on the domicil of the owner or on the actual situs of the property itself. In general and in the absence of statute, the maxim *mobilia sequuntur personam* governs;<sup>1</sup> but the modern tendency, under constitutions and statutes declaring the state's taxing power to extend to all property within its jurisdiction, is to consider the actual location of the articles taxed,<sup>2</sup> and even evidences of debt, such as bonds, stocks, notes, and mortgages, may be taxed within the state at the place where they are situated.<sup>3</sup> With regard, however, to intangible personal property not reduced to such form, such as simple debts not evidenced by note or the like, the domicil of the owner must determine the place of taxation in accordance with the fiction embodied in the maxim *mobilia sequuntur personam*, that is, they must be taxed at the domicil of the owner.<sup>4</sup> These principles will find more ample illustration in the discussion of the taxation of particular classes of personal property which follows.

1. **Domicil Determines Place of Taxation** — *Connecticut*. — *Hartford v. Champion*, 58 Conn. 268.

*Illinois*. — *King v. McDrew*, 31 Ill. 418.

*Indiana*. — *Culbertson v. Floyd County*, 52 Ind. 361.

*Kansas*. — *Griffith v. Carter*, 8 Kan. 565; *Dykes v. Lockwood Mortg. Co.*, 57 Kan. 416, 2 Kan. App. 217.

*Massachusetts*. — *Bulkley v. Williamstown*, 3 Gray (Mass.) 493; *Carnoe v. Freetown*, 9 Gray (Mass.) 357; *Briggs v. Rochester*, 16 Gray (Mass.) 337; *Flanders v. Cross*, 10 Cush. (Mass.) 514; *Kirkland v. Whately*, 4 Allen (Mass.) 462; *Lyman v. Fiske*, 17 Pick. (Mass.) 231, 28 Am. Dec. 293.

*New Hampshire*. — *Moore v. Wilkins*, 10 N. H. 452; *Berlin Mills Co. v. Wentworth*, 60 N. H. 156.

*New Jersey*. — *Wheaton v. Mickel*, 63 N. J. L. 525.

*New York*. — *Miner v. Fredonia*, 27 N. Y. 155; *People v. McLean*, 80 N. Y. 254.

*North Carolina*. — *Winston v. Salem*, 131 N. Car. 404, Cook, J., dissenting.

*Pennsylvania*. — *Finley v. Philadelphia*, 32 Pa. St. 381.

*Vermont*. — *Blood v. Sayre*, 17 Vt. 609.

*Wisconsin*. — *Kellogg v. Oshkosh*, 14 Wis. 623.

2. **Actual Situs of Property Controls Taxation** — *United States*. — *Tappan v. Merchants' Nat. Bank*, 19 Wall. (U. S.) 490; *State R. Tax Cases*, 92 U. S. 607; *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, affirmed 18 Utah 378.

*Connecticut*. — *Allen v. Gleason*, 4 Day (Conn.) 376; *Rowe v. Blakeslee*, 11 Conn. 479.

*Illinois*. — *Edwards v. Beaird*, 1 Ill. 70; *Mills v. Thornton*, 26 Ill. 300, 79 Am. Dec. 377; *Munson v. Crawford*, 65 Ill. 185.

*Iowa*. — *Dean v. Solon*, 97 Iowa 303; *Ament v. Humphrey*, 3 Greene (Iowa) 255; *Lemp v. Hastings*, 4 Greene (Iowa) 448.

*Kansas*. — *Wilcox v. Ellis*, 14 Kan. 588, 19 Am. Rep. 107; *Swallow v. Thomas*, 15 Kan. 66; *Fisher v. Rush County*, 19 Kan. 414.

*Massachusetts*. — *Gray v. Kettell*, 12 Mass. 160; *Boston Loan Co. v. Boston*, 137 Mass. 332.

*Minnesota*. — *Minneapolis, etc., Elevator Co. v. Clay County*, 60 Minn. 522.

*Mississippi*. — *Colbert v. Leake County*, 60 Miss. 142.

*New Jersey*. — *Mayer v. Jersey City*, 61 N. J. L. 473.

*New York*. — *People v. Tax Com'rs*, 23 N. Y. 224; *People v. Feitner*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 84.

*Pennsylvania*. — *Maltby v. Reading, etc., R. Co.*, 52 Pa. St. 140; *Com. v. American Dredging Co.*, 122 Pa. St. 386, 9 Am. St. Rep. 116.

*Washington*. — *North Western Lumber Co. v. Chehalis County*, 24 Wash. 626.

*Wisconsin*. — *Torrey v. Shawano County*, 79 Wis. 152.

In *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, Gray, J., for the court, said: "In modern times, since the great increase in the amount and variety of personal property not immediately connected with the person of the owner, that rule [that the situs of personal property was determined by the owner's domicil] has yielded more and more to the *lex situs*, the law of the place where the property is kept and used."

The requirement that personal estate should be "within the state" should be interpreted in the light of fact and not on the basis of the fiction that the domicil of the owner draws to it his personality. *People v. Tax Com'rs*, 23 N. Y. 224, overruling *Wilson v. New York*, 4 E. D. Smith (N. Y.) 675.

**Illustrations.** — Though the owner may reside in the state, his capital invested elsewhere and evidenced by securities there is not taxable in the state of his residence. *People v. Gardner*, 51 Barb. (N. Y.) 352. And though he may reside elsewhere, his property in the state is taxable there. *Redmond v. Rutherford*, 87 N. Car. 124; *Catlin v. Hull*, 21 Vt. 152.

3. *Buck v. Miller*, 147 Ind. 586, 62 Am. St. Rep. 436; *Liverpool, etc., Ins. Co. v. Assessors*, 51 La. Ann. 1028, 72 Am. St. Rep. 483; *State v. St. Louis County Ct.*, 47 Mo. 594; *People v. Ogdensburg*, 48 N. Y. 397.

4. *Meyer v. Pleasant*, 41 La. Ann. 645; *Liverpool, etc., Ins. Co. v. Assessors*, 51 La. Ann. 1028, 72 Am. St. Rep. 483.

In *People v. Tax Com'rs*, 23 N. Y. 224, it was held that the actual situs of personal property of a character capable of having an actual situs determined its place of taxation; but property merely in transit through the state

**b. RESIDENCE OR DOMICIL FOR PURPOSES OF TAXATION.** — The general principles which determine the owner's place of residence or domicile have been elsewhere discussed.<sup>1</sup>

**Residence Alone Sufficient for Taxation.** — Personal property may be taxed at the residence of the owner, although he may have no intention of making such residence his domicile.<sup>2</sup>

**The Residence of a Man, for Purposes of Taxation,** is in the county where he spends practically all his time, where his interests are, and where he allows himself to be assessed for a small amount of his property, and not in a city where certain of his trunks and a small amount of his clothing are kept.<sup>3</sup>

**Plantation in Two Counties.** — Personal property on a large farm or plantation extending over portions of two counties is taxable in the county in which the owner resides, although he may have changed his residence from one county to another for the express purpose of residing where the taxes were the least.<sup>4</sup>

**Consent to Taxation at Place Other than Residence.** — A person may consent to the taxation of a portion of his personal property at a place other than his residence, but such a consent does not affect his right to object to the taxation there of other personal property as to which he has given no consent.<sup>5</sup>

**Two Residences.** — Where one has two or more residences, he is taxable either at the one in which his principal business is transacted<sup>6</sup> or at the one where he spends the greater portion of his time.<sup>7</sup>

**A Change of Domicil or Residence** cannot be effected by intention alone without actual removal, and one continues taxable at the same place who has merely formed an intention of changing his domicile but has not done so.<sup>8</sup> Resi-

cannot be said to have an actual situs therein, and debts and choses in actions generally follow the domicile of the owner.

1. See the titles *DOMICIL*, vol. 10, p. 6; *RESIDENCE*, vol. 24, p. 692.

2. **Residence Without Domicil Sufficient.** — *St. Louis v. Wiggins Ferry Co.*, 11 Wall. (U. S.) 423; *Finley v. Philadelphia*, 32 Pa. St. 381; *Mann v. Clark*, 33 Vt. 55.

One who has resided in the city for nearly two years is taxable there, although he has a domicile in another state where he votes and pays taxes and to which he intends to return. *Matter of Austen*, 13 N. Y. App. Div. 247.

**Domicil Is Said to Be the Test of Liability to Taxation in Massachusetts.** — *Borland v. Boston*, 132 Mass. 89, 42 Am. Rep. 424, citing *Opinion of Justices*, 5 Met. (Mass.) 590, and *disapproving Briggs v. Rochester*, 16 Gray (Mass.) 337.

3. *King v. Parker*, 73 Iowa 757; *People v. Barker*, 70 Hun (N. Y.) 397.

**Absence of Two Years from State.** — When one leaves his domicile in a state with the intention of returning after an indefinite time (probably two or three years), and actually returns after an absence of two years, taxes for the two years of his absence are rightly assessed to him as a person "residing in this state." *Culbertson v. Floyd County*, 52 Ind. 361.

**House on Town Line.** — Where a town line passes through the house of a taxpayer, his residence will be in that town in which the most necessary part of his house and the other buildings are situated. *Judkins v. Reed*, 48 Me. 386; *Chenery v. Waltham*, 8 Cush. (Mass.) 327.

4. *People v. Caldwell*, 142 Ill. 434.

5. *Phelps v. Thurston*, 47 Conn. 477.

**Taxes Fraudulently Assessed at Place Other than Residence.** — Where, however, one fraudu-

lently procures his property to be assessed at his former residence because the rate is lower there, payment of taxes there will not protect him against assessment and collection of taxes at his actual residence. *Mahany v. People*, 138 Ill. 311.

6. **Residence at Principal Place of Business.** — *Bartlett v. New York*, 5 Sandf. (N. Y.) 44; *Douglas v. New York*, 2 Duer (N. Y.) 110; *Bell v. Pierce*, 51 N. Y. 16, affirming 48 Barb. (N. Y.) 51; *People v. O'Rourke*, 32 N. Y. App. Div. 66; *Bowe v. Jenkins*, 69 Hun (N. Y.) 458; *Paddock v. Lewis*, 59 N. Y. App. Div. 430. But see *Huckins v. Boston*, 4 Cush. (Mass.) 543.

Personal property at the residence, and other personal property at the place of business may be taxed separately under the *New Jersey* statute although both places are in the same taxing district. *Mullins v. Jersey City*, 61 N. J. L. 135, where it was said: "In such a case a single assessment might not be invalid but clearly it is not enjoined."

7. **Residence Where One Spends Most Time.** — *Bowman v. Boyd*, 21 Nev. 281; *Greene v. Gardiner*, 6 R. I. 242; *Arnold v. Davis*, 8 R. I. 341; *Ailman v. Griswold*, 12 R. I. 339. But see *Thayer v. Boston*, 124 Mass. 132, 26 Am. Rep. 650.

8. **Change of Residence.** — *Littlefield v. Brooks*, 50 Me. 475; *Parsons v. Bangor*, 61 Me. 457; *Stoddert v. Ward*, 31 Md. 562; *Otis v. Boston*, 12 Cush. (Mass.) 44; *Cabot v. Boston*, 12 Cush. (Mass.) 52; *Casey's Case*, 1 Ashm. (Pa.) 126; *Mann v. Clark*, 33 Vt. 55. See also *Parsons v. Bangor*, 61 Me. 457; *Borland v. Boston*, 132 Mass. 89, 42 Am. Rep. 424, criticizing *Colton v. Longmeadow*, 12 Allen (Mass.) 598, and *Briggs v. Rochester*, 16 Gray (Mass.) 337.

dence continues until a change is affirmatively shown or until there is satisfactory evidence of the abandonment of the former place as a residence.<sup>1</sup>

c. **ENUMERATION OF CLASSES OF PERSONALTY** — (1) *Animals*. — Cattle in stockyards, held for sale, are taxable there as stock in trade.<sup>2</sup> Where it is provided that animals shall be listed where usually kept, the place of taxation, as between two ranches, is the one upon which they are kept the greater part of the year.<sup>3</sup> At one time cattle pastured in two adjoining counties in Texas might have been assessed at the owner's residence.<sup>4</sup> But under a later act they are assessable in each county, in the proportion that the land in each county bears to the whole pasture.<sup>5</sup>

**Cattle Shipped into the State**, under a bill of lading which allows of their being fed for an indefinite time and then shipped to a point in another state, at a through rate from the original point, the balance of the freight not to be paid if they are not so reshipped, are taxable in the state while there being fattened at the owner's pen.<sup>6</sup>

**Cattle Owned by a Nonresident**, within the state, are taxable there.<sup>7</sup> When grazing over a county adjoining that containing the home ranch or the residence of the owner, they are taxable at the latter place, although when assessed they are in the other county.<sup>8</sup>

(2) *Corporate Property*. — The taxable situs of corporate property of all kinds, including corporate stock, railroad property, stock in national banks, etc., is discussed fully elsewhere in this work.<sup>9</sup> Property in the hands of a receiver of corporate assets is assessable as it would have been before payment to such receiver.<sup>10</sup>

(3) *Debts and Credits*. — The general rule is that debts attend the person of the creditor and are taxable at his domicil. Such is the rule in the absence of some contrary statutory provision, whether the evidence of the debt is in the state or not, and whether it is negotiable or non-negotiable in form, and whether or not the property securing the debt is within the state, and whether the evidences of the debt are deposited in the state or without.<sup>11</sup> But the application of this rule has been much narrowed under the influence of statutes considered to lay emphasis rather on the actual situs of the per-

1. **Termination of Residence**. — *Nugent v. Bates*, 51 Iowa 79; *Bulkley v. Williamstown*, 3 Gray (Mass.) 493; *Carnoe v. Freetown*, 9 Gray (Mass.) 357; *Otis v. Boston*, 12 Cush. (Mass.) 44; *Bell v. Pierce*, 51 N. Y. 12; *Matter of Nichols*, 54 N. Y. 62.

2. *Animals*. — *Myers v. Baltimore County*, 83 Md. 385, 55 Am. St. Rep. 349.

3. *Graham v. Chautauqua County*, 31 Kan. 473; *Smith v. Mason*, 48 Kan. 586.

4. *Court v. O'Connor*, 65 Tex. 334.

5. *Nolan v. San Antonio Ranch Co.*, 81 Tex. 315. See also *Clampitt v. Johnson*, 17 Tex. Civ. App. 281.

6. *Waggoner v. Whaley*, 21 Tex. Civ. App. 1.

7. *Hardesty v. Fleming*, 57 Tex. 395. See also *Prairie Cattle Co. v. Williamson*, 5 Okla. 488.

8. *State v. Falkinburge*, 15 N. J. L. 320; *Barnes v. Woodbury*, 17 Nev. 383; *Ford v. McGregor*, 20 Nev. 446. See also *People v. Caldwell*, 142 Ill. 434; *Pierce v. Eddy*, 152 Mass. 594.

9. See the title **TAXATION (CORPORATE)**, *post*.

10. *State v. Red River Valley Elevator Co.*, 69 Minn. 131.

11. **Intangible Personal Property — Debts and Credits**. — *United States*. — *State Tax Case*, 15 Wall. (U. S.) 300, *disapproving* *Maltby v. Reading*, etc., R. Co., 52 Pa. St. 140; *De Vignier v.*

*New Orleans*, 4 Woods (U. S.) 206, 16 Fed. Rep. 11; *Murray v. Charleston*, 96 U. S. 432; *Kirtland v. Hotchkiss*, 100 U. S. 491; *Hartman v. Greenhow*, 102 U. S. 672. See also *U. S. v. Erie R. Co.*, 106 U. S. 327, *dissenting* opinion of Mr. Justice Field.

*Alabama*. — *Boyd v. Selma*, 96 Ala. 144.

*Arizona*. — *Territory v. Delinquent Tax-List*, (Ariz. 1890) 24 Pac. Rep. 182.

*California*. — *People v. Park*, 23 Cal. 138, *following* *Falkner v. Hunt*, 16 Cal. 167; *People v. Eastman*, 25 Cal. 601; *Mackay v. San Francisco*, 113 Cal. 392 *following* *San Francisco v. Lux*, 64 Cal. 481, and *State Tax Case*, 15 Wall. (U. S.) 300; *Matter of Fair*, 128 Cal. 607.

*Colorado*. — *Arapahoe County v. Cutter*, 3 Colo. 349; *Hathaway v. Choury*, 14 Colo. App. 478.

*Connecticut*. — *Kirtland v. Hotchkiss*, 42 Conn. 426, 19 Am. Rep. 546, *Foster, J., dissenting*.

*Georgia*. — *Augusta v. Dunbar*, 50 Ga. 387; *Richmond County Academy v. Augusta*, 90 Ga. 634.

*Illinois*. — *Goldgart v. People*, 106 Ill. 25, *distinguishing* *Tazewell County v. Davenport*, 40 Ill. 197; *People v. Davis*, 112 Ill. 272; *Scripps v. Board of Review*, 183 Ill. 278.

*Indiana*. — *Herron v. Keeran*, 59 Ind. 472, 26 Am. Rep. 87; *Foresman v. Byrns*, 68 Ind.

sonal property than on the domicil of the owner.<sup>1</sup> Thus it has been held that debts owned by nonresident creditors may be taxed within the state, if the evidences of such debts — notes, bonds, etc. — are within the jurisdiction, as where they are in the hands of agents or employed in business therein.<sup>2</sup> On the other hand, applying the same principles to another state of facts, where the owner resides in the state, his domicil has been held not to draw to it for purposes of taxation debts due him out of the state and evidenced by notes and the like which are also beyond the state's jurisdiction.<sup>3</sup> The domicil of the owner, however, has been held to be the only possible criterion of the liability to taxation of a simple debt not reduced to or evidenced by any written instrument.<sup>4</sup>

(4) *Decedent's Estate*. — The legal presumption is that personal property belonging to the estate of a decedent is, during the settlement of the estate, at the place where the decedent died.<sup>5</sup> In some jurisdictions such property

247; *Senour v. Ruth*, 140 Ind. 318; *Buck v. Miller*, 147 Ind. 586, 62 Am. St. Rep. 436.

*Iowa*. — *Hunter v. Page County*, 33 Iowa 376; *Barber v. Farr*, 54 Iowa 57; *Babcock v. Township Board of Equalization*, 65 Iowa 110.

*Kansas*. — *Fisher v. Rush County*, 19 Kan. 414; *Dykes v. Lockwood Mortg. Co.*, 57 Kan. 416, 2 Kan. App. 217. But see *Wilcox v. Ellis*, 14 Kan. 588, 19 Am. Rep. 107.

*Kentucky*. — *Com. v. Hays*, 8 B. Mon. (Ky.) 1; *Thomas v. Mason County Ct.*, 4 Bush (Ky.) 135.

*Louisiana*. — *New Orleans v. Mechanics'*, etc., Ins. Co., 30 La. Ann. 876, 31 Am. Rep. 232; *Meyer v. Pleasant*, 41 La. Ann. 645; *Barber Asphalt Paving Co. v. New Orleans*, 41 La. Ann. 1015; *Liverpool, etc., Ins. Co. v. Assessors*, 44 La. Ann. 760, 51 La. Ann. 1028, 72 Am. St. Rep. 483.

*Massachusetts*. — *Lanesborough v. Berkshire County*, 131 Mass. 424.

*Minnesota*. — *State v. Willard*, 77 Minn. 190.

*Mississippi*. — *Horne v. Green*, 52 Miss. 452; *Vicksburg v. Armour Packing Co.*, (Miss. 1898) 24 So. Rep. 224.

*Missouri*. — *State v. St. Louis County Ct.*, 47 Mo. 594; *State v. Howard County Ct.*, 69 Mo. 454; *State v. Renshaw*, 166 Mo. 682.

*Nevada*. — *State v. Earl*, 1 Nev. 394.

*New Jersey*. — *State v. Ross*, 23 N. J. L. 517.

*Ohio*. — *Grant v. Jones*, 39 Ohio St. 506; *Myers v. Seaberger*, 45 Ohio St. 232.

*Oregon*. — *Johnson v. Oregon*, 2 Oregon 327; *Johnson v. Oregon*, 3 Oregon 13.

*Pennsylvania*. — *Guthrie v. Pittsburgh, etc.*, R. Co., 158 Pa. St. 433, *distinguishing* *Lewis v. Chester County*, 60 Pa. St. 325.

*South Carolina*. — *Hayne v. Deliesseline*, 3 McCord L. (S. Car.) 374.

*Texas*. — *Ferris v. Kimble*, 75 Tex. 476; *Connor v. Waxahachie*, (Tex. 1889) 13 S. W. Rep. 30.

*Vermont*. — *Bullock v. Guilford*, 59 Vt. 516.

*Virginia*. — *State Bank v. Richmond*, 79 Va. 114.

1. See *supra*, this title, *Persons and Things Taxable* — 3. *b. Property Within Jurisdiction of State*; 4. *c. Credit, Debts, and Securities*; also *supra*, this section, 3. *a. General Principles*.

2. *Evidences of Debts Owned by Nonresidents Taxable*. — *Buck v. Miller*, 147 Ind. 586, 62 Am. St. Rep. 436 ("It can," said the court, "make no difference where the debtor lives, or

where the debt was contracted, provided only the bond, note, or other evidence of amount due the creditor is itself within the jurisdiction of the state"); *Meyer v. Pleasant*, 41 La. Ann. 645; *Liverpool, etc., Ins. Co. v. Assessors*, 51 La. Ann. 1031, 72 Am. St. Rep. 483; *St. Louis v. Wiggins Ferry Co.*, 40 Mo. 580; *Matter of Whiting*, 150 N. Y. 27, 55 Am. St. Rep. 640; *Matter of Houdayer*, 150 N. Y. 37, 55 Am. St. Rep. 642. See also *infra*, this section, *Property Employed in Business; Property in Hands of Agent*.

3. *Resident Owner of Debts Out of Jurisdiction Not Taxable*. — *People v. Gardner*, 51 Barb. (N. Y.) 353 (*distinguished* in *Boardman v. Tompkins County*, 85 N. Y. 359); *People v. Smith*, 88 N. Y. 577, *affirming* 24 Hun (N. Y.) 492; *Redmond v. Rutherford*, 87 N. Car. 122, *following* *Alvany v. Powell*, 2 Jones Eq. (55 N. Car.) 51. See also *Bridges v. Griffin*, 33 Ga. 113; *Fisher v. Rush County*, 19 Kan. 414; *Johnson v. Lexington*, 14 B. Mon. (Ky.) 521; *Redfield v. Genesee County, Clarke* (N. Y.) 42.

In *Wilcox v. Ellis*, 14 Kan. 588, 19 Am. Rep. 107, the court, speaking of debts due to a resident of Kansas for lands sold in Illinois and evidenced by securities there, said: "Now, as the state of Illinois, and not Kansas, must furnish the plaintiff with all the remedies he may have for the enforcement of all his rights connected with said notes, debt, etc., it would seem more just, if said debt is to be taxed at all, that the state of Illinois, and not Kansas, should tax it. \* \* \* But that he should be taxed on both [the land and the notes] in Illinois and on the notes in [Kansas], would be highly unjust."

*Bonds of a State* deposited in a state bank have been taxed there, although owned by a nonresident corporation. *People v. Home Ins. Co.*, 29 Cal. 533 [*following* *Catlin v. Hull*, 21 Vt. 156]; *State v. Assessors*, 47 La. Ann. 1544.

4. *Meyer v. Pleasant*, 41 La. Ann. 645; *Liverpool, etc., Ins. Co. v. Assessors*, 51 La. Ann. 1031, 72 Am. St. Rep. 483.

5. *Property of Decedent*. — *San Francisco v. Lux*, 64 Cal. 481; *Stanford v. San Francisco*, 131 Cal. 34; *Hardy v. Yarmouth*, 6 Allen (Mass.) 277; *Millsaps v. Jackson*, 78 Miss. 537; *Stephens v. Booneville*, 34 Mo. 323; *Rand v. Pittsfield*, 70 N. H. 530; *Matter of Haight*, 32 N. Y. App. Div. 496; *Staunton v. Stout*, 86 Va. 321. But see *Kent v. Exeter*, 68 N. H. 469.

is taxable in the hands of the executor or administrator.<sup>1</sup>

**As Between the Administrator or Executor and Those Beneficially Entitled** to the estate of the decedent, it is taxable in the hands of the former so long as the estate is in process of settlement and before distribution, but where there is no further need of an administrator, and the distributee or beneficiary can legally demand his share, the property is no longer taxable to the administrator.<sup>2</sup> Although the deceased was a resident of the state, his property in course of administration is not taxable therein, where neither the executor nor any of the beneficiaries are residents, and the property itself is not in the state.<sup>3</sup>

**Where There Are Two or More Executors** residing in two or more taxing districts, each should return such personal property of the decedent as may be in his immediate possession in his township.<sup>4</sup> It has been held, however, that where there are two or more administrators living in different counties, the tangible personal property belonging to the estate should be listed in the county of the administrator having actual possession and control at the time of the listing.<sup>5</sup>

(5) *Guardianship Property*. — In some jurisdictions personal property of a ward is assessed in the jurisdiction where the guardian resides,<sup>6</sup> in others its situs is that of the ward and not of the guardian.<sup>7</sup>

(6) *Logs and Lumber — Timber Cut*. — Logs piled ready for transportation to the owner's mill, or in a storage pond appurtenant to the mill, are taxable at the mill,<sup>8</sup> and logs in camp are taxable there if there is an office or building for transacting local business.<sup>9</sup> Logs cut and shipped, before the date for assessment, to a neighboring town to be manufactured, are taxable at the town,<sup>10</sup> and logs intended to be manufactured and sold in some other town than that in which the owner resides may be there taxed even if not there on taxing day, provided they are brought there and manufactured during the year.<sup>11</sup> Logs cannot be taxed where they are temporarily left afloat for sawing, if the firm to which they belong has its place of business in another township.<sup>12</sup> But whether logs piled upon the bank of a river, to be transported when the river opens, may be taxed there or not, depends upon whether or not they can be regarded as in transit. If not regarded as in transit, they are taxable.<sup>13</sup> Likewise, logs piled along a railroad track, awaiting the

In *Connecticut* the personal property of a decedent's estate is taxable at his domicile, pending settlement. *Cornwall v. Todd*, 38 Conn. 443.

See also *infra*, this title, IX. 6. e. (2) (g) *Deceased Owners*; XII. 3. b. *Primary Liability as between Owners of Different Estates*.

**As to Succession Taxes**, see the title SUCCESSION TAXES, *ante*, p. 337.

1. *McClellan v. Board of Review*, 200 Ill. 116; *Cameron v. Burlington*, 56 Iowa 320 [*questioning McGregor v. Vaupe*, 24 Iowa 436]; *State v. Collector*, 39 N. J. L. 79; *Endicott v. Corson*, 50 N. J. L. 381; *Hall v. Fayetteville*, 115 N. Car. 281 [*following Moore v. Fayetteville*, 80 N. Car. 154, 30 Am. Rep. 751]; *Sommers v. Boyd*, 48 Ohio St. 648; *Walla Walla v. Moore*, 16 Wash. 339, 58 Am. St. Rep. 31.

2. **After Distribution**. — *Louisville v. Sherley*, 80 Ky. 71; *Baldwin v. Shine*, 84 Ky. 512; *Lexington v. Fishback*, 109 Ky. 770; *Carleton v. Ashburnham*, 102 Mass. 348; *Hathaway v. Fish*, 13 Allen (Mass.) 267; *Herrick v. Big Rapids*, 53 Mich. 554. See also *Cornwall v. Todd*, 38 Conn. 443.

3. *Dallinger v. Rapello*, 14 Fed. Rep. 32, 15 Fed. Rep. 434, decided under statutes of *Massachusetts*.

4. **Two or More Executors**. — *Burns v. McNally*, 90 Iowa 432; *State v. Matthews*, 10

Ohio St. 431. But see *People v. Feitner*, 63 N. Y. App. Div. 174.

5. *Brown v. Noble*, 42 Ohio St. 405.

6. **Guardianship Property**. — *King v. McDrew*, 31 Ill. 418; *Tousey v. Bell*, 23 Ind. 423; *Hinkhouse v. Wilton*, 94 Iowa 254; *Baldwin v. Washington County*, 85 Md. 145; *Kinehart v. Howard*, 90 Md. 1; *Baldwin v. Fitchburg*, 8 Pick. (Mass.) 494; *Hughes v. Staunton*, 97 Va. 518.

7. *Louisville v. Sherley*, 80 Ky. 71; *State v. McCausland*, 154 Mo. 185; *School Directors v. James*, 2 W. & S. (Pa.) 568, 37 Am. Dec. 525; *Mason v. Thurber*, 1 R. I. 481. See also *Curtis v. Richland Tp.*, 56 Mich. 478; *West Chester School Dist. v. Darlington*, 38 Pa. St. 157.

8. **Logs and Lumber**. — *Elk Rapids Iron Co. v. Helena Tp.*, 117 Mich. 211; *Mitchell v. Lake Tp.*, 126 Mich. 367.

9. *Ryerson v. Muskegon*, 57 Mich. 383.

10. *Day v. Pelican*, 94 Wis. 503. See also *State v. Bellow*, 86 Wis. 189.

11. *Ellsworth v. Brown*, 53 Me. 519; *Farmingdale v. Berlin Mills Co.*, 93 Me. 333; *Connecticut Valley Lumber Co. v. Monroe*, 71 N. H. 473.

12. *Torrent v. Yager*, 52 Mich. 506, *following Putman v. Fife Lake Tp.*, 45 Mich. 125, and *McCoy v. Anderson*, 47 Mich. 504.

13. *C. N. Nelson Lumber Co. v. Loraine*, 22

convenience of the owner or the facilities of the shipper, are not in transit, and are there assessable.<sup>1</sup> Logs in transit to the owner's mill are taxable at the mill;<sup>2</sup> but if they are piled for the purpose of transporting them as soon as possible or within a reasonable time, they are constructively in transit and not taxable where piled.<sup>3</sup> Lumber kept in a yard, for sale, is assessable there as merchants' goods;<sup>4</sup> but lumber actually or constructively in transit is not taxable where found.<sup>5</sup> Lumber owned in one place and manufactured at another may be taxed at the latter place,<sup>6</sup> and when piled on leased ground at a railway station it may be there assessed as property stored, although no sales are made there.<sup>7</sup>

**Standing Timber** is not personal property, but is taxable as a part of the land on which it stands.<sup>8</sup>

(7) **Money.** — Money is taxable where situated.<sup>9</sup> The capital of a bank owned by an individual banker is taxable in the town or ward specified as the location of the banking office,<sup>10</sup> whether owned by a resident or nonresident.<sup>11</sup>

(8) **Mortgage Interests.** — A mortgage, when considered as nothing more than a security for the debt, follows the rule as to other debts, and is taxable at the residence of the owner, the mortgagee.<sup>12</sup> Since, however, the legislature has the power to fix the situs of property for purposes of taxation, it may select either the place where the security is held or where the property covered by the mortgage is located.<sup>13</sup>

(9) **Partnership Property.** — Partnership property is generally taxable at the place where the partnership business is carried on, and where such property is situated.<sup>14</sup> Under the *Massachusetts* statutes, where the place of business of a partnership is outside of the state the interest of a resident partner in the business may be taxed at his residence.<sup>15</sup>

A **Voluntary Association** falling short of a corporation is, in *Massachusetts*, taxable as a partnership.<sup>16</sup>

(10) **Property Employed in Business.** — In many of the states statutes have been passed taxing personal property or capital of merchants and manufac-

Fed. Rep. 54; *State Trust Co. v. Chehalis County*, (C. C. A.) 79 Fed. Rep. 282.

1. *Maurer v. Cliff*, 94 Mich. 194; *Plainfield Tp. v. Sage*, 107 Mich. 19; *Mitchell v. Lake Tp.*, 126 Mich. 367. See *infra*, this section, *Property in Transit or Temporarily Present*.

2. *Hurley v. Texas*, 20 Wis. 634.

3. *Corning v. Masonville Tp.*, 74 Mich. 177; *Brooks v. Arenac Tp.*, 71 Mich. 231; *Connecticut River Lumber Co. v. Columbia*, 62 N. H. 286; *Coe v. Errol*, 62 N. H. 303; *Winnipeg Paper Co. v. Northfield*, 67 N. H. 365. See the title *INTERSTATE COMMERCE*, vol. 17, p. 34.

4. **Lumber.** — *Gower v. Jonesboro*, 83 Me. 142; *Mitchell v. Plover*, 53 Wis. 548; *Washburn v. Oshkosh*, 60 Wis. 453; *Sanford v. Spencer*, 62 Wis. 230.

5. *Standard Oil Co. v. Bachelor*, 89 Ind. 1; *Monroe v. Greenhoe*, 54 Mich. 9; *Osterhout v. Jones*, 54 Mich. 228.

6. *Manistique Lumbering Co. v. Witter*, 58 Mich. 625. But see *Putnam v. Fife Lake Tp.*, 45 Mich. 125.

7. *Hood v. Judkins*, 61 Mich. 575. But see *Campbell v. Machias*, 33 Me. 419; *Stockwell v. Brewer*, 59 Me. 286.

8. **Standing Timber.** — *Fletcher v. Alcona Tp.*, 72 Mich. 18. See also *supra*, this title, *Persons and Things Taxable — Real Property*.

9. **Money.** — *People v. Whartenby*, 38 Cal. 461; *Barber v. Farr*, 54 Iowa 57; *Liverpool*,

*etc.*, *Ins. Co. v. Assessors*, 44 La. Ann. 760; *Gallatin v. Alexander*, 10 Lea (Tenn.) 475.

**Deposits in Banks Taxed as Money.** — See *supra*, this title, *Persons and Things Taxable — 4. d. Money Deposited in Bank*.

10. *Miner v. Fredonia*, 27 N. Y. 155. And see the title *TAXATION (CORPORATE)*, *post*.

11. *Duer v. Small*, 4 Blatchf. (U. S.) 263.

12. **Mortgage Interests.** — *Kirtland v. Hotchkiss*, 100 U. S. 499; *People v. Eastman*, 25 Cal. 603; *Latrobe v. Baltimore*, 19 Md. 13; *Appeal Tax Ct. v. Patterson*, 50 Md. 368. See also *supra*, this title, *Persons and Things Taxable — 4. e. Mortgages*.

13. *State v. Runyon*, 41 N. J. L. 98. See also *supra*, this title, *Persons and Things Taxable — 5. h. Mortgages*.

14. **Partnership Property.** — *Spinney v. Lynn*, 172 Mass. 464; *Little v. Cambridge*, 9 Cush. (Mass.) 298; *Williams v. Saginaw*, 51 Mich. 120; *Taylor v. Love*, 43 N. J. L. 142; *Fairbanks v. Kittredge*, 24 Vt. 9; *School Dist. v. Bowman*, (Mo. 1903) 77 S. W. Rep. 880.

Where such property is merely manufactured and stored in one place it should still be assessed at the place of business, although small quantities are occasionally sold at the former place. *McCoy v. Anderson*, 47 Mich. 502.

15. *Bemis v. Board of Aldermen*, 14 Allen (Mass.) 366.

16. *Hoadley v. Essex County*, 105 Mass. 519; *Ricker v. American L. & T. Co.*, 140 Mass. 346,

turers at the place where their business is carried on, and such statutes usually embrace property of nonresidents as well as that of residents.<sup>1</sup>

The Net Proceeds of a Mine are taxable as personalty at the place where the ore is taken to the surface through the main workings.<sup>2</sup>

Ice belonging to a nonresident, stored for transportation, is taxable where stored.<sup>3</sup>

(11) *Property in Hands of Agent.* — Money, securities, or other kinds of property, placed in the hands of an agent for the purpose of enabling him to transact the owner's business, such property constituting the stock in trade of the business, are taxable at the residence of the agent.<sup>4</sup> Such property is, however, taxable only when intended to be used by the agent in a continuing business; it is not taxable when left to him merely for the convenience of the makers of the notes.<sup>5</sup> Nor is property in an agent's possession taxable when his duty consists simply in collecting money upon the securities and forwarding it to the owner.<sup>6</sup>

(12) *Property Held in Trust.* — Property in the hands of a trustee is sometimes regarded, for the purposes of taxation, as belonging to the trustee, and taxable at his domicile.<sup>7</sup> But under other statutes trust property is taxed at

1. *Property Employed in Business* — *United States.* — *Duer v. Small*, 4 Blatchf. (U. S.) 263.

*Alabama.* — *St. John v. Mobile*, 21 Ala. 224.  
*Connecticut.* — *Shaw v. Hartford*, 56 Conn. 351.

*Illinois.* — *Munson v. Crawford*, 65 Ill. 185.  
*Indiana.* — *Powell v. Madison*, 21 Ind. 335.  
*Iowa.* — *Dean v. Solon*, 97 Iowa 303.

*Kentucky.* — But see *Swift v. Newport*, 7 Bush (Ky.) 37.

*Maryland.* — *Hopkins v. Baker*, 78 Md. 363.

*Massachusetts.* — *Little v. Greenleaf*, 7 Mass. 230; *Gray v. Kettell*, 12 Mass. 160; *Boston Loan Co. v. Boston*, 137 Mass. 332; *Barker v. Watertown*, 137 Mass. 227; *Charlestown v. Middlesex County*, 109 Mass. 270; *Hittinger v. Westford*, 135 Mass. 258; *Ingram v. Cowles*, 150 Mass. 155; *Cloutman v. Concord*, 163 Mass. 444 [following *Little v. Cambridge*, 9 Cush. (Mass.) 298]; *Wellington v. Belmont*, 164 Mass. 142; *Hittinger v. Boston*, 139 Mass. 17; *Cotton v. Boston*, 161 Mass. 8. But see *Lee v. Templeton*, 6 Gray (Mass.) 579; *Farwell v. Hathaway*, 151 Mass. 242.

*Michigan.* — *Comstock v. Grand Rapids*, 54 Mich. 641; *Manistique Lumbering Co. v. Witter*, 58 Mich. 625. But see *Monroe v. Greenhoe*, 54 Mich. 9; *Osterhout v. Jones*, 54 Mich. 228.

*Minnesota.* — *St. Paul v. Merritt*, 7 Minn. 258; *State v. Deering*, 56 Minn. 24; *Minneapolis, etc., Elevator Co. v. Clay County*, 60 Minn. 522; *State v. Clarke*, 64 Minn. 556; *State v. Dunn*, 86 Minn. 301.

*Rhode Island.* — *Woodman v. American Print Works*, 6 R. I. 470.

But see *Selz v. Cagwin*, 104 Ill. 647; *Martin v. Portland*, 81 Me. 293; *Bennett v. Birmingham*, 31 Pa. St. 15; *Steele v. Walling*, 7 R. I. 317; *Brown v. Greer*, 3 Head (Tenn.) 695.

*Capital "Employed in This State."* — See the title TAXATION (CORPORATE), *post*.

*Raw Material, Goods in Process of Manufacture, and Manufactured Goods* are, under a *New Jersey* act, taxable where found. *Warren Mfg. Co. v. Dalrymple*, 56 N. J. L. 440.

2. *Proceeds of Mines.* — *Eureka Hill Min. Co. v. Eureka*, 22 Utah 447.

3. *Ice.* — *Winkley v. Newton*, 67 N. H. 80; *John Hancock Ice Co. v. Rose*, 67 N. J. L. 87.

4. *Property in the Hands of Agent* — *Alabama.* — *Boyd v. Selma*, 96 Ala. 144.

*California.* — *Matter of Fair*, 128 Cal. 607.

*Illinois.* — *Tazewell County v. Davenport*, 40 Ill. 197; *Walton v. Westwood*, 73 Ill. 125; *Matzenbaugh v. People*, 194 Ill. 108, 88 Am. St. Rep. 134; *Ellis v. People*, 199 Ill. 548.

*Indiana.* — *Buck v. Miller*, 147 Ind. 586, 62 Am. St. Rep. 436.

*Iowa.* — *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *Hutchinson v. Board of Equalization*, 66 Iowa 35.

*Louisiana.* — *Bluefields Banana Co. v. Assessors*, 49 La. Ann. 43.

*Nebraska.* — *Finch v. York County*, 19 Neb. 50, 56 Am. Rep. 741.

*New York.* — *People v. Willis*, 133 N. Y. 383.

*North Carolina.* — *Redmond v. Rutherford*, 87 N. Car. 122, following *Alvany v. Powell*, 2 Jones Eq. (55 N. Car.) 51.

*South Dakota.* — *Billingshurst v. Skink County*, 5 S. Dak. 84.

*Vermont.* — *Catlin v. Hull*, 21 Vt. 152.

*Wisconsin.* — *State v. Gaylord*, 73 Wis. 316.

But see *Tolman v. Raymond*, 202 Ill. 197; *Lord v. Arnold*, 18 Barb. (N. Y.) 104; *People v. Sawyer*, (Supm. Ct. Spec. T.) 27 N. Y. Supp. 202; *Poppleton v. Yamhill County*, 18 Oregon 377.

*Money on Deposit Subject to Agent's Withdrawal.* — An agent for a nonresident may be taxed for money of his principal, on deposit subject to the agent's withdrawal. *People v. Ogdensburgh*, 48 N. Y. 390.

*Personal Property in Agent's Hands for Sale Taxable.* — *McCormick v. Fitch*, 14 Minn. 252; *Matter of Jefferson*, 35 Minn. 215. *Contra*, *State v. Engle*, 34 N. J. L. 425.

5. *Reat v. People*, 201 Ill. 469.

6. *Boardman v. Tompkins County*, 85 N. Y. 350; *Myers v. Seaberger*, 45 Ohio St. 232.

7. *Trust Property Taxed as Belonging to Trustee.* — *Richmond County Academy v. Augusta*, 90 Ga. 634; *Latrobe v. Baltimore*, 19 Md. 13; *Baltimore v. Stirling*, 29 Md. 49; *State v. Willard*, 77 Minn. 190; *People v. Assessors*, 40



the residence of the real or beneficial owner.<sup>1</sup>

(13) *Property in Transit or Temporarily Present.*—Property in transit through a state or subdivision thereof is not taxable while therein. Property is in transit when shipped for transportation across a state or other subdivision, although it may be detained for a while or temporarily piled or stored as a necessary part of shipment.<sup>2</sup> Property, however, within a state for the purpose of undergoing a part of the process of manufacture is there for more than a temporary purpose and may be taxed while there.<sup>3</sup>

(14) *Water Craft.*—Vessels are usually taxable at their home port. This is always true where the home port is also the residence of the owner.<sup>4</sup>

N. Y. 154; *People v. Barker*, (Supm. Ct. Spec. T.) 8 Misc. (N. Y.) 32 [*distinguishing* *People v. Coleman*, 42 Hun (N. Y.) 581]; *Guthrie v. Pittsburgh*, etc., R. Co., 158 Pa. St. 433 [*distinguishing* *Lewis v. Chester County*, 60 Pa. St. 325]; *Price v. Hunter*, 34 Fed. Rep. 355; *Anthony v. Caswell*, 15 R. I. 159.

**Who Are Trustees.**—*Registrars and Clerks of the Court of Chancery* are not taxable as trustees for the funds standing in their names at the banks in which the moneys of the court are deposited. *Matter of Kellinger*, 9 Paige (N. Y.) 62.

*The Committee of the Estate of a Lunatic or an Executor or Administrator* is not a trustee within the *Connecticut* statute. *Cornwall v. Todd*, 38 Conn. 443.

**When the Trustee Is a Nonresident** a resident beneficiary is not taxable for property in the trustee's hands, or for the income derived from such property. *Preston v. Boston*, 12 Pick. (Mass.) 7; *Dorr v. Boston*, 6 Gray (Mass.) 131.

Where a nonresident trustee had the custody and control of property, and the beneficiaries were also nonresident, it was held that there was nothing in the hands of the trustee that was taxable under the statute taxing debts and obligations due to persons residing within the state. *People v. Coleman*, 119 N. Y. 137; *People v. Barker*, 135 N. Y. 656.

**Where There Are Two or More Trustees**, those residing within a given jurisdiction may be taxed for property in their hands, but not for that in the hands of co-trustees living outside of the jurisdiction. *Mackay v. San Francisco*, 128 Cal. 678; *Richmond County Academy v. Augusta*, 90 Ga. 634; *Baltimore v. Stirling*, 29 Md. 48; *Stinson v. Boston*, 125 Mass. 348.

**1. Situs That of Beneficiary.**—*Lexington v. Fishback*, 109 Ky. 770; *Baldwin v. Ministerial Fund*, 37 Me. 369; *Davis v. Macy*, 124 Mass. 193; *Hunt v. Perry*, 165 Mass. 287; *Clark v. Powell*, 62 Vt. 442.

**2. Property in Transit.**—*Ogilvie v. Crawford County*, 2 McCrary (U. S.) 148; *Oakland v. Whipple*, 39 Cal. 112; *Burlington Lumber Co. v. Willetts*, 118 Ill. 559; *Madison v. Fitch*, 18 Ind. 33; *Fitch v. Madison*, 24 Ind. 425; *Woodward v. Jacobs*, 27 Ind. App. 188; *Rhyno v. Madison County*, 43 Iowa 632; *Creamer v. Bremen*, 91 Me. 508; *Conley v. Chedic*, 7 Nev. 336; *Robinson v. Longley*, 18 Nev. 71. See also the title *INTERSTATE COMMERCE*, vol. 17, p. 115.

**3. Property in Process of Manufacture.**—*Riesman v. Shepard*, 27 Ind. 288; *Standard Oil Co. v. Combs*, 96 Ind. 179, 49 Am. Rep. 156; *Union Refrigerator Transit Co. v. Lynch*, 18 Utah

378. But see *People v. Feitner*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 84.

**4. Water Craft.**—*United States.*—*St. Louis v. Wiggins Ferry Co.*, 11 Wall. (U. S.) 425; *Yost v. Lake Erie Transp. Co.*, (C. C. A.) 112 Fed. Rep. 746.

*California.*—*People v. Niles*, 35 Cal. 282.

*Florida.*—*Johnson v. De Bary-Baya Merchants' Line*, 37 Fla. 499.

*Illinois.*—*Wilkey v. Pekin*, 19 Ill. 160; *Dunleith v. Reynolds*, 53 Ill. 45.

*Maryland.*—*Hooper v. Baltimore*, 12 Md. 464.

*Massachusetts.*—*Stinson v. Boston*, 125 Mass. 348.

*Michigan.*—*Roberts v. Charlevoix Tp.*, 60 Mich. 197.

*Missouri.*—*St. Joseph v. Saville*, 39 Mo. 460.

*Ohio.*—*Pelton v. Northern Transp. Co.*, 37 Ohio St. 450.

*Pennsylvania.*—*Com v. American Dredging Co.*, 122 Pa. St. 386, 9 Am. St. Rep. 116.

*Washington.*—*North Western Lumber Co. v. Chehalis County*, 25 Wash. 95, 87 Am. St. Rep. 747.

See also the title *INTERSTATE COMMERCE*, vol. 17, p. 112.

**The Indiana Statute of 1872** taxed boats at the home port, *Eversole v. Cook*, 92 Ind. 222; but a later act taxes them at the owner's residence, without regard to the situation of the boat, *Cook v. Port Fulton*, 106 Ind. 170.

**A Vessel Is Not Taxable** at a place at which it merely touches, simply because a part owner lives there, *New Albany v. Meekin*, 3 Ind. 481. 56 Am. Dec. 522; nor at a port on one side of the river to which it sails, the permanent situs being on the other side, *St. Louis v. Wiggins Ferry Co.*, 11 Wall. (U. S.) 423; *Mobile v. Baldwin*, 57 Ala. 61, 29 Am. Rep. 712; *State v. Haight*, 30 N. J. L. 428; not even if it be owned partly on both sides of the river, *Irvin v. New Orleans*, etc., R. Co., 94 Ill. 105, 34 Am. Rep. 208.

**Vessel Owned in Delaware Taxed in Alabama.**—It has been held that a tugboat, dredge, and scow whose owners resided in Delaware, but which had remained in the state of Alabama for a year or more at work in Mobile bay, had become so incorporated with and a part of the tangible property of that state, for revenue purposes, as to have acquired its taxable situs there. *National Dredging Co. v. State*, 99 Ala. 467, following *Mobile v. Baldwin*, 57 Ala. 61, 29 Am. Rep. 712, and *Boyd v. Selma*, 96 Ala. 144.

**Owned and Taxed in One State, Though Enrolled in Another.**—A vessel enrolled in Philadelphia but owned in Virginia, and plying between a

**Boats Owned by a Corporation** are taxable where the company's principal office is located, and not at the managing agent's residence.<sup>1</sup>

**Several Permissible Places of Taxation.** — When assessed at any one of several permissible places, a vessel is not subject to taxation at another such place.<sup>2</sup>

**Taxation as Regulation of Commerce.** — The imposition of a tax upon every ship entering a designated port, to be collected upon entry, is a regulation of commerce, and as such unconstitutional and void.<sup>3</sup> But taxes levied by a state upon ships or vessels owned by the citizens of the state as property are not within the prohibition of the constitution. Such assessments, however, when levied for municipal purposes, must be made against the owner of the property, and can only be made in the municipality where the owner resides.<sup>4</sup>

**VIII. EXEMPTIONS.** — The subject of exemptions from taxation has been fully discussed in another title.<sup>5</sup>

**IX. ASSESSMENT — 1. Requisites of a Tax — Scope of Treatment.** — Three Things Are Essential to a tax: first, the ascertainment of a sum certain, or that can be rendered certain, to be imposed on the collective body of taxpayers; second, a legal imposition of that sum on the collective body of taxpayers; third, an apportionment of the amount among the individual taxpayers, so as to ascertain the part or share due from each. Under the constitutional distribution of governmental powers, the law-making function is the proper authority to determine to what extent the public property and revenue shall be applied to meet the pecuniary wants of the state, and how far the collective body of taxpayers shall be called upon to contribute; and the first two requisites are essentially legislative. The third is usually administrative, and delegated to public officers and boards, who act under specific statutory directions as to time and mode of performance.<sup>6</sup>

**The Main Purpose of This Subdivision** is a discussion of the apportionment of the tax among the individual taxpayers by these administrative officers and boards. The powers and duties of the legislative bodies are discussed elsewhere in this title and will be incidentally touched upon only.<sup>7</sup>

**2. Definitions — a. GENERAL MEANINGS.** — The Words "Assess" and "Assessment" are used repeatedly in the tax laws and decisions of the courts with different significations. As sometimes used, they are words of general import, and have substantially the same meanings as "tax" and "taxation,"<sup>8</sup> or are synonymous with the word "levy" in the sense of being merely descriptive

Virginia port and northern cities, was taxed in Virginia. *Norfolk, etc., R. Co. v. Board of Public Works*, 97 Va. 23.

1. *Pomeroy Salt Co. v. Davis*, 21 Ohio St. 555.

In *People v. Tax, etc., Com'rs*, 51 Hun (N. Y.) 312, a New York corporation was taxed for a vessel plying in the waters of Venezuela, all the money of the corporation being invested in building and outfitting the vessel. But see *Oakland v. Whipple*, 39 Cal. 112. And a steamboat owned in New York but plying in the waters of California was taxable in the latter state. *Minturn v. Hays*, 2 Cal. 590.

2. *Vogt v. Ayer*, 104 Ill. 583; *Halstead v. Adams*, 108 Ill. 609.

3. **Regulation of Commerce.** — *Steam Ship Co. v. Port Wardens*, 6 Wall. (U. S.) 31. See also the title *INTERSTATE COMMERCE*, vol. 17, p. 60.

4. *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 273.

5. See the title *EXEMPTIONS (FROM TAXATION)*, vol. 12, p. 266.

6. **Requisites of a Tax.** — *Morton v. Comptroller Gen.*, 4 S. Car. 430.

7. See generally *supra*, this title, and *infra*, X. *Levy*; XIX. *Municipal Taxation*.

8. **As Equivalents of Words "Tax" and "Taxation."** — *Peay v. Little Rock*, 32 Ark. 31; *Wells v. Savannah*, 107 Ga. 1; *Kilgus v. Good Shepherd Orphanage*, 94 Ky. 439; *Baltimore v. Green Mount Cemetery*, 7 Md. 517; *People v. Priest*, 169 N. Y. 432; *State v. Frazier*, 36 Oregon 178; *Rhode Island Hospital Trust Co. v. Babbitt*, 22 R. I. 113; *Prentice v. Ashland County*, 56 Wis. 345; *Chicago, etc., R. Co. v. Forrest County*, 95 Wis. 80; *Levy v. Wilcox*, 96 Wis. 127; *Winnipeg v. Canadian Pac. R. Co.*, 12 Manitoba 581, *reversed* on other grounds 30 Can. Sup. Ct. 558. See *supra*, this title, *Definitions and General Principles*.

**The General Meaning** of the word "assessment" is authoritative imposition. *Walker v. Jameson*, 140 Ind. 591, 49 Am. St. Rep. 222, *citing* *Welty*, *Law of Assessments*, 2, 3.

**The Word "Assessment"** being equivocal, its construction is to be determined by the context in accordance with the maxim *noscitur a sociis*. *Rhode Island Hospital Trust Co. v. Babbitt*, 22 R. I. 113.

of the act of laying a tax or impost.<sup>1</sup>

The Terms "Tax" and "Assessment" are also used in contradistinction to each other, the former referring to the general burden of taxation imposed for public purposes, the latter denoting a charge or special tax, predicated upon the principle of equivalents or benefits, imposed to pay the cost of a local improvement.<sup>2</sup>

*b.* IN APPORTIONING TAX. — In the terminology of the proceedings to apportion the amount to be raised by taxation among the individual taxpayers, the words "assess" and "assessment" are often used in a general and extended sense, implying the completed tax list, including every ministerial act necessary to charge each with his proper share or proportion, and sometimes including also the legislative function of imposing the amount to be raised upon the collective body of taxpayers.<sup>3</sup>

The Technical Meaning in This Connection, however, of the word "assessment" is the official listing of the persons and property subject to taxation and the valuing of the property of each, constituting the basis upon which the apportionment of the amount to be raised is made.<sup>4</sup>

1. As Synonymous with the Word "Levy." — *Kelly v. Herrall*, 20 Fed. Rep. 364; *South Covington, etc., St. R. Co. v. Bellevue*, 105 Ky. 283; *State v. Jersey City*, 42 N. J. L. 97. See also *State v. Fournet*, 30 La. Ann. 1103; *Chicago, etc., R. Co. v. Klein*, 52 Neb. 258, 54 Neb. 781; and *infra*, this title, *Levy*.

One Meaning of the word "assessment" is laying or levying a tax. *Palmer v. Stumph*, 29 Ind. 329; *State v. Cheraw, etc., R. Co.*, 54 S. Car. 564; *People v. Weaver*, 100 U. S. 539.

2. "Assessment" as a Special Tax. — See the titles EXEMPTIONS (FROM TAXATION), vol. 12, p. 314 *et seq.*; SPECIAL OR LOCAL ASSESSMENTS, vol. 25, pp. 1168, 1169; *supra*, III. 1. *Purpose of Tax*. See also *District of Columbia v. Sisters of Visitation*, 15 App. Cas. (D. C.) 300; *Palmer v. Stumph*, 29 Ind. 329; *Walker v. Jameson*, 140 Ind. 591, 49 Am. St. Rep. 222; *Adams v. Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484; *Boston Asylum, etc., v. Street Com'rs*, 180 Mass. 485; *First Div. St. Paul, etc., R. Co. v. St. Paul*, 21 Minn. 526; *State v. St. Paul*, 36 Minn. 529; *Hurford v. Omaha*, 4 Neb. 336; *Roosevelt Hospital v. New York*, 84 N. Y. 108; *Ridenour v. Saffin*, 1 Handy (Ohio) 464; *King v. Portland*, 2 Oregon 147; *Yates v. Milwaukee*, 92 Wis. 352; *Howes v. Racine*, 21 Wis. 514.

In This Sense the word "assessment" means "adjusting the shares of a contribution by several towards a common beneficial object, according to the benefit received." *Palmer v. Stumph*, 29 Ind. 329; *Adams v. Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484.

3. General and Extended Significations — *California*. — *Allen v. McKay*, 120 Cal. 332, dissenting opinion of Harrison, J.; *Farmers', etc., Bank v. Board of Equalization*, 97 Cal. 318.

*Colorado*. — *Wason v. Major*, 10 Colo. App. 181.

*Idaho*. — *People v. Moore*, 1 Idaho 662.

*Illinois*. — *Stephani v. Catholic Bishop*, 2 Ill. App. 249.

*Kentucky*. — *Pennington v. Woolfolk*, 79 Ky. 13.

*Michigan*. — *Seymour v. Peters*, 67 Mich. 415; *Rothschild v. Begole*, 105 Mich. 188.

*Minnesota*. — *Webb v. Bidwell*, 15 Minn. 479.

*Missouri*. — *Vallé v. Fargo*, 1 Mo. App. 344. *New Jersey*. — *State v. Blake*, 35 N. J. L. 208, affirmed 36 N. J. L. 442.

*New York*. — *J., etc., McKechnie Brewing Co. v. Canadaigua*, 15 N. Y. App. Div. 139.

*Pennsylvania*. — *Bratton v. Mitchell*, 1 W. & S. (Pa.) 310; *Wells v. Smyth*, 55 Pa. St. 159; *Heft v. Gephart*, 65 Pa. St. 510; *Greenough v. Fulton Coal Co.*, 74 Pa. St. 486.

*Texas*. — *State v. Farmer*, 94 Tex. 232 [citing *Clegg v. State*, 42 Tex. 605]; *Texas Banking, etc., Co. v. State*, 42 Tex. 636.

*Washington*. — *State v. Carson*, 6 Wash. 250.

*Wisconsin*. — *Richardson v. Sheldon*, 1 Pin. (Wis.) 624.

See also *State v. Camp Sing*, 18 Mont. 128, 56 Am. St. Rep. 551.

An Assessment is determining the valuation of the thing taxed and the amount of the tax required of each individual. *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 227 [approved U. S. v. Halloran, 14 Blatchf. (U. S.) 1, 26 Fed. Cas. No. 15,286; U. S. v. Tilden, 9 Ben. (U. S.) 368, 28 Fed. Cas. No. 16,519]. The word "assessment" is sometimes employed to express the amount of the tax that each taxpayer is to pay; but more commonly it means the official valuation of a taxpayer's property for the purpose of taxation. *State v. New York, etc., R. Co.*, 60 Conn. 326. To similar effect see *State v. Utter*, 34 N. J. L. 489; *Binghamton First Nat. Bank v. Binghamton*, 72 N. Y. App. Div. 354; *State v. Farmer*, 94 Tex. 232.

Under a Statutory Provision requiring city councils, on a designated day annually, to determine by resolution the amount of city taxes to be levied and assessed for the current year, and making the county assessment the basis of taxation, the assessment of property in the city is not completed until the date of the resolution fixing and levying the amount of taxes to be raised. *State v. Johnson*, 16 Mont. 570.

4. Assessment the Listing and Valuation of Taxable Property. — *Cooley, Taxation* (2d ed.), 351.

*United States*. — *People v. Weaver*, 100 U. S. 530; *Huntington v. Worthen*, 120 U. S. 97; *Kelly v. Herrall*, 20 Fed. Rep. 364.

*Alabama*. — *Perry County v. Selma, etc., R. Co.*, 58 Ala. 546.

**3. Necessity for Assessment.** — In laying an *ad valorem* tax, a valuation of the property of each person or corporation liable to be taxed is an absolute necessity. In no other way can the amount to be paid by each taxpayer be ascertained. A valid assessment is, therefore, indispensable.<sup>1</sup> This doctrine

*Arkansas.* — *Lyman v. Howe*, 64 Ark. 436.  
*California.* — *Allen v. McKay*, 120 Cal. 332; *Farmers', etc., Bank v. Board of Equalization*, 97 Cal. 318; *Wells v. State Board of Equalization*, 56 Cal. 194.

*Colorado.* — *People v. Lothrop*, 3 Colo. 428; *Taxation of Min. Claims*, 9 Colo. 635; *People v. Arapahoe County*, 27 Colo. 86.

*Idaho.* — *People v. Moore*, 1 Idaho 662.

*Illinois.* — *Chicago v. Fishburn*, 189 Ill. 367.  
*Indiana.* — *Adams v. Shelbyville*, 154 Ind. 467, 77 Am. St. Rep. 484, opinion of Baker, J.; *State v. Smith*, 158 Ind. 543, opinion of Dowl-  
 ing, J.

*Kansas.* — *Hines v. Leavenworth*, 3 Kan. 186; *Pomeroy Coal Co. v. Emlen*, 44 Kan. 117.  
*Louisiana.* — *Geren v. Gruber*, 26 La. Ann. 694; *State v. Assessors*, 30 La. Ann. 261.

*Mississippi.* — *State Revenue Agent v. Tonella*, 70 Miss. 701.

*Missouri.* — *State v. Kansas City, etc., R. Co.*, 116 Mo. 15.

*Montana.* — *State v. Johnson*, 16 Mont. 570.

*Nebraska.* — *Morrill v. Taylor*, 6 Neb. 236; *Lynam v. Anderson*, 9 Neb. 367.

*New York.* — *People v. New Rochelle*, 83 Hun (N. Y.) 185.

*North Dakota.* — *Sheets v. Paine*, 10 N. Dak. 103.

*Oklahoma.* — *Gray v. Stiles*, 6 Okla. 455, opinion of McAtee, J.

*South Carolina.* — *State v. Cheraw, etc., R. Co.*, 54 S. Car. 564, citing 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 199.

*South Dakota.* — *In re Assessment of Taxes*, 4 S. Dak. 6.

*Texas.* — *San Antonio St. R. Co. v. San Antonio*, 22 Tex. Civ. App. 341; *Hoefling v. San Antonio*, 15 Tex. Civ. App. 257.

*Washington.* — *Seattle v. Yesler*, 1 Wash. Ter. 571.

*Wisconsin.* — *Marsh v. Clark County*, 42 Wis. 502.

*Canada.* — *Winnipeg v. Canadian Pac. R. Co.*, 12 Manitoba 581, citing 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 199, reversed on other grounds 30 Can. Sup. Ct. 558.

See generally the cases cited *supra*, this sub-  
 division.

**The Assessment Is Made** within the purview of a statute, speaking of the time "when the assessment is made," when the assessors have acted in viewing the property, in making their statements thereof, and in entering their valuations in the annual books in which shall be entered "in detail the assessed valuations." After that time the books are open for examination and correction. Every step subsequent thereto is one of review. *Matter of Tilyou*, 57 N. Y. App. Div. 101.

The words "list" and "assess," while used in a somewhat different sense in the tax laws, are a part of the same process of getting property upon the tax roll; and the phrase "to list and collect taxes," sued in a law making provision for the discovery and taxation of

omitted property, includes an assessment. *Beresheim v. Arnd*, 117 Iowa 83.

The word "Assessment" in a statutory provision giving a board of appeal and revision power to increase or diminish any assessment," refers to the value placed on property and not the list, and does not authorize the board to add to the list property omitted by the assessor, but only to raise or lower the value of property already listed. *San Antonio St. R. Co. v. San Antonio*, 22 Tex. Civ. App. 341.

**1. Assessment Indispensable to Ad Valorem Tax** — *United States.* — *People v. Weaver*, 100 U. S. 539; *Custer County v. Anderson*, (C. C. A.) 68 Fed. Rep. 341.

*Alabama.* — *Crook v. Anniston City Land Co.*, 93 Ala. 4; *Driggers v. Cassidy*, 71 Ala. 529; *Perry County v. Selma, etc., R. Co.*, 58 Ala. 546.

*Arizona.* — *Waller v. Hughes*, (Ariz. 1886) 11 Pac. Rep. 122.

*Arkansas.* — *St. Louis, etc., R. Co. v. Miller County*, 67 Ark. 498; *Lyman v. Howe*, 64 Ark. 436.

*California.* — *Lake County v. Sulphur Bank Quicksilver Min. Co.*, 66 Cal. 17; *People v. Pearis*, 37 Cal. 259; *People v. McCreery*, 34 Cal. 432; *People v. San Francisco Sav. Union*, 31 Cal. 132; *Smith v. Davis*, 30 Cal. 539; *People v. Hastings*, 29 Cal. 449, 34 Cal. 571; *People v. Sneath*, 28 Cal. 612; *Hurlbutt v. Butenop*, 27 Cal. 50; *Moss v. Shear*, 25 Cal. 45, 85 Am. Dec. 94; *Kelsey v. Abbott*, 13 Cal. 618.

*Colorado.* — *People v. Lothrop*, 3 Colo. 428.

*Illinois.* — *Gannaway v. Barricklow*, 203 Ill. 410; *Lebanon v. Ohio, etc., R. Co.*, 77 Ill. 539; *Graves v. Bruen*, 11 Ill. 431.

*Indiana.* — *Evansville, etc., R. Co. v. Hays*, 118 Ind. 214.

*Iowa.* — *Thornburg v. Cardell*, (Iowa 1904) 98 N. W. Rep. 791; *Collins v. Keokuk*, 118 Iowa 30; *Galusha v. Wendt*, 114 Iowa 597; *Appanoose County v. Vermillion*, 70 Iowa 365; *Worthington v. Whitman*, 67 Iowa 190; *Early v. Whittingham*, 43 Iowa 162; *Rood v. Mitchell County*, 39 Iowa 444; *Bailey v. Fisher*, 38 Iowa 229.

*Kentucky.* — *Louisville Water Co. v. Clark*, 94 Ky. 47; *Slaughter v. Louisville*, 89 Ky. 112; *National Bank v. Licking Valley Land, etc., Co.*, (Ky. 1893) 22 S. W. Rep. 881.

*Louisiana.* — *Augusti v. Lawless*, 43 La. Ann. 1097, 45 La. Ann. 1370; *McWilliams v. Michel*, 43 La. Ann. 084; *Person v. O'Neal*, 32 La. Ann. 237; *Woolfolk v. Forbene*, 15 La. Ann. 15.

*Massachusetts.* — *Thurston v. Little*, 3 Mass. 420; *Thayer v. Stearns*, 1 Pick. (Mass.) 482.

*Mississippi.* — *Mullins v. Shaw*, 77 Miss. 000; *Yazoo, etc., R. Co. v. Adams*, 73 Miss. 648; *State Revenue Agent v. Tonella*, 70 Miss. 701; *Gamble v. Wittv*, 55 Miss. 26.

*Missouri.* — *State v. Burrough*, 174 Mo. 700; *State v. Mission Free School*, 162 Mo. 332; *State v. Thompson*, 149 Mo. 441; *St. Louis v. Wenneker*, 145 Mo. 230, 68 Am. St. Rep. 561; *State v. Wabash R. Co.*, 114 Mo. 1.

is as old as the law of taxation, and is the one proposition on which all courts and writers are agreed. It is upheld by all courts, state and federal, as that without which there cannot be a valid charge for a tax.<sup>1</sup> It is otherwise of a tax not laid according to the value of property, as is often the case with an occupation, business, or privilege tax.<sup>2</sup>

**4. Requirements as to Time When Made** — *a. IN GENERAL.* — In some jurisdictions all property, both real and personal, is required to be assessed annually for purposes of general taxation. In the case of land, however, the situs of which is fixed and permanent, it is frequently provided that a new assessment shall be made only once in two, five, ten, or other period of years, with such annual corrections as changes in ownership, erection or destruction of improvements, and the like, render necessary.<sup>3</sup> It is within the power of the legislature, in the absence of a constitutional restriction, to tax either real or personal property for several years at a given rate shown by a particular estimate or valuation. The rule of uniformity in taxation prescribed by the constitution is not a restriction upon this power.<sup>4</sup>

*Montana.* — *Northern Pac. R. Co. v. Carland*, 5 Mont. 146.

*Nebraska.* — *South Platte Land Co. v. Crete*, 11 Neb. 344; *Nebraska City v. Nebraska City Hydraulic Gas Light, etc., Co.*, 9 Neb. 339; *Morrill v. Taylor*, 6 Neb. 236.

*Nevada.* — *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220.

*New York.* — *May v. Traphagen*, 139 N. Y. 478; *Matter of Nichols*, 54 N. Y. 62.

*North Carolina.* — *Peebles v. Taylor*, 121 N. Car. 38.

*North Dakota.* — *Eaton v. Bennett*, 10 N. Dak. 346; *Sheets v. Paine*, 10 N. Dak. 103; *Sweigle v. Gates*, 9 N. Dak. 538; *Roberts v. Fargo First Nat. Bank*, 8 N. Dak. 504; *Shuttuck v. Smith*, 6 N. Dak. 56.

*Pennsylvania.* — *McReynolds v. Longenberger*, 57 Pa. St. 13; *Miller v. Hale*, 26 Pa. St. 432; *McCall v. Lorimer*, 4 Watts (Pa.) 351; *Cunningham v. White*, 2 Pa. Dist. 531.

*South Carolina.* — *State v. Cheraw, etc.*, R. Co., 54 S. Car. 564.

*Tennessee.* — *Anderson v. Post*, (Tenn. Ch. 1896) 38 S. W. Rep. 283.

*West Virginia.* — *State v. Tavenner*, 49 W. Va. 696; *State v. South Penn Oil Co.*, 42 W. Va. 80; *Cunningham v. Brown*, 39 W. Va. 588; *Mackin v. Taylor County Ct.*, 38 W. Va. 338.

*Wisconsin.* — *Schettler v. Ft. Howard*, 43 Wis. 48; *Marsh v. Clark County*, 42 Wis. 502; *Hersey v. Barron County*, 37 Wis. 75.

**Appraisement for Purposes of Customs Duties.** — See the title *REVENUE LAWS*, vol. 24, p. 903 *et seq.*

**Legacy and Succession Taxes.** — See the title *SUCCESSION TAXES*, *ante*, p. 337.

**The Valuation of Property** is the constitutional means adopted for the purpose of making the burdens of government bear upon each taxpayer in proportion to the value of his property. *Ex p. Ft. Smith, etc., Bridge Co.*, 62 Ark. 461.

1. *Thibodeaux v. State*, 69 Miss. 683.

2. **Occupation, Business, and Privilege Taxes.** — See the titles *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*, vol. 21, p. 818; *REVENUE LAWS*, vol. 24, p. 917. See also *Clark v. Adams*, 80 Miss. 219; and *infra*, this subdivision, *By Whom Assessment Made* — *Legislative Bodies*.

**Franchise Tax.** — See *Provident Inst. v.*

*Massachusetts*, 6 Wall. (U. S.) 611, and the title *TAXATION (CORPORATE)*, *post*.

3. **When Assessment Made** — *In General.* — *Shotwell v. Moore*, 129 U. S. 590; *Lebanon v. Ohio, etc.*, R. Co., 77 Ill. 539; *Crawford v. Polk County*, 112 Iowa 118; *Snell v. Ft. Dodge*, 45 Iowa 564; *Liquidating Com'rs v. Marrero*, 106 La. 130; *Nason v. Whitney*, 1 Pick. (Mass.) 140; *Tunica County v. Tate*, 78 Miss. 294; *Forsdick v. Quitman County*, (Miss. 1899) 25 So. Rep. 294; *State v. Cook*, 82 Mo. 185; *State v. New Lindell Hotel Co.*, 9 Mo. App. 450; *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 229; *Ransom v. Potter*, 12 Ohio Cir. Dec. 478, 22 Ohio Cir. Ct. 388; *Jermyn v. Fowler*, 186 Pa. St. 595, 42 W. N. C. (Pa.) 387; *Kister's Petition*, 9 Pa. Dist. 64; *Clove Spring Iron Works v. Cone*, 56 Vt. 603; *Alger v. Curry*, 38 Vt. 382; *Wilson v. Marsh*, 34 Vt. 352; *Godfrey v. Bennington Water Co.*, (Vt. 1903) 55 Atl. Rep. 654; *State v. Nichols*, 29 Wash. 159; *State v. South Penn Oil Co.*, 42 W. Va. 80. See *infra*, this section, 6. *g. Valuation of Property*.

**A Constitutional Requirement** for assessment of lands every fifth year is affirmative merely and not a limitation against shorter intervals. *Ex p. Lynch*, 16 S. Car. 32, *cited* *Ross v. Kelly*, 45 S. Car. 457.

**A Statutory Direction that the Assessment Be Made Up from the Roll of the Preceding Year** is not an integral or vital step in levying the tax, where the statute also confers ample power upon the taxing officers to correct the new roll and add property thereto. *People v. Schoonover*, 47 N. Y. App. Div. 278, *reversing* 26 Misc. (N. Y.) 576, *affirmed* without opinion 166 N. Y. 629. *Compare* *People v. Adams*, 125 N. Y. 471, *affirming* (Super. Ct. Gen. T.) 10 N. Y. Supp. 295, 56 Hun (N. Y.) 645.

**Assessments "at the Time Ordered by the Town"** implies a discretion within strict limits and not the fixing of a particular day. Fixing a designated month is sufficient. *Warwick, etc., Water Co. v. Carr*, (R. I. 1902) 52 Atl. Rep. 1030.

**Time of Making Discretionary Within Statutory Limits.** — *Hardin v. Guthrie*, 26 Nev. 246.

4. **Power of Legislature.** — *Kelsey v. Nevada*, 18 Cal. 630; *Wingate v. Ketner*, 8 Wash. 94; *Cross v. Milwaukee*, 19 Wis. 509.

**b. RELATION OF ASSESSMENT TO DAY CERTAIN.** — The taxable status of persons and property generally relates to a day certain in each year. When the law thus provides, no taxes can be legally assessed and levied for a particular year unless the conditions requisite to liability exist on the day fixed; and no changes in ownership, fluctuations in value, nonresidence, removal or destruction of the property, or the like, occurring subsequent thereto, can be considered in making or reviewing an assessment.<sup>1</sup> The very notion of an assessment involves the fixing of values as of a certain date, since there is no mode of making the valuation vary with the increased or diminished value during the current year, and, if there were, such varying valuations would be destructive of established principles of uniformity.<sup>2</sup>

**5. By Whom Assessment Made** — *a. LEGISLATIVE BODIES.* — The fundamental law requires general taxes to be laid according to the value of the

**1. Relation of Assessment to Day Certain** — *United States.* — *Shotwell v. Moore*, 129 U. S. 590; *Dodge v. Nevada Nat. Bank*, (C. C. A.) 109 Fed. Rep. 726.

*Alabama.* — *Board of Revenue v. Montgomery Gas-Light Co.*, 64 Ala. 269.

*Arkansas.* — *Hunt v. McFadgen*, 20 Ark. 277; *State v. Certain Lands*, 40 Ark. 34.

*California.* — *San Gabriel Valley Land, etc., Co. v. Witmer Bros. Co.*, 96 Cal. 623; *San Francisco v. Pennie*, 93 Cal. 465; *San Francisco, etc., R. Co. v. State Board of Equalization*, 60 Cal. 12.

*Colorado.* — *Pueblo County v. Wilson*, 15 Colo. 90; *Price v. Kramer*, 4 Colo. 546.

*District of Columbia.* — *Anglo-American Ins. Co. v. District of Columbia*, 5 Mackey (D. C.) 422.

*Illinois.* — *Condit v. Widmayer*, 196 Ill. 623; *Maxwell v. People*, 189 Ill. 546; *Johnson v. Lyon*, 106 Ill. 64; *Biggins v. People*, 96 Ill. 381; *Shaw v. Dennis*, 10 Ill. 405.

*Indiana.* — *Pittsburgh, etc., R. Co. v. Harden*, 137 Ind. 486.

*Iowa.* — *Matter of Kauffman*, 104 Iowa 639; *Sully v. Poorbaugh*, 45 Iowa 453; *Milwaukee, etc., R. Co. v. Kossuth County*, 41 Iowa 57.

*Kansas.* — *Howell v. Scott*, 44 Kan. 247.

*Kentucky.* — *Baldwin v. Shine*, 84 Ky. 502; *Com. v. Gaines*, 80 Ky. 489; *Com. v. Riley*, 72 S. W. Rep. 809, 24 Ky. L. Rep. 2005.

*Louisiana.* — *Palfrey v. Connely*, 106 La. 699, 107 La. 169; *Southern Ins. Co. v. Assessors*, 49 La. Ann. 401; *Home Ins. Co. v. Assessors*, 48 La. Ann. 451; *Templeton v. Levee Com'rs*, 16 La. Ann. 117. See also *Clifford v. Michiner*, 49 La. Ann. 1511.

*Maryland.* — *Hopkins v. Van Wyck*, 80 Md. 7; *William Skinner, etc., Ship Bldg., etc., Co. v. Baltimore*, 96 Md. 32.

*Massachusetts.* — *Vaughan v. Street Com'rs*, 154 Mass. 143; *Richardson v. Boston*, 148 Mass. 508; *Washburn v. Walworth*, 133 Mass. 499; *Davis v. Boston*, 129 Mass. 377.

*Minnesota.* — *Martin County v. Drake*, 40 Minn. 137.

*Missouri.* — *State v. Edwards*, 136 Mo. 360.

*Nebraska.* — *Union Stock Yards Nat. Bank v. Thurston County*, (Neb. 1902) 92 N. W. Rep. 1022.

*Nevada.* — *State v. Eastabrook*, 3 Nev. 173.

*New Jersey.* — *Brpeck v. Jersey City*, 44 N. J. L. 156; *State v. Shurts*, 41 N. J. L. 279; *State v. Pettit*, 39 N. J. L. 654; *State v. Union*

*Tp.*, 36 N. J. L. 309; *State v. Hansom*, 36 N. J. L. 50; *State v. Hardin*, 34 N. J. L. 79; *State v. Roat*, (N. J. 1900) 45 Atl. Rep. 910.

*New York.* — *May v. Traphagen*, 139 N. Y. 478; *People v. Tax, etc., Com'rs*, 91 N. Y. 593; *Overing v. Foote*, 65 N. Y. 263; *Clark v. Norton*, 49 N. Y. 245; *People v. Ogdensburgh*, 48 N. Y. 390; *Mygatt v. Washburn*, 15 N. Y. 316; *People v. Sawyer*, (Supm. Ct. Spec. T.) 27 N. Y. Supp. 202; *People v. McComber*, (Supm. Ct. Spec. T.) 7 N. Y. Supp. 71.

*North Dakota.* — *State v. Minneapolis, etc., Elevator Co.*, 6 N. Dak. 41.

*Oregon.* — *Oregon Steam Nav. Co. v. Portland*, 2 Oregon 81.

*Rhode Island.* — *McAdam v. Honey*, 20 R. I. 351.

*South Carolina.* — *Harth v. Gibbes*, 3 Rich. L. (S. Car.) 316.

*Tennessee.* — *Shelby County v. Mississippi, etc., R. Co.*, 16 Lea (Tenn.) 401; *McClellan v. Memphis, etc., R. Co.*, 11 Lea (Tenn.) 336; *Rutledge v. Fogg*, 3 Coldw. (Tenn.) 554, 91 Am. Dec. 299; *Crutchfield v. Stambaugh*, 8 Heisk. (Tenn.) 832.

*Vermont.* — *Pitkin v. Parks*, 54 Vt. 301; *Walker v. Miner*, 32 Vt. 769; *Woodward v. French*, 31 Vt. 337.

*Wisconsin.* — *Eagle River v. Brown*, 85 Wis. 76; *Pennsylvania Coal Co. v. Porth*, 63 Wis. 77; *Warren v. Werner*, 14 Wis. 366.

**Conveyances Pending Assessment to Municipal or Other Corporations Exempt from Taxation.** — *Gachet v. New Orleans*, 52 La. Ann. 813 [distinguished *Prytania St. Market Co. v. New Orleans*, (La. 1903) 34 So. Rep. 797]; *Buckhout v. New York*, 82 N. Y. App. Div. 218; *Sisters of Poor v. New York*, 51 Hun (N. Y.) 355, affirmed without opinion 112 N. Y. 677.

**The Fixing of a Day Certain to which assessments generally shall relate does not preclude the enactment of special provisions for the making of particular assessments as to other periods of the year.** *Shotwell v. Moore*, 129 U. S. 590.

**The Record of the Assessment need not contain the statement that the taxpayer owned the property assessed on the assessment date.** *Santa Barbara v. Eldred*, 108 Cal. 294.

**2. San Francisco, etc., R. Co. v. State Board of Equalization**, 60 Cal. 12.

**Assessment of Escaped Property.** — See *infra*, this section, 7. **Assessment of Escaped Property** — *Reassessment*.

property of the taxpayers, and no arbitrary assessment can be made either by statute or ordinance.<sup>1</sup> It has also been held that the assessment of property is an executive or judicial function and cannot be made directly by the law-making bodies;<sup>2</sup> but in the case of taxes laid upon solvent securities, certificates of deposit, mortgages, undivided profits, or the like, the nominal or face value of which is identical with the actual value, an assessment by the legislature without the intervention of assessing officers or boards is usually unobjectionable.<sup>3</sup>

**b. PUBLIC OFFICERS AND BOARDS—(1) In General.**—Subject only to constitutional limitations, the whole power of taxation under the system of government in the *United States* is lodged in the legislative bodies of the different states, and they may provide such officers, agents, or tribunals for the making of assessments as they may deem advisable.<sup>4</sup> This power is variously exercised.<sup>5</sup> In a few instances the office of assessor, as the county, township, or other local taxing officer is usually called,<sup>6</sup> has been held to be a constitutional office, to some extent beyond legislative control and interference.<sup>7</sup> Generally,

**1. Arbitrary Assessment of Property by Statute or Ordinance Invalid.**—*Smith v. County Com'rs Ct.*, 117 Ala. 196 [*cited State v. Street*, 117 Ala. 203]; *Wells, etc., Co.'s Express v. Crawford County*, 63 Ark. 576; *Taxation of Min. Claims*, 9 Colo. 635; *Hawkins v. Mangum*, 78 Miss. 97, *citing* 25 AM. AND ENG. ENCYC. OF LAW. (1st ed.) 65; *McCurdy v. Prugh*, 59 Ohio St. 465. See *supra*, IV. 2. c. (3) (b) *Taxation by Valuation*.

**2. Assessment an Executive or Judicial Function.**—*People v. Hastings*, 29 Cal. 449, 34 Cal. 571; *People v. San Francisco Sav. Union*, 31 Cal. 132; *People v. McCreery*, 34 Cal. 432; *Slaughter v. Louisville*, 89 Ky. 112; *Roberts v. Fargo First Nat. Bank*, 8 N. Dak. 504; *Gray v. Stiles*, 6 Okla. 531, *per* Keaton, J.; *Cunningham v. Brown*, 39 W. Va. 588. See also *Taxation of Min. Claims*, 9 Colo. 635; *People v. Arapahoe County*, 27 Colo. 86; *Jacksonville v. Bassett*, 20 Fla. 525.

**Under a Constitutional Provision** that the value of property shall be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct, and not otherwise, neither the legislative nor executive branches of the government can make assessments. *Republic L. Ins. Co. v. Pollak*, 75 Ill. 292.

**A Statute Requiring the Listing of "the Amount of Money, Notes, or Credits"** is not unconstitutional as amounting to a legislative assessment. *People v. Arapahoe County*, 27 Colo. 86.

**3. Instances of Valid Legislative Assessments.**—*Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 227, two justices dissenting; *King v. U. S.*, 99 U. S. 229; *U. S. v. Erie R. Co.*, 107 U. S. 1; *U. S. v. Philadelphia, etc., R. Co.*, 123 U. S. 113; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, *affirming* (Pa. 1889) 16 Atl. Rep. 593; *U. S. v. Warrick*, 25 Fed. Rep. 138; *U. S. v. Little Miami, etc., R. Co.*, 1 Fed. Rep. 700; *U. S. v. Tilden*, 9 Ben. (U. S.) 368, 28 Fed. Cas. No. 16,519; *U. S. v. Hazard*, 3 Cent. L. J. 653, 26 Fed. Cas. No. 15,337; *U. S. v. Chase*, 8 Chicago Leg. N. 123, 25 Fed. Cas. No. 14,788; *Farmers', etc., Bank v. Board of Equalization*, 97 Cal. 318; *State v. Sterling*, 20 Md. 502, *approved Westminster v. Westminster Sav. Bank*, 92 Md. 62; *Faust v. Twenty-third German American Bldg. Assoc.*, 84 Md. 186, two judges concurring on

other grounds; *Com. v. Lehigh Valley R. Co.*, 129 Pa. St. 429; *Com. v. Delaware Div. Canal Co.*, 123 Pa. St. 594; *Vermont, etc., R. Co. v. Vermont R. Co.*, 63 Vt. 1.

**The Legislature Unquestionably Possesses the Power** to assess taxes itself; but the inconvenience of so doing renders this impracticable. *Mackin v. Taylor County Ct.*, 38 W. Va. 338. To the same effect, *Faust v. Twenty-third German American Bldg. Assoc.*, 84 Md. 186.

**4. Province of Legislature—In General.**—See *supra*, this title, *Power of Taxation*; *Faust v. Twenty-third German American Bldg. Assoc.*, 84 Md. 186; *State v. Sterling*, 20 Md. 502; *State Tax Com'rs v. Assessors*, 124 Mich. 491; *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 63 Vt. 1; *Com. v. Brown*, 91 Va. 762; *Heilig v. Puyallup*, 7 Wash. 29; *State v. Carson*, 6 Wash. 250; *Mackin v. Taylor County Ct.*, 38 W. Va. 338.

**5. Local Assessing Officers.**—For instances of statutes making provision for local assessing officers, see the following cases: *Harwood v. Perrin*, (Ariz. 1900) 60 Pac. Rep. 891; *Burton Stock Car Co. v. Traeger*, 187 Ill. 9, *followed* *Burton Stock Car Co. v. Barnett*, 187 Ill. 539; *People v. Cook County*, 176 Ill. 576, *cited* *People v. Knopf*, 183 Ill. 410; *Du Page County v. Jenks*, 65 Ill. 275; *Larned v. Elliott*, 155 Ind. 702; *State v. Burke*, 154 Ind. 645; *State v. Arrington*, 18 Nev. 412; *People v. Woodruff*, 32 N. Y. 355, 29 How. Pr. (N. Y.) 203, *reversing sub nom.* *People v. Allen*, 42 Barb. (N. Y.) 203; *In re Assessorship*, 9 Pa. Dist. 345, 23 Pa. Co. Ct. 654; *Reals v. Smith*, 8 Wyo. 159.

**Boards of Equalization and Review.**—See *infra*, this section, 11. *Appeal and Review*.

**6. "Assessor" Defined.**—*Allen v. McKay*, 120 Cal. 332, *per* Harrison, J.; *Savings, etc., Soc. v. Austin*, 46 Cal. 416, *per* Wallace, C. J.; *Oakland v. Southern Pac. R. Co.*, 131 Cal. 226; *Valle v. Fargo*, 1 Mo. App. 344. See also *Ames v. People*, 26 Colo. 83; *Shuttuck v. Smith*, 6 N. Dak. 56.

**7. Office of Assessor a Constitutional Office.**—*Houghton v. Austin*, 47 Cal. 646, *overruling* *Savings, etc., Soc. v. Austin*, 46 Cal. 416; *Union Pac. R. Co. v. Alexander*, 113 Fed. Rep. 347, *appeal dismissed* without opinion, (C. C. A.) 115 Fed. Rep. 1017 (construing *Colorado constitution*); *State Revenue Agent v. Tonella*,

however, there is no restriction upon the power of the legislature to provide other officers, boards, or tribunals to review and correct the valuations placed upon property by the local assessors or to perform their duties in whole or in part.<sup>1</sup> Thus the revenue acts frequently provide that certain classes of property, such as railroad and corporation property, shall be assessed by county or state boards of equalization and review or by special boards created for the purpose, and not by the local assessing officers,<sup>2</sup> and the power to assess taxable property omitted from the regular assessments is often conferred upon such boards.<sup>3</sup>

The Requirements of Uniformity, Equality, and Due Process of Law do not mean that the same officers shall act in the assessment of every kind of taxable property, or that the proceedings touching the assessment shall be the same in every instance.<sup>4</sup>

(2) *Officers De Jure and De Facto.* — It is essential to the validity of an assessment that it be made by the officer or other agency authorized by law to make it.<sup>5</sup> In the application of this rule it has generally been held, as in other cases of public officers, that the acts of a *de facto* officer are as valid as those of an officer *de jure*.<sup>6</sup> In some jurisdictions, however, statutes requir-

70 Miss. 701, cited *Adams v. Kuhn*, 72 Miss. 276, and *Yazoo*, etc., R. Co. v. *Adams*, 73 Miss. 648. See also *Taxation of Min. Claims*, 9 Colo. 635; *People v. Lothrop*, 3 Colo. 428.

1. *Agencies for Making Assessments.* — See the constitutions and revenue acts of the different states; *supra*, this title, *Power of Taxation*; *infra*, this section, 11. *b. Boards of Equalization and Review*; title *TAXATION (CORPORATE)*, *post*. See also *Pulaski County Board of Equalization Cases*, 49 Ark. 518; *Ames v. People*, 26 Colo. 83; *Chicago v. Fishburn*, 189 Ill. 367; *Chicago*, etc., R. Co. v. *People*, 98 Ill. 350; *Com. v. E. H. Taylor Jr. Co.*, 101 Ky. 325, 19 Ky. L. Rep. 552; *Sawyer v. Dooley*, 21 Nev. 390; *North Carolina R. Co. v. Alamance*, 82 N. Car. 259.

2. See the title *TAXATION (CORPORATE)*, *post*. See also *Central Pac. R. Co. v. Evans*, 111 Fed. Rep. 71; *Ames v. People*, 26 Colo. 83; *Hannibal*, etc., R. Co. v. *State Board of Equalization*, 64 Mo. 294; *Sawyer v. Dooley*, 21 Nev. 390; *Poe v. Howell*, (N. Mex. 1901) 67 Pac. Rep. 62.

3. See cases cited *infra*, this section, 7. *Assessment of Escaped Property—Reassessment*.

4. *Rules of Uniformity, Equality, and Due Process of Law.* — See *supra*, this title, *Power of Taxation*; *Pittsburgh*, etc., R. Co. v. *Backus*, 133 Ind. 625, *affirmed* 154 U. S. 421; *Cleveland*, etc., R. Co. v. *Backus*, 133 Ind. 513, *affirmed* 154 U. S. 439; *Midland Elevator Co. v. Stewart*, 50 Kan. 378; *Geary County v. Missouri*, etc., R. Co., 62 Kan. 168, *reversing* 9 Kan. App. 350; *Com. v. E. H. Taylor Jr. Co.*, 101 Ky. 325, 19 Ky. L. Rep. 552; *Yazoo*, etc., R. Co. v. *Adams*, 77 Miss. 764, 73 Miss. 648; *Sawyer v. Dooley*, 21 Nev. 390; *Com. v. Brown*, 91 Va. 762; *State v. Anderson*, 90 Wis. 550; *Kelley v. Rhoads*, 7 Wyo. 237, 75 Am. St. Rep. 904.

5. *Assessments by Persons Not Authorized by Law to Make Them, Void* — *Arkansas*. — *Lyman v. Howe*, 64 Ark. 436.

*California*. — *People v. White*, 47 Cal. 616; *Williams v. Corcoran*, 46 Cal. 553; *Reily v. Lancaster*, 39 Cal. 354; *People v. San Francisco Sav. Union*, 31 Cal. 132; *People v. Hastings*, 29 Cal. 450, 34 Cal. 571.

*Florida*. — *Tampa v. Mugge*, 40 Fla. 326; *Tampa v. Kaunitz*, 39 Fla. 683, 63 Am. St. Rep. 202; *Sloan v. Sloan*, 25 Fla. 53; *Hughey v. Winborne*, (Fla. 1902) 33 So. Rep. 249.

*Georgia*. — *Bohler v. Verdery*, 92 Ga. 715; *Adams v. Justices*, 21 Ga. 206.

*Illinois*. — *Gunning v. People*, 189 Ill. 165, 82 Am. St. Rep. 433, *reversing* on other grounds 86 Ill. App. 676; *People v. Lots in Ashley*, 122 Ill. 297; *Mix v. People*, 116 Ill. 265; *People v. Ward*, 105 Ill. 620; *Chicago*, etc., R. Co. v. *People*, 98 Ill. 350.

*Indiana*. — *Evansville*, etc., R. Co. v. *Hays*, 118 Ind. 214.

*Iowa*. — *Cedar Rapids*, etc., R. Co. v. *Cedar Rapids*, 106 Iowa 476; *Rood v. Mitchell County*, 39 Iowa 444; *Bailey v. Fisher*, 38 Iowa 229.

*Kentucky*. — *Louisville v. Louisville Public Warehouse Co.*, 107 Ky. 184; *Com. v. E. H. Taylor Jr. Co.*, 101 Ky. 325, 19 Ky. L. Rep. 552; *Turner v. Pewee Valley*, 100 Ky. 288; *Bruce v. Vanceburg*, etc., *Turnpike Board Co.*, (Ky. 1896) 35 S. W. Rep. 112.

*New Hampshire*. — *Rowe v. Addison*, 34 N. H. 306; *Perkins v. Langmaid*, 36 N. H. 502.

*New Jersey*. — *Maxson v. Segoine*, 53 N. J. L. 339.

*New York*. — *People v. Parker*, 117 N. Y. 86.

**Assessment Must Be by Officer Either de Jure or de Facto.** — *Tampa v. Kaunitz*, 39 Fla. 683, 63 Am. St. Rep. 202.

**Acts Validating Assessment by Other than Designated Officer Held Valid.** — *Wells County v. McHenry*, 7 N. Dak. 246. *Compare* *Turner v. Pewee Valley*, 100 Ky. 288. And see generally the title *CONSTITUTIONAL LAW*, vol. 6, p. 945.

6. *De Facto Officers* — *Arkansas*. — *Barton v. Lattourette*, 55 Ark. 81; *Moore v. Turner*, 43 Ark. 243; *Scott v. Watkins*, 22 Ark. 556.

*Florida*. — *Kissimmee City v. Cannon*, 26 Fla. 3.

*Illinois*. — *People v. Lieb*, 85 Ill. 484; *Sullivan v. State*, 66 Ill. 75; *Du Page County v. Jenks*, 65 Ill. 275. See also *People v. Knopf*, 183 Ill. 410.

*Iowa*. — *Peirce v. Weare*, 41 Iowa 378;



ing assessing officers to be sworn before entering upon their duties are construed to be for the protection of the taxpayer; and strict compliance with their provisions is a condition precedent to a valid assessment.<sup>1</sup>

(3) *Pecuniary Interest as a Disqualification.* — The fact that an assessing officer has a pecuniary interest in the amount of the taxes imposed or collected, by reason of the law giving him a percentage thereof, does not disqualify him from performing the duties of the office. Although he acts judicially in fixing the valuation of property, he is not a judge and his proceedings are not judicial.<sup>2</sup>

(4) *Delegation of Powers* — (a) *General Rules.* — Many of the duties of assessing officers or boards, such as transcribing assessments, calculating amounts, and the like, are of a clerical nature, involving no discretion and having no relation to any rights of the taxpayer; and they may lawfully delegate their authority to other persons, whether officers or not, or adopt and ratify the acts of such persons. On the other hand, in valuing the property and performing other duties involving the exercise of judicial discretion, the personal judgment of the assessing officers is essential to a valid assessment.<sup>3</sup>

(b) *Action by Boards.* — When authority to make or revise assessments is conferred on a board consisting of several members, it cannot be exercised

*Bailey v. Fisher*, 38 Iowa 229; *Washington County v. Miller*, 14 Iowa 584.

*Maryland.* — *Koontz v. Hancock*, 64 Md. 134.

*Mississippi.* — *Wolfe v. Murphy*, 60 Miss. 1; *Ray v. Murdock*, 36 Miss. 692.

*Nevada.* — *Sawyer v. Dooley*, 21 Nev. 290.

*New Jersey.* — *Bailey v. Brown*, 53 N. J. L. 162; *Bloomfield Tp. v. Pierson*, 47 N. J. L. 247; *State v. Collector*, 39 N. J. L. 75; *State v. Perkins*, 24 N. J. L. 409.

*Texas.* — *Texas, etc., R. Co. v. Harrison County*, 54 Tex. 119.

See also *Hawkins v. Jonesboro*, 63 Ga. 527; *Birch v. Fisher*, 13 S. & R. (Pa.) 209. See generally the title *DE FACTO OFFICERS*, vol. 8, p. 771.

1. *Qualifying by Taking Oath Essential to a Valid Assessment.* — *Parker v. Overman*, 18 How. (U. S.) 137; *Martin v. Barbour*, 34 Fed. Rep. 701, *affirmed* 140 U. S. 634; *Ainsworth v. Dean*, 21 N. H. 400; *Pike v. Hanson*, 9 N. H. 491; *Tucker v. Aiken*, 7 N. H. 113; *Bowler v. Brown*, 84 Me. 376; *Dresden v. Goud*, 75 Me. 298; *Gould v. Monroe*, 61 Me. 544; *Orneville v. Palmer*, 79 Me. 472; *Lynde v. Dummerston*, 61 Vt. 48; *Ayers v. Moulton*, 51 Vt. 115. See also *Lord v. Parker*, 83 Me. 530; *French v. Spalding*, 61 N. H. 395.

*Board of Assessors.* — An assessment made by a board of assessors is void if one of the members was not qualified according to law, at least where he participated in making it. *Jordan v. Hopkins*, 85 Me. 159; *Machiasport v. Small*, 77 Me. 109; *Williamsburg v. Lord*, 51 Me. 599.

*The Failure of an Assessor to Qualify Anew*, on being reappointed for another term, will not invalidate his assessment, where it is provided by statute that public officers may continue to act until their successors have been elected and qualified. *Bath v. Reed*, 78 Me. 276.

*Parol Evidence* is admissible to show that the proper oath was administered, if the fact does not appear from the public records. *Whiting v. Ellsworth*, 85 Me. 301. See also *Bowler v. Brown*, 84 Me. 376; *Wilmot v. Lathrop*, 67 Vt. 671 (time when oath administered).

*Record of Oath Not Essential.* — *Wilmot v. Lathrop*, 67 Vt. 671.

2. *Pecuniary Interest of Officer as a Disqualification.* — *Oskamp v. Lewis*, 103 Fed. Rep. 906; *Beresheim v. Arnd*, 117 Iowa 83; *Probasco v. Raine*, 50 Ohio St. 378; *Grundy County v. Tennessee Coal, etc., Co.*, 94 Tenn. 295. *Contra*, *Meyers v. Shields*, 61 Fed. Rep. 713 [*cited* *Aultman, etc., Co. v. Brumfield*, 102 Fed. Rep. 71]; *Brinkerhoff v. Brumfield*, 94 Fed. Rep. 422; *Conklin v. Squire*, 4 Ohio Dec. 493.

3. *Delegation of Powers — General Rules* — *Alabama.* — *Weaver v. State*, 39 Ala. 535.

*California.* — *People v. Hastings*, 29 Cal. 449, 34 Cal. 571.

*Florida.* — *Tampa v. Mugge*, 40 Fla. 326; *Tampa v. Kaunitz*, 39 Fla. 683, 63 Am. St. Rep. 202.

*Illinois.* — *Wilson v. Weber*, 96 Ill. 454.

*Iowa.* — *Snell v. Ft. Dodge*, 45 Iowa 564.

*Kentucky.* — *Turner v. Pewee Valley*, 100 Ky. 288.

*Louisiana.* — *Merchants' Mut. Ins. Co. v. Assessors*, 40 La. Ann. 371.

*Michigan.* — *Paldi v. Paldi*, 84 Mich. 346; *Woodman v. Auditor Gen.*, 52 Mich. 30.

*Mississippi.* — *Stokes v. State*, 24 Miss. 621.

*Nebraska.* — *South Platte Land Co. v. Crete*, 11 Neb. 344.

*New York.* — *People v. Hagadorn*, 104 N. Y. 516; *New York v. Davenport*, 92 N. Y. 604; *Bellinger v. Gray*, 51 N. Y. 610; *People v. Schoonover*, 47 N. Y. App. Div. 278, *reversing* (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 576, *affirmed* without opinion 166 N. Y. 629; *Ne-ha-sa-ne Park Assoc. v. Lloyd*, 7 N. Y. App. Div. 359.

*North Carolina.* — *Covington v. Rockingham*, 93 N. Car. 134.

*North Dakota.* — *Farrington v. New England Invest. Co.*, 1 N. Dak. 102.

*Pennsylvania.* — *Jermyn v. Fowler*, 186 Pa. St. 595, 42 W. N. C. (Pa.) 387.

*Wisconsin.* — *Mills v. Johnson*, 17 Wis. 598; *Dean v. Gleason*, 16 Wis. 1.

*Roll Raises No Presumption as to Who Entered Items Therein.* — *Hughey v. Winborne*, (Fla.

by one of them acting alone; but action by a majority is generally sufficient, if opportunity was afforded the others to be present and take part,<sup>1</sup> unless joint action is commanded by the statute.<sup>2</sup> Such boards, like all boards composed of a number of persons, may generally act through committees of one or more members to hear the evidence and report it to the full board with recommendations as to the action to be adopted.<sup>3</sup>

c. JUDICIAL TRIBUNALS—(1) *In General*.—By the division of the powers of government in the *United States*, the valuation of property for purposes of *ad valorem* taxation, although judicial in character, belongs to the legislative and ministerial class of duties and is not a judicial proceeding.<sup>4</sup> Accordingly it has been held that the judiciary cannot be empowered to make original assessments or to revise the valuations of assessing officers and boards on appeal or other direct proceeding; that the jurisdiction of the courts is limited to compelling such tribunals to act and the annulling of void assessments.<sup>5</sup>

1902) 33 So. Rep. 249, citing *Sloan v. Sloan*, 25 Fla. 53.

**Employment and Compensation of Clerks of Board of State Tax Commissioners.**—*Warner v. State Auditors*, 128 Mich. 500, 8 Detroit Leg. N. 725.

1. **Action by Boards—United States.**—*Cooley v. O'Connor*, 12 Wall. (U. S.) 391; *Schenk v. Peay*, 1 Dill. (U. S.) 267.

*California.*—*People v. Coghill*, 47 Cal. 361.

*Colorado.*—*People v. Lothrop*, 3 Colo. 428.

*Illinois.*—*State v. Sullivan*, 43 Ill. 412.

*Louisiana.*—*Oteri v. Parker*, 42 La. Ann. 374.

*Maine.*—*Belfast Sav. Bank v. Kennebec Land, etc., Co.*, 73 Me. 404; *Bangor v. Lancey*, 21 Me. 472; *Johnson v. Goodridge*, 15 Me. 29.

*Massachusetts.*—*Williams v. School Dist. No. 1*, 21 Pick. (Mass.) 75, 32 Am. Dec. 243.

*New Jersey.*—*State v. Parker*, 32 N. J. L. 341.

*New York.*—*People v. Parker*, 117 N. Y. 86; *Colman v. Shattuck*, 62 N. Y. 348; *Bellinger v. Gray*, 51 N. Y. 610; *People v. Chenango County*, 11 N. Y. 563; *Lamoureux v. O'Rourke*, 3 Abb. App. Dec. (N. Y.) 15; *Lee v. Parry*, 4 Den. (N. Y.) 125; *Doughty v. Hope*, 3 Den. (N. Y.) 249, affirmed 1 N. Y. 79; *Metcalf v. Messenger*, 46 Barb. (N. Y.) 325.

*North Carolina.*—*State v. McIntoch*, 7 Ired. L. (29 N. Car.) 68.

*Ohio.*—*Britt v. Lewis*, 9 Ohio Cir. Dec. 166, 16 Ohio Cir. Ct. 343.

*Tennessee.*—*Carroll v. Alsop*, 107 Tenn. 257, citing 19 AM. AND ENG. ENCYC. OF LAW (1st ed.) 465, and note.

*Texas.*—*Ferris v. Kimble*, 75 Tex. 476, followed *Connor v. Waxahachie* (Tex. 1889) 13 S. W. Rep. 30; *Taxes, etc., R. Co. v. Harrison County*, 54 Tex. 119.

*Wisconsin.*—*State v. Lippels*, 112 Wis. 203; *State v. Gaylord*, 73 Wis. 316; *Marshall v. Benson*, 48 Wis. 558.

*Wyoming.*—*Albany Mut. Bldg. Assoc. v. Laramie*, 10 Wyo. 54.

See also *Hough v. Hastings*, 18 Ill. 312. *Contra*, *Hamilton v. State*, 3 Ind. 452. See generally the title QUORUM, vol. 23, p. 589.

**No Quorum Adjournments Admissible.**—*O'Neil v. Tyler*, 3 N. Dak. 47.

**Temporary Absence of Member from Hearing, During Which No Vote Taken, Immaterial.**—*Graham v. Lasater*, (Tex. Civ. App. 1894) 26 S. W. Rep. 472.

2. **Joint Action Required by Statute.**—*People v. Ahern*, 52 Cal. 208; *People v. Hagar*, 49 Cal. 229; *People v. Coghill*, 47 Cal. 361.

3. **Reference to Committees.**—*Earl v. Raymond*, 188 Ill. 15, followed *Kimbark v. Raymond*, 188 Ill. 66, and *Mayer v. Raymond*, 188 Ill. 143; *Halsey v. People*, 84 Ill. 89; *Beers v. People*, 83 Ill. 488; *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561; *Boyce v. Sebring*, 66 Mich. 210. See also *New Orleans Gaslight Co. v. New Orleans*, 46 La. Ann. 1146.

**Whole Board Cannot Act Where Part Only Have Heard Evidence.**—See *Oxford Tp. v. Delaware, etc., R. Co.*, 64 N. J. L. 195.

4. See *State v. Thorne*, 112 Wis. 81, and generally cases cited in the next note; *infra*, this section, 11. *Appeal and Review*.

5. **Original Assessments—United States.**—*State Railroad Tax Cases*, 92 U. S. 575; *Fleming v. Trowsdale*, (C. C. A.) 85 Fed. Rep. 189; *Chamberlain v. Walter*, 60 Fed. Rep. 788; *Ketchum v. Pacific R. Co.*, 4 Dill. (U. S.) 41 note, 14 Fed. Cas. No. 7,738; *Paul v. Pacific R. Co.*, 4 Dill. (U. S.) 35, 18 Fed. Cas. No. 10,845.

*California.*—*Clunie v. Siebe*, 112 Cal. 593. *Iowa.*—*Galusha v. Wendt*, 114 Iowa 597; *Crawford v. Polk County*, 112 Iowa 118.

*Kentucky.*—*Levi v. Louisville*, 97 Ky. 394, cited *Crecelius v. Louisville*, (Ky. 1899) 49 S. W. Rep. 547; *Cassidy v. Young*, 92 Ky. 227; *Slaughter v. Louisville*, 89 Ky. 112; *Baldwin v. Shine*, 84 Ky. 502; *Pennington v. Woolfolk*, 79 Ky. 13, cited *McLean County v. Deposit Bank*, 81 Ky. 254.

*Mississippi.*—*Yazoo, etc., R. Co. v. Adams*, 73 Miss. 648.

*Nevada.*—*Sawyer v. Dooley*, 21 Nev. 390. See also *Hardenburgh v. Kidd*, 10 Cal. 402; *State v. Wabash R. Co.*, 114 Mo. 1 [citing *Pacific R. Co. v. Cass County*, 53 Mo. 171]; *Mackin v. Taylor County Ct.*, 38 W. Va. 338.

**Revision of Valuations on Appeal.**—*State Auditor v. Atchison, etc., R. Co.*, 6 Kan. 500, 7 Am. Rep. 575, cited *Amrine v. Kansas Pac. R. Co.*, 7 Kan. 179, and *Kansas Pac. R. Co. v. Riley County*, 20 Kan. 141; *Baltimore v. Bonaparte*, 93 Md. 156, cited *Baltimore v. Austin*, 95 Md. 90.

**Under the Illinois Constitution.**—Assessments cannot be made or valuations revised by the courts. *Burton Stock Car Co. v. Traeger*, 187 Ill. 9, followed *Burton Stock Car. Co. v. Bar-*

On the other hand, power to make and revise assessments, conferred by statute on the judiciary, has been exercised by it without question, and in some instances objections to jurisdiction have been held untenable.<sup>1</sup>

(2) *Courts of Inferior Jurisdiction.* — By constitutional provision or long-continued practical construction, ministerial and judicial powers are often blended in courts of inferior jurisdiction; and in that event authority to make and revise assessments may be lawfully delegated to such judicial tribunals.<sup>2</sup>

*d. MUNICIPAL ASSESSMENTS.* — Power is sometimes conferred upon municipal corporations, such as cities, towns, school districts, and the like, to make assessments of property for municipal taxation distinct from assessments for state and county taxes, and appoint or elect their own officers for the purpose. Under other revenue acts only one set of assessing officers exists and but one assessment is made for the state and its municipalities.<sup>3</sup>

**6. Assessment Proceedings** — *a. IN GENERAL.* — Subject to constitutional restrictions, it is for the legislature within its discretion to provide the method and mode of assessing property for purposes of taxation.<sup>4</sup> The assessment should be made in accordance with these provisions, and with the securities and solemnities provided by statute.<sup>5</sup>

nett, 187 Ill. 539; Keokuk, etc., Bridge Co. v. People, 185 Ill. 276; Ottawa Glass Co. v. McCaleb, 81 Ill. 556; Republic L. Ins. Co. v. Pollak, 75 Ill. 292; Spencer v. People, 68 Ill. 510.

1. See *infra*, this section, 11. *Appeal and Review.*

**Statutes Sometimes Empower Courts** to review the tax, ascertain and determine for what sum the property was legally liable, and fix the amount. State v. Union Tp., 36 N. J. L. 309; Blume v. Bowes, 65 N. J. L. 470; Woodward v. Taylor, (Wash. 1903) 73 Pac. Rep. 785. See also De Witt v. Elizabeth, 56 N. J. L. 119.

**Suits in Equity to Enjoin Tax.** — In a suit in equity to enjoin a void assessment, a reassessment by the court was held to be authorized by the principle of the taxes based thereon, and by the principle of equity that injunctions issue as a matter of discretion, and the court may always attach equitable conditions. Chicago Union Traction Co. v. State Board of Equalization, 114 Fed. Rep. 557.

**2. Courts of Inferior Jurisdiction.** — Cassidy v. Young, 92 Ky. 227; Slaughter v. Louisville, 89 Ky. 112; Louisville, etc., R. Co. v. Com., 85 Ky. 198; Baldwin v. Shine, 84 Ky. 502; Hoke v. Com., 79 Ky. 567; Pennington v. Woolfolk, 79 Ky. 13.

**3. Municipal Assessments.** — See for illustration: *Kansas.* — Geary County v. Missouri, etc., R. Co., 62 Kan. 168, reversing 9 Kan. App. 350; Missouri, etc., R. Co. v. Miami County, (Kan. 1903) 73 Pac. Rep. 103.

*Kentucky.* — Royer Wheel Co. v. Taylor County, 104 Ky. 741; Levi v. Louisville, 97 Ky. 394.

*Louisiana.* — City Item Co-operative Printing Co. v. New Orleans, 51 La. Ann. 713; Hollingsworth v. Thompson, 45 La. Ann. 222, 40 Am. St. Rep. 220.

*Maryland.* — James Clark Distilling Co. v. Cumberland, 95 Md. 468; Salisbury v. Jackson, 89 Md. 518, citing Frederick County v. Frederick, 88 Md. 654.

*Michigan.* — State Tax Com'rs v. Cady, 124 Mich. 683, distinguishing State Tax Com'rs v. Assessors, 124 Mich. 491.

*Missouri.* — Cape Girardeau v. Buehrmann, 148 Mo. 198; State v. Edwards, 136 Mo. 360.

*Pennsylvania.* — Jermyn v. Fowler, 186 Pa. St. 595, 42 W. N. C. (Pa.) 387.

*South Carolina.* — Ross v. Kelly, 45 S. Car. 457.

*Tennessee.* — East Tennessee, etc., R. Co. v. Morristown, (Tenn. Ch. 1895) 35 S. W. Rep. 771.

*Texas.* — Hall v. Houston, etc., R. Co., 39 Tex. 286.

*Vermont.* — Woodward v. French, 31 Vt. 337.

**Compromise by Municipality of Suit for Taxes.** — Where the same assessment is the basis of state and municipal taxation a city has no power to compromise a suit brought by it to recover the municipal taxes, and thus indirectly effect a reduction in the valuation of the taxpayer's property. City Item Co-operative Printing Co. v. New Orleans, 51 La. Ann. 713.

**4. Authority of Legislature to Provide Method of Assessing Property.** — Witherspoon v. Duncan, 4 Wall. (U. S.) 210; Williams v. Albany, 122 U. S. 154; DuPage County v. Jenks, 65 Ill. 275; State v. Weyerhauser, 68 Minn. 353, 72 Minn. 519, affirmed 176 U. S. 550; State v. Hannibal, etc., R. Co., 60 Mo. 143; State v. Eastabrook, 3 Nev. 173; Frazier v. Prince, 8 Okla. 253; Howe Ins. Co. v. Lynch, 19 Utah 189; Grout v. Johnson, 73 Vt. 268; Smith v. Cleveland, 17 Wis. 573; Marsh v. Clark County, 42 Wis. 502. See also San Luis Obispo v. Pettit, 87 Cal. 499.

**When Statutes Are Directory and When Mandatory** in this connection has been already considered. See the title STATUTES, vol. 26, p. 690. See also Thomas v. Chapin, 116 Mo. 396; State v. Neosha Bank, 120 Mo. 161; State v. Stamm, 165 Mo. 73; Sweigle v. Gates, 9 N. Dak. 538; Eaton v. Bennett, 10 N. Dak. 346; Evans v. Newell, 18 R. I. 38.

**Duties of Officer.** — In the absence of any constitutional or statutory provision as to the duties of the assessor, his duties will be held to be such as are usually incumbent upon such officer. People v. Ames, 24 Colo. 422.

**5. Assessment Should Comply with Statutes** — *United States.* — Albany City Nat. Bank v.

**Formal Errors and Irregularities.** — Mere formal errors and irregularities which are not violative of mandatory statutory provisions are usually held not to invalidate the assessment. In some of the states statutes expressly provide that tax proceedings shall not be invalidated because of informalities and irregularities.<sup>1</sup>

**b. THE ROLL** — (1) *Form and Contents Generally.* — The roll or list is the record of the assessment.<sup>2</sup> The roll generally contains, among other things, a description of the taxable property, the amount of tax, the names of the owners, and the value of the property. It is essential to the validity of an assessment that a proper roll or list should be kept in accordance with mandatory statutory provisions.<sup>3</sup>

(2) *Arrangement.* — The statutes generally provide for the arrangement and form of the roll. It is common for the roll to be arranged in columns, wherein the names of the taxable inhabitants, the description, quantity, and

Maher, 19 Blatchf. (U. S.) 175; Lyon v. Alley, 130 U. S. 177.

Alabama. — State v. Sloss, 87 Ala. 119.

California. — Moss v. Shear, 25 Cal. 38, 85 Am. Dec. 94; Lake County v. Sulphur Bank Quicksilver Min. Co., 66 Cal. 17; San Luis Obispo v. Pettit, 87 Cal. 499.

Illinois. — People v. Lee, 112 Ill. 113.

Montana. — Northern Pac. R. Co. v. Carland, 5 Mont. 146.

New York. — Clark v. Norton, 49 N. Y. 243; National Bank v. Elmira, 53 N. Y. 49; Sanders v. Downs, 141 N. Y. 422.

North Dakota. — Sweigle v. Gates, 9 N. Dak. 538.

Oklahoma. — Frazier v. Prince, 8 Okla. 253.

Pennsylvania. — Cunningham v. White, 2 Pa. Dist. 531.

Rhode Island. — Evans v. Newell, 18 R. I. 38.

Vermont. — Clove Spring Iron Works v. Cone, 56 Vt. 603.

Virginia. — Baltimore, etc., R. Co. v. Koontz, 77 Va. 698.

Wisconsin. — Marsh v. Clark County, 42 Wis. 502.

That provisions for the assessment of property are *in invitum*, and must be strictly followed to divest title, see Gwynn v. Dierssen, 101 Cal. 563.

**Substantial Compliance** with the requirements of the law in making assessments is all that is necessary. Co-operative Sav., etc., Assoc. v. Green, 5 Idaho 660. See also Sanders v. Downs, 141 N. Y. 422.

**The Discretion of Officers** in making assessments on unseated land in Pennsylvania is subject only to the condition of being intelligible. Laird v. Hiester, 24 Pa. St. 452, *criticising* Owens v. Vanhook, 3 Watts (Pa.) 260.

**1. Formal Errors** — California. — Los Angeles v. Los Angeles City Water Co., 137 Cal. 699. See also Santa Barbara v. Eldred, 108 Cal. 294.

Colorado. — Haley v. Elliott, 20 Colo. 379. Illinois. — Pacific Hotel Co. v. Lieb, 83 Ill. 604.

Massachusetts. — Blackburn v. Walpole, 9 Pick. (Mass.) 97; Torrey v. Millbury, 21 Pick. (Mass.) 64.

Michigan. — Wall v. Trumbull, 16 Mich. 228; Auditor Gen. v. Keweenaw Assoc., 107 Mich. 405.

Missouri. — State v. Neosho Bank, 120 Mo. 161; State v. Stamm, 165 Mo. 73.

New Jersey. — State v. Bishop, 34 N. J. L. 45; State v. Manning, 41 N. J. L. 275.

Pennsylvania. — Insurance Co. v. Yard, 17 Pa. St. 331.

**Substantial Compliance Sufficient.** — People v. Barker, 86 Hun (N. Y.) 283, *affirming* 11 Misc. (N. Y.) 262.

**Duplicate Assessment Book Held Not Essential.** — Conklin v. Cullen, (Mont. 1903) 74 Pac. Rep. 72; Auditor Gen. v. Hutchinson, 113 Mich. 245; Ludington v. Escanaba, 115 Mich. 288.

**2. Definitions.** — The assessment roll is the list made by the assessor, and not the lists returned by individual taxpayers of their property. Vicksburg Bank v. Adams, 74 Miss. 179.

**Collector's Roll Is No Part of Assessment.** — Hernandez v. San Antonio, (Tex. Civ. App. 1897) 39 S. W. Rep. 1022.

**Evidence of Assessor's Acts.** — In California it has been held that the assessment roll, when completed and certified by the assessor to the board of supervisors, is the only evidence of his acts and intentions. Allen v. McKay, 139 Cal. 94.

**3. Contents and Necessity of Assessment Roll or List.** — O'Neal v. Virginia, etc., Bridge Co., 18 Md. 1, 79 Am. Dec. 669; Thurston v. Little, 3 Mass. 429; Roe v. St. John, 7 Neb. 139; Bailey v. Ackerman, 54 N. H. 527; Trowbridge v. Horan, 78 N. Y. 439; People v. Hagadorn, 104 N. Y. 516; Howard v. Shumway, 13 Vt. 358; Downing v. Roberts, 21 Vt. 441; Nickle v. Douglas, 37 U. C. Q. B. 51. See also People v. Stockton, etc., R. Co., 49 Cal. 414; State v. Wabash R. Co., 114 Mo. 1; Evans v. Newell, 18 R. I. 38.

**Two Rolls May Be Provided**, each being required to contain a designated class of assessments. See Folkerts v. Power, 42 Mich. 283.

**A Separate List Unknown to the Law** is not to be considered part of an assessment roll as against an individual whose assessment does not appear on the roll. Albany City Nat. Bank v. Maher, 19 Blatchf. (U. S.) 175.

**Entry in Separate Book or Paper Upheld.** — Noyes v. Hale, 137 Mass. 266. See also Morrill v. Douglass, 14 Kan. 293.

**Separate Assessment of State, County, and Town Taxes.** — Rockland v. Ulmer, 84 Me. 503; Thayer v. Stearns, 1 Pick. (Mass.) 482; State v. Falkinburge, 15 N. J. L. 320; Insurance Co. v. Yard, 17 Pa. St. 331.

value of the property, and other required insertions, are to be entered in their proper places. The statutory requirements differ as to such matters.<sup>1</sup>

**c. RETURNS BY TAXPAYERS—(1) Statutory Provisions.**—The revenue laws usually require persons liable to taxation to make out and furnish the assessing officer a statement containing a list of all their taxable property, and, in some jurisdictions, an estimate of its value. Noncompliance with the statutory requirement, or a false or fraudulent return, is generally made a penal or criminal offense, or subjects the taxpayer to other punishment, such as a withdrawal of the right to have the assessment reviewed, or an arbitrary addition to the valuation of his property or the amount of the tax. The constitutionality of such statutes is universally upheld by the courts, but under general rules of law the penal provisions are strictly construed.<sup>2</sup>

**1. Arrangement of Roll under Statutes—California.**—*People v. Sierra Buttes Quartz Min. Co.*, 39 Cal. 511; *People v. Hollister*, 47 Cal. 408; *Knott v. Peden*, 84 Cal. 299.

**Florida.**—*Tampa v. Mugge*, 40 Fla. 326.

**Indiana.**—*Thompson v. Honey Creek Drain- ing Co.*, 33 Ind. 268.

**Massachusetts.**—*Torrey v. Millbury*, 21 Pick. (Mass.) 64.

**Missouri.**—*State v. St. Louis, etc., R. Co.*, 117 Mo. 1; *State v. Lounsberry*, 125 Mo. 157.

**New York.**—*People v. Clapp*, 64 Hun (N. Y.) 547; *Bennett v. Robinson*, 42 N. Y. App. Div. 412; *People v. Hagadorn*, 104 N. Y. 516.

**Informalities Held Immaterial.**—*People v. Sierra Buttes Quartz Min. Co.*, 39 Cal. 511 (name extending beyond column); *People v. Garmon*, 63 N. Y. App. Div. 530, *affirming* 34 Misc. (N. Y.) 350 (arrangement of columns).

**2. Return—Statutory Provisions—In General—Alabama.**—*Board of Revenue v. Montgomery Gas-Light Co.*, 64 Ala. 269.

**California.**—*Biddle v. Oaks*, 59 Cal. 94.

**Florida.**—*Levy v. Smith*, 4 Fla. 154.

**Illinois.**—*Seigfried v. Raymond*, 190 Ill. 424; *Johnson v. Roberts*, 102 Ill. 655; *Leper v. Pulsifer*, 37 Ill. 110; *Durbin v. People*, 54 Ill. App. 101.

**Indiana.**—*State v. Halter*, 149 Ind. 292; *Durham v. State*, 117 Ind. 477; *Burgh v. State*, 108 Ind. 135; *Roseberry v. Huff*, 27 Ind. 12; *Buckingham v. State*, 17 Ind. 305; *Boyer v. Jones*, 14 Ind. 354; *State v. Lenfesty*, 10 Ind. 397; *Burns v. State*, 5 Ind. App. 385; *State v. Emshwiller*, 6 Blackf. (Ind.) 76.

**Iowa.**—*Marion County v. Kruidenier*, 72 Iowa 92; *Washington County v. Miller*, 14 Iowa 584.

**Kentucky.**—*Com. v. Bond*, 107 Ky. 269; *Lee v. Com.*, 6 Dana (Ky.) 311; *Oldhams v. Jones*, 5 B. Mon. (Ky.) 458; *Peacock Distilling Co. v. Com.*, 62 S. W. Rep. 272, 22 Ky. L. Rep. 1948; *Bybee v. Smith*, (Ky. 1900) 57 S. W. Rep. 789; *Com. v. Lauth*, (Ky. 1900) 56 S. W. Rep. 519; *Com. v. Toncray*, (Ky. 1899) 52 S. W. Rep. 797; *Alexander v. Com.*, 1 Bibb (Ky.) 515; *Olds v. Com.*, 3 A. K. Marsh. (Ky.) 465.

**Louisiana.**—*Griggery Constr. Co. v. Freeman*, 108 La. 435; *Merchants' Mut. Ins. Co. v. Assessors*, 40 La. Ann. 372.

**Maine.**—*Orland v. County Com'rs*, 76 Me. 460.

**Massachusetts.**—*Hopkins v. Reading*, 170 Mass. 568; *Ashley v. Bristol County*, 166 Mass. 216; *National Bank of Commerce v. New Bed-*

*ford*, 155 Mass. 313; *Lanesborough v. Berkshire County*, 131 Mass. 424; *Westhampton v. Searle*, 127 Mass. 502; *Tobey v. Wareham*, 2 Allen (Mass.) 594; *Otis Co. v. Ware*, 8 Gray (Mass.) 509.

**Minnesota.**—*McCormick v. Fitch*, 14 Minn. 252.

**Missouri.**—*State v. Welch*, 28 Mo. 600; *State v. Ebbs*, 89 Mo. App. 95.

**Nevada.**—*State v. Diamond Valley Live Stock, etc., Co.*, 21 Nev. 86; *State v. Central Pac. R. Co.*, 17 Nev. 259; *State v. Washoe County*, 5 Nev. 317, 7 Nev. 83.

**New Hampshire.**—*Kent v. Exeter*, 68 N. H. 469; *Farmington v. Dowing*, 67 N. H. 441; *Perley v. Parker*, 20 N. H. 263; *Tucker v. Aiken*, 7 N. H. 113.

**New Jersey.**—*State v. Comptroller*, 54 N. J. L. 135; *State v. Parker*, 34 N. J. L. 49; *Young v. Parker*, 33 N. J. L. 192; *State v. Appgar*, 31 N. J. L. 258.

**North Carolina.**—*State v. Bell*, Phil. L. (61 N. Car.) 76; *Green v. Allen*, Bush. L. (44 N. Car.) 228.

**Pennsylvania.**—*Fox's Appeal*, 112 Pa. St. 337; *Com. v. Cooke*, 50 Pa. St. 201; *Harper v. Farmers', etc., Bank*, 7 W. & S. (Pa.) 204.

**Rhode Island.**—*Narragansett Pier Co. v. Assessors*, 17 R. I. 452.

**South Carolina.**—*McNulty v. Wilson*, 4 Strobb. L. (S. Car.) 231; *Butler v. Bailly*, 2 Bay (S. Car.) 244; *State v. Allen*, 2 McCord L. (S. Car.) 55.

**Texas.**—*Galbraith v. State*, 33 Tex. Crim. 331; *Caldwell v. State*, 14 Tex. App. 171; *Haugh v. State*, 12 Tex. App. 343; *Berry v. State*, 10 Tex. App. 315; *Mock v. State*, 11 Tex. App. 56.

**Vermont.**—*Rowell v. Horton*, 58 Vt. 1; *Bartlett v. Wilson*, 59 Vt. 23; *Meserve v. Folsom*, 62 Vt. 504.

**Virginia.**—*Com. v. Brown*, 91 Va. 762, *citing* 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 206; *Washington v. Com.*, 2 Va. Cas. 258.

**Wisconsin.**—*State v. Wolfrum*, 88 Wis. 481.

See generally cases cited *infra*, this subsection; and for the assessment of taxable property omitted by the taxpayer in making return, see also *infra*, this section, 7. *Assessment of Escaped Property—Reassessment.*

**Montana—List from Employers of Employees Required for Poll Tax.**—*State v. Owsley*, 17 Mont. 94.

**Forfeiture of Land for Continued Failure to Return.**—*State v. Tavener*, 49 W. Va. 696; *Cecil v. Clark*, 44 W. Va. 702; *State v. Low*, 46

Although a return omits taxable property or contains erroneous statements of fact, it is generally held not to be false or fraudulent, within the meaning of the statute, if no bad faith or negligence is chargeable to the taxpayer; and the failure to make any return is, under some circumstances, excusable.<sup>1</sup>

**Void Assessments.** — Statutes denying to taxpayers who fail to make return of their property the right to have their assessments reviewed have no application where the assessments are void.<sup>2</sup>

(2) *Effect of Statutes* — (a) *Upon Exercise of Power to Assess.* — Compliance with statutory provisions requiring persons to return their property for taxation, and assessing officers to make demand upon them to do so, are not conditions precedent to the making of the assessment; nor is the return when made conclusive upon the assessing officers, but only evidence for their information. It is their duty in every case to discover and list all the property for which the taxpayer is liable to taxation, and to exercise their own judgment in fixing its value, using every means of information available to them for the purpose.<sup>3</sup> The assessor has the power to add omitted property to the list

W. Va. 451. See also *infra*, this title, XVI. *Forfeiture for Noncompliance with Tax Laws.*

1. *Requisites of Statutory Offense* — *United States.* — *Hazzard v. O'Bannon*, 36 Fed. Rep. 854.

*Alabama.* — *Smith v. State*, 43 Ala. 344.

*Indiana.* — *Powell v. Madison*, 21 Ind. 335.

*Iowa.* — *Marion County v. Galvin*, 73 Iowa 18.

*Massachusetts.* — *Troy Cotton, etc., Manufactory v. Fall River*, 167 Mass. 517; *Wright v. Lowell*, 166 Mass. 298; *Lowell v. Middlesex County*, 3 Allen (Mass.) 546.

*Michigan.* — *Gratwick, etc., Lumber Co. v. Oscoda*, 97 Mich. 221.

*Nebraska.* — *Lynam v. Anderson*, 9 Neb. 367.

*Nevada.* — *State v. Western Union Tel. Co.*, 4 Nev. 338.

*New Hampshire.* — *Parsons v. Durham*, 70 N. H. 44; *Amoskeag Mfg. Co. v. Manchester*, 70 N. H. 200; *Melvin v. Wear*, 56 N. H. 436; *Perry's Petition*, 16 N. H. 44; *Walker v. Cochran*, 8 N. H. 166.

*New Jersey.* — *Port Colden Bldg., etc., Assoc. v. Nunn*, 44 N. J. L. 354.

*Wyoming.* — *Albany Mut. Bldg. Assoc. v. Laramie*, 10 Wyo. 54.

*Contra*, *German Sav. Bank v. Archbold*, 15 Blatchf. (U. S.) 398, *reversed* on other grounds 104 U. S. 708; *Buchanan v. Cook*, 70 Vt. 168; *Newell v. Whitingham*, 58 Vt. 341, *Ross, J., dissenting*.

2. *Void Assessments.* — *Assessors v. Pullman's Palace-Car Co.*, (C. C. A.) 60 Fed. Rep. 37, *affirming* 55 Fed. Rep. 206; *Connecticut Valley Lumber Co. v. Monroe*, 71 N. H. 473; *Walker v. Cochran*, 8 N. H. 166; *Timmerman v. St. John*, 21 Can. Sup. Ct. 691. See also *Newark Brass Works v. Assessors*, 63 N. J. L. 500.

3. *Return Not a Condition Precedent to Assessment* — *When Made Not Conclusive* — *United States.* — *Custer County v. Anderson*, (C. C. A.) 68 Fed. Rep. 341.

*Alabama.* — *State Auditor v. Jackson County*, 65 Ala. 142; *Lott v. Hubbard*, 44 Ala. 593.

*Arkansas.* — *Kinsworthy v. Mitchell*, 21 Ark. 145.

*California.* — *Kern Valley Water Co. v. Kern County*, 137 Cal. 511; *San Francisco v. La Societe Francaise, etc.*, 131 Cal. 612; *Savings, etc., Soc. v. San Francisco*, 131 Cal. 356, *cited* *Security Sav. Bank v. San Francisco*, 132 Cal.

600; *People v. National Bank*, 123 Cal. 63, 69 Am. St. Rep. 32; *Bode v. Holtz*, 65 Cal. 106.

*Colorado.* — *People v. Arapahoe County*, 27 Colo. 86.

*Connecticut.* — *Hartford v. Champion*, 58 Conn. 268, 54 Conn. 436.

*Florida.* — *King v. Gwynn*, 14 Fla. 32.

*Georgia.* — *Bohler v. Verdery*, 92 Ga. 715; *Collier v. Morrow*, 90 Ga. 148; *State v. Southwestern R. Co.*, 70 Ga. 11.

*Idaho.* — *Co-operative Sav., etc., Assoc. v. Green*, 5 Idaho 660.

*Illinois.* — *Tolman v. Salomon*, 191 Ill. 202; *Morris v. Jones*, 150 Ill. 542; *Illinois, etc., R., etc., Co. v. Stookey*, 122 Ill. 358; *Humphreys v. Nelson*, 115 Ill. 45; *Felsenthal v. Johnson*, 104 Ill. 21; *St. Louis, etc., R. Co. v. Surrell*, 88 Ill. 535; *Pacific Hotel Co. v. Lieb*, 83 Ill. 602; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *Republic L. Ins. Co. v. Pollak*, 75 Ill. 292; *Chicago, etc., R. Co. v. Bureau County*, 25 Ill. 475.

*Indiana.* — *Chicago, etc., R. Co. v. John*, 150 Ind. 113.

*Kentucky.* — *Com. v. Holliday*, 98 Ky. 616; *Spalding v. Com.*, 88 Ky. 135; *Baldwin v. Shine*, 84 Ky. 502; *Com. v. Engle*, (Ky. 1899) 52 S. W. Rep. 811.

*Louisiana.* — *State v. Louisiana Mut. Ins. Co.*, 19 La. Ann. 474.

*Massachusetts.* — *Batchelder v. Cambridge*, 176 Mass. 384; *White v. New Bedford*, 160 Mass. 217; *Vaughan v. Street Com'rs*, 154 Mass. 143; *Noyes v. Hale*, 137 Mass. 266; *Newburyport v. Essex County*, 12 Met. (Mass.) 211; *Porter v. Norfolk County*, 5 Gray (Mass.) 365; *Winnisimmet Co. v. Assessors*, 6 Cush. (Mass.) 477; *Lincoln v. Worcester*, 8 Cush. (Mass.) 55.

*Michigan.* — *Bowman v. Montcalm Circuit Judge*, 129 Mich. 608, 8 Detroit Leg. N. 1044; *Gratwick, etc., Lumber Co. v. Oscoda*, 97 Mich. 221. See also *Turner v. Dickerman*, 95 Mich. 1.

*Minnesota.* — *Thompson v. Tinkcom*, 15 Minn. 295, *cited* *State v. St. Paul Trust Co.*, 76 Minn. 423.

*Missouri.* — *State v. Stamm*, 165 Mo. 73; *State v. Reed*, 159 Mo. 77; *State v. Hoyt*, 123 Mo. 348.

*Montana.* — *McMillan v. Carter*, 6 Mont. 215.

*Nebraska.* — *Lynam v. Anderson*, 9 Neb. 367; *Roe v. St. John*, 7 Neb. 139; *Jones v. Seward County*, 5 Neb. 561.

rendered by the owner at any time before the assessment is completed, by reason alone of the authority explicitly granted by law.<sup>1</sup>

(b) **Return as an Estoppel.** — A taxpayer who lists his property for taxation is generally bound by the statements he makes as to its extent and value, and estopped from disputing an assessment made in conformity therewith, in the absence of fraud, accident, mistake, or other reasonable excuse,<sup>2</sup> or want of jurisdiction on the part of the assessing officers rendering the assessment void.<sup>3</sup>

*Nevada.* — *State v. Western Union Tel. Co.*, 4 Nev. 338; *State v. Kruttschnitt*, 4 Nev. 178.  
*New York.* — *People v. Tax, etc.*, Com'r's, 99 N. Y. 254, affirming 31 Hun (N. Y.) 568; *People v. Tax, etc.*, Com'r's, 76 N. Y. 64; *People v. Tax, etc.*, Com'r's, (Supm. Ct. Gen. T.) 46 How. Pr. (N. Y.) 315.

*Oklahoma.* — *Russell v. Green*, 10 Okla. 340; *Pentecost v. Stiles*, 5 Okla. 500.

*Oregon.* — *Oregon, etc.*, R. Co. v. Lane County, 23 Oregon 386; *Oregon, etc.*, Mortg. Sav. Bank v. Jordan, 16 Oregon 113.

*Pennsylvania.* — *Williamson's Estate*, 153 Pa. St. 508, 32 W. N. C. (Pa.) 93, affirming 1 Pa. Dist. 159; *Com. v. Lehigh Valley R. Co.*, 104 Pa. St. 89; *Delaware, etc.*, Canal Co. v. Com., 43 Pa. St. 227.

*South Carolina.* — *State v. Covington*, 35 S. Car. 245; *Ex p. Lynch*, 16 S. Car. 32.

*South Dakota.* — *State v. State Board of Assessment*, 3 S. Dak. 338.

*Texas.* — *San Antonio St. R. Co. v. San Antonio*, 22 Tex. Civ. App. 341; *Moody v. Galveston*, 21 Tex. Civ. App. 16; *Hoeffling v. San Antonio*, 15 Tex. Civ. App. 257; *Cook v. Galveston, etc.*, R. Co., 5 Tex. Civ. App. 644.

*Vermont.* — *Taylor v. Moore*, 63 Vt. 60; *Weatherhead v. Guilford*, 62 Vt. 327; *Bartlett v. Wilson*, 60 Vt. 644; *Bullock v. Guilford*, 59 Vt. 516; *Hows v. Bassett*, 56 Vt. 141.

*Wisconsin.* — *State v. Gaylord*, 73 Wis. 306; *Lawrence v. Janesville*, 46 Wis. 364.

*Wyoming.* — *Johnson County v. Searight Cattle Co.*, 3 Wyo. 777.

**Contra** under some statutes of the requirement that assessing officers make demand for a list, which is held to be jurisdictional. *State v. Cummings*, 151 Mo. 49; *Cape Girardeau v. Buehrmann*, 148 Mo. 198; *State v. Seahorn*, 139 Mo. 582; *Northern Pac. R. Co. v. Carland*, 5 Mont. 146, followed *Powder River Cattle Co. v. Custer County*, 45 Fed. Rep. 323.

The presumption will be indulged that the assessors discharged this duty in the absence of evidence to the contrary. *State v. Seahorn*, 139 Mo. 582.

**Provision for Examination of Taxpayer and Other Witnesses Directory.** — *People v. National Bank*, 123 Cal. 63, 69 Am. St. Rep. 32, distinguishing *Weyse v. Crawford*, 85 Cal. 196, and approving *Thompson v. Tinkcom*, 15 Minn. 295.

**Return of Residence for Purposes of Taxation Not Conclusive.** — *Goldsbury v. Warwick*, 112 Mass. 384.

**Statute Limiting Time Within Which Assessor May Vary Return.** — *Bohler v. Verdery*, 92 Ga. 715 (subsequent changes in valuation void).

**Former Assessment as a Basis**, where taxpayer fails to make return. *Vaughan v. Street Com'r's*, 154 Mass. 143; *Batchelder v. Cambridge*, 176 Mass. 384; *Ex p. Lynch*, 16 S. Car. 32; *Bartlett v. Wilson*, 60 Vt. 644.

**Lowering Valuation Made by Return — Lowered Valuation Valid.** — *Bowman v. Montcalm Circuit Judge*, 129 Mich. 608, 8 Detroit Leg. N. 1044. See also *Collier v. Morrow*, 90 Ga. 149.

**Burden of Proof — Evidence.** — The fact of return need not appear on the record, and where the statute withdraws the right to have the assessment reviewed where no return is made, the burden is upon the taxpayer claiming the right to show that he is not in default. *State v. Sadler*, 21 Nev. 13.

**1. Adding Property Omitted.** — *San Antonio St. R. Co. v. San Antonio*, 22 Tex. Civ. App. 341.

**2. Return as an Estoppel — General Rule — California.** — *Lake County v. Sulphur Bank Quicksilver Min. Co.*, 68 Cal. 14; *People v. Stockton, etc.*, R. Co., 49 Cal. 414.

*Colorado.* — *Price v. Kramer*, 4 Colo. 546.

*Connecticut.* — *Greenwoods Co. v. New Hartford*, 65 Conn. 461; *Randell v. Bridgeport*, 63 Conn. 321; *Albany Brewing Co. v. Meriden*, 48 Conn. 244; *Ives v. North Canaan*, 33 Conn. 402.

*Florida.* — *Tampa v. Mugge*, 40 Fla. 326; *Kissimsee City v. Drought*, 26 Fla. 1, 23 Am. St. Rep. 546.

*Illinois.* — *Tolman v. Raymond*, 202 Ill. 197; *Dennison v. Williamson County*, 153 Ill. 516; *People v. Atkinson*, 103 Ill. 45.

*Indiana.* — *Telle v. Green*, 28 Ind. 184; *Conwell v. Connersville*, 8 Ind. 358.

*Iowa.* — *Leonard v. Madison County*, 64 Iowa 418.

*Louisiana.* — *Factors, etc.*, Ins. Co. v. Levi, 42 La. Ann. 432.

*Massachusetts.* — *Pingree v. Berkshire County*, 102 Mass. 76.

*Michigan.* — *Sage v. Burlingame*, 74 Mich. 120.

*Minnesota.* — *Faribault Water Works Co. v. Rice County*, 44 Minn. 12.

*Missouri.* — *Lexington v. Lafayette County Bank*, 165 Mo. 671; *Mathews v. Kansas*, 80 Mo. 231.

*New York.* — *Cerbat Min. Co. v. State*, 29 Hun (N. Y.) 81.

*Tennessee.* — *Shelby County v. Mississippi, etc.*, R. Co., 16 Lea (Tenn.) 401.

*Texas.* — *Scollard v. Dallas*, 16 Tex. Civ. App. 620.

*Vermont.* — *Bemis v. Phelps*, 41 Vt. 1.

See also *infra*, IX. 6. f. (3) (g) *Waiver and Estoppel*.

**But Estoppel Arises**, it has been held, only where representations have been made to the assessor to be acted on and have misled them. *Troy Cotton, etc., Manufactory v. Fall River*, 167 Mass. 517. See also *Dunnell Mfg. Co. v. Pawtucket*, 7 Gray (Mass.) 277.

**3. Taxpayer Not Estopped by Return Where Assessment Void — United States.** — *Wilmington v. Ricaud*, (C. C. A.) 90 Fed. Rep. 214.

*Connecticut.* — *Phelps v. Thurston*, 47 Conn. 477.

*d.* EXAMINATION OF WITNESSES, PRODUCTION OF BOOKS AND PAPERS. — In some jurisdictions assessing officers in fixing the extent and value of a taxpayer's property are expressly authorized by statute to swear and examine witnesses and compel the production of books and papers.<sup>1</sup>

*e.* NAMING THE TAXPAYER — (1) *General Rules.* — The revenue laws usually direct the assessment to be made against the person liable for the taxes, and in his name. This requirement is held to be for the benefit and protection of the taxpayer, and mandatory in the absence of legislation to the contrary; noncompliance therewith by the assessing officers rendering the assessment void.<sup>2</sup> In many jurisdictions, however, it is expressly declared that no omissions or other irregularities in the name shall affect the validity of the assessment; or other provisions exist which, to a greater or less extent, render requirements as to name directory merely, and convert the assessment from a proceeding *in personam* into one *in rem* against the property.<sup>3</sup>

*Georgia.* — *White v. State*, 51 Ga. 252.

*Iowa.* — *Salter v. Burlington*, 42 Iowa 531.

*Kentucky.* — *Com. v. Hamilton*, 72 S. W. Rep. 744, 24 Ky. L. Rep. 1944.

*Massachusetts.* — *Charlestown v. Middlesex County*, 109 Mass. 270.

*Missouri.* — *State v. Burrough*, 174 Mo. 700.

*Nebraska.* — *Chicago, etc., R. Co. v. Cass County*, 51 Neb. 369.

*Ohio.* — *Sommers v. Boyd*, 48 Ohio St. 648.

*Utah.* — *Centennial Eureka Min. Co. v. Juab County*, 22 Utah 395.

*Wisconsin.* — *State v. Bellew*, 86 Wis. 189.

*Compare* *Republic L. Ins. Co. v. Pollak*, 75 Ill. 292; *Telle v. Green*, 28 Ind. 184; *American Union Express Co. v. St. Joseph*, 66 Mo. 675, 27 Am. Rep. 382.

1. *Examination of Witnesses, Production of Books and Papers.* — See for illustration: *People v. National Bank*, 123 Cal. 63, 69 Am. St. Rep. 32; *Coöperative Bldg., etc., Assoc. v. State*, 156 Ind. 463; *State v. Workingmen's Bldg., etc., Assoc.*, 152 Ind. 278; *State v. Real Estate Bldg., etc., Assoc.*, 151 Ind. 502; *Satterwhite v. State*, 142 Ind. 1; *State v. Reynolds*, 108 Ind. 353; *Burns v. State*, 5 Ind. App. 385; *Thompson v. Tinkcom*, 15 Minn. 295. See also *supra*, this subdivision, *c. Returns by Taxpayers*; *infra*, 11. *Appeal and Review.*

*The Power to Make and Revise Assessments* is judicial, and carries with it the power to administer oaths and examine witnesses in determining the ownership and valuation of property. *Satterwhite v. State*, 142 Ind. 1; *Burns v. State*, 5 Ind. App. 385; *Williamson's Estate*, 1 Pa. Dist. 159, 11 Pa. Co. Ct. 235, *modified* on other grounds 153 Pa. St. 508.

*Statutes Liberally Construed.* — *Coöperative Bldg., etc., Assoc. v. State*, 156 Ind. 463.

2. *Requirements as to Name Mandatory.* — See generally cases *infra*, this section.

*Waiver — Estoppel — United States.* — *The North Cape*, 6 Biss. (U. S.) 505.

*Florida.* — *Hughey v. Winborne*, (Fla. 1902) 33 So. Rep. 249.

*Louisiana.* — *Hood v. New Orleans*, 49 La. Ann. 1461; *Factors, etc., Ins. Co. v. Levi*, 42 La. Ann. 432; *Carter v. New Orleans*, 33 La. Ann. 816.

*New Hampshire.* — *Randall v. Watson*, 70 N. H. 236; *Nelson v. Pierce*, 6 N. H. 194.

*New York.* — *Parsons v. Parker*, 80 Hun (N. Y.) 281; *Matter of Reid*, (County Ct.) 31 Misc.

(N. Y.) 156, *reversed* on other grounds 52 N. Y. App. Div. 243.

*Oregon.* — *Kirkwood v. Ford*, 34 Oregon 552.

*Estoppel.* — An assessment to the wrong person is no estoppel to the state owning the property or to its successors in title to show the assessment void. *Slattery v. Heilperin*, (La. 1902) 34 So. Rep. 139; *Totten v. Nighbert*, 41 W. Va. 800 [*cited* *Cecil v. Clark*, 44 W. Va. 702]; *Rich v. Braxton*, 158 U. S. 375, *affirming* 47 Fed. Rep. 178.

*Designating Name by Ditto Marks Held Permissible.* — *Hoyt v. Clark*, 64 Minn. 139, *cited* *Doherty v. Real Estate Title Ins., etc., Co.*, 85 Minn. 518.

3. *Requirements as to Name Directory Merely — United States.* — *Witherspoon v. Duncan*, 4 Wall. (U. S.) 210; *The North Cape*, 6 Biss. (U. S.) 505.

*Arkansas.* — *Garibaldi v. Jenkins*, 27 Ark. 453; *Kinsworthy v. Mitchell*, 21 Ark. 145; *Merrick v. Hutt*, 15 Ark. 331.

*California.* — *Klumpke v. Baker*, 131 Cal. 80, *cited* *Davis v. Pacific Imp. Co.*, 137 Cal. 245; *Landregan v. Peppin*, 86 Cal. 122; *People v. Home Ins. Co.*, 29 Cal. 534.

*Florida.* — *Stackpole v. Hancock*, 40 Fla. 362.

*Illinois.* — *Union Trust Co. v. Weber*, 96 Ill. 346; *Kennedy v. St. Louis, etc., R. Co.*, 62 Ill. 395.

*Indiana.* — *Helms v. Wagner*, 102 Ind. 385; *Schrodt v. Deputy*, 88 Ind. 90; *Stilz v. Indianapolis*, 81 Ind. 582; *Small v. Lawrenceburgh*, 128 Ind. 231.

*Kentucky.* — *Woolley v. Louisville*, 71 S. W. Rep. 893, 24 Ky. L. Rep. 1357.

*Maryland.* — *Moffat v. Calvert County*, (Md. 1903) 54 Atl. Rep. 960; *O'Neal v. Virginia, etc., Bridge Co.*, 18 Md. 1, 79 Am. Dec. 669.

*Massachusetts.* — *Westhampton v. Searle*, 127 Mass. 502; *Tyler v. Hardwick*, 6 Met. (Mass.) 470.

*Michigan.* — *Menominee v. S. K. Martin Lumber Co.*, 119 Mich. 201; *H. M. Loud, etc., Lumber Co. v. Hagar*, 118 Mich. 452; *Hooker v. Bond*, 118 Mich. 255; *Iron Star Co. v. Wehse*, 117 Mich. 487; *Hinds v. Belvidere Tp.*, 107 Mich. 662; *Auditor Gen. v. Keweenaw Assoc.*, 107 Mich. 405; *Fletcher v. Post*, 104 Mich. 424; *Bradley v. Bouchard*, 85 Mich. 18; *Hill v. Graham*, 72 Mich. 659; *Michigan Dairy Co. v. McKinlay*, 70 Mich. 574; *Petrie Lumber Co. v. Collins*, 66 Mich. 64.



(2) *Owner or Occupant — Unknown Owner — (a) In General.* — The statutes usually contain a general provision requiring assessments to be made in the name of the owner of the property, if known, or, in the case of real estate, in the name of the occupant or person in possession; if these directions cannot be complied with, the property to be assessed as belonging to an unknown owner. Except as modified by other statutory provisions, strict compliance with such directions is necessary to a valid assessment.<sup>1</sup>

*Minnesota.* — Minneapolis R. Terminal Co. v. Minnesota Debenture Co., 81 Minn. 66.

*Mississippi.* — Powell v. McKee, 81 Miss. 229; Dunn v. Winston, 31 Miss. 135.

*Missouri.* — State v. Hurt, 113 Mo. 90.

*Montana.* — Birney v. Warren, (Mont. 1903) 72 Pac. Rep. 293; Cobban v. Hinds, 23 Mont. 338.

*Nebraska.* — Carman v. Harris, 61 Neb. 635; Roads v. Estabrook, 35 Neb. 297; Lynam v. Anderson, 9 Neb. 367. See also Chamberlain Banking House v. Woolsey, 60 Neb. 516.

*New Jersey.* — State v. Matthews, 40 N. J. L. 269; State v. Vanderbilt, 33 N. J. L. 38.

*New York.* — Haight v. New York, 99 N. Y. 280; Sanders v. Carley, 83 N. Y. App. Div. 193; Cottle v. Cary, 73 N. Y. App. Div. 54, affirmed without opinion 173 N. Y. 624; People v. Barker, 67 Hun (N. Y.) 649, 21 N. Y. Supp. 704; Collins v. Long Island City, 56 Hun (N. Y.) 647, 10 N. Y. Supp. 946; Powell v. Jenkins, (Supm. Ct. Spec. T.) 14 Misc. (N. Y.) 83.

*North Carolina.* — Peebles v. Taylor, 118 N. Car. 165, 121 N. Car. 38.

*North Dakota.* — Sykes v. Beck, (N. Dak. 1903) 96 N. W. Rep. 844; Hertzler v. Cass County, (N. Dak. 1903) 96 N. W. Rep. 294.

*Pennsylvania.* — Strauch v. Shoemaker, 1 W. & S. (Pa.) 166; Glass v. Gilbert, 58 Pa. St. 266.

*Tennessee.* — Anderson v. Post, (Tenn. Ch. 1896) 38 S. W. Rep. 283.

*Washington.* — Woodward v. Taylor, (Wash. 1903) 73 Pac. Rep. 785, overruling contrary construction of Washington statutes in Northern Pac. R. Co. v. Galvin, 85 Fed. Rep. 811; Coolidge v. Pierce County, 28 Wash. 95.

*West Virginia.* — Boggess v. Scott, 48 W. Va. 316 [cited Bailey v. McClagherty, 48 W. Va. 546]; Kendall v. Scott, 48 W. Va. 251.

*Canada.* — McCarrall v. Watkins, 19 U. C. Q. B. 248; London v. Watt, 22 Can. Sup. Ct. 300, affirming 19 Ont. App. 675, and citing Nickle v. Douglas, 37 U. C. Q. B. 51.

**Under a Constitutional Prohibition** against the enactment of local or special laws "authorizing the creation, extension, or impairing of liens," or "prescribing the effect of judicial sales of real estate," a statute declaring that claims for overdue taxes in cities of the second class shall be liens on real estate, whether the owner is named or not, and a judicial sale thereunder shall vest a good title in the purchaser, is void. Safe Deposit, etc., Co. v. Fricke, 152 Pa. St. 231, 31 W. N. C. (Pa.) 324, followed McKay v. Trainor, 152 Pa. St. 242, 31 W. N. C. (Pa.) 320.

**Registering Titles for Purposes of Assessment.** — Zink v. McManus, 121 N. Y. 259, reversing 49 Hun (N. Y.) 583; Safe Deposit, etc., Co. v. Fricke, 152 Pa. St. 231, 31 W. N. C. (Pa.) 324, followed McKay v. Trainor, 152 Pa. St. 242, 31 W. N. C. (Pa.) 329; Pittsburg v. Magee, 15

Pa. Super. Ct. 264; Philadelphia v. Unknown Owner, 20 Pa. Super. Ct. 203, followed Philadelphia v. Allen, 20 Pa. Super. Ct. 209; Boggess v. Scott, 48 W. Va. 316; Cunningham v. Brown, 39 W. Va. 588.

**Assessments in Name of Person Previously Assessed or Who Makes Return of Property.** — Flanagan v. Dunne, (C. C. A.) 105 Fed. Rep. 828; Hughey v. Winborne, (Fla. 1902) 33 So. Rep. 249; Stackpole v. Hancock, 40 Fla. 362; Baldwin v. Washington County, 85 Md. 145, writ of error dismissed 168 U. S. 705; Frederick County v. Claggett, 31 Md. 210; McGillin v. Chase County, 39 Neb. 422; Adams v. Sleeper, 64 Vt. 544.

**1. Owners or Occupants — Unknown Owner — United States.** — Bird v. Benlisa, 142 U. S. 664; Lewis v. Withers, 44 Fed. Rep. 165; Tracy v. Reed, 38 Fed. Rep. 69; Greenwalt v. Tucker, 3 McCrary (U. S.) 166.

*Alabama.* — Crook v. Anniston City Land Co., 93 Ala. 4; State v. Sloss, 87 Ala. 119; Lassitter v. Lee, 68 Ala. 287.

*California.* — Klumpke v. Baker, 131 Cal. 80; Gwynn v. Dierssen, 101 Cal. 563; Emeric v. Alvarado, 90 Cal. 444; Jatunn v. O'Brien, 89 Cal. 57; Greenwood v. Adams, 80 Cal. 74; Pearson v. Creed, 78 Cal. 144; Klumpke v. Baker, 68 Cal. 559; Lake County v. Sulphur Bank Quicksilver Min. Co., 66 Cal. 17; Daly v. Ah Goon, 64 Cal. 512; Bosworth v. Webster, 64 Cal. 1; San Francisco v. Phelan, 61 Cal. 617; Brady v. Dowden, 59 Cal. 51; Hearst v. Egglestone, 55 Cal. 365; Grotefend v. Ultz, 53 Cal. 666; Crawford v. Schmidt, 47 Cal. 617; People v. Whipple, 47 Cal. 591; Blatner v. Davis, 32 Cal. 328; Brunn v. Murphy, 29 Cal. 326; Bidleman v. Brooks, 28 Cal. 72; Moss v. Shear, 25 Cal. 38, 85 Am. Dec. 94, cited Smith v. Davis, 30 Cal. 536; Kelsey v. Abbott, 13 Cal. 609.

*Connecticut.* — Smith v. Read, 51 Conn. 10.

*Florida.* — McKeown v. Collins, 38 Fla. 276; Daniel v. Taylor, 33 Fla. 636; Brown v. Castellow, 33 Fla. 204; L'Engle v. Florida Cent., etc., R. Co., 21 Fla. 352.

*Illinois.* — Bell v. Barnard, 37 Ill. App. 275.

*Indiana.* — Mullikin v. Reeves, 71 Ind. 281; Madison v. Whitney, 21 Ind. 261.

*Iowa.* — Henkle v. Keota, 68 Iowa 334; Parker v. Cochran, 64 Iowa 757.

*Kentucky.* — O'Callaghan v. Owensboro, 64 S. W. Rep. 619, 23 Ky. L. Rep. 1099; Spalding v. Thompson, (Ky. 1895) 30 S. W. Rep. 20; Payne v. Arthur, (Ky. 1895) 29 S. W. Rep. 860; National Bank v. Licking Valley Land, etc., Co., (Ky. 1893) 22 S. W. Rep. 881; Wheeler v. Bramel, (Ky. 1888) 8 S. W. Rep. 199; Johnson v. M'Intire, 1 Bibb (Ky.) 295; Bell v. Fry, 5 Dana (Ky.) 341.

*Louisiana.* — Jopling v. Chachere, 107 La. 522; Webre v. Lutchter, 45 La. Ann. 574; Robinson v. Williams, 45 La. Ann. 485; Norres v.

If the Name of the Owner Was Known to the assessing officers, or might have been ascertained by them from the public records or other available sources of information, an assessment to an unknown owner is void.<sup>1</sup>

Slight Errors in the name of the taxpayer, the addition of other names to that of the real owner or of words *descriptio personæ*, and the like, if not in

Hays, 44 La. Ann. 907; *McWilliams v. Michel*, 43 La. Ann. 984; *Maspereau v. New Orleans*, 38 La. Ann. 400; *Denegre v. Gérac*, 35 La. Ann. 954; *Davenport v. Knox*, 34 La. Ann. 407; *Baton Rouge Oil Works*, 34 La. Ann. 255; *Le Blanc v. Blodgett*, 34 La. Ann. 107; *Hayes v. Viator*, 33 La. Ann. 1162; *Stafford v. Twitchell*, 33 La. Ann. 520; *Person v. O'Neal*, 32 La. Ann. 228; *Workingmen's Bank v. Lannes*, 30 La. Ann. 871; *Thibodaux v. Keller*, 29 La. Ann. 508; *Slattery v. Heilperin*, (La. 1902) 34 So. Rep. 139.

*Maine*. — *Morrill v. Lovett*, 95 Me. 165; *Foxcroft v. Straw*, 86 Me. 76; *Herriman v. Stowers*, 43 Me. 497; *Barker v. Blake*, 36 Me. 433; *Augusta Bank v. Augusta*, 36 Me. 255; *Barker v. Hesselstine*, 27 Me. 354; *Brown v. Veazie*, 25 Me. 359; *Moulton v. Blaisdell*, 24 Me. 283; *Lunt v. Wormell*, 19 Me. 100.

*Massachusetts*. — *Raymond v. Worcester*, 172 Mass. 205; *Desmond v. Babbitt*, 117 Mass. 233; *Welles v. Battelle*, 11 Mass. 477; *Pease v. Whitney*, 5 Mass. 380; *Sargent v. Bean*, 7 Gray (Mass.) 125.

*Michigan*. — *Mann v. Carson*, 120 Mich. 631; *Pieotter v. Whaley*, 80 Mich. 257; *Blackwood v. Van Vleit*, 30 Mich. 118.

*Mississippi*. — *Redmond v. Banks*, 60 Miss. 293; *Dunn v. Winston*, 31 Miss. 135; *Green v. Craft*, 28 Miss. 70; *Baskins v. Doe*, 24 Miss. 431.

*Missouri*. — *St. Louis v. Wenneker*, 145 Mo. 230, 68 Am. St. Rep. 561; *Springfield v. Springfield First Nat. Bank*, 87 Mo. 441; *Jefferson v. Mock*, 74 Mo. 61; *Hume v. Wainscott*, 46 Mo. 145; *Abbott v. Lindenbower*, 42 Mo. 162; *State v. Gibson*, 12 Mo. App. 1.

*Montana*. — *Birney v. Warren*, (Mont. 1903) 72 Pac. Rep. 293.

*Nebraska*. — *Lynam v. Anderson*, 9 Neb. 367. *Nevada*. — *State v. Ernst*, 26 Nev. 113, citing 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 213, 214.

*New Hampshire*. — *Langley v. Batchelder*, 69 N. H. 566; *Lime Rock Nat. Bank v. Henry*, 69 N. H. 298; *Benton v. Merrill*, 68 N. H. 369; *Burpee v. Russell*, 64 N. H. 62; *Fowler v. Springfield*, 64 N. H. 108; *Perham v. Haverhill Fibre Co.*, 64 N. H. 2; *French v. Spalding*, 61 N. H. 395; *Thompson v. Ela*, 60 N. H. 562; *Perley v. Stanley*, 59 N. H. 587; *Bowles v. Clough*, 55 N. H. 389; *Cocheco Mfg. Co. v. Strafford*, 51 N. H. 471; *Nashua Sav. Bank v. Nashua*, 46 N. H. 389; *Dewey v. Stratford*, 42 N. H. 286; *Brewster v. Hough*, 10 N. H. 138; *Cornish Bridge v. Richardson*, 8 N. H. 207; *Nelson v. Pierce*, 6 N. H. 196.

*New Jersey*. — *Earles v. Ramsay*, 61 N. J. L. 194; *Reese v. Sherrer*, 49 N. J. L. 610; *State v. Union Tp.*, 36 N. J. L. 309; *State v. Hardin*, 34 N. J. L. 79; *State v. Vanderbilt*, 33 N. J. L. 38.

*New York*. — *Dubois v. Webster*, 7 Hun (N. Y.) 371.

*North Carolina*. — *Willard v. Blount*, 11 Ired. L. (33 N. Car.) 624; *Morrison v. McLauchlin*, 88 N. Car. 251.

*North Dakota*. — *Sweigle v. Gates*, 9 N. Dak. 538; *Roberts v. Fargo First Nat. Bank*, 8 N. Dak. 504.

*Oregon*. — *Lewis v. Blackburn*, 42 Oregon 114, citing 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 212; *Title Trust Co. v. Aylsworth*, 40 Oregon 20; *Dowell v. Portland*, 13 Oregon 248.

*Tennessee*. — *Anderson v. Post*, (Tenn. Ch. 1896) 38 S. W. Rep. 283.

*Texas*. — *Irvin v. Edwards*, 92 Tex. 258, reversing (Tex. Civ. App. 1898) 45 S. W. Rep. 1026; *Pitts v. Booth*, 15 Tex. 453; *Yenda v. Wheeler*, 9 Tex. 408; *Connell v. State*, (Tex. Civ. App. 1900) 55 S. W. Rep. 980.

*Vermont*. — *Bemis v. Phelps*, 41 Vt. 1; *Moss v. Hinds*, 29 Vt. 188.

*Washington*. — *Vestal v. Morris*, 11 Wash. 451; *Baer v. Choir*, 7 Wash. 631.

*West Virginia*. — *Boggess v. Scott*, 48 W. Va. 316.

*Wisconsin*. — *Towne v. Salentine*, 92 Wis. 404; *Milwaukee Iron Co. v. Hubbard*, 29 Wis. 51.

*Wyoming*. — *Hecht v. Boughton*, 2 Wyo. 386.

**What Constitutes Occupancy or Possession — Husband as Occupant of Wife's Lands.** — *Smith v. Read*, 51 Conn. 11; *Paul v. Fries*, 18 Fla. 573; *Kerslake v. Cummings*, 180 Mass. 65; *Southworth v. Edmands*, 152 Mass. 203; *Flax Pond Water Co. v. Lynn*, 147 Mass. 31; *Tweed v. Metcalf*, 4 Mich. 579; *Loomis v. Semper*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 567, distinguishing *Powell v. Jenkins*, (Supm. Ct. Spec. T.) 14 Misc. (N. Y.) 83; *Van Nostrand v. Hubbard*, 35 N. Y. App. Div. 201; *Massing v. Ames*, 37 Wis. 645, distinguishing *Hamilton v. Fond du Lac*, 25 Wis. 496.

**Property Claimed by Different Persons may be taxed "owner unknown."** The assessor is not required to determine the question of ownership as between different parties or claimants, nor to incur the risk of making the assessment in the name of a party not the holder of the legal title. *French v. Spalding*, 61 N. H. 395.

**1. Knowledge by Assessors of Name of Owner.** — *Oliver v. Robinson*, 58 Ala. 46; *Klumpke v. Baker*, 68 Cal. 559; *Nichols v. McGlathery*, 43 Iowa 189; *Sutton v. Calhoun*, 14 La. Ann. 205; *Rapp v. Lowry*, 30 La. Ann. 1272; *Barker v. Hesselstine*, 27 Me. 354; *Perham v. Haverhill Fibre Co.*, 64 N. H. 2; *Thompson v. Gerrish*, 57 N. H. 85. *Contra* that assessing officers are not charged with notice of the record title. *Lime Rock Nat. Bank v. Henry*, 69 N. H. 298; *Benton v. Merrill*, 68 N. H. 369; *Hutchinson v. Kline*, 199 Pa. St. 564; *Massing v. Ames*, 37 Wis. 645.

**That the Owner Was Known to the purchaser of the property at tax sale is immaterial.** *Lassiter v. Lee*, 68 Ala. 287.

fact misleading or prejudicial, will not render the assessment void.<sup>1</sup>

(b) **Name Adopted and Used by Taxpayer.** — If the name given in an assessment is one by which the taxpayer, whether a natural person, corporation, or copartnership, is commonly known, it will suffice, although not his true name.<sup>2</sup>

(c) **Owner Person Having Title on Assessment Date.** — In making the assessment against the owner, the person who owns the property on the assessment date is the person in whose name it must be made, irrespective of any prior or subsequent changes in ownership.<sup>3</sup>

(d) **Record Owners.** — Under the general statutes assessments made in the name of a person shown by the public records to be the owner have been upheld, although he had in fact conveyed his title; and such assessments are expressly authorized in some states. A *prima facie* title is sufficient, the assessor not being required to determine the validity of apparent titles.<sup>4</sup>

1. **Slight Errors in Name—California.** — Houser, etc., Mfg. Co. v. Hargrove, 129 Cal. 90, reversing (Cal. 1900) 57 Pac. Rep. 94; Lake County v. Sulphur Bank Quicksilver Min. Co., 68 Cal. 14; People v. Sierra Buttes Quartz Min. Co., 39 Cal. 511.

Illinois. — Booth v. Raymond, 191 Ill. 351; Lyle v. Jacques, 101 Ill. 644.

Kentucky. — Com. v. Hamilton, 72 S. W. Rep. 744, 24 Ky. L. Rep. 1944.

Maine. — Thorndike v. Camden, 82 Me. 39; Farnsworth Co. v. Rand, 65 Me. 19.

Massachusetts. — Westhampton v. Searle, 127 Mass. 502; Tyler v. Hardwick, 6 Met. (Mass.) 470.

Michigan. — Gratwick, etc., Lumber Co. v. Oscoda, 97 Mich. 221; Hill v. Graham, 72 Mich. 659.

Nevada. — State v. Diamond Valley Live Stock, etc., Co., 21 Nev. 86.

New Hampshire. — Carpenter v. Dalton, 58 N. H. 615; Pierce v. Richardson, 37 N. H. 306; Souhegan Nail, etc., Factory v. McConihe, 7 N. H. 309; Van Dyke v. Carleton, 61 N. H. 574.

New Jersey. — State v. Matthews, 40 N. J. L. 269; Pennington v. Mendes, 38 N. J. Eq. 336.

New York. — People v. Garmon, 63 N. Y. App. Div. 530, affirming 34 Misc. (N. Y.) 350; Van Voorhis v. Budd, 39 Barb. (N. Y.) 479; People v. Barker, 86 Hun (N. Y.) 283, affirming 11 Misc. (N. Y.) 262; Matter of Hartshorn, 63 Hun (N. Y.) 624, 17 N. Y. Supp. 567; McLean v. Horn, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 119; People v. Tax Com'rs, (Supm. Ct. Spec. T.) 17 N. Y. Supp. 923; People v. Barker, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 704, affirmed without opinion 137 N. Y. 631.

Oregon. — Hibernian Benev. Soc. v. Kelly, 28 Oregon 173, 52 Am. St. Rep. 769.

Vermont. — Adams v. Sleeper, 64 Vt. 544.

Virginia. — Stevenson v. Henkle, 100 Va. 591.

See generally the title NAME, vol. 21, p. 305. *Idem* Sonana. — Detroit v. Macier, 117 Mich. 76.

In Placing the Names of Taxpayers on the assessment rolls, while it is better to give the Christian or baptismal names, it suffices to use the initials, followed by the family or surname. Russell v. Lang, 50 La. Ann. 36.

2. **Name Adopted and Used by Taxpayer.** — Lyle v. Jacques, 100 Ill. 644; Farnsworth Co.

v. Rand, 65 Me. 19; Gratwick, etc., Lumber Co. v. Oscoda, 97 Mich. 221; Stanberry v. Jordan, 145 Mo. 371; State v. Neosho Bank, 120 Mo. 161; Patchin v. Ritter, 27 Barb. (N. Y.) 34; Van Voorhis v. Budd, 39 Barb. (N. Y.) 479.

3. **Owner the Person Having Title on Assessment Date—United States.** — State Trust Co. v. Chehalis County, (C. C. A.) 79 Fed. Rep. 282, citing 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 121; C. N. Nelson Lumber Co. v. Loraine, 22 Fed. Rep. 54.

California. — San Gabriel Valley Land, etc., Co. v. Witmer Bro. Co., 96 Cal. 623.

Illinois. — Biggins v. People, 96 Ill. 381; Russell v. Mandell, 73 Ill. 136.

Iowa. — Sully v. Poorbaugh, 45 Iowa 453; Tallman v. Butler County, 12 Iowa 531.

Louisiana. — Templeton v. Levee Com'rs, 16 La. Ann. 117.

Massachusetts. — Richardson v. Boston, 148 Mass. 508; Washburn v. Walworth, 133 Mass. 499.

Missouri. — Anderson v. Harwood, 47 Mo. App. 660; McLaren v. Sheble, 45 Mo. 130.

New Jersey. — Broeck v. Jersey City, 44 N. J. L. 156; State v. Union Tp., 36 N. J. L. 309; State v. Hardin, 34 N. J. L. 79; State v. Williamson, 33 N. J. L. 77; State v. Tax Com'rs, (N. J. 1901) 48 Atl. Rep. 538; State v. Lawson, (N. J. 1900) 45 Atl. Rep. 911.

Pennsylvania. — Shaw v. Quinn, 12 S. & R. (Pa.) 299; Densmore v. Haggerty, 59 Pa. St. 189.

Vermont. — Bemis v. Phelps, 41 Vt. 1.

Wisconsin. — Wisconsin Cent. R. Co. v. Lincoln County, 57 Wis. 137.

See also *supra*, this section, *Requirements as to Time When Made*.

4. **Assessment in Name of Record Owners—United States.** — State Trust Co. v. Chehalis County, (C. C. A.) 79 Fed. Rep. 282; The North Cape, 6 Biss. (U. S.) 505.

Connecticut. — Hartford v. Hartford Theological Seminary, 66 Conn. 475; Hellman v. Burritt, 62 Conn. 438; Meyer v. Trubee, 59 Conn. 422.

Kentucky. — Fish v. Genett, (Ky. 1900) 56 S. W. Rep. 813.

Louisiana. — Ashley Co. v. Bradford, 109 La. 641; Boyle v. West, 107 La. 347; Howcott v. New Orleans, 107 La. 305, citing Millaudon v. Gallagher, 104 La. 713; Gowland v. New Orleans, 52 La. Ann. 2042; Adolph v. Richard-

(e) **Resident and Nonresident, Seated and Unseated Lands.** — Real estate for purposes of assessment is, in some jurisdictions, classified as resident and nonresident or seated and unseated. The assessment of resident or seated land is one against the individual, and to be valid must be made in the name of the person designated by the statute; that of nonresident or unseated land is against the property, and omissions or mistakes in the name of the owner are immaterial. An incorrect classification of land in the assessment renders it void,<sup>1</sup> and cannot be cured by a subsequent statute. The assessment is not merely irregular, but no assessment.<sup>2</sup>

son, 52 La. Ann. 1156; *Matter of New Orleans*, 51 La. Ann. 972, cited *Rosetta Gravel*, etc., Co. v. Jollisaint, 51 La. Ann. 804; *Reinach v. New Orleans Imp. Co.*, 50 La. Ann. 497; *Martin v. Southern Athletic Club*, 48 La. Ann. 1051; *Home Ins. Co. v. Assessors*, 48 La. Ann. 451; *Michel v. Stream*, 48 La. Ann. 341; *Denegre v. Buchanan*, 47 La. Ann. 1559; *Dibble v. Lepert*, 47 La. Ann. 792; *Lockhart v. Smith*, 47 La. Ann. 121; *Williams v. Landry*, 47 La. Ann. 5; *Augusti v. Citizens Bank*, 46 La. Ann. 529; *Prescott v. Payne*, 44 La. Ann. 650; *Gee v. Clark*, 42 La. Ann. 919; *Mason v. Bemiss*, 38 La. Ann. 935.

**Massachusetts.** — *Hunt v. Boston*, 183 Mass. 303; *Kerslake v. Cummings*, 180 Mass. 65; *Lynde v. Brown*, 143 Mass. 337; *Butler v. Stark*, 139 Mass. 19.

**North Dakota.** — *Roberts v. Fargo First Nat. Bank*, 8 N. Dak. 504.

**Virginia.** — *Douglas Co. v. Com.*, 97 Va. 397.

1. **Resident and Nonresident Lands** — *Massachusetts.* — *Alvord v. Collin*, 20 Pick. (Mass.) 418, cited *Desmond v. Babbitt*, 117 Mass. 233; *Rising v. Granger*, 1 Mass. 47.

**Michigan.** — *Fowler v. Campbell*, 100 Mich. 398; *Seymour v. Peters*, 67 Mich. 415; *Hanscom v. Hinman*, 30 Mich. 420; *Rayner v. Lee*, 20 Mich. 384.

**New York.** — *Sanders v. Downs*, 141 N. Y. 422, distinguished *French v. Whittlesey*, (Supm. Ct. Spec. T.) 30 N. Y. Supp. 363; *Joslyn v. Rockwell*, 128 N. Y. 334; *People v. Wemple*, 117 N. Y. 136, affirming 53 Hun (N. Y.) 197; *Hilton v. Fonda*, 86 N. Y. 339; *People v. Cassity*, 46 N. Y. 46; *Whitney v. Thomas*, 23 N. Y. 281; *People v. Chenango County*, 11 N. Y. 563; *Cottle v. Cary*, 73 N. Y. App. Div. 54, affirmed without opinion 173 N. Y. 624; *New York Milk Products Co. v. Damon*, 57 N. Y. App. Div. 261, affirmed without opinion 172 N. Y. 661; *Hagner v. Hall*, 10 N. Y. App. Div. 581, affirmed without opinion 159 N. Y. 552; *Parsons v. Parker*, 80 Hun (N. Y.) 281; *Butler v. Oswego*, 56 Hun (N. Y.) 358; *Dubois v. Webster*, 7 Hun (N. Y.) 371; *Turner v. Boyce*, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 502; *People v. Fredericks*, (Supm. Ct. Gen. T.) 33 How. Pr. (N. Y.) 162; *New York*, etc., R. Co. v. Lyon, 16 Barb. (N. Y.) 651; *Sanders v. Sexton* (Supm. Ct. Tr. T.) 36 Misc. (N. Y.) 574; *Toole v. Oneida County*, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 653, 25 Civ. Pro. (N. Y.) 267, affirmed 13 N. Y. App. Div. 471; *Stewart v. Chrysler*, 100 N. Y. 382; *Smith v. Read*, 51 Conn. 10 (construing New York statute). *Contra* under some New York municipal charters. *Sanders v. Carley*, 83 N. Y. App. Div. 193; *Cottle v. Cary*, 73 N. Y. App. Div. 54,

affirmed without opinion 173 N. Y. 624; *Collins v. Long Island City*, 56 Hun (N. Y.) 647, 10 N. Y. Supp. 946; *Zink v. McManus*, 49 Hun (N. Y.) 583, affirmed 121 N. Y. 259; *Powell v. Jenkins*, (Supm. Ct. Spec. T.) 14 Misc. (N. Y.) 83; *Glover v. Edgewater*, 3 Thomp. & C. (N. Y.) 497.

**Maine and New Hampshire.** — See the cases cited *supra*, this subdivision, *Owner or Occupant* — *Unknown Owner* — *In General*.

**Seated and Unseated Lands** — **Pennsylvania.** — *Miller v. McCullough*, 104 Pa. St. 624; *Arthurs v. King*, 95 Pa. St. 167; *Jackson v. Stoetzel*, 87 Pa. St. 302; *Watson v. Davidson*, 87 Pa. St. 270; *Wilmoth v. Canfield*, 76 Pa. St. 150; *Reading v. Finney*, 73 Pa. St. 467; *George v. Messinger*, 73 Pa. St. 418; *Biddle v. Noble*, 68 Pa. St. 279; *Bechtle v. Lingle*, 66 Pa. St. 38; *Heft v. Gephart*, 65 Pa. St. 510; *McReynolds v. Longenberger*, 57 Pa. St. 13; *Stewart v. Trevor*, 56 Pa. St. 374; *Lackawanna Iron, etc., Co. v. Fales*, 55 Pa. St. 99; *Hathaway v. Elsbree*, 54 Pa. St. 498; *Altmore v. Hufsmith*, 45 Pa. St. 121; *Miller v. Gorman*, 38 Pa. St. 309; *Arthurs v. Smathers*, 38 Pa. St. 40; *Green v. Watson*, 34 Pa. St. 333; *Negley v. Breeding*, 32 Pa. St. 325; *Jackson v. Sassaman*, 29 Pa. St. 112; *Laird v. Hiester*, 24 Pa. St. 452; *Russel v. Werntz*, 24 Pa. St. 337; *Ellis v. Hall*, 19 Pa. St. 292; *McKibbin v. Charlton*, 14 Pa. St. 128; *Milliken v. Benedict*, 8 Pa. St. 169; *Wilson v. Watterson*, 4 Pa. St. 214; *Rooney v. Perry*, 7 Pa. Dist. 373; *Cunningham v. White*, 2 Pa. Dist. 531; *Jackson v. Fleisher*, 1 Grant Cas. (Pa.) 459; *Burd v. Ramsay*, 9 S. & R. (Pa.) 112; *Patterson v. Blackmore*, 9 Watts (Pa.) 104; *Gibson v. Robbins*, 9 Watts (Pa.) 156; *Murray v. Guilford*, 8 Watts (Pa.) 548; *Rosenburger v. Schull*, 7 Watts (Pa.) 390; *Kennedy v. Daily*, 6 Watts (Pa.) 269; *Fish v. Brown*, 5 Watts (Pa.) 441; *Fager v. Campbell*, 5 Watts (Pa.) 287; *Owens v. Vanhook*, 3 Watts (Pa.) 260; *Shaeffer v. McKabe*, 2 Watts (Pa.) 221; *Harbeson v. Jack*, 2 Watts (Pa.) 124; *Campbell v. Wilson*, 1 Watts (Pa.) 504; *Wallace v. Scott*, 7 W. & S. (Pa.) 248; *Forster v. McDivit*, 5 W. & S. (Pa.) 359; *Mitchell v. Bratton*, 5 W. & S. (Pa.) 451; *Larimer v. McCall*, 4 W. & S. (Pa.) 133; *Harper v. McKeenan*, 3 W. & S. (Pa.) 238; *Strauch v. Shoemaker*, 1 W. & S. (Pa.) 175.

**Consent of Owner.** — Unseated land may be assessed as seated with the knowledge and assent of the owner, the latter classification being more advantageous to the county. *Milliken v. Benedict*, 8 Pa. St. 169; *Harper v. Farmers*, etc., Bank, 7 W. & S. (Pa.) 204; *Larimer v. McCall*, 4 W. & S. (Pa.) 135.

2. **Curative Acts.** — *Joslyn v. Rockwell*, 128 N.

(8) **Separate Estates or Interests in Same Property.** — A person in possession of land and having a freehold estate therein, or a permanent interest equivalent thereto, has the obligation to pay the taxes and is the owner for purposes of assessment, although his estate is less than a fee simple.<sup>1</sup> It is also frequently directed by statute that the fee in real property and estates or interests therein other than a freehold, such as leaseholds, timber or mineral rights, the interest of a mortgagee, and the like, shall be separately assessed to their respective owners;<sup>2</sup> and where the ownership of land and the improvements thereon or of the surface and the underlying minerals is severed, each owner must be separately assessed according to his interest.<sup>3</sup> With exceptions such as these

*Y.* 334, *affirming* 59 Hun (N. Y.) 129; *Cromwell v. MacLean*, 123 N. Y. 474; *Hagner v. Hall*, 10 N. Y. App. Div. 581, *affirmed* without opinion 159 N. Y. 552; *Sanders v. Saxton*, (Supm. Ct. Tr. T.) 36 Misc. (N. Y.) 574.

**Waiver.** — The fact that land is assessed as resident instead of nonresident is waived by objecting to the amount of the assessment only. *Matter of Eckerson*, (County Ct.) 25 Misc. (N. Y.) 645, *affirmed* without opinion 41 N. Y. App. Div. 631.

**1. Life Tenancies — Dower — Curtesy — Connecticut.** — *White v. Portland*, 67 Conn. 272.

**Kentucky.** — *Com. v. Hamilton*, 72 S. W. Rep. 744, 24 Ky. L. Rep. 1944.

**Louisiana.** — *Brent v. New Orleans*, 41 La. Ann. 1098.

**Maine.** — *Garland v. Garland*, 73 Me. 97; *Varney v. Stevens*, 22 Me. 331.

**Massachusetts.** — *Bates v. Sharon*, 175 Mass. 293; *Plympton v. Boston Dispensary*, 106 Mass. 544.

**New Jersey.** — *Matter of Collector*, 36 N. J. Eq. 448.

**New York.** — *Matter of Babcock*, 115 N. Y. 450; *Peck v. Sherwood*, 56 N. Y. 615; *Carter v. Youngs*, 42 N. Y. Super. Ct. 422; *King v. King*, 41 N. Y. Super. Ct. 518; *Fleet v. Dorland*, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 489; *Cairns v. Chabert*, 3 Edw. (N. Y.) 312; *Bidwell v. Greenshield*, (Buffalo Super. Ct. Tr. T.) 2 Abb. N. Cas. (N. Y.) 427; *Gillespie v. Brooks*, 2 Redf. (N. Y.) 364.

**North Carolina.** — *Willard v. Blount*, 11 Ired. L. (33 N. Car.) 624.

**Pennsylvania.** — *Spangler v. York County*, 13 Pa. St. 322.

**Rhode Island.** — *Weaver v. Arnold*, 15 R. I. 53.

**Tennessee.** — *Ferguson v. Quinn*, 97 Tenn. 46; *Whyte v. Nashville*, 2 Swan (Tenn.) 364; *Anderson v. Hensley*, 8 Heisk. (Tenn.) 834.

**Vermont.** — *Wilmott v. Lathrop*, 67 Vt. 671; *Webb v. Burlington*, 28 Vt. 188.

See also the title **DOWER**, vol. 10, p. 152.

**Qualified or Conditional Fees — Long Term Leases — United States.** — *New York Guaranty, etc., Co. v. Tacoma R., etc., Co.*, (C. C. A.) 93 Fed. Rep. 51.

**California.** — *Fall v. Marysville*, 19 Cal. 391. **Connecticut.** — *Connecticut Spiritualist Camp-meeting Assoc. v. East Lyme*, 54 Conn. 152.

**District of Columbia.** — *Washington Market Co. v. District of Columbia*, 4 Mackey (D. C.) 416.

**Iowa.** — *Muscatine v. Chicago, etc., R. Co.*, 79 Iowa 645.

**Massachusetts.** — *Butler v. Stark*, 139 Mass. 19.

**New Hampshire.** — *Atlantic, etc., R. Co. v. State*, 60 N. H. 133.

**Ohio.** — *Cincinnati College v. Yeatman*, 30 Ohio St. 276.

**Pennsylvania.** — *Philadelphia Library Co. v. Ingham, 1 Whart. (Pa.) 72; Irwin v. U. S. Bank*, 1 Pa. St. 349.

**2. Statutory Directions — In General.** — *Taylor v. Robinson*, 34 Fed. Rep. 678; *Freeman v. State*, 115 Ala. 208; *Meriden v. Maloney*, 74 Conn. 90; *Sholl v. People*, 194 Ill. 24; *Huck v. Chicago, etc., R. Co.*, 86 Ill. 352; *Pine County v. Tozer*, 56 Minn. 288; *State v. Railroad Com'rs*, 41 N. J. L. 235; *Daugherty v. Thompson*, 71 Tex. 192; *State v. Taylor*, 72 Tex. 297. See also *Taylor v. Robinson*, 72 Tex. 364; *Trammell v. Faught*, 74 Tex. 557; *Wilgus v. Com.*, 9 Bush (Ky.) 556.

**Interest of Mortgagees.** — *Bath v. Whitmore*, 79 Me. 182; *Detroit v. Assessors*, 91 Mich. 78; *State v. Runyon*, 41 N. J. L. 98; *State v. Massaker*, 25 N. J. L. 531; *Matter of Collector*, 36 N. J. Eq. 448; *Cruger v. Dougherty*, 43 N. Y. 107. See *supra*, VI. *Persons and Things Taxable*.

**3. Severance of Ownership — United States.** — *Forbes v. Gracey*, 94 U. S. 762.

**California.** — *Kern Valley Water Co. v. Kern County*, 137 Cal. 511; *San Francisco v. McGinn*, 67 Cal. 110; *People v. Sierra Buttes Quartz Min. Co.*, 39 Cal. 511.

**Illinois.** — *Consolidated Coal Co. v. Baker*, 135 Ill. 545; *In re Major*, 134 Ill. 19.

**Kentucky.** — *Stuart v. Com.*, 94 Ky. 595.

**Louisiana.** — *Globe Lumber Co. v. Lockett*, 106 La. 414, *citing* 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 123, 124; *Burbank v. Assessors*, 52 La. Ann. 1506.

**Massachusetts.** — *Lowell v. Middlesex County*, 152 Mass. 372; *McGee v. Salem*, 149 Mass. 238; *Flax Pond Water Co. v. Lynn*, 147 Mass. 31; *Milligan v. Drury*, 130 Mass. 428; *Hayden v. Foster*, 13 Pick. (Mass.) 497.

**Missouri.** — *State v. Mission Free School*, 162 Mo. 332; *State v. Thompson*, 149 Mo. 441; *State v. Mississippi River Bridge Co.*, 109 Mo. 253.

**New York.** — *People v. Assessors*, 93 N. Y. 308; *People v. Tax, etc., Com'rs*, 82 N. Y. 459; *Smith v. New York*, 68 N. Y. 552.

**Ohio.** — *Cincinnati College v. Yeatman*, 30 Ohio St. 276.

**Pennsylvania.** — *Neill v. Lacy*, 110 Pa. St. 294; *Sanderson v. Scranton*, 105 Pa. St. 469; *Logan v. Washington County*, 29 Pa. St. 373; *Moore's Appeal*, 4 Pa. Dist. 703; *Berwind White Coal Min. Co. v. Clearfield County*, 18 Pa. Co. Ct. 545; *Gorrell v. Murphy*, 1 Leg. Gaz. (Pa.) 495.

the title holder is the owner for purposes of taxation, and assessable for the entire property.<sup>1</sup>

(g) **Deceased Owners.** — Assessments in the name of a person as owner who was not living on the assessment date are void, except in jurisdictions where omissions or mistakes in the name are rendered immaterial by statute.<sup>2</sup>

(h) **Equitable Titles.** — Assessments in the name of a person as owner who holds the equitable title to property and is in possession have been generally upheld as valid.<sup>3</sup>

*Tennessee.* — East Tennessee, etc., R. Co. v. Morristown, (Tenn. Ch. 1895) 35 S. W. Rep. 771.

*West Virginia.* — State v. Low, 46 W. Va. 451; Carter v. Tyler County Ct., 45 W. Va. 806; State v. South Penn Oil Co., 42 W. Va. 80; U. S. Coal, etc., Co. v. Randolph County Ct., 38 W. Va. 201.

See also *supra*, VI. *Persons and Things Taxable.*

**Annuitants.** — Dilts v. Taylor, 57 N. J. L. 369; State v. Shurts, 41 N. J. L. 279; State v. Cornell, 31 N. J. L. 374; State v. Melroy, (N. J. 1890) 19 Atl. Rep. 732. Compare Spangler v. York County, 13 Pa. St. 322; Com. v. Nute, 72 S. W. Rep. 1090, 24 Ky. L. Rep. 2138. See also *supra*, this title, VI. 4. c. *Credits, Debts, and Securities.*

1. **Title Holder Owner and Assessable for Entire Property.** — Arkansas. — St. Louis, etc., R. Co. v. Williams, 53 Ark. 58, approved Ft. Smith Bridge Co. v. Hawkins, 54 Ark. 509.

Connecticut. — Sanford's Appeal, 75 Conn. 590; Yale University v. New Haven, 71 Conn. 316.

Illinois. — Chicago, etc., R. Co. v. People, 153 Ill. 409; Irvin v. New Orleans, etc., R. Co., 94 Ill. 105, 34 Am. Rep. 208.

Louisiana. — Williams v. Triche, 107 La. 92.

Massachusetts. — Singer Mfg. Co. v. Essex County, 139 Mass. 266.

Michigan. — Fletcher v. Alcona Tp., 72 Mich. 18.

Missouri. — State v. Mississippi River Bridge Co., 109 Mo. 253, 134 Mo. 321; State v. St. Louis County, 82 Mo. 234; State v. St. Louis County Ct., 13 Mo. App. 53.

New Jersey. — State v. Blundell, 24 N. J. L. 402.

Pennsylvania. — Moore's Appeal, 4 Pa. Dist. 703.

West Virginia. — Carter v. Tyler County Ct., 45 W. Va. 806; State v. South Penn Oil Co., 42 W. Va. 80; U. S. Coal, etc., Co. v. Randolph County Ct., 38 W. Va. 201.

**Mortgagors.** — United States. — Greenwalt v. Tucker, 3 McCrary (U. S.) 166.

Arizona. — Territory v. Delinquent Tax List, (Ariz. 1890) 24 Pac. Rep. 182.

California. — Central Pac. R. Co. v. State Board of Equalization, 60 Cal. 35.

Illinois. — Ralston v. Hughes, 13 Ill. 469.

Kansas. — Fields v. Russell, 38 Kan. 720.

Maine. — Coombs v. Warren, 34 Me. 89.

Maryland. — Allen v. Harford County, 74 Md. 204; Baltimore v. Canton Co., 63 Md. 237; Appeal Tax Ct. v. Rice, 50 Md. 319.

Massachusetts. — Parker v. Baxter, 2 Gray (Mass.) 185; Waltham Bank v. Waltham, 10 Met. (Mass.) 334.

Michigan. — Detroit v. Assessors, 91 Mich. 78.

Nebraska. — Union Stock Yards Nat. Bank

v. Thurston County, (Neb. 1902) 92 N. W. Rep. 1022.

New Hampshire. — Morrison v. Manchester, 58 N. H. 538.

New Jersey. — State v. Grey, 29 N. J. L. 380; State v. Massaker, 25 N. J. L. 531, 26 N. J. L. 564.

Pennsylvania. — Fager v. Campbell, 5 Watts (Pa.) 287.

**Unassigned Dower Interest.** — Felch v. Finch, 52 Iowa 566; Huston v. Seeley, 27 Iowa 183; Graves v. Cochran, 68 Mo. 74; State v. White, 61 Mo. 442; Williams v. Cox, 3 Edw. (N. Y.) 178; Harrison v. Peck, 56 Barb. (N. Y.) 251; Taylor v. Bentley, 3 Redf. (N. Y.) 34; Deitz v. Beard, 2 Watts (Pa.) 170. See also Bidwell v. Greenshield, (Buffalo Super. Ct. Tr. T.) 2 Abb. N. Cas. (N. Y.) 427; Branson v. Yancy, 1 Dev. Eq. (16 N. Car.) 77.

**Pledgers.** — Gibbins v. Adamson, 5 Kan. App. 90, affirmed without opinion 58 Kan. 818, citing 18 AM. AND ENG. ENCYC. OF LAW (1st ed.) 649; Waltham Bank v. Waltham, 10 Met. (Mass.) 334; Tucker v. Aiken, 7 N. H. 113; Lippincott v. Howell Tp., 66 N. J. L. 508; Ratterman v. Ingalls, 48 Ohio St. 468.

**Easements.** — Lowell v. Middlesex County, 152 Mass. 372; Winston v. Johnson, 42 Minn. 398; Winnipiseogee Lake Cotton, etc., Mfg. Co. v. Gilford, 64 N. H. 337; Bellows Falls Canal Co. v. Rockingham, 37 Vt. 622.

2. **Deceased Owners.** — California. — Smith v. Davis, 30 Cal. 536.

Iowa. — Matter of Kauffman, 104 Iowa 639, citing 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 213.

Kentucky. — Oldhams v. Jones, 5 B. Mon. (Ky.) 458.

Louisiana. — Edwards v. Fairex, 47 La. Ann. 170; George v. Cole, 109 La. 816; Geddes v. Cunningham, 104 La. 306; Kohlman v. Glaudi, 52 La. Ann. 700; Walsh v. Harang, 48 La. Ann. 984; Cucullu v. Brakenridge Lumber Co., 49 La. Ann. 1445; Clifford v. Michiner, 49 La. Ann. 1511; Montgomery v. Marydale Land, etc., Co., 46 La. Ann. 403.

Maine. — Morrill v. Lovett, 95 Me. 165.

Massachusetts. — Sawyer v. Mackie, 149 Mass. 269.

Nebraska. — Grant v. Bartholomew, 57 Neb. 673.

New Mexico. — Territory v. Perea, 10 N. Mex. 362.

West Virginia. — State v. Tavaner, 49 W. Va. 696.

**The Death After the Assessment Date** need not be regarded by the assessing officers; and the assessment is properly made in the decedent's name. Matter of Kauffman, 104 Iowa 639. See also Clifford v. Michiner, 49 La. Ann. 1511.

3. **Equitable Titles.** — United States. — Taylor v. Robinson, 34 Fed. Rep. 678.

(i) **Trustees.** — An assessment is properly made in the name of a trustee as owner where he is vested with title to the property; and it is frequently provided by statute that property present in the taxing district in the possession and control of a resident trustee shall be assessed in his name.<sup>1</sup> Other statutes direct assessments to be made in the name of the *cestui que trust*.<sup>2</sup>

(j) **Partnership Property.** — The statutes usually direct that copartnership property be jointly assessed in the name of the partnership. In the absence of such a provision it would seem necessary to assess the partners individually with their respective shares. The life of the partnership for purposes of assessment is generally held to continue after dissolution until its affairs have been wound up and the property distributed.<sup>3</sup>

(k) **Joint Ownership.** — Where property is held by two or more persons in indivision, the undivided share of each may be assessed in his name or the whole jointly in the names of all.<sup>4</sup>

*Georgia.* — *Wells v. Savannah*, 87 Ga. 397; *National Bank v. Danforth*, 80 Ga. 55.

*Louisiana.* — *Prescott v. Payne*, 44 La. Ann. 650; *Martin v. Southern Athletic Club*, 48 La. Ann. 1051; *Selby v. Levee Com'rs*, 14 La. Ann. 437.

*Missouri.* — *Farber v. Purdy*, 69 Mo. 601; *Anderson v. Harwood*, 47 Mo. App. 660.

*Pennsylvania.* — *Green v. Watson*, 34 Pa. St. 332.

*Washington.* — *Puget Sound Agricultural Co. v. Pierce County*, 1 Wash. Ter. 159.

*West Virginia.* — *Bogges v. Scott*, 48 W. Va. 316; *Whitham v. Sayers*, 9 W. Va. 671. See also *Fish v. Coggeshall*, 22 R. I. 318. *Compare State Trust Co. v. Chehalis County*, (C. C. A.) 79 Fed. Rep. 282; *Tracy v. Reed*, 38 Fed. Rep. 69.

In *Kentucky* it is the duty of the holder of the equitable title to list the property for taxation whether it be in possession or not. *Bond v. Brand*, 74 S. W. Rep. 673, 25 Ky. L. Rep. 26.

1. **Trustees** — *United States*. — *Price v. Hunter*, 34 Fed. Rep. 355.

*California.* — *People v. Home Ins. Co.*, 29 Cal. 533.

*Georgia.* — *Smith v. Byers*, 43 Ga. 191.

*Maryland.* — *Appeal Tax Ct. v. Gill*, 50 Md. 377; *Baltimore v. Stirling*, 29 Md. 48; *Latrobe v. Baltimore*, 19 Md. 13.

*Massachusetts.* — *Richardson v. Boston*, 148 Mass. 508; *Stinson v. Boston*, 125 Mass. 348; *Davis v. Macy*, 124 Mass. 193; *Miner v. Pingree*, 110 Mass. 47; *Hardy v. Yarmouth*, 6 Allen (Mass.) 277.

*Minnesota.* — *State v. Willard*, 77 Minn. 190.

*New York.* — *Trowbridge v. Horan*, 78 N. Y. 439; *Duval v. English Evangelical Lutheran Church*, 53 N. Y. 500; *People v. Ogdensburgh*, 48 N. Y. 390; *People v. Assessors*, 40 N. Y. 154; *People v. Tax Com'rs*, (Supm. Ct. Spec. T.) 17 N. Y. Supp. 923; *People v. Coleman*, 53 Hun (N. Y.) 482, 119 N. Y. 137; *People v. Feitner*, 61 N. Y. App. Div. 115, *affirming* 33 Misc. (N. Y.) 656, *affirmed* without opinion 168 N. Y. 646; *People v. Feitner*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 40; *People v. Barker*, 86 Hun (N. Y.) 283, *affirming* 11 Misc. (N. Y.) 262.

*Ohio.* — *State v. Matthews*, 10 Ohio St. 437.

*Pennsylvania.* — *Carlisle v. Marshall*, 36 Pa. St. 397; *Lewis v. Chester County*, 60 Pa. St. 325.

*Rhode Island.* — *Greene v. Mumford*, 4 R. I. 313.

Where One or More Persons are in control of property under distinct trusts created by the same instrument or as executors and trustees, the funds may be assessed against them *in solido*, and separate assessment need not be made for each trust. *People v. Feitner*, 59 N. Y. App. Div. 233, *affirmed* without opinion 167 N. Y. 621; *People v. Feitner*, 61 N. Y. App. Div. 115, *affirming* 33 Misc. (N. Y.) 656, *affirmed* without opinion 168 N. Y. 646; *People v. Feitner*, (Supm. Ct. Spec. T.) 75 N. Y. Supp. 1086.

2. **Cestui Que Trust.** — *Hunt v. Perry*, 165 Mass. 287; *Ricker v. American L. & T. Co.*, 140 Mass. 346; *Freetown v. Fish*, 123 Mass. 355; *Hathaway v. Fish*, 13 Allen (Mass.) 267; *Hardy v. Yarmouth*, 6 Allen (Mass.) 277.

3. **Partnership Property** — *California.* — *People v. Sneath*, 28 Cal. 612.

*Indiana.* — *Hart v. Smith*, 159 Ind. 182, 95 Am. St. Rep. 280.

*Kansas.* — *Swallow v. Thomas*, 15 Kan. 67.

*Louisiana.* — *Russell v. Lang*, 50 La. Ann. 36; *Thibodaux v. Keller*, 29 La. Ann. 508.

*Maine.* — *Stockwell v. Brewer*, 59 Me. 286.

*Massachusetts.* — *Ricker v. American L. & T. Co.*, 140 Mass. 346; *Oliver v. Lynn*, 130 Mass. 143.

*Michigan.* — *Hill v. Graham*, 72 Mich. 659; *Petrie Lumber Co. v. Collins*, 66 Mich. 64; *Blodgett v. Muskegon*, 60 Mich. 580; *Williams v. Saginaw*, 51 Mich. 120; *McCoy v. Anderson*, 47 Mich. 502; *Putman v. Fife Lake Tp.*, 45 Mich. 125.

*Missouri.* — *Stanberry v. Jordan*, 145 Mo. 371; *State v. Neosho Bank*, 120 Mo. 161; *School Dist. v. Bowman*, (Mo. 1903) 77 S. W. Rep. 880.

*New Hampshire.* — *Van Dyke v. Carleton*, 61 N. H. 574.

*New York.* — *People v. Wells*, 85 N. Y. App. Div. 440, *reversing* 40 Misc. (N. Y.) 553; *Wheeler v. Anthony*, 10 Wend. (N. Y.) 346; *People v. Ferguson*, 8 Cow. (N. Y.) 102.

*Ohio.* — *Robinson v. Ward*, 13 Ohio St. 293.

*Wisconsin.* — *State v. Lewis*, (Wis. 1903) 95 N. W. Rep. 388.

See also *People v. Sneath*, 28 Cal. 612; *Monroe v. Greenhoe*, 54 Mich. 9; *People v. Coleman*, 44 Hun (N. Y.) 20. See generally the titles OCCUPATION, BUSINESS, AND PRIVILEGE TAXES, vol. 21, p. 812; PARTNERSHIP, vol. 22, p. 76.

4. **Joint Ownership** — *Arkansas.* — *Payne v. Danley*, 18 Ark. 441, 68 Am. Dec. 187.

(1) **Fraudulent Conveyances — Change in Form of Property.** — Where a person makes a transfer of the property owned by him or exchanges it for exempt property as a mere subterfuge for the purpose of escaping taxation, the assessment is properly made in his name as owner.<sup>1</sup>

(3) **Persons Other than Owners or Occupants — (a) In General.** — For convenience, and the better to prevent property the ownership of which is not apparent or easily ascertainable from evading taxation, it is frequently provided that assessments may be made in the name of an agent, officer, receiver, or the like, for property in his possession and under his control and management. Such provisions are neither unreasonable nor unlawful.<sup>2</sup> In the absence of such a direction, however, the assessment of property thus situated can only be made in the name of the owner or other person designated by the general statutes.<sup>3</sup>

*California.* — *People v. McEwen*, 23 Cal. 54.  
*Louisiana.* — *Howcott v. New Orleans*, 107 La. 305; *Marti v. Wall*, 51 La. Ann. 946; *Russell v. Lang*, 50 La. Ann. 36; *Hood v. New Orleans*, 49 La. Ann. 1461; *Mercier's Succession*, 42 La. Ann. 1135; *Hayes v. Viator*, 33 La. Ann. 1162.

*Massachusetts.* — *Howard v. Proctor*, 7 Gray (Mass.) 128.

*Michigan.* — *Hubbard v. Winsor*, 15 Mich. 146.

*Minnesota.* — *State v. Rand*, 39 Minn. 502.

*New Jersey.* — *Fleischauer v. West Hoboken Tp.*, 40 N. J. L. 109.

*Utah.* — *Asper v. Moon*, 24 Utah 241.

**The Failure to Insert the Name of One or More Joint Owners Is Not Fatal.** — *Hood v. New Orleans*, 49 La. Ann. 1461. To similar effect, *People v. Gaus*, 169 N. Y. 19, affirming 64 N. Y. App. Div. 614.

1. **Fraudulent Conveyances — Change in Form of Property.** — *H. M. Loud, etc., Lumber Co. v. Elmer Tp.*, 123 Mich. 61; *People v. Sawyer*, (Supm. Ct. Spec. T.) 27 N. Y. Supp. 202; *People v. Barker*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 712. See also *Jones v. Seward County*, 10 Neb. 154.

2. **Agents — California.** — *Lake County v. Sulphur Bank Quicksilver Min. Co.*, 68 Cal. 14; *People v. Home Ins. Co.*, 29 Cal. 533.

*Connecticut.* — *Meyer v. Trubee*, 59 Conn. 422.

*Illinois.* — *Lockwood v. Johnson*, 106 Ill. 334; *Walton v. Westwood*, 73 Ill. 125; *Tazewell County v. Davenport*, 40 Ill. 204.

*Iowa.* — *Hutchinson v. Board of Equalization*, 66 Iowa 35; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56.

*Massachusetts.* — *Welles v. Battelle*, 11 Mass. 477.

*Michigan.* — *Spanish River Lumber Co. v. Bay City*, 113 Mich. 181.

*New Hampshire.* — *Fowler v. Springfield*, 64 N. H. 108.

*New York.* — *People v. Willis*, 133 N. Y. 383; *People v. Smith*, 88 N. Y. 577; *People v. Ogdensburgh*, 48 N. Y. 390; *People v. Coleman*, 53 Hun (N. Y.) 482; *People v. Sawyer*, (Supm. Ct. Spec. T.) 27 N. Y. Supp. 202.

*North Carolina.* — *Redmond v. Rutherford County*, 87 N. Car. 122.

*Wisconsin.* — *Merrill v. Champagne Lumber Co.*, 75 Wis. 142.

**Guardians.** — *Smith v. Macon*, 20 Ark. 17; *Tousey v. Bell*, 23 Ind. 423; *Baldwin v. Wash-*

*ington County*, 85 Md. 145, writ of error dismissed 168 U. S. 705; *Payson v. Tufts*, 13 Mass. 495; *Baldwin v. First Parish*, 8 Pick. (Mass.) 494; *State v. Burr*, 143 Mo. 209; *Kansas City v. Simpson*, 90 Mo. App. 50; *People v. Ogdensburgh*, 48 N. Y. 390; *School Directors v. James*, 2 W. & S. (Pa.) 568, 37 Am. Dec. 525.

**Receivers and Other Officers.** — *Los Angeles v. Los Angeles City Water Co.*, 137 Cal. 699; *San Luis Obispo v. Pettit*, 87 Cal. 499; *People v. Lardner*, 30 Cal. 242; *Fulkerson v. Treasurer*, 95 Va. 1.

**Assignees in Insolvency.** — *French v. Bobe*, 64 Ohio St. 323, distinguishing *McNeill v. Hagerty*, 51 Ohio St. 255; *In re Jackson Brewing Co.*, 7 Ohio Dec. 491, reversing 6 Ohio Dec. 396, 4 Ohio N. P. 243.

**Warehousemen.** — *Monticello Distilling Co. v. Baltimore*, 90 Md. 416.

3. **Statutory Authority for Such Assessments Necessary — California.** — *Weyse v. Crawford*, 85 Cal. 196.

*Kentucky.* — *Louisville v. Sherley*, 80 Ky. 71.

*Massachusetts.* — *City Nat. Bank v. Charles Baker Co.*, 180 Mass. 40; *Com. v. Barnstable Sav. Bank*, 126 Mass. 526; *Kirkland v. Whately*, 4 Allen (Mass.) 462.

*Michigan.* — *Curtis v. Richland Tp.*, 56 Mich. 478; *Barstow v. Big Rapids*, 56 Mich. 35.

*New Jersey.* — *State v. Railroad Com'rs*, 41 N. J. L. 235; *Matter of Ming*, 39 N. J. Eq. 1; *State v. Staats*, 39 N. J. L. 653; *State v. Irons*, 35 N. J. L. 464.

*New York.* — *Boardman v. Tompkins County*, 85 N. Y. 359.

*Ohio.* — *McNeill v. Hagerty*, 51 Ohio St. 255, reversing 4 Ohio Cir. Dec. 647, 7 Ohio Cir. Ct. 388.

*Pennsylvania.* — *Philadelphia, etc., R. Co. v. Com.*, 104 Pa. St. 80; *West Chester School Dist. v. Darlington*, 38 Pa. St. 157; *School Directors v. James*, 2 W. & S. (Pa.) 568, 37 Am. Dec. 525.

*Rhode Island.* — *Mason v. Thurber*, 1 R. I. 481.

*Virginia.* — *Stevenson v. Henkle*, 100 Va. 591.  
**Commission Agents and Brokers.** — *Penrose v. Gragard*, 105 La. 146; *Chase v. Boston*, 180 Mass. 458; *State v. Engle*, 34 N. J. L. 425.

**Property of Insane Person** cannot be assessed in the name of his committee, unless doing so is authorized by statute. *People v. Tax, etc., Com'rs*, 100 N. Y. 215, reversing 36 Hun (N. Y.) 359; *People v. Barker*, (Supm. Ct. Gen. T.)



(b) *Estates of Decedents.* — Where property is directed to be assessed in the name of the owner, it has been generally held necessary to make assessments of the property of the estate of a decedent in the names of the persons upon whom title has devolved.<sup>1</sup> Special provisions exist in most jurisdictions, however, directing assessments of property belonging to the estate, to be made against the estate, against the heirs, devisees, or other persons upon whom the title of the decedent devolves, according to the fact, without designating them by name, or against the legal representative.<sup>2</sup> After distribution of the estate, and, in some jurisdictions, after notice thereof to the assessing officers, the distributees are the owners for the purpose of assessment.<sup>3</sup>

21 N. Y. Supp. 704, *affirmed* without opinion 137 N. Y. 631.

Where a Guardian appropriates the money of the estate to his own use, an assessment against him personally is valid. *Clayton v. Tupelo*, (Miss. 1901) 29 So. Rep. 994.

Receiver Vested with Legal Title May Be Assessed in His Own Name. — *In re Mallory*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 437, 50 Hun (N. Y.) 601.

An Assessment against an Assignee under a General Assignment for the benefit of creditors in his own name has been held valid. *Carey v. Foster*, 7 Wyo. 216.

1. *Assessments in Names of Successors in Title* — *Alabama*. — *Scott v. Brown*, 106 Ala. 604; *Jackson v. King*, 82 Ala. 432; *Carlisle v. Watts*, 78 Ala. 486.

*California*. — *Pearson v. Creed*, 69 Cal. 538.

*Florida*. — *L'Engle v. Wilson*, 21 Fla. 461.

*Louisiana*. — *Kearns v. Collins*, 40 La. Ann. 453.

*Maine*. — *Fairfield v. Woodman*, 76 Me. 549.

*Mississippi*. — *Gamble v. Witty*, 55 Miss. 26.

*Missouri*. — *Berlien v. Bieler*, 96 Mo. 491.

*New Jersey*. — *State v. Collector*, 39 N. J. L. 79.

*New Mexico*. — *Territory v. Perea*, 10 N. Mex. 362; *Stewart v. Bernalillo County*, (N. Mex. 1902) 70 Pac. Rep. 574.

*New York*. — *Cromwell v. MacLean*, 123 N. Y. 474; *Trowbridge v. Horan*, 78 N. Y. 439; *Sandy Hill v. Akin*, 77 Hun (N. Y.) 537; *Matter of Kenworthy*, 63 Hun (N. Y.) 165; *Matter of Chadwick*, 59 N. Y. App. Div. 334; *Matter of Reid*, 52 N. Y. App. Div. 243, *reversing* (County Ct.) 31 Misc. (N. Y.) 156; *Matter of Adams*, 18 N. Y. App. Div. 415, *affirmed* 154 N. Y. 619; *People v. Valentine*, 5 N. Y. App. Div. 520; *Matter of Eckerson*, (County Ct.) 25 Misc. (N. Y.) 645, *affirmed* without opinion 41 N. Y. App. Div. 631.

*North Carolina*. — *Morrison v. McLaughlin*, 88 N. Car. 251.

*Pennsylvania*. — *Jackson v. Sassaman*, 29 Pa. St. 106; *Henry v. Horstick*, 9 Watts (Pa.) 412.

*Compare* *Endicott v. Corson*, 50 N. J. L. 381; *State v. Leggett*, 40 N. J. L. 308; *State v. Platt*, 24 N. J. L. 108.

2. *Statutory Provisions* — *United States*. — *Dallinger v. Rapello*, 14 Fed. Rep. 32.

*California*. — *San Francisco v. Pennie*, 93 Cal. 465.

*Connecticut*. — *Cornwall v. Todd*, 38 Conn. 443.

*Indiana*. — *Jenkins v. Rice*, 84 Ind. 342. See also *Noble v. Indianapolis*, 16 Ind. 506.

*Iowa*. — *Bell v. Stevens*, 116 Iowa 451, *citing* *Dorris v. Miller*, 105 Iowa 570; *McGregor v. Vampel*, 24 Iowa 436.

*Louisiana*. — *Montgomery v. Marydale Land, etc., Co.*, 46 La. Ann. 403; *Surget v. Newman*, 43 La. Ann. 873; *Carter v. New Orleans*, 33 La. Ann. 816.

*Maine*. — *Morrill v. Lovett*, 95 Me. 165; *Dresden v. Bridge*, 90 Me. 489; *Rockland v. Ulmer*, 87 Me. 357; *Fairfield v. Woodman*, 76 Me. 549; *Bath v. Reed*, 78 Me. 276; *Elliot v. Spinney*, 69 Me. 31.

*Maryland*. — *Moale v. Paltimore*, 61 Md. 224.

*Massachusetts*. — *White v. Mott*, 182 Mass. 195; *Hunt v. Perry*, 165 Mass. 287; *Tobin v. Gillespie*, 152 Mass. 219; *Wood v. Torrey*, 97 Mass. 321; *Payson v. Tufts*, 13 Mass. 493; *Cook v. Leland*, 5 Pick. (Mass.) 236; *Hardy v. Yarmouth*, 6 Allen (Mass.) 277.

*Michigan*. — *Orion Tp. v. Axford*, 112 Mich. 179; *Avery v. Dewitt*, 72 Mich. 25; *Herrick v. Big Rapids*, 53 Mich. 554; *Dickison v. Reynolds*, 48 Mich. 159.

*New Hampshire*. — *Kent v. Exeter*, 68 N. H. 469.

*New Jersey*. — *Dilts v. Taylor*, 57 N. J. L. 369; *State v. Runyon*, 41 N. J. L. 98; *State v. Jones*, 39 N. J. L. 650; *State v. Collector*, 39 N. J. L. 79.

*New York*. — *People v. Gaus*, 169 N. Y. 19, *affirming* 64 N. Y. App. Div. 614; *People v. Ogdensburgh*, 48 N. Y. 390; *Height v. New York*, 32 Hun (N. Y.) 153; *Wheeler v. Anthony*, 10 Wend. (N. Y.) 346; *Williams v. Holden*, 4 Wend. (N. Y.) 223; *McLean v. Horn*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 119, 62 Hun (N. Y.) 622.

*Ohio*. — *Wolfe v. Geffroy*, 16 Ohio St. 219.

*Oregon*. — *Johnson v. Oregon City*, 2 Oregon 327.

*Tennessee*. — *Gallatin v. Alexander*, 10 Lea (Tenn.) 475.

*Wisconsin*. — *Fond du Lac v. Otto*, 113 Wis. 39.

An Executor derives his appointment and his title to the estate from the will, and an assessment of the property may be made in his name before the will has been admitted to probate and letters testamentary issued. *People v. Barker*, 150 N. Y. 52, *affirming* 90 Hun (N. Y.) 609; *People v. Feitner*, (Supm. Ct. Spec. T.) 75 N. Y. Supp. 1086; *Bowe v. McNab*, 11 N. Y. App. Div. 386; *People v. Tax, etc.*, Com'rs, 31 Hun (N. Y.) 235.

Property Adjudged Not a Part of Estate. — Property cannot be assessed to an administrator, where it has been adjudged that it does not belong to the estate. *Bowe v. McNab*, 11 N. Y. App. Div. 386.

3. *Assessment After Distribution of Estate.* — *Stafford v. Twitchell*, 33 La. Ann. 520; *Nico-demus v. Hull*, 93 Md. 364; *Tobin v. Gillespie*,

(4) *Contractual Liability for Taxes.* — Contracts between individuals shifting the liability for taxes cannot affect the state in the exercise of the sovereign power of taxation; and the assessments must be made according to the statutory direction, whatever may be the effect of such covenants as between the parties thereto.<sup>1</sup>

(5) *Presumptions.* — If the assessment is regular on its face it will be presumed, in the absence of evidence to the contrary, that the assessing officers performed their duty and made it in the form warranted by the facts.<sup>2</sup>

*f. DESCRIPTION OF PROPERTY* — (1) *Classifications.* — The legislature generally classifies property for purposes of assessment, and it has the power to and frequently does require real property to be assessed as personally and *vice versa*.<sup>3</sup> These divisions should be followed in making up the assessment roll, and the different classes of property separately listed, but a failure to do so is generally held to be a mere irregularity,<sup>4</sup> unless it results in prejudice to the taxpayer or prevents the effective equalization and review of assessments.<sup>5</sup>

(2) *Description of Personalty* — (a) *In General.* — Personal property may in most states be listed in general terms and valued in gross, without a separate

152 Mass. 219; Carleton v. Ashburnham, 102 Mass. 348; Fowler v. Campbell, 100 Mich. 398; Cunningham v. White, 2 Pa. Dist. 531.

1. *Contractual Liability for Taxes.* — Yale University v. New Haven, 71 Conn. 316; Chicago, etc., R. Co. v. People, 153 Ill. 409; Williams v. Triche, 107 La. 92; State v. Runyon, 41 N. J. L. 98; Moore's Appeal, 4 Pa. Dist. 703. See also *supra*, this title, V. 3. c. *Real or Personal Property*.

2. *Presumptions* — *United States.* — Jenkins v. McTigue, 22 Fed. Rep. 148.

*California.* — Blatner v. Davis, 32 Cal. 328.

*Illinois.* — Merritt v. Thompson, 13 Ill. 716; Jackson v. Cummings, 15 Ill. 449.

*Iowa.* — Griffin v. Tuttle, 74 Iowa 219; Burdick v. Connell, 69 Iowa 458; Corning Town Co. v. Davis, 44 Iowa 622.

*Maine.* — Brown v. Veazie, 25 Me. 359.

*Maryland.* — Moale v. Baltimore, 61 Md. 224.

*New Hampshire.* — Lime Rock Nat. Bank v. Henry, 69 N. H. 298; Benton v. Merrill, 68 N. H. 369; French v. Spalding, 61 N. H. 395; Jaquith v. Putney, 48 N. H. 138; Smith v. Messer, 17 N. H. 420; Cardigan v. Page, 6 N. H. 182.

3. *Legislature May Determine Classification.* — See *supra*, this title, *Persons and Things Taxable*. See also the following cases:

*Arkansas.* — Wells, etc., Co.'s Express v. Crawford County, 63 Ark. 576; *Ex p.* Ft. Smith, etc., Bridge Co., 62 Ark. 461.

*California.* — Miller v. Kern County, 137 Cal. 516; Kern Valley Water Co. v. Kern County, 137 Cal. 511.

*Colorado.* — Ames v. People, 26 Colo. 83.

*Illinois.* — Johnson v. Roberts, 102 Ill. 655.

*Iowa.* — Central Iowa R. Co. v. Wright County, 67 Iowa 199, 22 Am. & Eng. R. Cas. 223.

*Kansas.* — Missouri, etc., R. Co. v. Miami County, (Kan. 1903) 73 Pac. Rep. 103.

*Louisiana.* — Behan v. Assessors, 46 La. Ann. 870.

*Pennsylvania.* — James H. Hawes Mfg. Co.'s Appeal, (Pa. 1889) 17 Atl. Rep. 219.

*Utah.* — State v. Thomas, 16 Utah 86.

*Washington.* — Eureka Dist. Gold Min. Co. v. Ferry County, 28 Wash. 250.

*West Virginia.* — Charleston, etc., Bridge Co. v. Kanawha County Ct., 41 W. Va. 658.

*Wyoming.* — Standard Cattle Co. v. Baird, 8 Wyo. 144.

The *Legislative Classification* does not prohibit further subdivision conducing to more exact valuation, provided the requirement of uniformity be regarded. Oregon, etc., R. Co. v. Jackson County, 38 Oregon 589; Dayton v. Multnomah County, 34 Oregon 239; Dayton v. Board of Equalization, 33 Oregon 131.

*Classification by Board of Supervisors* under delegation of power. McCutchen v. Lyon County, 95 Iowa 20.

4. *Incorrect Classification Mere Irregularity.* — Ledoux v. La Bee, 83 Fed. Rep. 761; People v. Culverwell, 44 Cal. 620; Robbins v. Magoun, 101 Iowa 580; Robertson v. Anderson, 57 Iowa 165; James Clark Distilling Co. v. Cumberland, 95 Md. 468; Tunica County v. Tate, 78 Miss. 294; Vicksburg Bank v. Adams, 74 Miss. 179; Newark, etc., Traction Co. v. North Arlington, 65 N. J. L. 150. *Contra*, People v. Owyhee Min. Co., 1 Idaho 409, Lewis, J., *dissenting*; Thompson v. Davidson, 15 Minn. 412.

A *Joint Assessment* of real and personal property is void. People v. Moore, 1 Idaho 662; Stark v. Shupp, 112 Pa. St. 395. *Contra*, Lowell v. Middlesex County, 152 Mass. 372; Eureka Dist. Gold Min. Co. v. Ferry County, 28 Wash. 250.

Where real and personal property are, in fact, separately valued, the entire assessment is not rendered void by computing the taxes on the aggregate sum. Mowry v. Slatersville Mills, 20 R. I. 94.

*Classifications of Land as Resident and Nonresident Mandatory.* — See *supra*, this section, 6. e.

(2) (e) *Resident and Nonresident, Seated and Unseated Lands.* Compare Adams v. Seymour, 30 Conn. 402.

5. *Exceptions to Rule.* — Huntington v. Central Pac. R. Co., 2 Sawy. (U. S.) 503; People v. Palmer, 113 Ill. 346, *cited* Gilbert v. Morgan, 08 Ill. App. 281; Northern Pac. R. Co. v. Carland, 5 Mont. 146.

listing and valuation of the specific articles of which it consists. A direction to list and value separately the different classes of personal property is, however, common. In a few states greater particularity is required.<sup>1</sup> The object of requiring any description of the property is that the taxpayer may know for what property he is assessed; and whatever is sufficient to identify that property with reasonable certainty is sufficient compliance with the statute.<sup>2</sup>

(b) **Waiver and Estoppel.** — Where the taxpayer fails to comply with a requirement that he make a statement or return of his property to the assessing officers, or where the assessment follows a return made by him, he is generally estopped from objecting to general descriptions and valuations in gross.<sup>3</sup>

(3) **Description of Realty** — (a) **General Rule.** — It is essential to the validity of an assessment of real estate that it contain a description of the property sufficiently accurate and certain to enable the owner readily to identify it as his, and to furnish a basis for the tax lien and for proceedings *in rem* against the tract, should such become necessary to the collection of the taxes.<sup>4</sup>

1. **Description of Personalty** — *Alabama.* — State v. Kidd, 125 Ala. 413, citing 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 218.

*Arizona.* — Atlantic, etc., R. Co. v. Yavapai County, (Ariz. 1889) 21 Pac. Rep. 768.

*California.* — Savings, etc., Soc. v. San Francisco, 131 Cal. 356; Lahman v. Hatch, 124 Cal. 1; Dear v. Weineke, 94 Cal. 322; San Francisco v. Pennie, 93 Cal. 465; Dear v. Varnum, 80 Cal. 86; Doland v. Mooney, 72 Cal. 34; San Francisco v. Flood, 64 Cal. 504; People v. McCreery, 34 Cal. 441; People v. Home Ins. Co., 29 Cal. 533; People v. Sneath, 28 Cal. 612; People v. Rains, 23 Cal. 131.

*Connecticut.* — Greenwoods Co. v. New Hartford, 65 Conn. 461; Lewis v. Eastford, 44 Conn. 477; Monroe v. New Canaan, 43 Conn. 309; Hamersley v. Franey, 39 Conn. 176; Whittelsey v. Clinton, 14 Conn. 72; Adam v. Litchfield, 10 Conn. 127.

*Illinois.* — King v. People, 193 Ill. 530.

*Michigan.* — Comstock v. Grand Rapids, 54 Mich. 641.

*Missouri.* — State v. Cummings, 151 Mo. 49.

*Rhode Island.* — Newport Reading-Room, Petitioner, 21 R. I. 440; Clarke v. Tinkham, 20 R. I. 790; Rumford Chemical Works v. Ray, 19 R. I. 302; Dunnell Mfg. Co. v. Newell, 15 R. I. 234.

*Texas.* — Wright v. San Antonio, (Tex. Civ. App. 1899) 50 S. W. Rep. 406.

See also cases cited in the next note but one. Compare Hart v. Smith, 159 Ind. 182, 95 Am. St. Rep. 280.

A Defective Description of Realty in an assessment roll will not affect the validity of a tax against personalty, valid in itself. Haley v. Elliott, 20 Colo. 379.

2. Savings, etc., Soc. v. San Francisco, 131 Cal. 356; San Francisco v. Pennie, 93 Cal. 465. See also State v. Kidd, 125 Ala. 413.

3. **Waiver and Estoppel** — *Connecticut.* — Hartford v. Champion, 54 Conn. 436, 58 Conn. 268.

*Illinois.* — King v. People, 193 Ill. 530.

*Massachusetts.* — Harrington v. Glidden, 179 Mass. 486, 94 Am. St. Rep. 613; Lamson Consol. Store Service Co. v. Boston, 170 Mass. 354; Hunt v. Perry, 165 Mass. 287; Lowell v. Middlesex County, 152 Mass. 372; Noyes v. Hale, 137 Mass. 266.

*Missouri.* — Lexington v. Lafayette County Bank, 165 Mo. 671; State v. Cummings, 151

Mo. 49; State v. Brown Tobacco Co., 140 Mo. 218.

*Rhode Island.* — Mowry v. Slatersville Mills, 20 R. I. 94.

*Texas.* — Moody v. Galveston, 21 Tex. Civ. App. 16.

4. **Description of Realty** — **General Rule and Illustrations** — *United States.* — Bird v. Benlisa, 142 U. S. 664; Raymond v. Longworth, 14 How. (U. S.) 76; Tilton v. Oregon Cent. Military Road Co., 3 Sawy. (U. S.) 22; Hintrager v. Nightingale, 36 Fed. Rep. 847.

*Alabama.* — Jones v. Pelham, 84 Ala. 208; Dane v. Glennon, 72 Ala. 160; Driggers v. Casady, 71 Ala. 529.

*Arkansas.* — Chestnut v. Harris, 64 Ark. 580, 62 Am. St. Rep. 213; Texarkana Water Co. v. State, 62 Ark. 188.

*California.* — Miller v. Williams, 135 Cal. 183; Harvey v. Meyer, 117 Cal. 60; Salisbury v. Shirley, 66 Cal. 223; People v. Cone, 48 Cal. 427; People v. Hancock, 48 Cal. 631; People v. Hyde, 48 Cal. 431; People v. Flint, 39 Cal. 670; People v. Mariposa Co., 31 Cal. 196; Bosworth v. Danzien, 25 Cal. 296; People v. Pico, 20 Cal. 595.

*Connecticut.* — Lewis v. Eastford, 44 Conn. 477.

*Georgia.* — Brinson v. Lassiter, 81 Ga. 40.

*Illinois.* — Koelling v. People, 196 Ill. 353; Sanford v. People, 102 Ill. 374.

*Indiana.* — Richardson v. State, 5 Blackf. (Ind.) 51.

*Iowa.* — Armour v. Officer, 116 Iowa 675.

*Kansas.* — Harding v. Greene, 59 Kan. 202; Wilkins v. Tourtellott, 28 Kan. 825; Lyon County v. Goddard, 22 Kan. 389.

*Louisiana.* — Scott v. Parry, 108 La. 11; M. E. Church v. New Orleans, 107 La. 611; Geddes v. Cunningham, 104 La. 306; Hood v. New Orleans, 49 La. Ann. 1461; Cucullu v. Brakenridge Lumber Co., 49 La. Ann. 1445; Poland v. Dreyfous, 48 La. Ann. 83; Augusti v. Lawless, 45 La. Ann. 1370, 43 La. Ann. 1097; Baton Rouge Oil Works, 34 La. Ann. 255; Rougelot v. Quick, 34 La. Ann. 123; Person v. O'Neal, 32 La. Ann. 228; Thibodaux v. Keller, 29 La. Ann. 508; Woolfolk v. Fonbene, 15 La. Ann. 15.

*Maine.* — Burgess v. Robinson, 95 Me. 120; Green v. Alden, 92 Me. 177; Oldtown v. Blake, 74 Me. 280; Bingham v. Smith, 64 Me. 450;

(b) **How Description May Be Aided** — *aa. IN GENERAL.* — It is not absolutely necessary that each description be complete in itself. It will suffice if it can be made certain by recourse to records, maps, plats, or other available documents, incorporated into it by reference, to general descriptive matter at the head of the column in which it appears or elsewhere in the assessment roll, or to other descriptions with which it is grouped.<sup>1</sup>

*Greene v. Walker*, 63 Me. 311; *Greene v. Lunt*, 58 Me. 518.

*Michigan.* — *Sleight v. Roe*, 125 Mich. 585; *Auditor Gen. v. Smith*, 125 Mich. 576; *Jackson v. Sloman*, 117 Mich. 126; *Auditor Gen. v. Sparrow*, 116 Mich. 574; *Atwell v. Zeluff*, 26 Mich. 118.

*Mississippi.* — *Sims v. Warren*, 67 Miss. 278; *Hughes v. Thomas*, (Miss. 1900) 29 So. Rep. 74; *Smith v. Hickman*, (Miss. 1899) 24 So. Rep. 973; *Dingey v. Paxton*, 60 Miss. 1038; *Wing v. Minor*, (Miss. 1890) 7 So. Rep. 347.

*Missouri.* — *State v. Burrough*, 174 Mo. 700; *State v. Sanford*, 127 Mo. 368; *State v. Wabash R. Co.*, 114 Mo. 1; *Jefferson v. Whipple*, 71 Mo. 519.

*Nebraska.* — *Spiech v. Tierney*, 56 Neb. 514.

*Nevada.* — *State v. Central Pac. R. Co.*, 21 Nev. 94.

*New Hampshire.* — *Ainsworth v. Dean*, 21 N. H. 400; *Smith v. Messer*, 17 N. H. 420.

*New Jersey.* — *Pfeiffer v. Miles*, 48 N. J. L. 451; *Newcomb v. Franklin Tp.*, 46 N. J. L. 437.

*New York.* — *Matter of New York Cent.*, etc., R. Co., 90 N. Y. 342; *People v. Banfield*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 13; *Peck v. Mallams*, 10 N. Y. 509; *Sharp v. Johnson*, 4 Hill (N. Y.) 92, 40 Am. Dec. 259; *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 531, 49 Am. Dec. 189; *Tallman v. White*, 2 N. Y. 66.

*North Carolina.* — *Fulcher v. Fulcher*, 122 N. Car. 101.

*North Dakota.* — *Sheets v. Paine*, 10 N. Dak. 103; *Power v. Bowdle*, 3 N. Dak. 107, 44 Am. St. Rep. 511; *Power v. Larabee*, 2 N. Dak. 141.

*Ohio.* — *Turney v. Yeoman*, 16 Ohio 25; *Treon v. Emerick*, 6 Ohio 391; *Lafferty v. Byers*, 5 Ohio 458; *Massie v. Long*, 2 Ohio 287, 15 Am. Dec. 547.

*Oregon.* — *Jory v. Palace Dry Goods Co.*, 30 Oregon 196; *Holmes v. School Dist. No. 15*, 11 Oregon 332.

*Pennsylvania.* — *Putnam v. Tyler*, 117 Pa. St. 570; *Greenough v. Fulton Coal Co.*, 74 Pa. St. 486; *Lyman v. Philadelphia*, 56 Pa. St. 488; *Philadelphia v. Miller*, 49 Pa. St. 440.

*Rhode Island.* — *Kettelle v. Warwick*, etc., *Water Co.*, 23 R. I. 114; *Taylor v. Narragansett Pier Co.*, 19 R. I. 123.

*South Dakota.* — *Stokes v. Allen*, 15 S. Dak. 421; *Van Cise v. Carter*, 9 S. Dak. 234.

*Tennessee.* — *Peck v. East Tennessee Lumber, etc., Co.* (Tenn. Ch. 1899) 53 S. W. Rep. 1107; *Morristown v. King*, 11 Lea (Tenn.) 669; *Bush v. Williams*, *Cooke (Tenn.)* 360.

*Texas.* — *State v. Farmer*, 94 Tex. 233; *Yenda v. Wheeler*, 9 Tex. 408; *Barrett v. Spence*, 28 Tex. Civ. App. 344; *Scollard v. Dallas*, 16 Tex. Civ. App. 620.

*Utah.* — *Asper v. Moon*, 24 Utah 241; *Allen v. Fitzgerald*, 23 Utah 597; *Eastman v. Gurrey*, 15 Utah 410; *Olsen v. Bagley*, 10 Utah 492.

*Vermont.* — *Waterman v. Davis*, 66 Vt. 83.

*Wisconsin.* — *Head v. James*, 13 Wis. 641.

**An Insufficient Description** is not cured by an accurate description in the report of the sale of the property for the taxes. *Morristown v. King*, 11 Lea (Tenn.) 669.

**Mistake in Acreage.** — Where the tract is sufficiently described, an incorrect statement as to the number of acres it contains does not render the assessment void. *Fish v. Genett*, (Ky. 100) 56 S. W. Rep. 813; *Gilman v. Riopelle*, 18 Mich. 145; *People v. Adams*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 295; *Putnam v. Tyler*, 117 Pa. St. 570; *Brown v. Hays*, 66 Pa. St. 229; *Williston v. Colkett*, 9 Pa. St. 38; *Barrett v. Spence*, 28 Tex. Civ. App. 344. See also *Poland v. Dreyfous*, 48 La. Ann. 83.

**Floating Grant.** — *People v. Crockett*, 33 Cal. 150, (description of land as specific quantity to be selected within the boundaries of a designated tract valid).

**Description in Copy of Roll.** — If any discrepancy in the description of the property in the original list and in the copies exists, the description in the original must control. *Geren v. Gruber*, 26 La. Ann. 694.

**Special Assessments and General Taxes.** — There is no distinction between special assessments and general taxes in respect to certainty of description of the property. *Koelling v. People*, 196 Ill. 353. See the title **SPECIAL OR LOCAL ASSESSMENTS**, vol. 25, p. 1223.

**1. How Description May Be Aided** — *California.* — *Lahman v. Hatch*, 124 Cal. 1; *Santa Barbara v. Eldred*, 108 Cal. 294; *Patten v. Green*, 13 Cal. 325.

*Illinois.* — *Cairo, etc., R. Co. v. Mathews*, 152 Ill. 153; *Greenwood v. La Salle*, 137 Ill. 225; *People v. Reat*, 107 Ill. 581.

*Iowa.* — *Burdick v. Connell*, 69 Iowa 458.

*Kentucky.* — *Com. v. Louisville*, (Ky. 1898) 47 S. W. Rep. 865.

*Louisiana.* — *Bristol v. Murff*, 49 La. Ann. 357.

*Maine.* — *Greene v. Walker*, 63 Me. 311.

*Massachusetts.* — *Westhampton v. Searle*, 127 Mass. 502.

*Michigan.* — *Harts v. Mackinac Island*, (Mich. 1902) 92 N. W. Rep. 351, *distinguishing* *Hubbard v. Winsor*, 15 Mich. 146, and *Petit v. Flint, etc., R. Co.*, 114 Mich. 362; *Auditor Gen. v. Sparrow*, 116 Mich. 574; *Bird v. Perkins*, 33 Mich. 28.

*Minnesota.* — *Williams v. Central Land Co.*, 32 Minn. 440.

*Mississippi.* — *Richter v. Beaumont*, 67 Miss. 285.

*Missouri.* — *State v. Vaile*, 122 Mo. 33.

*Nebraska.* — *Concordia L. & T. Co. v. Van Camp*, (Neb. 1902) 89 N. W. Rep. 744; *Kershaw v. Jansen*, 49 Neb. 467; *Roads v. Estabrook*, 35 Neb. 297.

*New York.* — *May v. Traphagen*, 139 N. Y.

Volume XXVII.

66. **PAROL EVIDENCE — JUDICIAL NOTICE.** — Parol evidence and matters within the judicial knowledge of the court are receivable to explain latent ambiguities and apply a description to its subject-matter, but not to supply one that is wholly insufficient to identify the property.<sup>1</sup>

(c) **Abbreviations.** — A description of land by abbreviations commonly used to designate congressional subdivisions sufficiently identifies it, and the use of other abbreviations in describing the property, if they are such as are well known and understood, is unobjectionable.<sup>2</sup>

(d) **Statutory Directions.** — Platted lands in cities and towns are properly described by the lot and block numbers, and other lands by the congressional divisions and subdivisions, where such descriptions will identify the land intended to be assessed; and the statutes frequently sanction such descriptions. The statutory provisions, however, are, as a rule, directory merely and do not render invalid descriptions by metes and bounds, by a name by which

478; *White v. Wheeler*, 51 Hun (N. Y.) 573; *Lalor v. New York*, 12 Daly (N. Y.) 235.

*North Dakota.* — *O'Neil v. Tyler*, 3 N. Dak.

47. *Oregon.* — *Dekum v. Multnomah County*, 38 Oregon 253.

*Pennsylvania.* — *McClements v. Downey*, 2 Pa. Super. Ct. 443.

*Rhode Island.* — *Hopkins v. Young*, 15 R. I. 48.

*Washington.* — *Noyes v. King County*, 18 Wash. 417.

*Wisconsin.* — *Merton v. Dolphin*, 28 Wis. 456.

1. **Parol Evidence — Alabama.** — *Driggers v. Cassady*, 71 Ala. 529.

*Arkansas.* — *Loneragan v. Baber*, 59 Ark. 15.

*Florida.* — *Miller v. Lindstrom*, (Fla. 1903) 33 S. Rep. 521.

*Illinois.* — Any description by which property can be identified by a competent surveyor with reasonable certainty, either with or without the aid of extrinsic evidence, is sufficient to sustain a tax levy. *Otis v. People*, 196 Ill. 542; *Koelling v. People*, 196 Ill. 353; *Carrington v. People*, 195 Ill. 484; *Sholl v. People*, 194 Ill. 24; *Cairo, etc., R. Co. v. Mathews*, 152 Ill. 153; *People v. Stahl*, 101 Ill. 346; *Fowler v. People*, 93 Ill. 116; *Law v. People*, 80 Ill. 268; *Buck v. People*, 78 Ill. 560.

*Iowa.* — *Armour v. Officer*, 116 Iowa 675; *Judd v. Anderson*, 51 Iowa 345; *Blair Town Lot, etc., Co. v. Scott*, 44 Iowa 143.

*Michigan.* — *Auditor Gen. v. Sparrow*, 116 Mich. 574.

*Minnesota.* — *Minneapolis R. Terminal Co. v. Minnesota Debenture Co.*, 81 Minn. 66; *Gillfillan v. Hobart*, 34 Minn. 67.

*Mississippi.* — *Leavenworth v. Greenville, etc., Storage Co.*, (Miss. 1903) 35 So. Rep. 138; *Hughes v. Thomas*, (Miss. 1900) 29 So. Rep. 74; *Smith v. Hickman*, (Miss. 1899) 24 So. Rep. 973; *McQueen v. Bush*, 76 Miss. 283; *Sims v. Warren*, 68 Miss. 447, 67 Miss. 278; *Dodds v. Marx*, 63 Miss. 443.

*Missouri.* — *State v. Wabash R. Co.*, 114 Mo. 1.

*New Jersey.* — *State v. Woodbridge Tp.*, 42 N. J. L. 401.

*New York.* — *People v. Garmon*, 63 N. Y. App. Div. 530, affirming 34 Misc. (N. Y.) 350.

*North Dakota.* — *Sheets v. Paine*, 10 N. Dak. 103; *Power v. Bowdle*, 3 N. Dak. 107, 44 Am. St. Rep. 511.

*Pennsylvania.* — *Marsh v. Nelson*, 101 Pa. St. 51; *Hess v. Herrington*, 73 Pa. St. 438; *Glass v. Gilbert*, 58 Pa. St. 266; *Woodside v. Wilson*, 32 Pa. St. 52; *McClements v. Downey*, 2 Pa. Super. Ct. 443.

*Rhode Island.* — *Kettelle v. Warwick, etc., Water Co.*, 23 R. I. 114; *Evans v. Newell*, 18 R. I. 38.

*Texas.* — *Cooper Grocery Co. v. Waco*, 30 Tex. Civ. App. 623; *Eustis v. Henrietta*, 90 Tex. 469, reversing on other grounds (Tex. Civ. App. 1896) 37 S. W. Rep. 632, and citing 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 218; *Grace v. Bonham*, 26 Tex. Civ. App. 161.

*Wisconsin.* — *Jenkins v. Sharpf*, 27 Wis. 472.

**Judicial Notice.** — *Kile v. Yellowhead*, 80 Ill. 208; *Poland v. Dreyfous*, 48 La. Ann. 83. See also *Dumphy v. Auditor Gen.*, 123 Mich. 354. See generally title JUDICIAL NOTICE, vol. 17, pp. 914, 915.

**The Name of the Taxpayer** is not sufficient as a basis for the introduction of extrinsic evidence to sustain the assessment, although the real estate owned by him is a matter of record. *McQueen v. Bush*, 76 Miss. 283; *Bowers v. Andrews*, 52 Miss. 596.

2. **Abbreviations — United States.** — *Jenkins v. McTigue*, 22 Fed. Rep. 148; *Kelly v. Herrall*, 20 Fed. Rep. 364.

*Alabama.* — *Smith v. Cox*, 115 Ala. 503.

*Arkansas.* — *Chestnut v. Harris*, 64 Ark. 580, 62 Am. St. Rep. 213; *Cooper v. Lee*, 59 Ark. 460.

*Illinois.* — *Koelling v. People*, 196 Ill. 353; *Sholl v. People*, 194 Ill. 24; *Taylor v. Wright*, 121 Ill. 455; *Kile v. Yellowhead*, 80 Ill. 208; *Buck v. People*, 78 Ill. 560; *Olcott v. State*, 10 Ill. 481.

*Indiana.* — *Jordan Ditching, etc., Assoc. v. Wagoner*, 33 Ind. 50.

*Michigan.* — *Auditor Gen. v. Sparrow*, 116 Mich. 574; *Sibley v. Smith*, 2 Mich. 486.

*Mississippi.* — *Havard v. Day*, 62 Miss. 748.

*Missouri.* — *State v. Vaile*, 122 Mo. 33.

*New Jersey.* — *State v. Newark*, 36 N. J. L. 288.

**Contra** of abbreviations for congressional subdivisions. *Power v. Larabee*, 2 N. Dak. 141; *Power v. Bowdle*, 3 N. Dak. 107, 44 Am. St. Rep. 511; *Sheets v. Paine*, 10 N. Dak. 103; *Turner v. Hand County*, 11 S. Dak. 348, approved *Stokes v. Allen*, 15 S. Dak. 421.

the tract is commonly known, or in any other way by which it can be located.<sup>1</sup> The question in each case is only as to whether the land can be identified and located from the description given.<sup>2</sup>

(6) **Descriptions in Assessments and in Conveyances.** — It cannot be laid down as a general rule that a description of real estate which would suffice in a deed or agreement to convey would sustain an assessment, since certainty may be imparted to a conveyance by parol evidence that a particular tract was intended and the grantee put into possession, although the description is wholly indefinite. Nor is it often required that the description follow that contained in the title papers of the taxpayer, though it will usually be sufficient if it does.<sup>3</sup>

(7) **Separate Assessment of Parcels.** — The revenue acts frequently direct each tract of real estate to be separately listed and valued. As a rule this requirement is held to be mandatory, and compliance therewith essential to the validity of the assessment. Under the statutes in some jurisdictions, however,

**1. Statutory Directions — Different Methods of Describing Real Estate — Alabama.** — *Driggers v. Cassady*, 71 Ala. 529.

**Arkansas.** — *Chestnut v. Harris*, 64 Ark. 580, 62 Am. St. Rep. 213; *Kelly v. Salinger*, 53 Ark. 114.

**California.** — *Allen v. McKay*, 139 Cal. 94, affirming 70 Pac. Rep. 8; *Davis v. Pacific Imp. Co.*, 137 Cal. 245; *Klumpke v. Baker*, 131 Cal. 80; *Santa Barbara v. Eldred*, 108 Cal. 294; *People v. Leet*, 23 Cal. 161; *High v. Shoemaker*, 22 Cal. 363; *Lachman v. Clark*, 14 Cal. 131; *Palmer v. Boling*, 8 Cal. 388.

**Illinois.** — *Taylor v. Wright*, 121 Ill. 455; *Chiniy v. People*, 78 Ill. 570.

**Iowa.** — *Cahalan v. Van Sant*, 87 Iowa 593.

**Kentucky.** — *Frankfort v. Farmers' Bank*, (Ky. 1901) 61 S. W. Rep. 458.

**Louisiana.** — *Russell v. Lang*, 50 La. Ann. 36; *Gulf State Land, etc., Co. v. Fasnacht*, 47 La. Ann. 1294; *Webre v. Lutchter*, 45 La. Ann. 574; *Sutton v. Calhoun*, 14 La. Ann. 205.

**Maine.** — *Adams v. Larrabee*, 46 Me. 516.

**Minnesota.** — *Minneapolis R. Terminal Co. v. Minnesota Debenture Co.*, 81 Minn. 66.

**Nebraska.** — *Alexander v. Hunter*, 29 Neb. 259.

**Nevada.** — *Wright v. Cradlebaugh*, 3 Nev. 341.

**New Jersey.** — *State v. Galloway Tp.*, 42 N. J. L. 415; *State v. Platt*, 24 N. J. L. 108.

**New York.** — *People v. O'Brien*, 53 Hun (N. Y.) 580.

**Pennsylvania.** — *Glass v. Gilbert*, 58 Pa. St. 266; *Lyman v. Philadelphia*, 56 Pa. St. 488; *McClements v. Downey*, 2 Pa. Super. Ct. 443.

**Rhode Island.** — *Hopkins v. Young*, 15 R. I. 48.

**Tennessee.** — *Nance v. Hopkins*, 10 Lea (Tenn.) 508.

**Texas.** — *Eustis v. Henrietta*, 90 Tex. 468, reversing on other grounds (Tex. Civ. App. 1896) 37 S. W. Rep. 632; *Dallas Title, etc., Co. v. Oak Cliff*, 8 Tex. Civ. App. 217; *Hernandez v. San Antonio*, (Tex. Civ. App. 1897) 39 S. W. Rep. 1022.

**Wisconsin.** — *Whitney v. Gunderson*, 31 Wis. 359; *Janesville v. Markoe*, 18 Wis. 350.

Compare as to the force and effect of statutory directions: *Hammon v. Nix*, (C. C. A.) 104 Fed. Rep. 689; *Matter of Wood*, 35 N. Y.

App. Div. 363, affirmed without opinion 163 N. Y. 605; *Bennett v. Kovarick*, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 73, affirmed without opinion 44 N. Y. App. Div. 629.

**Bridge Property — Statutory Requirements.** — *Keokuk, etc., Bridge Co. v. People*, 145 Ill. 596, followed *People v. Guthrie*, 149 Ill. 360, which reversed 46 Ill. App. 124.

**Railroad, Telegraph, and Like Property** in city streets has been held not within requirement as to designation by lot and block number. *Brooklyn El. R. Co. v. Brooklyn*, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 416. See the title TAXATION (CORPORATE), post.

2. *Allen v. McKay*, 139 Cal. 94, affirming 70 Pac. Rep. 8.

A Mistake in the Number of a Lot will not invalidate the assessment if the description is otherwise sufficient. *Marsh v. Nelson*, 101 Pa. St. 51.

**3. Descriptions in Assessments and in Conveyances — Alabama.** — *Jones v. Pelham*, 84 Ala. 208.

**California.** — *Miller v. Williams*, 135 Cal. 183; *Klumpke v. Baker*, 131 Cal. 80; *San Gabriel Valley Land, etc., Co. v. Witmer Bros. Co.*, 96 Cal. 623; *People v. Mahoney*, 55 Cal. 286; *Keane v. Cannovan*, 21 Cal. 302, 82 Am. Dec. 738.

**Illinois.** — *Koelling v. People*, 196 Ill. 353; *Carrington v. People*, 195 Ill. 484; *Law v. People*, 80 Ill. 268.

**Kentucky.** — *Fish v. Genett*, (Ky. 1900) 56 S. W. Rep. 813.

**Louisiana.** — *Muller v. Mazerat*, 109 La. 116; *In re Wenck*, 52 La. Ann. 376; *Chopin v. Pollet*, 48 La. Ann. 1186; *Gulf State Land, etc., Co. v. Fasnacht*, 47 La. Ann. 1294.

**Michigan.** — *Auditor Gen. v. Smith*, 125 Mich. 576; *Jackson v. Sloman*, 117 Mich. 126.

**North Dakota.** — *Power v. Bowdle*, 3 N. Dak. 107, 44 Am. St. Rep. 511; *Roberts v. Fargo First Nat. Bank*, 8 N. Dak. 504.

**Washington.** — *Eureka Dist. Gold Min. Co. v. Ferry County*, 28 Wash. 250.

A Description which would be sufficient in a conveyance is doubtless generally sufficient for taxation especially a description by which the owner has acquired title. *Koelling v. People*, 196 Ill. 353.

**Absence of Record Identifying Property Not Material.** — *Kershaw v. Jansen*, 49 Neb. 467.

a failure separately to assess each parcel is an irregularity merely, or the grouping of several tracts belonging to the same taxpayer is expressly authorized where practicable.<sup>1</sup> So the grouping and joining of real estate belonging to different owners as one tract, and assessing it as the property of one of them, renders the assessment void in some states, while in others it is only an irregularity or overvaluation.<sup>2</sup> The statutory requirement that each

**1. Separate Assessment of Parcels—General Rules—United States.**—*French v. Edwards*, 13 Wall. (U. S.) 511; *Assessors v. Pullman's Palace-Car Co.*, (C. C. A.) 60 Fed. Rep. 37 affirming 55 Fed. Rep. 206 (*construing Louisiana statute*); *Land, etc., Imp. Co. v. Bardon*, 45 Fed. Rep. 706; *Davis v. McGee*, 28 Fed. Rep. 867.

**Alabama.**—*Walker v. Chapman*, 22 Ala. 116. **California.**—*Cadwalader v. Nash*, 73 Cal. 43; *People v. Hollister*, 47 Cal. 408; *People v. Sierra Buttes Quartz Min. Co.*, 39 Cal. 511.

**Florida.**—*McKeown v. Collins*, 38 Fla. 276; *Parker v. Jacksonville*, 37 Fla. 342; *Levy v. Ladd*, 35 Fla. 391, citing *Graham v. Florida Land, etc., Co.*, 33 Fla. 356; *Kissimmee City v. Cannon*, 26 Fla. 3.

**Illinois.**—*Howe v. People*, 86 Ill. 288; *Thatcher v. People*, 79 Ill. 597.

**Iowa.**—*Cornoy v. Wetmore*, 92 Iowa 100.

**Kansas.**—*Hall v. Dodge*, 18 Kan. 277.

**Louisiana.**—*Hood v. New Orleans*, 49 La. Ann. 1461.

**Maine.**—*Nason v. Ricker*, 63 Me. 381; *Shimmin v. Inman*, 26 Me. 228.

**Massachusetts.**—*Jennings v. Collins*, 99 Mass. 29; *Hayden v. Foster*, 13 Pick. (Mass.) 492.

**Missouri.**—*Yeaman v. Lepp*, 167 Mo. 61; *State v. Wabash R. Co.*, 114 Mo. 1.

**Montana.**—*Cobban v. Hinds*, 23 Mont. 338; *Deloughrey v. Hinds*, 23 Mont. 260.

**Nebraska.**—*Dundy v. Richardson County*, 8 Neb. 508.

**Nevada.**—*Peers v. Reed*, 23 Nev. 404; *State v. Central Pac. R. Co.*, 21 Nev. 94; *Wright v. Cradlebaugh*, 3 Nev. 341.

**New Jersey.**—*State v. Van Horn*, 40 N. J. L. 143.

**New York.**—*May v. Traphagen*, 139 N. Y. 478, reversing (*Brooklyn City Ct. Gen. T.*) 19 N. Y. Supp. 679; *Smith v. Brooklyn*, 32 N. Y. App. Div. 223; *Dike v. Lewis*, 2 Barb. (N. Y.) 344.

**North Dakota.**—*Roberts v. Fargo First Nat. Bank*, 8 N. Dak. 504.

**Oklahoma.**—*Frazier v. Prince*, 8 Okla. 253, citing 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 222.

**Pennsylvania.**—*Hutchinson v. Kline*, 199 Pa. St. 564; *Fisk v. Corey*, 141 Pa. St. 334; *Reading v. Finney*, 73 Pa. St. 467; *Brown v. Hays*, 66 Pa. St. 229; *Heft v. Gephart*, 65 Pa. St. 510; *Russel v. Wernitz*, 24 Pa. St. 337; *Insurance Co. v. Yard*, 17 Pa. St. 338; *Philadelphia v. Thurlow*, 6 Pa. Dist. 51, 39 W. N. C. (Pa.) 412; *Harper v. M'Keehan*, 3 W. & S. (Pa.) 238; *Cunningham v. White*, 2 Pa. Dist. 531, citing *Morton v. Harris*, 9 Watts (Pa.) 319.

**Rhode Island.**—*St. Mary's Church v. Tripp*, 14 R. I. 307; *Young v. Joslin*, 13 R. I. 675.

**Texas.**—*State v. Baker*, 49 Tex. 763;

*Guerguin v. San Antonio*, 19 Tex. Civ. App. 98; *McCombs v. Rockport*, 14 Tex. Civ. App. 560.

**Washington.**—*Eureka Dist. Gold Min. Co. v. Ferry County*, 28 Wash. 250; *Lockwood v. Roys*, 11 Wash. 697;

**West Virginia.**—*Bogges v. Scott*, 48 W. Va. 316; *Winning v. Eakin*, 44 W. Va. 19.

**Wisconsin.**—*Neu v. Voegel*, 96 Wis. 489.

**Resident and Nonresident, Seated and Unseated Lands.**—See the cases cited *supra*, this subdivision, *Naming the Taxpayer—Resident and Nonresident, Seated and Unseated Lands.*

**Reduction in Gross by Board of Review of Separate Valuations** of lots belonging to one owner has been held proper. *People v. Feitner*, 61 N. Y. App. Div. 456, affirmed without opinion 168 N. Y. 677.

**Curative Acts.**—Such a defect may be cured and the assessment validated by act of the legislature. *Parker v. Jacksonville*, 37 Fla. 342.

**2. Assessments Grouping and Joining Land Owned by Person Assessed with That Not Owned by Him—California.**—*Klumpke v. Baker*, 131 Cal. 80; *Terrill v. Groves*, 18 Cal. 149.

**Illinois.**—*Howe v. People*, 86 Ill. 288.

**Indiana.**—*Romig v. Lafayette*, 33 Ind. 30.

**Kansas.**—*Challiss v. Hekelnkaemper*, 14 Kan. 474.

**Louisiana.**—*George v. Cole*, 109 La. 816; *Howcott v. Fifth Louisiana Levee Dist.*, 46 La. Ann. 322.

**Maine.**—*Barker v. Blake*, 36 Me. 433.

**Massachusetts.**—*Jennings v. Collins*, 99 Mass. 29; *Howe v. Boston*, 7 Cush. (Mass.) 273; *Hayden v. Foster*, 13 Pick. (Mass.) 492.

**Michigan.**—*Auditor Gen. v. Pioneer Iron Co.*, 123 Mich. 521; *Hanscom v. Hinman*, 30 Mich. 420; *Cooley v. Waterman*, 16 Mich. 366.

**Minnesota.**—*Minneapolis R. Terminal Co. v. Minnesota Debenture Co.*, 81 Minn. 66; *Farnham v. Jones*, 32 Minn. 7.

**Mississippi.**—*Sim v. Warren*, 67 Miss. 278; *Dunn v. Winston*, 31 Miss. 135.

**Montana.**—*Cobban v. Hinds*, 23 Mont. 338; *Deloughrey v. Hinds*, 23 Mont. 260.

**Nebraska.**—*Spiech v. Tierney*, 56 Neb. 514.

**New Hampshire.**—*Mowry v. Bladin*, 64 N. H. 3.

**New Jersey.**—*State v. North Bergen*, 39 N. J. L. 694.

**Ohio.**—*Douglas v. Dangerfield*, 10 Ohio 156.

**Oregon.**—*Title Trust Co. v. Aylsworth*, 40 Oregon 20.

**Pennsylvania.**—*Fisk v. Corey*, 141 Pa. St. 334; *Philadelphia v. Unknown Owner*, 20 Pa. Super. Ct. 203, followed *Philadelphia v. Allen*, 20 Pa. Super. Ct. 209; *Philadelphia v. Thurlow*, 5 Pa. Super. Ct. 600.

**Washington.**—*Coolidge v. Pierce County*, 28 Wash. 95.

See also *Douglas Co. v. Com.*, 97 Va. 397,

parcel shall be separately assessed does not necessarily mean that real estate for purposes of assessment must be divided into the smallest subdivisions possible;<sup>1</sup> and it is generally held not to compel a separate assessment of contiguous parcels belonging to the same person and occupied as a single tract, at least where they are covered with improvements in such manner as to render a separate valuation impracticable.<sup>2</sup>

(g) **Waiver and Estoppel.** — Where a statement or return of property for taxation is made by the taxpayer he is generally held to be estopped from objecting to assessments that follow the divisions and descriptions as he has given them in, although they do not conform to the requirements of the statute.<sup>3</sup>

(h) **Personal Liability for Taxes and Forfeitures.** — In some jurisdictions, while a description wholly indefinite and uncertain will not sustain a forfeiture or sale of the land for the taxes, it will be sufficient to create a personal liability if

1. **What Constitutes a Tract or Parcel.** — *Jones v. Pelham*, 84 Ala. 208; *Moore v. People*, 106 Ill. 376; *Pitkin v. Yaw*, 13 Ill. 251; *Spellman v. Curtin*, 12 Ill. 409, cited *Weaver v. Grant*, 39 Iowa 294; *Martin v. Cole*, 38 Iowa 141; *Howland v. Pettey*, 15 R. I. 603.

In subdividing tracts an assessor, unless authorized by law, may not make his own subdivision, nor follow subdivisions unknown to the owner. *Bidleman v. Brooks*, 28 Cal. 72; *People v. Palmer*, 113 Ill. 346, cited *Gilbert v. Morgan*, 98 Ill. App. 281; *Gage v. Rumsey*, 73 Ill. 473; *Brown v. Hays*, 66 Pa. St. 229; *Reading v. Finney*, 73 Pa. St. 467; *Philadelphia v. Thurlow*, 6 Pa. Dist. 51, 39 W. N. C. (Pa.) 412. See also *Hairston v. Stinson*, 13 Ired. L. (35 N. Car.) 479. He is not required to follow subdivisions made by the owner, however, so long as the latter retains title to the whole tract. *Jennings v. Collins*, 99 Mass. 29; *Bemis v. Caldwell*, 143 Mass. 299; *Guerquin v. San Antonio*, 19 Tex. Civ. App. 98; *San Antonio v. Raley*, (Tex. Civ. App. 1895) 32 S. W. Rep. 180; *Eureka Dist. Gold Min. Co. v. Ferry County*, 28 Wash. 250.

A Tract Plotted in Streets may be assessed in lots on the streets, unless the streets are private streets or alleys. *Philadelphia v. Thurlow*, 6 Pa. Dist. 51, 39 W. N. C. (Pa.) 412.

In Missouri the statute directs land to be listed by the smallest legal subdivisions or parts, except when parcels are under one ownership and can be consolidated. *State v. Wabash R. Co.*, 114 Mo. 1; *Yeaman v. Lepp*, 167 Mo. 61.

2. **Parcels Owned and Occupied as a Single Tract** — *United States*. — *New York Guaranty, etc., Co. v. Tacoma R., etc., Co.*, (C. C. A.) 93 Fed. Rep. 51.

*Arizona*. — *Jacobs v. Buckalew*, (Ariz. 1895) 42 Pac. Rep. 619.

*California*. — *People v. Culverwell*, 44 Cal. 620; *People v. Morse*, 43 Cal. 534.

*Idaho*. — *Co-operative Sav., etc., Assoc. v. Green*, 5 Idaho 660.

*Illinois*. — *Mix v. People*, 116 Ill. 265; *Pfeiffer v. People*, 170 Ill. 347, citing 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 223.

*Iowa*. — *Weaver v. Grant*, 39 Iowa 294.

*Kansas*. — *Dodge v. Emmons*, 34 Kan. 732; *Hall v. Dodge*, 18 Kan. 280; *McQuesten v. Swope*, 12 Kan. 32.

*Nebraska*. — *Pettibone v. Fitzgerald*, 62 Neb. 869; *Spiech v. Tierney*, 56 Neb. 514.

*New Jersey*. — *State v. Platt*, 24 N. J. L. 108.

*Vermont*. — *Bellows Falls Canal Co. v. Rockingham*, 37 Vt. 622.

*Washington*. — *Eureka Dist. Gold Min. Co. v. Ferry County*, 28 Wash. 250; *Pacific County v. Ellis*, 12 Wash. 108.

*West Virginia*. — *Maxwell v. Cunningham*, 50 W. Va. 298.

*Wisconsin*. — *Neu v. Voegel*, 96 Wis. 489.

*Contra*. — *Frazier v. Prince*, 8 Okla. 253.

The Use and Nature of the property must determine whether it is to be regarded as a unit. *Weaver v. Grant*, 39 Iowa 294.

Bridge and Approaches Constitute Unit. — *Keokuk, etc., Bridge Co. v. People*, 176 Ill. 267.

3. **Return of Property as a Waiver or Estoppel.** — *Cadwalader v. Nash*, 73 Cal. 43; *Albany Brewing Co. v. Meriden*, 48 Conn. 243; *Kissimmee City v. Drought*, 26 Fla. 1, 23 Am. St. Rep. 546; *Jeffries v. Clark*, 23 Kan. 448; *Spiech v. Tierney*, 56 Neb. 514; *Warwick, etc., Water Co. v. Carr*, (R. I. 1902) 52 Atl. Rep. 1030; *Mowry v. Slatersville Mills*, 20 R. I. 94; *Eustis v. Henrietta*, 90 Tex. 468, reversing on other grounds (Tex. Civ. App. 1896) 37 S. W. Rep. 632, followed (Tex. Civ. App. 1897) 41 S. W. Rep. 720; *Cooper Grocery Co. v. Waco*, 30 Tex. Civ. App. 623; *San Antonio v. Raley*, (Tex. Civ. App. 1895) 32 S. W. Rep. 180; *Grace v. Bonham*, 26 Tex. Civ. App. 161; *Harris v. Houston*, 21 Tex. Civ. App. 432; *Turner v. Houston*, 21 Tex. Civ. App. 214; *Scollard v. Dallas*, 16 Tex. Civ. App. 620; *McCombs v. Rockport*, 14 Tex. Civ. App. 560; *Dallas Title, etc., Co. v. Oak Cliff*, 8 Tex. Civ. App. 217. *Contra*, *State v. Burrough*, 174 Mo. 700; *Power v. Bowdle*, 3 N. Dak. 107, 44 Am. St. Rep. 511.

Descriptions in Former Assessments paid without objection create estoppel. *Benton v. Merrill*, 68 N. H. 369. Compare *McWilliams v. Great Spirit Springs Co.*, 7 Kan. App. 210.

Where the Taxpayer Returns His Real Estate in Separate Distinct Parcels, an assessment which includes them all under one designation, instead of separately describing and valuing them as required by the statute, is invalid. *Taylor v. Narragansett Pier Co.*, 19 R. I. 123; *Evans v. Newell*, 18 R. I. 38.



the property valued by the assessors can be ascertained by evidence, and the assessment is just and equitable in amount.<sup>1</sup>

*g. VALUATION OF PROPERTY*—(1) *In General*.—The constitutions or revenue acts of most states require all property to be assessed for taxation at its actual or fair cash value, which is sometimes defined to be the amount at which the property would be appraised if taken in payment of a just debt due from a solvent debtor, or the price it would bring at a fair voluntary sale.<sup>2</sup> The legislature has the power, however, to fix the assessed value at less than the full value, where the constitution is silent on the subject; since the rule requiring uniformity of taxation may be equally well secured by a proportionate basis.<sup>3</sup>

(2) *How Values Determined*.—In fixing this value the assessing officers act judicially. They may base their determinations solely upon their own

1. *Personal Liability and Forfeitures*.—Shaw *v. Orr*, 30 Iowa 355, citing *Burlington*, etc., R. Co. *v. Spearman*, 12 Iowa 112; *Hood v. New Orleans*, 49 La. Ann. 1461; *Rockland v. Ulmer*, 84 Me. 503; *Cressey v. Parks*, 76 Me. 532; *Dundy v. Richardson County*, 8 Neb. 508; *Newcomb v. Franklin Tp.*, 46 N. J. L. 437; *Clark v. Mulford*, 43 N. J. L. 550; *State v. Elizabeth*, 39 N. J. L. 689; *State v. Union Tp.*, 36 N. J. L. 309.

2. *Actual or Fair Cash Value*—*United States*.—*Huntington v. Central Pac. R. Co.*, 2 Sawy. (U. S.) 503; *Keener v. Union Pac. R. Co.*, 31 Fed. Rep. 126.

*Alabama*.—*Capital City Water Co. v. Board of Revenue*, 92 Ala. 380.

*Arizona*.—*Cochise County v. Copper Queen Consol. Min. Co.*, (Ariz. 1903) 71 Pac. Rep. 946.

*Colorado*.—*Gillett v. Logan County*, 13 Colo. App. 380.

*Connecticut*.—*Dennis's Appeal*, 72 Conn. 369.

*Florida*.—*Tampa v. Mugge*, 40 Fla. 326.

*Illinois*.—*Illinois*, etc., R., etc., Co. *v. Stookey*, 122 Ill. 358; *People v. Lots in Ashley*, 122 Ill. 297.

*Indiana*.—*Willis v. Crowder*, 134 Ind. 515.

*Kansas*.—*Stanfield v. Boyd*, 10 Kan. App. 265.

*Kentucky*.—*Owensboro Waterworks Co. v. Owensboro*, 74 S. W. Rep. 685, 24 Ky. L. Rep. 2530, rehearing denied (Ky. 1903) 75 S. W. Rep. 268.

*Massachusetts*.—*National Bank of Commerce v. New Bedford*, 175 Mass. 257; *Tremont*, etc., *Mills v. Lowell*, 163 Mass. 283; *Lowell v. Middlesex County*, 152 Mass. 372.

*Michigan*.—*Detroit Citizens' St. R. Co. v. Detroit*, 125 Mich. 673, 84 Am. St. Rep. 589; *Auditor Gen. v. Ayer*, 122 Mich. 136; *Wattles v. Lapeer*, 40 Mich. 624; *Hogelskamp v. Weeks*, 37 Mich. 422; *Clark v. Crane*, 5 Mich. 151, 71 Am. Dec. 776.

*Missouri*.—*State v. Stamm*, 165 Mo. 73.

*Nebraska*.—*Miller v. Hurford*, 13 Neb. 13.

*New Hampshire*.—*Winnipisogee Lake Cotton*, etc., *Mfg. Co. v. Gilford*, 67 N. H. 514.

*New Jersey*.—*Blume v. Bowes*, 65 N. J. L. 470; *Crispin v. Vansyckle*, 49 N. J. L. 366; *State v. Hornbacker*, 42 N. J. L. 635.

*New York*.—*People v. Barker*, 146 N. Y. 304; *People v. Barker*, 139 N. Y. 55, reversing on other grounds 68 Hun (N. Y.) 513; *People*

*v. Assessors*, 39 N. Y. 81, 97 Am. Dec. 773; *People v. Ferguson*, 38 N. Y. 89; *Oswego Starch Factory v. Dolloway*, 21 N. Y. 449; *Inman v. Coleman*, 37 Hun (N. Y.) 170.

*Ohio*.—*State v. Lewis*, 64 Ohio St. 216; *Ohio Farmers Ins. Co. v. Hard*, 10 Ohio Dec. 469, 8 Ohio N. P. 36.

*Oklahoma*.—*Streight v. Durham*, 10 Okla. 361.

*Oregon*.—*Oregon*, etc., R. Co. *v. Jackson County*, 38 Oregon 589; *Dayton v. Multnomah County*, 34 Oregon 239.

*Pennsylvania*.—*Com. v. Leigh Valley R. Co.*, 104 Pa. St. 89.

*Tennessee*.—*Carroll v. Alsup*, 107 Tenn. 257.

*Utah*.—*State v. Armstrong*, 19 Utah 117; *State v. Thomas*, 16 Utah 86.

*Washington*.—*Eureka Dist. Gold Min. Co. v. Ferry County*, 28 Wash. 250.

*Canada*.—*Bell Telephone Co. v. Ascot*, 16 Quebec Super. Ct. 436.

*Railroad Property*.—See the title TAXATION (CORPORATE), *post*. See also *Cincinnati Southern R. Co. v. Guenther*, 19 Fed. Rep. 395; *State v. Illinois Cent. R. Co.*, 27 Ill. 64, 79 Am. Dec. 396; *Atlantic*, etc., R. Co. *v. State*, 60 N. H. 133; *Central R. Co. v. Assessors*, 49 N. J. L. 1; *People v. Keator*, (Supm. Ct. Spec. T.) 67 How Pr. (N. Y.) 277; *People v. Weaver*, (Supm. Ct. Spec. T.) 67 How Pr. (N. Y.) 477; *People v. Hicks*, 40 Hun (N. Y.) 598.

The "Actual Value," "True Value," or "Cash Value," the expressions being synonymous, are made the basis by which the tax or value must be graduated or determined. *Carroll v. Alsup*, 107 Tenn. 257.

*Present and Not Prospective Value*.—*State v. Illinois Cent. R. Co.*, 27 Ill. 64, 79 Am. Dec. 396.

*Where There Are Two Kinds of Money of Unequal Value* in circulation, it is essential to uniformity in taxation that the legislature direct assessors as to which they shall base their estimates of value upon. *State v. Kruttschnitt*, 4 Nev. 178; *State v. Fish*, 4 Nev. 216. See also *Pacific Ins. Co. v. Soule*, 7 Wall. (U. S.) 433; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701.

3. *Assessments at Less than Actual Value*.—*Chicago v. Fishburn*, 189 Ill. 367. See also *Stratton v. Collins*, 43 N. J. L. 562; *West Hoboken v. Taxation Com'rs*, 66 N. J. L. 162; *Hixon v. Eagle River*, 91 Wis. 649.

knowledge in so far as they are personally cognizant of values, unless it is provided otherwise by statute. In other cases they must proceed upon inquiry and exercise their best judgment upon all the evidence and information obtainable.<sup>1</sup> What the law requires of assessors is an intelligent and fair exercise of the powers conferred upon them. It does not permit them to value property arbitrarily and capriciously, thereby unequally apportioning the burden of taxation.<sup>2</sup>

(3) *Methods of Valuation — Elements of Value* — (a) *In General*. — The advantages and disadvantages of location, earning capacity, cost of construction, market price, or other elements which enter into and constitute the value of property, should be considered by the assessing officers in arriving at their determination. The method to be followed and the elements of value to be taken into consideration in a particular case must generally be determined by the character and situation of the property involved.<sup>3</sup> There

1. *How Values Determined — Florida*. — King v. Gwynn, 14 Fla. 32.

*Illinois*. — St. Louis, etc., R. Co. v. Surrall, 88 Ill. 535.

*Iowa*. — Beeson v. Johns, 59 Iowa 166.

*Nevada*. — State v. Central Pac. R. Co., 10 Nev. 47.

*New Hampshire*. — Dewey v. Stratford, 42 N. H. 282.

*New York*. — People v. Barker, 48 N. Y. 76; Vail v. Owen, 19 Barb. (N. Y.) 22; People v. McNamara, 18 N. Y. App. Div. 17.

*Ohio*. — Ludlow v. Lewis, 9 Ohio Dec. 600, 6 Ohio N. P. 513; Nova Ceasarea Harmony Lodge No. 2 v. Hagerty, 11 Ohio Dec. (Reprint) 595, 28 Cinc. L. Bul. 67.

*Vermont*. — Weatherhead v. Guilford, 62 Vt. 327.

**Physical and Tangible Property** whose value is of common knowledge may be assessed according to their own judgment by the assessors subject, of course, to review in any manner provided by law. People v. McNamara, 18 N. Y. App. Div. 17.

2. **Arbitrary Valuations**. — Tampa v. Mugge, 40 Fla. 326; People v. Fraser, 74 Hun (N. Y.) 282, affirmed without opinion 145 N. Y. 593; Rawson v. Schott, 7 Ohio Cir. Dec. 256, 14 Ohio Cir. Ct. 94; Gerke Brewing Co. v. Hagerty, 1 Ohio Dec. 687, 1 Ohio N. P. 68. See *infra*, this section, *Appeal and Review*.

3. **Methods of Valuation — Elements of Value** — *United States*. — Cincinnati Southern R. Co. v. Guenther, 19 Fed. Rep. 395.

*Alabama*. — State v. Sage Land, etc., Co., 118 Ala. 677; State v. Bienville Water Supply Co., 89 Ala. 325; Stein v. Mobile, 17 Ala. 234.

*Connecticut*. — White v. Portland, 63 Conn. 18.

*Georgia*. — State v. Southwestern R. Co., 70 Ga. 11.

*Illinois*. — Keokuk, etc., Bridge Co. v. People, 161 Ill. 514; State v. Illinois Cent. R. Co., 27 Ill. 64, 79 Am. Dec. 396; Fitch v. Pinkard, 5 Ill. 69.

*Indiana*. — Willis v. Crowder, 134 Ind. 515.

*Louisiana*. — Morgan's Louisiana, etc., R., etc., Co. v. Board of Reviewers, 41 La. Ann. 1156.

*Maine*. — Auburn v. Young Men's Christian Assoc., 86 Me. 244, citing Cressey v. Parks, 76 Me. 532.

*Massachusetts*. — Troy Cotton, etc., Manu-

factory v. Fall River, 167 Mass. 517; Tremont, etc., Mills v. Lowell, 163 Mass. 283; Pingree v. Berkshire County, 102 Mass. 76; Boston Water Power Co. v. Boston, 9 Met. (Mass.) 199; Lowell v. Middlesex County, 6 Allen (Mass.) 131.

*Mississippi*. — Union Invest. Co. v. Harrison County, 67 Miss. 614.

*Nebraska*. — State v. Savage, (Neb. 1902) 91 N. W. Rep. 716.

*New Hampshire*. — Winnipiseogee Lake Cotton, etc., Mfg. Co. v. Gilford, 64 N. H. 337; Atlantic, etc., R. Co. v. State, 60 N. H. 133.

*New Jersey*. — Central R. Co. v. Assessors, 49 N. J. L. 1; New York, etc., R. Co. v. Hughes, 46 N. J. L. 67; State v. Abbott, 42 N. J. L. 111; State v. Jersey City, 36 N. J. L. 56; State v. Metz, 31 N. J. L. 378; State v. Dickerson, 25 N. J. L. 427; State v. Flavell, 24 N. J. L. 370.

*New York*. — People v. Tax Com'rs, 104 N. Y. 240; People v. Barker, 48 N. Y. 70; People v. Kalbfleisch, 25 N. Y. App. Div. 432, appeal dismissed without opinion 156 N. Y. 678; People v. Barker (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 258; People v. Keator, (Supm. Ct. Spec. T.) 67 How. Pr. (N. Y.) 277, 36 Hun (N. Y.) 592; People v. Pond, (Supm. Ct. Gen. T.) 13 Abb. N. Cas. (N. Y.) 1.

*Ohio*. — State v. Halliday, 61 Ohio St. 352.

*Oregon*. — Oregon, etc., R. Co. v. Jackson County, 38 Oregon 589; Oregon Steam Nav. Co. v. Wasco County, 2 Oregon 206.

*Pennsylvania*. — Logan v. Washington County, 29 Pa. St. 373; Smith v. Forest County, 23 Pa. Co. Ct. 643; Cambridge Springs Co.'s Appeal, 8 Pa. Dist. 55, 21 Pa. Co. Ct. 669; Berwind White Coal Min. Co. v. Clearfield County, 18 Pa. Co. Ct. 545; Heberton's Case, 2 Pa. Dist. 794, 13 Pa. Co. Ct. 372.

*Texas*. — Daugherty v. Thompson, 71 Tex. 192.

*Wisconsin*. — Webster-Glover Lumber, etc., Co. v. St. Croix County, 63 Wis. 647; Salscheider v. Ft. Howard, 45 Wis. 521; Hersey v. Barron County, 37 Wis. 75.

**The Value of Property** results from the use to which it is put, and varies with the profitability of that use, present and prospective, actual and anticipated. Wells, etc., Co.'s Express v. Crawford County, 63 Ark. 576.

**The Constitution** does not leave room for a different basis of valuation of real property as vacant or occupied. Nor can it be evaded

exists in fact no rigid rule for the valuation, which is affected by a multitude of circumstances which no rule can foresee or provide for. The assessor must consider all these circumstances and elements of value, and must exercise a prudent discretion in reaching a conclusion.<sup>1</sup> Where property is correctly valued, an assessment is not void because an erroneous method was followed by the assessing officers in fixing the valuation.<sup>2</sup>

(b) **Statutory Directions.** — The revenue acts sometimes contain directions as to the elements of value to be considered in assessing real estate and some other classes of property, such as stock in trade, partnership property, material used in manufacturing, and the product of mines.<sup>3</sup> A provision that the valuation shall be made upon actual view of the property is generally directory merely.<sup>4</sup>

(4) **Separate Interests Arising Out of Same Property.** — Where there are several estates or interests arising out of the same property, in assessing a particular interest its comparative value should be ascertained, having reference to the terms and conditions under which it is held and the value of the whole; and the aggregate of the separate valuations should not exceed the fair cash value of the property considered as an entirety.<sup>5</sup>

(5) **Choses in Action.** — Shares of stock, bonds, notes, and like choses in action are to be listed at their actual and not their nominal or face value, unless the two values coincide; and if wholly worthless they are not subject to taxation.<sup>6</sup>

by authorizing a valuation of one class of property, based upon its value for a particular use only. *Saltonstall v. Board of Review*, (Mich. 1903) 93 N. W. Rep. 246.

**Village Assessors Directed to Follow Town Valuations** "as far as practicable," must consider such valuations as an element of the assessment. *People v. Adams*, 125 N. Y. 471, affirming (Supm. Ct. Gen. T.) 10 N. Y. Supp. 295, 56 Hun (N. Y.) 645.

1. *New Orleans Cotton Exch. v. Assessors*, 37 La. Ann. 423, approved *Morgan's Louisiana, etc., R., etc., Co. v. Board of Reviewers*, 41 La. Ann. 1156.

2. **Erroneous Method of Valuation.** — *People v. Barker*, 66 Hun (N. Y.) 21, affirmed without opinion 137 N. Y. 544; *People v. Feitner*, 60 N. Y. App. Div. 282, affirming 33 Misc. (N. Y.) 32; *State v. Lewis*, 64 Ohio St. 216; *Britt v. Lewis*, 9 Ohio Cir. Dec. 166, 16 Ohio Cir. Ct. 343; *Com. v. New York, etc., R. Co.*, 188 Pa. St. 169; *Smith v. Forest County*, 23 Pa. Co. Ct. 643; *Eureka Dist. Gold Min. Co. v. Ferry County*, 28 Wash. 250; *Noyes v. King County*, 18 Wash. 417.

3. **Statutory Directions — United States.** — *Shotwell v. Moore*, 129 U. S. 590.

*Iowa.* — *Jewell v. Sumner Tp.*, 113 Iowa 47; *Iowa Pipe, etc., Co's Appeal*, 101 Iowa 170; *Dean v. Solon*, 97 Iowa 303.

*Michigan.* — *Detroit Citizens' St. R. Co. v. Detroit*, 125 Mich. 673, 84 Am. St. Rep. 589.

*Montana.* — *Montana Coal, etc., Coke Co. v. Livingston*, 21 Mont. 59.

*New Hampshire.* — *Connecticut Valley Lumber Co. v. Monroe*, 71 N. H. 473; *Russell v. Mason*, 69 N. H. 359.

*Ohio.* — *Hagerty v. Huddleston*, 60 Ohio St. 149 reversing 2 Ohio N. P. 291, 1 Ohio Dec. 331.

*Pennsylvania.* — *Com. v. New York, etc., R. Co.*, 188 Pa. St. 169.

*Utah.* — *Mercur Gold Min., etc., Co. v. Spry*,

16 Utah 222; *Centennial Eureka Min. Co. v. Juab County*, 22 Utah 395.

*Virginia.* — *Com. v. Brown*, 91 Va. 762.

*Washington.* — *Eureka Dist. Gold Min. Co. v. Ferry County*, 28 Wash. 250.

*West Virginia.* — *Charleston, etc., Bridge Co. v. Kanawha County Ct.*, 41 W. Va. 658.

**In the Absence of Constitutional Rules** such legislative directions must be followed. *State v. Savage*, (Neb. 1902) 91 N. W. Rep. 716; *Com. v. Brown*, 91 Va. 762; *Charleston, etc., Bridge Co. v. Kanawha County Ct.*, 41 W. Va. 658.

**Power of Direction Conferred on State Auditor.** — *State v. Halliday*, 61 Ohio St. 352.

4. **Actual View.** — *Moore v. Turner*, 43 Ark. 243; *Boorman v. Juneau County*, 76 Wis. 550. See also *Ludlow v. Lewis*, 9 Ohio Dec. 600, 6 Ohio N. P. 513; *Nova Ceasarea Harmony Lodge No. 2 v. Hagerty*, 11 Ohio Dec. (Reprint) 595, 28 Cinc. L. Bul. 67. *Compare Hersey v. Barron County*, 37 Wis. 75; *Marsh v. Clark County*, 42 Wis. 502, cited *Plumer v. Marathon County*, 46 Wis. 163.

5. **Separate Interests Arising Out of Same Property.** — *Freeman v. State*, 115 Ala. 208; *Consolidated Coal Co. v. Baker*, 135 Ill. 545; *Globe Lumber Co. v. Lockett*, 106 La. 414; *Tremont, etc., Mills v. Lowell*, 163 Mass. 283; *Cincinnati College v. Yeatman*, 30 Ohio St. 276; *Logan v. Washington County*, 29 Pa. St. 373; *Berwind White Coal Min. Co. v. Clearfield County*, 18 Pa. Co. Ct. 545; *Daugherty v. Thompson*, 71 Tex. 192; *State v. Taylor*, 72 Tex. 297.

**Annuity and Fund from Which It Proceeds.** — *Com. v. Nute*, 72 S. W. Rep. 1090, 24 Ky. L. Rep. 2138; *Crispin v. Vansyckle*, 49 N. J. L. 366; *State v. Melroy*, (N. J. 1890) 19 Atl. Rep. 732.

6. **Choses in Action — Georgia.** — *Irvin v. Turner*, 47 Ga. 382; *Carreker v. Walton*, 47 Ga. 394.

*Illinois.* — *Pacific Hotel Co. v. Lieb*, 83 Ill. 602; *Griffin v. Board of Review*, 184 Ill. 275.

(6) *Deducting Amount of Indebtedness* — (a) **General Rule.** — Unless authorized by statute, no deductions can be made from the value of taxable property on account of indebtedness or the insolvency of the owner. All property must bear its share of taxation, unless expressly exempted therefrom.<sup>1</sup>

(b) **Statutory Changes in Rule.** — In many jurisdictions statutes have been enacted permitting deductions from the value of taxable property to the amount of the debts of the owner or of certain kinds of his indebtedness. Usually the deductions can be made only from the value of taxable credits, sometimes from that of certain other classes, sometimes from any taxable property. Such statutes have been generally held not to violate the constitutional requirements that taxation shall be equal and uniform and that all property shall be taxed. To be entitled to the deduction, the taxpayer must conform to the statutory directions as to the manner in which it shall be claimed and the amount of the indebtedness proved.<sup>2</sup> Under some statutes

*Michigan.* — Perkins v. Nugent, 45 Mich. 156.  
*Minnesota.* — State v. London, etc., Mortg. Co., 80 Minn. 277.

*Mississippi.* — Oxford Bank v. Lafayette County, 79 Miss. 152.

*New York.* — People v. Barker, 19 N. Y. App. Div. 628, affirmed 154 N. Y. 128; People v. Barker, 19 N. Y. App. Div. 64, reversed on other grounds, 154 N. Y. 122; People v. Tax, etc., Com'rs, 31 Hun (N. Y.) 32.

*Ohio.* — McCurdy v. Prugh, 59 Ohio St. 465; Cameron v. Cappeller, 41 Ohio St. 533; Exchange Bank v. Hines, 3 Ohio St. 1; Sherard v. Lindsay, 7 Ohio Cir. Dec. 245, 13 Ohio Cir. Ct. 315.

1. **Deducting Amount of Indebtedness — General Rule** — *United States.* — State Railroad Tax Cases, 92 U. S. 605.

*Arizona.* — Territory v. Delinquent Tax-List, (Ariz. 1890) 24 Pac. Rep. 182.

*Florida.* — Lamar v. Palmer, 18 Fla. 147.

*Kentucky.* — Clark v. Belknap, (Ky. 1890) 13 S. W. Rep. 212.

*Louisiana.* — Home Ins. Co. v. Assessors, 48 La. Ann. 451.

*Maryland.* — Allen v. Harford County, 74 Md. 294.

*Missouri.* — Lindell v. State Bank, 4 Mo. 315.

*Nevada.* — Drexler v. Tyrrell, 15 Nev. 128.

*New Hampshire.* — Boston, etc., R. Co. v. State, 62 N. H. 648; Morrison v. Manchester, 58 N. H. 538.

*Ohio.* — In re Robb, 5 Ohio Dec. 227, 5 Ohio N. P. 52.

See generally cases cited in the next note.

A **Statute Allowing Remission of Taxes** does not allow a deduction from the assessed valuation of property for indebtedness. Steel v. Fell, 29 Oregon 272.

2. **Statutes Authorizing Deduction for Indebtedness.** — *United States.* — Evansville Bank v. Britton, 105 U. S. 322; National Albany Exch. Bank v. Wells, 18 Blatchf. (U. S.) 478; Richards v. Rock Rapids, 31 Fed. Rep. 505.

*Alabama.* — State Bank v. Board of Revenue, 91 Ala. 217.

*California.* — Los Angeles v. Los Angeles City Water Co., 137 Cal. 699; Henne v. Los Angeles County, 129 Cal. 297, reversing (Cal. 1899) 59 Pac. Rep. 780; Security Sav. Bank, etc., Co. v. Hinton, 97 Cal. 214; People v. San Francisco, 77 Cal. 136; Smith v. Keagle, (Cal. 1888) 20 Pac. Rep. 152.

*Connecticut.* — Hamersley v. Franey, 39 Conn. 176.

*Illinois.* — Siegfried v. Raymond, 190 Ill. 424; Sellars v. Barrett, 185 Ill. 466; Morris v. Jones, 150 Ill. 542.

*Indiana.* — State v. Smith, 158 Ind. 543, two justices dissenting; Moore v. Hewitt, 147 Ind. 464; Florer v. Sheridan, 137 Ind. 28, Howard, C. J., dissenting, cited Richmond First Nat. Bank v. Turner, 154 Ind. 456; Matter v. Campbell, 71 Ind. 512.

*Iowa.* — Hawkeye Ins. Co. v. Board of Equalization, 75 Iowa 770; Equitable L. Ins. Co. v. Board of Equalization, 74 Iowa 178; Bridgman v. Keokuk, 72 Iowa 42; Hutchinson v. Board of Equalization, 67 Iowa 182.

*Kansas.* — Kansas Mut. L. Assoc. v. Hill, 51 Kan. 636; Lappin v. Nemaha County, 6 Kan. 403; Gibbins v. Adamson, 5 Kan. App. 90, affirmed without opinion 58 Kan. 818.

*Kentucky.* — Baldwin v. Hewitt, 88 Ky. 673; Clark v. Belknap, (Ky. 1890) 13 S. W. Rep. 212; Com. v. St. Bernard Coal Co., (Ky. 1888) 9 S. W. Rep. 709.

*Maryland.* — Baltimore v. Canton Co., 63 Md. 218.

*Massachusetts.* — Gray v. Street Com'rs, 138 Mass. 414; Deane v. Hathaway, 136 Mass. 129.

*Michigan.* — Beecher v. Detroit, 110 Mich. 456; Standard L., etc., Ins. Co. v. Assessors, 95 Mich. 466; Standard L., etc., Ins. Co. v. Assessors, 91 Mich. 517; Detroit v. Assessors, 91 Mich. 78; St. Joseph First Nat. Bank v. St. Joseph Tp., 46 Mich. 526.

*Minnesota.* — State v. London, etc., Mortg. Co., 80 Minn. 277; State v. Willard, 77 Minn. 190, citing 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 229; State v. Redwood Falls Bldg., etc., Assoc., 45 Minn. 154.

*Mississippi.* — Harness v. Williams, 64 Miss. 600.

*Nebraska.* — Seward County v. Cattle, 14 Neb. 144; Jones v. Seward County, 5 Neb. 561.

*New Hampshire.* — Farmington v. Downing, 67 N. H. 441; Peavey v. Greenfield, 64 N. H. 284; Weston v. Manchester, 62 N. H. 574.

*New Jersey.* — Williams v. Bettie, 50 N. J. L. 132; Taylor v. Love, 43 N. J. L. 142; State v. Hornbacker, 42 N. J. L. 635; State v. Creveling, 40 N. J. L. 150; State v. Horner, 38 N. J. L. 212; State v. Pettit, 39 N. J. L. 654; State v. Parker, 34 N. J. L. 71; State v. Parker, 32 N. J. L. 341; State v. Johnson, 30

the value of a mortgage interest in land is assessable separately to the mortgagee only when the mortgagor claims deduction from the assessed valuation of the real estate on account of the mortgage indebtedness.<sup>1</sup> Corporations, as well as natural persons, are entitled to the deductions from the assessed valuation for indebtedness, allowed to taxpayers by the statutes.<sup>2</sup>

*N. J. L. 452; State v. Pearson, 24 N. J. L. 254; State v. Warner, (N. J. 1891) 22 Atl. Rep. 341.*

*New York.*—*People v. Barker, 145 N. Y. 239; People v. Coleman, 135 N. Y. 231; People v. Tax, etc., Com'rs, 99 N. Y. 154; People v. Ferguson, 38 N. Y. 89; People v. Feitner, 61 N. Y. App. Div. 129, modifying on other grounds 32 Misc. (N. Y.) 30, affirmed 171 N. Y. 641; People v. Barker, 35 N. Y. App. Div. 486, affirmed without opinion 159 N. Y. 569; People v. Barker, 16 N. Y. App. Div. 266, affirmed without opinion 154 N. Y. 762; People v. Tax, etc., Com'rs, 51 Hun (N. Y.) 641, 4 N. Y. Supp. 45; People v. Hicks, 40 Hun (N. Y.) 598, 105 N. Y. 198; People v. Davenport, 25 Hun (N. Y.) 630; People v. Barker, 72 Hun (N. Y.) 638, affirmed 141 N. Y. 118; People v. Coleman, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 675, 63 Hun (N. Y.) 633; People v. Haren, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 86, 50 Hun (N. Y.) 605; Matter of Murphy, (Supm. Ct. Spec. T.) 9 Misc. (N. Y.) 647; Farmers' L. & T. Co. v. New York, 7 Hill (N. Y.) 261; People v. Ryan, (Supm. Ct. Spec. T.) 10 Abb. N. Cas. (N. Y.) 37, affirmed 88 N. Y. 142.*

*North Carolina.*—*Raleigh, etc., R. Co. v. Wake County, 87 N. Car. 414.*

*Ohio.*—*Stewart v. Duerr, 11 Ohio Cir. Dec. 310, 20 Ohio Cir. Ct. 505.*

*Oregon.*—*Dekum v. Multnomah County, 38 Oregon 253; Ramp v. Marion County, 24 Oregon 461; Oregon, etc., Sav. Bank v. Catlin, 15 Oregon 342; Wetmore v. Multnomah County, 6 Oregon 464; Ankeny v. Multnomah County, 3 Oregon 386, 4 Oregon 271.*

*Rhode Island.*—*Hall v. Bain, 18 R. I. 413; Tripp v. Merchants' Mut. F. Ins. Co., 12 R. I. 435.*

*Texas.*—*Griffin v. Heard, 78 Tex. 607; City Bank v. Bogel, 51 Tex. 355; Moody v. Galveston, 21 Tex. Civ. App. 16; Campbell v. Wiggins, 2 Tex. Civ. App. 1.*

*Utah.*—*Home F. Ins. Co. v. Lynch, 19 Utah 189.*

*Vermont.*—*Sprague v. Fletcher, 69 Vt. 69.*

*Washington.*—*Barnes v. Flummerfelt, 21 Wash. 498; Hewitt v. Traders' Bank, 18 Wash. 326; Newport v. Mudgett, 18 Wash. 271; Pullman State Bank v. Manning, 18 Wash. 250.*

*Wisconsin.*—*Ruggles v. Fond du Lac, 53 Wis. 436.*

*Wyoming.*—*Albany Mut. Bldg. Assoc. v. Laramie, 10 Wyo. 54.*

**Contra** that statutes are unconstitutional where indebtedness can be deducted only from the value of certain classes of property. *Exchange Bank v. Hines, 3 Ohio St. 1; Treasurer v. People's, etc., Bank, 47 Ohio St. 503; In re Tax Assessment, 4 S. Dak. 6.*

**Bank Stock.**—For the deduction of indebtedness from the value of national or other bank stock, see also *Richmond First Nat. Bank v. Turner, 154 Ind. 456, overruling Wasson v.*

*Indianapolis First Nat. Bank, 107 Ind. 206; Bridgman v. Keokuk, 72 Iowa 42; Albia First Nat. Bank v. Albia, 86 Iowa 28 [cited Pringhar State Bank v. Rerick, 96 Iowa 238]; Matter of Kauffman, 104 Iowa 639; Dutton v. Citizens' Nat. Bank, 53 Kan. 440; Burrows v. Smith, 95 Va. 695 [followed People's Nat. Bank v. Marye, 107 Fed. Rep. 570]; Pullman State Bank v. Manning, 18 Wash. 250; Newport v. Mudgett, 18 Wash. 271; Hewitt v. Traders' Bank, 18 Wash. 326; Bramel v. Manning, 18 Wash. 421; Commercial State Bank v. Manning, 18 Wash. 695.*

**The Statutes May Not Discriminate Between Individuals,** as between residents and nonresidents. *Farmington v. Downing, 67 N. H. 441; Sprague v. Fletcher, 69 Vt. 69.*

**Failure of Assessing Officers** to allow deduction for indebtedness is merely an overvaluation and does not render the assessment void. *Ramp v. Marion County, 24 Oregon 461.*

**Businesses Conducted by a Partnership in Different Jurisdictions** are, for the purposes of assessment and taxation, separate and distinct partnerships, and the debts owed by the firm in a foreign jurisdiction cannot be deducted from the assessment of the property having its situs in another jurisdiction, under a statute of the latter entitling it "to deduct from the gross amount thereof all debts in good faith owing by him." *Barnes v. Flummerfelt, 21 Wash. 498.*

**1. Deduction of Mortgage Indebtedness** as a condition precedent to separate assessment of mortgage interest.

*Michigan.*—*Detroit v. Assessors, 91 Mich. 78; Taggart v. Sanilac County, 71 Mich. 16.*

*New Jersey.*—*Myers v. Campbell, 64 N. J. L. 186; Rosell v. Buck, 62 N. J. L. 575; Meyers v. Campbell, 59 N. J. L. 378; Merchants' Ins. Co. v. Newark, 54 N. J. L. 138; Angle v. Lantz, 53 N. J. L. 578; Crispin v. Vansyckle, 49 N. J. L. 366; Port Colden Bldg., etc., Assoc. v. Nunn, 44 N. J. L. 354; Appleby v. East Brunswick Tp., 44 N. J. L. 153; State v. Silvers, 41 N. J. L. 505; State v. Runyon, 41 N. J. L. 98; State v. Jones, 40 N. J. L. 105; State v. Trenton, 40 N. J. L. 89; State v. Crosley, 36 N. J. L. 426; State v. Bishop, 34 N. J. L. 45; State v. Williamson, 33 N. J. L. 77; State v. Grey, 29 N. J. L. 380; State v. Pearson, 24 N. J. L. 254; State v. Gano, (N. J. 1897) 37 Atl. Rep. 434.*

**2. Corporations.**—*Com. v. St. Bernard Coal Co., (Ky. 1888) 9 S. W. Rep. 709; People v. Dederick, 161 N. Y. 195, modifying 41 N. Y. App. Div. 617, which affirmed without opinion (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 539; People v. Barker, 72 Hun (N. Y.) 126, affirmed 141 N. Y. 196; People v. Coleman, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 666, 49 Hun (N. Y.) 607, affirmed 112 N. Y. 565; People v. Tax, etc., Com'rs, (Supm. Ct. Gen. T.) 46 How. Pr. (N. Y.) 315; McAden v. Meck-*

(7) *Omission of Dollar Mark from Roll*. — The omission of the dollar or cent mark, or other similar sign, from the figures representing the valuation of the property, is generally held not to render the assessment invalid, if it can be ascertained from the arrangement of the columns of the roll or the division of the figures what amount was intended.<sup>1</sup>

(8) *Res Judicata*. — Assessors are not bound by the previous assessed valuation of real estate, whether it was made by assessing officers or by a court on appeal, and may legally disregard it and exercise their own judgment. Each assessment is a distinct proceeding separate from other assessments, and the doctrine of *res judicata* has no application.<sup>2</sup>

*h. COMPLETION AND RETURN OF ASSESSMENT* — (1) *In General—Return*. — The revenue laws fix a time for the completion of the work of the local assessing officers and the making of a return or delivery over of the rolls to some other public officer or board, either for review and correction, or, where their determinations are final and conclusive, for the levy and collection of the taxes.<sup>3</sup> The making of the return by a day certain is sometimes for the purpose of affording the taxpayers notice of the assessment and opportunity to contest its correctness, in which event the assessment must be completed and the return made in strict compliance with the law.<sup>4</sup> More often,

lenburg County, 97 N. Car. 355; Barnes v. Flummerfelt, 21 Wash. 498. Compare People v. Board of Education, 46 Barb. (N. Y.) 588. See generally the title TAXATION (CORPORATE), *post*.

1. *Omission of Dollar Mark—United States*. — Jenkins v. McTigue, 22 Fed. Rep. 148; Tilton v. Oregon Cent. Military Road Co., 3 Sawy. (U. S.) 22.

Colorado. — Haley v. Elliott, 20 Colo. 379.

Illinois. — Elston v. Kennicott, 46 Ill. 187; State v. Allen, 43 Ill. 456; Chickering v. Faile, 38 Ill. 342; Jackson v. Cummings, 15 Ill. 449.

Indiana. — Midland R. Co. v. State, 11 Ind. App. 433.

Michigan. — Auditor-Gen. v. Sparrow, 116 Mich. 574 [citing Muirhead v. Sands, 111 Mich. 487]; St. Joseph First Nat. Bank v. St. Joseph Tp., 46 Mich. 526; Bird v. Perkins, 33 Mich. 28.

Montana. — Ward v. Gallatin County, 12 Mont. 23.

Nevada. — State v. Sadler, 21 Nev. 13; State v. Eureka Consol. Min. Co., 8 Nev. 15.

New Hampshire. — Sawyer v. Gleason, 59 N. H. 140.

New York. — Ensign v. Barse, 107 N. Y. 329; Chamberlain v. Taylor, 36 Hun (N. Y.) 24; Matter of Church of Holy Sepulchre, (Supm. Ct. Gen. T.) 61 How. Pr. (N. Y.) 315.

Rhode Island. — Hopkins v. Young, 15 R. I. 48.

Texas. — Conkli. v. El Paso, (Tex. Civ. App. 1897) 44 S. W. Rep. 879.

Washington. — Spokane Falls v. Browne, 3 Wash. 84.

Contra. — Emeric v. Alvarado, 90 Cal. 466; San Luis Obispo County v. White, 91 Cal. 432. See also Anderson v. Post, (Tenn. Ch. 1896) 38 S. W. Rep. 283.

The Abbreviation "Dolls." is equivalent to the word "dollars." Salisbury v. Shirley, 66 Cal. 223.

Dollar Mark at Head or Foot of Column Sufficient. — State v. Sadler, 21 Nev. 13.

2. *Res Judicata—Louisiana*. — Liquidating Com'rs v. Marrero, 106 La. 130; Legendre v. Assessor, 108 La. 515.

Massachusetts. — Lowell v. Middlesex County, 152 Mass. 372.

New York. — People v. Zundel, 157 N. Y. 513 [distinguishing People v. Carter, 119 N. Y. 557]; People v. Feitner, 58 N. Y. App. Div. 555. Contra of the judgment of a court except so far as the valuation has subsequently changed. Winnipiseogee Lake Cotton, etc., Mfg. Co. v. Laconia, 68 N. H. 284; Winnipiseogee Lake Cotton, etc., Mfg. Co. v. Gilford, 67 N. H. 514.

3. *Extension of Time by County Board*. — Stieff v. Hartwell, 35 Fla. 606; Herndon v. Mayfield, 79 Miss. 533; McGuire v. Union Invest. Co., 76 Miss. 868; Wolfe v. Murphy, 60 Miss. 1; Bennett v. Maxwell, (Miss. 1903) 34 So. Rep. 226.

*Extension of Time by Court*. — The courts cannot enlarge or extend the scope of the statute by granting further time when the assessor fails to act within the time prescribed. Bohler v. Verdery, 92 Ga. 715.

*Presumption of Due Return*. — Joyner v. Harrison, 56 Ark. 276; Moore v. Turner, 43 Ark. 243; Blossom v. Cannon, 14 Mass. 177; Morgan v. Blewitt, 72 Miss. 903; Grayson v. Richardson, 65 Miss. 222.

*Completion "On or Before" a Designated Date*. — Where the law provides for the completion of the assessment book "on or before" a designated date, the completion of the assessment some time prior to the date mentioned is unobjectionable. Allen v. McKay, 139 Cal. 94.

*Record Evidence of Time of Return*. — Where the record of the county supervisors, who are required to receive and approve the assessment roll, shows that it was filed after the time fixed by law, parol evidence is inadmissible to dispute the fact. Mullins v. Shaw, 77 Miss. 900. Compare Wilmot v. Lathrop, 67 Vt. 671.

4. *Purpose of Requiring Return—Connecticut*. — Thames Mfg. Co. v. Lathrop, 7 Conn. 550.

Florida. — Stieff v. Hartwell, 35 Fla. 606.

Illinois. — Sanderson v. La Salle, 57 Ill. 441; Marsh v. Chesnut, 14 Ill. 223; Keating v. Thorp, 15 Ill. 220; Billings v. Detten, 15 Ill. 218. As to the present rule see the Illinois cases cited in the next following note.

Massachusetts. — Blossom v. Cannon, 14

however, the requirement is not intended for the benefit of the taxpayers, but merely to secure order and dispatch in the performance of official duties, or the preservation of a record of the assessment; and errors or omissions will not invalidate the tax, unless prejudice results in fact. This rule is frequently declared by statute.<sup>1</sup>

(2) *Authentication* — (a) *Mandatory Statutes*. — The revenue acts generally require the assessing officers to sign the assessment rolls or books and incorporate or annex a statutory certificate or affidavit verifying the contents. In some jurisdictions these requirements are held to be material safeguards provided to secure integrity of assessment and protection for the taxpayer, noncompliance with which renders the assessment void.<sup>2</sup> Where assess-

Mass. 177, cited *Taft v. Wood*, 14 Pick. (Mass.) 362; *Thurston v. Little*, 3 Mass. 429; *Sprague v. Bailey*, 19 Pick. (Mass.) 436; *Thayer v. Stearns*, 1 Pick. (Mass.) 482.

*Mississippi*. — *Mullins v. Shaw*, 77 Miss. 900; *Brothers v. Beck*, 75 Miss. 482; *Carlisle v. Goode*, 71 Miss. 453; *Pearce v. Perkins*, 70 Miss. 276; *Mitchum v. McInnis*, 60 Miss. 945; *Brigins v. Chandler*, 60 Miss. 862; *Stovall v. Connor*, 58 Miss. 138.

*New York*. — *People v. Barker*, 150 N. Y. 52, affirming 90 Hun (N. Y.) 609. But see the *New York* cases cited in the next following note.

*Vermont*. — *Godfrey v. Bennington Water Co.*, (Vt. 1903) 55 Atl. Rep. 654; *Grout v. Johnson*, 73 Vt. 268; *Meacham v. Newport*, 70 Vt. 264; *Ayers v. Moulton*, 51 Vt. 112; *Howard v. Shumway*, 13 Vt. 359.

*Failure to Return and File Copy*. — A copy of an assessment required by statute to be filed on or before a designated date is for the use of assessing officers, not for the benefit of individual taxpayers; and a failure to file the copy on time will not invalidate the assessment. *Smith v. Blair*, 67 Vt. 658.

*Curative Acts*. — The power of the legislature in curing irregular assessments is not limited to matters of form; it may cure an assessment which is invalid because not filed in time, unless some right of the taxpayer has become vested under the general law. *Grout v. Johnson*, 73 Vt. 268. Compare *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550. *Contra*, *Marsh v. Chesnut*, 14 Ill. 223; *Carlisle v. Goode*, 71 Miss. 453.

1. *Arkansas*. — *Moore v. Turner*, 43 Ark. 244. *California*. — *San Francisco v. La Societe Francaise*, etc., 131 Cal. 612; *Los Angeles v. Los Angeles City Water Co.*, 137 Cal. 699.

*Colorado*. — *Waddingham v. Dickinson*, 17 Colo. 223; *Breeze v. Haley*, 10 Colo. 5.

*Dakota*. — *Frost v. Flick*, 1 Dak. 131.

*Illinois*. — *St. Louis Bridge Co. v. People*, 128 Ill. 422; *Wright v. People*, 87 Ill. 582; *Purrington v. People*, 79 Ill. 11; *Chiniquy v. People*, 78 Ill. 570; *Buck v. People*, 78 Ill. 566; *Farmers'*, etc., *Bank v. Vandalia*, 57 Ill. App. 681. As to the former rule in Illinois see the cases cited in the next preceding note.

*Iowa*. — *Smithberg v. Archer*, 108 Iowa 215; *Burlington Gas Light Co. v. Burlington*, 101 Iowa 458.

*Kentucky*. — *Anderson v. Mayfield*, 93 Ky. 230.

*Maine*. — *Bath v. Whitmore*, 79 Me. 182; *Norridgewock v. Walker*, 71 Me. 181; *Greene v. Lunt*, 58 Me. 518.

*Missouri*. — *Pacific R. Co. v. Franklin County*, 57 Mo. 223.

*Nebraska*. — *Burlington, etc., R. Co. v. Saline County*, 12 Neb. 396.

*Nevada*. — *State v. Northern Belle Mill, etc.*, Co., 15 Nev. 385; *State v. Western Union Tel. Co.*, 4 Nev. 338.

*New Hampshire*. — *Smith v. Bradley*, 20 N. H. 117.

*New York*. — *People v. Haupt*, 104 N. Y. 377; *Bradley v. Ward*, 58 N. Y. 401; *People v. Jones*, 43 Hun (N. Y.) 131; *Rome, etc., R. Co. v. Smith*, 39 Hun (N. Y.) 332; *New York v. Watts*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 595; *Oswego County v. Betts*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 934. But see the next preceding note.

*North Dakota*. — *O'Neil v. Tyler*, 3 N. Dak. 47.

*Ohio*. — See *Stormer v. Lucas County*, 11 Ohio Dec. 49, 8 Ohio N. P. 110.

*Oklahoma*. — *Sweet v. Boyd*, 6 Okla. 699.

*Pennsylvania*. — *Russel v. Werntz*, 24 Pa. St. 337.

*Canada*. — *Trenton v. Dyer*, 24 Can. Sup. Ct. 474.

2. *Authentication — Mandatory Statutes — United States*. — *Lamb v. Farrell*, 21 Fed. Rep. 5; *Griggs v. St. Croix County*, 20 Fed. Rep. 341.

*California*. — See *Allen v. McKay*, 139 Cal. 94.

*Florida*. — *Orlando v. Equitable Bldg., etc., Assoc.*, (Fla. 1903) 33 So. Rep. 986.

*Iowa*. — *Warfield-Pratt-Howell Co. v. Averill Grocery Co.*, 119 Iowa 75, citing 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 231.

*Maine*. — *Topsham v. Purinton*, 94 Me. 354; *Belfast Sav. Bank v. Kennebec Land, etc., Co.*, 73 Me. 404; *Norridgewock v. Walker*, 71 Me. 181; *Bangor v. Lancey*, 21 Me. 472; *Johnson v. Goodridge*, 15 Me. 29; *Foxcroft v. Nevens*, 4 Me. 72; *Colby v. Russell*, 3 Me. 227.

*Michigan*. — *Newkirk v. Fisher*, 72 Mich. 113; *Maxwell v. Paine*, 53 Mich. 32.

*Missouri*. — *State v. Seahorn*, 139 Mo. 582; *State v. Schooley*, 84 Mo. 451; *State v. Cook*, 82 Mo. 185.

*Nebraska*. — *Morrill v. Taylor*, 6 Neb. 236; *McNish v. Perrine*, 14 Neb. 582.

*New York*. — *People v. Suffern*, 68 N. Y. 323; *Bradley v. Ward*, 58 N. Y. 401; *National Bank v. Elmira*, 53 N. Y. 49; *Bellinger v. Gray*, 51 N. Y. 610; *Matter of Cameron*, 50 N. Y. 502; *Westfall v. Preston*, 49 N. Y. 349; *Van Rensselaer v. Witbeck*, 7 N. Y. 517, reversing 7 Barb. (N. Y.) 133; *O'Donnell v. McIntyre*, 37 Hun (N. Y.) 615, affirmed 116 N. Y. 663.

ments are made by a board of assessors consisting of several members, it is generally sufficient if the authentication is made by a majority; but if made by one member only the assessments are void.<sup>1</sup>

**Omissions and Variations** in the statutory certificate or affidavit which so change its terms as to dispense with material allegations are fatal;<sup>2</sup> but where the law is substantially complied with, informalities and irregularities in the authentication will be disregarded.<sup>3</sup>

**Amendment of Authentication.** — A defective authentication may be corrected by amendment, or the omission of one supplied, at any time before the assessing officers lose jurisdiction over the assessment rolls.<sup>4</sup>

(b) **Directory Statutes.** — In some states the requirements as to authentication are construed to be directory merely, or are so declared by express statute; and noncompliance will not invalidate the assessment unless the taxpayer is in fact prejudiced by the omission.<sup>5</sup>

*North Carolina.* — *Kelly v. Graig*, 5 Ired. L. (27 N. Car.) 129.

*North Dakota.* — *Lee v. Crawford*, 10 N. Dak. 482; *Eaton v. Bennett*, 10 N. Dak. 346.

*Rhode Island.* — *Sullivan v. Peckham*, 16 R. I. 525.

*South Carolina.* — *State v. Thompson*, 18 S. Car. 538.

*Vermont.* — *Potter v. Lewis*, 73 Vt. 367; *Meacham v. Newport*, 70 Vt. 264; *Smith v. Hard*, 61 Vt. 469; *Bartlett v. Wilson*, 59 Vt. 23; *Walker v. Burlington*, 56 Vt. 131; *Ayers v. Moulton*, 51 Vt. 112; *Rowe v. Hulett*, 50 Vt. 637; *Tunbridge v. Smith*, 48 Vt. 648; *Houghton v. Hall*, 47 Vt. 333; *Alger v. Curry*, 38 Vt. 382; *Reed v. Chandler*, 32 Vt. 285.

*Wisconsin.* — *Bass v. Fond du Lac County*, 60 Wis. 516; *Marshall v. Benson*, 48 Wis. 558; *Marsh v. Clark County*, 42 Wis. 502; *Iverslie v. Spaulding*, 32 Wis. 394; *Jarvis v. Silliman*, 21 Wis. 600.

*Canada.* — *Trenton v. Dyer*, 24 Can. Sup. Ct. 474.

**Time of Making Authentication.** — *State v. Phillips*, 102 Mo. 664; *People v. Turner*, 145 N. Y. 451; *People v. Jones*, 106 N. Y. 330; *Westfall v. Preston*, 49 N. Y. 349; *Van Rensselaer v. Witbeck*, 7 N. Y. 517; *Smith v. Mosher*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 786, 56 Hun (N. Y.) 643; *Matter of Young*, (County Ct.) 26 Misc. (N. Y.) 186; *Rowe v. Hulett*, 50 Vt. 637.

**Parol Evidence** is admissible to show that the date of the authentication as given in the assessment is erroneous and to prove the true date. *State v. Hurt*, 113 Mo. 90. *Compare* *Lee v. Crawford*, 10 N. Dak. 482.

**Mandamus to Compel Proper Authentication.** — Where assessors have intentionally assessed property at less than its actual value they cannot be compelled by the courts to annex to the roll the statutory affidavit that they have assessed it at "its full and true value." Courts do not sit to compel men to take false oaths. *People v. Fowler*, 55 N. Y. 252.

**Authentication After Review of Assessment.** — *Miller v. Kern County*, 137 Cal. 516; *New Orleans Gaslight Co. v. New Orleans*, 46 La. Ann. 1146; *Nova Ceasarea Harmony Lodge No. 2 v. Hagerty*, 11 Ohio Dec. (Reprint) 595, 28 Cinc. L. Bul. 67.

**1. Authentication by Boards of Assessors.** — *Johnson v. Goodridge*, 15 Me. 29; *Bangor v.*

*Lancey*, 21 Me. 472; *Belfast Sav. Bank v. Kennebec Land, etc., Co.*, 73 Me. 404; *Bellinger v. Gray*, 51 N. Y. 610; *Colman v. Shattuck*, 62 N. Y. 348; *Marshall v. Benson*, 48 Wis. 558.

**2. Material Omissions and Variations** — *Michigan.* — *Paldi v. Paldi*, 84 Mich. 346; *Westbrook v. Miller*, 64 Mich. 129; *Gilchrist v. Dean*, 55 Mich. 244; *Sinclair v. Learned*, 51 Mich. 343; *Hurd v. Raymond*, 50 Mich. 369; *Dickinson v. Reynolds*, 48 Mich. 158; *Crooks v. Whitford*, 47 Mich. 283; *Silsbee v. Stockle*, 44 Mich. 562; *Hogelskamp v. Weeks*, 37 Mich. 422; *Clark v. Crane*, 5 Mich. 151, 71 Am. Dec. 776.

*New York.* — *Shattuck v. Bascom*, 105 N. Y. 39; *Brevoort v. Brooklyn*, 89 N. Y. 128; *Inman v. Coleman*, 37 Hun (N. Y.) 170; *Hinckley v. Cooper*, 22 Hun (N. Y.) 253; *Beach v. Hayes*, (Supm. Ct. Spec. T.) 58 How. Pr. (N. Y.) 17.

*Wisconsin.* — *Scheiber v. Kaehler*, 49 Wis. 291; *Plumer v. Marathon County*, 46 Wis. 163.

**3. Substantial Compliance with Statutes** — *Kansas.* — *Shoup v. Central Branch Union Pac. R. Co.*, 24 Kan. 547.

*Maine.* — *Norridgewock v. Walker*, 71 Me. 181; *Lowe v. Weld*, 52 Me. 588; *Bangor v. Lancey*, 21 Me. 472; *Johnson v. Goodridge*, 15 Me. 29.

*Massachusetts.* — *Bradford v. Randall*, 5 Pick. (Mass.) 497.

*Michigan.* — *Darmstaetter v. Moloney*, 45 Mich. 621.

*Missouri.* — *State v. Seahorn*, 139 Mo. 582; *Taft v. McCulloch*, 135 Mo. 588.

*Nebraska.* — *McClure v. Warner*, 16 Neb. 447; *Hallo v. Helmer*, 12 Neb. 87; *Lynam v. Anderson*, 9 Neb. 375.

*New York.* — *Shattuck v. Bascom*, 105 N. Y. 39; *Buffalo, etc., R. Co. v. Erie County*, 48 N. Y. 93; *Parish v. Golden*, 35 N. Y. 462; *Matter of Adler*, 76 N. Y. App. Div. 571; *Ward v. Brooklyn*, 32 N. Y. App. Div. 430, *affirmed* without opinion 164 N. Y. 591; *Sherrill v. Hewitt*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 498, 59 Hun (N. Y.) 619.

*Vermont.* — *Brook v. Bruce*, 58 Vt. 261.

**4. Amending or Supplying Authentication.** — *People v. Jones*, 106 N. Y. 330; *People v. Garmon*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 350, *affirmed* 63 N. Y. App. Div. 530.

**5. Statutes Construed or Declared to Be Directory** — *Arkansas.* — *Moore v. Turner*, 43 Ark. 243, *following* *Equalization Board v. Land Owners*, 51 Ark. 516.



(c) **Presumptions.** — In the absence of evidence to the contrary it will be presumed that the assessing officers performed their official duty, and authenticated the assessment in the manner and form directed by the statute.<sup>1</sup>

(d) **Curative Acts.** — Where the failure to comply with the statutory requirements as to authentication renders the assessment void, it has generally been held that the legislature has no power to enact a statute curing the defects.<sup>2</sup> Otherwise of an assessment that is merely irregular.<sup>3</sup>

(e) **Equitable Relief.** — Although the assessment is void for want of a proper authentication, equitable relief against it is denied in some jurisdictions on such grounds, except on condition that the taxpayer pay the sum as taxes which in justice and equity he ought to pay.<sup>4</sup>

(3) **Revision and Correction of Roll.** — The assessing officers may reconsider and revise their opinions as to values, deductions, and any other matters involved in the assessment until the official entry of their determinations.<sup>5</sup> Like other officers or bodies possessing a judicial capacity, they have the competency to consult, resolve, and reconsider, and they are not bound by their conclusions until such conclusions have been promulgated by their authority. It is only this ultimate judgment, officially pronounced, that is unalterable.<sup>6</sup> On the other hand, after the assessment has been completed and the roll deposited with the officer or board authorized to receive it, the assessors can make no material additions or corrections, unless power to do so is expressly conferred by statute.<sup>7</sup> On being completed and returned, the

*Colorado.* — *Duggan v. McCullough*, 27 Colo. 43.

*Kansas.* — *Shoup v. Central Branch Union Pac. R. Co.*, 24 Kan. 547.

*Louisiana.* — *Boyle v. West*, 107 La. Ann. 347. *Mississippi.* — *Chesnut v. Elliott*, 61 Miss. 569; *Wolfe v. Murphy*, 60 Miss. 1; *Powers v. Penny*, 59 Miss. 5.

*Nebraska.* — *Carman v. Harris*, 61 Neb. 635; *Spiech v. Tierney*, 56 Neb. 514; *Twinting v. Finlay*, 55 Neb. 152; *Roads v. Estabrook*, 35 Neb. 297.

*Nevada.* — *State v. Western Union Tel. Co.*, 4 Nev. 338.

*New Hampshire.* — *Odiorne v. Rand*, 59 N. H. 504; *Smith v. Bradley*, 20 N. H. 117.

*New Jersey.* — *State v. Metz*, 31 N. J. L. 378. *Pennsylvania.* — *Townsen v. Wilson*, 9 Pa. St. 270.

**Failure to Date Assessment.** — An assessment is not void because it is not dated as required by statute. This is a directory provision, and not of a character to invalidate the assessment. *Warwick, etc., Water Co. v. Carr*, (R. I. 1902) 52 Atl. Rep. 1030.

1. **Presumptions** — *Maine.* — *Kellar v. Savage*, 20 Me. 199.

*Michigan.* — *Silsbee v. Stockle*, 44 Mich. 565; *Upton v. Kennedy*, 36 Mich. 215; *Bird v. Perkins*, 33 Mich. 28.

*Nebraska.* — *Carman v. Harris*, 61 Neb. 635; *Spiech v. Tierney*, 56 Neb. 514; *Twinting v. Finlay*, 55 Neb. 152; *Roads v. Estabrook*, 35 Neb. 297.

*New York.* — *Colman v. Shattuck*, 62 N. Y. 348; *Sherrill v. Hewitt*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 498, 59 Hun (N. Y.) 619.

*Vermont.* — *Brock v. Bruce*, 58 Vt. 266. And see generally the title **PRESUMPTIONS**, vol. 22, p. 1267 *et seq.*

2. **Curative Acts.** — *Topsham v. Purinton*, 94 Me. 354; *Bartlett v. Wilson*, 59 Vt. 23; *Power v. Kindschi*, 58 Wis. 539, 46 Am. Rep. 652;

*Scheiber v. Kaehler*, 49 Wis. 301; *Marshall v. Benson*, 48 Wis. 565; *Tierney v. Union Lumbering Co.*, 47 Wis. 248; *Plumer v. Marathon County*, 46 Wis. 177. See also *Ne-ha-sa-ne Park Assoc. v. Lloyd*, 7 N. Y. App. Div. 359. And see the title **STATUTES**, vol. 26, pp. 698, 699. *Compare Kent v. Warner*, 47 Hun (N. Y.) 474; *Matter of Lamb*, 51 Hun (N. Y.) 633, *affirmed without opinion* 121 N. Y. 703; *People v. Bleckwenn*, 55 Hun (N. Y.) 169, which was *affirmed without opinion* 120 N. Y. 637.

3. **Irregular Assessment.** — *Ensign v. Barse*, 107 N. Y. 329.

4. **Equitable Relief Against Void Assessment.** — *Challiss v. Atchison County*, 15 Kan. 49; *Wood v. Helmer*, 10 Neb. 65; *Farrington v. New England Invest. Co.*, 1 N. Dak. 102; *Wisconsin Cent. R. Co. v. Lincoln County*, 67 Wis. 478; *Fifield v. Marinette County*, 62 Wis. 532, *criticizing Marsh v. Clark County*, 42 Wis. 502.

5. **Revision and Correction Before Completion of Roll.** — *People v. Stockton, etc., R. Co.*, 49 Cal. 414; *City Item Co-operative Printing Co. v. New Orleans*, 51 La. Ann. 713; *State v. Silvers*, 41 N. J. L. 505; *State v. Crosley*, 36 N. J. L. 425; *People v. Wilson*, (Brooklyn City Ct. Gen. T.) 7 N. Y. Supp. 627, *affirmed* 119 N. Y. 515; *People v. Westchester County*, 15 Barb. (N. Y.) 607; *West Portland Park v. Kelly*, 29 Oregon 412.

6. *State v. Crosley*, 36 N. J. L. 425; *State v. Silvers*, 41 N. J. L. 505.

7. **Revision and Correction after Completion and Return of Roll** — *California.* — *Johnson v. Malloy*, 74 Cal. 430.

*Kansas.* — *Gibbons v. Adamson*, 44 Kan. 203.

*Louisiana.* — *Liquidating Com'rs v. Marrero*, 106 La. 130; *City Item Co-operative Printing Co. v. New Orleans*, 51 La. Ann. 713; *Kansas City, etc., R. Co. v. Davis*, 50 La. Ann. 1054.

*Massachusetts.* — *Opinion of Justices*, 18 Pick. (Mass.) 575.

*Nevada.* — *State v. April Fool Gold Min.*, Volume XXVII.

assessment roll becomes a record subject only to statutory alteration and review;<sup>1</sup> and if the taxpayer on examining it is satisfied with his assessment and willing to accept the decision of the assessors as therein expressed, he is entitled to assume that no change will be made and to act accordingly.<sup>2</sup>

**7. Assessment of Escaped Property — Reassessment — a. IN GENERAL.** — Statutes obtain in most jurisdictions making special provision for the assessment of property which has been omitted from the regular assessment for the current year, or the assessments for one or more preceding years, and thus escaped taxation. In states where the taxpayer is required to make return of his property, it is also usually provided that omissions shall subject him to a penalty. The power to make the assessment is variously conferred by the local statutes on one or more of the agencies having in charge the assessment, levy, and collection of taxes.<sup>3</sup> The power exists only to the extent that it

etc., Co., 26 Nev. 87; *State v. Manhattan Silver Min. Co.*, 4 Nev. 318.

*New York.* — *People v. Barker*, 150 N. Y. 52, affirming 90 Hun (N. Y.) 609; *People v. Forrest*, 96 N. Y. 544; *Clark v. Norton*, 49 N. Y. 245; *New York v. Smith*, 61 N. Y. App. Div. 407; *Matter of Nisbet*, 40 N. Y. App. Div. 611, affirmed without opinion 165 N. Y. 605; *People v. Neff*, 15 N. Y. App. Div. 8, affirmed without opinion 156 N. Y. 701; *Colonial L. Assur. Co. v. New York County*, 24 Barb. (N. Y.) 166; *People v. Westchester County*, 15 Barb. (N. Y.) 607; *People v. Greene County*, 12 Barb. (N. Y.) 217; *O'Donnell v. McIntyre*, 37 Hun (N. Y.) 615; *People v. Port Jervis*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 317.

*Oregon.* — *West Portland Park v. Kelly*, 29 Oregon 412; *Oregon Steam Nav. Co. v. Wasco County*, 2 Oregon 206; *Oregon Steam Nav. Co. v. Portland*, 2 Oregon 82.

*Rhode Island.* — *Sullivan v. Peckham*, 16 R. I. 525.

*Vermont.* — *Willard v. Pike*, 59 Vt. 202; *Bellows v. Weeks*, 41 Vt. 590; *Downing v. Roberts*, 21 Vt. 441.

*Washington.* — *Lewis v. Bishop*, 19 Wash. 312.

*Contra*, *Farmers, etc., Bank v. Vandalia*, 57 Ill. App. 681. See also in this connection *supra*, this section, 6. c. *Returns by Taxpayers*; and *infra*, 7. *Assessment of Escaped Property — Reassessment*.

**Boards of Equalization and Review.** — *Coulter v. Louisville Bridge Co.*, 70 S. W. Rep. 29, 24 Ky. L. Rep. 809; *Liquidating Com'rs v. Marrero*, 106 La. 130; *Weston v. Monroe*, 84 Mich. 341; *People v. Queens County*, 82 N. Y. 275; *People v. Schenectady County*, 35 Barb. (N. Y.) 408; *Clawson Lumber Co. v. Jones*, 20 Tex. Civ. App. 208. See also *Carroll v. Alsup*, 107 Tenn. 257.

**Immaterial Alterations.** — *Lahman v. Hatch*, 124 Cal. 1; *People v. Port Jervis*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 317.

**Failure to Enter the Values in the Roll** until after the amounts have been revised by the board of review, although not in compliance with the law, is not fatal to the assessment, unless the taxpayer is prejudiced in fact. *Three Rivers v. Smith*, 99 Mich. 510; *Detroit Citizens' St. R. Co. v. Detroit*, 125 Mich. 673, 84 Am. St. Rep. 589, 7 Detroit Leg. N. 677.

1. *Oregon Steam Nav. Co. v. Portland*, 2 Oregon 81.

**Statutes Conferring Power.** — *Los Angeles v. Los Angeles City Water Co.*, 137 Cal. 699; *San Luis Obispo County v. White*, 91 Cal. 432. See *infra*, this section, 11. *Appeal and Review*.

2. *New York v. Smith*, 61 N. Y. App. Div. 407; *Lewis v. Bishop*, 19 Wash. 312.

3. **Escaped Property — Colorado.** — *Aggers v. People*, 20 Colo. 348.

*Illinois.* — *Sellers v. Barrett*, 185 Ill. 466; *People v. Sellers*, 179 Ill. 170.

*Indiana.* — *Crowder v. Riggs*, 153 Ind. 158; *Delphi v. Bowen*, 138 Ind. 235; *Florer v. Sheridan*, 137 Ind. 28; *Florer v. Sherwood*, 128 Ind. 495.

*Iowa.* — *King v. Parker*, 73 Iowa 757; *Peirce v. Weare*, 41 Iowa 378; *Cedar Rapids, etc., R. Co. v. Carroll County*, 41 Iowa 153.

*Kentucky.* — *Spalding v. Com.*, 88 Ky. 135; *Louisville, etc., R. Co. v. Com.*, 85 Ky. 198; *Com. v. Sweigart*, 73 S. W. Rep. 758, 24 Ky. L. Rep. 2147; *Com. v. Collins*, 72 S. W. Rep. 819, 24 Ky. L. Rep. 2042; *Com. v. Riley*, 72 S. W. Rep. 809, 24 Ky. L. Rep. 2005; *Chicago, etc., R. Co. v. Com.*, 72 S. W. Rep. 119, 24 Ky. L. Rep. 2124; *Com. v. Nute*, 72 S. W. Rep. 1090, 24 Ky. L. Rep. 2138; *Com. v. Hamilton*, 72 S. W. Rep. 744, 24 Ky. L. Rep. 1944; *Com. v. Singer Mfg. Co.*, (Ky. 1893) 21 S. W. Rep. 354; *Fleming v. Sinclair*, 58 S. W. Rep. 370, 22 Ky. L. Rep. 499; *Louisville Water Co. v. Com.* (Ky. 1896) 34 S. W. Rep. 1064.

*Louisiana.* — *M. E. Church v. New Orleans*, 107 La. 611; *State v. New Orleans*, 105 La. 768; *Hodding v. New Orleans*, 48 La. Ann. 982; *State v. Louisiana Sav. Bank, etc., Co.*, 32 La. Ann. 1136.

*Maryland.* — *William Skinner, etc., Ship Bldg., etc., Co. v. Baltimore*, 96 Md. 32.

*Michigan.* — *State Tax Com'rs v. Assessors*, 124 Mich. 491.

*Nebraska.* — *Elkhorn Land, etc., Co. v. Dixon County*, 35 Neb. 426.

*New Mexico.* — *U. S. Trust Co. v. Territory*, 10 N. Mex. 416.

*Oregon.* — *Kirkwood v. Ford*, 34 Oregon 552; *Ramp v. Marion County*, 24 Oregon 461; *Oregon, etc., R. Co. v. Lane County*, 23 Oregon 386, cited *Southern Oregon Co. v. Coos County*, 39 Oregon 185; *Oregon, etc., Mortg. Sav. Bank v. Jordan*, 16 Oregon 113; *Poppleton v. Yamhill County*, 8 Oregon 338.

*Pennsylvania.* — *Williamson's Estate*, 153 Pa. St. 508, modifying 1 Pa. Dist. 159, 11 Pa. Co. Ct. 235.

has been conferred by statute, either expressly or by necessary implication.<sup>1</sup> The enactment of such laws, however, is promotive of and essential to the constitutional behest that all property shall contribute equally to the support of the government; and, penal provisions excepted, they may have a retro-active operation and should be liberally construed in aid of the taxing power.<sup>2</sup> Assessments made by officers or boards other than those invested with the power to make them are, as a general rule, illegal and void.<sup>3</sup>

*b. BAD FAITH AND NEGLIGENCE OF TAXPAYER. — The statutes usually*

*South Carolina.* — *State v. Covington*, 35 S. Car. 245.

*South Dakota.* — *Billingshurst v. Spink County*, 5 S. Dak. 84.

*Tennessee.* — *Union, etc., Bank v. Memphis*, 107 Tenn. 66; *Grundy County v. Tennessee Coal, etc., Co.*, 94 Tenn. 295; *Warner Iron Co. v. Pace*, 89 Tenn. 707; *South Nashville St. R. Co. v. Morrow*, 87 Tenn. 406; *Shelby County v. Mississippi, etc., R. Co.*, 16 Lea (Tenn.) 401; *Anderson v. Post*, (Tenn. Ch. 1896) 38 S. W. Rep. 283.

*Texas.* — *Hoefting v. San Antonio*, 15 Tex. Civ. App. 257.

*Vermont.* — *Potter v. Lewis*, 73 Vt. 367; *Godfrey v. Bennington Water Co.*, (Vt. 1903) 55 Atl. Rep. 654.

*Wyoming.* — *Albany Mut. Bldg. Assoc. v. Laramie*, (Wyo. 1901) 65 Pac. Rep. 1011.

See also in this connection *supra*, this subdivision, 6. *c. Returns by Taxpayers.*

**Improvements on Land.** — Where the statute contemplates that improvements shall be assessed separately from the real estate, such improvements, if they escape taxation, are properly regarded as omitted property. *William Skinner, etc., Ship Bldg., etc., Co. v. Baltimore*, 96 Md. 32.

**1. Power Dependent on Statutory Authority —** *Arkansas.* — *St. Louis, etc., R. Co. v. Miller County*, 67 Ark. 498.

*Illinois.* — *Hayward v. People*, 156 Ill. 84. *Compare Farmers, etc., Bank v. Vandalia*, 57 Ill. App. 681.

*Indiana.* — *Stockman v. Robbins*, 80 Ind. 195; *Parkinson v. Jasper County Telephone Co.*, (Ind. App. 1903) 67 N. E. Rep. 471.

*Iowa.* — *Thornburg v. Cardell*, (Iowa 1903) 95 N. W. Rep. 239; *Jewett v. Foot*, 119 Iowa 359; *Mead v. Storey County*, (Iowa 1903) 93 N. W. Rep. 88.

*Maryland.* — *Baltimore, etc., R. Co. v. Wicomico County*, 93 Md. 113.

*Mississippi.* — *Tunica County v. Tate*, 78 Miss. 294, *approved Powell v. McKee*, 81 Miss. 229; *State v. Tonella*, 70 Miss. 701, *cited Adams v. Kuhn*, 72 Miss. 276, and *Yazoo, etc., R. Co. v. Adams*, 73 Miss. 648.

*North Carolina.* — *Johnson v. Royster*, 88 N. Car. 194; *North Carolina R. Co. v. Alamance*, 77 N. Car. 4; *Sudderth v. Brittan*, 76 N. Car. 458.

*Oregon.* — *Oregon Steam Nav. Co. v. Portland*, 2 Oregon 81, *cited Oregon Steam Nav. Co. v. Wasco County*, 2 Oregon 206.

*South Carolina.* — *State v. Sheraw, etc., R. Co.*, 54 S. Car. 564.

*Rhode Island.* — *Sullivan v. Peckham*, 16 R. I. 525.

*Virginia.* — *Whiting v. West Point*, 89 Va. 741.

**Implied Authority.** — *Siberling v. Cropper*, 119 Iowa 420; *Jewett v. Foot*, 119 Iowa 359; *Beresheim v. Arnd*, 117 Iowa 83; *Bell v. Stevens*, 116 Iowa 451; *Lambe v. McCormick*, 116 Iowa 169; *Galusha v. Wendt*, 114 Iowa 597; *Smithberg v. Archer*, 108 Iowa 215; *Parker v. Van Steenburg*, 68 Iowa 174; *Robb v. Robinson*, 66 Iowa 500. See also *Amazon Ins. Co. v. Cappellar*, 38 Ohio St. 560; *State v. Raine*, 47 Ohio St. 447.

**Statutes Apply to Corporations.** — *Hunter Stone Co. v. Woodard*, 152 Ind. 474; *Ohio Farmers Ins. Co. v. Hard*, 59 Ohio St. 248. See the title TAXATION (CORPORATE), *post*.

**2. Purpose and Construction of Statutes — Penal Provisions.** — *Sturges v. Carter*, 114 U. S. 511; *Coöperative Bldg., etc., Assoc. v. State*, 156 Ind. 463; *Hunter Stone Co. v. Woodard*, 152 Ind. 474; *Graham v. Russell*, 152 Ind. 186; *Saint v. Welsh*, 141 Ind. 382; *Reynolds v. Bowen*, 138 Ind. 434; *Beresheim v. Arnd*, 117 Iowa 83; *Bell v. Stevens*, 116 Iowa 451; *Lambe v. McCormick*, 116 Iowa 169; *Galusha v. Wendt*, 114 Iowa 597; *Louisville, etc., Mail Co. v. Barbour*, 88 Ky. 73; *Fleming v. Sinclair*, 58 S. W. Rep. 370, 22 Ky. L. Rep. 499; *Baltimore, etc., R. Co. v. Wicomico County*, 93 Md. 113; *Yazoo, etc., R. Co. v. Adams*, 73 Miss. 648; *State v. Baker*, 170 Mo. 383; *Gager v. Prout*, 48 Ohio St. 89; *State v. Pors*, 107 Wis. 420; *Cross v. Milwaukee*, 19 Wis. 509; *Tallman v. Janesville*, 17 Wis. 71.

**Delinquent Tax Penalties and Interest.** — Penalties and interest for nonpayment of taxes cannot be added from the time when the property should have been assessed and the taxes paid. Until the assessment and levy are completed there is no tax. *Gallup v. Schmidt*, 154 Ind. 196, *affirmed* on other grounds 183 U. S. 300.

**3. Assessments Made by Unauthorized Officers or Boards.** — *Powder River Cattle Co. v. Custer County*, 45 Fed. Rep. 323; *Parkinson v. Jasper County Telephone Co.*, (Ind. App. 1903) 67 N. E. Rep. 471; *Royce v. Jenney*, 50 Iowa 676; *Pomeroy Coal Co. v. Emlen*, 44 Kan. 117; *Clark v. Belknap*, (Ky. 1890) 13 S. W. Rep. 212; *Mercier v. New Orleans*, 38 La. Ann. 958; *State v. Crookston Lumber Co.*, 85 Minn. 405; *State v. Cunningham*, 153 Mo. 642; *Little Rock, etc., R. Co. v. Williams*, 101 Tenn. 146; *State v. Nashville, etc., R. Co.*, 96 Tenn. 385, *distinguishing Grundy County v. Tennessee Coal, etc., Co.*, 94 Tenn. 295; *San Antonio St. R. Co. v. San Antonio*, 22 Tex. Civ. App. 341; *Cook v. Galveston, etc., R. Co.*, 5 Tex. Civ. App. 644. *Contra*, *Cosier v. McMillian*, 22 Mont. 486.

**Assessments Ordered by Board Having No Original Jurisdiction to Assess.** — An assessment made by the proper assessing officer is valid, although

apply whether the taxpayer is chargeable with bad faith or negligence in the omission of the property or not.<sup>1</sup> In *Ohio*, however, prior to the amendment of 1900 which establishes the principle just stated,<sup>2</sup> assessments of escaped property could not be made, except for the current year, unless the taxpayer had fraudulently or negligently omitted it in returning his property for taxation, or had evaded making a return.<sup>3</sup>

c. REASSESSMENTS. — Property which has been assessed but escaped taxation by reason of the assessment against it being illegal and void, if subject to taxation in fact, is, no doubt, assessable as omitted property under the statutes enacted for that purpose.<sup>4</sup> It has also been held that where property has been grossly and fraudulently undervalued, and thus *pro tanto* escaped taxation, such statutes authorize the taxing officers to reassess it for the omitted value.<sup>5</sup> In some jurisdictions the statutes expressly provide for reassessment in such cases.<sup>6</sup>

d. TIME OF MAKING ASSESSMENT. — Assessments of escaped property

not made on his own initiative but by order of the board of equalization, which is without jurisdiction to make the assessment itself. *Ferris v. Kimble*, 75 Tex. 476, followed *Connor v. Waxahachie* (Tex. 1889) 13 S. W. Rep. 30. *Contra*, where the valuation is fixed by the board and not independently by the assessing officer. *Western Ranches v. Custer County*, (Mont. 1903) 72 Pac. Rep. 659, followed *Mataador Land, etc., Co. v. Custer County*, (Mont. 1903) 72 Pac. Rep. 662. An order of the board of equalization directing the assessor to add solvent credits at their face value is not an exercise of assessorial powers. Solvent credits, like gold coin, must necessarily be assessed at their face value. To describe the property is, therefore, to fix its value. *Farmers', etc., Bank v. Board of Equalization*, 97 Cal. 318.

1. **Bad Faith and Negligence of Taxpayer — General Rule.** — The tax law contemplates instances of omissions of property from current assessment lists, not only on account of evasions and concealments by property owners, but also by reason of derelictions of the officers on whom rests the primary duty of listing all taxables, without regard to any fault on the part of the taxpayer. *Hunter Stone Co. v. Woodard*, 152 Ind. 474.

2. **Ohio Amendment of 1900.** — *Bates's Annot. Stat. Ohio* (4th ed.), § 2781a; *Toledo Bridge Co. v. Yost*, 12 Ohio Cir. Dec. 448, 22 Ohio Cir. Ct. 376.

3. **Ohio — Early Statutes.** — *State v. Halliday*, 61 Ohio St. 352; *Ohio Farmers Ins. Co. v. Hard*, 59 Ohio St. 248; *Rheinboldt v. Raine*, 52 Ohio St. 160; *Probasco v. Raine*, 50 Ohio St. 378; *Ratterman v. Ingalls*, 48 Ohio St. 468; *Gager v. Prout*, 48 Ohio St. 89; *Cameron v. Cappeller*, 41 Ohio St. 533; *Amazon Ins. Co. v. Cappellar*, 38 Ohio St. 560; *Toledo Bridge Co. v. Yost*, 12 Ohio Cir. Dec. 448, 22 Ohio Cir. Ct. 376; *Stewart v. Duerr*, 11 Ohio Cir. Dec. 310, 20 Ohio Cir. Ct. 505; *Adams v. Shields*, 9 Ohio Cir. Dec. 558, 17 Ohio Cir. Ct. 129; *Sherard v. Lindsay*, 7 Ohio Cir. Dec. 245, 13 Ohio Cir. Ct. 315; *Phipps v. Ratterman*, 6 Ohio Cir. Dec. 488, 10 Ohio Cir. Ct. 205, 3 Ohio Dec. 209, 4 Ohio Dec. 453, overruling 4 Ohio Cir. Dec. 678, 7 Ohio Cir. Ct. 458; *Neave Bldg. Co. v. Brooks*, 6 Ohio Cir. Dec. 280, 9 Ohio Cir. Ct. 151, 2 Ohio Dec. 598; *Ohio Farmers Ins. Co. v. Hard*,

10 Ohio Dec. 469, 8 Ohio N. P. 36; *Patton v. Commercial Bank*, 10 Ohio Dec. 321, 7 Ohio N. P. 401; *Jones v. Wood*, 2 Ohio Dec. 75, 1 Ohio N. P. 155; *Ludlow v. Willich*, 1 Cinc. Super. Ct. 315.

**Return of Shares of Bank Stock.** — *State v. Akins*, 63 Ohio St. 182, followed *Lander v. Mercantile Nat. Bank, (C. C. A.)* 118 Fed. Rep. 785, which affirmed 109 Fed. Rep. 21.

4. **Void Assessments.** — *Matter of Chadwick*, 59 N. Y. App. Div. 334; *Scollard v. Dallas*, 16 Tex. Civ. App. 620. See also *Overing v. Foote*, 43 N. Y. 290, distinguishing *Bennett v. Buffalo*, 17 N. Y. 383.

5. **Assessments Undervaluing Property.** — *Galusha v. Wendt*, 114 Iowa 597; *State v. Weyerhauser*, 68 Minn. 353, 72 Minn. 519, affirmed 176 U. S. 550; *Adams v. Clarke*, 80 Miss. 134; *South Nashville St. R. Co. v. Morrow*, 87 Tenn. 406; *Louisville, etc., R. Co. v. State*, 8 Heisk. (Tenn.) 790. See also *Parkinson v. Jasper County Telephone Co.*, (Ind. App. 1903) 67 N. E. Rep. 471. But see *contra*, *Clunie v. Siebe*, 112 Cal. 593.

**After Payment of Tax.** — The fact that the tax has been levied on the basis of the illegal assessment, and paid, does not prevent the making of the reassessment. *Chicago Union Traction Co. v. State Board of Equalization*, 112 Fed. Rep. 607. *Contra*, *Graham v. Florida Land, etc., Co.*, 33 Fla. 356.

6. **Reassessments Expressly Authorized.** — *Weaver v. State*, 39 Ala. 535; *Colusa County v. Glenn County*, 124 Cal. 498; *Crawford County v. Huls*, 12 Ill. App. 406; *Topsham v. Purinton*, 94 Me. 354; *Rockland v. Ulmer*, 87 Me. 357; *Hunt v. Perry*, 165 Mass. 287; *Davis v. Boston*, 129 Mass. 377; *Hubbard v. Garfield*, 102 Mass. 72; *Burr v. Wilcox*, 13 Allen (Mass.) 269; *Inglee v. Bosworth*, 5 Pick. (Mass.) 498, 16 Am. Dec. 419; *Auditor Gen. v. Smith*, 125 Mich. 576; *Auditor Gen. v. Gurney*, 109 Mich. 472; *People v. Banfield*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 13; *Johnston v. Oshkosh*, 65 Wis. 473; *Bass v. Fond du Lac County*, 60 Wis. 516; *Bradley v. Lincoln County*, 60 Wis. 71; *Monroe v. Ft. Howard*, 50 Wis. 228; *Kingsley v. Marathon County*, 40 Wis. 649; *Single v. Stettin*, 49 Wis. 645; *Flanders v. Merrimack*, 48 Wis. 567; *Plumer v. Marathon County*, 46 Wis. 164; *Marsh v. Clark County*, 42 Wis. 502; *Peters v. Myers*, 22 Wis. 602.

are made *nunc pro tunc*; and it is immaterial that the regular periods for making and reviewing assessments, levying the taxes or placing the rolls in the hands of the collection officers, have elapsed when they are made,<sup>1</sup> unless the owner is thereby deprived of some constitutional right, or the statute limits the time.<sup>2</sup>

*e. RELATION BACK OF ASSESSMENT* — (1) *In General*. — The assessment when made relates back to the time when the property should have been assessed, and is not affected by changes in ownership, consumption, or removal subsequent to the latter date. The equitable doctrine of purchasers for value without notice affords no protection against the exercise of the power to assess escaped property.<sup>3</sup>

(2) *Valuation of Property*. — The valuation of the property for purposes of the assessment must be fixed according to its value at the time when it ought to have been assessed, unless some other standard is fixed by law.<sup>4</sup>

*f. DEATH OF TAXPAYER*. — The death of the taxpayer does not abate the liability to pay taxes on property which escaped taxation during his lifetime; and they are properly assessed against the estate.<sup>5</sup>

*g. REGULAR ASSESSMENT AS RES JUDICATA* — (1) *General Rule*. — An assessment is not a judgment within the doctrine of *res judicata*, and does not bar or estop a supplemental assessment of property which was, in fact, erroneously omitted, even though its omission in the first instance was the result of a decision by the officers making the regular assessment, holding it to be exempt.<sup>6</sup>

(2) *Assessments in Gross*. — Where the regular assessment values the property in gross without enumerating the specific items, it cannot be known whether any property was omitted by the assessing officers or not, and no supplemental assessment can be made.<sup>7</sup>

**1. Time of Making Assessments — General Rule.** — *Coöperative Bldg., etc., Assoc. v. State*, 156 Ind. 463; *Galusha v. Wendt*, 114 Iowa 597; *Parker v. Van Steenburg*, 68 Iowa 174; *Baltimore, etc., R. Co. v. Wicomico County*, 93 Md. 113; *Hopkins v. Van Wyck*, 80 Md. 7, *cited* *Carstairs v. Cochran*, 95 Md. 488; *Tunica County v. Tate*, 78 Miss. 294; *State v. Simmons*, 70 Miss. 485. *Compare Overing v. Foote*, 65 N. Y. 263, *distinguishing* 43 N. Y. 290.

**2. Exceptions to Rule.** — *Auditor Gen. v. Gurney*, 109 Mich. 472; *Three Rivers v. Smith*, 99 Mich. 507; *Maurer v. Cliff*, 94 Mich. 194; *Frontier Land, etc., Co. v. Baldwin*, 3 Wyo. 764.

**3. Relation Back of Assessment.** — *Com. v. Riley*, 72 S. W. Rep. 809, 24 Ky. L. Rep. 2005; *State v. Weyerhauser*, 68 Minn. 353, 72 Minn. 519, *affirmed* 176 U. S. 550; *State v. Simmons*, 70 Miss. 485; *Matter of Chadwick*, 59 N. Y. App. Div. 334; *State v. Pors*, 107 Wis. 420; *Oberreich v. Fond du Lac County*, 63 Wis. 216; *Marco v. Fond du Lac County*, 63 Wis. 212; *Tallman v. Janesville*, 17 Wis. 71, *followed* *Cross v. Milwaukee*, 19 Wis. 509. *Contra*, *Bloxham v. Florida Cent., etc., R. Co.*, 35 Fla. 625.

Under the Ohio Statute changes of ownership during the current year may be disregarded by the auditor in assessing property for the taxes of that year which has escaped the regular assessment; but in making such assessment for preceding years he cannot go behind a change in ownership. *Yost v. Maumee Brewery Co.*, 10 Ohio Cir. Dec. 693, 20 Ohio Cir. Ct. 26; *Neave Bldg. Co. v. Brooks*, 6 Ohio Cir. Dec. 280, 9 Ohio Cir. Ct. 151, 2 Ohio Dec. 598.

**4. Valuation of Property.** — *Davis v. Boston*, 129 Mass. 377; *Hubbard v. Garfield*, 102 Mass. 72; *State v. Simmons*, 70 Miss. 485. See also *Scheiber v. Kaehler*, 49 Wis. 291.

An Early New York Statute provided that the property should be assessed "at the valuation of the preceding year if it was then valued, or, if not, at the valuation of the year preceding that." If the property was not valued in one of those years, there was no power to make the assessment. *People v. Goff*, 52 N. Y. 434; *Overing v. Foote*, 43 N. Y. 290, 65 N. Y. 263; *People v. Assessors*, 92 N. Y. 430; *Marsh v. Bowen*, (Supm. Ct.) 12 Abb. N. Cas. (N. Y.) 1. See 2 Heyd. Rev. Stat. N. Y. (2d ed.) 1875.

**5. Death of Taxpayer.** — *Graham v. Russell*, 152 Ind. 186; *Saint v. Welsh*, 141 Ind. 382; *Reynolds v. Bowen*, 138 Ind. 434; *Com. v. Sweigart*, 73 S. W. Rep. 758, 24 Ky. L. Rep. 2147. *Contra* of personal property unless the statute specifically authorizes it. *State v. Everhard*, (Minn. 1903) 95 N. W. Rep. 1115.

**6. Res Judicata.** — *Sturges v. Carter*, 114 U. S. 511; *Reynolds v. Bowen*, 138 Ind. 434; *Lambe v. McCormick*, 116 Iowa 169; *M. E. Church v. New Orleans*, 107 La. 611; *State v. Assessors*, 52 La. Ann. 223; *Rockland v. Farnsworth*, 93 Me. 178; *Adams v. Clarke*, 80 Miss. 134; *Gager v. Prout*, 48 Ohio St. 89, *cited* *Hagerty v. Huddleston*, 60 Ohio St. 149; *Lee v. Sturges*, 46 Ohio St. 153; *Hibernian Benev. Soc. v. Kelly*, 28 Oregon 173, 52 Am. St. Rep. 769; *Grigsby v. Minnehaha County*, 6 S. Dak. 492. See the title *RES JUDICATA*, vol. 24, p. 723.

**7. Assessments in Gross.** — *Allwood v. Cowen*, Volume XXVII.

**h. FERRETING CONTRACTS.**—Taxing officers or municipal authorities, such as county boards, are sometimes empowered by express statutory provision to enter into contracts with individuals for the ferreting out or discovery of property that has escaped taxation.<sup>1</sup> In some states, also, authority to enter into such contracts has been held to be within the general powers conferred by law on county boards.<sup>2</sup>

**8. Compensation of Assessing Officers.**—The rules of law applicable generally to the compensation of public officers are discussed elsewhere in this work. Other matters, such as the amount of compensation to which assessors, members of revising boards, and other officers performing duties in connection with the assessment, are entitled; its form, whether by salary, fees, or a percentage on the amount of the assessed valuation or taxes, and the means of payment, are wholly dependent on the terms and construction of local statutes.<sup>3</sup>

**9. Liability of Assessing Officers**—*a. CIVIL LIABILITY.*—In valuing property and in performing other duties relative to assessments as to which it is the evident intention of the law that assessors shall act solely on their own judgment and discretion, they exercise judicial functions; and if they have jurisdiction over both person and subject-matter, they incur no civil liability for injuries to taxpayers resulting from erroneous acts, at least when not chargeable with bad faith or malice. If, on the other hand, they act without jurisdiction, they are clearly liable. Other duties are enjoined on them which are ministerial, and, as in the case of other ministerial officers, assessors are civilly liable to individuals for injuries resulting from omissions, negligence,

111 Ill. 481; *Dresden v. Bridge*, 90 Me. 489; *Oxford Bank v. Lafayette County*, 79 Miss. 152; *Cape Girardeau v. Buehrmann*, 148 Mo. 198; *Shove v. Manitowoc*, 57 Wis. 5.

An Assessment of a taxpayer for "amount of indebtedness which he regards as probably collectible" does not assess him for "money on hand, or on deposit, or loaned," and he may be additionally assessed therefor. *Adams v. Clarke*, 80 Miss. 134, Calhoun, J., *dissenting*.

**1. Ferreting Contracts—Express Statutes.**—*Shinn v. Cunningham*, (Iowa 1903) 94 N. W. Rep. 941; *State v. Crites*, 48 Ohio St. 142; *State v. Cappeller*, 39 Ohio St. 207; *State v. Lewis*, 12 Ohio Dec. 46; *State v. Hagerty*, 3 Ohio Cir. Dec. 161, 5 Ohio Cir. Ct. 325.

**Agents Appointed by Auditor—Kentucky.**—Stat. Ky. 1899, § 4258; *Sebree v. Com.*, 74 S. W. Rep. 716, 25 Ky. L. Rep. 121; *Hoke v. Com.*, 79 Ky. 567.

**2. Contracts by County Boards under General Powers.**—*Vandercook v. Williams*, 106 Ind. 345; *Williams v. Segur*, 106 Ind. 368; *Richmond v. Dickinson*, 155 Ind. 345; *Fleener v. Litsey*, 30 Ind. App. 399; *Disbrow v. Cass County*, 119 Iowa 538; *Shinn v. Cunningham*, (Iowa 1903) 94 N. W. Rep. 941; *Reed v. Cunningham*, (Iowa 1903) 96 N. W. Rep. 1119; *Burnett v. Markley*, 23 Oregon 436. See also *McMahon v. New Orleans*, 52 La. Ann. 1226. *Contra*, *Grannis v. Blue Earth County*, 81 Minn. 55.

**3. Compensation.**—See generally the title PUBLIC OFFICERS, vol. 23, p. 385 *et seq.* See also the following cases:

*Alabama.*—*Stahmer v. State*, 125 Ala. 72; *East v. Eichelberger*, 69 Ala. 187; *Shaver v. Robinson*, 59 Ala. 195.

*Arkansas.*—*Bell v. Arkansas County*, 44 Ark. 493.

*California.*—*Matter of Dodge*, 135 Cal. 512; *Tulare County v. May*, 118 Cal. 303.

*Indiana.*—*Allen County v. Chapman*, 22 Ind. App. 60.

*Kentucky.*—*Harrison v. Com.*, 83 Ky. 162.

*Louisiana.*—*State v. Jumel*, 30 La. Ann. 235.

*Mississippi.*—*Bogan v. Holder*, 76 Miss. 597; *Williams v. Sharkey County*, 74 Miss. 122.

*New Mexico.*—*Baca v. Bernalillo County*, 10 N. Mex. 438.

*New York.*—*People v. Jones*, 68 N. Y. App. Div. 396, *affirmed* without opinion 175 N. Y. 471.

*Ohio.*—*Stormer v. Lucas County*, 11 Ohio Dec. 49, 8 Ohio N. P. 110.

*Pennsylvania.*—*Marquette v. Berks County*, 3 Pa. Super. Ct. 36, 39 W. N. C. (Pa.) 325; *Young v. Huntingdon County*, 20 Pa. Co. Ct. 374.

*South Carolina.*—*State v. Ransom*, 9 S. Car. 199.

*Texas.*—*McLennan County v. Frost*, (Tex. Civ. App. 1903) 75 S. W. Rep. 876; *Dimmit County v. Cavender*, (Tex. Civ. App. 1901) 65 S. W. Rep. 881; *School Trustees v. Farmer*, 23 Tex. Civ. App. 39.

*Washington.*—*State v. Carson*, 6 Wash. 250; *Heilig v. Puyallup*, 7 Wash. 29.

*Wisconsin.*—*Morey v. Racine*, 116 Wis. 8; *Anderson v. Milwaukee*, 113 Wis. 1; *Powers v. Oshkosh*, 56 Wis. 660.

*Wyoming.*—*Beals v. Smith*, 8 Wyo. 159.

**Compensation for Assessing Poll Taxes.**—*Shaver v. Robinson*, 59 Ala. 195; *Matter of Dodge*, 135 Cal. 512.

**Taxpayer Not Liable for Percentage of Assessor.**—The taxpayer cannot be charged with the percentage of the assessor in addition to the tax, under a statute providing that a tax commissioner making an assessment of escaped property "shall receive ten per centum of the tax arising" therefrom. *Stahmer v. State*, 125 Ala. 72.

or error in performance.<sup>1</sup> While these rules are well established, there is considerable difference of opinion as to what acts of the assessors are judicial and what are ministerial,<sup>2</sup> and as to the extent of the protection afforded them when the erroneous exercise of judicial discretion is attributable to fraud or malice. Relative to the latter difference of opinion it has been said that the weight of authority supports the doctrine that assessors, like other *quasi-judicial* officers, are liable for damages caused by erroneous acts done with a malicious, corrupt, or other sinister motive.<sup>3</sup> The extent to which assessors

**1. Civil Liability of Assessors — United States.**

— *Bailey v. Berkey*, 81 Fed. Rep. 737.  
*California*. — *Ballerino v. Mason*, 83 Cal. 447.  
*Iowa*. — *Parkinson v. Parker*, 48 Iowa 667.  
*Maine*. — *Emery v. Sanford*, 92 Me. 525;  
*Ware v. Percival*, 61 Me. 391, 14 Am. Rep. 565;  
*Allen v. Archer*, 49 Me. 346; *Herriman v. Stowers*, 43 Me. 497; *Hemingway v. Machias*, 33 Me. 445; *Stickney v. Bangor*, 30 Me. 404; *Huse v. Merriam*, 2 Me. 375.

*Massachusetts*. — *Durant v. Eaton*, 98 Mass. 469; *Libby v. Burnham*, 15 Mass. 144; *Agry v. Young*, 11 Mass. 220; *Colman v. Anderson*, 10 Mass. 119; *Dillingham v. Snow*, 5 Mass. 547; *Sprague v. Bailey*, 19 Pick. (Mass.) 436; *Freeman v. Kenney*, 15 Pick. (Mass.) 44; *Inglee v. Bosworth*, 5 Pick. (Mass.) 498, 16 Am. Dec. 419; *Griffin v. Rising*, 11 Met. (Mass.) 339; *Dickinson v. Billings*, 4 Gray (Mass.) 42 [*criticizing Baker v. Allen*, 21 Pick. (Mass.) 382]; *Eames v. Johnson*, 4 Allen (Mass.) 382.

*Michigan*. — *Meade v. Haines*, 81 Mich. 261; *Moss v. Cummings*, 44 Mich. 359; *Wall v. Trumbull*, 16 Mich. 238.

*Minnesota*. — *Stewart v. Case*, 53 Minn. 63, 39 Am. St. Rep. 575.

*Nevada*. — *Whitmore v. McGregor*, 20 Nev. 451; *Ford v. McGregor*, 20 Nev. 446.

*New Hampshire*. — *Hayes v. Hanson*, 12 N. H. 284; *McDaniel v. Tebbetts*, 60 N. H. 497; *Odiorne v. Rand*, 59 N. H. 504; *Salisbury v. Merrimack County*, 59 N. H. 359.

*New Jersey*. — *State v. Jersey City*, 24 N. J. L. 662.

*New York*. — *Hilton v. Fonda*, 86 N. Y. 340; *Williams v. Weaver*, 75 N. Y. 30, *affirmed* 100 U. S. 547; *Dorn v. Backer*, 61 N. Y. 261, *reversing* 61 Barb. (N. Y.) 597; *Dorwin v. Strickland*, 57 N. Y. 493; *National Bank v. Elmira*, 53 N. Y. 53, *reversing* 6 Lans. (N. Y.) 116; *Westfall v. Preston*, 49 N. Y. 349; *Clark v. Norton*, 49 N. Y. 243; *Western R. Co. v. Nolan*, 48 N. Y. 513; *Buffalo, etc., R. Co. v. Erie County*, 48 N. Y. 105; *Swift v. Poughkeepsie*, 37 N. Y. 511, 41 How. Pr. (N. Y.) 493, 2 Abb. App. Dec. (N. Y.) 167; *Barhyte v. Shepherd*, 35 N. Y. 238; *Bennett v. Buffalo*, 17 N. Y. 383; *Mygatt v. Washburn*, 15 N. Y. 316; *People v. Chenango County*, 11 N. Y. 563; *Vose v. Willard*, 47 Barb. (N. Y.) 320; *People v. Reddy*, 43 Barb. (N. Y.) 539; *Brown v. Smith*, 24 Barb. (N. Y.) 419; *Vail v. Owen*, 19 Barb. (N. Y.) 22; *Prosser v. Secor*, 5 Barb. (N. Y.) 608; *Robinson v. Rowland*, 26 Hun (N. Y.) 501; *Easton v. Calendar*, 11 Wend. (N. Y.) 90; *Weaver v. Devendorf*, 3 Den. (N. Y.) 117; *Wade v. Matheson*, 4 Lans. (N. Y.) 158.

*Pennsylvania*. — *Clinton School Dist. Appeal*, 56 Pa. St. 315.

*Utah*. — *Taylor v. Robertson*, 16 Utah 330.

*Vermont*. — *Wilson v. Marsh*, 34 Vt. 352;

*Stearns v. Miller*, 25 Vt. 20; *Fairbanks v. Kirtledge*, 24 Vt. 9; *Fuller v. Gould*, 20 Vt. 643; *Howard v. Shumway*, 13 Vt. 359; *Henry v. Edson*, 2 Vt. 499. See also *Kellogg v. Higgins*, 11 Vt. 240.

*Wisconsin*. — *State v. Thorne*, 112 Wis. 81.  
 See generally the title PUBLIC OFFICERS, vol. 23, p. 375 *et seq.*

**The Distinction Is Between an Erroneous and Illegal Assessment.** — The former is when the officers have power to act, but err in the exercise of the power; the latter, when they have no power to act at all, and it does not aid them to decide that they have. *National Bank v. Elmira*, 53 N. Y. 53, *reversing* 6 Lans. (N. Y.) 116, *approved* *Ford v. McGregor*, 20 Nev. 446; *Dorn v. Backer*, 61 N. Y. 261, *reversing* 61 Barb. (N. Y.) 597; *Prosser v. Secor*, 5 Barb. (N. Y.) 608.

**Liability When Vote of District Imposing Tax Is Void or Statute Unconstitutional.** — *Judd v. Thompson*, 125 Mass. 553; *Dickinson v. Billings*, 4 Gray (Mass.) 42; *Bassett v. Porter*, 4 Cush. (Mass.) 487; *Little v. Merrill*, 10 Pick. (Mass.) 543; *Withington v. Eveleth*, 7 Pick. (Mass.) 106; *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145; *Drew v. Davis*, 10 Vt. 506, 33 Am. Dec. 213. *Compare* *Boody v. Watson*, 64 N. H. 162; *Edes v. Boardman*, 58 N. H. 580.

**Actions Against Municipality.** — A taxpayer who has paid a tax illegally assessed is not entitled to an action against the town to recover back the amount, in the absence of statute; but his remedy, if he has any, is against the assessors. *Foss v. Whitehouse*, 94 Me. 491; *Hayford v. Belfast*, 69 Me. 63; *Gilman v. Waterville*, 59 Me. 491; *Smith v. Readfield*, 27 Me. 145.

**Liability of Assessors to Municipality.** — If assessors are liable at all to the municipality from which they received their appointment, they are so certainly only for want of fidelity and integrity or for not discharging their duties according to their best judgment and understanding. *First Parish v. Fiske*, 8 Cush. (Mass.) 264, 54 Am. Dec. 755; *Lincoln v. Chapin*, 132 Mass. 470.

**Omission of Taxable Property from Assessment.** — *Schofield v. Watkins*, 22 Ill. 66; *Merritt v. Farriss*, 22 Ill. 303; *Dunham v. Chicago*, 55 Ill. 357; *Emery v. Sanford*, 92 Me. 525; *Easton v. Calendar*, 11 Wend. (N. Y.) 90.

**Erroneous Acts Instigated or Concurred in by Taxpayer.** — *Pease v. Whitney*, 8 Mass. 94; *Hilton v. Fonda*, 86 N. Y. 330.

**Voluntary Payment of Illegal Tax.** — *Sexton v. Pepper*, 28 Hun (N. Y.) 31.

**2.** See generally the cases cited in the preceding note. See also *Ford v. McGregor*, 20 Nev. 446.

**3.** *Bailey v. Berkey*, 81 Fed. Rep. 737. *Contra*,

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shall be civilly liable is sometimes declared by statute.<sup>1</sup>

*b. CRIMINAL AND PENAL LIABILITY.* — Assessors are subject to prosecution for malfeasance, misfeasance, and nonfeasance in office, to the same extent as other officers; and by statute the failure or refusal to perform all or some of the duties required of them by law is frequently made punishable penal or criminally.<sup>2</sup>

**10. Notice and Opportunity to Be Heard — a. BY ASSESSORS.** — Proceedings for the assessment of a tax being *quasi-judicial*, it follows that in order to give validity to the assessment, notice thereof should be given to the owner of the property to be assessed. The form of the notice, as well as the time and manner of giving it, is regulated by statute, which is mandatory, and may usually be given by leaving with the taxpayer whose property is to be assessed a written or printed notice requiring him to make a statement of all of his taxable property,<sup>3</sup> or by posting notice of the time and place of meeting of the assessors.<sup>4</sup> Where an assessor accepts the list furnished by the property owner without question, he cannot alter or raise the valuation without giving notice to the party assessed.<sup>5</sup>

*b. NOTICE OF MEETINGS OF BOARDS OF REVIEW.* — After a person has listed his property for taxation, no change in the list or alteration of the assessment can be compulsorily made by an officer, tribunal, or board of commissioners sitting as a board of review, whose decision is final, until, by notice of the time and place of meeting, or by due process of law, such person has had an opportunity to be heard on the question of the correctness of his list, and to offer his objections to an increase in its valuation,<sup>6</sup> before the

*Stewart v. Case*, 53 Minn. 63, 39 Am. St. Rep. 575, citing *Cooley*, Taxation, p. 786. See generally the cases cited in the preceding notes.

**1. Statutory Provisions.** — *Foss v. Whitehouse*, 94 Me. 491; *Emery v. Sanford*, 92 Me. 525; *Rowe v. Friend*, 90 Me. 241; *Gilman v. Waterville*, 59 Me. 491; *First Parish v. Fiske*, 8 Cush. (Mass.) 264, 54 Am. Dec. 755.

**2. Criminal and Penal Liability.** — *Siebe v. San Francisco*, 114 Cal. 551; *Gunning v. People*, 189 Ill. 165, 82 Am. St. Rep. 433, reversing 86 Ill. App. 676; *Dillingham v. Snow*, 5 Mass. 547; *First Parish v. Fiske*, 8 Cush. (Mass.) 264, 54 Am. Dec. 755; *State v. Creveling*, 40 N. J. L. 150; *State v. Allen*, 71 Vt. 323. See generally the title PUBLIC OFFICERS, vol. 23, p. 382 *et seq.*

**3. Cooperative Bldg., etc., Assoc. v. State**, 156 Ind. 463; *State v. Cummings*, 151 Mo. 49; *Cape Girardeau v. Buehrmann*, 148 Mo. 198.

**4. Taft v. Ballou**, 23 R. I. 213; *McTwiggan v. Hunter*, 18 R. I. 776.

The omission of the word "require" as used in Gen. Laws R. I., c. 46, § 6, that "such notices shall require every person" liable to taxation to produce to the assessors a true and exact account of his ratable estate, does not render the notice fatally defective, where it states by reasonably intelligible abbreviations the time and place where the assessors will meet for the purpose of receiving accounts of ratable estates, coupled with a statement of the penalty for refusing to do so. *Kettelle v. Warwick, etc.*, Water Co., 23 R. I. 114.

**Proof of the Posting of Notices of assessment by a person other than the assessor answers the requirements of the statutes.** *Oswego County v. Betts*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 924.

**Proof of Service by Mail.** — *Hagenmeyer v. Board of Equalization*, 82 Cal. 214.

**5. Where Assessor Accepts List Without Question Notice Must Be Given Before Alteration.** — *Cleghorn v. Postlewaite*, 43 Ill. 428; *McConkey v. Smith*, 73 Ill. 313; *Shawneetown First Nat. Bank v. Cook*, 77 Ill. 622; *Huling v. Ehrich*, 183 Ill. 315; *Tolman v. Salomon*, 191 Ill. 202; *Cox v. Hawkins*, 199 Ill. 68; *State v. Stamm*, 165 Mo. 73.

If, however, the assessor finds other property from that listed by the owner, he may list and assess it without notice to the owner. *Wabash, etc., R. Co. v. Johnson*, 108 Ill. 11.

A statute making provision for a board of appeals, to decide upon the value of property assessed when the assessor and property owner cannot agree upon the value, is valid; and the taxpayer cannot object to an assessment where the assessor has valued the property in accordance with the value placed upon it in making his return, on the ground that the law makes no provision for the review of such assessment, and affords him no opportunity to be heard. *Scollard v. Dallas*, 16 Tex. Civ. App. 620.

**6. Notice Necessary Before Proceedings Become Final.** — *United States.* — *Santa Clara County v. Southern Pac. R. Co.*, 18 Fed. Rep. 385; *Exchange Bank Tax Cases*, 21 Fed. Rep. 99; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701; *Albany City Nat. Bank v. Maher*, 19 Blatchf. (U. S.) 179; *French v. Edwards*, 13 Wall. (U. S.) 506.

*Arkansas.* — *Ex p. Ft. Smith, etc., Bridge Co.*, 62 Ark. 461.

*California.* — *Patten v. Green*, 13 Cal. 325; *Hagenmeyer v. Board of Equalization*, 82 Cal. 214.

*Georgia.* — *Compare Collier v. Morrow*, 90 Ga. 148.

*Illinois.* — *Hough v. Hastings*, 18 Ill. 312; *Cleghorn v. Postlewaite*, 43 Ill. 428; *Darling v. Gunn*, 50 Ill. 424; *Shawneetown First Nat.*



proceedings become effectual and his liability is definitely fixed.<sup>1</sup> Likewise in adding omitted property to the tax duplicate, a notice and hearing must be given to the owner.<sup>2</sup> A substantial compliance with statutory requirements

*Bank v. Cook*, 77 Ill. 622; *People v. Ward*, 105 Ill. 620; *Tolman v. Salomon*, 191 Ill. 202.

*Indiana*.—*Kuntz v. Sumption*, 117 Ind. 1; *Gallup v. Schmidt*, 154 Ind. 196, affirmed 183 U. S. 300; *Hubbard v. Goss*, 157 Ind. 485.

*Iowa*.—*Auer v. Dubuque*, 65 Iowa 650.

*Kansas*.—*Kansas Pac. R. Co. v. Russell*, 8 Kan. 558; *Gibbins v. Adamson*, 44 Kan. 203.

*Kentucky*.—*Bruce v. Vanceburg, etc.*, Turnpike Road Co., (Ky. 1896) 35 S. W. Rep. 112; *Negley v. Henderson Bridge Co.*, 107 Ky. 414.

*Louisiana*.—*Union Oil Co. v. Campbell*, 48 La. Ann. 1350.

*Maryland*.—*Alleghany County v. New York Min. Co.*, 76 Md. 549; *Baldwin v. State*, 89 Md. 587, affirmed 179 U. S. 220; *Monticello Distilling Co. v. Baltimore*, 90 Md. 416; *Gittings v. Baltimore*, 95 Md. 419.

*Michigan*.—*Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535; *Dool v. Cassopolis*, 42 Mich. 547; *Avery v. East Saginaw*, 44 Mich. 587; *Taylor v. Deveaux*, 100 Mich. 581.

*Mississippi*.—*Alabama, etc., R. Co. v. Brennan*, 69 Miss. 103.

*Missouri*.—*State v. Springer*, 134 Mo. 212; *State v. Baker*, 170 Mo. 194; *Relfe v. Columbia L. Ins. Co.*, 11 Mo. App. 374.

*Nebraska*.—*South Platte Land Co. v. Buffalo County*, 7 Neb. 253; *Spiech v. Tierney*, 56 Neb. 514.

*New Jersey*.—*State v. Carragan*, 37 N. J. L. 264; *State v. Harrison*, 39 N. J. L. 51.

*New York*.—*People v. Barker*, 86 Hun (N. Y.) 240; *Douglas v. Westchester County*, 172 N. Y. 309, reversing 68 N. Y. App. Div. 295.

*Oregon*.—*Oregon, etc., R. Co. v. Lane County*, 23 Oregon 386.

*Texas*.—*Hoefling v. San Antonio*, 15 Tex. Civ. App. 257.

*Vermont*.—*Brush v. Buker*, 56 Vt. 143; *Godfrey v. Bennington Water Co.*, (Vt. 1903) 55 Atl. Rep. 654.

*Virginia*.—*Heth v. Radford*, 96 Va. 272.

*Washington*.—*Landes Estate Co. v. Clallam County*, 19 Wash. 569; *Lewis v. Bishop*, 19 Wash. 312; *Citizens' Nat. Bank v. Columbia County*, 23 Wash. 441; *Ladd v. Gilson*, 26 Wash. 79; *Everett Water Co. v. Fleming*, 26 Wash. 364.

*West Virginia*.—*Cunningham v. Brown*, 39 W. Va. 588.

*Wisconsin*.—*State v. Wharton*, 117 Wis. 558. See also *McIntyre v. White Creek*, 43 Wis. 620.

**Joint or Common Owners.**—Notice of an intent to raise a valuation on real estate must be served on all the owners holding undivided interests therein. *Perkins v. Zumstein*, 2 Ohio Cir. Dec. 601.

**Filing Abstract of Lists Held Notice to Taxpayer.**—*Godfrey v. Bennington Water Co.*, (Vt. 1903) 55 Atl. Rep. 654.

**Filing Copy of Assessor's Books Held Sufficient Notice.**—*State v. Reed*, 159 Mo. 77. Compare *State v. Spencer*, 114 Mo. 574; *Noll v. Morgan*, 82 Mo. App. 112.

**Tax Bill as Notice of Assessment.**—*Carstairs v. Cochran*, 95 Md. 488.

**Notice of Grounds of Increase of Valuation Not Required.**—*American Express Co. v. Raymond*, 189 Ill. 232; *Pike v. Raymond*, 189 Ill. 250.

**Notice Need Not Specify Property Added.**—*Poppleton v. Yamhill County*, 18 Oregon 377.

**What Constitutes Raising.**—In *Kissimmee City v. Cannon*, 26 Fla. 3, it was held that the final assessment roll, however made up, is that to which the taxpayer must look, and where an assessor made valuations in a memorandum book, and after advising with members of the board in order to arrive at a correct valuation, raised such valuations on the final assessment, it was not such a raising of valuation as to require a notice to be given the owner of the property.

**1. Opportunity to Be Heard Before Legal Proceedings Become Effectual.**—*Carson v. St. Francis Levee Dist.*, 59 Ark. 513; *Hough v. Hastings*, 18 Ill. 312; *Alleghany County v. New York Min. Co.*, 76 Md. 549; *State v. Springer*, 134 Mo. 212; *State v. Cummings*, 151 Mo. 49; *State v. Baker*, 170 Mo. 194; *Sioux City, etc., R. Co. v. Washington County*, 3 Neb. 30; *Wells County v. McHenry*, 7 N. Dak. 246.

**Collection Enjoined for Want of Opportunity to Be Heard.**—*Negley v. Henderson Bridge Co.*, 107 Ky. 414.

But if the taxpayer is provided by statute with an adequate legal remedy to correct errors in overvaluation, and fails to avail himself thereof, an injunction will be denied. *Swenson v. McLaren*, 2 Tex. Civ. App. 331.

**Meeting of Board as Affecting Opportunity to Be Heard.**—Unless the board meets at the time fixed by law, the levy will be invalidated, although the notice is in due form. *Slaughter v. Louisville*, 89 Ky. 112; *Caledonia Tp. v. Rose*, 94 Mich. 216. See also *Nashville v. Weiser*, 54 Ill. 245; *Nixon v. Ruple*, 30 N. J. L. 58.

And on the same principle the board must sit for the full time prescribed by law. *Wright v. Auditor Gen.*, 118 Mich. 556.

**Objections Must Be Made Within Statutory Period.**—*Union Oil Co. v. Campbell*, 48 La. Ann. 1350.

**Due Process of Law.**—If the opportunity to object is afforded the taxpayer in an action for the collection of the tax he is not deprived of his property without due process of law. *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Lent v. Tillson*, 140 U. S. 316; *Exchange Bank Tax Cases*, 21 Fed. Rep. 99; *Murdock v. Cincinnati*, 44 Fed. Rep. 726; *Young v. Wempe*, 46 Fed. Rep. 354; *Garvin v. Daussman*, 114 Ind. 429, 5 Am. St. Rep. 637; *Ulman v. Baltimore*, 72 Md. 609; *Redwood County v. Winona, etc.*, Land Co., 40 Minn. 512; *Douglas Co. v. Com.*, 97 Va. 397.

**2. Notice of Addition of Omitted Property.**—*Indiana*.—*Cummings v. Stark*, 138 Ind. 94; *Reynolds v. Bowen*, 138 Ind. 434; *Chicago, etc., R. Co. v. John*, 150 Ind. 113; *Gallup v. Schmidt*, 154 Ind. 196; *Coöperative Bldg., etc., Assoc. v. State*, 156 Ind. 463.

*Iowa*.—*Galusha v. Wendt*, 114 Iowa 597; *Beresheim v. Arnd*, 117 Iowa 83.

as to notice, both in respect to its form and the manner of bringing it to the attention of the taxpayer, is essential.<sup>1</sup>

*Kansas*.—*Dykes v. Lockwood Mortg. Co.*, 57 Kan. 416, affirming 2 Kan. App. 217.

*Maryland*.—*Myers v. Baltimore County*, 83 Md. 385, 55 Am. St. Rep. 349; *Baltimore County v. Winand*, 77 Md. 522.

*Mississippi*.—*Madison County v. Frazier*, 78 Miss. 880; *Clarksdale v. Yazoo, etc., R. Co.*, (Miss. 1901) 29 So. Rep. 93.

*Ohio*.—*Schindler v. Lewis*, 9 Ohio Cir. Dec. 174; *Phillips v. Hunter*, 6 Ohio Cir. Dec. 746; *Hayes v. Yost*, 24 Ohio Cir. Ct. 18.

In *Jackson v. Chizum*, 78 Iowa 209, it was held that where an assessor deferred listing certain omitted bank stock for assessment until he could obtain the decision of the board of equalization as to whether or not it should be assessed, and upon their direction such stock was subsequently listed and assessed, it was not a raising of the assessment within the meaning of the statute (Iowa Laws 1880, c. 9, § 3), which required notice to the taxpayers and an opportunity to be heard. See also *Keihl v. Chizum*, 78 Iowa 213.

In *Ohio*, although notice may not be required during the course of a proceeding to assess omitted property, the assessment, nevertheless, is not void as having been made without due process of law, where, under the provisions of a statute, the validity of the assessment can be tested in the courts and an illegal levy or assessment enjoined. *Oskamp v. Lewis*, 103 Fed. Rep. 906. *Contra*, *Meyers v. Shields*, 61 Fed. Rep. 713.

In *Oregon* the board of equalization is empowered to assess property which the assessor has omitted from the roll, and fix a valuation thereon; this it may do without any notice other than the general notice given by the assessor of the meeting of the board for the purpose of correcting and equalizing the assessment roll. *Oregon, etc., R. Co. v. Lane County*, 23 Oregon 386; *Ramp v. Marion County*, 24 Oregon 461; *Kirkwood v. Ford*, 34 Oregon 552.

*Payment as Waiver of Notice*.—*Hodding v. New Orleans*, 48 La. Ann. 982.

*Notice to Representatives of Deceased Taxpayer*.—*Graham v. Russell*, 152 Ind. 186. See also *Reynolds v. Bowen*, 138 Ind. 434; *Saint v. Welsh*, 141 Ind. 382; *Buck v. Miller*, 147 Ind. 586, 62 Am. St. Rep. 436.

*Taxpayer Not Prejudiced*.—Failure to give the statutory notice to the taxpayer to appear and show cause why omitted property should not be placed on the tax duplicate, or the insufficiency of the notice given, is no ground for an injunction against the collection of taxes, if no substantial right of the taxpayer was prejudiced. *Crowder v. Riggs*, 153 Ind. 158; *Miller v. Vollmer*, 153 Ind. 26.

*If the Taxpayer Is Required to List His Property* for taxation and fails to do so, the assessor may place it on the schedule and assess it, without any notice whatever of his action in that regard. *Morris v. Jones*, 150 Ill. 542.

*1. Compliance with Statutory Requirements Essential*.—*United States*.—*Albany City Nat. Bank v. Maher*, 19 Blatchf. (U. S.) 175.

*Connecticut*.—*Thames Mfg. Co. v. Lathrop*, 7 Conn. 550.

*Illinois*.—*Marsh v. Chesnut*, 14 Ill. 223; *Nashville v. Weiser*, 54 Ill. 245.

*Indiana*.—*Scott v. Brackett*, 89 Ind. 413.

*Maryland*.—*Alleghany County v. New York Min. Co.*, 76 Md. 549.

*Massachusetts*.—*Lowell v. Wentworth*, 6 Cush. (Mass.) 221.

*Michigan*.—*Caledonia Tp. v. Rose*, 94 Mich. 216; *Three Rivers v. Smith*, 99 Mich. 507.

*Mississippi*.—*McGuire v. Union Invest. Co.*, 76 Miss. 868; *Farasworth Lumber Co. v. Fairley*, (Miss. 1900) 27 So. Rep. 836.

*Missouri*.—*Noll v. Morgan*, 82 Mo. App. 112.

*Montana*.—*Western Ranches v. Custer County*, (Mont. 1903) 72 Pac. Rep. 659; *Mataador Land, etc., Co. v. Custer County*, (Mont. 1903) 72 Pac. Rep. 662.

*New Jersey*.—*Clark Thread Co. v. Kearny Tp.*, 55 N. J. L. 50; *West Hoboken v. Hudson County*, 66 N. J. L. 162.

*North Carolina*.—*Cleaveland County v. Atlanta, etc., R. Co.*, 86 N. Car. 541.

*Ohio*.—*Perkins v. Zumstein*, 2 Ohio Cir. Dec. 601; *Britt v. Hagerty*, 5 Ohio Cir. Dec. 64.

*Rhode Island*.—*Wood v. Quimby*, 20 R. I. 482.

*Texas*.—*Hoefling v. San Antonio*, 15 Tex. Civ. App. 257.

*Vermont*.—*Dean v. Aiken*, 48 Vt. 541; *Thomas v. Leland*, 70 Vt. 223.

*Washington*.—*Everett Water Co. v. Fleming*, 26 Wash. 364.

*Service on Tenant of Taxpayer Not Sufficient*.—*State v. Drake*, 33 N. J. L. 194.

If the assessment actually made was valid under the act in force at the time it was made, the fact that in their notice to the relator the respondents incorrectly described the statute under which they assumed to act would not invalidate the assessment made prior to the time of the sending of such notice. *People v. Barker*, 35 N. Y. App. Div. 486, affirmed without opinion 159 N. Y. 569.

The statutory provision does not require two notices, one requiring a taxpayer to bring in to the assessors a true and exact account of all his ratable estate, followed by final notice giving the time and place of meeting of the assessors, but a single notice answers the requirement of the statute where it contains the necessary information. *McTwiggan v. Hunter*, 19 R. I. 265.

*Form of Notice*.—Notice is regulated by statute as to form, etc., and usually states the valuation placed upon the property by the assessor and the valuation to which the property is to be raised or lowered by the board, with a direction that the owner appear within a specified time from the date of the notice and show cause, if any he has, why such change should not be made, and the time is computed so as to include the day of notice. *Hagenmeyer v. Board of Equalization*, 82 Cal. 214.

The hour when the board shall meet is immaterial, if notice of the day and place of meeting of the board is given. *Smith v. Hard*, 61 Vt. 469.

Likewise any reasonable notice is sufficient

c. MANNER OF GIVING NOTICE — (1) *By Publication*. — Notice may usually be given by publication in a newspaper or newspapers when authorized by statute.<sup>1</sup>

(2) *By Statutory Provisions*. — A statute prescribing the time and place at which the board shall meet and hear complaints is sufficient notice,<sup>2</sup> and in many jurisdictions it is held that such provisions are sufficient to authorize the board either to raise, lower, or otherwise alter assessments as the board

in the absence of statutory provision as to its form and manner of service. *Spring Valley Water Works v. Schottler*, 62 Cal. 69; *Fairbault Water Works Co. v. Rice County*, 44 Minn. 12; *Black v. McGonigle*, 103 Mo. 192; *Clark Thread Co. v. Kearny Tp.*, 55 N. J. L. 50; *Stearns v. Miller*, 25 Vt. 20.

1. *Notice by Publication in Newspaper*. — *Lent v. Tillson*, 140 U. S. 316; *Campbellsville Lumber Co. v. Hubbert*, (C. C. A.) 112 Fed. Rep. 718; *Davies v. Los Angeles*, 86 Cal. 37; *Brunswick v. Finney*, 54 Ga. 317; *Ellis v. People*, 199 Ill. 548; *Matter of Kauffman*, 104 Iowa 639; *Slaughter v. Louisville*, 89 Ky. 112; *New Orleans v. St. Romes*, 28 La. Ann. 17; *Methodist Protestant Church v. Baltimore*, 6 Gill (Md.) 391, 48 Am. Dec. 540; *O'Neal v. Virginia, etc.*, *Bridge Co.*, 18 Md. 1, 79 Am. Dec. 669; *Williams v. Detroit*, 2 Mich. 560; *Muirhead v. Sands*, 111 Mich. 487; *Auditor Gen. v. Hutchinson*, 113 Mich. 245; *Auditor Gen. v. Sparrow*, 116 Mich. 574; *Ball v. Ridge Copper Co.*, 118 Mich. 7; *State v. Jersey City*, 28 N. J. L. 500; *State v. Runyon*, 41 N. J. L. 98; *Hoefling v. San Antonio*, 15 Tex. Civ. App. 257; *Meggett v. Eau Claire*, 81 Wis. 326.

And see generally the title PUBLICATION, vol. 23, p. 307.

*Provision for Such Notice Is Constitutional*. — *Wabash Eastern R. Co. v. East Lake Fork Special Drainage Dist.*, 134 Ill. 384; *Lamb v. Connolly*, 122 N. Y. 531; *Terrel v. Wheeler*, 123 N. Y. 76.

*Necessity of Publication*. — *Loomis v. Semper*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 567.

In *Ormsby v. Louisville*, 79 Ky. 197, it was held that the publication of the notice of the sittings of a board of tax commissioners was a condition precedent to the city's right to collect *ad valorem* taxes.

But a newspaper advertisement, signed by the city assessor, he being *ex officio* a member of the board, is not a notice published by the board. *Slaughter v. Louisville*, 89 Ky. 112, citing *Dumesnil v. Louisville*, 4 Ky. L. Rep. 14.

*Sufficiency of Publication*. — A publication by posting notice at the courthouse and city hall substantially complies with a statute requiring a legal notice, *Brunswick v. Finney*, 54 Ga. 317; especially if there is no newspaper published in the county or particular district, *Legendre v. Assessors*, 108 La. 515; and proper notice may be given by depositing it in the mails, addressed, postage prepaid, to the party whose interests are to be affected, *Hagenmeyer v. Board of Equalization*, 82 Cal. 214.

But in *Indiana* it has been held that a general notice to the public by publication or posting is not sufficient notice to an individual taxpayer to authorize a change in the valuation of his property. *Kuntz v. Sumption*, 117 Ind. 1. Compare *McEneaney v. Sullivan*, 125 Ind.

407, wherein it was held that notice by publication under the Act of March 8, 1889, was sufficient notice to property holders and was within the requirements of the constitution.

2. *United States*. — *State Railroad Tax Cases*, 92 U. S. 575; *Kentucky Railroad Tax Cases*, 115 U. S. 321; *Winona, etc., Land Co. v. Minnesota*, 159 U. S. 527; *Weyerhaeuser v. Minnesota*, 176 U. S. 550; *Santa Clara County v. Southern Pac. R. Co.*, 18 Fed. Rep. 385.

*Arkansas*. — *Pulaski County Board of Equalization Cases*, 49 Ark. 518; *St. Louis, etc., R. Co. v. Worthen*, 52 Ark. 529.

*Illinois*. — *Evans v. Gage*, 1 Ill. App. 202.

*Indiana*. — *Hyland v. Brazil Block Coal Co.*, 128 Ind. 335; *Smith v. Rude Bros., etc., Mfg. Co.*, 131 Ind. 150; *Cleveland, etc., R. Co. v. Backus*, 133 Ind. 515; *Pittsburgh, etc., R. Co. v. Backus*, 133 Ind. 625; *Indianapolis, etc., R. Co. v. Backus*, 133 Ind. 609; *Gallup v. Schmidt*, 154 Ind. 196.

*Iowa*. — *Snell v. Ft. Dodge*, 45 Iowa 564; *Nugent v. Bates*, 51 Iowa 77, 33 Am. Rep. 117; *Foy v. College*, 95 Iowa 689; *Burlington Gas Light Co. v. Burlington*, 101 Iowa 458.

*Kansas*. — *Gillett v. Lyon County*, 30 Kan. 166.

*Kentucky*. — *Cincinnati, etc., R. Co. v. Com.*, 81 Ky. 492.

*Maryland*. — *Methodist Protestant Church v. Baltimore*, 6 Gill (Md.) 391, 48 Am. Dec. 540; *O'Neal v. Virginia, etc., Bridge Co.*, 18 Md. 1, 79 Am. Dec. 669; *Monticello Distilling Co. v. Baltimore*, 90 Md. 416; *Carstairs v. Cochran*, 95 Md. 488.

*Massachusetts*. — *Harrington v. Glidden*, 179 Mass. 486, 94 Am. St. Rep. 613.

*Michigan*. — *Hinds v. Belvidere Tp.*, 107 Mich. 664.

*Minnesota*. — *State v. Hynes*, 82 Minn. 34.

*Missouri*. — *State v. New Lindell Hotel Co.*, 9 Mo. App. 450; *State v. Springer*, 134 Mo. 212.

*Montana*. — *Cobham v. Hinds*, 23 Mont. 338.

*Nebraska*. — *Sioux City, etc., R. Co. v. Washington County*, 3 Neb. 30.

*New Jersey*. — *Nixon v. Ruple*, 30 N. J. L. 58; *State v. Runyon*, 41 N. J. L. 98.

*New York*. — *In re McLean*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 230.

*Ohio*. — *Hambelton v. Dempsey*, 20 Ohio 168; *Glenn v. Raine*, 4 Ohio Dec. 517.

*Oklahoma*. — *Streight v. Durham*, 10 Okla. 361.

*Oregon*. — *Oregon, etc., R. Co. v. Lane County*, 23 Oregon 386.

*Tennessee*. — *Carroll v. Alsup*, 107 Tenn. 257.

*Utah*. — *State v. Armstrong*, 19 Utah 117.

*Wisconsin*. — *State v. Wharton*, 117 Wis. 558.

*Wyoming*. — *Johnson County v. Searight Cattle Co.*, 3 Wyo. 777.

may deem just, without further notice to the taxpayer.<sup>1</sup> A statute, however, which assumes to make void assessments valid, without making provision for a reassessment or notice and opportunity to be heard, is within the constitutional prohibition.<sup>2</sup>

*d. WAIVER OF NOTICE.* — The appearance by a taxpayer before the board in contest of his assessment waives any failure by the assessing officers to give notice.<sup>3</sup>

## *e. OF MEETINGS OF BOARDS OF EQUALIZATION.* — A board of equaliza-

**1. Where Board Is Authorized to Raise, Lower, or Alter Assessments Without Notice.** — Pulaski County Board of Equalization Cases, 49 Ark. 518; *Gillett v. Lyon County*, 30 Kan. 166; *State v. New Lindell Hotel Co.*, 9 Mo. App. 450; *Collier v. Morrow*, 90 Ga. 148; *Vanderpool v. Bonnell*, 49 N. J. L. 317.

But in some states the rule obtains that direct notice must be given to the taxpayer whose rights and interests are affected before any additions can be made or valuations increased. See *Patten v. Green*, 13 Cal. 325; *Glassford v. Dorsey*, 2 Ill. App. 521; *Cleghorn v. Postlewaite*, 43 Ill. 428; *McConkey v. Smith*, 73 Ill. 313; *Henkle v. Keota*, 68 Iowa 334; *Leavenworth County v. Lang*, 8 Kan. 284; *Kansas Pac. R. Co. v. Russell*, 8 Kan. 558; *Allegany County v. Union Min. Co.*, 61 Md. 545; *Relfe v. Columbia L. Ins. Co.*, 11 Mo. App. 374; *Sioux City, etc., R. Co. v. Washington County*, 3 Neb. 30; *South Platte Land Co. v. Buffalo County*, 7 Neb. 253; *State v. Northern Belle Mill, etc., Co.*, 12 Nev. 89; *Clark Thread Co. v. Kearny Tp.*, 55 N. J. L. 50; *Avant v. Flynn*, 2 S. Dak. 153.

**2. Statute Validating Assessment Must Provide for Notice.** — *Albany City Nat. Bank v. Maher*, 20 Blatchf. (U. S.) 341; *Spencer v. Merchant*, 125 U. S. 345; *Exchange Bank Tax Cases*, 21 Fed. Rep. 99; *Marsh v. Chestnut*, 14 Ill. 223; *Billings v. Detten*, 15 Ill. 218; *Slaughter v. Louisville*, 89 Ky. 112; *Matter of Union College*, 129 N. Y. 308; *Matter of Flower*, 129 N. Y. 643.

Where an assessment has been declared illegal and void, a second assessment of the property cannot be made without notice to the taxpayer at some stage of the proceedings. *Douglas v. Westchester County*, 172 N. Y. 309, *reversing* 68 N. Y. App. Div. 296.

While a statute authorizing a municipality to impose a tax is not rendered unconstitutional by reason of the absence of a provision therein requiring notice, nevertheless notice must be given. See also *Paulsen v. Portland*, 149 U. S. 30; *Patten v. Green*, 13 Cal. 325; *Gatch v. Des Moines*, 63 Iowa 718; *Gilmore v. Hentig*, 33 Kan. 156; *Baltimore v. Grand Lodge, etc.*, 60 Md. 280; *Williams v. Detroit*, 2 Mich. 560; *State v. New Lindell Hotel Co.*, 9 Mo. App. 450; *Rich Hill Coal Min. Co. v. Neptune*, 19 Mo. App. 438; *Musser v. Adair*, 55 Ohio St. 466; *Cleveland v. Tripp*, 13 R. I. 50; *Avant v. Flynn*, 2 S. Dak. 153.

**3. Waiver of Notice** — *Arizona*. — See *Hampson v. Dysart*, (Ariz. 1898) 53 Pac. Rep. 581.

*California*. — *Spring Valley Water Works v. Schottler*, 62 Cal. 69; *Farmers', etc., Bank v. Board of Equalization*, 97 Cal. 318.

*Connecticut*. — *Quinebaug Reservoir Co. v.*

*Union*, 73 Conn. 294; *Sanford's Appeal*, 75 Conn. 590.

*Illinois*. — *Ayers v. Widmayer*, 188 Ill. 121.

*Indiana*. — *International Bldg., etc., Assoc. v. Marion County*, 30 Ind. App. 12; *Deniston v. Terry*, 141 Ind. 677; *State v. Brackett*, 141 Ind. 702.

*Iowa*. — *Hutchinson v. Board of Equalization*, 66 Iowa 35; *Henkle v. Keota*, 68 Iowa 334.

*Michigan*. — *Louden v. East Saginaw*, 41 Mich. 18; *Hamilton v. Ames*, 74 Mich. 298.

*Minnesota*. — *Faribault Water Works Co. v. Rice County*, 44 Minn. 12.

*Missouri*. — *State v. Board of Equalization*, 108 Mo. 235; *State v. Baker*, 170 Mo. 383; *Taber v. Wilson*, 34 Mo. App. 89.

*Nebraska*. — *McGee v. State*, 32 Neb. 149.

*Nevada*. — *State v. Western Union Tel. Co.*, 4 Nev. 338.

*New York*. — *People v. Schoonover*, 47 N. Y. App. Div. 278, *reversing* 26 Misc. (N. Y.) 576, *affirmed* without opinion 166 N. Y. 629; *Jewell v. Van Steenburgh*, 58 N. Y. 85.

*Oregon*. — *Godfrey v. Douglas County*, 28 Oregon 446.

*Texas*. — *Graham v. Lasater*, (Tex. Civ. App. 1894) 26 S. W. Rep. 472.

*Utah*. — *Central Pac. R. Co. v. Standing*, 13 Utah 488.

*Washington*. — *Ladd v. Gilson*, 26 Wash. 79.

*Wisconsin*. — *State v. Gaylord*, 73 Wis. 306.

*Wyoming*. — *Albany Mut. Bldg. Assoc. v. Laramie*, (Wyo. 1901) 65 Pac. Rep. 1011.

Where the proceeding has been twice continued at the instance of the taxpayer, he cannot complain that no legal notice had been given him. *Tillis v. Covington County*, 91 Ala. 396. See also *Faribault Water Works Co. v. Rice County*, 44 Minn. 12.

The failure to give the taxpayer the required notice having rendered the tax illegal because the board had acquired no jurisdiction to act with reference thereto, the fact that the taxpayer subsequently appeared and asked a reduction of its assessment, which was partially granted, did not obviate or waive the want of jurisdiction in the board's original action. Plaintiff was seeking a reduction of its assessment, and therefore properly appeared before the board to ask the same. *Western Ranches v. Custer County*, (Mont. 1903) 72 Pac. Rep. 659; *Matador Land, etc., Co. v. Custer County*, (Mont. 1903) 72 Pac. Rep. 662.

**Appearance by Bank Officer as Witness Merely.**

— The appearance by an officer of a bank cited as a witness and not for the purpose of bringing in the bank, is not an appearance by the bank in contest of its assessment. *Eaton v. Union County Nat. Bank*, 141 Ind. 159.

tion may raise or lower the entire assessment of any particular district without notice to the individual taxpayers or the people of the district, when it is made to appear that the assessment in one district is relatively higher or lower than that in another.<sup>1</sup>

**11. Appeal and Review**—*a. CORRECTION OF CLERICAL ERRORS.*—The revenue acts generally empower some of the officers and boards who successively obtain possession and control of the assessment rolls in the several processes of assessing, levying, and collecting taxes, to correct any formal or other clerical errors appearing therein.<sup>2</sup>

*b. BOARDS OF EQUALIZATION AND REVIEW*—(1) *In General*—*Statutory Provisions.*—In most jurisdictions one or more boards, each consisting of several members, are provided by the statutes for the equalization of assessments among the local divisions of a taxing district and among the taxing districts of the whole state, and for the review and correction of the valuations placed by the local assessing officers upon the property of the individual taxpayers. The number and composition of the boards provided for these purposes, and the manner of their election or appointment are entirely a matter of local statutory regulation, and the laws of the different states contain many variant provisions. County commissioners and township trustees frequently constitute local boards, and certain of the state officers *ex officio* members of state boards.<sup>3</sup> It is the function of these boards to examine the assessments

**1. Notice Unnecessary.**—State Railroad Tax Cases, 92 U. S. 575; Pittsburgh, etc., R. Co. v. Backus, 154 U. S. 421; Cleveland, etc., R. Co. v. Backus, 154 U. S. 439; McLeod v. Receveur, (C. C. A.) 71 Fed. Rep. 455; Scammon v. Chicago, 44 Ill. 269; Hyland v. Brazil Block Coal Co., 128 Ind. 335; Hubbard v. Goss, 157 Ind. 485; Fields v. Russell, 38 Kan. 720; State v. Hannibal, etc., R. Co., 101 Mo. 120; Dundy v. Richardson County, 8 Neb. 508; Hallo v. Helmer, 12 Neb. 87; Suydam v. Merrick County, 19 Neb. 155; State v. Edwards, 26 Neb. 701, on rehearing 31 Neb. 369; Territory v. Albuquerque Nat. Bank, 10 N. Mex. 283.

Notice is given to all banks of the time and place of the meeting of the board of equalization for banks by Rev. Stat. Ohio, § 2808, but if the board meets on the day appointed by statute and adjourns without naming a time to meet again, but meets upon the call of the president or secretary without the knowledge of the taxpayer, it does not meet the requirements of the statute, and the power of the notice in the statute is entirely lost by such adjournment. Euclid Ave. Sav., etc., Co. v. Hubbard, 12 Ohio Cir. Dec. 279, 22 Ohio Cir. Ct. 20. But see *contra*, Lander v. Mercantile Bank, 186 U. S. 458, reversing 105 Fed. Rep. 899.

In Kentucky, the state board of equalization, provided for by Act of May 10, 1884, consisting of a member elected from each congressional district of the state, is authorized to equalize the taxes among the several counties according to the value of the property therein, and the act is not objectionable because it does not provide for notice to the taxpayer of the meeting of the board. Spalding v. Hill, 86 Ky. 656.

**2. Correction of Clerical Errors.**—See for illustrations:

*Alabama.*—Weaver v. State, 39 Ala. 535.

*California.*—Los Angeles v. Los Angeles City Water Co., 137 Cal. 699; San Luis Obispo County v. White, 91 Cal. 432.

*Iowa.*—Smith v. McQuiston, 108 Iowa 363,

limiting Polk County v. Sherman, 99 Iowa 60; Ridley v. Doughty, 85 Iowa 418; Parker v. Van Stenburgh, 68 Iowa 174.

*Montana.*—State v. Yellowstone County, 12 Mont. 503.

*Nebraska.*—Union Stock Yards Nat. Bank v. Thurston County, (Neb. 1902) 91 N. W. Rep. 286.

*New York.*—People v. Coleman, 42 Hun (N. Y.) 581.

*Ohio.*—Lewis v. State, 59 Ohio St. 37; Amazon Ins. Co. v. Cappellar, 38 Ohio St. 560; State v. Montgomery County, 31 Ohio St. 271; State v. Lewis, 11 Ohio Cir. Dec. 13, 20 Ohio Cir. Ct. 319. Compare Barney, etc., Mfg. Co. v. Montgomery County, 11 Ohio Dec. (Reprint) 790, 29 Cinc. L. Bul. 366.

*Oregon.*—Oregon Steam Nav. Co. v. Wasco County, 2 Oregon 206.

**3. In General**—*Statutory Provisions*—*Alabama.*—Weaver v. State, 39 Ala. 535.

*California.*—Miller v. Kern County, 137 Cal. 516; Henne v. Los Angeles County, 129 Cal. 297, reversing on other grounds (Cal. 1899) 59 Pac. Rep. 780; Santa Clara County v. Southern Pac. R. Co., 18 Fed. Rep. 385 (construing California statutes).

*Colorado.*—Price v. Kramer, 4 Colo. 546.

*Dakota.*—Pierre Water-Works Co. v. Hughes County, 5 Dak. 145.

*Georgia.*—Bohler v. Verdery, 92 Ga. 715; Stewart v. Collier, 91 Ga. 117.

*Illinois.*—People v. Sellars, 179 Ill. 170; People v. Board of Review, 178 Ill. 348; People v. Cook County, 176 Ill. 576, 180 Ill. 48; Wabash Eastern R. Co. v. East Lake Fork Special Drainage Dist., 134 Ill. 384; St. Louis Bridge Co. v. People, 128 Ill. 422; Felsenthal v. Johnson, 104 Ill. 21; Du Page County v. Jenks, 65 Ill. 275; People v. Salomon, 46 Ill. 333; Hough v. Hastings, 18 Ill. 312; Chicago Union Traction Co. v. State Board of Equalization, 112 Fed. Rep. 607 (construing Illinois statutes).

of individuals, with a view to the correction of errors and inequalities, and to examine them as a whole with a view to determine their relative quality as between the different taxing districts; and they are essential to the fulfilment of the requirements that taxation should be equal and uniform, and according to the value of taxable property.<sup>1</sup> Under some statutes the assessors themselves are empowered in the first instance to receive, hear, and pass upon applications for the correction of individual assessments.<sup>2</sup> In *New York* this application should be in writing under oath, containing a statement of the

*Indiana*.—*Evansville, etc., R. Co. v. West*, 139 Ind. 254; *Cleveland, etc., R. Co. v. Backus*, 133 Ind. 513, *affirmed* 154 U. S. 439; *Pittsburgh, etc., R. Co. v. Backus*, 133 Ind. 625, *affirmed* 154 U. S. 421; *Indianapolis, etc., R. Co. v. Backus*, 133 Ind. 609, *affirmed* 154 U. S. 438; *Seymour First Nat. Bank v. Isaacs*, (Ind. 1903) 68 N. E. Rep. 288.

*Iowa*.—*Keck v. Keokuk County*, 37 Iowa 547; *Smith v. Jones County*, 30 Iowa 531.

*Kansas*.—*Geary County v. Missouri, etc., R. Co.*, 62 Kan. 168, *reversing* 9 Kan. App. 350; *Midland Elevator Co. v. Stewart*, 50 Kan. 378; *Challiss v. Rigg*, 49 Kan. 119; *Missouri River, etc., R. Co. v. Morris*, 7 Kan. 210; *Amrine v. Kansas Pac. R. Co.*, 7 Kan. 178; *Missouri, etc., R. Co. v. Miami County*, (Kan. 1903) 73 Pac. Rep. 103.

*Kentucky*.—*Mossett v. Newport, etc., Bridge Co.*, 106 Ky. 518; *Slaughter v. Louisville*, 89 Ky. 112; *Spalding v. Hill*, 86 Ky. 656.

*Louisiana*.—*Union Oil Co. v. Campbell*, 48 La. Ann. 1350; *New Orleans Gaslight Co. v. New Orleans*, 46 La. Ann. 1146; *State v. State Tax Collector*, 39 La. Ann. 530.

*Maine*.—*Bath v. Whitmore*, 79 Me. 182.

*Massachusetts*.—*Flax Pond Water Co. v. Lynn*, 147 Mass. 31.

*Michigan*.—*State Tax Com'rs v. Quinn*, 125 Mich. 128; *State Tax Com'rs v. Cady*, 124 Mich. 683; *State Tax Com'rs v. Assessors*, 124 Mich. 491; *Boyce v. Sebring*, 66 Mich. 210; *Comstock v. Grand Rapids*, 54 Mich. 641; *Atty-Gen. v. Sanilac County*, 42 Mich. 72.

*Mississippi*.—*Herndon v. Mayfield*, 79 Miss. 533; *Mixon v. Cleveenger*, 74 Miss. 67; *Meridian v. Phillips*, 65 Miss. 362; *Wolfe v. Murphy*, 60 Miss. 1.

*Missouri*.—*Black v. McGonigle*, 103 Mo. 192; *Hannibal, etc., R. Co. v. State Board of Equalization*, 64 Mo. 294.

*Nebraska*.—*Sumner v. Colfax County*, 14 Neb. 524.

*Nevada*.—*Sawyer v. Dooley*, 21 Nev. 390; *State v. Ormsby County*, 7 Nev. 392.

*New Hampshire*.—*Edes v. Boardman*, 58 N. H. 580; *Briggs's Petition*, 29 N. H. 547.

*New Jersey*.—*West Hoboken v. Hudson County*, 66 N. J. L. 162; *State v. Kearny Tp.*, 55 N. J. L. 50; *Central R. Co. v. Assessors*, 49 N. J. L. 1; *Fuller v. Elizabeth*, 42 N. J. L. 427; *State v. Roe*, 36 N. J. L. 86.

*New Mexico*.—*Territory v. Albuquerque First Nat. Bank*, 10 N. Mex. 283; *Poe v. Howell*, (N. Mex. 1901) 67 Pac. Rep. 62.

*New York*.—*McLean v. Jephson*, 123 N. Y. 142; *People v. Hadley*, 76 N. Y. 337; *People v. Raymond*, 37 N. Y. 428; *Stanley v. Albany County*, 121 U. S. 535, (*construing New York law*).

*Ohio*.—*State v. Morris*, 63 Ohio St. 496; *Black v. Hagerty*, 60 Ohio St. 551, *affirming* 9 Ohio Cir. Dec. 93; 16 Ohio Cir. Ct. 255; *Gaylord v. Hubbard*, 56 Ohio St. 25; *State v. Holmes*, 20 Ohio St. 474; *Ludlow v. Lewis*, 9 Ohio Dec. 600, 6 Ohio N. P. 513.

*Oregon*.—*Kirkwood v. Ford*, 34 Oregon 552; *French v. Harney County*, 33 Oregon 418; *Dayton v. Board of Equalization*, 33 Oregon 131; *Godfrey v. Douglas County*, 28 Oregon 446; *Rhea v. Umatilla County*, 2 Oregon 298; *Oregon Steam Nav. Co. v. Wasco County*, 2 Oregon 206.

*Pennsylvania*.—*Wharton v. Birmingham*, 37 Pa. St. 371; *Crist v. Morris*, 11 Phila. (Pa.) 357, 33 Leg. Int. (Pa.) 256.

*Texas*.—*Texas, etc., R. Co. v. Harrison County*, 54 Tex. 119; *Scollard v. Dallas*, 16 Tex. Civ. App. 620.

*Vermont*.—*Leach v. Blakely*, 34 Vt. 134.

*Virginia*.—*Richmond v. Crenshaw*, 76 Va. 936.

*Washington*.—*Commercial Electric Light, etc., Co. v. Judson*, 21 Wash. 49.

*Wisconsin*.—*State v. Lippels*, 112 Wis. 203; *State v. Thorne*, 112 Wis. 81; *State v. Anderson*, 90 Wis. 550; *Bratton v. Johnson*, 76 Wis. 430; *State v. Myers*, 52 Wis. 628, *cited* *State v. Manitowoc County Clerk*, 59 Wis. 15.

*Wyoming*.—*Albany Mut. Bldg. Assoc. v. Laramie*, 10 Wyo. 54.

*Canada*.—*Nickle v. Douglas*, 37 U. C. Q. B. 51. See also cases *cited infra*, this section, *Powers and Duties*.

**State Boards of Equalization**—*State Officers Ex Officio Members*.—*Cleveland, etc., R. Co. v. Backus*, 133 Ind. 513, *affirming* 154 U. S. 439.

**Creation of State Board No Interference with Local Self-government**.—*State Tax Com'rs v. Assessors*, 124 Mich. 491, *approved* *State Tax Com'rs v. Quinn*, 125 Mich. 128.

1. *Chicago Union Traction Co. v. State Board of Equalization*, 114 Fed. Rep. 557; *Spalding v. Hill*, 86 Ky. 656. See also *State Tax Com'rs v. Assessors*, 124 Mich. 491; *State v. Baker*, 170 Mo. 194.

2. **Application to Assessors**—*California*.—*Henne v. Los Angeles County*, 129 Cal. 297.

*Louisiana*.—*Louisiana Brewing Co. v. Assessors*, 41 La. Ann. 565; *Gay v. Assessors*, 34 La. Ann. 370; *New Orleans City Gas Light Co. v. Assessors*, 31 La. Ann. 475.

*Maine*.—*Bath v. Whitmore*, 79 Me. 182; *Stickney v. Bangor*, 30 Me. 404.

*New York*.—*Matter of Corwin*, 135 N. Y. 245, *reversing* 64 Hun (N. Y.) 167; *People v. Adams*, 125 N. Y. 471; *Clark v. Norton*, 49 N. Y. 243; *People v. O'Rourke*, 31 N. Y. App. Div. 583; *People v. Neff*, 15 N. Y. App. Div. 8, *affirmed* without opinion 156 N. Y. 701;

nature of the relief sought and facts showing the applicant to be entitled to it. The assessors are empowered to examine the taxpayer and other witnesses if not satisfied with the statutory statement; and in passing upon the application they are not confined to the evidence produced in these ways, but may consider other evidence in their possession. They cannot, however, act arbitrarily and capriciously, but are bound by the proofs of the taxpayer, if positive and uncontradicted.<sup>1</sup>

(2) *Powers and Duties* — (a) *In General*. — Boards of equalization and review are creatures of statute, with specially defined duties and responsibilities, and are of limited jurisdiction. Like all inferior tribunals they can exercise no authority except such as is expressly or by necessary implication conferred upon them, and are confined in the performance of their duties to a reasonably strict observance of the statutory requirements.<sup>2</sup> The powers and duties

*People v. Sheppard*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 453. See also cases cited in next note.

*North Carolina*. — *Covington v. Rockingham*, 93 N. Car. 134.

*Arbitrators or Referees*. — Sometimes when the assessors refuse an application for a reduction of the valuation of property, arbitrators or referees may be called in to find its true value. *Bohler v. Verdery*, 92 Ga. 715; *Collier v. Morrow*, 90 Ga. 149; *New Orleans Gas Light Co. v. Assessors*, 31 La. Ann. 270; *State v. Assessors*, 30 La. Ann. 261.

1. *New York — Form and Contents of Application, Hearing, and Determination*. — *People v. Barker*, 146 N. Y. 304; *People v. Barker*, 144 N. Y. 94, *reversing* on other grounds 81 Hun (N. Y.) 22, *cited* *People v. Barker*, 144 N. Y. 638; *People v. Barker*, 141 N. Y. 251, *reversing* 74 Hun (N. Y.) 418; *People v. Barker*, 139 N. Y. 55, *reversing* 68 Hun (N. Y.) 513, *cited* *People v. Barker*, 75 Hun (N. Y.) 6; *People v. Davenport*, 91 N. Y. 574; *People v. Feitner*, 82 N. Y. App. Div. 368; *People v. Feitner*, 78 N. Y. App. Div. 313, *modifying* on other grounds 38 Misc. (N. Y.) 178; *People v. Feitner*, 77 N. Y. App. Div. 428; *People v. Feitner*, 65 N. Y. App. Div. 224; *People v. Feitner*, 58 N. Y. App. Div. 468, *affirming* 32 Misc. (N. Y.) 61; *People v. Webster*, 49 N. Y. App. Div. 556; *People v. Feitner*, 45 N. Y. App. Div. 542, *affirming* 27 Misc. (N. Y.) 384; *People v. Feitner*, 44 N. Y. App. Div. 278; *Matter of Nisbet*, 40 N. Y. App. Div. 611, *affirmed* without opinion 165 N. Y. 605; *People v. O'Rourke*, 31 N. Y. App. Div. 583; *People v. Johnson*, 29 N. Y. App. Div. 75; *People v. Barker*, 23 N. Y. App. Div. 530, *affirmed* without opinion 155 N. Y. 665; *People v. Neff*, 15 N. Y. App. Div. 8, *affirmed* without opinion 156 N. Y. 701; *People v. Barker*, 14 N. Y. App. Div. 412; *People v. Barker*, 7 N. Y. App. Div. 27, *affirmed* without opinion 151 N. Y. 639; *People v. Campbell*, 88 Hun (N. Y.) 544; *People v. Barker*, 86 Hun (N. Y.) 148, *affirmed* in part 147 N. Y. 31; *People v. Hall*, 83 Hun (N. Y.) 375; *People v. Barker*, 68 Hun (N. Y.) 513; *People v. Feitner*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 463; *People v. Feitner*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 303, *affirmed* without opinion 62 N. Y. App. Div. 618; *People v. Feitner*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 299, *affirmed* without opinion 63 N. Y. App. Div. 615; *People v. Feitner*, (Supm. Ct.

Spec. T.) 33 Misc. (N. Y.) 293; *People v. Dederick*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 539, *affirmed* without opinion 41 N. Y. App. Div. 617, *modified* on other grounds 161 N. Y. 195; *People v. Barker*, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 258; *People v. Barker*, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 252.

*In Making Inquiry* the assessors are not bound by the strict rules of evidence which govern in actions generally. *People v. Barker*, 144 N. Y. 94, *reversing* 81 Hun (N. Y.) 22; *People v. Campbell*, 88 Hun (N. Y.) 544; *People v. Barker*, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 258; *People v. Barker*, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 252.

*Personalty and Realty Assessments Distinguished*. — More latitude should necessarily be given assessors in determining and ascertaining the amount and value of personal property (on account of the difficulty of finding it), than should be permitted in assessing real property. Presumptions to some extent may be indulged. *People v. Barker*, 146 N. Y. 304.

*No Reduction if Taxpayer Refuses to Submit to Examination*. — *People v. O'Rourke*, 31 N. Y. App. Div. 583; *People v. Maynard*, (Supm. Ct. Spec. T.) 7 Misc. (N. Y.) 295. See also *People v. Hall*, 83 Hun (N. Y.) 375.

*Assessors May Not Increase Assessment*. — *People v. Neff*, 15 N. Y. App. Div. 8, *affirmed* without opinion 156 N. Y. 701; *Matter of Nisbet*, 40 N. Y. App. Div. 611, *affirmed* without opinion 165 N. Y. 605.

*Taxpayer Estopped by His Own Statements*. — *People v. Barker*, 86 Hun (N. Y.) 148, *affirmed* in part 147 N. Y. 31; *People v. Barker*, 75 Hun (N. Y.) 6; *People v. Feitner*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 467.

*Waiver*. — Assessors, by receiving and acting upon the statement of a taxpayer, without objection, waive any irregularities either of form or of substance. *Matter of Corwin*, 135 N. Y. 245, *reversing* 64 Hun (N. Y.) 167; *People v. Webster*, 49 N. Y. App. Div. 556; *People v. Johnson*, 29 N. Y. App. Div. 75; *People v. Kilborne*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 599.

2. *Boards of Equalization and Review Statutory and Inferior Tribunals — United States*. — Central Pac. R. Co. v. *Evans*, 111 Fed. Rep. 71.

*Arkansas*. — *Lyman v. Howe*, 64 Ark. 436.

*California*. — *Colusa County v. Glenn County*, 124 Cal. 498; *People v. Reynolds*, 28 Cal. 113.

conferred by the revenue acts upon the boards vary greatly in the different states. They cannot, in the absence of statutory authority, make original assessments, change the valuations or otherwise correct individual assessments, or, in equalizing, change valuations of particular classes of property or parts of a taxing district only, or the aggregate valuations as returned by the assessors; but power to act in one or more of these ways is frequently vested in them.<sup>1</sup>

*Idaho*.—Orr v. State Board of Equalization, 2 Idaho 923.

*Illinois*.—Madison County v. Smith, 95 Ill. 328; State v. Allen, 43 Ill. 456.

*Indiana*.—Indianapolis v. Sturdevant, 24 Ind. 391; Hamilton v. State, 3 Ind. 452.

*Louisiana*.—Mercier v. New Orleans, 38 La. Ann. 958.

*Michigan*.—Case v. Dean, 16 Mich. 12.

*Minnesota*.—State v. Crookston Lumber Co., 85 Minn. 405; State v. Empanger, 73 Minn. 337.

*Missouri*.—State v. New Lindell Hotel Co., 9 Mo. App. 450.

*Nebraska*.—Suydam v. Merrick County, 19 Neb. 155.

*Nevada*.—State v. Ernst, 26 Nev. 113.

*New Mexico*.—Poe v. Howell, (N. Mex. 1901) 67 Pac. Rep. 62.

*New Jersey*.—State v. Hopper, 54 N. J. L. 544; State v. Hudson County, 46 N. J. L. 93.

*New York*.—People v. Adams, 125 N. Y. 471; People v. Delaware County, 60 N. Y. 381; Marsh v. Bowen, (Supm. Ct.) 12 Abb. N. Cas. (N. Y.) 1.

*Ohio*.—Euclid Ave. Sav., etc., Co. v. Hubbard, 12 Ohio Cir. Dec. 279, 22 Ohio Cir. Ct. 20.

*Oklahoma*.—Gray v. Stiles, 6 Okla. 455, per McAtee, J.; Wallace v. Bullen, 6 Okla. 17, 9 Okla. 1, dissenting opinion of McAtee, J., citing 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 247.

*Oregon*.—Dayton v. Board of Equalization, 33 Oregon 131; Oregon Steam Nav. Co. v. Wasco County, 2 Oregon 206.

*Pennsylvania*.—Lackawanna County v. Com., 156 Pa. St. 477; Williamson's Estate, 153 Pa. St. 508, modifying 1 Pa. Dist. 159, 11 Pa. Co. Ct. 235.

*South Carolina*.—State v. Covington, 35 S. Car. 245.

*South Dakota*.—Campbell v. Minnehaha Nat. Bank, 11 S. Dak. 133.

*Wisconsin*.—State v. Lippels, 112 Wis. 203.

**The Regularity and Validity of Their Acts Is Presumed where jurisdiction appears.** Tierney v. Brown, 65 Miss. 563, 7 Am. St. Rep. 679; Hambleton v. Dempsey, 20 Ohio 168; Tainter v. Lucas, 29 Wis. 375; Wauwatosa v. Gunion, 25 Wis. 271.

**1. Powers and Duties—In General—United States.**—Whitbeck v. Mercantile Nat. Bank, 127 U. S. 193; State Railroad Tax Cases, 92 U. S. 575; Paul v. Pacific R. Co., 4 Dill. (U. S.) 35.

*Alabama*.—Weaver v. State, 39 Ala. 535.

*Arizona*.—Hampson v. Dysart, (Ariz. 1898) 53 Pac. Rep. 581.

*Arkansas*.—Lyman v. Howe, 64 Ark. 436; Pulaski County Board of Equalization Cases, 49 Ark. 518.

*California*.—Miller v. Kern County, 137 Cal. 516; Baldwin v. Ellis, 68 Cal. 495; Spring Valley Water Works v. Schottler, 62 Cal. 60; San Francisco, etc., R. Co. v. State Board of Equali-

zation, 60 Cal. 12; Wells v. State Board of Equalization, 56 Cal. 194; Fall v. Marysville, 19 Cal. 391.

*Colorado*.—People v. Ames, 27 Colo. 126; People v. Bell, 27 Colo. 134; People v. Laube, 27 Colo. 135.

*Delaware*.—Biggs v. Buckingham, 6 Del. Ch. 267.

*Florida*.—Tampa v. Mugge, 40 Fla. 326; Pensacola v. Louisville, etc., R. Co., 21 Fla. 492.

*Georgia*.—Collier v. Morrow, 90 Ga. 148.

*Idaho*.—Murphy v. Board of Equalization, 6 Idaho 745; Orr v. State Board of Equalization, 3 Idaho 190.

*Illinois*.—Workingmen's Banking Co. v. Wolff, 150 Ill. 491; Kimball v. Merchants' Sav., etc., Co., 89 Ill. 611; Coolbaugh v. Huck, 86 Ill. 600; McConkey v. Smith, 73 Ill. 313; Darling v. Gunn, 50 Ill. 424; People v. Nichols, 49 Ill. 517; State v. Allen, 43 Ill. 456.

*Indiana*.—International Bldg., etc., Assoc. v. Marion County, 30 Ind. App. 12.

*Iowa*.—Montis v. McQuiston, 107 Iowa 651; McCutchen v. Lyon County, 95 Iowa 20; Parker v. Van Steenburg, 68 Iowa 174; Harris v. Fremont County, 63 Iowa 639; Getchell v. Polk County, 51 Iowa 107; Royce v. Jenney, 50 Iowa 676; Smith v. Jones County, 30 Iowa 531.

*Kansas*.—Pomeroy Coal Co. v. Emlen, 44 Kan. 117; Gillett v. Lyon County, 30 Kan. 166; Braden v. Union Trust Co., 25 Kan. 362.

*Massachusetts*.—Lowell v. Middlesex County, 152 Mass. 372.

*Michigan*.—Messenger v. Peter, 129 Mich. 93, 8 Detroit Leg. N. 867; Board State Tax Com'rs v. Quinn, 125 Mich. 128; Boyce v. Sebring, 66 Mich. 210; Yelverton v. Steele, 36 Mich. 62; Tweed v. Metcalf, 4 Mich. 579.

*Minnesota*.—State v. Crookston Lumber Co., 85 Minn. 405; State v. Empanger, 73 Minn. 337.

*Missouri*.—State v. Baker, 170 Mo. 194; State v. Vaile, 122 Mo. 33; State v. Hannibal, etc., R. Co., 101 Mo. 120; State v. New Lindell Hotel Co., 9 Mo. App. 450.

*Montana*.—State v. Ellis, 15 Mont. 224.

*Nebraska*.—Sarpy County v. Clarke, (Neb. 1903) 93 N. W. Rep. 416; Lexington Mill, etc., Co. v. Dawson County, (Neb. 1901) 96 N. W. Rep. 62; State v. Edwards, 31 Neb. 369; Kittle v. Shervin, 11 Neb. 65; Sioux City, etc., R. Co. v. Washington County, 3 Neb. 30.

*Nevada*.—State v. Ormsby County, 7 Nev. 392.

*New Hampshire*.—Gove v. Newton, 58 N. H. 359; Manchester Mills v. Manchester, 57 N. H. 309; Briggs's Petition, 29 N. H. 547; Perry's Petition, 16 N. H. 44.

*New Jersey*.—West Hoboken v. Hudson County, 66 N. J. L. 162; McCallum v. Assessors, 48 N. J. L. 544; State v. Kearny Tp., 55 N. J. L. 50; State v. Van Horn, 40 N. J. L. 143; State



(b) **Original and Appellate Jurisdiction.** — In some cases the boards of equalization and review exercise original jurisdiction in correcting and equalizing assessments, while in others their jurisdiction is appellate and can only be invoked by an application in the nature of an appeal from the action of the local assessors.<sup>1</sup> Where review and approval by such boards are conditions precedent to the finality of the assessment, action by them is essential to its validity.<sup>2</sup> In other cases the assessment is final except as legally changed on review, and illegal action by the boards or an entire failure to act will not affect it unless rights of individual taxpayers are prejudiced thereby.<sup>3</sup>

(c) **Equalization.** — In construing general statutory provisions conferring power to equalize and adjust valuations, different meanings are given to the word "equalize." In some jurisdictions it is held that such provisions do not authorize the boards to change the aggregate valuations returned by the assessors, or the valuations placed by them upon the property of individual taxpayers, but merely to make a different apportionment of the total valuation among the taxing districts.<sup>4</sup> In other states such provisions are held

*v. Dickerson*, 25 N. J. L. 427; *State v. Coe*, (N. J. 1899) 44 Atl. Rep. 952.

*New York.* — *People v. Adams*, 125 N. Y. 471; *People v. Campbell*, 93 N. Y. 196; *Clark v. Norton*, 49 N. Y. 245; *Tallmadge v. Rensselaer County*, 21 Barb. (N. Y.) 611; *Adriance v. New York County*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 224.

*Ohio.* — *State v. Raine*, 47 Ohio St. 447; *Frantz v. Mueller*, 35 Ohio St. 397; *Humphreys v. Safe Deposit Co.*, 29 Ohio St. 608; *Glenn v. Raine*, 4 Ohio Dec. 517.

*Oregon.* — *Oregon, etc., R. Co. v. Jackson County*, 38 Oregon 589; *Dayton v. Multnomah County*, 34 Oregon 239; *Dayton v. Board of Equalization*, 33 Oregon 131; *Portland University v. Multnomah County*, 31 Oregon 498; *Oregon Coal, etc., Co. v. Coos County*, 30 Oregon 308; *Smith v. Kelly*, 24 Oregon 464.

*Pennsylvania.* — *Williamson's Estate*, 153 Pa. St. 508, 32 W. N. C. (Pa.) 93, *affirming* 1 Pa. Dist. 159; *Kister's Petition*, 9 Pa. Dist. 64.

*South Dakota.* — *Campbell v. Minnehaha Nat. Bank*, 11 S. Dak. 133, *followed* *Coler v. Sterling County Treasurer*, 11 S. Dak. 140; *Dakota L. & T. Co. v. Codrington County*, 9 S. Dak. 159.

*Tennessee.* — *Carroll v. Alsip*, 107 Tenn. 257.

*Texas.* — *International, etc., R. Co. v. Smith County*, 54 Tex. 1; *San Antonio St. R. Co. v. San Antonio*, 22 Tex. Civ. App. 341; *Hoefling v. San Antonio*, 15 Tex. Civ. App. 257.

*Utah.* — *State v. Thomas*, 16 Utah 86.

*Washington.* — *State v. Nichols*, 29 Wash. 159.

*Wisconsin.* — *State v. Lippels*, 112 Wis. 203, *followed* *State v. Losby*, 115 Wis. 57; *State v. Gaylord*, 73 Wis. 306; *Shove v. Manitowoc*, 57 Wis. 5; *Lawrence v. Janesville*, 46 Wis. 364; *McIntyre v. White Creek*, 43 Wis. 620; *Wauwatosa v. Gunyon*, 25 Wis. 271; *Hersey v. Milwaukee County*, 16 Wis. 185, 82 Am. Dec. 713; *Kelley v. Corson*, 8 Wis. 182.

See also cases cited *supra*, this section, 11. b.

(1) *In General* — **Statutory Provisions.**

1. **Original and Appellate Jurisdiction** — *Arizona.* — *Copper Queen Consol. Min. Co. v. Board of Equalization*, (Ariz. 1901) 65 Pac. Rep. 149.

*Illinois.* — *Workingmen's Banking Co. v. Wolff*, 150 Ill. 401.

*Indiana.* — *Parkinson v. Jasper County Tele-*

*phone Co.*, (Ind. App. 1903) 67 N. E. Rep. 471; *Eaton v. Union County Nat. Bank*, 141 Ind. 136; *Cummings v. Stark*, 138 Ind. 94; *Jones v. Rushville Nat. Bank*, 138 Ind. 87, *followed* *Conzman v. Terre Haute Brewing Co.*, 138 Ind. 696; *Hauck v. Terre Haute First Nat. Bank*, 138 Ind. 700; *Seymour First Nat. Bank v. Brodhecker*, 137 Ind. 693; *Conzman v. Terre Haute First Nat. Bank*, 137 Ind. 698, and *Hauch v. Terre Haute Brewing Co.*, 137 Ind. 698.

*Nebraska.* — *Lincoln Land Co. v. Phelps County*, 59 Neb. 249.

*New Jersey.* — *Elizabeth v. New Jersey Jockey Club*, 63 N. J. L. 515.

*New Mexico.* — *Territory v. Albuquerque First Nat. Bank*, 10 N. Mex. 283; *Poe v. Howell*, (N. Mex. 1901) 67 Pac. Rep. 62.

*Oregon.* — *Dayton v. Board of Equalization*, 33 Oregon 131.

*Pennsylvania.* — *Respublica v. Deaves*, 3 Yeates (Pa.) 464.

See also *infra*, this section, *Proceedings of Board*.

2. **Review and Approval as Condition Precedent to Finality of Assessment.** — *Davis v. Vanarsdale*, 59 Miss. 367; *Henry v. Chester*, 15 Vt. 460.

3. **Assessments Final Unless Legally Changed on Review** — *United States.* — *Paul v. Pacific R. Co.*, 4 Dill. (U. S.) 35.

*California.* — *Los Angeles v. Los Angeles City Water Works Co.*, 49 Cal. 638.

*Illinois.* — *Workingmen's Banking Co. v. Wolff*, 150 Ill. 491; *Kimball v. Merchants' Sav., etc., Co.*, 89 Ill. 611; *Mix v. People*, 72 Ill. 241; *People v. Nichols*, 49 Ill. 517; *State v. Allen*, 43 Ill. 456; *Gunning v. People*, 76 Ill. App. 574; *Farmers', etc., Bank v. Vandalia*, 57 Ill. App. 681.

*Iowa.* — *Dickey v. Polk County*, 58 Iowa 287.

*Kansas.* — *Missouri River, etc., R. Co. v. Morris*, 7 Kan. 210.

*Michigan.* — *Chamberlain v. St. Ignace*, 92 Mich. 332, *followed* *Goudreau v. St. Ignace*, 97 Mich. 413; *Avery v. East Saginaw*, 44 Mich. 587.

*Texas.* — *Hoefling v. San Antonio*, 15 Tex. Civ. App. 257.

4. **Restricted Construction of Equalization Statutes** — *Colorado.* — *People v. Lothrop*, 3 Colo. 428, *cited* *Ames v. People*, 26 Colo. 83, and *In re Assessment of Property*, 25 Colo. 296.

sufficient to empower boards to change the aggregate valuations of the different taxing districts, of classes of property or of individual assessments, to the end that all property shall be valued at its actual value as the law requires.<sup>1</sup>

(3) *Proceedings of Board*. — A board of equalization or review can act in the equalization or correction of assessments only when sitting as a board for that purpose.<sup>2</sup> Statutory provisions as to the time and place of meeting are, as a rule, held to be mandatory, and any action taken by the board after the expiration of the time limited or elsewhere than at the place prescribed by the statute is invalid.<sup>3</sup> In some jurisdictions, however, such statutes are declared to be directory merely.<sup>4</sup>

*Kansas*. — *Missouri, etc., R. Co. v. Miami County*, (Kan. 1903) 73 Pac. Rep. 103; *Stanfield v. Boyd*, 10 Kan. App. 265.

*Montana*. — *State v. State Board of Equalization*, 18 Mont. 473, followed *State v. Fortune*, 24 Mont. 154.

*New Mexico*. — *Poe v. Howell*, (N. Mex. 1901) 67 Pac. Rep. 62.

**Definitions of "Equalize" and "Equalization" as Thus Used.** — *State v. Cunningham*, 153 Mo. 642; *Gray v. Stiles*, 6 Okla. 455, opinion of McAttee, J.; *Poe v. Howell*, (N. Mex. 1901) 67 Pac. Rep. 62. See also *Boyce v. Sebring*, 66 Mich. 210.

**Equalizing and Adjusting Taxes** are only steps in the laying of a tax, of which the first step is the act of assessing. All of these are of the same general class, and pertain to the general subject of laying a tax. *Ames v. People*, 26 Colo. 83.

**Equalization and Review** are wholly different matters, and an exercise of the one function does not exhaust the power or bar an exercise of the other. *State v. Ormsby County*, 7 Nev. 292.

**Equality** in the rate of assessment means proportional valuation. *Crawford v. Linn County*, 11 Oregon 484, approved *Dayton v. Board of Equalization*, 33 Oregon 131.

**1. Broad Construction of Equalization Statutes** — *Iowa*. — *Murphy v. Board of Equalization*, 6 Idaho 745.

*Oklahoma*. — *Wallace v. Bullen*, 6 Okla. 757, 9 Okla. 1, overruling *Gray v. Stiles*, 6 Okla. 455, and *Mayfield v. Bradley*, 6 Okla. 547, McAttee, J., dissenting; *Webb v. Renfrew*, 7 Okla. 198; *Bardrick v. Dillon*, 7 Okla. 535; *Weber v. Dillon*, 7 Okla. 568; *Martin v. Clay*, 8 Okla. 46; *Lee v. Mehew*, 8 Okla. 136; *Streight v. Durham*, 10 Okla. 361.

*Utah*. — *Salt Lake City v. Armstrong*, 15 Utah 472; *State v. Thomas*, 16 Utah 86; *State v. Armstrong*, 19 Utah 117.

**Definitions of "Equalize" and "Equalization" as Thus Used.** — *State v. Karr*, 64 Neb. 514; *State v. Meyers*, 23 Nev. 274; *Bardrick v. Dillon*, 7 Okla. 535; *Wallace v. Bullen*, 6 Okla. 757.

**Equalizing Valuations of Particular Classes of Property.** — *Territory v. Albuquerque First Nat. Bank*, 10 N. Mex. 283.

**2. Board Must Sit Specially.** — *Peterson v. Osage City First Nat. Bank*, 8 Kan. App. 508; *Clarke v. Stearns County*, 66 Minn. 304; *Sumner v. Colfax County*, 14 Neb. 524. Compare *State v. Ormsby County*, 7 Nev. 392; *State v. Central Pac. R. Co.*, 17 Nev. 259.

**3. Statutes Mandatory as to Time and Place of Meeting.** — *Wiley v. Flournoy*, 30 Ark. 609; *Yocum v. Brazil First Nat. Bank*, 144 Ind. 272; *City Item Co-operative Printing Co. v. New Orleans*, 51 La. Ann. 713; *Phillips v. New Buffalo Tp.*, 64 Mich. 683; *Caledonia Tp. v. Rose*, 94 Mich. 216; *McMillan v. Felcher*, 100 Mich. 343; *Auditor-Gen. v. Chandler*, 108 Mich. 569; *Tiernay v. Brown*, 67 Miss. 109; *Auditor Gen. v. Sparrow*, 116 Mich. 574; *Yazoo Delta Invest. Co. v. Suddoth*, 70 Miss. 416; *Matador Land, etc., Co. v. Custer County*, (Mont. 1903) 72 Pac. Rep. 662; *Sioux City, etc., R. Co. v. Washington County*, 3 Neb. 30; *Sumner v. Colfax County*, 14 Neb. 524; *State v. Central Pac. R. Co.*, 21 Nev. 270; *Power v. Larabee*, 2 N. Dak. 141. See also *Hyland v. Brazil Block Coal Co.*, 128 Ind. 335; *Atchison, etc., R. Co. v. Wilson*, 35 Kan. 175; *St. Joseph Lead Co. v. Simms*, 108 Mo. 222.

**Irregular Meeting Immaterial When Subsequent Proceedings Regular.** — *Cato v. Gordon*, 63 Miss. 320; *Yazoo Delta Invest. Co. v. Suddoth*, 70 Miss. 416; *Morgan v. Blewitt*, 72 Miss. 903.

**Sundays Not Included in Statutory Provision for Length of Session.** — *Walker v. Chicago*, 56 Ill. 277.

**The Board Need Remain in Session** only until sufficient time has been given for hearing and determining objections. *Wolfe v. Murphy*, 60 Miss. 1.

**Curative Acts May Legalize Unsanctioned Special Sessions.** — *Seymour First Nat. Bank v. Isaacs*, (Ind. 1903) 68 N. E. Rep. 288.

**4. Statutes Directory Merely.** — *Birmingham Bldg., etc., Assoc. v. State*, 120 Ala. 403; *State Auditor v. Jackson County*, 65 Ala. 142; *Perry County v. Selma, etc., R. Co.*, 65 Ala. 391; *Buswell v. Alameda County*, 116 Cal. 351; *Duggan v. McCullough*, 27 Colo. 43; *Mossett v. Newport, etc., Bridge Co.*, 106 Ky. 518; *State v. Vaile*, 122 Mo. 33; *Graham v. Lasater*, (Tex. Civ. App. 1894) 26 S. W. Rep. 472. See also *Sanford's Appeal*, 75 Conn. 590; *Halsey v. People*, 84 Ill. 89; *Silsbee v. Stockle*, 44 Mich. 561; *Faribault Water Works Co. v. Rice County*, 44 Minn. 12; *Godfrey v. Douglas County*, 28 Oregon 446; *Nashville Sav. Bank v. Nashville*, 3 Tenn. Ch. 362.

**Date of Certificate of Board Immaterial.** — *Auditor Gen. v. Ayer*, 122 Mich. 136.

**California — Time for Board to Act May Be Extended.** — *Security Sav. Bank, etc., Co. v. Los Angeles County*, (Cal. 1893) 34 Pac. Rep. 437. But such extension cannot be granted by the clerk of the state board. *Buswell v. Alameda County*, 116 Cal. 351.

**Waiver of Irregularity.** — Irregularity as to the time and place of meeting may be waived by appearance without objection at the meeting actually held.<sup>1</sup>

**Adjournment.** — Though the statute is silent as to adjournment, the board has the inherent power to adjourn from time to time as the business before it may demand,<sup>2</sup> and may take action at an adjourned meeting held subsequently to the time fixed by statute for the conclusion of its deliberations.<sup>3</sup>

**Procedure.** — In the absence of statutory provision,<sup>4</sup> the proceedings before the board are informal, and are not governed by the rules of practice applicable to the trial of civil actions.<sup>5</sup> A complaint is not generally necessary as a condition precedent to action equalizing assessments among the divisions of a taxing district or the different taxing districts of the state, making additions to the property assessed or increasing the valuation of individual assessments.<sup>6</sup> It is otherwise in some states, and a complaint is almost always essential to the exercise of jurisdiction to reduce valuations placed upon the property of individual taxpayers.<sup>7</sup> Such complaint, when required, may be made by any one interested in the assessment,<sup>8</sup> and may be amended by the party pre-

1. **Waiver of Irregularity.** — *Ayers v. Widmayer*, 188 Ill. 121; *State v. Thomas*, 17 N. J. L. 160; *State v. Cooper*, 59 Wis. 666. See also *Atlantic, etc., R. Co. v. Yavapai County*, (Ariz. 1889) 21 Pac. Rep. 768; *Wolfe v. Murphy*, 60 Miss. 1; *O'Neil v. Tyler*, 3 N. Dak. 47.

2. **Power to Adjourn.** — *Ex p. Howard-Harrison Iron Co.*, 119 Ala. 484, 72 Am. St. Rep. 928; *Symms v. Graves*, 65 Kan. 628; *Lum v. Vicksburg*, 72 Miss. 950; *State v. Vaile*, 122 Mo. 33.

**The Board May Adjourn** in order to correct errors in the previous proceedings. *Black v. McGonigle*, 103 Mo. 192.

3. *Halsey v. People*, 84 Ill. 89; *St. Louis Bridge Co. v. People*, 128 Ill. 422. And see *Challiss v. Rigg*, 49 Kan. 119; *Tierney v. Brown*, 65 Miss. 563, 7 Am. St. Rep. 679. But compare *State v. Central Pac. R. Co.*, 21 Nev. 270.

4. *State v. New Lindell Hotel Co.*, 9 Mo. App. 450; *Sioux City, etc., R. Co. v. Washington County*, 3 Neb. 30.

5. *Burns v. McNally*, 90 Iowa 432; *People v. State Assessors*, 47 Hun (N. Y.) 450; *Gager v. Prout*, 48 Ohio St. 89; *Poppleton v. Yamhill County*, 18 Oregon 377.

**The Board May Make Its Own reasonable rules and regulations.** *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561; *McMorran v. Wright*, 74 Mich. 356.

**Trial by Jury.** — Complainants are not constitutionally entitled to a trial by jury of the issues raised by their complaints. *Davis v. Clinton*, 55 Iowa 549; *Ross v. Crawford County*, 16 Kan. 411; *Cocheco Mfg. Co. v. Stratford*, 51 N. H. 455. See also *Dunlieth, etc., Bridge Co. v. Dubuque County*, 55 Iowa 558.

6. **Complaint Unnecessary.** — *Ex p. Howard-Harrison Iron Co.*, 119 Ala. 484, 72 Am. St. Rep. 928; *Pulaski County Board of Equalization Cases*, 49 Ark. 518; *Allison Ranch Min. Co. v. Nevada County*, 104 Cal. 161; *Fields v. Russell*, 38 Kan. 720; *Burns v. McNally*, 90 Iowa 432; *Sawyer v. Dooley*, 21 Nev. 390; *State v. Meyers*, 23 Nev. 274; *Ludlow v. Lewis*, 9 Ohio Dec. 600, 6 Ohio N. P. 513; *State v. Armstrong*, 19 Utah 117; *Salt Lake City v. Armstrong*, 15 Utah 472. See also *Sanford's Appeal*, 75 Conn. 590, citing *Ives v. Goshen*, 65 Conn. 460.

7. **Complaint Necessary.** — *People v. Reynolds*, 28 Cal. 107; *People v. Flint*, 39 Cal. 670; *People v. Goldtree*, 44 Cal. 323; *Los Angeles v. Los Angeles City Water Works Co.*, 49 Cal. 638; *People v. Lots in Ashley*, 122 Ill. 297; *Slaughter v. Louisville*, 89 Ky. 112; *Union Oil Co. v. Campbell*, 48 La. Ann. 1350 [*distinguishing Merchants' Nat. Ins. Co. v. Assessors*, 40 La. Ann. 371]; *Griswold v. Union School Dist.*, 24 Mich. 262; *Barrett v. Shannon*, 19 Mont. 397 [*followed Metlen v. Shannon*, 19 Mont. 401]; *State v. Northern Belle Mill, etc., Co.*, 12 Nev. 89; *State v. Washoe County*, 14 Nev. 140; *State v. Central Pac. R. Co.*, 17 Nev. 259; *Sarpy County v. Clarke*, (Neb. 1903) 93 N. W. Rep. 416; *Suydam v. Merrick County*, 19 Neb. 155; *McGee v. State*, 32 Neb. 149; *State v. Dodge County*, 20 Neb. 595; *Grant v. Bartholomew*, 57 Neb. 675; *People v. Forrest*, 30 Hun (N. Y.) 240; *People v. Tax, etc., Com'rs*, 33 Barb. (N. Y.) 116. See also *State v. Thompson*, 2 N. H. 236; *Melvin v. Weare*, 56 N. H. 436; *Oregon, etc., Sav. Bank v. Catlin*, 15 Oregon 342; *Bratton v. Johnson*, 76 Wis. 430.

**California — Verified Complaint.** — *Garretson v. Santa Barbara County*, 61 Cal. 54.

**Member of Board May Make Complaint.** — *Central Pac. R. Co. v. Standing*, 13 Utah 488.

**Letter or Telegram a Sufficient Complaint.** — *Standard Cattle Co. v. Baird*, 8 Wyo. 144.

**Complaint Need Not Be Served on Person Affected.** — *Central Pac. R. Co. v. Standing*, 13 Utah 488.

8. **Interested Party May Make Complaint.** — *Dundee Mortg. Trust Invest. Co. v. Charlton*, 3 Fed. Rep. 192; *Thatcher v. People*, 79 Ill. 599; *Griswold v. Union School Dist.*, 24 Mich. 262; *Merrill v. Humphrey*, 24 Mich. 170; *Walsh v. King*, 74 Mich. 354; *Auditor Gen. v. Jenkinson*, 90 Mich. 523; *St. Louis v. Speck*, 67 Mo. 403; *Lexington Mill, etc., Co. v. Dawson County*, (Neb. 1901) 96 N. W. Rep. 62; *State v. Edwards*, 26 Neb. 701; *Dewey v. Stratford*, 40 N. H. 203; *Carpenter v. Dalton*, 58 N. H. 615; *State v. Dickerson*, 25 N. J. L. 427; *People v. Forrest*, 96 N. Y. 544. See also *Matter of Des Moines Water Co.*, 48 Iowa 324; *Gilkey v. Merrill*, 67 Wis. 459.

**Municipality May Make Complaint.** — *St. Louis Bridge Co. v. People*, 128 Ill. 422.

senting the same.<sup>1</sup> Upon the hearing of complaints, the board has power to subpoena witnesses and hear evidence.<sup>2</sup> But the board is not concluded by such evidence;<sup>3</sup> and, except in a few jurisdictions,<sup>4</sup> is not bound to hear extrinsic evidence, but may act upon its own knowledge and judgment, or avail itself of any means of information obtainable,<sup>5</sup> provided its action be not arbitrary or unreasonable.<sup>6</sup> An applicant for relief at the hands of the board is cast with the burden of proof to establish the facts entitling him to such relief.<sup>7</sup>

(4) *Record of Proceedings.*—The statutes usually require that a full and

**Nonresident Taxpayers May Make Complaint.**—*Winnisimmet Co. v. Assessors*, 6 Cush. (Mass.) 477; *Hicks v. Westport*, 130 Mass. 480; *Dewey v. Stratford*, 40 N. H. 203.

**Mortgagor May Make Complaint.**—*Flint, etc., R. Co. v. Auditor Gen.*, 41 Mich. 635; *Detroit v. Assessors*, 91 Mich. 78.

**Bank May Complain Against Assessment of Its Own Stock.**—*Price v. Kramer*, 4 Colo. 546; *National Bank of Commerce v. New Bedford*, 155 Mass. 313. *Compare* *People v. Wall St. Bank*, 39 Hun (N. Y.) 525.

**1. Amendment of Complaint.**—*Lowell v. Middlesex County*, 146 Mass. 403; *State v. McClurg*, 27 N. J. L. 253.

**2. Central Pac. R. Co. v. Standing**, 13 Utah 488.

**Punishment for Contempt** cannot be imposed by the board upon a witness failing or refusing to appear and testify. *Langenberg v. Decker*, 131 Ind. 471. *Compare* *Goodman v. People*, 90 Ill. App. 533.

**Oath of Witnesses May Be Dispensed With.**—*State v. Baker*, 170 Mo. 194.

**Illinois—Failing to Appear Misdemeanor.**—*Goodman v. People*, 90 Ill. App. 533.

**3. Board Not Concluded by Evidence.**—*Earl v. Raymond*, 188 Ill. 15; *Kimball v. Raymond*, 188 Ill. 66; *Mayer v. Raymond*, 188 Ill. 143; *People v. Davenport*, 91 N. Y. 574; *People v. Tax, etc., Com'rs*, 40 Barb. (N. Y.) 334; *Olympia Water Works v. Gelbach*, 16 Wash. 482; *Percival v. Gelbach*, 16 Wash. 703; *Brown v. Oneida County*, 103 Wis. 149.

**The Admission of Improper Evidence** is no ground for setting aside a determination of the board. *Sherard v. Lindsay*, 7 Ohio Cir. Dec. 245, 13 Ohio Cir. Ct. 315.

**4. Board Can Act Only upon Evidence—California.**—*Farmers', etc., Bank v. Board of Equalization*, 97 Cal. 318; *Oakland v. Southern Pac. Co.*, 131 Cal. 226.

**Nebraska.**—*State v. Dodge County*, 20 Neb. 595; *State v. Karr*, 64 Neb. 514.

**New Jersey.**—*State v. McClurg*, 27 N. J. L. 253.

**Wisconsin.**—*Phillips v. Stevens' Point*, 25 Wis. 594; *Shove v. Manitowoc*, 57 Wis. 5; *Hixon v. Eagle River*, 91 Wis. 649; *Brown v. Oneida County*, 103 Wis. 149; *State v. Lawler*, 103 Wis. 460; *State v. Pors*, 107 Wis. 420; *State v. Lien*, 108 Wis. 316, 112 Wis. 282; *State v. Fuldner*, 109 Wis. 56. See also *Wilson v. Heller*, 32 Wis. 457; *McIntyre v. White Creek*, 43 Wis. 620.

**Evidence as to Value of Similar Property Not Admissible.**—*Alabama Mineral Land Co. v. Perry County*, 95 Ala. 105; *State v. Bienville Water Supply Co.*, 89 Ala. 325; *Redd v. St. Francis County*, 17 Ark. 416; *White v. Portland*,

63 Conn. 18; *Chicopee v. Hampden County*, 16 Gray (Mass.) 38; *Lowell v. Middlesex County*, 152 Mass. 372; *Haven v. Essex County*, 155 Mass. 467. *Compare* *Manchester Mills v. Manchester*, 58 N. H. 38; *Lowell v. Middlesex County*, 146 Mass. 403.

**Statement of Assessor Before Board Competent Evidence.**—*State v. Northern Belle Mill, etc., Co.*, 12 Nev. 89.

**Wisconsin—Letters and Affidavits Excluded.** *State v. Lien*, 112 Wis. 282; *State v. Wharton*, 117 Wis. 558; except as admissions, if they contain such, *State v. Sackett*, 117 Wis. 580.

**5. Hearing of Evidence Not Obligatory—Arkansas.**—*Pulaski County Board of Equalization Cases*, 49 Ark. 518.

**Illinois.**—*Republic L. Ins. Co. v. Pollak*, 75 Ill. 292; *St. Louis, etc., R. Co. v. Surrell*, 88 Ill. 535; *Earl v. Raymond*, 188 Ill. 15; *Kimball v. Raymond*, 188 Ill. 66; *Mayer v. Raymond*, 188 Ill. 143.

**Iowa.**—*Grimes v. Burlington*, 74 Iowa 123; *Smith v. Jones County*, 30 Iowa 531; *Ferguson v. Board of Review*, 119 Iowa 338.

**Kansas.**—*Kansas Pac. R. Co. v. Riley County*, 20 Kan. 141; *Fields v. Russell*, 38 Kan. 720; *Syms v. Graves*, 65 Kan. 628.

**Michigan.**—*Case v. Dean*, 16 Mich. 12; *Griswold v. Union School Dist.*, 24 Mich. 262; *Grand Rapids v. Wellesman*, 85 Mich. 234.

**Missouri.**—*Hannibal, etc., R. Co. v. State Board of Equalization*, 64 Mo. 294; *State v. Hannibal, etc., R. Co.*, 101 Mo. 120.

**Montana.**—*State v. Ellis*, 15 Mont. 224.

**New Jersey.**—*State v. Roe*, 36 N. J. L. 86.

**New York.**—*People v. Hadley*, 76 N. Y. 337; *New York v. Davenport*, 92 N. Y. 604.

**Utah.**—*Central Pac. R. Co. v. Standing*, 13 Utah 488.

**6. Action Must Be Reasonable.**—*State v. Hannibal, etc., R. Co.*, 101 Mo. 120; *Dundy v. Richardson County*, 8 Neb. 508; *People v. Reddy*, 43 Barb. (N. Y.) 539; *People v. Howland*, 61 Barb. (N. Y.) 273; *People v. Dykes*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 78; *Fratz v. Mueller*, 35 Ohio St. 397; *Central Pac. R. Co. v. Standing*, 13 Utah 488; *Tainter v. Lucas*, 29 Wis. 375; *Fond du Lac Water Co. v. Fond du Lac*, 82 Wis. 322. See also *Hagenmeyer v. Board of Equalization*, 82 Cal. 214; *La Salle, etc., Horse, etc., R. Co. v. Donoghue*, 127 Ill. 27, 11 Am. St. Rep. 90.

**7. Burden of Proof upon Applicant.**—*Jones v. Tiffin*, 24 Iowa 190; *New Orleans Cotton Exch. v. Assessors*, 37 La. Ann. 423; *State v. Abbott*, 42 N. J. L. 109; *State v. Hudson County*, 46 N. J. L. 93; *People v. Davenport*, 91 N. Y. 574; *People v. Adams*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 205.

**An Affidavit of Applicant as to his nonowner—**

intelligible record shall be kept of all the proceedings of boards of equalization and review.<sup>1</sup> Such record must exhibit the jurisdictional facts necessary to give the board authority for its action.<sup>2</sup> It must show any additions to or deductions from the valuation of taxable property, in addition to the aggregate valuation,<sup>3</sup> but it need not contain the evidence upon which the board acted in reaching the conclusions set forth.<sup>4</sup>

**Conclusiveness of Record.** — The record is the proper evidence of the official doings of the board,<sup>5</sup> and cannot be varied or contradicted by extrinsic evidence.<sup>6</sup> The contents, however, of a lost or destroyed record may be shown by secondary evidence.<sup>7</sup>

**Correction of Errors.** — If omissions or errors are discovered in the records, the board not only has the legal right to supply the omissions and to correct the errors at any subsequent meeting, but it is its duty to do so,<sup>8</sup> and the

ship of property is conclusive when not contradicted by other evidence. *State v. McClurg*, 27 N. J. L. 253.

**1. Record Must Be Kept.** — *New Orleans Gas-light Co. v. New Orleans*, 46 La. Ann. 1146; *Paldi v. Paldi*, 84 Mich. 346; *State v. Central Pac. R. Co.*, 17 Nev. 259; *State v. Warford*, 32 N. J. L. 207; *Fisher v. Betts*, (N. Dak. 1903) 96 N. W. Rep. 132. *Compare State v. Cornwall*, 97 Wis. 565; *State v. Losby*, 115 Wis. 57; *Dayton v. Board of Equalization*, 33 Oregon 131.

**Record Need Not Be Kept in Special Book.** — *State Auditor v. Jackson County*, 65 Ala. 142; *Fowler v. Russell*, 45 Kan. 425.

**Record Required to Be Kept by Secretary.** — *State v. Wray*, 55 Mo. App. 646.

**2. Jurisdictional Facts Must Appear.** — *Copper Queen Consol. Min. Co. v. Board of Equalization*, (Ariz. 1901) 65 Pac. Rep. 149; *Finch v. Tehama County*, 29 Cal. 453; *Rhode v. Davis*, 2 Ind. 53; *Rosenthal v. Madison*, etc., *Plank-road Co.*, 10 Ind. 358; *Symms v. Graves*, 65 Kan. 628; *Plummer v. Waterville*, 32 Me. 566; *State v. Washoe County*, 5 Nev. 317; *State v. Board of Equalization*, 7 Nev. 83; *State v. Central Pac. R. Co.*, 17 Nev. 259, 21 Nev. 270; *Nixon v. Ruple*, 30 N. J. L. 58; *State v. Warford*, 32 N. J. L. 207; *Euclid Ave. Sav.*, etc., *Co. v. Hubbard*, 12 Ohio Cir. Dec. 279, 22 Ohio Cir. Ct. 20; *Hecht v. Boughton*, 2 Wyo. 386.

**Need Not Show that Members Took Oath.** — *State v. Board of Equalization*, 108 Mo. 235; *Taber v. Wilson*, 34 Mo. App. 89.

**Must Show Complaint of Assessor's Valuation.** — *State v. Dodge County*, 20 Neb. 595; *State v. Central Pac. R. Co.*, 17 Nev. 263.

**The Amount of State Tax to Be Raised** need not appear on the record by the certificate of the auditor. *Hoffman v. Lynburn*, 104 Mich. 494.

**Delivery of Statement of Property Owner Need Not Be Shown.** — *State v. Central Pac. R. Co.*, 17 Nev. 259.

**3. Changes in Valuation Must Appear.** — *Earl v. Raymond*, 188 Ill. 15; *Kimbark v. Raymond*, 188 Ill. 66; *American Express Co. v. Raymond*, 189 Ill. 232; *Pike v. Raymond*, 189 Ill. 250; *Aplin v. Roberts*, 83 Mich. 471; *Chamberlain v. St. Ignace*, 92 Mich. 332; *Auditor Gen. v. Ayer*, 109 Mich. 694, 122 Mich. 136; *Auditor Gen. v. Sparrow*, 116 Mich. 574; *State v. Lewis*, 64 Ohio St. 216. See also *Savings, etc., Soc. v. San Francisco*, 131 Cal. 356,

**Presumption Is Against Deductions** not appearing. *Hoffman v. Lynburn*, 104 Mich. 494; *Ball v. Ridge Copper Co.*, 118 Mich. 7.

**A Mutilated Record** which fails to show the equalization will not affect the validity of the tax. *Easton v. Savery*, 44 Iowa 654.

**Two Resolutions of Board Taken Together.** — *Auditor Gen. v. Longyear*, 110 Mich. 223.

**Changes Must Appear upon Roll.** — *Yazoo Delta Invest. Co. v. Suddoth*, 70 Miss. 416.

**4. Evidence Need Not Be Stated.** — *State v. Hannibal*, etc., *R. Co.*, 101 Mo. 120; *State v. Springer*, 134 Mo. 212; *State v. Baker*, 170 Mo. 383; *Frantz v. Mueller*, 35 Ohio St. 397; *Godfrey v. Douglas County*, 28 Oregon 446; *Becker v. Malheur County*, 24 Oregon 217. *Compare Ratterman v. Niehaus*, 2 Ohio Cir. Dec. 673, 4 Ohio Cir. Ct. 502; *Ludlow v. Lewis*, 9 Ohio Dec. 600, 6 Ohio N. P. 513; *Gerke Brewing Co. v. Hagerty*, 1 Ohio Dec. 687, 1 Ohio N. P. 68; *Hayes v. Yost*, 24 Ohio Cir. Ct. 18.

**Findings of Fact** need not be made. *Lexington Mill, etc., Co. v. Dawson County*, (Neb. 1901) 96 N. W. Rep. 62.

**Particularity in Statement of Proceedings Not Necessary.** — *Graham v. Lasater*, (Tex. Civ. App. 1894) 26 S. W. Rep. 472; *State v. Cornwall*, 97 Wis. 565; *State v. Losby*, 115 Wis. 57.

**5. Record Conclusiveness.** — *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 349; *Timberlake v. Brewer*, 59 Ala. 108; *Hagenmeyer v. Board of Equalization*, 82 Cal. 218; *Oakland v. Southern Pac. Co.*, 131 Cal. 226; *Murphy v. Board of Equalization*, 6 Idaho 745; *St. Louis Bridge Co. v. People*, 128 Ill. 422; *Oteri v. Parker*, 42 La. Ann. 374; *Yelverton v. Steele*, 36 Mich. 62; *Auditor Gen. v. Ayer*, 109 Mich. 694, 122 Mich. 136; *Auditor Gen. v. Sparrow*, 116 Mich. 574; *State v. Central Pac. R. Co.*, 17 Nev. 259.

**6. Varying Record by Proof Aliunde.** — *Seymour First Nat. Bank v. Isaacs*, (Ind. 1903) 68 N. E. Rep. 288; *Blanchard v. Powers*, 42 Mich. 619; *State v. Crookston Lumber Co.*, 85 Minn. 405; *State v. Central Pac. R. Co.*, 17 Nev. 263. *Compare Allison Ranch Min. Co. v. Nevada County*, 104 Cal. 161; *Haven v. Essex County*, 155 Mass. 467; *State v. Aldridge*, 66 Ohio St. 598; *Hagerty v. Huddleston*, 60 Ohio St. 149, reversing 1 Ohio Dec. 331, 2 Ohio N. P. 291.

**7. State Auditor v. Jackson County, 65 Ala. 142.**

**8. Correction of Errors.** — *Seymour First Nat. Bank v. Isaacs*, (Ind. 1903) 68 N. E. Rep. 288;

performance of such duty may be compelled by mandamus.<sup>1</sup>

**Statutes Mandatory.** — A statutory provision requiring a record to be kept is regarded as mandatory and as exacting strict compliance,<sup>2</sup> but mere irregularities of form will not invalidate the tax,<sup>3</sup> nor will the entire absence of a record so operate as against one who has suffered no injury by reason of the omission.<sup>4</sup>

(5) *Entry of Determination on Roll.* — The mere clerical act of noting on the assessment roll an increase or reduction of the valuation is usually performed by the assessor or clerk of the board, in pursuance of the judgment of the board;<sup>5</sup> and a failure of the proper official to comply with the board's direction in this respect is redressible by mandamus<sup>6</sup> or certiorari<sup>7</sup> proceedings.

*c. JUDICIAL TRIBUNALS* — (1) *No Inherent Right of Appeal.* — Due process of law does not require that the property holder be given the right to have his assessment reviewed upon the merits by the courts, it being clearly within the power of the legislature, in accomplishing the necessities of the government, to provide that certain officers or boards shall fix the assessment finally and conclusively;<sup>8</sup> nor is the valuation of the property such an exercise of judicial authority as necessarily involves the right of appeal to judicial tribunals.<sup>9</sup>

*Boyce v. Auditor Gen.*, 90 Mich. 314; *Black v. McGonigle*, 103 Mo. 192; *State v. Central Pac. R. Co.*, 17 Nev. 259.

**Court May Allow Clerk to Sign Nunc Pro Tunc.** — *Shelden v. Marion Tp.*, 101 Mich. 256.

**The Secretary of the Board May Correct the record as to erroneous entries made by one acting under his direction and authority.** *State v. Wray*, 55 Mo. App. 646.

1. *State v. Dodge County*, 20 Neb. 595.

2. **Statutes Mandatory.** — *Perry County v. Selma*, etc., R. Co., 65 Ala. 391; *State Auditor v. Jackson County*, 65 Ala. 142; *Moser v. White*, 29 Mich. 59; *Yelverton v. Steele*, 36 Mich. 62; *Gilchrist v. Dean*, 55 Mich. 244; *Williams v. Mears*, 61 Mich. 86; *Aplin v. Roberts*, 83 Mich. 471; *Paldi v. Paldi*, 84 Mich. 346; *State v. Warford*, 32 N. J. L. 207; *Ratterman v. Niehaus*, 2 Ohio Cir. Dec. 673, 4 Ohio Cir. Ct. 502; *Hayes v. Yost*, 24 Ohio Cir. Ct. 18. *Compare Hutchinson v. Board of Equalization*, 66 Iowa 35.

**Requirement as to Signing Record Mandatory.** — *State Auditor v. Jackson County*, 65 Ala. 142; *Darmstaetter v. Moloney*, 45 Mich. 621; *Pearsall v. Eaton County*, 71 Mich. 438; *Weston v. Monroe*, 84 Mich. 341; *Auditor Gen. v. Hill*, 97 Mich. 80. See also *Burt v. Wadsworth*, 39 Mich. 126; *Hixon v. Oneida County*, 82 Wis. 515; *State v. Wray*, 55 Mo. App. 646.

**Signature by Board Unnecessary When Not Required by Statute.** — *Pentecost v. Stiles*, 5 Okla. 500.

**Requirement as to Attaching Certificate to Roll Mandatory.** — *Tweed v. Metcalf*, 4 Mich. 579; *Burt v. Wadsworth*, 39 Mich. 126; *Maxwell v. Paine*, 53 Mich. 30. See also *Perry County v. Selma*, etc., R. Co., 65 Ala. 391.

3. **More Irregularities Immaterial.** — *State v. Atkins*, 129 Ala. 138; *Ross v. Crawford County*, 16 Kan. 411; *Fowler v. Russell*, 45 Kan. 425; *Blue Iron Min. Co. v. Negaunee*, 105 Mich. 317; *Dickison v. Reynolds*, 48 Mich. 158; *Hoffman v. Lynburn*, 104 Mich. 494.

**Judgment of Board Sufficient if So Definite as to Be Intelligible.** — *State v. Atkins*, 129 Ala. 138; *Ex p. Howard-Harrison Iron Co.*, 130 Ala. 185;

*Seymour First Nat. Bank v. Isaacs*, (Ind. 1903) 68 N. E. Rep. 288.

4. **Auditor-Gen. v. Buckeye Iron Co.**, (Mich. 1903) 93 N. W. Rep. 1080.

5. **Entry by Assessor or Clerk.** — *Weaver v. State*, 39 Ala. 535; *Farmers', etc., Bank v. Board of Equalization*, 97 Cal. 318; *Keck v. Keokuk County*, 37 Iowa 547; *Louisville Bridge Co. v. Louisville*, (Ky. 1901) 65 S. W. Rep. 814; *State v. Assessors*, 30 La. Ann. 261; *Gay v. Assessors*, 34 La. Ann. 371; *Yazoo Delta Invest. Co. v. Suddoth*, 70 Miss. 416; *People v. Clapp*, 64 Hun (N. Y.) 547; *People v. Zoeller*, (Supm. Ct. Spec. T.) 15 N. Y. Supp. 684; *Duck v. Peeler*, 74 Tex. 268; *Ferris v. Kimble*, 75 Tex. 476; *Connor v. Waxahachie*, (Tex. 1889) 13 S. W. Rep. 30. See also *Harts v. Mackinac Island*, (Mich. 1902) 92 N. W. Rep. 351; *Boody v. Watson*, 64 N. H. 162; *State v. Cromer*, 35 S. Car. 213; *State v. Boyd*, 35 S. Car. 233.

6. *State v. Assessors*, 30 La. Ann. 261; *People v. Ontario County*, 85 N. Y. 323. See also *Wood v. McGuire*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 659; *State v. Cromer*, 35 S. Car. 213; *Mix v. People*, 72 Ill. 241.

7. *Keck v. Keokuk County*, 37 Iowa 547.

8. **No Inherent Right of Appeal.** — *Taylor v. Louisville*, etc., R. Co., (C. C. A.) 88 Fed. Rep. 350, *affirming* 86 Fed. Rep. 168; *Collins v. Keokuk*, 118 Iowa 30; *Ward v. Beale*, 91 Ky. 60; *Paducah St. R. Co. v. McCracken County*, 105 Ky. 472; *State v. Armstrong*, 19 Utah 117; *Olympia Water Works v. Thurston County*, 14 Wash. 268, *followed* *Knapp v. King County*, 15 Wash. 541, and *Buchanan v. Adams County*, 15 Wash. 699. See also *Pittsburgh*, etc., R. Co. v. *Backus*, 154 U. S. 421, *affirming* 133 Ind. 625.

9. **Assessments Not Necessarily Appealable Adjudications.** — *Auditor v. Atchison*, etc., R. Co., 6 Kan. 500, 7 Am. Rep. 575; *Morris v. Lalaurie*, 39 La. Ann. 47; *Wagoner v. Loomis*, 37 Ohio St. 571. See also *Union Tow-boat Co. v. Bordelon*, 7 La. Ann. 193. *Compare* *Pierre Water-Works Co. v. Hughes County*, 5 Dak. 145.

(2) *Review upon Merits under Statutory Provisions.* — In some states, under special statutory provisions, the decisions of assessing officers and boards may, by appeal or other method provided by statute, be brought before the courts, where the matter will be reviewed on the merits, and such a decree rendered as will secure the ends of justice and equality.<sup>1</sup> In the notes will be found decisions pertaining to various questions which have arisen under statutes providing for the judicial review of assessments.<sup>2</sup> The assessment will be reduced when the valuation is excessive, or when the average

1. *Review on the Merits* — *Alabama*. — Alabama G. S. R. Co. v. Boyd, 124 Ala. 525; Birmingham Bldg., etc., Assoc. v. State, 120 Ala. 403; State v. Atkins, 129 Ala. 138.

*Arkansas*. — Randle v. Williams, 18 Ark. 380.  
*Colorado*. — Gillett v. Logan County, 13 Colo. App. 380.

*Connecticut*. — Greenwoods Co. v. New Hartford, 65 Conn. 461; Ives v. Goshen, 65 Conn. 456.

*Florida*. — Kissimmee City v. Cannon, 26 Fla. 3.

*Illinois*. — Pease v. Chicago, 21 Ill. 500; Ohio, etc., R. Co. v. Lawrence County, 27 Ill. 50; Preston v. Johnson, 104 Ill. 625.

*Iowa*. — Lyons v. Board of Equalization, 102 Iowa 1; Bremer County Bank v. Bremer County, 42 Iowa 394; District Tp. v. Brown, 47 Iowa 25; Grimes v. Burlington, 74 Iowa 123; Burns v. McNally, 90 Iowa 432; German American Sav. Bank v. Burlington, 118 Iowa 84. See also Phelps Mortg. Co. v. Board of Equalization, 84 Iowa 610.

*Kentucky*. — Cassidy v. Young, 92 Ky. 227; Louisville Water Co. v. Clark, 94 Ky. 47; Marion County v. Wilson, 105 Ky. 302.

*Louisiana*. — Patterson v. New Orleans, 47 La. Ann. 275. See Tebault v. New Orleans, 108 La. 686.

*Maine*. — Levant v. Penobscot County, 67 Me. 429; Wheeler v. Waldo County, 88 Me. 174.

*Massachusetts*. — Lowell v. Middlesex County, 146 Mass. 403; Haven v. Essex County, 155 Mass. 467.

*Mississippi*. — Simmons v. Scott County, 68 Miss. 37.

*New Hampshire*. — See Bradley v. Laconia, 66 N. H. 269.

*New Jersey*. — State v. Dickerson, 25 N. J. L. 427; Van Riper v. North Plainfield, 43 N. J. L. 349; Central R. Co. v. Assessors, 49 N. J. L. 1; Williams v. Bettle, 50 N. J. L. 132; Earles v. Ramsay, 61 N. J. L. 194; Blume v. Bowes, 65 N. J. L. 470; People's Invest. Co. v. Assessors, 66 N. J. L. 175; Newark v. North Jersey St. R. Co., 68 N. J. L. 486.

*New York*. — Genesee Valley Nat. Bank v. Livingston County, 53 Barb. (N. Y.) 223; People v. Zoeller, (Supm. Ct. Spec. T.) 15 N. Y. Supp. 684; Mercantile Nat. Bank v. New York, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 32, affirmed 50 N. Y. App. Div. 628, affirmed 172 N. Y. 35; People v. Ogdensburgh, 48 N. Y. 390. See also Brooklyn El. R. Co. v. Brooklyn, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 416; People v. McNamara, 18 N. Y. App. Div. 17.

*Ohio*. — Ohio Farmers' Ins. Co. v. Hard, 10 Ohio Dec. 469.

*Pennsylvania*. — Doylestown Tax Assess-

ments, 17 Pa. Co. Ct. 535; Heberton's Case, a Pa. Dist. 794; Cambridge Springs Co.'s Appeal, 8 Pa. Dist. 55; Berwind White Coal Min. Co. v. Clearfield County, 18 Pa. Co. Ct. 545.

*Washington*. — See Pacific County v. Ellis, 12 Wash. 108.

*West Virginia*. — Mackin v. Taylor County Ct., 38 W. Va. 338; State v. South Penn Oil Co., 42 W. Va. 80.

The Meaning of "Over Assessment," under the Louisiana statute, is overvaluation. State v. Assessors, 30 La. Ann. 261.

2. *Right of Appeal* from county commissioners does not imply appeal from their acts as a board of equalization. General Custer Min. Co. v. Van Camp, 2 Idaho 44; Sioux City, etc., R. Co. v. Washington County, 3 Neb. 30. *Contra*, Pierre Water-Works Co. v. Hughes County, 5 Dak. 145.

*Right Determined by Amount in Controversy.* — Babcock v. Board of Equalization, 65 Iowa 110; Henkle v. Keota, 68 Iowa 334; Com. v. Huffman, (Ky. 1900) 55 S. W. Rep. 7.

*Illinois* — *Right Restricted to Claims of Exemption.* — Havemeyer v. Board of Review, 202 Ill. 446; Keokuk, etc., Bridge Co. v. People, 185 Ill. 276; Dutton v. Board of Review, 188 Ill. 366.

*Massachusetts* — *Statute Applied to Pending Cases.* — Tremont, etc., Mills v. Lowell, 165 Mass. 265.

*Appeal Barred by reference under statute.* New Orleans Gas Light Co. v. Assessors, 31 La. Ann. 270, 475.

*Who May Appeal* — *Iowa* — *Administrator of Person Assessed.* — Matter of Kauffman, 104 Iowa 639.

*Mississippi* — *Either Party* — *State Revenue Agent.* — Adams v. Kuhn, 72 Miss. 276.

See also *Ex p.* Howard-Harrison Iron Co., 119 Ala. 484, 72 Am. St. Rep. 928.

*Time for Appeal Limited.* — Hopkins v. Van Wyck, 80 Md. 7; William Skinner, etc., Ship Bldg., etc., Co. v. Baltimore, 96 Md. 32; National Bank of Commerce v. New Bedford, 175 Mass. 257. See also Kansas City, etc., R. Co. v. Davis, 50 La. Ann. 1054; Liquidating Com'rs v. Marrero, 106 La. 130.

*No Appeal Lies until Assessment Approved.* — Madison County v. Frazier, 78 Miss. 880. See Louisiana Brewing Co. v. Assessors, 41 La. Ann. 565.

*Appeal Bond Unnecessary.* — Marion v. Cedar Rapids, etc., R. Co., (Iowa 1903) 94 N. W. Rep. 501.

*Collection of Taxes Not Delayed by Appeal.* — City Item Cooperative Printing Co. v. New Orleans, 51 La. Ann. 713; Tunica County v. Tate, 78 Miss. 294.

*Evidence Outside the Record may be ad-*  
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rate of other assessments is too low, and the taxpayer is thereby compelled to pay more than his just share of the aggregate tax;<sup>1</sup> but it has been held that courts in determining appeals can only consider the correctness of the assessment in regard to the complaint made, and have no authority to increase the assessment.<sup>2</sup> As a rule, where only a portion of an assessment is illegal, and that portion can be ascertained, the assessment will be modified or annulled only to the extent that it is unlawful or unjust,<sup>3</sup> but where the lawful and unlawful parts are blended together in one indivisible assessment, the entire assessment is illegal and will be so declared.<sup>4</sup> The constitutional power of the legislature to require appellate courts, in reviewing the action of boards of assessors, to appraise the property as the facts may require, has been both affirmed<sup>5</sup> and denied.<sup>6</sup>

(3) *Assessment Ordinarily Conclusive.* — Where there is no constitutional provision for judicial review, the assessment as determined by the assessors, boards of equalization and review, or other municipal officers to whom the matter is intrusted, is, subject to the exceptions hereafter pointed out,<sup>7</sup> conclusive on the courts.<sup>8</sup> An assessment cannot be declared void by the

mitted when the object of the appeal is to secure a new trial on the merits. *Grimes v. Burlington*, 74 Iowa 123.

*Personal Judgment on Appeal Not Authorized.* — *Vicksburg Bank v. Adams*, 74 Miss. 179; *Morris Ice Co. v. Adams*, 75 Miss. 410.

*Must Be Substantial Grievance.* — *Ives v. Goshen*, 65 Conn. 456; *People v. Carter*, 109 N. Y. 576.

*Amount Lawfully Due Not Avoided.* — *Edes v. Boardman*, 58 N. H. 580.

*Abatement Applied on Subsequent Tax.* — *Boston, etc., R. Co. v. State*, 64 N. H. 490.

1. *Reduction of Excessive Assessment.* — *Cedar Rapids, etc., R. Co. v. Cedar Rapids*, 106 Iowa 476; *Auditor Gen. v. Jenkinson*, 90 Mich. 523; *State v. Metz*, 31 N. J. L. 365; *State v. Parker*, 34 N. J. L. 49; *State v. Elizabeth*, 39 N. J. L. 249; *Pacific County v. Ellis*, 12 Wash. 108.

*Reduction to Correspond to General Undervaluation.* — *Auditor Gen. v. Jenkinson*, 90 Mich. 523; *Manchester Mills v. Manchester*, 57 N. H. 309; *People v. Keator*, (Supm. Ct. Spec. T.) 67 How. Pr. (N. Y.) 277; *People v. Ganley*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 563; *People v. Zoeller*, (Supm. Ct. Spec. T.) 15 N. Y. Supp. 684; *People v. Carter*, 109 N. Y. 576; *People v. Badgley*, 138 N. Y. 314.

2. *No Power to Increase Assessment.* — *Matter of Des Moines Water Co.*, 48 Iowa 324; *Cedar Rapids, etc., R. Co. v. Cedar Rapids*, 106 Iowa 476; *Farmers L. & T. Co. v. Fonda*, 114 Iowa 728 [followed *Ferguson v. Rolfe*, (Iowa 1903) 94 N. W. Rep. 1129]; *Lowell v. Middlesex County*, 3 Allen (Mass.) 546; *Leach v. Blakely*, 34 Vt. 134.

3. *Separation of Legal and Illegal Items.* — *Pensacola v. Louisville, etc., R. Co.*, 21 Fla. 492; *Kissimmee City v. Cannon*, 26 Fla. 3; *Tampa v. Mugge*, 40 Fla. 326; *State v. Vaile*, 122 Mo. 33; *Spiech v. Tierney*, 56 Neb. 514; *Grant v. Bartholomew*, 57 Neb. 673; *Cochecho Mfg. Co. v. Strafford*, 51 N. H. 455; *People v. Neff*, 15 N. Y. App. Div. 8, affirmed without opinion 156 N. Y. 701; *Dayton v. Multnomah County*, 34 Oregon 239. *Contra*, *Meacham v. Newport*, 70 Vt. 264.

4. *Whole Assessment Illegal When Legal and Illegal Portions Not Separable.* — *California v.*

*Central Pac. R. Co.*, 127 U. S. 1; *Hart v. Smith*, 159 Ind. 182, 95 Am. St. Rep. 280; *U. S. Trust Co. v. Territory*, 10 N. Mex. 416. See also *People v. Ohio, etc., R. Co.*, 96 Ill. 411; *State v. Lawler*, 103 Wis. 460; *State v. Wharton*, 117 Wis. 558.

5. *Appraisal by Court on Appeal.* — *Farmers' L. & T. Co. v. Newton*, 97 Iowa 502; *Edes v. Boardman*, 58 N. H. 584; *Nalle v. Austin*, 23 Tex. Civ. App. 595.

6. *Appraisal by Courts Denied.* — *Baltimore v. Bonaparte*, 93 Md. 156. See also *Bradley v. New Haven*, 73 Conn. 646; *Maxwell v. People*, 189 Ill. 546.

7. See *infra*, this subdivision, *Proper Subjects for Judicial Inquiry; Equitable Relief.*

8. *Assessment Ordinarily Conclusive — California.* — *Farmers', etc., Bank v. Board of Equalization*, 97 Cal. 318.

*Colorado.* — *Gillett v. Logan County*, 13 Colo. App. 380.

*Connecticut.* — *Monroe v. New Canaan*, 43 Conn. 309.

*Illinois.* — *Worthington v. Pike County*, 23 Ill. 363; *Ohio, etc., R. Co. v. Lawrence County*, 27 Ill. 50. See also *Ellis v. People*, 199 Ill. 548.

*Indiana.* — *Rhoads v. Cushman*, 45 Ind. 85; *Hart v. Smith*, 159 Ind. 182, 95 Am. St. Rep. 280.

*Kentucky.* — *Chicago, etc., R. Co. v. Com.*, (Ky. 1903) 72 S. W. Rep. 1119.

*Maryland.* — *Alleghany County v. New York Min. Co.*, 76 Md. 549.

*Massachusetts.* — *Com v. Cary Imp. Co.*, 98 Mass. 19.

*Michigan.* — *Pioneer Iron Co. v. Negaunee*, 116 Mich. 430.

*New Hampshire.* — *Durham v. Thompson*, 2 N. H. 166.

*New York.* — *Bell v. Pierce*, 48 Barb. (N. Y.) 51; *People v. Barker*, 144 N. Y. 94.

*North Carolina.* — *Pickens v. Henderson County*, 112 N. Car. 608. See also *Wilmington, etc., R. Co. v. Brunswick County*, 72 N. Car. 10; *Wade v. Craven County*, 74 N. Car. 81.

*Ohio.* — *Wagoner v. Loomis*, 37 Ohio St. 571; *State v. Lewis*, 64 Ohio St. 216; *Glenn v. Raine*, 4 Ohio Dec. 517.



courts for mere irregularities,<sup>1</sup> nor for clerical inaccuracies,<sup>2</sup> nor the accidental omission of property liable to taxation.<sup>3</sup> Since the court cannot substitute

*Pennsylvania.* — Clinton School Dist. Appeal, 56 Pa. St. 315; Hammett v. Philadelphia, 65 Pa. St. 146, 3 Am. Rep. 615.

*Tennessee.* — Tomlinson v. Board of Equalization, 88 Tenn. 1.

*Texas.* — Hoefling v. San Antonio, 15 Tex. Civ. App. 257; Johnson v. Holland, 17 Tex. Civ. App. 210; Linz v. Sherman, (Tex. Civ. App. 1901) 62 S. W. Rep. 71.

*Utah.* — Home F. Ins. Co. v. Lynch, 19 Utah 189.

*Wyoming.* — Johnson County v. Searight Cattle Co., 3 Wyo. 777.

**Order of Board Conclusive that It Acted upon Sufficient Evidence.** — Hampson v. Dysart, (Ariz. 1898) 53 Pac. Rep. 581.

**Oregon Statute — Court's Power Confined to Formal Matters Only.** — Portland University v. Multnomah County, 31 Oregon 498.

**Review under Common-law Power Upheld.** — Boody v. Watson, 64 N. H. 162.

**1. Irregularities — United States.** — Campbellville Lumber Co. v. Hubbert, (C. C. A.) 112 Fed. Rep. 718.

*California.* — San Francisco, etc., R. Co. v. State Board of Equalization, 60 Cal. 12.

*Idaho.* — Murphy v. Board of Equalization, 6 Idaho 745.

*Illinois.* — Beers v. People, 83 Ill. 488.

*Indiana.* — Reynolds v. Bowen, 138 Ind. 434.

*Iowa.* — Sioux City, etc., R. Co. v. Osceola County, 45 Iowa 168.

*Maine.* — Rogers v. Greenbush, 58 Me. 390, 4 Am. Rep. 292; Gilman v. Waterville, 59 Me. 491; Hayford v. Belfast, 69 Me. 63; Rockland v. Ulmer, 84 Me. 503, 87 Me. 357; Rowe v. Friend, 90 Me. 241; Foss v. Whitehouse, 94 Me. 491.

*Massachusetts.* — Com. v. New England Slate, etc., Co., 13 Allen (Mass.) 391.

*Michigan.* — Stockle v. Silsbee, 41 Mich. 615.

*Minnesota.* — State v. West Duluth Land Co., 75 Minn. 456.

*Mississippi.* — Brigins v. Chandler, 60 Miss. 862.

*Missouri.* — Thomas v. Chapin, 116 Mo. 396; State v. Neosho Bank, 120 Mo. 161; State v. Phillips, 137 Mo. 259.

*Nevada.* — State v. Sadler, 21 Nev. 13.

*New Hampshire.* — Sawyer v. Gleason, 59 N. H. 140.

*New Jersey.* — State v. Bishop, 34 N. J. L. 45; State v. Taylor, 35 N. J. L. 189; State v. Runyon, 41 N. J. L. 98.

*New York.* — See Wood v. McGuire, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 659.

*Tennessee.* — State v. Cincinnati, etc., R. Co., 13 Lea (Tenn.) 500.

*Vermont.* — Henry v. Chester, 15 Vt. 460.

**Tax Erroneously Assessed but Not Excessive.** — If the whole tax assessed against a taxpayer does not exceed the sum which he ought to pay, he is not entitled to an abatement because part of the tax is erroneously assessed. Lowell v. Middlesex County, 152 Mass. 372; State v. Thayer, 60 Minn. 170; Edes v. Boardman, 58 N. H. 580; Connecticut Valley Lumber Co. v. Monroe, 71 N. H. 473; State v. Haight, 35 N. J. L. 178; Wehre v. Lutchter, 45 La. Ann. 574.

**Procedure in Making Assessment Liberally Construed.** — Rockland v. Rockland Water Co., 82 Me. 188.

**Improperly Assessing Land as Timber Land Not Fatal.** — Boorman v. Juneau County, 76 Wis. 550.

**2. Clerical Inaccuracies Not Fatal.** — Rhoads v. Cushman, 45 Ind. 85; Rowe v. Friend, 90 Me. 241; Bell v. Pierce, 48 Barb. (N. Y.) 51; Chamberlain v. Taylor, 36 Hun (N. Y.) 24; Wilmot v. Lathrop, 67 Vt. 671; Peterson v. Osage City First Nat. Bank, 8 Kan. App. 508.

**3. Accidental Omission of Property — California.** — People v. McCreery, 34 Cal. 432.

*Illinois.* — Schofield v. Watkins, 22 Ill. 66; Merritt v. Farriss, 22 Ill. 311; Dunham v. Chicago, 55 Ill. 361; Spencer v. People, 68 Ill. 510; Coal Run Coal Co. v. Finlen, 124 Ill. 666.

*Indiana.* — Goddard v. Stockman, 74 Ind. 400.

*Louisiana.* — New Orleans v. Davidson, 30 La. Ann. 554.

*Maine.* — Dover v. Maine Water Co., 90 Me. 180.

*Massachusetts.* — Williams v. School Dist. No. 1, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; Watson v. Princeton, 4 Met. (Mass.) 602.

*Michigan.* — Auditor Gen. v. Prescott, 94 Mich. 190; Muskegon v. Boyce, 123 Mich. 535.

*Nebraska.* — Kittle v. Shervin, 11 Neb. 65; State v. Savage, (Neb. 1902) 91 N. W. Rep. 716.

*New Hampshire.* — Smith v. Messer, 17 N. H. 420.

*New Jersey.* — State v. Platt, 24 N. J. L. 108; State v. Dickerson, 25 N. J. L. 431.

*New York.* — People v. Assessors, 16 Hun (N. Y.) 196; People v. Feitner, 51 N. Y. App. Div. 196, affirming 30 Misc. (N. Y.) 216; Van Deventer v. Long Island City, 139 N. Y. 133.

*Ohio.* — Exchange Bank v. Hines, 3 Ohio St. 1.

*Pennsylvania.* — Insurance Co. v. Yard, 17 Pa. St. 331; Berwind White Coal Min. Co. v. Clearfield County, 18 Pa. Co. Ct. 545.

*Rhode Island.* — Capwell v. Hopkins, 10 R. I. 378; McTiggan v. Hunter, 19 R. I. 265.

*South Dakota.* — Henderson v. Hughes County, 13 S. Dak. 576.

*Vermont.* — Spear v. Braintree, 24 Vt. 414.

*Washington.* — Puget Sound Agricultural Co. v. Pierce County, 1 Wash. Ter. 159; Eureka Dist. Gold Min. Co. v. Ferry County, 28 Wash. 250.

*Wisconsin.* — Weeks v. Milwaukee, 10 Wis. 242; Hersey v. Milwaukee County, 16 Wis. 195; 82 Am. Dec. 713; Dean v. Gleason, 16 Wis. 1; Smith v. Smith, 19 Wis. 615, 88 Am. Dec. 707; Lefferts v. Calumet County, 21 Wis. 688; Hale v. Kenosha, 29 Wis. 599; Milwaukee Iron Co. v. Hubbard, 29 Wis. 51; Plumer v. Marathon County, 26 Wis. 161.

**Undervaluation of Other Property No Ground for Setting Aside Assessment.** — Georgia Midland, etc., R. Co. v. State, 89 Ga. 597; People v. Lots in Ashlev, 122 Ill. 207.

**Intentional Omission or Undervaluation of property is no ground for setting the assessment aside, unless the objector shows injury.** State v. Lakeside Land Co., 71 Minn. 283. See

its judgment for that of the assessing officers or reviewing boards,<sup>1</sup> an erroneous exercise of judgment by such officers or boards does not warrant interference by the court;<sup>2</sup> and so questions as to the excessiveness of the assessment are beyond the province of judicial inquiry.<sup>3</sup>

(4) *Proper Subjects for Judicial Inquiry* — (a) *Constitutional Questions*. — Questions which involve the construction and validity of revenue statutes, and the constitutionality of assessments made thereunder, can only be determined by the courts, and it is not competent for the legislature to declare, as against questions of this character, that the action of assessors or administrative boards, shall be conclusive.<sup>4</sup> Under the usual constitutional provisions requiring equality and uniformity of taxation, it has been held that a taxpayer whose property is assessed upon a higher basis of valuation than that generally adopted, although at not more than its true value, is entitled to a corresponding reduction of his assessment;<sup>5</sup> but there is a contrary line of decisions holding that no fundamental right of a complainant is violated by the general undervaluation of other property, where the complainant's property is assessed at no more than its fair cash value as required by law.<sup>6</sup>

(b) *Jurisdictional Questions*. — Boards for the assessment of property possess only granted powers, and their acts done in excess of the power conferred do not conclude judicial investigation.<sup>7</sup> Matters which are jurisdictional, and therefore open to inquiry, are generally questions as to whether the tax itself

also *State v. Dickerson*, 25 N. J. L. 427. *Compare Auditor Gen. v. Prescott*, 94 Mich. 190; *Auditor Gen. v. Pioneer Iron Co.*, 123 Mich. 521.

1. *Judgment of Court Not to Be Substituted for that of Assessors*. — *State Railroad Tax Cases*, 92 U. S. 575; *Maish v. Arizona*, 164 U. S. 599; *Monroe v. New Canaan*, 43 Conn. 309; *Keokuk, etc., Bridge Co. v. People*, 185 Ill. 276; *Hulbert v. People*, 189 Ill. 114; *Burton Stock Car Co. v. Traeger*, 187 Ill. 9; *Lincoln Land Co. v. Phelps County*, 59 Neb. 249; *People v. Haupt*, 104 N. Y. 377.

2. *Erroneous Exercise of Judgment Not Reviewable*. — *Republic L. Ins. Co. v. Pollak*, 75 Ill. 292, followed *People v. Big Muddy Iron Co.*, 89 Ill. 116; *People v. Lots in Ashley*, 122 Ill. 297; *Clement v. People*, 177 Ill. 144; *Pioneer Iron Co. v. Negaunee*, 116 Mich. 430; *Muskegon v. Boyce*, 123 Mich. 535. See also *State v. Metz*, 31 N. J. L. 365.

*Basis of Valuation Partially Erroneous*. — *Case v. Dean*, 16 Mich. 12; *Grand Rapids v. Welleman*, 85 Mich. 234.

3. *Excessiveness of Assessment Not Reviewable*. — *Campbellsville Lumber Co. v. Hubbert*, (C. C. A.) 112 Fed. Rep. 718; *Morgan v. Smithson*, 9 Ill. 368; *Ward v. Beale*, 91 Ky. 60; *Williams v. Saginaw*, 51 Mich. 120; *Aurora Iron Min. Co. v. Ironwood*, 119 Mich. 325; *State v. Savage*, (Neb. 1902) 91 N. W. Rep. 716; *State v. Platt*, 24 N. J. L. 108; *State v. Metz*, 31 N. J. L. 365; *State v. Lewis*, 11 Ohio Cir. Dec. 13, 20 Ohio Cir. Ct. 319.

4. *Constitutional Questions Reviewable*. — *Railroad, etc., Co's v. Board of Equalizers*, 85 Fed. Rep. 302; *Pueblo County v. Wilson*, 15 Colo. 90; *Palfrey v. Connely*, 106 La. 699; *State v. London, etc., Mortg. Co.*, 80 Minn. 277; *Dayton v. Board of Equalization*, 33 Oregon 131; *McTwiggan v. Hunter*, 18 R. I. 776; *Mackin v. Taylor County Ct.*, 38 W. Va. 338; *Charleston, etc., Bridge Co. v. Kanawha County Ct.*, 41 W.

Va. 658; *State v. South Penn Oil Co.*, 42 W. Va. 80. See also *supra*, this title, IV. 2. *Constitutional Restrictions*.

5. *Equality and Uniformity of Taxation Required*. — *Ex p. Ft. Smith, etc., Bridge Co.*, 62 Ark. 461; *Randell v. Bridgeport*, 63 Conn. 321; *Greenwoods Co. v. New Hartford*, 65 Conn. 461; *State v. Osborn*, 60 Neb. 415; *State v. Karr*, 64 Neb. 514; *State v. Savage*, (Neb. 1902) 91 N. W. Rep. 716; *Sarpy County v. Clarke*, (Neb. 1903) 93 N. W. Rep. 416; *Amoskeag Mfg. Co. v. Manchester*, 70 N. H. 200; *Oregon, etc., R. Co. v. Jackson County*, 38 Oregon 589; *Doylestown Tax Assessments*, 17 Pa. Co. Ct. 535. See also *Dennis's Appeal*, 72 Conn. 369; *Darling v. Gunn*, 50 Ill. 424.

*Judicial Notice of General Undervaluation*. — *Railroad, etc., Co's v. Board of Equalizers*, 85 Fed. Rep. 302; *State v. Savage*, (Neb. 1902) 91 N. W. Rep. 716; *Ohio Farmers Ins. Co. v. Hard*, 10 Ohio Dec. 469; *Oregon, etc., R. Co. v. Jackson County*, 38 Oregon 589.

6. *General Undervaluation Not Fundamentally Illegal*. — *Cochise County v. Copper Queen Consol. Min. Co.*, (Ariz. 1903) 71 Pac. Rep. 946; *Louisville R. Co. v. Com.*, 105 Ky. 710; *Paducah St. R. Co. v. McCracken County*, 105 Ky. 472; *Lexington Mill, etc., Co. v. Dawson County*, (Neb. 1901) 96 N. W. Rep. 62; *People v. Delaware County*, 60 N. Y. 381, reversing 2 Hun (N. Y.) 102, 4 Thomp. & C. (N. Y.) 336; *McCurdy v. Prugh*, 59 Ohio St. 465; *Carroll v. Aisup*, 107 Tenn. 257.

7. See *infra*, the subdivisions *Equitable Relief*; *Collateral Attack*.

*Jurisdictional Questions Open to the Courts*. — *Copper Queen Consol. Min. Co. v. Board of Equalization*, (Ariz. 1901) 65 Pac. Rep. 149; *Hart v. Smith*, 159 Ind. 182, 95 Am. St. Rep. 280; *People v. Davenport*, 91 N. Y. 574; *People v. Wilson*, 119 N. Y. 515; *Lackawanna County v. Cohn*, 156 Pa. St. 477; *London v. Watt*, 22 Can Sup. Ct. 300, affirming 19 Ont. App. 675.

was valid,<sup>1</sup> or as to whether the property was assessable,<sup>2</sup> or was located within the district of the assessing officers,<sup>3</sup> or whether there was jurisdiction over the person assessed;<sup>4</sup> and it has been held that all clear violations of law in the assessment proceeding are jurisdictional.<sup>5</sup>

(e) **Fraud.** — As fraud vitiates every act or proceeding which it touches, an assessment when made with the design to exact from a particular taxpayer an unjust amount of taxes, or with any other corrupt motive, is void, and the courts are open to hear the complaint, and, if established, to grant proper relief.<sup>6</sup>

(5) **Equitable Relief.** — Before courts of equity will grant relief against assessments of property for taxation, it must appear that some wrong is about to be inflicted which is not remediable at law, or by the special method pointed out by statute, thus bringing the case under the recognized head of equitable jurisdiction.<sup>7</sup> As a rule, equitable relief will be given only when it is clearly shown that the assessment was made without jurisdiction,<sup>8</sup> or was

1. **Validity of Tax.** — *Harrington v. Glidden*, 179 Mass. 486, 94 Am. St. Rep. 613.

2. **Whether Property Assessable.** — *Goddard v. Seymour*, 30 Conn. 394; *Phelps v. Thurston*, 47 Conn. 477; *Horne v. Green*, 52 Miss. 452; *Berry v. Missoula County*, 6 Mont. 121; *Earles v. Ramsay*, 61 N. J. L. 194; *National Bank v. Elmira*, 53 N. Y. 53; *Portland University v. Multnomah County*, 31 Oregon 498; *Timmerman v. St. John*, 21 Can. Sup. Ct. 691.

**Where a Proportionate Part Only of Property included in an assessment, and not the whole, is exempt from taxation, the error is one of overvaluation only and not jurisdictional.** *Foxcroft v. Piscataquis Valley Campmeeting Assoc.*, 86 Me. 78; *Rockland v. Rockland Water Co.*, 82 Me. 188; *All Saints Parish v. Brookline*, 178 Mass. 404; *Kelley v. Barton*, 174 Mass. 396; *Worden v. Oneida County*, 35 N. Y. App. Div. 206; *Matter of Peek*, 80 Hun (N. Y.) 122; *Matter of Baumgarten*, 39 N. Y. App. Div. 174; *Tucker v. Utica*, 35 N. Y. App. Div. 173; *Broderick v. Yonkers*, 22 N. Y. App. Div. 448, *affirmed* without opinion 163 N. Y. 571.

3. **Property Within Assessor's District.** — *Toby v. Haggerty*, 23 Ark. 370; *People v. Placerville*, etc., R. Co., 34 Cal. 656; *Taylor v. Youngs*, 48 Mich. 268; *Treasurer v. Mulford*, 26 N. J. L. 49; *Dorn v. Backer*, 61 N. Y. 261; *Dorn v. Fox*, 61 N. Y. 264. But see *State v. Dunn*, 86 Minn. 301.

**Statutory Remedy for Assessments Made in Wrong District.** — *Ellis v. People*, 199 Ill. 548; *State v. Dunn*, 86 Minn. 301; *State v. Twin Lakes*, 84 Minn. 374; *State v. Hynes*, 82 Minn. 34; *State v. Willard*, 77 Minn. 190; *Clarke v. Stearns County*, 66 Minn. 304, 47 Minn. 552. See also *People v. Tax*, etc., Com'rs, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 347; *Matter of McLean*, 138 N. Y. 158, *affirming* 66 Hun (N. Y.) 122.

4. **Jurisdiction of Person Assessed.** — *Bohler v. Verdery*, 92 Ga. 715; *People v. Dederick*, 40 N. Y. App. Div. 570, *affirmed* 160 N. Y. 687; *Lapolt v. Maltby*, (County Ct.) 10 Misc. (N. Y.) 330.

5. **All Clear Violations of Law Jurisdictional.** — See *State v. Losby*, 115 Wis. 57; *State v. Lawler*, 103 Wis. 460.

6. **Fraud.** (See *infra*, the subdivisions *Equitable Relief*; *Collateral Attack*.) — *Odd Fellows' Hall Assoc. v. Dayton*, 76 S. W. Rep. 181, 25

Ky. L. Rep. 665; *Tampa v. Kaunitz*, 39 Fla. 693, 63 Am. St. Rep. 202; *Jackson County v. Thornton*, (Fla. 1902) 33 So. Rep. 291; *Cleveland, etc., R. Co. v. Backus*, 133 Ind. 513, *affirmed* 154 U. S. 439; *Pittsburgh, etc., R. Co. v. Backus*, 133 Ind. 625, *affirmed* 154 U. S. 421; *Galusha v. Wendt*, 114 Iowa 597; *Pioneer Iron Co. v. Negaunee*, 116 Mich. 430; *Auditor Gen. v. Hughitt*, (Mich. 1903) 93 N. W. Rep. 621, 9 Detroit Leg. N. 614; *State v. Cunningham*, 153 Mo. 642; *Oregon, etc., R. Co. v. Jackson County*, 38 Oregon 589; *Gove v. Tacoma*, 26 Wash. 474; *Miller v. Pierce County*, 28 Wash. 110.

**Fraudulent Intentional Undervaluation.** — *State Board of Equalization v. People*, 191 Ill. 528.

7. **Want of Remedy at Law** — *United States*. — *Taylor v. Louisville, etc., R. Co.*, (C. C. A.) 88 Fed. Rep. 350, *affirming* 86 Fed. Rep. 168.

*Alabama.* — *Weaver v. State*, 39 Ala. 535.

*California.* — *San Jose Gas Co. v. January*, 57 Cal. 614.

*Illinois.* — *Felsenthal v. Johnson*, 104 Ill. 21; *Preston v. Johnson*, 104 Ill. 625; *Beidler v. Kochersperger*, 171 Ill. 563; *Kochersperger v. Larned*, 172 Ill. 86; *Kinley Mfg. Co. v. Kochersperger*, 174 Ill. 379; *New Haven Clock Co. v. Kochersperger*, 175 Ill. 383; *White v. Raymond*, 188 Ill. 298; *Coxe v. Solomon*, 188 Ill. 571; *Standard Oil Co. v. Magee*, 191 Ill. 84.

*Iowa.* — *District Tp. v. Brown*, 47 Iowa 25.

*Maryland.* — *Gittings v. Baltimore*, 95 Md. 419.

*Minnesota.* — *Laird v. Pine County*, 72 Minn. 409.

*Missouri.* — *State v. Neosho Bank*, 120 Mo. 161; *National Bank v. Staats*, 155 Mo. 55.

*Rhode Island.* — *McTwiggan v. Hunter*, 18 R. I. 776.

*Texas.* — *Houston, etc., R. Co. v. Presidio County*, 53 Tex. 518; *Chisholm v. Adams*, 71 Tex. 678.

**Right to Equitable Relief Must Be Clear.** — *State Railroad Tax Cases*, 92 U. S. 575.

8. **Relief Against Want of Jurisdiction.** — *Cleg-horn v. Postlewaite*, 43 Ill. 428; *Darling v. Gunn*, 50 Ill. 424; *Allegheny County v. New York Min. Co.*, 76 Md. 549; *Poe v. Howell*, (N. Mex. 1901) 67 Pac. Rep. 62; *Western R. Co. v. Nolan*, 48 N. Y. 513; *Euclid Ave. Sav., etc., Co. v. Hubbard*, 12 Ohio Cir. Dec. 279, 22 Ohio Cir. Ct. 20; *Welch v. Clatsop County*,

fraudulently made,<sup>1</sup> and then will require the payment of whatever amount of tax is found to be lawfully due.<sup>2</sup> Sometimes, by statute, an injunction is made a proper remedy for any illegal assessment.<sup>3</sup> Equity will not inquire into irregularities<sup>4</sup> nor review questions of valuation,<sup>5</sup> unless the valuation is so grossly excessive as to be inconsistent with an exercise of honest judgment,<sup>6</sup> or is so unequal and discriminating as to violate the fundamental

24 Oregon 457; *Hibernian Benev. Soc. v. Kelly*, 28 Oregon 173, 52 Am. St. Rep. 769; *Clinton School Districts Appeal*, 56 Pa. St. 315; *International, etc., R. Co. v. Smith County*, 54 Tex. 1; *Mercur Gold Min., etc., Co. v. Spry*, 16 Utah 222.

**Assessment Wholly Void for Want of Jurisdiction.** — *Stephens v. Smith*, 30 Ind. App. 120; *Montis v. McQuiston*, 107 Iowa 651; *Hagerty v. Huddleston*, 60 Ohio St. 149, reversing 1 Ohio Dec. 331.

**An Illegal Exercise of Unquestioned Powers** is no ground for equitable relief. *Martin v. Barnett*, 188 Ill. 288.

**As a Cloud upon Title Equity Will Believe Against Taxes on Exempt Property.** — *Benn v. Chehalis County*, 11 Wash. 134; *Laird v. Pine County*, 72 Minn. 409; *Keokuk, etc., Bridge Co. v. People*, 185 Ill. 276; *Milwaukee Iron Co. v. Hubbard*, 29 Wis. 51.

**Unauthorized Rule of Valuation.** — Where the assessors adopt an unauthorized rule of valuation their acts are so far without jurisdiction as to call for the interference of a court of equity. *Hersey v. Barron County*, 37 Wis. 75; *Marsh v. Clark County*, 42 Wis. 502; *Schettler v. Ft. Howard*, 43 Wis. 48; *Goff v. Outagamie County*, 43 Wis. 55; *Salscheider v. Ft. Howard*, 45 Wis. 519.

**1. Fraud** — *United States*. — *Altschul v. Gittings*, 86 Fed. Rep. 200.

*Illinois*. — *Illinois, etc., R., etc., Co. v. Stookey*, 122 Ill. 358; *Coal Run Coal Co. v. Finlen*, 124 Ill. 666; *Kochersperger v. Larned*, 172 Ill. 86; *Kinley Mfg. Co. v. Kochersperger*, 174 Ill. 379; *Burton Stock Car Co. v. Traeger*, 187 Ill. 9; *Coxe v. Salomon*, 188 Ill. 571; *Hulbert v. People*, 189 Ill. 114.

*Kentucky*. — *Baldwin v. Shine*, 84 Ky. 502.

*Oregon*. — *Welch v. Clatsop County*, 24 Oregon 457; *Hibernian Benev. Soc. v. Kelly*, 28 Oregon 173, 52 Am. St. Rep. 769; *West Portland Park v. Kelly*, 29 Oregon 412; *Dayton v. Multnomah County*, 34 Oregon 239.

*Texas*. — *Johnson v. Holland*, 17 Tex. Civ. App. 210.

*Washington*. — *Olympia Water Works v. Gelbach*, 16 Wash. 482; *Baker v. King County*, 17 Wash. 622; *Noyes v. King County*, 18 Wash. 417; *Edison Electric Illuminating Co. v. Spokane County*, 22 Wash. 168; *Chehalis Boom Co. v. Chehalis County*, 24 Wash. 135; *Templeton v. Pierce County*, 25 Wash. 377.

**Evidence of Fraud — Acting Arbitrarily and Against Evidence.** — *Tainter v. Lucas*, 29 Wis. 375. See also *Cochise County v. Copper Queen Consol. Min. Co.*, (Ariz. 1903) 71 Pac. Rep. 946.

**Intentional Omission of Certain Property** justifies equitable interference. *Milwaukee Iron Co. v. Hubbard*, 29 Wis. 51; *Semple v. Langlade County*, 75 Wis. 354; *Green Bay, etc., Canal Co. v. Outagamie County*, 76 Wis. 587; *Hersey*

*v. Milwaukee County*, 16 Wis. 195, 82 Am. Dec. 713.

**Federal Jurisdiction under Fourteenth Amendment.** — See *Louisville Trust Co. v. Stone*, (C. C. A.) 107 Fed. Rep. 305 (intentional undervaluation). See also the titles *CIVIL RIGHTS*, vol. 6, p. 78; *CONSTITUTIONAL LAW*, vol. 6, p. 970; and *supra*, this title, IV. 2. *Constitutional Restrictions*.

**2. Payment of Lawful Tax Required.** — *Cincinnati Southern R. Co. v. Guenther*, 19 Fed. Rep. 395; *Chicago Union Traction Co. v. State Board of Equalization*, 114 Fed. Rep. 557; *Yazoo, etc., R. Co. v. Adams*, 73 Miss. 648; *State v. Western Union Tel. Co.*, 165 Mo. 502; *Farrington v. New England Invest. Co.*, 1 N. Dak. 102; *George v. Dean*, 47 Tex. 73.

**3. Injunction Authorized by Statute.** — *Yazoo, etc., R. Co. v. Adams*, 73 Miss. 648; *Webb v. Renfrew*, 7 Okla. 198; *Bardrick v. Dillon*, 7 Okla. 535; *Wallace v. Bullen*, 6 Okla. 17, 9 Okla. 1; *Miller v. Pierce County*, 28 Wash. 110; *Whatcom County v. Fairhaven Land Co.*, 7 Wash. 101; *Standard Cattle Co. v. Baird*, 8 Wyo. 146.

**4. Irregularities** — *Illinois*. — *Wilson v. Weber*, 96 Ill. 454; *People v. Lots in Ashley*, 122 Ill. 297.

*Indiana*. — *Center, etc., Gravel Road Co. v. Black*, 32 Ind. 468; *Hunter Stone Co. v. Woodward*, 152 Ind. 474.

*Iowa*. — *Cedar Rapids, etc., R. Co. v. Carroll County*, 41 Iowa 153.

*Kansas*. — *Kansas Pac. R. Co. v. Riley County*, 20 Kan. 141; *Challiss v. Rigg*, 49 Kan. 119; *Kansas Mut. L. Assoc. v. Hill*, 51 Kan. 644; *Dutton v. Citizens' Nat. Bank*, 53 Kan. 440; *Hudson v. Miller*, 10 Kan. App. 532.

*Nebraska*. — *South Platte Land Co. v. Crete*, 11 Neb. 344.

*North Carolina*. — *Covington v. Rockingham*, 93 N. Car. 134.

*Oklahoma*. — *Sweet v. Boyd*, 6 Okla. 699.

*South Dakota*. — *Avant v. Flynn*, 2 S. Dak. 153.

*Washington*. — *Noyes v. King County*, 18 Wash. 417.

**5. Questions of Valuation.** — *Republic L. Ins. Co. v. Pollak*, 75 Ill. 292; *Illinois, etc., R., etc., Co. v. Stookey*, 122 Ill. 358; *Pittsburgh, etc., R. Co. v. Backus*, 133 Ind. 633; *Jones v. Rushville Natural Gas Co.*, 135 Ind. 595; *Royer Wheel Co. v. Taylor County*, 104 Ky. 741; *Covington v. Shinkle*, 74 S. W. Rep. 652, 25 Ky. L. Rep. 73; *McDonald v. Escanaba*, 62 Mich. 555; *International, etc., R. Co. v. Smith County*, 54 Tex. 1; *Canfield v. Bayfield County*, 74 Wis. 60; *Hixon v. Oneida County*, 82 Wis. 515.

**Decision Made in Board's Discretion.** — *Senour v. Matchett*, 140 Ind. 636.

**6. Grossly Excessive Valuation.** — *Danforth v. Livingston*, 23 Mont. 558; *Oregon, etc., R. Co.*

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law of the land.<sup>1</sup>

(6) *Mandamus*. — In appropriate cases the courts will employ mandamus to compel the officers who have charge of the assessment to perform their official duties in the manner prescribed by law.<sup>2</sup>

d. COLLATERAL ATTACK. — The officers whose duty it is to fix the assessments, whether as original assessors, or as boards of equalization and review passing upon the work of the assessors, act in a judicial or *quasi*-judicial capacity,<sup>3</sup> and their findings, when made in good faith and in the exercise of an actual jurisdiction, are, like the judgments of courts, secure from collateral attack.<sup>4</sup> Findings which for fraud or lack of jurisdiction are void may be

v. Jackson County, 38 Oregon 589; Southern Oregon Co. v. Coos County, 39 Oregon 185, followed Southern Oregon Co. v. Schroeder, 39 Oregon 607.

1. *Gross Inequalities in Valuation*. — Cummings v. Merchants' Nat. Bank, 101 U. S. 153; Exchange Nat. Bank v. Miller, 19 Fed. Rep. 372; Linton v. Athens, 53 Ga. 588; Wagoner v. Loomis, 37 Ohio St. 571; Goff v. Outagamie County, 43 Wis. 55; Semple v. Langlade County, 75 Wis. 354.

2. *Mandamus*. — Hyatt v. Allen, 54 Cal. 353; Loewenthal v. People, 192 Ill. 222; State v. Assessors, 52 La. Ann. 223; Knight v. Thomas, 93 Me. 494; People v. Wilson, 119 N. Y. 515; People v. Assessors, 44 Barb. (N. Y.) 148; People v. Olmsted, 45 Barb. (N. Y.) 644. See also State Board of Equalization v. People, 191 Ill. 528.

Judicial Act Not Compelled by Mandamus. — Wheeler v. Waldo County, 88 Me. 174.

3. *Assessments Made Judicially*. — United States. — Youngstown Bridge Co. v. Kentucky, etc., Bridge Co., 64 Fed. Rep. 441 (declaring the law of Indiana); McLeod v. Receveur, (C. C. A.) 71 Fed. Rep. 455; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701; Stanley v. Albany County, 121 U. S. 535.

California. — People v. Goldtree, 44 Cal. 323; Oakland v. Southern Pac. Co., 131 Cal. 226.

Idaho. — Orr v. State Board of Equalization, 2 Idaho 923.

Illinois. — East St. Louis Connecting R. Co. v. People, 119 Ill. 182; St. Louis Bridge, etc., R. Co. v. People, 127 Ill. 627.

Indiana. — Biggs v. Lake County, 7 Ind. App. 142. But see Pittsburgh, etc., R. Co. v. Backus, 133 Ind. 625.

Kentucky. — See Louisville Water Co., v. Clark, 94 Ky. 47.

Louisiana. — Union Oil Co. v. Campbell, 48 La. Ann. 1350.

Maine. — Wheeler v. Waldo County, 88 Me. 174.

Michigan. — Griswold v. Union School Dist., 24 Mich. 262.

Missouri. — State v. Dowling, 50 Mo. 134; St. Louis Mut. L. Ins. Co. v. Charles, 47 Mo. 462.

Nevada. — State v. Central Pac. R. Co., 21 Nev. 270.

New Hampshire. — Sanborn v. Fellows, 22 N. H. 473; Boody v. Watson, 64 N. H. 162; Manchester v. Furnald, 71 N. H. 153.

New York. — Clark v. Norton, 49 N. Y. 243; Bellinger v. Gray, 51 N. Y. 610; Williams v. Weaver, 75 N. Y. 30; New York v. Daven-

port, 92 N. Y. 604; People v. Hagadorn, 104 N. Y. 516; Van Deventer v. Long Island City, 139 N. Y. 133; Vail v. Owen, 19 Barb. (N. Y.) 22; Brown v. Smith, 24 Barb. (N. Y.) 419; Easton v. Calendar, 11 Wend. (N. Y.) 90.

North Dakota. — Farrington v. New England Invest. Co., 1 N. Dak. 102; Shuttuck v. Smith, 6 N. Dak. 56.

Ohio. — Hagerty v. Huddleston, 60 Ohio St. 149; Ohio Farmers Ins. Co. v. Hard, 10 Ohio Dec. 469. But see Musser v. Adair, 55 Ohio St. 466. Compare Gager v. Prout, 48 Ohio St. 89.

Oregon. — Oregon Steam Nav. Co. v. Wasco County, 2 Oregon 206; Oregon, etc., R. Co. v. Jackson County, 38 Oregon 589; Southern Oregon Co. v. Coos County, 39 Oregon 185; Southern Oregon Co. v. Schroder, 39 Oregon 607.

Pennsylvania. — Moore v. Taylor, 147 Pa. St. 481.

Vermont. — Fairbanks v. Kittredge, 24 Vt. 9; Wilson v. Marsh, 34 Vt. 352.

West Virginia. — State v. South Penn Oil Co., 42 W. Va. 80.

4. *Security from Collateral Attack*. — United States. — Stanley v. Albany County, 121 U. S. 535.

Illinois. — Dunham v. Chicago, 55 Ill. 357; Spencer v. People, 68 Ill. 510; People v. Big Muddy Iron Co., 89 Ill. 116; East St. Louis Connecting R. Co. v. People, 119 Ill. 182; St. Louis Bridge, etc., R. Co. v. People, 127 Ill. 627.

Indiana. — Biggs v. Lake County, 7 Ind. App. 142; Stephens v. Smith, 30 Ind. App. 120; International Bldg., etc., Assoc. v. Marion County, 30 Ind. App. 12; Senour v. Matchett, 140 Ind. 636.

Michigan. — Griswold v. Union School Dist., 24 Mich. 262; Stockle v. Silsbee, 41 Mich. 615.

Minnesota. — State v. Lakeside Land Co., 71 Minn. 283; State v. Hynes, 82 Minn. 34.

Missouri. — State v. Hunter, 98 Mo. 386; State v. Vaile, 122 Mo. 33; State v. Western Union Tel. Co., 165 Mo. 502.

Nebraska. — Chapel v. Franklin County, 58 Neb. 544.

Nevada. — State v. Sadler, 21 Nev. 13.

New Hampshire. — Boody v. Watson, 64 N. H. 162; Farmington v. Downing, 67 N. H. 441.

New Jersey. — Chosen Freeholders v. Vanarsdale, 42 N. J. L. 536; Fuller v. Elizabeth, 42 N. J. L. 427. See also State v. Ocean Tp., 39 N. J. L. 75.

New York. — Genesee Valley Nat. Bank v. Livingston County, 53 Barb. (N. Y.) 223; Austen v. Westchester Telephone Co., (N. Y.

collaterally attacked,<sup>1</sup> but an assessment will not be rendered void, and thus exposed to collateral attack, by irregularities or errors honestly committed in the exercise of an official discretion.<sup>2</sup>

c. EXCLUSIVENESS OF STATUTORY REMEDIES. — Errors in assessments, which constitute irregularities merely and do not go to the groundwork of the tax and render the assessments void, can be corrected only in case the revenue acts provide a remedy therefor; and these remedies, when provided, are exclusive, whether they are confined to such inferior tribunals as ministerial officers and boards of equalization and review or include an appeal to the courts. Failure to invoke the statutory remedy within the time prescribed precludes relief by action or suit or in any other proceeding. The excessive valuation of property is an irregularity within this rule where the assessing officers had jurisdiction and acted in good faith, and the only remedy is the procedure given by statute.<sup>3</sup> On the other hand, where defects in assessments

Super. Ct. Gen. T.) 8 Misc. (N. Y.) 11; Brooklyn El. R. Co. v. Brooklyn, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 416, affirmed 11 N. Y. App. Div. 127; Matter of Adler, 76 N. Y. App. Div. 571, affirmed 174 N. Y. 287; Williams v. Weaver, 75 N. Y. 30; New York v. Davenport, 92 N. Y. 604; People v. Kingston, 101 N. Y. 82; McLean v. Jephson, 123 N. Y. 142; U. S. Trust Co. v. New York, 144 N. Y. 488.

Ohio. — Sherard v. Lindsay, 7 Ohio Cir. Dec. 245; Ludlow v. Lewis, 9 Ohio Dec. 600.

Pennsylvania. — Stewart v. Maple, 70 Pa. St. 221.

Vermont. — Taylor v. Moore, 63 Vt. 60. See also Wilson v. Marsh, 34 Vt. 352.

West Virginia. — State v. South Penn Oil Co., 42 W. Va. 80.

See generally the title JURISDICTION, vol. 17, p. 1042.

1. Void Assessments Collaterally Attacked — Illinois. — Clement v. People, 177 Ill. 144.

Michigan. — Wattles v. Lapeer, 40 Mich. 624.

Missouri. — State v. Vaile, 122 Mo. 33; State v. Cunningham, 153 Mo. 642; State v. Merchants Bank, 160 Mo. 640.

New York. — Bowe v. McNab, 11 N. Y. App. Div. 386; Dale v. New York, 71 N. Y. App. Div. 227; Rochester v. Bloss, 77 N. Y. App. Div. 28, affirmed 173 N. Y. 646; National Bank v. Elmira, 53 N. Y. 53; U. S. Trust Co. v. New York, 144 N. Y. 488.

Vermont. — Henry v. Chester, 15 Vt. 460.

Washington. — Olympia Water Works v. Thurston County, 14 Wash. 268.

2. Irregularities Not Fatal — United States. — Youngstown Bridge Co. v. Kentucky, etc., Bridge Co., 64 Fed. Rep. 441 (declaring the law of Indiana); McLeod v. Receveur, (C. C. A.) 71 Fed. Rep. 455.

Illinois. — People v. Lots in Ashley, 122 Ill. 297; Keokuk, etc., Bridge Co. v. People, 145 Ill. 596 [followed People v. Guthrie, 149 Ill. 360]; Spring Valley Coal Co. v. People, 157 Ill. 543.

Indiana. — Senour v. Matchett, 140 Ind. 636.

Missouri. — State v. Hannibal, etc., R. Co., 101 Mo. 120.

New York. — Norris v. Jones, (Supm. Ct. Spec. T.) 7 Misc. (N. Y.) 198, affirmed 81 Hun (N. Y.) 304; Van Deventer v. Long Island City, 139 N. Y. 133.

North Dakota. — Shuttuck v. Smith, 6 N. Dak. 56.

Vermont. — Bullock v. Guilford, 59 Vt. 516.

Wisconsin. — Marsh v. Richwood, 113 Wis. 111.

3. Assessments Erroneous but Not Void — United States. — Stanley v. Albany County, 121 U. S. 535.

Arkansas. — Randle v. Williams, 18 Ark. 380.

California. — Henne v. Los Angeles County, 129 Cal. 297, reversing (Cal. 1899) 59 Pac. Rep. 780, cited Columbia Sav. Bank v. Los Angeles County, 137 Cal. 467; San Jose Gas Co. v. January, 57 Cal. 614; Central Pac. R. Co. v. Board of Equalization, 43 Cal. 365; Chambers v. Satterlee, 40 Cal. 519; People v. Arguello, 37 Cal. 524; Nolan v. Reese, 32 Cal. 484; Emery v. Bradford, 29 Cal. 75; Conlin v. Seamen, 22 Cal. 546.

Colorado. — People v. Arapahoe County, 27 Colo. 86; Duggan v. McCullough, 27 Colo. 43; Barnett v. Jaynes, 26 Colo. 279; Price v. Kramer, 4 Colo. 546.

Connecticut. — State v. Fyler, 48 Conn. 145; Monroe v. New Canaan, 43 Conn. 309; Windsor v. Field, 1 Conn. 279.

Florida. — Jackson County v. Thornton, (Fla. 1902) 33 So. Rep. 291.

Georgia. — Du Bignon v. Brunswick, 106 Ga. 317; Brunswick v. Finney, 54 Ga. 317.

Illinois. — Madison County v. Smith, 95 Ill. 328; Adsit v. Lieb, 76 Ill. 198; Peoria v. Kidder, 26 Ill. 351; Morgan v. Smithson, 9 Ill. 368.

Indiana. — Senour v. Matchett, 140 Ind. 636; Jeffersonville, etc., R. Co. v. McQueen, 49 Ind. 64.

Iowa. — Collins v. Keokuk, 118 Iowa 30; Burlington Gas Light Co. v. Burlington, 101 Iowa 458; Smith v. Marshalltown, 86 Iowa 516; Richards v. Wapello County, 48 Iowa 510; Macklot v. Davenport, 17 Iowa 379.

Kentucky. — Mossett v. Newport, etc., Bridge Co., 106 Ky. 518; Royer Wheel Co. v. Taylor County, 104 Ky. 741.

Louisiana. — Liquidating Com'rs v. Marrero, 106 La. 130; Parker v. Strauss, 49 La. Ann. 1173; Behan v. Assessors, 46 La. Ann. 870; Leeds v. Hardy, 43 La. Ann. 810; New Orleans v. Canal, etc., Co., 32 La. Ann. 157; New Orleans Gas Light Co. v. Assessors, 31 La. Ann. 270; New Orleans v. New Orleans Canal, etc., Co., 29 La. Ann. 851; Frost v. New Orleans, 28 La. Ann. 417; New Orleans v. Buckner, 28 La. Ann. 414; Geren v. Gruber, 26 La. Ann. 694; State v. Louisiana Mut. Ins.

are jurisdictional, rendering them void, the persons aggrieved thereby are entitled to invoke the ordinary judicial remedies applicable for obtaining relief against the illegal acts of inferior tribunals, and may generally obtain relief in equity for fraud, accident, mistake, or other equitable ground, irrespective of whether they have pursued the statutory remedies.<sup>1</sup> With respect

Co., 19 La. Ann. 474; *Schmidt v. New Orleans*, 28 La. Ann. 429.

*Maine*.—*Auburn v. Paul*, 84 Me. 212; *Bath v. Whitmore*, 79 Me. 182; *Waite v. Princeton*, 66 Me. 225; *Gillpatrick v. Saco*, 57 Me. 277; *Hemingway v. Machias*, 33 Me. 445; *Stickney v. Bangor*, 30 Me. 404; *Holton v. Bangor*, 23 Me. 264.

*Massachusetts*.—*Harrington v. Glidden*, 179 Mass. 486, 94 Am. St. Rep. 613; *Bates v. Sharon*, 175 Mass. 293; *Norcross v. Milford*, 150 Mass. 237; *Richardson v. Boston*, 148 Mass. 508; *Hicks v. Westport*, 130 Mass. 480; *Davis v. Macy*, 124 Mass. 193; *Charlestown v. Middlesex County*, 101 Mass. 87; *Little v. Greenleaf*, 7 Mass. 236; *Preston v. Boston*, 12 Pick. (Mass.) 7; *Osborn v. Danvers*, 6 Pick. (Mass.) 98; *Salmond v. Hanover*, 13 Allen (Mass.) 119; *Lincoln v. Worcester*, 8 Cush. (Mass.) 55; *Howe v. Boston*, 7 Cush. (Mass.) 273; *Bates v. Boston*, 5 Cush. (Mass.) 93; *Bourne v. Boston*, 2 Gray (Mass.) 494; *Boston Water Power Co. v. Boston*, 9 Met. (Mass.) 199.

*Michigan*.—*Detroit Citizens' St. R. Co. v. Detroit*, 125 Mich. 673, 84 Am. St. Rep. 589; *Detroit River Sav. Bank v. Detroit*, 114 Mich. 81; *Michigan Sav. Bank v. Detroit*, 107 Mich. 246; *Caledonia Tp. v. Rose*, 94 Mich. 216; *Meade v. Haines*, 81 Mich. 261; *Comstock v. Grand Rapids*, 54 Mich. 641; *Williams v. Saginaw*, 51 Mich. 120; *St. Joseph First Nat. Bank v. St. Joseph Tp.*, 46 Mich. 530; *Atty-Gen. v. Sanilac County*, 42 Mich. 72.

*Minnesota*.—*Clarke v. Sterns County*, 66 Minn. 304, 47 Minn. 552.

*Mississippi*.—*Yazoo, etc., R. Co. v. Adams*, 77 Miss. 764, citing 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 236; *Yazoo Delta Invest. Co. v. Suddoth*, 70 Miss. 416; *Forsdick v. Quitman County*, (Miss. 1899) 25 So. Rep. 294.

*Missouri*.—*National Bank v. Staats*, 155 Mo. 55; *State v. Cummings*, 151 Mo. 49; *State v. Seahorn*, 139 Mo. 582; *State v. Hoyt*, 123 Mo. 348; *State v. Neosho Bank*, 120 Mo. 161; *Deane v. Todd*, 22 Mo. 90.

*Montana*.—*Missoula First Nat. Bank v. Bailey*, 15 Mont. 301; *Ward v. Gallatin County*, 12 Mont. 23; *Northern Pac. R. Co. v. Patterson*, 10 Mont. 90.

*Nebraska*.—*Chapel v. Franklin County*, 58 Neb. 544; *Medland v. Connell*, 57 Neb. 10.

*Nevada*.—*Hardin v. Guthrie*, 26 Nev. 246; *State v. Sadler*, 21 Nev. 13; *State v. Wright*, 4 Nev. 251.

*New Hampshire*.—*Farmington v. Downing*, 67 N. H. 441; *Aldrich v. Cheshire R. Co.*, 21 N. H. 359.

*New Jersey*.—*State v. Danser*, 23 N. J. L. 552.

*New Mexico*.—*U. S. Trust Co. v. Territory*, 10 N. Mex. 416.

*New York*.—*People v. Adams*, 125 N. Y. 471; *People v. Dolan*, 126 N. Y. 166, modifying

on other grounds (Supm. Ct. Gen. T.) 11 N. Y. Supp. 35, 57 Hun (N. Y.) 589; *People v. Tax, etc., Com'rs*, 99 N. Y. 254; *Rochester v. Bloss*, 77 N. Y. App. Div. 28, affirmed without opinion 173 N. Y. 646; *People v. Barker*, 75 Hun (N. Y.) 6, cited *People v. Feitner*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 467; *People v. Barker*, 86 Hun (N. Y.) 148, affirmed in part 147 N. Y. 31; *Matter of Winegard*, 78 Hun (N. Y.) 58; *People v. Feitner*, 65 N. Y. App. Div. 224; *People v. Feitner*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 463; *People v. Manhattan F. Ins. Co.* (Supm. Ct. Spec. T.) 59 N. Y. Supp. 1007; *New York v. Watts*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 595; *Matter of McLean*, 3 Silv. Sup. (N. Y.) 314.

*Oklahoma*.—*Carroll v. Gerlach*, 11 Okla. 151; *Wilson v. Wiggins*, 7 Okla. 517.

*Oregon*.—*West Portland Park v. Kelly*, 29 Oregon 412; *Oregon Steam Nav. Co. v. Wasco County*, 2 Oregon 206.

*Pennsylvania*.—*Moore v. Taylor*, 147 Pa. St. 481; *Van Nort's Appeal*, 121 Pa. St. 118; *Carlisle School Dist. v. Hephurn*, 79 Pa. St. 159; *Hutchinson v. Pittsburg*, 72 Pa. St. 320; *Everitt's Appeal*, 71 Pa. St. 216; *Clinton School Dist.'s Appeal*, 56 Pa. St. 315; *Wharton v. Birmingham*, 37 Pa. St. 371; *Hughes v. Kline*, 30 Pa. St. 227; *Kimber v. Schuylkill County*, 20 Pa. St. 366; *Republica v. Deaves*, 3 Yeates (Pa.) 464.

*Rhode Island*.—*Tripp v. Merchants' Mut. F. Ins. Co.*, 12 R. I. 435.

*Tennessee*.—*Union, etc., Bank v. Memphis*, 107 Tenn. 66; *Ward v. Alsop*, 100 Tenn. 619, citing 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 241-244, 453 *et seq.*; *Grundy County v. Tennessee Coal, etc., Co.*, 94 Tenn. 295.

*Texas*.—*Hoeftling v. San Antonio*, 15 Tex. Civ. App. 257.

*Vermont*.—*Waterman v. Davis*, 66 Vt. 83.

*Wisconsin*.—*Bratton v. Johnson*, 76 Wis. 430; *Boorman v. Juneau County*, 76 Wis. 550.

**Statutory Appeals and Certiorari**.—*Ferguson v. Board of Review*, 119 Iowa 338; *Smith v. Jones County*, 30 Iowa 531; *Polk County v. Des Moines*, 70 Iowa 351; *State v. State Board of Assessment*, 3 S. Dak. 338.

**Cumulative Remedies**.—*Maxwell v. People*, 189 Ill. 546, 580, 591, 604; *Wilmington v. Ricaud*, (C. C. A.) 90 Fed. Rep. 214 (*construing North Carolina statutes*); *Moody v. Galveston*, 21 Tex. Civ. App. 16.

**Mandamus to Correct Errors**.—Failure to pursue the statutory remedy does not preclude the bringing of mandamus against an officer empowered to correct clerical or other errors in assessments. *Smith v. McQuiston*, 108 Iowa 363, limiting *Polk County v. Sherman*, 99 Iowa 66.

**1. Jurisdictional Defects—Equitable Relief**.—*Colorado*.—*Pueblo County v. Wilson*, 15 Colo. 90.

*Illinois*.—*Maxwell v. People*, 189 Ill. 546;

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to relief on equitable grounds such as fraud, however, it has been held that the statutory remedies for the correction of assessments must be pursued, and failure to do so, unless excusable, will waive the right to relief in the courts.<sup>1</sup>

*f.* **PRESUMPTIONS AND BURDEN OF PROOF.**—In accordance with the universal presumption in favor of the regularity and validity of official acts, tax assessments made in the line of official duty are presumably correct, and the burden of showing the contrary is upon the person claiming to be aggrieved.<sup>2</sup> Accordingly, it will be presumed that the required notice of the

St. Louis Bridge, etc., R. Co. v. People, 127 Ill. 627; *Buttenuth v. St. Louis Bridge Co.*, 123 Ill. 535, 5 Am. St. Rep. 545; *English v. People*, 96 Ill. 566.

*Iowa.*—*Dickey v. Polk County*, 58 Iowa 287; *Barber v. Farr*, 54 Iowa 57.

*Louisiana.*—*Taylor Bros. Iron Works Co. v. New Orleans*, 44 La. Ann. 554; *New Orleans v. McArthur*, 12 La. Ann. 47.

*Maine.*—*Judkins v. Reed*, 48 Me. 386.

*Massachusetts.*—*Charlestown v. Middlesex County*, 109 Mass. 270; *Bemis v. Board of Aldermen*, 14 Allen (Mass.) 366.

*Michigan.*—*Detroit v. Wayne Circuit Judge*, 127 Mich. 604; *Williams v. Saginaw*, 51 Mich. 120; *McCoy v. Anderson*, 47 Mich. 502; *Nester v. Baraga Tp.* (Mich. 1903) 95 N. W. Rep. 722; *Woodmere Cemetery Assoc. v. Springwells Tp.*, 130 Mich. 466.

*Minnesota.*—*St. Paul v. Merritt*, 7 Minn. 258.

*Nevada.*—*State v. Central Pac. R. Co.*, 7 Nev. 99.

*New Hampshire.*—*Walker v. Cochran*, 8 N. H. 166.

*New York.*—*McLean v. Jephson*, 123 N. Y. 142, reversing 41 Hun (N. Y.) 479; *People v. Lewis*, 55 Hun (N. Y.) 521; *Matter of Ulster County Sav. Bank*, 20 Hun (N. Y.) 481; *Dale v. New York*, 71 N. Y. App. Div. 227; *People v. Feitner*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 641, 30 Civ. Pro. (N. Y.) 398; *People v. Feitner*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 474; *Metcalf v. Messenger*, 46 Barb. (N. Y.) 325.

*Oregon.*—*West Portland Park v. Kelly*, 29 Oregon 412.

*Pennsylvania.*—*Com. v. Delaware Div. Canal Co.*, 123 Pa. St. 594; *Silver v. Schuylkill*, 32 Pa. St. 356.

*Rhode Island.*—*Mechanics' Sav. Bank v. Granger*, 17 R. I. 77.

*Tennessee.*—*Ward v. Alsup*, 100 Tenn. 619, citing 25 AM. AND ENG. ENCYC. OF LAW (1st ed.) 244, note 1; *Union, etc., Bank v. Memphis*, 107 Tenn. 66; *Grundy County v. Tennessee Coal, etc., Co.*, 94 Tenn. 295.

*Texas.*—*Davis v. Burnett*, 77 Tex. 3.

*Vermont.*—*Babcock v. Granville*, 44 Vt. 325; *Fairbanks v. Kittredge*, 24 Vt. 9.

*Washington.*—*Lewiston Water, etc., Co. v. Asotin County*, 24 Wash. 371.

*Wisconsin.*—*Crane v. Janesville*, 20 Wis. 305; *State v. Williston*, 20 Wis. 228.

*Canada.*—*Nickle v. Douglas*, 37 U. C. Q. B. 51, affirming 35 U. C. Q. B. 126; *O'Brien v. Cogswell*, 17 Can. Sup. Ct. 420, dismissing appeal from *sub nom. Cogswell v. Holland*, 21 Nova Scotia 155, 279.

**Excusing Failure to Pursue Statutory Remedy.**—*Du Bignon v. Brunswick*, 106 Ga. 317; *Peo-*

*ple v. Lots in Ashley*, 122 Ill. 297; *Felsenthal v. Johnson*, 104 Ill. 21; *Trust, etc., Co. v. Portsmouth*, 59 N. H. 33; *People v. Duguid*, 68 Hun (N. Y.) 243; *People v. Feitner*, 35 N. Y. App. Div. 490; *Clawson Lumber Co. v. Jones*, 20 Tex. Civ. App. 208.

**1. Relief on Equitable Grounds in Statutory Tribunals.**—*Burton Stock Car Co. v. Traeger*, 187 Ill. 9, followed *Burton Stock Car Co. v. Barnett*, 187 Ill. 539; *Spring Valley Coal Co. v. People*, 157 Ill. 543; *Crawford v. Polk County*, 112 Iowa 118; *Ferguson v. Board of Review*, 119 Iowa 338; *Moody v. Galveston*, 21 Tex. Civ. App. 16; *Clawson Lumber Co. v. Jones*, 20 Tex. Civ. App. 208. See also *State v. West Duluth Land Co.*, 75 Minn. 456; *State v. Lakeside Land Co.*, 71 Minn. 283.

**A Charge of Fraud Must Involve the Board of Equalization** as well as the assessors, since an arbitrary and illegal instrument as made by the assessors does not necessarily vitiate the assessment as established upon review by the board of equalization. *Southern Oregon Co. v. Coos County*, 39 Oregon 185, citing *State v. Central Pac. R. Co.*, 21 Nev. 172.

**2. Presumptions and Burden of Proof.**—*Alabama.*—*Perry County v. Selma, etc., R. Co.*, 65 Ala. 391; *State Auditor v. Jackson County*, 65 Ala. 142; *State v. Kidd*, 125 Ala. 413; *Walling v. Morgan County*, 126 Ala. 326. But see *Sullivan v. State*, 110 Ala. 95.

*California.*—*Palmer v. Boling*, 8 Cal. 384; *Oakland v. Southern Pac. Co.*, 131 Cal. 226.

*Colorado.*—*People v. Arapahoe County*, 27 Colo. 86.

*Illinois.*—*Buck v. People*, 78 Ill. 560; *Beers v. People*, 83 Ill. 488; *Consolidated Coal Co. v. Baker*, 135 Ill. 545; *Wabash R. Co. v. People*, 138 Ill. 307.

*Indiana.*—*Adams v. Davis*, 109 Ind. 10; *Buck v. Miller*, 147 Ind. 586, 62 Am. St. Rep. 436; *Midland R. Co. v. State*, 11 Ind. App. 433.

*Iowa.*—*Jones v. Tiffin*, 24 Iowa 190; *Bee-son v. Johns*, 59 Iowa 166; *Silcott v. McCarty*, 62 Iowa 161; *King v. Parker*, 73 Iowa 757; *Matter of Kauffman*, 104 Iowa 639; *Frost v. Board of Review*, 114 Iowa 103.

*Kentucky.*—*Marion County v. Wilson*, 105 Ky. 302; *Woolley v. Louisville*, 71 S. W. Rep. 893, 24 Ky. L. Rep. 1357.

*Louisiana.*—*New Orleans v. New Orleans Canal, etc., Co.*, 29 La. Ann. 851; *New Orleans v. Louisiana Sav. Bank, etc., Co.*, 31 La. Ann. 826; *State v. Louisiana Sav. Bank, etc., Co.*, 32 La. Ann. 1136; *New Orleans Cotton Exch. v. Assessors*, 37 La. Ann. 423; *Merchants' Mut. Ins. Co. v. Assessors*, 40 La. Ann. 371; *Oteri v. Parker*, 42 La. Ann. 374.

*Massachusetts.*—*Blossom v. Cannon*, 14 Mass. 177.



assessment was given,<sup>1</sup> that the board held its session as prescribed by law;<sup>2</sup> that a correct method of valuation was used,<sup>3</sup> and that a fair valuation was placed upon the property;<sup>4</sup> that the assessment was made in good faith<sup>5</sup> and by the proper officer,<sup>6</sup> and was completed within the time required.<sup>7</sup>

**X. LEVY** — 1. **In General — Meaning of Term.** — The word "levy" as applied to taxes has various meanings. It is used indiscriminately to denote the legislative function of charging the collective body of taxpayers with the sums to be raised, and the ministerial function of extending the taxes against the individual taxpayers. The latter involves the ascertainment of the amount due from each taxpayer, and is complementary of the work of the assessors.<sup>8</sup> The word also means the raising or collection of the tax,<sup>9</sup> and is sometimes used as the equivalent of the word "assess."<sup>10</sup>

*Michigan.* — *Yelverton v. Steele*, 36 Mich. 62; *Stockle v. Silsbee*, 41 Mich. 615; *Hunt v. Chapin*, 42 Mich. 25; *Perkins v. Nugent*, 45 Mich. 157; *Cuming v. Grand Rapids*, 46 Mich. 150; *Detroit Citizens' St. R. Co. v. Detroit*, 125 Mich. 673, 84 Am. St. Rep. 589.

*Minnesota.* — *St. Peter's Church v. Scott County*, 12 Minn. 395; *Thompson v. Tinkcom*, 15 Minn. 297; *Redwood County v. Winona, etc.*, Land Co., 40 Minn. 512, *affirmed* *Winona, etc.*, Land Co. v. Minnesota, 159 U. S. 527; *State v. Weyerhaeuser*, 68 Minn. 353, *affirmed* 176 U. S. 550.

*Mississippi.* — *Brigins v. Chandler*, 60 Miss. 862.

*Nebraska.* — *Miller v. Hurford*, 13 Neb. 13. *New Hampshire.* — *Dewey v. Stratford*, 42 N. H. 282.

*New Jersey.* — *State v. McClurg*, 27 N. J. L. 253; *Newark v. State*, 32 N. J. L. 453; *State v. Manning*, 41 N. J. L. 275; *State v. Abbott*, 42 N. J. L. 109; *State v. Hudson County*, 46 N. J. L. 93; *State v. Pierson*, 47 N. J. L. 247; *State v. Hawken*, 50 N. J. L. 122.

*New York.* — *People v. Campbell*, 70 Hun (N. Y.) 599, 24 N. Y. Supp. 212; *People v. Jackson*, 18 N. Y. App. Div. 627; *People v. Kalbfleisch*, 25 N. Y. App. Div. 432; *People v. O'Rourke*, 31 N. Y. App. Div. 583; *Matter of Adler*, 76 N. Y. App. Div. 571, *affirmed* 174 N. Y. 287; *Matter of Voorhis*, 90 N. Y. 668; *People v. Davenport*, 91 N. Y. 574; *People v. Collision*, (Supm. Ct. Spec. T.) 22 Abb. N. Cas. (N. Y.) 52; *Oswego County v. Betts*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 934; *People v. Davenport*, 91 N. Y. 574; *People v. Adams*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 295.

*North Dakota.* — *Farrington v. New England Invest. Co.*, 1 N. Dak. 102.

*Oregon.* — *Oregon Coal, etc., Co. v. Coos County*, 30 Oregon 308.

*Tennessee.* — *Louisville, etc., R. Co. v. State*, 8 Heisk. (Tenn.) 663.

*Vermont.* — *Macomber v. Center*, 44 Vt. 235.

*Wisconsin.* — *Tainter v. Lucas*, 29 Wis. 375; *State v. Manitowoc County*, 59 Wis. 15; *Canfield v. Bayfield County*, 74 Wis. 60.

1. **Notice of Assessment.** — *Maish v. Arizona*, 164 U. S. 599; *Taft v. Ballou*, 23 R. I. 213.

**Recitals in Certificate of Equalization Not Conclusive as to Notice.** — *State v. Warford*, 32 N. J. L. 207.

2. **Required Sessions Held.** — *Adams v. Osgood*, 60 Neb. 779.

3. **Correct Method of Valuation.** — *Gallup v.*

*Schmidt*, 154 Ind. 196; *People v. Feitner*, 58 N. Y. App. Div. 555; *People v. Davenport*, 91 N. Y. 574.

4. **Fair Valuation.** — *Chicago Union Traction Co. v. State Board of Equalization*, 112 Fed. Rep. 607; *State v. Western Union Tel. Co.*, 165 Mo. 502; *Williams v. Bettie*, 50 N. J. L. 132.

5. **Good Faith Presumed.** — *People v. Barker*, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 258.

6. **Proper Officer.** — *Pentecost v. Stiles*, 5 Okla. 501.

7. **Completion in Required Time.** — *State v. Meyers*, 23 Nev. 274.

8. **Various Meanings of Word "Levy."** — *Perry County v. Selma, etc.*, R. Co., 58 Ala. 546; *Maguire v. Board of Revenue*, 71 Ala. 401; *Allen v. McKay*, 120 Cal. 332; *State v. Maginnis*, 26 La. Ann. 558; *State v. Lakeside Land Co.*, 71 Minn. 283; *Moore v. Foote*, 32 Miss. 469; *Hohenstatt v. Bridgeton*, 62 N. J. L. 169; *Morton v. Comptroller Gen.*, 4 S. Car. 430; *Clegg v. State*, 42 Tex. 605; *Bradley v. Lincoln County*, 60 Wis. 71; *Winnipeg v. Canadian Pac. R. Co.*, 12 Manitoba 581 [*reversed* on other grounds 30 Can. Sup. Ct. 558], *citing* 25 AM. AND ENCYC. OF LAW (1st ed.) 181. See also *State v. Camp Sing*, 18 Mont. 128, 56 Am. St. Rep. 551, and *Levy*, vol. 18, p. 838.

The word "Levy" as applied to taxes sometimes means to raise, to exact by authority of government, or to determine by vote the amount of taxes to be raised. It is in this sense that towns, cities, and school districts levy taxes. In other cases it is used with reference to the mere ministerial or executive acts of extending them on the tax books, and collecting them. *State v. Lakeside Land Co.*, 71 Minn. 283.

**Assessment and Levy in Tax Procedure.** — To assess a tax is to adjudge and determine what portion of his property the taxpayer shall contribute to the public. To levy a tax is to make a record of this determination and to extend the assessment against the taxpayer's property. *Chicago, etc., R. Co. v. Klein*, 52 Neb. 258. See also *Moore v. Foote*, 32 Miss. 469.

9. **"Levy" as Meaning Collection of Tax.** — *Rhoads v. Given*, 5 Houst. (Del.) 183; *Valle v. Fargo*, 1 Mo. App. 344; *Waterman v. Harkness*, 2 Mo. App. 494; *Elliot v. Gantt*, 64 Mo. App. 248; *Chicago, etc., R. Co. v. Forest County*, 95 Wis. 80.

10. See *supra*, this title, *Assessment — Definitions*; and see *San Luis Obispo v. Pettit*, 87 Cal. 499; *Scudder v. State*, 33 N. J. L. 424;

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**2. Legislative Levy — a. NECESSITY OF.** — The first step in taxation, whether by the state or inferior political subdivisions of the state, is the levy by the proper legislative body. Until this is done there can be no assessment or collection.<sup>1</sup>

**b. PROPERTY NOT TAXABLE IN ABSENCE OF LEVY.** — It is elementary that property, however taxable, that is, however liable to taxation, cannot be assessed and subjected to consequent taxes unless the authority which had the right to speak has been heard thus to command. In other words, property in itself taxable cannot be assessed and be made to contribute, by taxation, to government expenses, where the proper authority has not directed its assessment.<sup>2</sup>

**c. LEGISLATIVE INTENT TO IMPOSE TAX MUST BE APPARENT.** — Since it is a settled principle that, however clear the power may be, or even the duty, of the legislative body to levy a tax on any particular species of property, until that power has been exerted the burden cannot be imposed and the legislative intent to impose a tax must be explicitly and distinctly shown. It cannot be extended by implication beyond the clear import of the language used. Hence, where there was no legislative enactment directing the assessment on a man's income, such income could not be assessed and payment of the tax enforced.<sup>3</sup>

**d. LEVY, HOW MADE.** — The levy, that is, the governmental act which determines that a tax shall be laid, as distinguished from the levy on property, incident to the enforcement of the collection of the tax, has been embodied in constitutional provisions in some of the states without the assistance of the legislature;<sup>4</sup> but, as a general rule, a levy can be made only by legislative enactment or authority,<sup>5</sup> within the limits and in the form prescribed by the

*Evans v. Saunders*, 3 Lea (Tenn.) 734; *Homes v. Henrietta*, (Tex. Civ. App. 1897) 41 S. W. Rep. 728, Hunter, J., *dissenting*.

**1. Levy First Step in Taxation.** — *State v. Board of Revenue*, 73 Ala. 65. See *Clegg v. State*, 42 Tex. 605. See also *Morton v. Comptroller Gen.*, 4 S. Car. 430, wherein the court enumerates the various steps to be taken in imposing a tax under the constitution and laws of *South Carolina*.

**A Failure to Levy a Tax** under a statute requiring a levy is a fraudulent defect in tax proceedings which destroys the groundwork of the tax. *Dever v. Cornwell*, 10 N. Dak. 123.

**In Missouri**, by statute, express power is given to the County Court to levy certain taxes on railroad property, both local and distributable, and the manner is prescribed in which that power shall be exercised. Until the County Court has made such levy, the clerk has no power to extend such taxes upon the tax books against the property of the railroad company. *State v. Hannibal*, etc., R. Co., 135 Mo. 618.

**2. Property Not Taxable in Absence of Levy.** — *Smithberg v. Archer*, 108 Iowa 215; *New Orleans Cotton Exch. v. Assessors*, 35 La. Ann. 1154.

**As the Taxing Power Is Vested in the Legislature**, and as it is the exclusive province of the legislature to apportion and direct the assessment of taxes, no property can be lawfully taxed without legislative authority. *Wheeler v. Plattsmouth*, 7 Neb. 270. And see *supra*, this title, *Power of Taxation*.

**3. Legislative Intent to Levy Tax Must Be Shown.** — *Forman v. Assessors*, 35 La. Ann. 825; *New Orleans Cotton Exch. v. Assessors*, 35 La. Ann. 1154.

**4. Levy of Taxes Embodied in Constitutional Provisions.** — *San Francisco*, etc., R. Co. v. State Board of Equalization, 60 Cal. 12; *Davis v. Green*, 40 La. Ann. 281; *Walcott v. People*, 17 Mich. 68.

**A Constitutional Provision of Missouri** was held not to confer power on cities and towns to levy taxes, in *State v. Van Every*, 75 Mo. 530. The court said: "Such powers they derive from acts of the general assembly and not directly from the constitutional provision."

**5. Levy Can Only Be Made by Legislative Authority** — *United States*. — *Meriwether v. Garrett*, 102 U. S. 472.

*Alabama*. — *State v. Board of Revenue*, 73 Ala. 65.

*California*. — *Houghton v. Austin*, 47 Cal. 646.

*Georgia*. — *Vanover v. Davis*, 27 Ga. 354.

*Illinois*. — *Allen v. Peoria*, etc., R. Co., 44 Ill. 85.

*Indiana*. — *Bright v. McCullough*, 27 Ind. 223.

*Louisiana*. — *Forman v. Assessors*, 35 La. Ann. 825; *New Orleans Cotton Exch. v. Assessors*, 35 La. Ann. 1154.

*Michigan*. — *Folkerts v. Power*, 42 Mich. 283.

*Missouri*. — *State v. St. Louis*, etc., R. Co., 74 Mo. 163.

*North Carolina*. — *Simmons v. Wilson*, 66 N. Car. 336.

*Ohio*. — *Zanesville v. Richards*, 5 Ohio St. 590.

*Oklahoma*. — *Atchison*, etc., R. Co. v. *Wiggins*, 5 Okla. 477.

*South Carolina*. — *Morton v. Comptroller Gen.*, 4 S. Car. 430.

organic law,<sup>1</sup> and by a duly authorized and properly constituted body.<sup>2</sup> Thus, where a law required a county levy to be laid by a majority at least of the justices of the county, it was held that any less number, although they might constitute a court for a different purpose, had no jurisdiction in the case of a levy.<sup>3</sup>

**Designating Purpose of Tax.** — In many of the states it is required that the enactment levying a tax shall designate or specify the purpose for which the tax is levied.<sup>4</sup>

**e. CONCLUSIVENESS AND EFFECT OF LEVY.** — The determination of the legislative body in levying a tax is, within constitutional restrictions, generally conclusive and not subject to judicial review.<sup>5</sup> The legislature may repeal a statute under which taxes have been imposed, or prohibit the collection of taxes after they have been duly levied and assessed.<sup>6</sup> But the repeal of a taxing statute does not in every case necessarily abrogate proceedings already commenced under the former statute, so as to relieve a taxpayer from

*Virginia.* — *Virginia, etc., R. Co. v. Washington County*, 30 Gratt. (Va.) 471.

And see *supra*, this title, *Power of Taxation*.

**1. Legislative Enactment Must Comply with Organic Law.** — *People v. Kings County*, 52 N. Y. 556; *Sweigle v. Gates*, 9 N. Dak. 538; *Morton v. Comptroller Gen.*, 4 S. Car. 430; *State v. Hagood*, 13 S. Car. 46; *Clegg v. State*, 42 Tex. 605; *Dean v. Lufkin*, 54 Tex. 265. See *supra*, this title, *Power of Taxation* — *Constitutional Restrictions*. See also the title *STATUTES*, vol. 26, p. 536.

**Power of Municipal Corporations to Levy Taxes.** — See *infra*, this title, *Municipal Taxation*.

**Validity of Levy by Percentages in North Dakota.** — *Fisher v. Betts*, (N. Dak. 1903) 96 N. W. Rep. 132. See also *Sykes v. Beck*, (N. Dak. 1903) 96 N. W. Rep. 844.

**Authority of County to Levy Taxes in Georgia.** — *Habersham County v. Porter Mfg. Co.*, 103 Ga. 613; *Atlanta Nat. Bldg., etc., Assoc. v. Stewart*, 109 Ga. 80.

**Where a Day Is Appointed by Law When a Levying Court Shall Meet and levy taxes, if the court does not meet upon that day a levy made by them at a subsequent time is invalid.** *Berger v. Lutterloh*, 69 Ark. 576.

**Time of Making Levy by County Commissioners in Oklahoma.** — *Sharpe v. Engle*, 2 Okla. 624, followed *Sharpe v. Maney*, 3 Okla. 105.

**Statutory Provision Concerning Time of Making Levy Held Directory.** — *Wingate v. Ketner*, 8 Wash. 94.

**2. Body Imposing Tax Must Possess Authority and Be Properly Constituted.** — *Gilbert v. Houston*, Litt. Sel. Cas. (Ky.) 223. See also generally the title *STATUTES*, vol. 26, p. 534.

**The Provision in the Tennessee Code requiring a specified number or portion of the justices composing the court to be present for any given purpose has been uniformly construed by the Supreme Court of the state as rendering void an action of the court which did not on the record appear to have been transacted or ordered by a court composed of the requisite number.** *Central Trust Co. v. Ashville Land Co.*, (C. C. A.) 72 Fed. Rep. 361, citing *Coleman v. Smith*, Mart. & Y. (Tenn.) 36; *Mankin v. State*, 2 Swan (Tenn.) 206, and *McCullough v. Moore*, 9 Yerg. (Tenn.) 305.

**3. Concurrence of Majority.** — *Gilbert v. Houston*, Litt. Sel. Cas. (Ky.) 223. See *State v.*

*Woodside*, 8 Ired. L. (30 N. Car.) 104; *Steele v. Blanton*, 1 Lea (Tenn.) 514.

**A Vote of Village Trustees Was Held to Constitute a Refusal to Levy a Tax** where the board of trustees consisted of six members, and three of them voted to raise the required sum and three voted against it. Such act of the board was in legal effect a refusal, because a majority did not vote in favor of the requisition. *People v. Bennett*, 54 Barb. (N. Y.) 480.

**4. Specifying Purpose of Levy.** — *Somerset v. Somerset Banking Co.*, 109 Ky. 549; *Cahill v. Perrine*, 105 Ky. 531.

A levy of a tax by the commissioners' court "for court-house and jail" is not void for uncertainty, the purpose being sufficiently indicated in the order. *Creswell Ranch, etc., Co. v. Roberts County*, (Tex. Civ. App. 1894) 27 S. W. Rep. 737.

**5. Determination of Legislative Body Conclusive** — *United States.* — *Chicago, etc., R. Co. v. Otoe County*, 16 Wall. (U. S.) 667.

*California.* — *People v. Burr*, 13 Cal. 343; *Beals v. Amador County*, 35 Cal. 624.

*Iowa.* — *Stewart v. Polk County*, 30 Iowa 9, 1 Am. Rep. 238.

*Louisiana.* — *State v. Maginnis*, 26 La. Ann. 558.

*Michigan.* — *Woodbridge v. Detroit*, 8 Mich. 274.

*Missouri.* — *Glasgow v. Rowse*, 43 Mo. 479.

*New York.* — *People v. Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Brewster v. Syracuse*, 19 N. Y. 116; *Gordon v. Cornes*, 47 N. Y. 608; *People v. Home Ins. Co.*, 92 N. Y. 328.

*Ohio.* — *Scovill v. Cleveland*, 1 Ohio St. 126. See also *supra*, this title, *Power of Taxation*.

**Determination of Local Bodies Conclusive.** — *Case v. Dean*, 16 Mich. 12; *Water Com'rs v. East Saginaw*, 33 Mich. 164; *Matter of Powers*, 52 Mo. 218; *Wharton v. School Directors*, 42 Pa. St. 358; *Obion County v. Marr*, 8 Humph. (Tenn.) 634; *Creswell Ranch, etc., Co. v. Roberts County*, (Tex. Civ. App. 1894) 27 S. W. Rep. 737; *Eddy v. Wilson*, 43 Vt. 362; *Tee-garden v. Racine*, 56 Wis. 545.

**6. Repeal of Statute Imposing Taxes.** — *Augusta v. North*, 57 Me. 392. And see the title *STATUTES*, vol. 26, pp. 752, 753.

**Authority of Inferior Bodies to Reverse Official Action Relating to Taxation.** — *People v. Schenectady County*, 35 Barb. (N. Y.) 408.

payment of an assessment, unless such an intent is clearly expressed.<sup>1</sup> A defective levy may be cured by the legislature where the levy sought to be invalidated was one that the legislature might originally have made or authorized a board to make.<sup>2</sup>

*f.* **EXHAUSTION OF POWER.** — In general, the power to tax is permanent and continuing, to be exercised whenever the public good may require it;<sup>3</sup> though a single levy is sometimes deemed to exhaust the power for the time being, as where the body levying the tax has authority to make a levy but once within a certain period of time.<sup>4</sup> A levy of the full amount limited by law may preclude an additional tax,<sup>5</sup> but it has been held that an unsuccessful attempt to lay a tax does not exhaust the power, and a new and valid levy may be made afterwards.<sup>6</sup>

*g.* **RECORD OF LEVY.** — It has been held that every essential proceeding in the course of a levy of taxes should appear in some written and permanent form in the records of the bodies authorized to act upon it, and that a parol levy of taxes is not possible.<sup>7</sup> The record is usually the only evidence to show whether the tax was duly levied,<sup>8</sup> and it is ordinarily conclusive as to

1. **Repeal of Statute Held Not to Affect Tax.** — *Appeal Tax Ct. v. Western Maryland R. Co.*, 50 Md. 274. See also *Warren R. Co. v. Belvidere*, 35 N. J. L. 584.

**Legislative Intent Must Clearly Appear.** — *Gardenshire v. Mitchell*, 21 Kan. 83; *Clegg v. State*, 42 Tex. 605.

**Constitutional Charge Held Not to Invalidate Tax.** — *Burlington, etc., R. Co. v. Saunders County*, 9 Neb. 507.

2. **Curing Defective Levy.** — *Shuttuck v. Smith*, 6 N. Dak. 56, cited *Wells County v. McHenry*, 7 N. Dak. 246. See also *Dever v. Cornwell*, 10 N. Dak. 123.

3. **That the Taxing Power Is Continuing.** — See *Municipality No. Two v. Dunn*, 10 La. Ann. 57. See also *Reithmiller v. People*, 44 Mich. 280.

**A Levy Was Held to Be Continuing** in *Davis v. Brace*, 82 Ill. 542.

4. **Bodies Held to Have Exhausted Power in Making Levies.** — *Cope v. Collins*, 37 Ark. 649; *Vance v. Little Rock*, 30 Ark. 435; *St. Louis Bridge, etc., R. Co. v. People*, 127 Ill. 627; *Cummings v. Fitch*, 40 Ohio St. 56; *Oliver v. Carsner*, 39 Tex. 396.

**Making Two Levies in One Year.** — Where a board of trustees for schools was not required to make a levy at any special date, it was held that it would make two levies in the same year, one for the current, the other for the year following. *Cincinnati, etc., R. Co. v. Com.*, (Ky. 1899) 51 S. W. Rep. 568.

**Additional Assessment by Common Council Held Unauthorized.** — *Oregon Steam Nav. Co. v. Portland*, 2 Oregon 81.

**Exhaustion of Power by Levy under Mandamus.** — *Vance v. Little Rock*, 30 Ark. 435.

5. **Levy of Limited Amount Precludes Additional Tax.** — *Dumpley v. Humboldt County*, 58 Iowa 273; *Sterling School Furniture Co. v. Harvey*, 45 Iowa 466; *Atchison, etc., R. Co. v. Atchison County*, 47 Kan. 722; *Osborne County v. Blake*, 25 Kan. 356; *Atchison, etc., R. Co. v. Woodcock*, 18 Kan. 20; *State v. Cage*, 34 La. Ann. 506; *Wattles v. Lapeer*, 40 Mich. 624; *Arnold v. Hawkins*, 95 Mo. 569; *Cummings v. Fitch*, 40 Ohio St. 56.

**Excessive Levy Held Illegal.** — *Atchison, etc., R. Co. v. Wiggins*, 5 Okla. 477.

**Limitation in Nebraska on Amount Counties May Levy.** — *Chicago, etc., R. Co. v. Klein*, 52 Neb. 258. See also *Chicago, etc., R. Co. v. Klein*, 54 Neb. 781.

6. **Unsuccessful Attempt to Lay Tax Does Not Exhaust Power.** — *Sanford v. Prentice*, 28 Wis. 358. See also *Himmelmänn v. Cofran*, 36 Cal. 411; *Somerset v. Somerset Banking Co.*, 109 Ky. 549; *State v. Maguire*, 52 Mo. 420.

A school district meeting voted a tax for a schoolhouse. No action was taken upon the vote, and it was neither reconsidered nor rescinded. Some months afterwards a like tax was voted at a special meeting. It was held that the last vote was valid. *Randall v. Smith*, 1 Den. (N. Y.) 214.

7. **Necessity of Record.** — *Moore v. Cooke*, 40 Iowa 290; *Moser v. White*, 29 Mich. 59; *Cardigan v. Page*, 6 N. H. 182. See also *Central Trust Co. v. Ashville Land Co.*, (C. C. A.) 72 Fed. Rep. 361; *Hodgkin v. Fry*, 33 Ark. 716; *Taymouth v. Koehler*, 35 Mich. 22; *Sherwin v. Bugbee*, 17 Vt. 337.

**School Directors Held Not Required to Keep Record.** — In *Gearhart v. Dixon*, 1 Pa. St. 224, it was held that school directors are not required to keep a record of their proceedings, in levying a school tax, although it is advisable that they should do so.

**Tax Held Valid Notwithstanding Neglect to Record.** — *Kansas City, etc., R. Co. v. Tontz*, 29 Kan. 460.

**Statement in Record Held Sufficient.** — *Jefferson County v. Johnson*, 23 Kan. 717.

**Minutes of County Commissioners Held Sufficient under Florida Statute.** — *State v. Southern Land, etc., Co.*, (Fla. 1903) 33 So. Rep. 999.

**Levy by County Fiscal Court Held Sufficient under Kentucky Statute.** — *Pulaski County v. Watson*, 106 Ky. 500.

**Presumption that Tax Is Levied by Proper Authority.** — *Gage v. Bailey*, 102 Ill. 11.

**Township Committee Order Need Not Be in Writing.** — *State v. Sallmann*, 37 N. J. L. 156.

8. **Record as Evidence.** — *Casady v. Lowry*, 49 Iowa 523; *Moore v. Cooke*, 40 Iowa 290; *Halleck v. Boylston*, 117 Mass. 469; *Williams v. School Dist. No. 1*, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; *Williams v. Mears*, 61 Mich. 86; *Paul v. Linscott*, 56 N. H. 347; *Farrar v. Fessenden*,

all matters properly stated therein.<sup>1</sup> It should show that the requisite statutory preliminary requirements have been complied with;<sup>2</sup> that a meeting of the proper body has been held, and the proceedings thereof,<sup>3</sup> and that the proposition to make the levy has been duly presented and adopted;<sup>4</sup> also the facts constituting performance of the statutory requirements should appear, a mere statement that the statute was complied with being usually not enough.<sup>5</sup> Due authentication as required by law may be necessary to the validity of the proceedings,<sup>6</sup> and though it may be proper and desirable that the records of subordinate bodies concerning their proceedings in levying a tax should contain certain signatures, yet an entry of the levy on the proper book of record kept for that purpose may under certain circumstances be sufficient.<sup>7</sup>

**Absence of the Record of Levy** from the place provided for its preservation, and in which it ought to be found, may constitute a circumstance tending to show that no levy was made,<sup>8</sup> but facts may be shown from which its existence and subsequent loss or destruction may be inferred;<sup>9</sup> and when such loss or destruction is established, secondary evidence of its contents may be given.<sup>10</sup>

**3. Ministerial Levy** — *a.* IN GENERAL. — The levy that is to be discussed in this subdivision denotes the ministerial function of extending the tax against the individual subjects of taxation, which involves the ascertainment of the amount due from each taxable subject.<sup>11</sup> After the preliminary steps have been taken, the amount to be imposed upon each subject must be computed and entered in the roll by the officers or body upon whom the duty rests. The statutory provisions of the various states prescribe the mode of

39 N. H. 268; *Cardigan v. Page*, 6 N. H. 182; *State v. Hardcastle*, 26 N. J. L. 143; *Sherwin v. Bugbee*, 17 Vt. 337. See also *Burlington, etc., R. Co. v. Lancaster County*, 4 Neb. 293.

**Record of Meeting Held Admissible Though Not Required to Be Kept.** — *Rose v. Hindman*, 36 Iowa 160.

**Prima Facie Evidence of Levy Overcome by Lack of Record in Proper Book.** — *Hintrager v. Kiene*, 62 Iowa 605.

**1. Record Conclusive Evidence.** — As bearing on the conclusiveness of the record, see *West v. Whitaker*, 37 Iowa 598; *Gaither v. Green*, 40 La. Ann. 362; *St. Johnsbury First Nat. Bank v. Concord*, 50 Vt. 257; *Eddy v. Wilson*, 43 Vt. 362. Compare *State v. Van Winkle*, 25 N. J. L. 73; *Gearhart v. Dixon*, 1 Pa. St. 224. See also generally the title RECORDS, vol. 24, p. 155.

**Where a City Council Levied a Tax "For Judgment Fund"** it was held incompetent to show that the council meant a tax for general purposes. *Rice v. Walker*, 44 Iowa 458.

**2. What Record Should Show.** — *Boyce v. Sebring*, 66 Mich. 210; *State v. Duryea*, 40 N. J. L. 266; *Hardcastle v. State*, 27 N. J. L. 551; *State v. Hardcastle*, 26 N. J. L. 143; *State v. Van Winkle*, 25 N. J. L. 73. And see *Spear v. Ditty*, 8 Vt. 419.

**3. Meeting and Proceedings Thereof Should Appear.** — *State v. Van Winkle*, 25 N. J. L. 73; *Dudley v. Oliver*, 5 Ired. L. (27 N. Car.) 227; *Tobin v. Morgan*, 70 Pa. St. 229. See also *Taymouth v. Koehler*, 35 Mich. 22; *Steckert v. East Saginaw*, 22 Mich. 104.

**4. Due Presentation and Adoption of Proposition to Make Levy.** — *Pontiac v. Axford*, 49 Mich. 69; *State v. Duryea*, 40 N. J. L. 266; *State v. Van Winkle*, 25 N. J. L. 73. See also *Judd v. Thompson*, 125 Mass. 553.

**Sufficiency of School District Meeting Certificate under New Jersey Statute.** — *School Dist. No. 8 v. Padden*, 44 N. J. L. 151; *Hardcastle v. State*, 27 N. J. L. 551.

**Amendment of Record.** — *Ohio, etc., R. Co. v. People*, 119 Ill. 207.

**5. Record Should State Facts.** — See *Nelson v. Pierce*, 6 N. H. 194; *Hardcastle v. State*, 27 N. J. L. 551; *State v. Hardcastle*, 26 N. J. L. 143; *Sherwin v. Bugbee*, 17 Vt. 337.

**6. Authentication of Record.** — *Hardcastle v. State*, 27 N. J. L. 551; *School Dist. No. 8 v. Padden*, 44 N. J. L. 151.

**7. Necessity of Signing by Proper Officers.** — *People v. Eureka Lake, etc., Canal Co.*, 48 Cal. 143; *Spring Valley Coal Co. v. People*, 157 Ill. 543; *Goddard v. Stockman*, 74 Ind. 400; *Martin v. Coe*, 38 Iowa 141; *MacKenzie v. Wooley*, 39 La. Ann. 944; *Lacey v. Davis*, 4 Mich. 140, 66 Am. Dec. 534; *Beck v. Allen*, 58 Miss. 143. And see *Hilliard v. Bunker*, 68 Ark. 341; *Fish v. Genett*, (Ky. 1900) 56 S. W. Rep. 813.

**8. Absence of Record.** — *Hintrager v. Kiene*, 62 Iowa 605. See also *Hilton v. Bender*, 69 N. Y. 75.

**9. Previous Existence May Be Shown.** — See *Hilton v. Bender*, 69 N. Y. 75. See also *Moore v. Cooke*, 40 Iowa 290.

**Proof of Fact of Levy and Loss of Record** should be made by the party claiming the benefit of the levy. *Moore v. Cooke*, 40 Iowa 290.

**10. Secondary Evidence.** — *Norris v. Russell*, 5 Cal. 249. See generally the title SECONDARY EVIDENCE, vol. 25, p. 161.

**For a Discussion of the Rules of Law Pertaining to Lost Records** see generally the title LOST PAPERS AND RECORDS, vol. 19, p. 552.

**11. See *supra*, this title, *Assessment — Definitions*.**

procedure which should be obeyed by the designated officers.<sup>1</sup> It has been held that the computation of the amount to be raised, and the determination of the rate per cent. necessary to raise it, may be assigned to other than legislative officers.<sup>2</sup> It has also been held, under statutory provisions directing certain officers to ascertain the rate per cent. which upon the total assessable valuation of property will produce a net amount not less than the amount directed to be levied, that it is proper for such officers so to fix the rate per cent. of the levy that the amount produced will be sufficient to meet the sums appropriated and the commissions which the statute provides may be retained by the collector out of the amounts by him collected. The commissions are established by law, and the inclusion of them does not involve the exercise by the officer of any judicial function or taxing power, or even discretion or judgment. A rate of per cent. which will produce the net amount required to be raised, exclusive of the costs of collection and the amount of losses and deductions which will probably occur, is a proper one to be adopted by the officer extending the tax, if the total rate levied does not exceed that allowed by law.<sup>3</sup>

**b. NECESSITY OF EXTENDING TAX.** — It has been held that a failure to extend the tax, so as to show how much is imposed upon each person, is fatal to its validity,<sup>4</sup> and where delinquent taxes were not carried forward upon the tax books, as required by law, tax sales made for such delinquent taxes were held invalid.<sup>5</sup> But a failure to extend the tax has been held, in some cases, not to affect the validity of the proceedings.<sup>6</sup>

**1. Extending Taxes under State Statutes.** — *Adams v. Davis*, 109 Ind. 10; *Milwaukee, etc., R. Co. v. Kossuth County*, 41 Iowa 57; *Harwood v. Brownell*, 48 Iowa 657; *Castles v. New Orleans*, 46 La. Ann. 542; *Seymour v. Peters*, 67 Mich. 415; *State v. Johnson*, 16 Mont. 570; *State v. Perkins*, 24 N. J. L. 409; *Bellinger v. Gray*, 51 N. Y. 610; *People v. Hagadorn*, 104 N. Y. 516; *Ne-ha-sa-ne Park Assoc. v. Lloyd*, 7 N. Y. App. Div. 359; *People v. Wemple*, 67 Hun (N. Y.) 495.

**A Military Poll Tax in Colorado** must be extended with the other taxes upon the assessment list. *People v. Ames*, 24 Colo. 422.

**Apportionment of the Whole Sum** imposed by way of tax on the collective body of taxpayers upon the separate individuals composing that body is usually an administrative act, performed under specific statutory directions, ascertaining the mode and time of its performance. *Morton v. Comptroller Gen.*, 4 S. Car. 430.

**Necessity for Keeping State, County, and Township Taxes Separate.** — *State v. Falkinburge*, 15 N. J. L. 320; *Camden, etc., R. Co. v. Hillegas*, 18 N. J. L. 11.

**2. That the Rate May Be Fixed by Officers** see *Edwards v. People*, 88 Ill. 340; *State v. Bailey*, 56 Kan. 81; *State v. Maginnis*, 26 La. Ann. 558. See also *Morton v. Comptroller Gen.*, 4 S. Car. 430. Compare *Gannaway v. Barricklow*, 203 Ill. 410.

In *Mustard v. Hoppess*, 69 Ind. 324, the levy of a tax was attacked on the ground that the board of commissioners did not specify the per centum to be levied on the taxable property, but it was held that this was unnecessary, as it was "mere clerkship for the auditor to calculate the proper per centum, and place the same upon the tax duplicate."

**The Work of Calculating** and carrying out the amount or sum due is merely clerical, and can

be done at any time when anybody might wish to pay the tax. Land is made debtor by being returned, assessed, and valued, and the rate per cent. fixed. The amount is a mere arithmetical process, and subject to the maxim *id certum est quod certum reddi potest*. *Heft v. Gephart*, 65 Pa. St. 510. *Greenough v. Fulton Coal Co.*, 74 Pa. St. 486.

**3. Authority of Officers to Fix Rate in Illinois.** — *Chicago, etc., R. Co. v. Baldridge*, 177 Ill. 229; *Baltimore, etc., R. Co. v. People*, 200 Ill. 541; *Edwards v. People*, 88 Ill. 340; *Union Trust Co. v. Weber*, 96 Ill. 346; *People v. Cooper*, 10 Ill. App. 384.

In California it was held that a statute which delegated to the state board the power to fix the rate of taxation after allowing for delinquency in the collection of taxes was unconstitutional, because it was a delegation of legislative power. The statute in question left it entirely in the hands of the board to add any sum or percentage it might deem proper in anticipation of possible delinquencies. *Houghton v. Austin*, 47 Cal. 646, *overruling Savings, etc., Soc. v. Austin*, 46 Cal. 416. See also *Will v. Austin*, 53 Cal. 152; *San Francisco, etc., R. Co. v. State Board of Equalization*, 60 Cal. 12.

**4. Effect of Failure to Extend Tax.** — *St. Louis, etc., R. Co. v. State*, 47 Ark. 323; *Seymour v. Peters*, 67 Mich. 415.

**5. Delinquent Taxes Not Carried Forward.** — *Barke v. Early*, 72 Iowa 273; *Hooper v. Sac County Bank*, 72 Iowa 280; *Moon v. March*, 40 Kan. 58; *State v. Perkins*, 24 N. J. L. 409.

**6. Failure to Extend Tax Held Not to Affect Validity.** — *Pensacola v. Bell*, 22 Fla. 469; *Thatcher v. People*, 79 Ill. 597; *Vittum v. People*, 183 Ill. 154.

**That More Irregularities Will Not Vitiolate the Proceedings**, see *St. Louis, etc., R. Co. v. Gracy*, 126 Mo. 472; *State v. Hannibal, etc., R. Co.*, 135 Mo. 618.

**XI. TAX LIEN — 1. Nature and Creation.** — There is no common-law rule which makes a levy and assessment of taxes *ex proprio vigore* a lien on the property of the taxpayer. Such liens owe their existence wholly to statute; and their duration, limitation, and priorities, together with the property to which they attach, must be determined by the statutes creating them.<sup>1</sup> The lien does not arise by implication from the power to tax,<sup>2</sup> nor does an obligation to assess taxes give a lien on the property upon which such taxes should be assessed.<sup>3</sup> And a provision that taxes shall be entitled to priority of payment over other claims has been held not to create a lien.<sup>4</sup>

**Construction of Statute.** — Where a lien is expressly created by statute, it cannot be enlarged by construction,<sup>5</sup> and it has been held that the statute creating it must be strictly construed.<sup>6</sup>

**Retrospective Construction.** — The lien may be given for taxes delinquent at the time of the passage of the act creating it as well as for those subsequently assessed;<sup>7</sup> but the statute will not have this retroactive effect unless such

**1. Tax Liens Wholly Statutory — United States.** — *U. S. v. Pacific R. Co.*, 4 Dill. (U. S.) 71; *Heine v. Levee Com'rs*, 19 Wall. (U. S.) 655; *Maish v. Bird*, 22 Fed. Rep. 180; *Tompkins v. Little Rock, etc., R. Co.*, 18 Fed. Rep. 344.

*Alabama.* — *Sheffield City Co. v. Tradesman's Nat. Bank*, 131 Ala. 187.

*Colorado.* — *Wason v. Major*, 10 Colo. App. 189.

*Connecticut.* — *Albany Brewing Co. v. Meriden*, 48 Conn. 243; *Meyer v. Burritt*, 60 Conn. 122.

*Delaware.* — *In re Lord, etc., Chemical Co.*, 7 Del. Ch. 248.

*Idaho.* — *Palmer v. Pettingill*, 6 Idaho 346.

*Illinois.* — *Binkert v. Wabash R. Co.*, 98 Ill. 205.

*Indiana.* — *Fisher v. Brower*, 159 Ind. 145.

*Iowa.* — *Garrettson v. Scofield*, 44 Iowa 37; *Jaffray v. Anderson*, 66 Iowa 719.

*Kentucky.* — *Kentucky Cent. R. Co. v. Com.*, 92 Ky. 64.

*Massachusetts.* — *Fuller v. Day*, 103 Mass. 481.

*Michigan.* — *Lyon v. Guthard*, 52 Mich. 271; *Touney v. Post*, 91 Mich. 631.

*Mississippi.* — *Anderson v. State*, 23 Miss. 459; *Bailey v. Fuqua*, 24 Miss. 497.

*Montana.* — *Walsh v. Croft*, 27 Mont. 407.

*Nebraska.* — *Hedman v. Anderson*, 8 Neb. 180; *Otoe County v. Mathews*, 18 Neb. 466.

*New Jersey.* — *Morrow v. Dows*, 28 N. J. Eq. 463; *Camden v. Allen*, 26 N. J. L. 398; *State v. Hand*, 41 N. J. L. 518; *Johnson v. Van Horn*, 43 N. J. L. 136; *Linn v. O'Neil*, 55 N. J. L. 58.

*Pennsylvania.* — *Kennedy v. Daily*, 6 Watts (Pa.) 269; *Burd v. Ramsay*, 9 S. & R. (Pa.) 109; *Ellis v. Hall*, 19 Pa. St. 292; *Philadelphia v. Greble*, 38 Pa. St. 339; *Allegheny City's Appeal*, 41 Pa. St. 60; *Pottsville Lumber Co. v. Wells*, 157 Pa. St. 10; *Snyder v. Mogart*, 5 Pa. Dist. 148; *United Security L. Ins., etc., Co. v. Dougherty*, 18 Pa. Co. Ct. 217; *Rutt v. Burke*, 18 Pa. Co. Ct. 445; *Taylor v. Bowling*, 18 Pa. Co. Ct. 259, 5 Pa. Dist. 605; *Kenner v. Kelly*, 19 Pa. Co. Ct. 348; *Gubert v. Aiello*, 3 Lack. Leg. N. (Pa.) 294; *Burgwin v. Burchfield*, 28 Pittsb. Leg. J. (Pa.) 13; *Brigg's Appeal*, 38 Leg. Int. (Pa.) 262.

*South Carolina.* — *Barker v. Smith*, 10 S. Car. 226.

*South Dakota.* — *Miller v. Anderson*, 1 S. Dak. 545; *Iowa Land Co. v. Douglas County*, 8 S. Dak. 491.

*Washington.* — *Phelan v. Smith*, 22 Wash. 397.

*West Virginia.* — *Board of Education v. Old Dominion Iron Min., etc., Co.*, 18 W. Va. 441.

*Wyoming.* — *Lobban v. State*, 9 Wyo. 377.

**2. Lien Not Implied from Power to Tax.** — *Maish v. Bird*, 22 Fed. Rep. 180; *Fisher v. Brower*, 159 Ind. 145; *State v. Bellin*, 79 Minn. 134; *Philadelphia v. Greble*, 38 Pa. St. 339; *Philadelphia v. Anderson*, 142 Pa. St. 357; *Pottsville Lumber Co. v. Wells*, 157 Pa. St. 5; *Wetzel v. Goodyear*, 5 Pa. Dist. 12; *Laird v. Wack*, 5 Pa. Dist. 606; *Brooke v. Kaufman*, 6 Pa. Dist. 513; *Rutt v. Burke*, 18 Pa. Co. Ct. 445; *Gubert v. Aiello*, 3 Lack. Leg. N. (Pa.) 294.

**Liens from Necessary Implication.** — It seems that a lien, though not expressly given, may arise by necessary implication (see the title STATUTES, vol. 26, p. 613) in order to render effective the means expressly provided for the enforcement of the tax. *Snyder v. Mogart*, 5 Pa. Dist. 146; *Burd v. Ramsay*, 9 S. & R. (Pa.) 109; *Barker v. Smith*, 10 S. Car. 226.

**3. Obligation to Assess Creates No Lien.** — *Heine v. Levee Com'rs*, 19 Wall. (U. S.) 655; *Rees v. Watertown*, 19 Wall. (U. S.) 107; *Wason v. Major*, 10 Colo. App. 185.

**4. U. S. v. Hooe**, 3 Cranch (U. S.) 73; *Anderson v. State*, 23 Miss. 459.

**5. Not Enlarged by Construction.** — *Gudger v. Bates*, 52 Ga. 285; *Fisher v. Brower*, 159 Ind. 145; *Jaffray v. Anderson*, 66 Iowa 719; *New England L. & T. Co. v. Young*, 81 Iowa 738; *Miller v. Anderson*, 1 S. Dak. 545; *Phelan v. Smith*, 22 Wash. 397; *Lobban v. State*, 9 Wyo. 377. See also the title LIENS, vol. 19, p. 24.

**6. Strict Construction.** — *Fisher v. Brower*, 159 Ind. 145; *Howell v. Essex County Road Board*, 32 N. J. Eq. 672; *State v. Newark*, 42 N. J. L. 38; *Miller v. Anderson*, 1 S. Dak. 539. And see *infra*, this section, *Essentials to Validity*. But compare the title LIENS, vol. 19, p. 24.

The statute must be strictly construed as against the party in whose favor the lien is created, *U. S. v. Pacific R. Co.*, 4 Dill. (U. S.) 71; consequently, in favor of innocent purchasers of the property subject to the lien, *U. S. v. Pacific R. Co.*, 1 McCrary (U. S.) 1.

**7. Plymouth County v. Moore**, 114 Iowa 700; *Kansas v. Hannibal, etc., R. Co.*, 77 Mo. 180. See generally as to retroactive legislation with

clearly appears to have been the legislative intent.<sup>1</sup>

**2. Lien of Municipal Taxes.** — In the absence of express charter or statutory authority, a municipality has no power to create a lien for taxes imposed by it.<sup>2</sup> Thus, a power given to a city to levy a tax does not of itself confer the power to create a lien therefor.<sup>3</sup> But it has been held that where a city is empowered to sell lands for delinquent taxes it may make such taxes a lien upon the land.<sup>4</sup> The tax lien of a municipality does not conflict with the lien of the state, and they may exist as concurrent charges upon the same property.<sup>5</sup>

**3. Essentials to Validity.** — It is essential to the validity of a tax lien that all the prerequisites of the statute imposing the tax and creating the lien should be strictly complied with. If the tax is invalid the invalidity of the lien follows as of course.<sup>6</sup> Thus, an illegal assessment of property creates no

regard to tax laws the titles CONSTITUTIONAL LAW, vol. 6, p. 945; STATUTES, vol. 26, pp. 698, 699.

**1. Prospective Construction.** — *Burnet v. Dean*, 60 N. J. Eq. 9; *Pittsburgh's Appeal*, 40 Pa. St. 455. See also *Dallam v. Oliver*, 3 Gill (Md.) 445; *Clark v. Hall*, 19 Mich. 356; *Smith v. Humphrey*, 20 Mich. 398.

**2. Express Statutory Authority Necessary.** — *Heine v. Levee Com'rs*, 19 Wall. (U. S.) 655; *Mix v. Ross*, 57 Ill. 125; *Ham v. Miller*, 20 Iowa 450; *Springfield v. Starke*, 93 Mo. App. 70; *Schmidt v. Smith*, 57 Mo. 135; *Kansas v. Payne*, 71 Mo. 159; *Jefferson v. Whipple*, 71 Mo. 519; *Philadelphia v. Greble*, 38 Pa. St. 339; *Howell v. Philadelphia*, 38 Pa. St. 471; *People's Nat. Bank v. Ennis*, (Tex. Civ. App. 1899) 50 S. W. Rep. 632.

**Special Assessments.** — See the title SPECIAL OR LOCAL ASSESSMENTS, vol. 25, p. 1234.

**Fire District — No Lien Unless Specially Given.** — *Quimby v. Wood*, 19 R. I. 571.

**General Tax Act Granting Lien to Municipalities.** — *Hayden v. Foster*, 13 Pick. (Mass.) 492, construing the *Massachusetts Tax Act of 1824*.

**The Remedy by Action** is not affected by the absence of a lien. *Jefferson v. McCarty*, 74 Mo. 55. See also *Jefferson v. Mock*, 74 Mo. 61. And where a lien is expressly given it is merely cumulative and does not interfere with the remedy at law. *New Haven v. Fair Haven, etc.*, R. Co., 38 Conn. 422, 9 Am. Rep. 399.

**Implied Lien.** — See *Ross v. Portland*, 42 Oregon 134.

**Extension of Time.** — In *Hohenstatt v. Bridgeton*, 62 N. J. L. 169, it was held that the supplement of the *New Jersey Tax Act (P. L. 1882, p. 130, Gen. Stat. N. J. 1895, p. 3360, par. 376)* extends the tax lien period to three years in an incorporated city by whose charter taxes were to be assessed and collected as in townships, notwithstanding that by the township law the lien period was for two years only.

**3. Lien Not Implied from Power to Tax.** — *Ham v. Miller*, 20 Iowa 450; *Alexander v. Helber*, 35 Mo. 334. And see *supra*, this section, *Nature and Creation*.

**Special Assessment.** — *Merriam v. Moody*, 25 Iowa 163.

**4. Lien from Power to Sell.** — *Eschbach v. Pitts*, 6 Md. 71. See also *Dallam v. Oliver*, 3 Gill (Md.) 445.

**5. Concurrent Charges.** — *Justice v. Logansport*, 101 Ind. 326; *Belloq v. New Orleans*, 31

La. Ann. 471. See also *A. P. Cook Co. v. Aplin*, 79 Mich. 100.

**No Priority in State.** — Where land is sold for state, county, and municipal taxes, and the proceeds are insufficient to pay all, the state cannot assert a prior right to satisfaction, if no special priority is given to it by statute. *Nashville v. Lee*, 12 Lea (Tenn.) 452.

**6. Strict Compliance with Statute Necessary — United States.** — *U. S. v. Pacific R. Co.*, 1 McCrary (U. S.) 1.

*Colorado.* — *Wason v. Major*, 10 Colo. App. 185.

*Connecticut.* — *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550; *New London v. Miller*, 60 Conn. 112; *Meyer v. Burritt*, 60 Conn. 117; *Hellman v. Burritt*, 62 Conn. 438; *New Britain v. Mariners Sav. Bank*, 67 Conn. 528.

*Illinois.* — *Graves v. Bruen*, 11 Ill. 431; *Tibbetts v. Job*, 11 Ill. 453.

*Iowa.* — *Dows v. Dale*, 74 Iowa 108.

*Kentucky.* — *Louisville v. State Bank*, 3 Met. (Ky.) 148.

*Massachusetts.* — *Thurston v. Little*, 3 Mass. 429.

*New Jersey.* — *Howell v. Essex County Road Board*, 32 N. J. Eq. 672; *State v. Newark*, 42 N. J. L. 38; *Robinson v. Hulick*, 67 N. J. L. 496.

*New York.* — *Greenfield v. Beaver*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 366.

*North Dakota.* — *Swenson v. Greenland*, 4 N. Dak. 532.

*Pennsylvania.* — *Reading v. Krause*, 167 Pa. St. 23; *Bryn Mawr College v. Anderson*, 10 Pa. Co. Ct. 442.

*South Dakota.* — *Miller v. Anderson*, 1 S. Dak. 539.

*Vermont.* — *Judevine v. Jackson*, 18 Vt. 470.

**The Proceedings** authorized by the statute to create and enforce the lien must be followed as directed. *Lyon v. Alley*, 130 U. S. 177; *Creighton v. Manson*, 27 Cal. 614.

**Special Assessments** must be made in pursuance of law, that a valid municipal lien may be created. See the title SPECIAL OR LOCAL ASSESSMENTS, vol. 25, p. 1236. And see *Western Pennsylvania R. Co. v. Allegheny*, 92 Pa. St. 100.

**A Certificate of Delinquent Taxes** to another county when the delinquent has left no property in the county in which he was assessed cannot, unless it sets out the matters required by the statute (Code Iowa 1897, § 1409), make the



lien on the property assessed.<sup>1</sup> Actual demand for payment of the tax has been held not to be necessary to the creation of the lien<sup>2</sup> unless such demand is made necessary by statute;<sup>3</sup> and a statute requiring that the lien shall be recorded must be complied with.<sup>4</sup>

**Proceedings for Sale.** — Neither the lien for the taxes nor the obligation to pay them ceases by reason of any defect in proceedings for the sale of the land to enforce the collection of the taxes.<sup>5</sup>

**4. When Lien Attaches.** — In the absence of a statutory provision fixing the time when the lien for taxes shall attach to real property, it has been held to attach as soon as the land becomes charged with the payment of a certain fixed sum as taxes,<sup>6</sup> and in the case of personalty there can be no lien until seizure.<sup>7</sup> But the statute creating the lien usually fixes the time when it

taxes a lien on land in the county to which they are certified. *Union Cent. L. Ins. Co. v. Chapin*, 113 Iowa 411.

**Tax Book Failing to Show Delinquent Taxes — Mistake of Officer.** — See *infra*, this title, *Payment and Tender — Payment Frustrated by Officer*.

**1. Valid Assessment Necessary.** — *Ferris v. Coover*, 10 Cal. 632; *People v. Hastings*, 29 Cal. 450; *People v. Pearis*, 37 Cal. 259; *Wason v. Major*, 10 Colo. App. 189; *Bell v. Barnard*, 37 Ill. App. 275; *Worthington v. Whitman*, 67 Iowa 190; *Greenfield v. Beaver*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 366; *North Carolina R. Co. v. Alamance*, 77 N. Car. 4.

**The Essentials of a Valid Assessment** are treated elsewhere in this title. See *supra*, this title, *Assessment; Levy*.

**Verification of Assessment Roll Held Essential to Create Lien.** — *Morrill v. Taylor*, 6 Neb. 236; *Lynam v. Anderson*, 9 Neb. 367; *Hallo v. Helmer*, 12 Neb. 87; *McNish v. Perrine*, 14 Neb. 582.

**Description of Realty Held Essential to Lien.** — *People v. Chicago*, etc., R. Co., 96 Ill. 369; *Pfeiffer v. Miles*, 48 N. J. L. 450. See also *Richardson v. State*, 5 Blackf. (Ind.) 51; *Woodside v. Wilson*, 32 Pa. St. 52.

**Descriptions Held Sufficient.** — *Philadelphia v. Thurlow*, 5 Pa. Super. Ct. 600; *Pittsburgh v. Hannan*, 8 Pa. Dist. 188.

**Description Held Totally Insufficient.** — *Sanford v. People*, 102 Ill. 374. See also *Bell v. Barnard*, 37 Ill. App. 275 (personal property).

**Description Sufficient to Show Property Intended to Be Taxed.** — It has been held that a lien will hold if the purchaser can show what property was intended to be taxed, *State v. Casteel*, 110 Ind. 174; and that an insufficient description will not preclude the purchaser at the tax sale from maintaining an action to enforce a lien against the land intended to be taxed and sold, *Flinn v. Parsons*, 60 Ind. 573; *Cooper v. Jackson*, 71 Ind. 244; *Sloan v. Sewell*, 81 Ind. 180.

**The Identification of the Property** is a question for the jury on the evidence. *Stewart v. Shoensfelt*, 13 S. & R. (Pa.) 360; *Thompson v. Fisher*, 6 W. & S. (Pa.) 520.

**2. Demand.** — *Hart v. Tiernan*, 59 Conn. 521.

**3. U. S. v. Pacific R. Co.**, 4 Dill. (U. S.) 72; *U. S. v. Pacific R. Co.*, 1 McCrary (U. S.) 1; *Brown v. Goodwin*, 75 N. Y. 409.

**4. Recording.** — In Louisiana registry is essential to preserve the lien of the state for taxes as against third persons, *New Orleans*

*Sav. Inst. v. Leslie*, 28 La. Ann. 496; *Cochran v. Ocean Dry Dock Co.*, 30 La. Ann. 1365 (tax due to city of New Orleans); *Jacob v. Preston*, 31 La. Ann. 516; but not as against the person assessed, *Adams v. Wakefield*, 26 La. Ann. 592. The lien exists without being reinscribed until the taxes secured are fully paid. *Gulf States Land Co. v. Parker*, 60 Fed. Rep. 974. But this provision does not affect tax liens of the *United States* on the land of a manufacturer of tobacco. *U. S. v. Snyder*, 149 U. S. 210.

**In Pennsylvania** the lien for taxes cannot exist unless a certified copy has been entered of record as required by the law creating it. *Anspach's Appeal*, 112 Pa. St. 27; *Grubb v. Weaver*, 19 Pa. Co. Ct. 609; *In re Wilson*, 4 Pa. St. 164; *In re Arnold*, 46 Pa. St. 277; *Wm. Wilson, etc., Silversmith Co.'s Estate*, 150 Pa. St. 285; *Gladde v. Chapman*, 188 Pa. St. 586. Under an early statute, however, the provision as to record was held to be simply directory. *Parker's Appeal*, 8 W. & S. (Pa.) 449; *Wallace's Estate*, 59 Pa. St. 401.

But a tax lien has been held not to be lost as against general creditors by a failure to transmit to the proper county a copy of the lien for record. *Goodwin Gas Stove, etc., Co.'s Estate*, 166 Pa. St. 296.

**Statute Not Applicable to Unseated Lands.** — *Sinnemahoning Iron, etc., Co. v. Cameron County*, 12 Pa. Co. Ct. 291.

**5. Phelan v. San Francisco**, 120 Cal. 1.

**6. In Absence of Statutory Provision — Realty.** — *Bennett v. Hunter*, 9 Wall. (U. S.) 326; *Eaton v. Chesebrough*, 82 Mich. 214; *Webb v. Bidwell*, 15 Minn. 479; *Burr v. Palmer*, 53 N. Y. App. Div. 361. See also *Hutchins v. Moody*, 30 Vt. 655.

This time is generally the time of the assessment of the tax. *Lyon v. Alley*, 130 U. S. 177.

**Time When Duty to Pay Arises.** — In *Harrington v. Hilliard*, 27 Mich. 271, it was said that the time fixed by the statute, viz., the first Monday in December of the year in which they are assessed, was intended "to correspond with the time when the imposition of the taxes, for all legal purposes, is to be considered as consummated, and when for the first time the duty to pay springs into existence for any purpose."

**Amount Must Be Fixed.** — Strictly speaking, a lien does not attach to the land until the amount of the tax is fixed. *Wise v. L., etc., Wise Co.*, 12 N. Y. App. Div. 319, *affirmed* 153 N. Y. 507; *Barlow v. St. Nicholas Nat. Bank*, 63 N. Y. 400, 20 Am. Rep. 547.

**7. Personalty — No Lien Before Seizure.** — *Maish v. Bird*, 22 Fed. Rep. 180; *McKay v.*

shall attach.<sup>1</sup> In the notes will be found a number of cases construing the statutory provisions of several of the states.<sup>2</sup>

Batchelor, 2 Colo. 591; Palmer v. Pettingill, 6 Idaho 346; State v. Rowse, 49 Mo. 586; Shelby v. Tiddy, 118 N. Car. 792; Parsons v. Allison, 5 Watts (Pa.) 76; Moore v. Marsh, 60 Pa. St. 46; Blakeslee v. Stebbins, 3 Pa. Dist. 269; Helsel v. Walker, 7 Pa. Dist. 628; Fletcher v. Evans, 12 Pa. Co. Ct. 440. See also George v. St. Louis Cable, etc., R. Co., 44 Fed. Rep. 117.

**Railroad Property.** — In Stevens v. Lake George, etc., R. Co., 82 Mich. 426, the general lien of the state against all the personal property of a railroad company for taxes assessed against it was held to attach from the time when the commissioner of railroads filed a computation of the amount of the tax with the auditor-general. See also San Diego County v. Riverside County, 125 Cal. 495.

1. **Time of Attaching of Lien Determined by Legislature.** — Phelan v. Smith, 22 Wash. 397.

2. **Various Statutes — California.** — Reeve v. Kennedy, 43 Cal. 643; California L. & T. Co. v. Weis, 118 Cal. 489; San Diego County v. Riverside County, 125 Cal. 495 (railroad taxes).

**Colorado.** — Wason v. Major, 10 Colo. App. 181 (real property).

**Delaware.** — Chester v. Roan, 8 Del. Co. Rep. (Pa.) 66.

**Illinois.** — Taxes on Real Estate become a lien upon the land charged from the first day of May in each year. Cooper v. Corbin, 105 Ill. 224; Almy v. Hunt, 48 Ill. 45.

**Personal Property Taxes Do Not Become a Lien on Real Estate** until the collector, having failed to collect, charges a sum on such real estate in his application for judgment for delinquent taxes. Parsons v. East St. Louis Gas Light, etc., Co., 108 Ill. 384; Carter v. Rodewald, 108 Ill. 351.

**No Lien Is Created on Personal Property** until the tax books are placed in the hands of the collector. Schaeffer v. People, 60 Ill. 179; Gaar v. Hurd, 92 Ill. 315; Binkert v. Wabash R. Co., 98 Ill. 206; Belleville Nail Co. v. People, 98 Ill. 399; Cooper v. Corbin, 105 Ill. 224. And if the collector fails to make any levy on the personal property until after the return day of the warrant, the warrant then being dead, all liens that might have been, but were not, perfected by a levy are lost. Ream v. Stone, 102 Ill. 359. See also Hill v. Figley, 23 Ill. 418; Bell v. Barnard, 37 Ill. App. 275; Crescent Livery Co. v. Perkins, 44 Ill. App. 373.

**Indiana — Lien on Real Estate.** — The aggregate amount of poll taxes and those upon personal and real estate is a lien upon all real estate of the taxpayer within the county, and such lien attaches on the first day of January in each year. Cones v. Wilson, 14 Ind. 465; Isaac v. Decker, 41 Ind. 410; Veit v. Graff, 37 Ind. 254. A warrantor before such date does not covenant against them. Overstreet v. Dobson, 28 Ind. 256.

**On Personality.** — There is also a lien upon personal property for all taxes, but no time is fixed by statute for it to attach. As between the state and the owner at the time of settlement, the lien attaches as soon as the duplicate

is issued to the treasurer. Cones v. Wilson, 14 Ind. 465. See McNeil v. Farneman, 37 Ind. 203; Barker v. Morton, 19 Ind. 146.

**Iowa.** — Taxes on Personal Property do not become a lien on the real estate of the owner until they are due, and they do not become due by the mere assessment of the property for taxation. Castle v. Anderson, 69 Iowa 428.

**As to Taxes on a Stock of Goods,** see Plymouth County v. Moore, 114 Iowa 700.

**Louisiana.** — The filing of an assessment roll in the office of the recorder of mortgages acts as a lien on each specific piece of real estate thereon assessed, and the same property becomes subject to a legal mortgage after the thirty-first day of December of the current year. Behan v. Assessors, 46 La. Ann. 870.

**Massachusetts.** — Taxes on Real Estate constitute a lien thereon for two years after they are committed to the collector, and his lien relates back to the day on which they were assessed. Cochran v. Guild, 106 Mass. 29, 8 Am. Rep. 296; Hill v. Bacon, 110 Mass. 387; Davis v. Bean, 114 Mass. 358; and is not secondary or collateral to any personal liability of the person to whom it is assessed, Swan v. Emerson, 129 Mass. 289.

**Michigan.** — As to when the lien attaches to personality, see Tousey v. Post, 91 Mich. 631; St. Johns Nat. Bank v. Bingham Tp., 113 Mich. 203.

**Minnesota — Real Property.** — See Hennepin County v. St. Paul, etc., R. Co., 33 Minn. 534; Martin County v. Drake, 40 Minn. 137; State v. Northwestern Telephone Exch. Co., 80 Minn. 17.

**Missouri.** — State and county taxes are made a lien on real estate from the first Monday in September, and the owner at that time will be liable to a subsequent purchaser for them, on his covenant of warranty, even though the sale is prior to the assessment. McLaren v. Sheble, 45 Mo. 130; Blossom v. Van Court, 34 Mo. 390, 86 Am. Dec. 114.

**The Lien Relates Back** and takes effect from the inception point of the assessment, although the assessment may not be consummated until a later day or month in the year. It is immaterial that the rights of a third person who purchased for value and without notice have intervened. McLaren v. Sheble, 45 Mo. 130.

**Nebraska.** — Taxes Assessed on Personal Property are a lien from the delivery of the tax list to the county treasurer on all the personal property owned by the persons assessed. Reynolds v. Fisher, 43 Neb. 172; Farmers' L. & T. Co. v. Memminger, 48 Neb. 17; Chamberlain Banking House v. Woolsey, 60 Neb. 516; Blanchard v. Logan County, (Neb. 1902) 89 N. W. Rep. 376; Foster, etc., Lumber Co. v. Leisure, (Neb. 1902) 91 N. W. Rep. 556.

**As to Real Estate,** see Cushman v. Taylor, (Neb. 1902) 90 N. W. Rep. 207.

**New Jersey.** — See Hallinger v. Zimmerman, 63 N. J. Eq. 100; Duryee v. U. S. Credit System Co., 55 N. J. Eq. 311; Robinson v. Hulick, 67 N. J. L. 496; Hohenstatt v. Bridgeton, 62 N. J. L. 169.

**Fraction of Day.** — The lien attaches at the earliest moment of the day fixed, as there is no point of time less than a day at which the tax may be regarded as attaching.<sup>1</sup>

**5. To What Property Lien Attaches.** — The statutes creating liens determine what property shall be subject to them.<sup>2</sup> The lien for taxes on real estate attaches to each particular tract for that portion of the tax assessed against it, and a tax assessed against one tract is not a lien on the other tracts owned by the same person.<sup>3</sup> It is otherwise, however, as to the lien for taxes upon personalty. A lien on personal property is not confined to the specific articles assessed, but attaches to all the personal property of the person from whom the tax is due.<sup>4</sup> Taxes on personal property may, by statute, be made a lien

**New York.** — No lien or incumbrance is created by the tax until after the list containing it is confirmed, *Washington Heights M. E. Church v. New York*, 20 Hun (N. Y.) 297; *Barlow v. St. Nicholas Nat. Bank*, 63 N. Y. 399, 20 Am. Rep. 547; *Fisher v. New York*, 67 N. Y. 73; *Colored Orphans Assoc. v. New York*, 104 N. Y. 581; *Lathers v. Keough*, 109 N. Y. 583; *In re Van Beuren*, (Supm. Ct. Spec. T.) 66 N. Y. Supp. 267; for the amount of the tax is not ascertained and determined until confirmation, *Dowdney v. New York*, 54 N. Y. 186.

Taxes are a lien upon real property from the time when the warrant is issued for their collection, and not until then. *Burr v. Palmer*, 53 N. Y. App. Div. 358; *Matter of Board of Education*, 59 N. Y. App. Div. 258; *Coudert v. Huerstel*, 60 N. Y. App. Div. 83; *Lathers v. Keogh*, 109 N. Y. 583. See also *Rundell v. Lakey*, 40 N. Y. 516; *Matter of Babcock*, 115 N. Y. 455; *Wise v. L.*, etc., *Wise Co.*, 153 N. Y. 507, 12 N. Y. App. Div. 319.

**North Dakota.** — *Personal Property.* — *Swenson v. Greenland*, 4 N. Dak. 532.

**Texas.** — In *State v. Farmer*, 94 Tex. 232, it was held that a lien of the state for taxes against land arose out of the assessment, and did not exist until that was made.

**Vermont.** — The lien becomes fixed when the officer by some official act manifests his intention to pursue the land for the purpose of enforcing the collection of the taxes; and in the case of a nonresident proprietor, taxes become a lien when the constable has made a list of the land and the taxes assessed thereon, and deposited it in the town clerk's office for record. *Hutchins v. Moody*, 34 Vt. 433.

**Washington.** — As to when the lien attaches to personalty, see *Phelan v. Smith*, 22 Wash. 397.

**1. Fraction of Day.** — In *Hill v. Bacon*, 110 Mass. 387, the grantor of a deed with covenant of warranty dated April 30 was in possession of the land conveyed till one o'clock in the afternoon of May 1, when he executed and delivered the deed, and the grantee immediately took possession. The tax on the land for the year beginning May 1 was assessed to the grantor, who did not pay it, and the land having been sold for such nonpayment, it was held that there was a breach of the covenant.

**2. Statute Creating Lien.** — *Meyer v. Burritt*, 60 Conn. 123; *Albany Brewing Co. v. Meriden*, 48 Conn. 243.

**Severed Fixtures.** — The lien of the state for

taxes cannot follow several fixtures as personal property. *State v. Goodnow*, 80 Mo. 271.

**Franchises — Corporations.** — Taxes due to the commonwealth are a lien on the franchises and property, both real and personal, of corporations and limited partnerships. *Goodwin Gas Stove, etc., Co.'s Estate*, 3 Pa. Dist. 483, *affirmed* 166 Pa. St. 296. See generally the title TAXATION (CORPORATE), *post*.

**Franchise Tax Lien on Assets of Bank.** — *Mid-dlesboro v. Coal, etc., Bank*, 108 Ky. 680.

**Railroad.** — Taxes on the capital stock of a railroad constitute a lien on the real property of the company. *Union Trust Co. v. Weber*, 96 Ill. 346.

**The Personal Property of a Railroad** is within a statute providing that the state shall have a lien on a railroad and all appurtenances thereof. *Stevens v. Lake George, etc., R. Co.*, 82 Mich. 426.

**Shares of Stock.** — Where a statute provided that the capital stock of a bank, and not the shareholders, should be taxed, it was held that the tax was against the shareholders, and that a provision for its payment by the bank was but a method of collecting the tax from the stockholders, the lien being on the stock and not on any property of the bank. *Cleveland Trust Co. v. Lander*, 10 Ohio Cir. Dec. 452, 19 Ohio Cir. Ct. 271.

**3. Real Estate — Each Particular Tract.** — *Meyer v. Burritt*, 60 Conn. 117; *Hellman v. Burritt*, 62 Conn. 438; *Meridan v. Maloney*, 74 Conn. 90; *Binkert v. Wabash R. Co.*, 98 Ill. 215; *Kepley v. Jansen*, 107 Ill. 80; *Behan v. Assessors*, 46 La. Ann. 870; *Hayden v. Foster*, 13 Pick. (Mass.) 492; *State v. Sargeant*, 76 Mo. 557; *State v. Baker*, 49 Tex. 763; *Edmonson v. Galveston*, 53 Tex. 157; *Jodon v. Brenham*, 57 Tex. 655. See also *Behan v. Assessors*, 46 La. Ann. 870; *State v. Hand*, 41 N. J. L. 517. But see, under express statutory provisions, *Cones v. Wilson*, 14 Ind. 465; *Geren v. Gruber*, 26 La. Ann. 697.

**Sale of Separate Tracts.** — In *State v. Hand*, 41 N. J. L. 518, it was held that two separate lots of land could not be sold together for the taxes which were separately assessed against each lot.

**4. Personalty — Lien Not Confined to Specific Articles.** — *Hill v. Figley*, 23 Ill. 418; *Crescent Livery Co. v. Perkins*, 44 Ill. App. 373; *Binkert v. Wabash R. Co.*, 98 Ill. 206; *Gaar v. Hurd*, 92 Ill. 330; *Cooper v. Corbin*, 105 Ill. 224; *Barker v. Morton*, 19 Ind. 146; *Hill v. Palmer*, 32 Neb. 632; *Reynolds v. Fisher*, 43 Neb. 172;

upon the realty of the taxpayer as well as upon his personalty;<sup>1</sup> but unless it is expressly so provided by statute, no such lien exists.<sup>2</sup> And so taxes levied on land do not constitute a lien on personal property in the absence of a statute to that effect.<sup>3</sup> Taxes assessed on personal property have been held not only to be a lien on the property assessed, but on that subsequently acquired.<sup>4</sup>

**Land, Not Interest in Land.** — The tax lien on real estate attaches to the land itself, and not to any particular interest therein.<sup>5</sup>

*Farmers L. & T. Co. v. Memminger*, 48 Neb. 17; *Chamberlain Banking House v. Woolsey*, 60 Neb. 516.

**Specific Property.** — But in *Lee v. Stanard*, 15 Colo. App. 101, it was held that the lien created by the levy or assessment of taxes on personal property, such as a herd of range horses, attached only to the specific property attached or levied upon, and while for the collection of taxes any property belonging to the person assessed might be taken, as against subsequent purchasers or incumbrancers only the property to which the lien attached could be seized. See also *Chicago Bazaar Co. v. McNichols*, 13 Colo. App. 154.

And in *Arkansas* under a statute declaring that "taxes assessed upon real or personal property shall bind the same," and that "all taxes assessed shall be a lien upon and bind the property assessed," it was held that the taxes on each class of personal property were a lien only on the property of that class, but the whole tax of each class was a lien on every item of that class. *Bridwell v. Morton*, 46 Ark. 73.

**1. Taxes on Personalty Lien on Realty.** — *California L. & T. Co. v. Weis*, 118 Cal. 489; *Palmer v. Pettingill*, 6 Idaho 346; *Carter v. Rodewald*, 108 Ill. 351; *Isaacs v. Decker*, 41 Ind. 410; *Peckham v. Millikan*, 99 Ind. 352; *Garrettson v. Scofield*, 44 Iowa 35; *Paulson v. Rule*, 49 Iowa 576; *New England L. & T. Co. v. Young*, 81 Iowa 732; *State v. Newark*, 42 N. J. L. 38; *Miller v. Anderson*, 1 S. Dak. 539; *Iowa Land Co. v. Douglas County*, 8 S. Dak. 491.

**All Property, Both Real and Personal**, of the tax debtor may be made subject to the lien. *Beard v. Allen*, 141 Ind. 248; *Adams v. Davis*, 109 Ind. 10; *Justice v. Logansport*, 101 Ind. 326.

**Tenancy by Entirety.** — Under such a statute, land held by a husband and wife as tenants by the entirety is not subject to a lien for taxes on the husband's personal estate. *Morrison v. Seybold*, 92 Ind. 298.

**Ownership of Other Property.** — Such a lien is not affected by the fact that the owner had other and personal property which might be taken on a tax warrant. *Albany Brewing Co. v. Meriden*, 48 Conn. 243.

**Improvements of Realty.** — *People v. Smith*, 123 Cal. 70.

**Lien on Realty but Not on Personalty.** — It was provided by statute that every tax should have the effect of a judgment against the person, and every lien the force and effect of an execution duly levied against all personal property. It was also enacted that every personal-property tax should be a lien on the owner's realty.

Another provision authorized certain real-property liens for real-property taxes. It was held that no tax lien attached to assessed personalty the owner of which owned no realty, and hence the sale for taxes of such personalty in the hands of an innocent purchaser should be enjoined. *Walsh v. Croft*, 27 Mont. 407.

**Illinois — Necessity of Charging Lien on Particular Tract.** — See *Carter v. Rodewald*, 108 Ill. 351; *Parsons v. East St. Louis Gas Light, etc., Co.*, 108 Ill. 380; *Belleville Nail Co. v. People*, 98 Ill. 399.

**Taxes Assessed Against the Personalty of a Partnership** have been held to become a lien on the real property of an individual partner subsequently acquired. *Bibbins v. Clark*, 90 Iowa 230.

**2. Gifford v. Callaway**, 8 Colo. App. 359; *In re Lord, etc., Chemical Co.*, 7 Del. Ch. 248; *State v. Powell*, 44 Mo. 436; *State v. Hand*, 41 N. J. L. 518; *Linn v. O'Neil*, 55 N. J. L. 58.

**3. Anderson v. State**, 23 Miss. 459; *Bailey v. Fuqua*, 24 Miss. 497; *Parker's Appeal*, 5 Pa. St. 390.

**4. After-acquired Property.** — *Bibbins v. Clark*, 90 Iowa 230; *Foster, etc., Lumber Co. v. Leisure*, (Neb. 1902) 91 N. W. Rep. 556. See also *Cummings v. Easton*, 46 Iowa 185.

**5. Land, Not Interest, Subject of Lien.** — *Osterberg v. Union Trust Co.*, 93 U. S. 424; *Spratt v. Price*, 18 Fla. 289; *New England L. & T. Co. v. Young*, 81 Iowa 740; *Cooper v. Holmes*, 71 Md. 20; *Parker v. Baxter*, 2 Gray (Mass.) 185; *Spiech v. Tierney*, 56 Neb. 514; *Eastman v. Thayer*, 60 N. H. 408; *Miller v. Anderson*, 1 S. Dak. 544.

**Ownership — Residency.** — The lien attaches without regard to ownership. *Dunlap v. Gallatin County*, 15 Ill. 7. So it matters not whether the owner be a resident or a nonresident. *Edwards v. Beaird*, 1 Ill. 70.

**Revenue Act.** — But where an act of Congress made the land upon which whisky was distilled liable for the taxes due to the government for the distillation, it was held that this did not apply where the distillation was by one upon the land of another without his knowledge or consent. *Gudger v. Bates*, 52 Ga. 285.

**Title.** — In *Oldham v. Jones*, 5 B. Mon. (Ky.) 458, it was said: "The law requires the title as well as the land to be entered, not only to enable the commonwealth to impose the tax, but to collect it. The lien for its payment is upon the title as well as the land. When the register exposes the land for sale, he at the same time announces the title which the purchaser will obtain, and upon that title alone the purchaser agrees to rely."

**Property Held under a Contract of Purchase**, upon which a part of the purchase money has

**Assessment to Wrong Person.** — It follows, as the lien attaches to the land, and not to any particular interest in it, that it may be valid although the tax is assessed to the wrong person.<sup>1</sup>

**6. Priority of Lien.** — It is within the constitutional power of the legislature to make the tax a lien superior to any other security, incumbrance, or lien arising either before or after the assessment of the tax, and in many states the legislature has exercised this power.<sup>2</sup> But such priority will not be

been paid, is subject to sale for taxes. *National Bank v. Danforth*, 80 Ga. 55; *Morgan v. Burks*, 90 Ga. 287.

**Remainders and Reversions.** — Under some of the statutes the lien is on the reversioner's interest as well as on that of the life tenant. See *Spiech v. Tierney*, 56 Neb. 514. In other jurisdictions, however, the contrary is held. See *State v. Campbell*, (Tenn. 1897) 41 S. W. Rep. 937; *Nashville v. Cowan*, 10 Lea (Tenn.) 212; *Stovall v. Austin*, 16 Lea (Tenn.) 700; *Ferguson v. Quinn*, 97 Tenn. 46; *Tabb v. Com.*, 98 Va. 47. And see the title TAX TITLES, *post*.

**Mortgages.** — In *Dekum v. Multnomah County*, 38 Oregon 253, it was held that under the mortgage-tax law of the state a mortgage on real property was an interest in the land which might be sold for the payment of any taxes due thereon.

**1. To Whom Assessed.** — *Union Trust Co. v. Weber*, 96 Ill. 346; *Cobban v. Hinds*, 23 Mont. 338; *Chester v. Roan*, 8 Del. Co. Rep. (Pa.) 66; *Vanarsdalen's Appeal*, 3 W. N. C. (Pa.) 463; *Pittsburgh v. Hannon*, 8 Pa. Dist. 188; *Dungan's Appeal*, 88 Pa. St. 414.

**An Assessment on Bank Stock** in the name of the bank, instead of in the names of the individual stockholders, does not invalidate the lien. *Small v. Lawrenceburgh*, 128 Ind. 231.

**2. Priority of Lien — California.** — *California L. & T. Co. v. Weis*, 118 Cal. 489.

**Colorado.** — *Gifford v. Callaway*, 8 Colo. App. 359.

**Connecticut.** — *Albany Brewing Co. v. Meriden*, 48 Conn. 243.

**Delaware.** — *Rhoads v. Given*, 5 Houst. (Del.) 183.

**Georgia.** — *Verdery v. Dotterer*, 69 Ga. 198; *Morgan v. Burks*, 90 Ga. 287; *Brooks v. Matledge*, 100 Ga. 367.

**Illinois.** — *Cooper v. Corbin*, 105 Ill. 224.

**Indiana.** — *Jenkins v. Newman*, 122 Ind. 99; *Fisher v. Brower*, 159 Ind. 145. See also *Ferris v. Berkshire L. Ins. Co.*, 139 Ind. 486.

**Iowa.** — *New England L. & T. Co. v. Young*, 81 Iowa 732.

**Kansas.** — *Opdyke v. Crawford*, 19 Kan. 604; *Gilman v. Stock Exch. Bank*, 64 Kan. 87; *Kerr v. Hoskinson*, 5 Kan. App. 193.

**Louisiana.** — *In re Douglas*, 41 La. Ann. 765; *Behan v. Assessors*, 46 La. Ann. 870.

**Maine.** — *Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729.

**Maryland.** — *American Casualty Ins. Co.'s Case*, 82 Md. 535.

**Massachusetts.** — *Parker v. Baxter*, 2 Gray (Mass.) 185.

**Missouri.** — *Keating v. Craig*, 73 Mo. 507; *Rohrer v. Oder*, 124 Mo. 21.

**Montana.** — *Fryer v. Metz*, 12 Montg. Co. Rep. (Pa.) 108.

**New Hampshire.** — *Eastman v. Thayer*, 60 N. H. 408.

**New Jersey.** — *Hopper v. Malleson*, 16 N. J. Eq. 386; *Morrow v. Dows*, 28 N. J. Eq. 459; *Hardenbergh v. Converse*, 31 N. J. Eq. 500; *Paterson v. O'Neill*, 32 N. J. Eq. 386; *Howell v. Essex County Road Board*, 32 N. J. Eq. 675; *Lydecker v. Palisade Land Co.*, 33 N. J. Eq. 415; *Allen v. Allen*, 34 N. J. Eq. 493; *Hand v. Startup*, 38 N. J. Eq. 115; *Robinson v. Hulick*, 67 N. J. L. 496; *Matter of W. S. Car Co.*, 60 N. J. Eq. 514.

**Ohio.** — *Creech v. Pittsburg, etc., R. Co.*, 3 Ohio Dec. 265; *Donohue v. Brotherton*, 10 Ohio Dec. 47, 7 Ohio N. P. 367.

**Oregon.** — *Ross v. Portland*, 42 Oregon 134.

**Pennsylvania.** — *Ancona v. Becker*, 3 Pa. Dist. 86; *Snyder v. Mogart*, 5 Pa. Dist. 148, 17 Pa. Co. Ct. 1; *Strasburger v. Guintner*, 23 Pa. Co. Ct. 481; *Titusville's Appeal*, 108 Pa. St. 600; *Auspach's Appeal*, 112 Pa. St. 27; *Hazlett v. McCutcheon*, 158 Pa. St. 539; *Ellis v. Kies*, 1 Dauphin Co. Rep. (Pa.) 195. See also *Pennock v. Hoover*, 5 Rawle (Pa.) 291. Formerly no priority of lien was given to taxes in Pennsylvania. *Gormley's Appeal*, 27 Pa. St. 49; *Pittsburgh's Appeal*, 40 Pa. St. 455; *Allegheny City's Appeal*, 41 Pa. St. 60; *Cadmus v. Jackson*, 52 Pa. St. 295.

**Texas.** — See *Ft. Worth v. Boulware*, 26 Tex. Civ. App. 76.

**Virginia.** — *Simmons v. Lyle*, 32 Gratt. (Va.) 752; *Thomas v. Jones*, 94 Va. 756.

**Wyoming.** — *Lobban v. State*, 9 Wyo. 377.

And see the statutes of the various states.

**Nebraska — Distinction Between Realty and Personality.** — In Nebraska the lien for taxes on real estate is superior to any mortgage or incumbrance thereon. *Eddy v. Kimerer*, 61 Neb. 498; *Campbell v. Gawlewicz*, (Neb. 1902) 91 N. W. Rep. 569. But in respect to taxes on personality no priority is given over liens on the personality assessed which were created before the assessment. *Reynolds v. Fisher*, 43 Neb. 172; *Reynolds v. McMillan*, 43 Neb. 183; *Farmers L. & T. Co. v. Memminger*, 48 Neb. 17; *Chamberlain Banking House v. Woolsey*, 60 Neb. 516; *Blanchard v. Logan County*, (Neb. 1902) 89 N. W. Rep. 376.

**In New York**, in the absence of a statute giving priority to a lien for taxes, it is held that a specific lien on personal property, acquired by attachment in an action at law, cannot be displaced in favor of a subsequent claim for taxes on the same property where no specific lien has been acquired by warrant or any legal process. *Wise v. L., etc., Wise Co.*, 153 N. Y. 507.

**Priority Between State and Municipality.** — The lien of municipal taxes to which priority is given over prior mortgages and other incumbrances will not, as a rule, supersede mortgages made to the state or its representatives, because the state is not affected by such a statute, except by express mention or necessary

implied<sup>1</sup> unless such clearly appears to have been the legislative intent.<sup>2</sup> And the mere declaration that taxes shall be a lien on the property assessed has been held not to be sufficient to give precedence to the lien.<sup>3</sup> The statute creating the lien may give to it precedence over all liens and incumbrances existing prior to the passage of such statute;<sup>4</sup> but this retrospective effect will not be given in the absence of clear legislative intent.<sup>5</sup>

**7. Termination of Lien — a. IN GENERAL.** — Payment or tender at the proper time and place and to the proper officials will generally discharge the lien;<sup>6</sup> so the lien may be terminated by abandonment on the part of the taxing power,<sup>7</sup> by statutory limitation,<sup>8</sup> or by the repeal of the statute under which the taxes are levied, unless there is a clear intention to continue the lien.<sup>9</sup> But the lien is not lost by a change of county boundaries,<sup>10</sup> nor by mere delay in collecting, not amounting to abandonment.<sup>11</sup> Nor does the fact that some one is personally liable for the taxes relieve real estate of a tax

implication. *U. S. v. Hoar*, 2 Mason (U. S.) 314; *Public School Trustees v. Trenton*, 30 N. J. Eq. 667; *State v. Van Hovenberg*, (N. J. 1899) 45 Atl. Rep. 439.

**Penalty for Nonpayment Included in Priority.** — *Titusville's Appeal*, 108 Pa. St. 600.

**Paramount Tax Lien Privileged from Marshaling.** — *People's Sav. Bank v. Tripp*, 13 R. I. 621. But in the absence of statutory priority taxes are marshaled according to the general law determining the rank of liens. *Gormley's Appeal*, 27 Pa. St. 49.

**1. Priority Not Implied.** — *Gifford v. Callaway*, 8 Colo. App. 359; *Chamberlain Banking House v. Woolsey*, 60 Neb. 516; *Public School Trustees v. Trenton*, 30 N. J. Eq. 679; *Howell v. Essex County Road Board*, 32 N. J. Eq. 676; *Roraback v. Stebbins*, 4 Abb. App. Dec. (N. Y.) 100; *Wise v. L., etc., Wise Co.*, 12 N. Y. App. Div. 319; *Rhein Bldg. Assoc. v. Lea*, 100 Pa. St. 214.

**2. Morrow v. Dows**, 28 N. J. Eq. 459, holding that intention to give priority appeared where, in addition to the declaration that the tax should be a lien upon the land, the law authorized a sale of timber; *Doremus v. Cameron*, 49 N. J. Eq. 1. See also *Paterson v. O'Neill*, 32 N. J. Eq. 386; *Pennington v. Mendes*, 38 N. J. Eq. 336; *State v. Newark*, 42 N. J. L. 45; *Howell v. Essex County Road Board*, 32 N. J. Eq. 677, virtually *overruling* *O'Neill v. Dringer*, 31 N. J. Eq. 507.

**3. Mere Declaration of Lien Gives No Priority.** — *St. Johns Nat. Bank v. Bingham Tp.*, 113 Mich. 203; *Lucking v. Ballantyne*, (Mich. 1903) 94 N. W. Rep. 8; *Miller v. Anderson*, 1 S. Dak. 539; *Iowa Land Co. v. Douglas County*, 8 S. Dak. 491. But see *Minnesota v. Central Trust Co.*, (C. C. A.) 94 Fed. Rep. 244, decided under the *Minnesota* statute.

**Tax on Personalty Lien on Realty.** — Although a statute constitutes a tax on personal property a lien on real estate of the person assessed, such lien is subordinate to an antecedent mortgage on the real estate where the statute makes no attempt to fix its priority in respect to other liens. *Gifford v. Callaway*, 8 Colo. App. 359; *Bibbins v. Clark*, 90 Iowa 230 [*overruling* *New England L. & T. Co. v. Young*, 81 Iowa 732]; *Bibbins v. Polk County*, 100 Iowa 493; *Miller v. Anderson*, 1 S. Dak. 539; *Lobban v. State*, 9 Wyo. 382.

So in *State v. Newark*, 42 N. J. L. 38, it was held that taxes assessed on real estate had priority over mortgages, but taxes assessed on personal property of the owners of land had not such priority. And this would seem to be the doctrine in *Illinois*. See *Dunlap v. Gallatin County*, 15 Ill. 7; *Binkert v. Wabash R. Co.*, 98 Ill. 205.

**4. Retrospective Effect of Statute.** — *O'Brien v. Cogswell*, 17 Can. Sup. Ct. 420; *Lydecker v. Palisade Land Co.*, 33 N. J. Eq. 415. See also *State v. Newark*, 42 N. J. L. 45.

**5. Finn v. Haynes**, 37 Mich. 62. See also *Harrison v. Metz*, 17 Mich. 377.

**6. Payment of Tender.** — *Bennett v. Hunter*, 9 Wall. (U. S.) 326; *Chaffe v. Ludeling*, 34 La. Ann. 962. And see *infra*, this title, *Payment and Tender*.

**As to Subrogation to the Rights of the State,** see the title SUBROGATION, *ante*, p. 199.

**7. Abandonment.** — *Bradley v. Hintrager*, 61 Iowa 337.

**8. See *infra*, this subsection, *Statutory Limitation*.**

**9. Repeal of Statute.** — *McQuilkin v. Doe*, 8 Blackf. (Ind.) 581; *Duryee v. U. S. Credit System Co.*, 55 N. J. Eq. 311; *Gull River Lumber Co. v. Lee*, 7 N. Dak. 135; *Bryan v. Harvey*, 11 Tex. 311. See also *Mount v. State*, 6 Blackf. (Ind.) 25. *Compare* *Gardenhire v. Mitchell*, 21 Kan. 83, wherein the lien was held to be preserved under a general law providing that the repeal of a statute should not affect any right accrued under the statute repealed. And see *Smith v. Kelly*, 24 Oregon 464; *Alliance Trust Co. v. Multnomah County*, 38 Oregon 433, in which cases it was held that a repeal of the tax law does not destroy the remedy with respect to the existing taxes.

**Repeal by Implication.** — See *Philadelphia v. Kates*, 150 Pa. St. 30.

**Substantial Re-enactment** may furnish ground for inferring that the legislature intended to reserve and continue the lien for taxes which had accrued under prior statutes. *Gorley v. Sewell*, 77 Ind. 316.

**10. Not Lost by Change of County Boundaries.** — *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94; *Devor v. McClintock*, 9 W. & S. (Pa.) 80.

**11. Not Lost by Mere Delay in Collecting.** — *Iowa Land Co. v. Douglas County*, 8 S. Dak. 491. *Compare* *Robinson v. Bierce*, 102 Tenn. 428.

lien.<sup>1</sup> And a lien on personal property for the taxes assessed against it has been held not to be lost by a failure to take the steps necessary to make the taxes a lien on the land of the owner.<sup>2</sup>

**b. STATUTORY LIMITATION.** — The statute sometimes gives a perpetual lien which cannot be divested by mere lapse of time.<sup>3</sup> Where the duration of the lien is expressly limited by statute it is of course lost by the expiration of the statutory period.<sup>4</sup> Provision is sometimes made, however, for its renewal,<sup>5</sup> and the statutes sometimes provide that land may be sold for taxes after the expiration of the statutory term of the lien, unless the land has been alienated in the meantime.<sup>6</sup>

**Merger.** — Where a judgment is obtained in a tax suit the tax lien is not merged in the judgment lien so as to expire in the time limited for a general judgment lien.<sup>7</sup>

**1. Personal Liability.** — *Gable v. Seiben*, 137 Ind. 155.

The Institution of a Personal Action for the recovery of a tax does not divest its lien. *Eschbach v. Pitts*, 6 Md. 71.

**2. Personal Property.** — *Duryee v. U. S. Credit System Co.*, 55 N. J. Eq. 311.

**3. Perpetual Lien.** — See *Gulf States Land Co. v. Parker*, 60 Fed. Rep. 974; *Adams v. Davis*, 109 Ind. 10; *Gable v. Seiben*, 137 Ind. 155; *Beard v. Allen*, 141 Ind. 248. See also *Rochford v. Fleming*, 10 S. Dak. 24, holding that the lien of a county for taxes was not lost by the county bidding in the land at a sale for such taxes. Compare *Adams v. Osgood*, 42 Neb. 450, wherein it was said: "Whatever may be the rule elsewhere, we think, under our statutes, that the only way by which a valid tax existing against real estate here can be discharged is by the payment of such tax, unless such real estate be sold for taxes and the holder of the tax lien fails to bring suit to foreclose the same for five years after the expiration of the time to redeem." And see *Spiech v. Tierney*, 56 Neb. 517; *Johnson v. Finley*, 54 Neb. 733; *Black v. Leonard*, 33 Neb. 745.

**Special and General Laws.** — A general statute limited the lien for taxes to two years; an act incorporating a certain town provided that a tax lien on real estate should "remain a lien thereon until paid." It was held that the latter provision superseded that contained in the general act. *Skinner v. Christie*, 52 N. J. Eq. 720.

So in *Wells County v. McHenry*, 7 N. Dak. 246, it was held that a tax lien on real estate having been declared to be perpetual, no lapse of time would bar a remedy to enforce such lien against the land, and that no limitation statute could be invoked as a defense to the proceedings to foreclose the tax lien.

But in *State v. Bellin*, 79 Minn. 131, it was held that a statute providing that the lien for taxes on real property should continue until they were paid did not affect the provision of the statute of limitation applicable under previous decisions to taxes and tax judgments.

**4. Time Fixed by Statute.** — *Isaac v. Swift*, 10 Cal. 80, 70 Am. Dec. 698; *Field v. West Orange Tp.*, 37 N. J. Eq. 434; *Kirkpatrick v. New Brunswick*, 40 N. J. Eq. 46; *Johnson v. Van Horn*, 45 N. J. L. 136; *Burnet v. Dean*, 63 N. J. Eq. 253; *Philadelphia v. Rebank*, 12 Pa. Co. Ct. 526; *Grubb v. Weaver*, 19 Pa. Co. Ct. 609;

*Philadelphia v. Heister*, 142 Pa. St. 39. See also *Philadelphia v. Kates*, 150 Pa. St. 30; *Philadelphia v. Scott*, 93 Pa. St. 25. Compare *Brooke v. Kaufman*, 6 Pa. Dist. 513; *Chester v. Sinex*, 8 Del. Co. Rep. (Pa.) 160.

**Necessity for Sale Within Period.** — In *Dubois v. Poughkeepsie*, 22 Hun (N. Y.) 117, it was held that a sale made subsequent to the two years prescribed for the continuance of the lien was invalid although preliminary proceedings were begun within that period.

**Statute Held to Be Prospective Only.** — *Hart v. New Orleans*, 51 La. Ann. 912. See also *Parham's Succession*, 51 La. Ann. 980; *Gowland v. New Orleans*, 52 La. Ann. 2042.

**5. Scire Facias to Revive Lien.** — See *Philadelphia v. Kates*, 150 Pa. St. 30; *Philadelphia v. Reeves*, 15 Pa. Super. Ct. 535; *Philadelphia v. Rebank*, 12 Pa. Co. Ct. 526.

In *Pennsylvania* it has been held that the lien of registered taxes on real estate is lost unless a scire facias *sur* claim is issued before the expiration of five years from the first day of January following the year for which the taxes were assessed. *Philadelphia v. Browning*, 13 Pa. Super. Ct. 164; *Philadelphia v. Heister*, 142 Pa. St. 39; *Philadelphia v. Kates*, 150 Pa. St. 30. But where the lien filed comprises taxes for more than one year, and the lien for taxes for some of the years is lost before the issuance of the sci. fa., after judgment is obtained, it cannot be divided and that relating to the invalid years be stricken off. *Philadelphia v. Browning*, 13 Pa. Super. Ct. 164.

**New Jersey Statute — Statutory Limitation Not Extended.** — *Harned v. Camden*, 66 N. J. L. 520.

**6. Sale After Expiration of Statutory Term.** — See *Holden v. Eaton*, 7 Pick. (Mass.) 15 (federal statute); *Kelso v. Boston*, 120 Mass. 297; *Russell v. Deshon*, 124 Mass. 342; *Market Nat. Bank v. Belmont*, 137 Mass. 407; *Bull v. Griswold*, 14 R. I. 22. See also *Gove v. Newton*, 58 N. H. 359; *Mason v. Bilbruck*, 62 N. H. 440.

**7. Not Merged in Judgment Lien.** — *Beard v. Allen*, 141 Ind. 243, holding that the foreclosure of the lien for taxes did not merge such lien in the judgment. *Kentucky Cent. R. Co. v. Com.*, 92 Ky. 64, holding that a simple money judgment for taxes, though the limitation of the judgment was fifteen years, could not extend the lien of the taxes, which was limited by statute to five years. *Boyd v. Ellis*, 107

c. **EFFECT OF ALIENATION, JUDICIAL SALE, ETC.** — A tax lien is not discharged by the alienation of the property to which it has attached. The purchaser of the property takes it subject to the lien, whether he knew of its existence or not. The lien follows the property into the hands of successive purchasers until discharged by payment, lapse of time, or otherwise.<sup>1</sup> It has been held that the lien is not divested by making an assignment for the benefit of creditors.<sup>2</sup> So a receiver<sup>3</sup> or an assignee in insolvency or bankruptcy<sup>4</sup> takes subject to the lien.

**Order of Liability.** — When property is sold and conveyed by a common grantor at different times and to different purchasers, and taxes having a lien on all the property sold are due, the last property sold is primarily bound for the payment of such taxes.<sup>5</sup>

**Effect of Judicial Sale.** — A lien for taxes which has attached to property is not divested by a subsequent judicial sale, and the purchaser takes subject thereto,<sup>6</sup> even though the decree under which the sale was made directed that the property should be sold free from all incumbrances.<sup>7</sup> But if a stat-

Mo. 401. See also *Riley v. McCord*, 21 Mo. 285.

**Execution Lien.** — *State v. Guerry*, 15 Rich. L. (S. Car.) 353.

1. **Not Discharged by Alienation.** — *U. S. v. Turner*, 18 Int. Rev. Rec. 5, 28 Fed. Cas. No. 16,548; *Alkan v. Bean*, 8 Biss. (U. S.) 83; *Driggers v. Cassady*, 71 Ala. 529; *Doe v. Deavors*, 8 Ga. 479; *Dunlap v. Gallatin County*, 15 Ill. 7; *Ewing v. Robeson*, 15 Ind. 26; *Oldham v. Jones*, 5 B. Mon. (Ky.) 465; *Morris v. Lalaurie*, 39 La. Ann. 47; *Schmidt v. Smith*, 57 Mo. 135 (property held in trust); *Scott v. Shy*, 53 Mo. 478; *Foster, etc., Lumber Co. v. Leisure*, (Neb. 1902) 91 N. W. Rep. 556; *Hoglen v. Cohan*, 30 Ohio St. 436; *Easton v. Drake*, 9 Kulp (Pa.) 320; *Mills v. Thurston County*, 16 Wash. 378.

**Personalty.** — Under a statute providing for a tax lien on personal property, it has been held that the lien continues and follows the property if it remains in the county, although the title thereto may have been transferred to another owner. *Mills v. Thurston County*, 16 Wash. 378.

**Satisfaction of Mortgage.** — A tax lien on a mortgagee's interest in real property is not released by satisfaction of the mortgage. *Dekum v. Multnomah County*, 38 Oregon 253. See also *Alliance Trust Co. v. Multnomah County*, 38 Oregon 433.

**Collateral-inheritance Tax — Equitable Conversion.** — In *Brown's Estate*, 5 Pa. Dist. 286, it was held that where by the will of a testator there is a conversion of his real estate into personalty, the lien of a collateral-inheritance tax is transferred from his real estate to the fund which is produced by the direction to convert. See also *Com. v. Coleman*, 52 Pa. St. 468; *Miller v. Com.*, 111 Pa. St. 321; *Williamson's Estate*, 153 Pa. St. 532. And see the title **SUCCESSION TAXES**, *ante*, p. 337.

**Alienation to Corporation.** — In *State v. Northwestern Telephone Exch. Co.*, 80 Minn. 17, it was held that a tax lien is not divested by a sale after it has attached to a corporation which has commuted to the state by the payment of a percentage on its gross earnings in lieu of all other taxes.

**Confusion of Goods.** — It has been held that

where the purchaser of a stock of goods on which there was a tax lien mixed therewith other goods subsequently purchased, the whole stock was subjected to the lien. *Mills v. Thurston County*, 16 Wash. 378. But see *Chicago Bazaar Co. v. McNichols*, 13 Colo. App. 154.

2. **Assignment for Benefit of Creditors.** — *State v. Rowse*, 49 Mo. 586; *Goodwin Gas Stove, etc., Co's Estate*, 3 Pa. Dist. 483, *affirmed* 166 Pa. St. 296. See also *Cones v. Wilson*, 14 Ind. 465 (personal property).

3. **Receivers.** — *Duryee v. U. S. Credit System Co.*, 55 N. J. Eq. 311, holding that the court may provide for payment of the taxes as a preferred claim out of the proceeds of the property. See also *Matter of Columbia Ins. Co.*, 4 Abb. App. Dec. (N. Y.) 239.

4. **Assignee in Insolvency or Bankruptcy Takes Subject to Lien.** — *In re Brand*, 2 Hughes (U. S.) 334; *Stokes v. State*, 46 Ga. 412, 12 Am. Rep. 588; *Mesker v. Koch*, 76 Ind. 68; *Meeks v. Whatley*, 48 Miss. 337; *People v. Manhattan F. Ins. Co.*, (Supm. Ct. Spec. T.) 59 N. Y. Supp. 1007.

5. **Order of Liability.** — *Merchants Nat. Bank v. McWilliams*, 107 Ga. 532; *Askew v. Scottish American Mortg. Co.*, 114 Ga. 300. See also *Reynolds v. Wood*, 111 Ga. 854. And see generally the title **MARSHALING ASSETS**, vol. 19, p. 1273 *et seq.*

6. **Lien Not Discharged by Judicial Sale.** — *Osterberg v. Union Trust Co.*, 93 U. S. 426; *Bloxham v. Consumers' Electric Light, etc., R. Co.*, 36 Fla. 519, 51 Am. St. Rep. 44; *Atlanta, etc., R. Co. v. State*, 63 Ga. 483; *Kerr v. Hoskinson*, 5 Kan. App. 193; *Middlesboro v. Coal, etc., Bank*, 108 Ky. 680; *Ketcham v. Fitch*, 13 Ohio St. 201; *Steen's Estate*, 175 Pa. St. 299, holding that municipal taxes were not discharged under a statute providing that a sale should "discharge the premises sold from the lien of the debts of the decedent except debts of record and debts secured by mortgage."

**Sheriff's Sale.** — See *Doe v. Deavors*, 8 Ga. 479; *Freeman v. Atlanta*, 66 Ga. 617.

7. **Partition Sale cannot have the effect of discharging the lien.** *Morris v. Lalaurie*, 39 La. Ann. 47.

8. **Bloxham v. Consumers' Electric Light, etc., R. Co., 36 Fla. 519, 51 Am. St. Rep. 44.**



ute directs that the tax shall be paid out of the proceeds of the sale, the purchaser takes the property free from the lien.<sup>1</sup> So the lien is not affected by a foreclosure sale of a mortgage on lands.<sup>2</sup> But a sale of land for taxes for one year discharges the land from the lien of the taxes delinquent thereon for the years prior to the one for which the sale was made, for the lien of each year's tax is paramount to all previous liens.<sup>3</sup> There are, however, decisions in conflict with this rule.<sup>4</sup>

**8. Personal Liability Independent of Lien.**—Where a personal liability for taxes rests on the owner of the property assessed, such liability is independent of the tax lien.<sup>5</sup> Therefore an action may be brought against the taxpayer for the taxes whether there is or is not a lien in existence.<sup>6</sup> And

**1. Payment from Proceeds of Sale.**—*Kerr v. Hoskinson*, 5 Kan. App. 193; *Annely v. De Sassure*, 12 S. Car. 488. See also *Shaw v. Allegheny*, 115 Pa. St. 46, holding that the insufficiency of the proceeds to pay the taxes does not prevent the divestiture of the lien; *Smith v. Simpson*, 60 Pa. St. 169; *Anspach's Appeal*, 112 Pa. St. 27; *Strasburger v. Guinter*, 23 Pa. Co. Ct. 481.

**A Sale of a Portion of the Land** liable for the tax will not, in *Pennsylvania*, prevent the discharge of the lien, since the tax is not apportionable, but rests on the entire tract. *Mellon's Appeal*, 114 Pa. St. 564. See also *Philadelphia v. McGonigle*, 4 Phila. (Pa.) 351, 18 Leg. Int. (Pa.) 110.

**Orphans' Court Sale.**—In *Brotherlin's Estate*, 15 Pa. Co. Ct. 251, 3 Pa. Dist. 698, it was held that where unseated lands against which taxes had been assessed were sold at an Orphans' Court sale the taxes could not be paid out of the proceeds of the sale.

**Hand Money.**—In *Fidelity Ins., etc., Co. v. Byrnes*, 4 Pa. Dist. 654, it was held that hand money paid to the sheriff by a purchaser of real estate was bound by a lien for taxes of which the sheriff had no notice, notwithstanding the purchaser made default in payment and before a final sale was made the lien for taxes had expired by limitation of time.

**2. Foreclosure Sale.**—*Isaacs v. Decker*, 41 Ind. 410; *Bodertha v. Spencer*, 40 Ind. 353; *Vaughn v. Clark*, 5 Neb. 238; *Iler v. Colson*, 8 Neb. 331; *State v. Godfrey*, 10 Ohio Cir. Dec. 316.

**Payment of Taxes from Proceeds.**—In *Opdyke v. Crawford*, 19 Kan. 604, it was held that the court should, on application of the plaintiff in foreclosure, order that the taxes due on the mortgaged property be first paid out of the proceeds of the sale.

**3. Sale for Taxes Discharges Lien for Previous Years**—*California*.—*Dougherty v. Henarie*, 47 Cal. 9; *Chandler v. Dunn*, 50 Cal. 15; *Anderson v. Ryder*, 46 Cal. 135. But see *Cowell v. Washburn*, 22 Cal. 520.

*Illinois*.—*Law v. People*, 116 Ill. 244.

*Iowa*.—*Preston v. Van Gorder*, 31 Iowa 250; *Bowman v. Thompson*, 36 Iowa 505; *Shoemaker v. Lacey*, 38 Iowa 277; *Hough v. Easley*, 47 Iowa 330.

*Kansas*.—*McFadden v. Goff*, 32 Kan. 415; *Belz v. Bird*, 31 Kan. 141; *Board of Regents v. Linscott*, 30 Kan. 240.

*Louisiana*.—*Bradford v. Lafargue*, 30 La. Ann. 432.

*Massachusetts*.—*Langley v. Chapin*, 134 Mass. 82.

*Michigan*.—*Robbins v. Barron*, 32 Mich. 36.

*Minnesota*.—*Wass v. Smith*, 34 Minn. 304.

*Ohio*.—*Buckley v. Osburn*, 8 Ohio 180.

*Pennsylvania*.—*Irwin v. Frego*, 22 Pa. St. 368; *Huzzard v. Trego*, 35 Pa. St. 9.

*Wisconsin*.—*Jarvis v. Peck*, 19 Wis. 74; *Sayles v. Davis*, 22 Wis. 225; *Eaton v. North*, 29 Wis. 75.

See further *infra*, this title, *Tax Sales—Lands—Conduct of Sale—Amount for Which Sale to Be Made*. And see the title *Tax Titles*, *post*.

**Two Sales at Same Time and Place—Second Sale Valid.**—See *Keen v. Sheehan*, 154 Mass. 208.

**Owner Who Redeems.**—The rule has been held to operate as well in favor of the owner who redeems from the sale as of a purchaser at a tax sale. *Hough v. Easley*, 47 Iowa 330; *Kessey v. Connell*, 68 Iowa 430. But see *Texarkana Water Co. v. State*, 62 Ark. 188. Compare *Gray v. Coan*, 30 Iowa 536, 40 Iowa 329.

**Mistake.**—In *Bowman v. Eckstein*, 46 Iowa 583, it was held that the sale did not operate as a discharge of the lien of prior delinquent taxes omitted by mistake from the sale.

**Land Bid In by State.**—In *Traylor v. State*, 19 Tex. Civ. App. 86, it was held that a tax lien might be asserted by the state against property which had been sold and bid in by the state for its taxes, under a statute which declared that state taxes should "remain a lien upon said land." See also *Masterson v. State*, 17 Tex. Civ. App. 91.

**4. Contra.**—*Adams v. Osgood*, 42 Neb. 450; *Smith v. Specht*, 58 N. J. Eq. 47, holding that a statute giving to a tax lien priority over other incumbrances did not apply to prior liens for taxes held by the state; *Nashville v. Cowan*, 10 Lea (Tenn.) 209. See also *Public School Trustees v. Trenton*, 30 N. J. Eq. 667; *Smith v. Billingsley*, 58 N. J. Eq. 47.

**5. Personal Liability Independent of Lien.**—*Kentucky Cent. R. Co. v. Com.*, 92 Ky. 64. And see *O'Grady v. Barnhisel*, 23 Cal. 294; *Oakland v. Whipple*, 39 Cal. 112; *Hart v. Tiernan*, 59 Conn. 521. See also *supra*, this title, *Persons and Things Taxable—In General*.

**6. Jefferson v. Whipple**, 71 Mo. 519; *Jefferson v. McCarty*, 74 Mo. 55; *Jefferson v. Curry*, 77 Mo. 230. And see *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 231; *Rundell v. Lakey*,

although the lien may have been discharged by the expiration of the period fixed by statute, the tax may be collectible as a debt.<sup>1</sup>

**XII. PAYMENT AND TENDER — 1. Opportunity to Pay.** — The statutes generally provide that before levy and sale, or other steps to enforce the collection of a tax, the taxpayer shall have an opportunity voluntarily to pay his assessment, and the demand and notice prescribed for this purpose are prerequisites to any steps for collection, such as action, levy, sale, etc.<sup>2</sup>

**2. Time and Place.** — Taxes should be paid at the time and place prescribed by statute;<sup>3</sup> but a sale of land for taxes may generally be avoided by payment at any time before the execution of the tax deed.<sup>4</sup> Payment of taxes on real property generally must be made in the town, county, or district where the land is located.<sup>5</sup>

40 N. Y. 517; and the title *TAXATION*, 21 ENCYC. OF PL. AND PR. 385.

**Judgment Not Enforceable as Lien.** — In *Kentucky* it has been held that a mere money judgment for taxes against the property owner cannot be enforced as a lien on the property without alleging and proving the steps necessary to the creation of a valid tax lien. *Kentucky Cent. R. Co. v. Com.*, 92 Ky. 64.

**1. Tax Collectible as Debt After Loss of Lien.** — *State v. Myer*, 41 La. Ann. 436; *Oteri v. Parker*, 42 La. Ann. 374; *Leeds v. Hardy*, 43 La. Ann. 811; *People's Homestead Assoc. v. Garland*, 107 La. 476; *Harness v. Cravens*, 126 Mo. 233; *Philadelphia v. Kates*, 150 Pa. St. 30. See also *Stewart's Succession*, 41 La. Ann. 128; *Mercier's Succession*, 42 La. Ann. 1135.

But though the taxes may be collected as debts, they have no priority over other incumbrances when the lien is lost. *People's Homestead Assoc. v. Garland*, 107 La. 476.

**2. Opportunity to Pay — Notice, Demand, Etc.** — *United States*. — *Parker v. Rule*, 9 Cranch (U. S.) 65.

*Arkansas*. — *Hickman v. Kempner*, 35 Ark. 505.

*Iowa*. — *Lathrop v. Howley*, 50 Iowa 39.

*Kansas*. — *Hier v. Rullman*, 22 Kan. 606.

*Kentucky*. — *Hoozer v. Buckner*, 11 B. Mon. (Ky.) 183; *Julian v. Stephens*, (Ky. 1889) 11 S. W. Rep. 6.

*Louisiana*. — *Villey v. Jarreau*, 33 La. Ann. 291.

*Maine*. — *Wiggin v. Temple*, 73 Me. 380.

*Massachusetts*. — *Reed v. Crapo*, 127 Mass. 39.

*Minnesota*. — *St. Anthony Falls Water Power Co. v. Greeley*, 11 Minn. 324; *Redwood County v. Winona, etc.*, Land Co., 40 Minn. 512.

*Missouri*. — *Atkison v. Amick*, 25 Mo. 404.

*Nevada*. — *State v. Western Union Tel. Co.*, 4 Nev. 338.

*New York*. — *Thompson v. Gardner*, 10 Johns. (N. Y.) 404.

*Texas*. — *Lockhart v. Houston*, 45 Tex. 317.

See also *infra*, this title, *Collection*; *Tax Sales*. Compare *Noland v. Busby*, 28 Ind. 154; *Virden v. Bowers*, 55 Miss. 1.

**What Is Sufficient Demand.** — See *Himmelman v. Booth*, 53 Cal. 50.

**Who Should Make Demand.** — The collector is the proper person to make the demand. *York v. Goodwin*, 67 Me. 260.

**Demand as Condition Precedent.** — Demand is

necessary before a levy, but it is not a condition precedent to the duty of the taxpayer to pay. *Goddard v. Seymour*, 30 Conn. 394. See also *Den v. Helmes*, 3 N. J. L. 600.

**Demand May Be Proved by Parol.** — *Gossett v. Kent*, 19 Ark. 602.

**Refusal to Pay Justifies Immediate Levy.** — *Wheelock v. Archer*, 26 Vt. 380.

**3. Time and Place Provided.** — *Union Pac. R. Co. v. Dodge County*, 98 U. S. 541; *State v. Safe Deposit, etc., Co.*, 86 Md. 581; *State v. Bryant*, 121 N. Car. 569; *Breisch v. Cox*, 81 Pa. St. 336.

**Construction of Mississippi Statute.** — *Carlisle v. Yoder*, 69 Miss. 384; *Carlisle v. Chrestman*, 69 Miss. 392.

**Payment at a Time When the Collector Is Not Authorized to Receive Payment** will not avoid a subsequent sale. *Thornton v. Smith*, 36 Ark. 508.

**Payment Before Assessment** is no protection. *Cossart v. Spence*, 23 Ark. 374.

**Overpayment of Previous Year.** — The taxes of one year cannot be compensated by an overpayment of a tax of a previous year. *New Orleans v. Davidson*, 30 La. Ann. 541, 31 Am. Rep. 228, 30 La. Ann. 554.

**Waiver of Exact Time of Payment.** — Where a tax was in fact paid and received by the proper officers and never returned or tendered back, there was held to be an effectual waiver of any objection which might possibly have been urged that the payment was not made in time. *McHenry v. Alford*, 168 U. S. 651.

**Penalties for Failure to Pay at the Time and Place Provided.** — See *infra*, this title, *Collection* — 3. *d. Means of Inducing Payment*.

**4. Payment Defeating Tax Sale.** — *Huber v. Pickler*, 94 Mo. 382. See also *infra*, this title, XV. 2. a. (3) *Nonpayment of Tax*; XVII. 7. *Payment and Tender*; and the title *Tax Titles*, *post*, IV. 1. *In General — Until Execution of Deed*.

**Payment Prior to Sale Sufficient.** — *Bennett v. Hunter*, 9 Wall. (U. S.) 326, *applying Act Cong. June 7, 1862*.

**Extension of Time for Making Return.** — In *Drennan v. Beierlein*, 49 Mich. 272, it was held that a taxpayer's right to make payment after the return of taxes is the same after an extension of the time for making the return as before.

8. See *supra*, this title, VII. 2. *Real Property*; *infra*, this title, XV. 2. b. (3) *By What Officer Conducted*.

**3. By Whom Made — a. BY WHOM PAYMENT MAY BE MADE.** — Payment of Taxes by One Joint Tenant or tenant in common inures to the benefit of all.<sup>1</sup>

Payment by an Agent of the taxpayer is equivalent to a payment by the principal.<sup>2</sup>

Any Person Having an Interest in the Property may make payment where such interest would be divested by a tax sale of the property, *e. g.*, a lienor, mortgagee, or person claiming title to the property.<sup>3</sup>

Payment by Third Person. — It has been held that payment of taxes by any one, whether interested in the property or not, extinguished them.<sup>4</sup> But it would seem from some cases that payment by a stranger does not extinguish the tax.<sup>5</sup>

**Mandamus to Compel Receipt of Taxes.** — A writ of mandamus may issue to compel a tax collector to accept payment from one who has the right to make it, in case of an unlawful refusal on the part of such collector.<sup>6</sup>

**b. PRIMARY LIABILITY AS BETWEEN OWNERS OF DIFFERENT ESTATES.** — Where there are several estates in property the person having the present possession and enjoyment is primarily liable for the taxes.<sup>7</sup>

**Tenant for Life.** — Thus it is the duty of the tenant for life in possession to keep the current taxes paid if the estate is sufficient for the purpose.<sup>8</sup>

**1. Co-owner or Cotenant.** — *Loomis v. Pingree*, 43 Me. 299; *Franklin v. Terrell*, 3 Hawks (10 N. Car.) 283; *Brown v. Day*, 78 Pa. St. 129. And see the title JOINT TENANTS AND TENANTS IN COMMON, vol. 17, p. 686.

**The Tender of a Pro Rata Share of the tax by one of several cotenants has been held to be sufficient as to her.** *Winter v. Atkinson*, 28 La. Ann. 650.

**2. Payment by Agent.** — *Hills v. Exchange Bank*, 105 U. S. 319. See also *Hawkins v. Dougherty*, 9 Houst. (Del.) 156, holding that while the collector may except such payment, he is not compellable to do so, but his bond is liable in case of a subsequent failure to collect.

Payment by an agent is valid without reference to the state of accounts between principal and agent. *Rand v. Scofield*, 43 Ill. 167.

**Rule to Contrary Invalid.** — Tax commissioners have no right to establish a rule that they will receive taxes from no one but the owner in person. *Atwood v. Weems*, 99 U. S. 183; *U. S. v. Lee*, 106 U. S. 196; *Bennett v. Hunter*, 9 Wall. (U. S.) 326; *Tacey v. Irwin*, 18 Wall. (U. S.) 549.

**Ratification** is equivalent to prior authority. *Parsons v. Slaughter*, 63 Fed. Rep. 880. See generally the title AGENCY, vol. 1, p. 1213.

**3. Payment by Any Person Having Interest in Property.** — *U. S. v. Tilden*, 9 Ben. (U. S.) 368; *Cole v. Wright*, 70 Ind. 179; *Barthell v. Syverson*, 54 Iowa 160; *Lillie v. Case*, 54 Iowa 177; *McKeever v. Beacom*, 101 Iowa 173; *Blackwood v. Van Vleit*, 30 Mich. 118; *Brown v. Day*, 78 Pa. St. 129; *Lobban v. State*, 9 Wyo. 386.

**Lienholder.** — *McNary v. Wrightman*, 32 Oregon 573; *Packwood v. Briggs*, 25 Wash. 530 (holder of general judgment lien).

**Mortgagee.** — *Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729.

**4. Payment by Any Person.** — *Morrison v. Kelly*, 22 Ill. 610, 74 Am. Dec. 169; *Wilbert v. Michel*, 42 La. Ann. 855. See also *Griffing v. Pintard*, 25 Miss. 173; *Nickum v. Gaston*, 28 Oregon 322.

**Tax Collectors Are Ministerial Officers and**

must accept payment from any one offering to pay. *Iowa R. Land Co. v. Guthrie*, 53 Iowa 383.

**Mistake.** — Where taxes on land were paid by mistake by one not the owner, the payment was held to cancel the assessment, and the fact that the money was refunded by the collector acting without authority made no difference. *Mason v. Chicago*, 48 Ill. 420. As to the existence of authority to refund, see *infra*, this title, XIII. 1. *Refunding of Taxes.*

**5. Broderick v. Allamakee County**, 104 Iowa 750; *Bailey v. McClaugherty*, 48 W. Va. 546; *Simpson v. Edmiston*, 23 W. Va. 675. And see *infra*, this section, *Effect*.

**6. Mandamus to Compel Acceptance.** — *Clementi v. Jackson*, 92 N. Y. 591; *People v. O'Keefe*, 90 N. Y. 419. But see *Hawkins v. Dougherty*, 9 Houst. (Del.) 156, holding that in *Delaware* mandamus will not lie to compel acceptance from an agent. See also *infra*, this title, *Collection*.

**7. Present Possession.** — *Willard v. Blount*, 11 Ired. L. (33 N. Car.) 624; *Spangler v. York County*, 13 Pa. St. 322. See also *supra*, this title, IX. 6. *e. (2) (f) Separate Estates or Interests in Same Property.*

**8. Tenant for Life — United States.** — *Pike v. Wassell*, 94 U. S. 711.

*Illinois.* — *Waldo v. Cummings*, 45 Ill. 421.  
*Indiana.* — *Clark v. Middlesworth*, 82 Ind. 240.

*Iowa.* — *Olleman v. Kelgore*, 52 Iowa 38.

*Kentucky.* — *Arnold v. Smith*, 3 Bush (Ky.) 163.

*Maine.* — *Varney v. Stevens*, 22 Me. 334; *Garland v. Garland*, 73 Me. 98.

*Massachusetts.* — *Holmes v. Taber*, 9 Allen (Mass.) 246.

*New Hampshire.* — *Peirce v. Burroughs*, 58 N. H. 302.

*New Jersey.* — *Holcombe v. Holcombe*, 29 N. J. Eq. 597; *Cadmus v. Combes*, 37 N. J. Eq. 264.

*New York.* — *Gillespie v. Brooks*, 2 Redf. (N. Y.) 363; *Booth v. Ammerman*, 4 Bradf. (N. Y.) 129; *Ex p. McComb*, 4 Bradf. (N. Y.) 151; *Carter v. Youngs*, 42 N. Y. Super. Ct. 418;

But it has been held that a special assessment against real property for a permanent improvement is apportionable between the life tenant and the remainderman,<sup>1</sup> although in general special assessments are payable by the life tenant.<sup>2</sup>

**A Mortgagor** in possession is primarily liable for the taxes in the absence of a statute changing the rule or (as between the parties) of an agreement to the contrary.<sup>3</sup>

**A Vendee** in possession under a contract of sale is liable, as between himself and his vendor, for taxes assessed after the commencement of his possession.<sup>4</sup>

**The Trustee** should pay the taxes levied against the trust estate in the absence of a statute providing otherwise.<sup>5</sup>

**Personal Representatives.** — Taxes assessed and due at the date of the death of the owner of the property may be regarded as a debt against the decedent, and as such to be paid by the executor or administrator.<sup>6</sup>

*Wade v. Malloy*, 16 Hun (N. Y.) 226; *De Witt v. Cooper*, 18 Hun (N. Y.) 67; *Pinckney v. Pinckney*, 1 Bradf. (N. Y.) 269; *Hepburn v. Hepburn*, 2 Bradf. (N. Y.) 74; *Griswold v. Griswold*, 4 Bradf. (N. Y.) 216; *Sheldon v. Ferris*, 45 Barb. (N. Y.) 124; *Deraismes v. Deraismes*, 72 N. Y. 154.

*Oregon.* — *Abernethy v. Orton*, 42 Oregon 441, 95 Am. St. Rep. 774.

*Pennsylvania.* — *McDonald v. Heylin*, 4 Phila. (Pa.) 73, 17 Leg. Int. (Pa.) 148; *Spangler v. York County*, 13 Pa. St. 322.

*Rhode Island.* — *Weaver v. Arnold*, 15 R. I. 53.

*Tennessee.* — *Anderson v. Hensley*, 8 Heisk. (Tenn.) 834; *Nashville v. Cowan*, 10 Lea (Tenn.) 209; *Stovall v. Austin*, 16 Lea (Tenn.) 700; *Ferguson v. Quinn*, 97 Tenn. 46.

**Sufficiency of Income — Burden of Proof on Remainderman.** — *Clark v. Middlesworth*, 82 Ind. 241.

**A Receiver** may be appointed for a life tenant neglecting to pay taxes. *Cairns v. Chabert*, 3 Edw. (N. Y.) 312. See also *Sidenberg v. Ely*, (Ct. App.) 11 Abb. N. Cas. (N. Y.) 358, 90 N. Y. 264, 43 Am. Rep. 163; *King v. King*, 41 N. Y. Super. Ct. 516. And see generally the title RECEIVERS, vol. 23, p. 1011.

**Waste — Forfeiture.** — Neglect of a life tenant to pay taxes accrued during his tenancy makes him liable to an action of waste or in the nature of waste. *Stetson v. Day*, 51 Me. 434; *Phelan v. Boylan*, 25 Wis. 679. See also *Varney v. Stevens*, 22 Me. 331; *Wade v. Molloy*, 16 Hun (N. Y.) 226. Or he may be liable to the forfeiture of the estate. *McMillan v. Robbins*, 5 Ohio 28. See also *Estabrook v. Royon*, 52 Ohio St. 322.

**1. Special Assessment.** — *Plympton v. Boston Dispensary*, 106 Mass. 544; *Gillespie v. Brooks*, 2 Redf. (N. Y.) 363; *Stilwell v. Doughty*, 2 Bradf. (N. Y.) 312; *Miller's Estate*, Tuck. (N. Y.) 346; *Bloodgood v. Clark*, 4 Paige (N. Y.) 574; *Cogswell v. Cogswell*, 2 Edw. (N. Y.) 231; *Cairns v. Chabert*, 3 Edw. (N. Y.) 312; *Fleet v. Dorland*, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 489; *Peck v. Sherwood*, 56 N. Y. 615; *Thomas v. Evans*, 105 N. Y. 612.

**2.** *Garland v. Garland*, 73 Me. 97; *Wilson v. Edmonds*, 24 N. H. 517; *Holcombe v. Holcombe*, 20 N. J. Eq. 597; *Outcalt v. Appleby*, 36 N. J. Eq. 73; *Hepburn v. Hepburn*, 2 Bradf. (N. Y.) 76; *Hitner v. Ege*, 23 Pa. St. 305; *Whyte v. Nashville*, 2 Swan (Tenn.) 364.

**3. Mortgagor.** — *Opdyke v. Crawford*, 19 Kan. 604; *Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729; *Gormley's Appeal*, 27 Pa. St. 49. See generally *supra*, this title, VI. 4. *e. Mortgages*; IX. 6. *e. (2) (f) Separate Estates or Interests in Same Property.*

**Covenant to Pay Taxes.** — See the title MORTGAGES, vol. 20, p. 931.

**A Mortgagor Who Has Conveyed His Interest** in the premises before a tax accrues is not liable for its payment. *Gormley's Appeal*, 27 Pa. St. 49.

**4. Vendee in Possession.** — *Sherman v. Savery*, 2 Fed. Rep. 505; *Cole v. Wright*, 70 Ind. 179; *Sackett v. Osborn*, 26 Iowa 146; *Lillie v. Case*, 54 Iowa 177; *Greer v. McCarter*, 5 Kan. 17; *Farber v. Purdy*, 69 Mo. 601; *Francis v. Washburn*, 5 Hayw. (Tenn.) 294. But see *Wilson v. Tappan*, 6 Ohio 172.

**Payment Inure to Benefit of Title When Consummated.** — *Russell v. Mandell*, 73 Ill. 136.

**Taxes Previously Assessed** and remaining unpaid are a personal charge against the vendor. *Alexandria v. Preston*, 8 Cranch (U. S.) 53; *Biggins v. People*, 96 Ill. 381; *Blodgett v. German Sav. Bank*, 69 Ind. 153; *Greer v. McCarter*, 5 Kan. 17; *Smeich v. York County*, 68 Pa. St. 439; *Henry v. Horstick*, 9 Watts (Pa.) 412. *Aliter* when the taxes previously assessed have not been extended. *Barlow v. St. Nicholas Nat. Bank*, 63 N. Y. 399, 20 Am. Rep. 547; *Dowdney v. New York*, 54 N. Y. 186. But compare *Rundell v. Lakey*, 40 N. Y. 513.

**Tax on Sales.** — In *Tennessee* the vendee of land is required to pay the tax imposed on sales. *Guthrie v. South Western Iron Co.*, 8 Heisk. (Tenn.) 826.

**5. Trust Property.** — *Holmes v. Taber*, 9 Allen (Mass.) 246; *Holcombe v. Holcombe*, 29 N. J. Eq. 597; *Commonwealth Nat. Bank v. Shoemaker*, 13 W. N. C. (Pa.) 255; *Landreth v. McCaffrey*, 17 Pa. Super. Ct. 272. See also *supra*, this title, VII. 3. *c. (12) Property Held in Trust*; IX. 6. *e. (2) (i) Trustees.*

**Holder of Naked Legal Title Not Liable.** — See *Rawle v. Renshaw*, 15 Pa. Super. Ct. 488.

**6. Personal Representatives.** — *Shaw v. Camp*, 56 Ill. App. 24; *Brown v. Evans*, 15 Kan. 88; *Sohier v. Eldredge*, 103 Mass. 345; *Holcombe v. Holcombe*, 29 N. J. Eq. 597; *Fleet v. Dorland*, (Summ. Ct. Spec. T.) 11 How. Pr. (N. Y.) 489; *McMahon v. Beekman*, (Supm. Ct. Spec. T.) 65 How. Pr. (N. Y.) 427; *Lawrence v. Holden*, 3 Bradf. (N. Y.) 142. See also *supra*,

**Heir or Devisee.** — Taxes accruing after the death of the owner of the property are to be paid by the heir or devisee.<sup>1</sup>

**Assignee — Receiver.** — An assignee for the benefit of creditors<sup>2</sup> or a receiver<sup>3</sup> should pay the taxes upon the property in his hands as assignee or receiver.

**Landlord and Tenant.** — The subject of liability as between landlord and tenant is treated elsewhere.<sup>4</sup>

**c. REIMBURSEMENT — Party in Interest — Payment in Good Faith.** — When a party in interest, on default of the person primarily liable, is compelled to pay taxes to protect his own interest, he has a remedy over for the recovery of the amount so paid against the party primarily liable.<sup>5</sup> And where one in good faith, believing himself to be the owner of land, pays the taxes upon it, and afterwards the land is adjudged to belong to another, the law raises an implied promise on the part of the other to reimburse the one who has paid the taxes, and on such an implied promise an action will lie.<sup>6</sup> So where

this title, VII. 3. c. (4) *Decedent's Estate*; IX. 6. e. (2) (g) *Deceased Owners*; also the title *EXECUTORS AND ADMINISTRATORS*, vol. 11, pp. 946, 1261, 1273.

**An Executor, in Order to Execute a Power of Sale** in a will devising real property, may pay taxes illegally assessed on the property against the estate or heirs of the decedent. *Adams v. Monroe County*, 154 N. Y. 619.

**Where Property Is Mortgaged to the Estate**, and the mortgagor neglects to pay taxes, the executor, or, in case of his neglect, a creditor of the estate, may pay them. *Whittaker v. Wright*, 35 Ark. 511.

1. **Heir.** — *Shaw v. Camp*, 56 Ill. App. 24; *Stark v. Brown*, 101 Ill. 400; *Reading v. Wier*, 29 Kan. 429. See also *Henry v. Horstick*, 9 Watts (Pa.) 412. And see the references in the last note *supra*.

2. **Assignee for Benefit of Creditors.** — *Brooks v. Eighmey*, 53 Iowa 276. See also the title *ASSIGNMENTS FOR BENEFIT OF CREDITORS*, vol. 3, p. 106, and see pp. 98, 116.

3. **Receiver.** — *Palmer v. Pettingill*, 6 Idaho 346. See also the titles *RECEIVERS*, vol. 23, p. 1072; *RECEIVERS OF RAILROADS*, vol. 24, p. 24.

**Insurance Company Dissolved — Superintendent of Insurance to Pay Taxes.** — *In re Life Assoc. of America*, 12 Mo. App. 40.

4. See the title *LEASES*, vol. 18, p. 650.

5. **Reimbursement — Indiana.** — *Cole v. Wright*, 70 Ind. 179.

*Iowa.* — *Barthell v. Syverson*, 54 Iowa 160; *Lillie v. Case*, 54 Iowa 177; *McKeever v. Beacom*, 101 Iowa 175.

*Kansas.* — *Brown v. Evans*, 15 Kan. 88.

*Louisiana.* — *Erwin's Succession*, 16 La. Ann. 132.

*New York.* — *Cairns v. Chabert*, 3 Edw. (N. Y.) 312; *Rundell v. Lakey*, 40 N. Y. 513; *Deraismes v. Deraismes*, 72 N. Y. 154; *Sidenberg v. Ely*, 90 N. Y. 257, 43 Am. Rep. 163.

*Oregon.* — *Abernethy v. Orton*, 42 Oregon 442, 95 Am. St. Rep. 774.

*Pennsylvania.* — *Com. v. Mahon*, 12 Pa. Super. Ct. 616; *Republic Bldg., etc., Assoc. v. Webb*, 12 Pa. Super. Ct. 545; *Rawle v. Renshaw*, 15 Pa. Super. Ct. 488; *Caldwell v. Moore*, 11 Pa. St. 58; *King v. Mt. Vernon Bldg. Assoc.*, 106 Pa. St. 165.

**Cotenant Entitled to Contribution.** — See the titles *CONTRIBUTION AND EXONERATION*, vol. 7, p. 355; *JOINT TENANTS AND TENANTS IN COM-*

*MON*, vol. 17, p. 686. And see as to conditions precedent under the *New Hampshire* statute, *Homer v. Cilley*, 14 N. H. 85.

**Judgment Creditor — Lien as Against Mortgagee.** — See *Packwood v. Briggs*, 25 Wash. 530.

**A Mortgagee**, it has been held, may have the amount of a tax paid by him included in his judgment upon the mortgage. *Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729; *Gorham v. National L. Ins. Co.*, 62 Minn. 327; *Commonwealth Nat. Bank v. Shoemaker*, 13 W. N. C. (Pa.) 255; *Landreth v. McCaffrey*, 17 Pa. Super. Ct. 272. But see *Savage v. Scott*, 45 Iowa 130. Compare *Barthell v. Syverson*, 54 Iowa 164.

**Mortgagee Entitled to Recover from Trustee.** — *Landreth v. McCaffrey*, 17 Pa. Super. Ct. 272.

**A Remainderman** coerced into paying taxes or assessments may compel the life tenant to refund. *Dorr v. Boston*, 6 Gray (Mass.) 131; *Linden v. Graham*, 34 Barb. (N. Y.) 316; *Graham v. Dunigan*, 2 Bosw. (N. Y.) 516, 6 Duer (N. Y.) 629. But see *Ferguson v. Quinn*, 97 Tenn. 46.

**Vendor May Recover from Vendee in Possession.** — *Lillie v. Case*, 54 Iowa 177.

**No Reimbursement Where Tax Invalid.** — *Warfield-Pratt-Howell Co. v. Averill Grocery Co.*, 119 Iowa 75.

6. **Payment under Claim of Ownership — Iowa.** — *Goodnow v. Moulton*, 51 Iowa 555; *Goodnow v. Wells*, 54 Iowa 326; *Goodenow v. Litchfield*, 59 Iowa 226, 63 Iowa 275; *Goodnow v. Stryker*, 61 Iowa 261, 62 Iowa 221; *Merrill v. Tobin*, 82 Iowa 529.

*Nebraska.* — *Browne v. Finley*, 51 Neb. 465.

*Ohio.* — *Desnoyers v. Dennison*, 10 Ohio Cir. Dec. 430, 19 Ohio Cir. Ct. 320.

*Pennsylvania.* — *Republic Bldg., etc., Assoc. v. Webb*, 12 Pa. Super. Ct. 545; *Landreth v. McCaffrey*, 17 Pa. Super. Ct. 272; *Commonwealth Nat. Bank v. Shoemaker*, 13 W. N. C. (Pa.) 255; *Caldwell v. Moore*, 11 Pa. St. 58; *Hogg v. Longstreth*, 97 Pa. St. 255; *King v. Mt. Vernon Bldg. Assoc.*, 106 Pa. St. 165.

**But Where the Land Belonged to the County**, and was therefore exempt, it was held that one who paid taxes thereon under a belief that he held title could not recover against a subsequent grantee from the county. *Hays v. McCormick*, 83 Iowa 89.

a person *bona fide*, to protect his interest or supposed interest in land, or in the honest belief that he is the owner thereof, pays the taxes, he will be subrogated to the tax lien.<sup>1</sup>

But a Mere Volunteer who pays taxes without any interest in or claim against the property is not entitled to reimbursement from the person liable for the taxes,<sup>2</sup> nor will he be subrogated to the benefit of the tax lien.<sup>3</sup>

**4. To Whom Made.**—Payment of a tax must be made to the officer authorized by law to collect it,<sup>4</sup> or to his duly authorized deputy.<sup>5</sup>

**5. How Made**—*a. IN GENERAL*—**Must Be Absolute.**—The payment or tender of taxes must be absolute and unconditional.<sup>6</sup> The taxpayer and the collector can make no arrangement whereby the taxpayer is discharged from liability for his taxes by anything except the absolute payment of them.<sup>7</sup> In some states, however, the collector is permitted to satisfy the tax by payment to the treasurer and to enforce his claim for the payment so made against the person taxable.<sup>8</sup>

**1. Lien for Reimbursement—United States.**—*Parks v. Watson*, 20 Fed. Rep. 765.

*Arkansas.*—*Peay v. Feild*, 30 Ark. 600.

*Illinois.*—*Sharp v. Thompson*, 100 Ill. 447, 39 Am. Rep. 61.

*Indiana.*—*Cole v. Wright*, 70 Ind. 179; *Willson v. Brown*, 82 Ind. 471.

*Iowa.*—*Barthell v. Syverson*, 54 Iowa 160; *Lillie v. Case*, 54 Iowa 177; *Merrill v. Tobin*, 82 Iowa 529.

*Kansas.*—*Goodman v. Malcolm*, 9 Kan. App. 887, 58 Pac. Rep. 564.

*Maine.*—*Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729.

*Maryland.*—*Orem v. Wrightson*, 51 Md. 34, 34 Am. Rep. 286.

*Nebraska.*—*Pettit v. Black*, 8 Neb. 52.

*Contra.*—*Sperry v. Butler*, 75 Conn. 369 [distinguishing *Hart v. Tiernan*, 59 Conn. 526; *Meyer v. Burrill*, 60 Conn. 117; and *Cole v. Rice*, 74 Conn. 680, as having been decided under special charter provisions]; *Griffing v. Pintard*, 25 Miss. 173.

**Subrogation of Collector.**—See *infra*, this section, *How Made—In General*.

**Mortgagee.**—*Fiacre v. Chapman*, 32 N. J. Eq. 463.

**Surety.**—*Wallace's Estate*, 59 Pa. St. 401.

**2. Mere Volunteer. Not Entitled to Reimbursement.**—*Garrigan v. Knight*, 47 Iowa 525; *Goodnow v. Moulton*, 51 Iowa 559; *Goodnow v. Stryker*, 61 Iowa 261; *Bibbins v. Clark*, 90 Iowa 230; *Iowa R. Land Co. v. Davis*, 102 Iowa 128; *Taylor v. Planet Property, etc., Co.*, 78 Mo. App. 137; *Southern Home Bldg., etc., Assoc. v. Thomson*, 24 Tex. Civ. App. 76; *Hinchman v. Morris*, 29 W. Va. 673.

**Voluntary Payment by Husband on Wife's Property.**—*Doughty v. Miller*, 50 N. J. Eq. 529.

**3. Volunteer Not Entitled to Subrogation.**—*Mercantile Trust Co. v. Hart*, (C. C. A.) 76 Fed. Rep. 673; *Montgomery v. Charleston*, (C. C. A.) 99 Fed. Rep. 825; *Peay v. Feild*, 30 Ark. 600; *Union Cent. L. Ins. Co. v. Chapin*, 113 Iowa 411; *Crum v. Burke*, 25 Pa. St. 377; *Hoffman v. Bell*, 61 Pa. St. 444; *Hinchman v. Morris*, 29 W. Va. 673. Compare *Parks v. Watson*, 20 Fed. Rep. 764.

**One Who Holds a Lien on Part of the Debtor's Property** cannot pay all the taxes of his debtor and be subrogated to the lien of the commonwealth on property of the debtor on which he

had no lien. *Allen v. Perrine*, 103 Ky. 516.

**An Equitable Mortgagee** of an individual share has been held to be a volunteer as to a payment of taxes on the whole tract. *Koehler v. Hughes*, (Supm. Ct. Spec. T.) 4 Misc. (N. Y.) 236, affirmed 73 Hun (N. Y.) 167.

**Tax Officers May Refuse Payment from Volunteer.**—*Iowa R. Land Co. v. Guthrie*, 53 Iowa 383.

**4. Payment to Authorized Officer.**—*Marshall v. Baldwin*, 11 Phila. (Pa.) 403, 32 Leg. Int. (Pa.) 208; *Young v. King*, 3 R. I. 196.

**Acting as Collector Prima Facie Evidence of Authority.**—*Deen v. Wills*, 21 Tex. 642.

**Construction of Kentucky Statute.**—*Auditor v. Western Union Tel. Co.*, (Ky. 1898) 46 S. W. Rep. 704.

**Delinquent Taxes—Payment—Prosecution.**—The officer charged with the collection of taxes or his agent may, after the time for the payment of poll taxes has expired, receive payment thereof with penalties added, and need not prosecute the delinquent for a misdemeanor. *State v. Folk*, 45 S. Car. 491.

**5. Deputy.**—*Jones v. Welsing*, 52 Iowa 220.

**Signature by Stamp Sufficient.**—*Randall v. Dailey*, 66 Wis. 285. See also the title SIGN—SIGNATURE, vol. 25, p. 1066.

**6. Unconditional Payment or Tender.**—*State Railroad Tax Cases*, 92 U. S. 575; *State v. Carson City Sav. Bank*, 17 Nev. 146; *Stiles v. Hitchcock*, 47 Vt. 419, 19 Am. Rep. 121.

**7. Arrangement Between Taxpayer and Collector.**—*Conway v. Cable*, 37 Ill. 83, 87 Am. Dec. 240; *Merriam v. Dovey*, (Neb. 1888) 36 N. W. Rep. 382. See also *Miller v. Wisener*, 45 W. Va. 59 (contract for services).

**Entering Unpaid Taxes as Paid** cannot of itself discharge the property owner. *Reutchler v. Huckle*, 3 Ill. App. 144; *Ambler v. Clayton*, 23 Iowa 173; *Nutting v. Lynn*, 18 Pa. Super. Ct. 63. But such arrangement may render the property owner personally liable to the collector as for an advancement. *Elson v. Spraker*, 100 Ind. 374.

**8. Collector Paying Tax.**—*Miltenger v. Cooke*, 18 Wall. (U. S.) 421; *Jacks v. Dyer*, 31 Ark. 334; *White v. State*, 51 Ga. 252; *Schaum v. Showers*, 49 Ind. 285; *Gove v. Newton*, 58 N. H. 359; *Smith v. Messer*, 17 N. H. 420; *Shriver v. Cowell*, 92 Pa. St. 262; *Wallace's Estate*, 59 Pa. St. 401.

No Set-off can be allowed <sup>1</sup> in the absence of statute.<sup>2</sup>

The Payment or Tender Must Be of the Whole Amount Due for taxes in order to discharge the lien.<sup>3</sup> But where several assessments are united for convenience of collection, the full amount of any one separate tax may be paid although the taxpayer refuses to pay the others united with it.<sup>4</sup>

Expenses of Collection and Penalties for Default are a part of the taxes and must be paid or the lien will not be discharged.<sup>5</sup>

b. MEDIUM OF PAYMENT. — A tax collector has no right to receive in payment of taxes anything except legal-tender money, and a lien for taxes will not be discharged except by such payment or tender, unless a statute specifically authorizes the receipt of something else in payment.<sup>6</sup>

Check, Draft, Note. — The receipt of a check, draft, or note, the marking of the taxes paid on the books, and the delivering of a receipt will not constitute payment nor conclude the public in a controversy between the taxpayer and the authorities. The check or draft given to a collector as payment does not discharge the lien unless such instrument be in fact paid.<sup>7</sup>

Subrogation of Collector Who Pays Taxes Out of His Own Pocket. — See *Davie v. Blackburn*, 117 N. Car. 383.

Assignment of Collector's Rights — *Laches*. — See *State v. Taggart*, 148 Ind. 431.

1. Set-off Not Allowed. — See the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM, vol. 25, pp. 504, 507, 608; and see *People v. Roberts*, 30 N. Y. App. Div. 78, affirmed 156 N. Y. 693; *Shoemaker v. Swiler*, 2 Leg. Opin. (Pa.) 7; *Trenholm v. Charleston*, 3 S. Car. 347, 16 Am. Rep. 732; *Keep v. Frazier*, 4 Wis. 224.

Sheriff's Individual Indebtedness. — *Miller v. Wisener*, 45 W. Va. 59.

2. *Anderson v. Mayfield*, 93 Ky. 230.

3. Whole Amount Due Must Be Paid. — *Tacey v. Irwin*, 18 Wall. (U. S.) 549; *Flynn v. Edwards*, 36 Fed. Rep. 873; *Driggers v. Cassady*, 71 Ala. 529; *Hunt v. McFadgen*, 20 Ark. 277; *Lafin v. Herrington*, 16 Ill. 301; *Auld v. McAllaster*, 43 Kan. 162; *State v. Carson City Sav. Bank*, 17 Nev. 146; *Crum v. Burke*, 25 Pa. St. 377; *Heft v. Gephart*, 65 Pa. St. 510. See also *supra*, this title, *Tax Lien — Termination of Lien*.

Duty to Accept Part Payment. — In *Kansas* it has been held that a county treasurer may refuse to receive a partial payment of a tax. *Julien v. Ainsworth*, 27 Kan. 446. But in *Louisiana* and *Michigan* a partial payment of a distinct and definite portion of a tax may be made and the remainder contested. *Liquidating Com'rs v. Marrero*, 106 La. 130; *Chapin Min. Co. v. Uddenberg*, 126 Mich. 375, distinguishing *Sayers v. O'Connor*, 124 Mich. 256.

And where a railroad passed through several towns it was held that taxes due to one town might be paid without paying taxes due in other towns of the same county. *Ward v. Wheeling*, etc., R. Co., 4 Ohio Dec. 154.

Payment of Taxes on Realty Includes Appurtenances. — *Capital City Gas Light Co. v. Charter Oak Ins. Co.*, 51 Iowa 31.

4. May Pay Any One Separate Tax. — *Iowa R. Land Co. v. Carroll County*, 39 Iowa 151; *Olmsted County v. Barber*, 31 Minn. 256. See also *Lawrence v. Miller*, 86 Ill. 502; *Cones v. Wilson*, 14 Ind. 465; *Auld v. McAllaster*, 43 Kan. 162.

The Owner of a Distinct Portion of an Entire

Tract assessed may pay the taxes due on his portion alone. *Lawrence v. Miller*, 86 Ill. 502.

Payment by Holder of Lien on Separate Tract. — *McNary v. Wrightman*, 32 Oregon 573.

5. Penalties and Expenses Included. — *Bracey v. Ray*, 26 La. Ann. 710; *Joslyn v. Tracy*, 19 Vt. 569.

Where Taxes and Costs for Different Years are due, there may be payment of the amount due for one year without payment of the balance. *Duvall v. Perkins*, 77 Md. 583.

Excessive Penalty Need Not Be Paid. — *Chicago, etc., R. Co. v. Hartshorn*, 30 Fed. Rep. 541.

6. Medium of Payment — *United States*. — *Alkan v. Bean*, 8 Biss. (U. S.) 83; *Tennessee v. Sneed*, 96 U. S. 69; *Clark v. Keith*, 106 U. S. 464.

*Arkansas*. — *Wells v. Cole*, 27 Ark. 603; *Coit v. Claw*, 28 Ark. 516; *Loftin v. Watson*, 32 Ark. 414.

*Idaho*. — *Crutcher v. Sterling*, 1 Idaho 307.

*Illinois*. — *Fuller v. Chicago*, 89 Ill. 282.

*Kansas*. — *Judd v. Driver*, 1 Kan. 455.

*Michigan*. — *Carter v. Lewis*, 27 Mich. 241; *Jones v. Wright*, 34 Mich. 371; *Turnbull v. Alpena Tp.*, 74 Mich. 621.

*Mississippi*. — *McWilliams v. Phillips*, 51 Miss. 196; *Wynn v. Stone*, 69 Miss. 80.

*Missouri*. — *Craig v. Smith*, 31 Mo. App. 286.

*Pennsylvania*. — *Nutting v. Lynn*, 18 Pa. Super. Ct. 63.

*South Carolina*. — *Trenholm v. Charleston*, 3 S. Car. 347, 16 Am. Rep. 732.

*Tennessee*. — *State v. Sneed*, 9 Baxt. (Tenn.) 472; *Keith v. Clarke*, 4 Lea (Tenn.) 718; *Clark v. Keith*, 8 Lea (Tenn.) 703.

*Vermont*. — *Sawyer v. Springfield*, 40 Vt. 305.

Credit on Amount Due under Municipal Contract. — *Wagner v. Porter*, (Tex. Civ. App. 1900) 56 S. W. Rep. 560.

Payment in Coin Alone may be prescribed by statute. *People v. Shearer*, 30 Cal. 645; *Prescott v. McNamara*, 73 Cal. 236; *Whiteaker v. Haley*, 2 Oregon 140.

Payment in Void Currency Gives No Personal Right of Action to Collector. — *Richards v. Stogsell*, 21 Ind. 74.

7. Check, Draft, Etc. — *Mercantile Trust Co. v. Hart*, (C. C. A.) 76 Fed. Rep. 673; *El Paso County v. Colorado Springs Co.*, 15 Colo. App.

**Scrip, Warrants, Orders, Etc.** — It is sometimes provided by statute that the collector shall accept scrip in payment of taxes, *e. g.*, coupons, county and town warrants, school orders, etc.; and where there is such a provision the collector is of course bound to receive the scrip designated in payment.<sup>1</sup> Such statutes, however, are to be strictly pursued, and their terms cannot be extended by construction.<sup>2</sup>

**6. How Established — Evidence — Entry in Tax Book.** — Payment of taxes may be proved by the entry of payment in the tax book or other record.<sup>3</sup>

The Original Receipt of the tax collector is competent *prima facie* evidence of the payment of taxes.<sup>4</sup> But the receipt is not conclusive evidence of pay-

274; *Koonen v. District of Columbia*, 4 Mackey (D. C.) 339, 54 Am. Rep. 278; *Barnard v. Mercer*, 54 Kan. 630; *Houghton v. Boston*, 159 Mass. 138; *Elliott v. Miller*, 8 Mich. 132; *Moore v. Auditor Gen.*, 122 Mich. 599; *Kahl v. Love*, 37 N. J. L. 5; *McLanahan v. Syracuse*, 18 Hun (N. Y.) 259; *Orange County Bank v. Wake-man*, 1 Cow. (N. Y.) 46; *Mumford v. Arm-strong*, 4 Cow. (N. Y.) 553; *Ankeny v. Alb-right*, 20 Pa. St. 157.

**Collector May Refuse to Receive Check or Draft.** — *Richards v. Hatfield*, 40 Neb. 879.

**Check Operates as Conditional Payment.** — *Houghton v. Boston*, 159 Mass. 138.

**Payment of the Check.** — *Richards v. Hatfield*, 40 Neb. 879.

**Note.** — *Kerner v. Boston Cottage Co.*, 123 N. Car. 294.

**Validity of Note.** — It has been held that a note given in payment of taxes is without consideration and void. *Dickson v. Gamble*, 16 Fla. 687; *Embden v. Bunker*, 86 Me. 313. See also *Packard v. Tisdale*, 50 Me. 376; *Walker v. Walker*, 86 Me. 314; *Thorndike v. Camden*, 82 Me. 39. But it would seem that the officer may advance taxes from his private funds and take a personal note for the loan. *Hatch v. Reid*, 112 Mich. 430, *distinguishing* *Doran v. Phillips*, 47 Mich. 228. These were cases of occupation taxes. See generally the title *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*, vol. 21, p. 819.

**1. Payment with Scrip Held Good — United States.** — *Furman v. Nichol*, 8 Wall. (U. S.) 44; *Keith v. Clark*, 97 U. S. 454; *Virginia Coupon Cases*, 114 U. S. 270; *Marye v. Parsons*, 114 U. S. 329; *McGahey v. Virginia*, 135 U. S. 684; *Parsons v. Slaughter*, 63 Fed. Rep. 876.

**Arkansas.** — *Danley v. Pike*, 15 Ark. 141; *English v. Oliver*, 28 Ark. 317; *Loftin v. Wat-son*, 32 Ark. 415.

**California.** — *Prescott v. McNamara*, 73 Cal. 236 (levee taxes).

**Georgia.** — *Fuller v. State*, 73 Ga. 408.

**North Carolina.** — *Kerner v. Boston Cottage Co.*, 123 N. Car. 294.

**South Dakota.** — *Western Town Lot Co. v. Lane*, 7 S. Dak. 599.

**Tennessee.** — *Clark v. Keith*, 8 Lea (Tenn.) 703; *Lea v. Memphis*, 9 Baxt. (Tenn.) 103.

**Texas.** — *Ostrum v. San Antonio*, 30 Tex. Civ. App. 462.

**Virginia.** — *Antoni v. Wright*, 22 Gratt. (Va.) 835; *Williamson v. Massey*, 33 Gratt. (Va.) 239; *Lee v. Harlow*, 75 Va. 22; *Com. v. Ford*, 89 Va. 427; *Com. v. Dunlop*, 80 Va. 431; *Maury v. Com.*, 62 Va. 310.

**Acceptance Operates as Payment of Order.** — *Marinette v. Oconto County*, 47 Wis. 216.

**Scrip Receivable Only for Taxes of Body Issuing It.** — *Wallis v. Smith*, 29 Ark. 354; *Wells v. Cole*, 27 Ark. 603.

**Tax Collected in Currency May Be Paid Over in Scrip.** — *Askew v. Columbia County*, 32 Ark. 271.

**Scrip Receivable Though Barred by Statute of Limitations.** — *Daniel v. Askew*, 36 Ark. 487.

**2. Right Not Extended by Construction.** — *Wallis v. Smith*, 29 Ark. 354; *Bummel v. Hous-ton*, 68 Tex. 10. See also *Loftin v. Watson*, 32 Ark. 415.

**Unregistered Warrants Not Receivable.** — *Jones v. Melchior*, 71 Miss. 115.

**Warrant of One Year Not Receivable for Taxes of Another.** — *State v. Payne*, 151 Mo. 663 [*over-ruling* *Reynolds v. Norman*, 114 Mo. 509; *Wil-son v. Knox County*, 132 Mo. 387]; *Kansas City, etc., R. Co. v. Thornton*, 152 Mo. 570.

**3. Record.** — *Taylor v. Lawrence*, 148 Ill. 388; *Adams v. Beale*, 19 Iowa 61; *Harrison v. Sauer-wein*, 70 Iowa 291; *Dennett v. Croker*, 8 Me. 239; *Knapp v. Brooks*, 200 Pa. St. 497.

**Contradiction of Record.** — See *State v. School, etc.*, *Land Com'rs*, 13 Wis. 409.

**Abbreviations in Record.** — See *Ambler v. Clay-ton*, 23 Iowa 173. *Ankeny v. Albright*, 20 Pa. St. 157; *Brown v. Bradshaw*, 100 Va. 124; *McIntosh v. Marathon Land Co.*, 110 Wis. 296. And see the title *ABBREVIATIONS*, vol. 1, p. 100.

**But a Tax Collector's Certificate that No Taxes Are Charged** against the land on his books has been held not to be sufficient evidence of pay-ment. *Acklin v. Paschal*, 48 Tex. 147.

**4. Receipt — Illinois.** — *Abbott v. Stone*, 70 Ill. App. 671, *affirmed* 172 Ill. 634, 64 Am. St. Rep. 60.

**Massachusetts.** — *Hall v. Hall*, 1 Mass. 101.

**Michigan.** — *Johnstone v. Scott*, 11 Mich. 232; *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490; *Weimer v. Porter*, 42 Mich. 569.

**Minnesota.** — *Seigneuret v. Fahey*, 27 Minn. 60; *Ferris v. Boxell*, 34 Minn. 262; *Ripon Col-lege v. Brown*, 66 Minn. 180.

**Missouri.** — *Huber v. Pickler*, 94 Mo. 382.

**Nebraska.** — *Miller v. Hurford*, 13 Neb. 13; *Ure v. Reichenberg*, 63 Neb. 899; *Richards v. Hatfield*, 40 Neb. 879; *Mutual Ben. L. Ins. Co. v. Daniels*, (Neb. 1903) 93 N. W. Rep. 134.

**Oregon.** — *Nickum v. Gaston*, 28 Oregon 322.

**Texas.** — *Deen v. Willis*, 21 Tex. 642.

**Wyoming.** — *Lobban v. State*, 9 Wyo. 386.

And see the titles *PAYMENT*, vol. 22, pp. 582, 581; *RECEIPTS*, vol. 23, p. 983 *et seq.*

**Evidence of Amount Paid.** — *Merrill v. Tobin*, 82 Iowa 520.

**Sufficiency of Description in Receipt.** — See *Per-kins v. Bulkley*, 166 Ill. 231; *Myers v. Ladd*,



ment<sup>1</sup> unless made so by statute.<sup>2</sup> Like receipts from other public officers, tax receipts prove themselves.<sup>3</sup>

**Other Competent Evidence.** — The tax receipts and tax books are not exclusive, but payment may be proved by any other competent evidence.<sup>4</sup> As in other cases, however, the best evidence obtainable is required.<sup>5</sup>

**Parol Evidence** is admissible to show the payment of a tax whether an official receipt exists or not.<sup>6</sup>

**Presumptions.** — The absence from the tax book of an entry of payment of taxes assessed against property therein described raises a presumption that such taxes have not in fact been paid;<sup>7</sup> but such presumption is by no means conclusive.<sup>8</sup> No presumption of payment arises from the duty of the property owner to make it,<sup>9</sup> nor, as a general rule, from mere lapse of time.<sup>10</sup> But the fact that taxes have not been returned as delinquent has been held to be strong evidence that they were paid.<sup>11</sup>

**Evidence of the Payment of Taxes for Previous Years** is not admissible to establish payment for a subsequent year.<sup>12</sup>

**Judicial Determination.** — As between the parties, payment cannot be shown in opposition to a judicial determination that the taxes are delinquent.<sup>13</sup>

**7. Effect.** — The Primary Effect of the payment of a tax is to extinguish the tax and discharge the tax lien<sup>14</sup> even though the description in the assessment

26 Ill. 415; *Kruse v. Wilson*, 79 Ill. 233; *Orton v. Nooman*, 25 Wis. 672, the last case holding that the intention of the receipt to cover the property in dispute is a question for the jury.

**Receipt of Deputy.** — *Jones v. Welsing*, 52 Iowa 220.

**What Constitutes Antedating — Louisiana Constitution.** — *McAyeal v. Murrell*, 108 La. 116.

**Levy of Assessment.** — In *Adams v. Osgood*, 55 Neb. 766, it was held that a tax receipt was not sufficient to establish the fact of a levy when such levy was disputed in the pleadings. See also *Clark v. Blair*, 14 Fed. Rep. 812; *Miller v. Hurford*, 13 Neb. 13; *Merrill v. Wright*, 41 Neb. 351.

**1. Receipt Not Conclusive Evidence of Payment.** — *Richards v. Hatfield*, 40 Neb. 879; *Ellen v. Ellen*, 16 S. Car. 132; *Lobban v. State*, 9 Wyo. 386. See also *State v. School*, etc., *Land Com'rs*, 13 Wis. 409. And see the cross-references in the last note, *supra*.

**2. Statute Making Receipt Conclusive.** — *Rockford v. Fleming*, 10 S. Dak. 24; *Danforth v. McCook County*, 11 S. Dak. 258, 74 Am. St. Rep. 808.

**3. McReynolds v. Longenberger, 57 Pa. St. 13.**

**4. Evidence of Payment.** — *Davis v. Hare*, 32 Ark. 386; *Adams v. Beale*, 19 Iowa 61; *Dennett v. Crocker*, 8 Me. 239; *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490; *McReynolds v. Longenberger*, 57 Pa. St. 13; *McDonough v. Jefferson County*, 79 Tex. 535; *Brown v. Bradshaw*, 100 Va. 124.

**Tax Certificate — Stub Book.** — *Cornoy v. Wetmore*, 92 Iowa 100; *Ellsworth v. Low*, 62 Iowa 178; *Harrison v. Sauerwein*, 70 Iowa 291; *Buck v. Holt*, 74 Iowa 294; *McIntosh v. Marathon Land Co.*, 110 Wis. 298, *overruling Pier v. Prouty*, 67 Wis. 218.

**5.** See the titles EVIDENCE, vol. 11, p. 535; SECONDARY EVIDENCE, vol. 25, p. 161; and see *Richards v. Hatfield*, 40 Neb. 879.

**Abstract of Title Inadmissible.** — *Brinker v. Union Pac. R. Co.*, 11 Colo. App. 166.

**Altered Writing as Evidence.** — See *Nickum v. Gaston*, 28 Oregon 322.

**6. Parol Evidence.** — *Davis v. Hare*, 32 Ark. 386; *Boykin v. State*, 40 Fla. 484; *Hinchman v. Whetstone*, 23 Ill. 185; *Rand v. Scofield*, 43 Ill. 167; *Elston v. Kennicott*, 46 Ill. 188; *Adams v. Beale*, 19 Iowa 61; *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490; *Richards v. Hatfield*, 40 Neb. 879; *Nickum v. Gaston*, 28 Oregon 322; *Wolf v. Philadelphia*, 105 Pa. St. 25; *Knuapp v. Brooks*, 200 Pa. St. 494; *McDonough v. Jefferson County*, 79 Tex. 535. See also *Trager v. Jenkins*, 75 Miss. 676. And see the titles PAYMENT, vol. 22, p. 580; RECEIPTS, vol. 23, p. 984.

Under the *Mississippi* statute providing that none but a certain form of receipt shall be valid as evidence, payment of taxes before a sale cannot be shown to invalidate a tax title, unless the prescribed receipt was given; but it does not prevent proof of the loss of a valid receipt. *Edmondson v. Ingram*, 68 Miss. 32.

**Evidence to Contradict Description in Receipt.** — *Brymer v. Taylor*, 5 Tex. Civ. App. 103.

**Collector Is Competent Witness.** — *Davis v. Hare*, 32 Ark. 386.

**Question for Jury.** — *Nickum v. Gaston*, 28 Oregon 322.

**7. Presumptions.** — *Hinchman v. Whetstone*, 23 Ill. 185; *Adams v. Beale*, 19 Iowa 61; *Wolf v. Foster*, 13 Kan. 116; *Stout v. Hyatt*, 13 Kan. 232; *Richards v. Hatfield*, 40 Neb. 879.

**8. Keesling v. Winfield, 149 Ind. 709. But see *Holbrook v. Dickenson*, 56 Ill. 497.**

**9. Ankeny v. Albright, 20 Pa. St. 157.**

**10.** See the title PAYMENT, vol. 22, p. 595, and see *Lohrs v. Miller*, 12 Gratt. (Va.) 456; *Smith v. Thorp*, 17 W. Va. 221. But see *Woodburn v. Farmers'*, etc., *Bank*, 5 W. & S. (Pa.) 447; *McLaughlin v. Kain*, 45 Pa. St. 113.

**11. Lewis v. Disher, 25 Wis. 441.**

**12. Ankeny v. Albright, 20 Pa. St. 157.**

**13. Wallace v. Brown, 22 Ark. 118, 76 Am. Dec. 421; *Gaylord v. Scarff*, 6 Iowa 179; *Cadmus v. Jackson*, 52 Pa. St. 295.**

**14. Lien Discharged — United States.** — *McHenry v. Alford*, 168 U. S. 651; *Bennett v. Hunter*, 9 Wall. (U. S.) 326.

was erroneous,<sup>1</sup> or though the assessment was so irregular as to pass no title to a purchaser at a tax sale thereunder.<sup>2</sup> And where land is twice assessed to different persons, payment by one of them will discharge the lien as to the other.<sup>3</sup>

**Payment, of Course, Defeats the Right to Sell the Property** for nonpayment of taxes; and a tax sale of land for a tax improperly reported as delinquent, which the owner has paid, is illegal and void, and conveys no title to the purchaser.<sup>4</sup> And the rule is the same whether the sale was made through inadvertence or mistake or in positive disregard of the fact of payment.<sup>5</sup>

**The Misapplication of a Payment** by the officer receiving it will not destroy its effect as payment.<sup>6</sup> Thus, a payment is not defeated by its application to the taxes

*Georgia.*—Johnson v. Christie, 64 Ga. 117.  
*Illinois.*—Morrison v. Kelly, 22 Ill. 610, 74 Am. Dec. 169.

*Missouri.*—Huber v. Pickler, 94 Mo. 382; Harness v. Cravens, 126 Mo. 233.

*Nebraska.*—Alexander v. Hunter, 29 Neb. 259.

*New York.*—Olipphant v. Burns, 146 N. Y. 218.

*Oregon.*—Nickum v. Gaston, 28 Oregon 322.

*Pennsylvania.*—Hunter v. Cochran, 3 Pa. St. 105; Montgomery v. Meredith, 17 Pa. St. 42; Wallace's Estate, 59 Pa. St. 401; Reading v. Finney, 73 Pa. St. 467.

*Canada.*—Myers v. Brown, 17 U. C. C. P. 307.

See also *supra*, this title, *Tax Lien—Termination of Lien*.

**Payment under Mistake Extinguishes Tax.**—Mason v. Chicago, 48 Ill. 420; Richmond v. Brown, 66 Me. 373; Stephens v. Wells, 6 Watts (Pa.) 325. And see Maxwell v. Hunter, 65 Iowa 121.

1. Hollywood v. Wellhausen, 28 Tex. Civ. App. 541; Merton v. Dolphin, 28 Wis. 456.

2. Graham v. Florida Land, etc., Co., 33 Fla. 356.

3. Rath v. Martin, 93 Iowa 499; Dodds v. Marx, 63 Miss. 443; Perret v. Borries, 78 Miss. 934; Alexander v. Hunter, 29 Neb. 259; Montgomery v. Meredith, 17 Pa. St. 42.

In West Virginia, however, privity of title seems to be necessary in order that payment by one who is not primarily responsible for the tax may discharge the lien. See State v. Low, 46 W. Va. 451; Simpson v. Edmiston, 23 W. Va. 675; Bradley v. Ewart, 18 W. Va. 598; Whitham v. Sayers, 9 W. Va. 671. Compare Bailey v. McClaugherty, 48 W. Va. 546. And see *supra*, this section, *By Whom Payment May Be Made*.

4. **Right to Sell Defeated**—United States.—Schenk v. Peay, 1 Dill. (U. S.) 267; Bennett v. Hunter, 9 Wall. (U. S.) 326; Tacey v. Irwin, 18 Wall. (U. S.) 549; Atwood v. Weems, 99 U. S. 183.

*Arkansas.*—Wallace v. Brown, 22 Ark. 118, 76 Am. Dec. 421; Kinsworthy v. Austin, 23 Ark. 375; Davis v. Hare, 32 Ark. 386.

*District of Columbia.*—Wall v. District of Columbia, 6 Mackey (D. C.) 194.

*Florida.*—Conant v. Busing, 23 Fla. 559.

*Georgia.*—Rish v. Ivey, 76 Ga. 738.

*Illinois.*—Curry v. Hinman, 11 Ill. 420; Morrison v. Kelly, 22 Ill. 610, 74 Am. Dec. 169; Mason v. Chicago, 48 Ill. 420; Perkins v. Bulkley, 166 Ill. 229.

*Iowa.*—Gaylord v. Scarff, 6 Iowa 179; Walton v. Gray, 29 Iowa 440; Morris v. Sioux County, 42 Iowa 416; Iowa R. Land Co. v. Guthrie, 53 Iowa 383; Hilliard v. Griffin, 72 Iowa 331.

*Kansas.*—Mathews v. Buckingham, 22 Kan. 166; Doty v. Bassett, 44 Kan. 754.

*Kentucky.*—Blight v. Banks, 6 T. B. Mon. (Ky.) 192, 17 Am. Dec. 136.

*Louisiana.*—Wilbert v. Michel, 42 La. Ann. 853; Lefebvre v. Negrotto, 44 La. Ann. 792.

*Michigan.*—Rowland v. Doty, Harr. (Mich.) 3; Rayner v. Lee, 20 Mich. 384.

*Mississippi.*—Griffing v. Pintard, 25 Miss. 173; Sigman v. Lundy, 66 Miss. 522.

*Missouri.*—Huber v. Pickler, 94 Mo. 382.

*Oregon.*—Nickum v. Gaston, 28 Oregon 328.

*Pennsylvania.*—Dougherty v. Dickey, 4 W. & S. (Pa.) 146; Hunter v. Cochran, 3 Pa. St. 105; Montgomery v. Meredith, 17 Pa. St. 42; Ankeny v. Albright, 20 Pa. St. 157; Laird v. Hiester, 24 Pa. St. 452; Cadmus v. Jackson, 52 Pa. St. 295; Reading v. Finney, 73 Pa. St. 467; Brown v. Day, 78 Pa. St. 129; Breisch v. Cox, 81 Pa. St. 336; Kramer v. Goodlander, 98 Pa. St. 366; Patton v. Long, 68 Pa. St. 260.

*Virginia.*—Martin v. Snowden, 18 Gratt. (Va.) 100.

*West Virginia.*—Jones v. Dils, 18 W. Va. 759.

*Wisconsin.*—Sprague v. Coenen, 30 Wis. 209; Randall v. Dailey, 66 Wis. 285; McIntosh v. Marathon Land Co., 110 Wis. 296.

And see Jackson v. Morse, 18 Johns. (N. Y.) 441, 9 Am. Dec. 225; Utica Bank v. Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; Joslyn v. Rockwell, 128 N. Y. 334; Franklin v. Terrell, 3 Hawks. (10 N. Car.) 283. See also the title TAX TITLES, *post*.

**Taxpayer Must Be in Default.**—Jones v. Burford, 26 Miss. 194; Williams v. Camnack, 27 Miss. 209, 61 Am. Dec. 508; Green v. Craft, 28 Miss. 70.

**Tender to the Purchaser** is not necessary before bringing suit to set aside the sale. Lefebvre v. Negrotto, 44 La. Ann. 792.

**Limitations in Favor of Tax Purchaser.**—See the title TAX TITLES, *post*.

5. Hickman v. Kempner, 35 Ark. 505; Myrick v. Montgomery County, 33 Ind. 383; Stephens v. Wells, 6 Watts (Pa.) 325.

6. **Misapplication of Payment.**—Henderson v. Robinson, 76 Iowa 603; Dougherty v. Dickey, 4 W. & S. (Pa.) 146; Montgomery v. Meredith, 17 Pa. St. 47; Jones v. Dils, 18 W. Va. 759. See also Fuller v. Grand Rapids, 40 Mich. 395.

of other persons.<sup>1</sup> So where the owner of land intends to pay taxes on one tract and so informs the collector, and pays him the proper amount, and the collector, by mistake, gives a receipt for a different tract, and returns the one actually paid as delinquent, and it is sold for taxes, the owner may show actual payment against the purchaser at the tax sale.<sup>2</sup>

**Tender.** — A tender by a taxpayer or his agent operates as payment of the taxes, if kept good.<sup>3</sup>

**8. Payment Frustrated by Officer.** — If the owner of land, or a party having an interest therein, in good faith applies to the proper officer for the purpose of paying the tax thereon, and payment is prevented by the mistake or fault of such officer, as, for example, where a tax is omitted from the list made out by the officer, the attempt to pay is considered, in most jurisdictions, as the legal equivalent of payment in so far as to discharge the lien and bar a sale for nonpayment.<sup>4</sup> Thus, where the owner of land in good faith attempts to pay the tax thereon, and is informed by the officer whose duty it is to state the amount of the tax that there are no taxes on the roll against such land, it is held that his title is not defeated by a subsequent sale of the land for nonpayment of taxes.<sup>5</sup> So it has been held that where the purchaser of

And see *infra*, this section, *Payment Frustrated by Officer*.

**Lien Discharged Though Collector Embezzles Money.** — *Richards v. Hatfield*, 40 Neb. 879.

**The Taxpayer May Rely on the Officer to whom payment is made for the proper application of the payment.** *Henderson v. Robinson*, 76 Iowa 603. And see *Corning Town Co. v. Davis*, 44 Iowa 622; *Corbin v. Stewart*, 44 Iowa 543; *Fenton v. Way*, 40 Iowa 196.

**1. Application to Taxes of Other Persons.** — *Mason v. Chicago*, 48 Ill. 420; *Maxwell v. Hunter*, 65 Iowa 121; *Henderson v. Robinson*, 76 Iowa 603; *Lefebvre v. Negrotto*, 44 La. Ann. 792; *Nickum v. Gaston*, 28 Oregon 328; *Dougherty v. Dickey*, 4 W. & S. (Pa.) 146; *Laird v. Hiester*, 24 Pa. St. 452; *Merton v. Dolphin*, 28 Wis. 456.

**Payment of Tax on Wrong Land.** — In *Gunn v. Thompson*, 70 Ark. 500, where the plaintiff, intending to pay a tax rightly assessed to him, by mistake paid taxes assessed to another, it was held that a subsequent sale of the plaintiff's land was void.

But in *Gordon v. Chiles*, (Miss. 1892) 12 So. Rep. 146, where the plaintiff paid taxes on land wrongly assessed to him, it was held that land belonging to him, but assessed to another, was not discharged thereby.

**2. Hickman v. Kempner**, 35 Ark. 505; *Dougherty v. Dickey*, 4 W. & S. (Pa.) 146.

**3. Tender.** — *Poindexter v. Greenhow*, 114 U. S. 270; *Schenk v. Peay*, 1 Dill. (U. S.) 267, 21 Fed. Cas. No. 12,451; *Parsons v. Slaughter*, 63 Fed. Rep. 876; *McGahey v. Virginia*, 135 U. S. 684; *Kinsworthy v. Austin*, 23 Ark. 375; *Duval v. Perkins*, 77 Md. 583; *Jones v. Burford*, 26 Miss. 194; *Hoge v. Hubb*, 94 Mo. 489; *State v. Central Pac. R. Co.*, 21 Nev. 247; *Breisch v. Cox*, 81 Pa. St. 336; *Pottsville Lumber Co. v. Wells*, 157 Pa. St. 5. And see *infra*, this section, *Payment Frustrated by Officer*. But see *McGuire v. Brockman*, 58 Mo. App. 307.

**Tender Must Be Sufficient in Amount.** — See *Longinette v. Shelton*, (Tenn. Ch. 1898) 52 S. W. Rep. 1078; *Harness v. Cravens*, 126 Mo. 233.

**Tender Must Be of Whole Amount.** — See *supra*, this section, *How Made — In General*.

**Tender Suspends Interest.** — *Iowa R. Land Co. v. Carroll County*, 39 Iowa 151; *McGuire v. Brockman*, 58 Mo. App. 307.

**Injunction.** — Where a taxpayer tenders the amount of taxes due from him, which the collector refuses because the collection of the taxes for that year has been enjoined in a suit to which the taxpayer is not a party, a new demand is necessary after the injunction is dissolved before the taxpayer can be placed in default for nonpayment. *Jones v. Burford*, 26 Miss. 194.

**4. Payment Frustrated by Officer — United States.** — *Lewis v. Withers*, 44 Fed. Rep. 165.

*Iowa.* — *Neeley v. Wise*, 44 Iowa 544; *Corning Town Co. v. Davis*, 44 Iowa 629; *Jiska v. Ringgold County*, 57 Iowa 630.

*Mississippi.* — *Griffing v. Pintard*, 25 Miss. 173; *Jones v. Burford*, 26 Miss. 194.

*New York.* — *Van Benthuyssen v. Sawyer*, 36 N. Y. 150.

*Pennsylvania.* — *Baird v. Cahoon*, 5 W. & S. (Pa.) 540; *Breisch v. Cox*, 81 Pa. St. 336; *Philadelphia v. Anderson*, 142 Pa. St. 357.

*West Virginia.* — *Jones v. Dils*, 18 W. Va. 759.

*Wisconsin.* — *Gould v. Sullivan*, 84 Wis. 659, 36 Am. St. Rep. 955; *Bray, etc., Land Co. v. Newman*, 92 Wis. 271; *Edwards v. Upham*, 93 Wis. 455.

But see *contra*, *Croswell v. Benton*, 54 Minn. 264; *Richards v. Hatfield*, 40 Neb. 879; *Spiech v. Tierney*, 56 Neb. 514; *Heil v. Barron*, 8 Ohio Dec. 424, 7 Ohio N. P. 84.

**Prevention of Tender.** — It has been held that a mistake or fault of the receiving officer preventing a tender of payment of taxes will render the tax deed void. *Martin v. Barbour*, 34 Fed. Rep. 701; *People v. Registrar of Arrears*, 114 N. Y. 19; *Breisch v. Cox*, 81 Pa. St. 336.

**5. Lewis v. Monson**, 151 U. S. 545; *Wakefield v. Rotherham*, 67 Iowa 444; *Pottsville Lumber Co. v. Wells*, 157 Pa. St. 5; *Gould v. Sullivan*, 84 Wis. 659, 36 Am. St. Rep. 955; *Bray, etc., Land Co. v. Newman*, 92 Wis. 274; *Nelson v. Churchill*, 117 Wis. 10. Compare *Wallace v. International Paper Co.*, 70 N. Y. App. Div. 298, holding that an erroneous state-

real estate obtains from the treasurer a certificate that no taxes are due on the property, which certificate is substantiated by the tax books, he takes the property free from liens for taxes which were actually due.<sup>1</sup> And an erroneous statement as to the amount due for such taxes is equally within the rule, if acted on and payment made by the landowner accordingly.<sup>2</sup>

**When Rule Does Not Apply.** — The rule, however, is confined to cases where the landowner is prevented from paying the taxes by the neglect, wrong, or fault of the officer charged with the duty of collecting or receiving taxes, and does not apply where the officer applied to is not charged with such duty, or the party applying for the statement has no interest in the property,<sup>3</sup> or where it does not appear that the claimant was prepared and willing to pay the taxes.<sup>4</sup> So where the application for a statement of taxes due describes the property inaccurately, a mistake of the officer growing out of such inaccurate description will not relieve the applicant from liability.<sup>5</sup>

**9. Receipt.** — It is the duty of the officer receiving the tax to give a receipt for all payments properly made,<sup>6</sup> and such duty may be enforced by mandamus.<sup>7</sup>

**XIII. RECOVERY AND REFUNDING OF TAXES** — **1. Refunding of Taxes.** — In the absence of statute officers have no power to refund taxes paid, even though illegally assessed.<sup>8</sup> In many jurisdictions, however, provision is made by statute for the refunding of taxes illegally exacted, upon application to the proper officer or board.<sup>9</sup> The benefits of such statutes are generally not

ment that there are no unpaid taxes renders the subsequent sale of the land merely voidable.

**1. Rule Applied to Purchaser.** — *Jiska v. Ringgold County*, 57 Iowa 630; *Cummings v. Easton*, 46 Iowa 183.

**2. Payment of Amount Demanded** — *United States*. — *Lewis v. Monson*, 151 U. S. 545. *Arkansas*. — *Hickman v. Kempner*, 35 Ark. 505.

*Iowa*. — *Cummings v. Easton*, 46 Iowa 183; *Jiska v. Ringgold County*, 57 Iowa 630; *Wakefield v. Rotherham*, 67 Iowa 444; *Hintrager v. Mahoney*, 78 Iowa 537.

*Kansas*. — *Moon v. March*, 40 Kan. 58.

*Michigan*. — *Hough v. Auditor-Gen.*, 116 Mich. 663; *Carpenter v. Jones*, 117 Mich. 91.

*Missouri*. — *Harness v. Cravens*, 126 Mo. 233. *New York*. — *People v. Registrar of Arrears*, 114 N. Y. 19.

*Pennsylvania*. — *Laird v. Hiester*, 24 Pa. St. 452; *Freeman v. Cornwell*, (Pa. 1888) 15 Atl. Rep. 873; *Dietrick v. Mason*, 57 Pa. St. 40; *Breisch v. Cox*, 81 Pa. St. 336; *Philadelphia v. Anderson*, 142 Pa. St. 357; *Pottsville Lumber Co. v. Wells*, 157 Pa. St. 5.

*Wisconsin*. — *Randall v. Dailey*, 66 Wis. 285; *Bray, etc., Land Co. v. Newman*, 92 Wis. 271.

But see *Johnson v. Finley*, 54 Neb. 733, holding that a partial payment by reason of a mistake of the officer in stating the amount due merely discharged the taxes *pro tanto*.

**Change in Map.** — In *Lewis v. Monson*, 151 U. S. 545, it was held that where payment of taxes on one of several tracts was inadvertently omitted because of the adoption of a new official map, filed without the landowner's knowledge, and such tract was sold for non-payment of the taxes, he remaining in possession, his title would prevail in an action by the purchaser to recover possession of it. See also *Richter v. Beaumont*, 67 Miss. 285.

**Evidence.** — A settlement of the tax and the receipt therefor, unassailed, have been held to

be clear evidence that the taxpayer applied to the treasurer for the taxes assessed against him and paid all that was demanded. *Breisch v. Cox*, 81 Pa. St. 336. See also *Bray, etc., Land Co. v. Newman*, 92 Wis. 271, wherein the receipt on a printed blank had no entry under the column headed, "Taxes unpaid previous years."

**3. When Rule Not Applicable.** — *Alkan v. Bean*, 8 Biss. (U. S.) 83; *Elliot v. District of Columbia*, 3 MacArthur (D. C.) 396; *Gow v. Tidrick*, 49 Iowa 284; *Kahl v. Love*, 37 N. J. L. 5; *Elizabeth v. Shirley*, 35 N. J. Eq. 515; *Muller v. Bayonne*, 45 N. J. Eq. 237; *Van Benthuyssen v. Sawyer*, 36 N. Y. 150; *Edwards v. Upham*, 93 Wis. 455.

**4. Moore v. Hamlin**, 38 Iowa 482.

**5. Browne v. Finley**, 51 Neb. 465.

**6. Receipt.** — *Hawkins v. Dougherty*, 9 Houst. (Del.) 156; *Julian v. Stephens*, (Ky. 1889) 11 S. W. Rep. 6. *Contra*, *Stiles v. Hitchcock*, 47 Vt. 419, 19 Am. Rep. 121.

In some jurisdictions this duty is declared by statute. See *e. g.*, Gen. Laws N. Y., c. 24, § 94.

**7. Mandamus.** — *Perry v. Washburn*, 20 Cal. 318; *Gifford v. Callaway*, 8 Colo. App. 359; *Law v. People*, 84 Ill. 142; *Lawrence v. Miller*, 86 Ill. 502; *Lobban v. State*, 9 Wyo. 377.

**8. No Power to Refund.** — *Howell v. Ada County*, 6 Idaho 154.

**9. Statutory Provision for Refunding** — *Alabama*. — *White v. Smith*, 117 Ala. 232.

*California*. — *Hayes v. Los Angeles County*, 99 Cal. 74.

*Illinois*. — *Barber v. Jackson County*, 40 Ill. App. 42.

*Indiana*. — *St. Joseph County v. Ruckman*, 57 Ind. 96; *Henderson v. State*, 58 Ind. 244; *Indianapolis v. McAvoy*, 86 Ind. 587; *Howard County v. Armstrong*, 91 Ind. 528; *Newsom v. Bartholomew County*, 92 Ind. 229; *Durham v. Montgomery County*, 95 Ind. 182; *Carroll*

confined to parties who have paid an illegal tax upon compulsion, but extend to all persons who have paid taxes that they were not legally bound to pay.<sup>1</sup>

**2. Recovery of Taxes Paid—*a*. RIGHT TO RECOVER IN GENERAL.**—In the absence of specific statutory provision the general doctrines as to the recovery of payments<sup>2</sup> apply to the payment of taxes. Hence, taxes voluntarily paid without legal duress or coercion cannot be recovered back;<sup>3</sup> but

County *v. Graham*, 98 Ind. 279; *Henry County v. Murphy*, 100 Ind. 570; *Indianapolis v. Vajen*, 111 Ind. 240; *Simonson v. West Harrison*, 5 Ind. App. 459; *Pulaski County v. Senn*, 117 Ind. 410; *De Pauw Plate Glass Co. v. Alexandria*, 152 Ind. 543; *Donch v. Lake County*, 4 Ind. App. 374; *Leonard v. Indianapolis*, 9 Ind. App. 262; *Cleveland, etc., R. Co. v. Marion County*, 19 Ind. App. 58; *Indianapolis v. Ritzinger*, 24 Ind. App. 65; *Indianapolis v. Morris*, 25 Ind. App. 409.

*Iowa*.—*Harper v. Sexton*, 22 Iowa 442; *Lauman v. Des Moines County*, 29 Iowa 310; *Rhodes v. Sexton*, 33 Iowa 540; *Tallant v. Burlington*, 39 Iowa 543; *Isbell v. Crawford County*, 40 Iowa 102; *Dubuque, etc., R. Co. v. Webster County*, 40 Iowa 16; *Morris v. Sioux County*, 42 Iowa 416; *Richards v. Wapello County*, 48 Iowa 507; *Robinson v. Burlington*, 50 Iowa 240; *Barnes v. Marshall County*, 56 Iowa 20; *Dickey v. Polk County*, 58 Iowa 287; *Crosby v. Floete*, 65 Iowa 370; *Winzer v. Burlington*, 68 Iowa 279; *Thomas v. Burlington*, 69 Iowa 140; *Eyerly v. Jasper County*, 72 Iowa 149.

*Missouri*.—*State v. Chicago, etc., R. Co.*, 165 Mo. 598.

*Nebraska*.—*Chicago, etc., R. Co. v. Nemaha County*, 50 Neb. 393; *Martin v. Kearney County*, 62 Neb. 538.

*New York*.—*Matter of Farmers' Nat. Bank*, 1 Thomp. & C. (N. Y.) 383; *People v. Madison County*, 51 N. Y. 442; *Matter of New York Catholic Protectory*, 77 N. Y. 342; *People v. Wemple*, 133 N. Y. 617; *Matter of Buffalo Mut. Gas Light Co.*, 144 N. Y. 228; *Adams v. Monroe County*, 18 N. Y. App. Div. 415, *affirmed* 154 N. Y. 619; *Matter of Edison Electric Illuminating Co.*, 22 N. Y. App. Div. 371, *affirmed* 155 N. Y. 699; *People v. Roberts*, 30 N. Y. App. Div. 78, *affirmed* 156 N. Y. 693; *McCue v. Monroe County*, 45 N. Y. App. Div. 406, *affirmed* 162 N. Y. 235; *Matter of Reid*, 52 N. Y. App. Div. 243, *reversing* (County Ct.) 31 Misc. (N. Y.) 156; *Harris v. Niagara County*, 33 Hun (N. Y.) 279; *Van Antwerp v. Kelly*, 50 Hun (N. Y.) 513; *Matter of L. E. Waterman Co.*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 569.

*North Carolina*.—*North Carolina R. Co. v. Alamance*, 77 N. Car. 4.

*Oregon*.—*Kirkwood v. Ford*, 34 Oregon 552.

*Washington*.—*State v. Whittlesey*, 17 Wash. 447.

*Wyoming*.—*Kelley v. Rhoads*, 7 Wyo. 237, 75 Am. St. Rep. 904; *Carton v. Uinta County*, 10 Wyo. 416.

**1. Voluntary Payments May Be Refunded.**—*Pacific Coast Co. v. Wells*, 134 Cal. 471; *Du Bois v. Lake County*, 10 Ind. App. 348; *Indianapolis v. Morris*, 25 Ind. App. 409; *Indianapolis v. Vajen*, 111 Ind. 240; *People v. Madison County*, 51 N. Y. 442; *Adams v. Monroe*

*County*, 154 N. Y. 625; *Matter of Edison Electric Illuminating Co.*, 22 N. Y. App. Div. 371; *Van Hise v. Rensselaer County*, (County Ct.) 21 Misc. (N. Y.) 572; *State v. Hagerty*, 4 Ohio Dec. 283, 3 Ohio N. P. 246; *Carton v. Uinta County*, 10 Wyo. 416. See also *Hayes v. Los Angeles County*, 99 Cal. 74. But see *State v. Chicago, etc., R. Co.*, 165 Mo. 598.

<sup>2</sup> See the title PAYMENTS, vol. 22, pp. 609, 612.

**3. Voluntary Payments Not Recoverable**—*England*.—*Brisbane v. Dacres*, 5 Taunt. 144, 1 E. C. L. 43.

*Canada*.—*Bogie v. Montreal*, 16 Quebec Super. Ct. 593.

*United States*.—*Oceanic Steam Nav. Co. v. Tappan*, 16 Blatchf. (U. S.) 296; *Union Pac. R. Co. v. Dodge County*, 98 U. S. 544; *Little v. Bowers*, 134 U. S. 547; *Stone v. Kentucky Bank*, 174 U. S. 408, 799, *affirming* 88 Fed. Rep. 383.

*Alabama*.—*Cahaba v. Burnett*, 34 Ala. 400.

*California*.—*Brumagim v. Tillinghast*, 18 Cal. 265, 79 Am. Dec. 176; *Santa Rosa Bank v. Chalfant*, 52 Cal. 170; *Merrill v. Austin*, 53 Cal. 379; *De Fremery v. Austin*, 53 Cal. 380; *Younger v. Santa Cruz County*, 68 Cal. 241; *Grimley v. Santa Clara County*, 68 Cal. 575; *Maxwell v. San Louis Obispo County*, 71 Cal. 466; *Cooper v. Chamberlin*, 78 Cal. 450; *Phelan v. San Francisco*, 120 Cal. 1; *San Diego Land, etc., Co. v. La Presa School Dist.*, 122 Cal. 98; *Rooney v. Snow*, 131 Cal. 51.

*Florida*.—*Johnson v. Atkins*, (Fla. 1902) 32 So. Rep. 879.

*Georgia*.—*Jackson v. Atlanta*, 61 Ga. 228; *McGehee v. Columbus*, 69 Ga. 581; *Americus First Nat. Bank v. Americus*, 68 Ga. 119, 45 Am. Rep. 476; *Tatum v. Trenton*, 85 Ga. 468; *Williams v. Stewart*, 115 Ga. 864.

*Illinois*.—*Elston v. Chicago*, 40 Ill. 514, 89 Am. Dec. 361; *People v. Miner*, 46 Ill. 374; *Swanston v. Ijams*, 63 Ill. 165; *Chicago, etc., R. Co. v. People*, 136 Ill. 660; *Walser v. Board of Education*, 160 Ill. 272; *Otis v. People*, 196 Ill. 542; *Lyons v. Cook*, 9 Ill. App. 543; *Chicago v. Klinkert*, 94 Ill. App. 524.

*Indiana*.—*Ligonier v. Ackerman*, 46 Ind. 552; 15 Am. Rep. 323; *St. Joseph County v. Ruckman*, 57 Ind. 96; *Donch v. Lake County*, 4 Ind. App. 378; *Howard County v. Armstrong*, 91 Ind. 528; *Durham v. Montgomery County*, 95 Ind. 182; *Indianapolis v. Vajen*, 111 Ind. 240; *Simonson v. West Harrison*, 5 Ind. App. 459.

*Iowa*.—*Espy v. Ft. Madison*, 14 Iowa 226; *Garrigan v. Knight*, 47 Iowa 525; *Lindsey v. Boone County*, 92 Iowa 86; *Odendahl v. Rich*, 112 Iowa 182.

*Kansas*.—*Dickinson County v. National Land Co.*, 23 Kan. 196.

*Kentucky*.—*Louisville, etc., R. Co. v. Hopkins County*, 87 Ky. 608; *Louisville City Nat.*

when a person is called upon peremptorily to pay a tax to which he is not liable, and he can save himself or his property in no other way than by paying the illegal demand, he may recover the money so paid as money had and received.<sup>1</sup>

*Bank v. Coulter*, (Ky. 1902) 66 S. W. Rep. 427.

*Maine*. — *Rogers v. Greenbush*, 58 Me. 390, 4 Am. Rep. 292.

*Maryland*. — *Monticello Distilling Co. v. Baltimore*, 90 Md. 416.

*Massachusetts*. — *Wright v. Boston*, 9 Cush. (Mass.) 241; *Emery v. Lowell*, 127 Mass. 138.

*Michigan*. — *Thompson v. Detroit*, 114 Mich. 502; *Gage v. Saginaw*, 128 Mich. 682.

*Minnesota*. — *Falvey v. Hennepin County*, 76 Minn. 257; *Gould v. Hennepin County*, 76 Minn. 379; *Wheeler v. Hennepin County*, 87 Minn. 243.

*Mississippi*. — *Jackson v. Newman*, 59 Miss. 385, 42 Am. Rep. 367.

*Missouri*. — *Walker v. St. Louis*, 15 Mo. 563; *State v. Powell*, 44 Mo. 436; *Couch v. Kansas City*, 127 Mo. 436; *Robins v. Latham*, 134 Mo. 469; *State v. Chicago, etc.*, R. Co., 165 Mo. 611.

*Nebraska*. — *Caldwell v. Lincoln*, 19 Neb. 569; *Martin v. Kearney County*, 62 Neb. 538; *Dakota County v. Chicago, etc.*, R. Co., 63 Neb. 405.

*New Hampshire*. — *Amoskeag Mfg. Co. v. Manchester*, 70 N. H. 336.

*New York*. — *Ernenwein v. Oneida County*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 216; *Toal v. New York*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 18, *affirmed* 67 N. Y. App. Div. 619; *New York, etc.*, R. Co. v. Marsh, 12 N. Y. 308; *Ætna Ins. Co. v. New York*, 153 N. Y. 331, *affirming* 7 N. Y. App. Div. 145; *Feist v. New York*, 74 N. Y. App. Div. 627; *Sexton v. Pepper*, 28 Hun (N. Y.) 31; *People v. Brinckerhoff*, 40 Hun (N. Y.) 381; *Wilcox v. New York*, 53 N. Y. Super. Ct. 436.

*North Dakota*. — *St. Anthony, etc., Elevator Co. v. Bottineau County*, 9 N. Dak. 346.

*Ohio*. — *State v. Lewis*, 11 Ohio Cir. Dec. 13, 20 Ohio Cir. Ct. 319.

*Pennsylvania*. — *Luzerne County v. Com.*, 2 Dauph. Co. Rep. (Pa.) 253; *Meylert v. Sullivan County*, 19 Pa. St. 181; *McCrickart v. Pittsburgh*, 88 Pa. St. 133.

*Rhode Island*. — *Dunnell Mfg. Co. v. Newell*, 15 R. I. 233.

*South Carolina*. — *Robinson v. Charleston*, 2 Rich. L. (S. Car.) 319.

*Tennessee*. — *Union, etc., Bank v. Memphis*, 107 Tenn. 66; *Clarksville v. Montgomery County*, (Tenn. Ch. 1901) 62 S. W. Rep. 33.

*Texas*. — *Davie v. Galveston*, 16 Tex. Civ. App. 13; *Galveston City Ct. v. Galveston*, 56 Tex. 486; *Taylor v. Hall*, 71 Tex. 216; *Houston v. Feeser*, 76 Tex. 365. But see *Galveston v. Sydnor*, 39 Tex. 236.

*Utah*. — *Raleigh v. Salt Lake City*, 17 Utah 130.

*Vermont*. — *Henry v. Chester*, 15 Vt. 469; *Babcock v. Granville*, 44 Vt. 325; *Burnham v. Strafford*, 53 Vt. 610; *Meacham v. Newport*, 70 Vt. 67.

*Virginia*. — *Richmond v. Judah*, 5 Leigh (Va.) 305.

*Wisconsin*. — *Babcock v. Fond du Lac*, 58 Wis. 230.

*Wyoming*. — *Carton v. Uinta County*, 10 Wyo. 416.

**One Who Has No Interest in the Premises** other than that of a mere resident or interloper cannot recover illegal taxes voluntarily paid by him. *McCue v. Monroe County*, 45 N. Y. App. Div. 406, *affirmed* 162 N. Y. 235.

**Rule Applies Though Tax Unconstitutional.** — *San Francisco, etc., R. Co. v. Dinwiddie*, 8 Sawy. (U. S.) 312; *Yates v. Royal Ins. Co.*, 200 Ill. 202; *Taylor v. Board of Health*, 31 Pa. St. 73, 72 Am. Dec. 724; *Clarksville v. Montgomery County*, (Tenn. Ch. 1901) 62 S. W. Rep. 33.

**A Voluntary Payment by a Receiver** has been held not recoverable by subsequent purchasers who had been parties to the suit. *Norfolk, etc., R. Co. v. Smyth County*, 87 Va. 521.

**1. Involuntary Payments May Be Recovered** — *England*. — *Morgan v. Palmer*, 2 B. & C. 729, 9 E. C. L. 232.

*United States*. — *Elliott v. Swartwout*, 10 Pet. (U. S.) 137; *Erskine v. Van Arsdale*, 15 Wall. (U. S.) 75; *Wilmington v. Ricard*, (C. C. A.) 90 Fed. Rep. 214; *Montgomery v. Charleston*, (C. C. A.) 99 Fed. Rep. 108; *Union Pac. R. Co. v. Dodge County*, 98 U. S. 541; *U. S. v. Lawson*, 101 U. S. 164; *U. S. v. Ellsworth*, 101 U. S. 170; *Swift Co. v. U. S.*, 111 U. S. 23; *Stanley v. Albany County*, 121 U. S. 549; *Little v. Bowers*, 134 U. S. 548.

*Arkansas*. — *Magnolia v. Sharman*, 46 Ark. 358.

*Illinois*. — *La Salle County v. Simmons*, 10 Ill. 513; *Harvey v. Olney*, 42 Ill. 336; *Chicago v. Sperbeck*, 69 Ill. App. 562; *Chicago v. Klinkert*, 94 Ill. App. 524.

*Iowa*. — *Winzer v. Burlington*, 68 Iowa 279.

*Kansas*. — *Wyandotte County v. Kansas City, etc.*, R. Co., 4 Kan. App. 772; *Kansas Pac. R. Co. v. Wyandotte County*, 16 Kan. 587; *St. Louis, etc., R. Co. v. Labette County*, 63 Kan. 889, 66 Pac. Rep. 1045; *Connelly v. Trego County*, 64 Kan. 168.

*Kentucky*. — *Bruner v. Clay City*, 100 Ky. 567.

*Maine*. — *Howard v. Augusta*, 74 Me. 79; *Creamer v. Bremen*, 91 Me. 508.

*Massachusetts*. — *Lincoln v. Worcester*, 8 Cush. (Mass.) 55; *Wright v. Boston*, 9 Cush. (Mass.) 241; *Gerry v. Stoneham*, 1 Allen (Mass.) 319; *Sumner v. First Parish*, 4 Pick. (Mass.) 361; *Goodrich v. Luenburg*, 9 Gray (Mass.) 38; *Preston v. Boston*, 12 Pick. (Mass.) 7; *Day v. Lawrence*, 167 Mass. 371; *Somerville v. Waltham*, 170 Mass. 160.

*Michigan*. — *Lyon v. Guthard*, 52 Mich. 271; *Woodmere Cemetery Assoc. v. Springwells Tp.*, 130 Mich. 466; *Thompson v. Detroit*, 114 Mich. 503.

*Minnesota*. — *State v. Nelson*, 41 Minn. 25; *Wheeler v. Hennepin County*, 87 Minn. 243.

*Missouri*. — *Westlake v. St. Louis*, 77 Mo. 47, 46 Am. Rep. 4.

*New York*. — *Newman v. Livingston County*,

Volume XXVII.

**Tax Must Be Illegal and Not Merely Irregular.** — But although the payment of a tax was involuntary, there can be no recovery unless the tax was illegal; mere irregularities in the proceedings will not warrant a recovery.<sup>1</sup> And if the tax is not itself illegal and void, and is voluntarily paid, an agreement by the proper officers to refund is void and affords no ground of action.<sup>2</sup> If a tax is partly illegal, and the illegal portion can be separated, it may be recovered if paid under duress, provided the legal tax be first tendered and refused.<sup>3</sup>

**Tax Must Have Been Received by State or Municipality.** — And in order to recover illegal taxes involuntarily paid it must appear that the taxes have been received to the use of the state or municipality from the collecting officer.<sup>4</sup>

**Ordinary Remedy.** — There can be no recovery by action where the taxpayer has failed to pursue his ordinary remedies to relieve himself from the pay-

45 N. Y. 676; *Bridges v. Sullivan County*, 92 N. Y. 570; *Jex v. New York*, 103 N. Y. 536; *Ballston First Nat. Bank v. Saratoga County*, 106 N. Y. 493; *U. S. Trust Co. v. New York*, 144 N. Y. 488; *Etna Ins. Co. v. New York*, 153 N. Y. 339; *Adams v. Monroe County*, 18 N. Y. App. Div. 415, *affirmed* 154 N. Y. 619; *Deady v. Lyons*, 39 N. Y. App. Div. 139; *Matter of Chadwick*, 59 N. Y. App. Div. 334; *Dale v. New York*, 71 N. Y. App. Div. 231.

*North Dakota.* — *St. Anthony, etc., Elevator Co. v. Bottineau County*, 9 N. Dak. 346.

*Rhode Island.* — *American Bank v. Mumford*, 4 R. I. 478; *St. Mary's Church v. Tripp*, 14 R. I. 307; *Rumford Chemical Works v. Ray*, 19 R. I. 456; *Lindsey v. Allen*, 19 R. I. 721; *Fish v. Higbee*, 22 R. I. 223.

*Tennessee.* — *Little Rock, etc., R. Co. v. Williams*, 101 Tenn. 146.

*Texas.* — *Galveston v. Sydnor*, 39 Tex. 236.

*Utah.* — *Raleigh v. Salt Lake City*, 17 Utah 130.

*Vermont.* — *Henry v. Chester*, 15 Vt. 460; *Allen v. Burlington*, 45 Vt. 202; *Stowe v. Stowe*, 70 Vt. 609.

*Wisconsin.* — *Parcher v. Marathon County*, 52 Wis. 388, 38 Am. Rep. 745; *Neumann v. La Cross*, 94 Wis. 103.

*Wyoming.* — *Kelley v. Rhoads*, 7 Wyo. 237, 75 Am. St. Rep. 904.

**1. Tax Must Be Illegal and Not Merely Irregular.** — *United States.* — *Union Pac. R. Co. v. Dodge County*, 98 U. S. 541.

*Arkansas.* — *Magnolia v. Sharman*, 46 Ark. 358.

*Illinois.* — *Elston v. Chicago*, 40 Ill. 514, 89 Am. Dec. 361; *Stephenson County v. Manny*, 56 Ill. 160; *Otis v. People*, 196 Ill. 543; *Chicago v. Fidelity Sav. Bank*, 11 Ill. App. 165.

*Indiana.* — *Howard County v. Armstrong*, 91 Ind. 528; *Durham v. Montgomery County*, 95 Ind. 182; *Carroll County v. Graham*, 98 Ind. 279; *Henry County v. Murphy*, 100 Ind. 570.

*Iowa.* — *Kraft v. Keokuk*, 14 Iowa 86; *Lindsey v. Boone County*, 92 Iowa 86; *Odendahl v. Rich*, 112 Iowa 182.

*Maine.* — *Rogers v. Greenbush*, 58 Me. 390, 4 Am. Rep. 292; *Hayford v. Belfast*, 69 Me. 63.

*Massachusetts.* — *Lynde v. Melrose*, 10 Allen (Mass.) 49; *Wright v. Boston*, 9 Cush. (Mass.) 241; *Preston v. Boston*, 12 Pick. (Mass.) 13; *Williams v. School Dist. No. 1*, 21 Pick. (Mass.) 75, 32 Am. Dec. 243.

*Michigan.* — *Hinds v. Belvidere Tp.*, 107 Mich. 664; *Thompson v. Detroit*, 114 Mich. 502.

*Minnesota.* — *Clarke v. Stearns County*, 47 Minn. 552.

*New Hampshire.* — *Hanson v. Haverhill*, 60 N. H. 218.

*New York.* — *Matter of New York Catholic Protectory*, 8 Hun (N. Y.) 91; *Swift v. Poughkeepsie*, 37 N. Y. 511.

*Utah.* — *Raleigh v. Salt Lake City*, 17 Utah 130.

*Wisconsin.* — *Day v. Pelican*, 94 Wis. 503.

*Wyoming.* — *Carton v. Uinta County*, 10 Wyo. 416.

**Valid Tax Not Recoverable Though Paid under Unlawful Duress.** — *Foss v. Whitehouse*, 94 Me. 491.

**Taxes Collected Before Assessment Recoverable.** — *Shewalter v. Brown*, 35 Miss. 423.

**2. Agreement to Refund Void.** — *Lyons v. Cook*, 9 Ill. App. 543. See also *Matter of L. E. Waterman Co.*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 569.

**3. Tax Partly Illegal.** — *Mendocino Bank v. Chalfant*, 51 Cal. 471; *Lake Superior Ship Canal R., etc., Co. v. Thompson Tp.*, 56 Mich. 493. See also *Chicago, etc., R. Co. v. Nemaha County*, 50 Neb. 393.

**Property Partly Exempt—No Recovery in Absence of Notice.** — *Broderick v. Yonkers*, 22 N. Y. App. Div. 448, *affirmed* 163 N. Y. 571. See also *Swift v. Poughkeepsie*, 37 N. Y. 511. And that there can be no recovery in *Massachusetts* by a religious society where part of the property claimed to be exempt was taxable, see *All Saints Parish v. Brookline*, 178 Mass. 404 [citing *Boston Water Power Co. v. Boston*, 9 Met. (Mass.) 199; *Chapel of Good Shepherd v. Boston*, 120 Mass. 212; *Hicks v. Westport*, 130 Mass. 478; *Richardson v. Boston*, 148 Mass. 508; *Schwarz v. Boston*, 151 Mass. 226; *Kelley v. Barton*, 174 Mass. 396].

In *Vermont* partial invalidity has been held to render the whole tax recoverable. *Meacham v. Newport*, 70 Vt. 67 [citing *Drew v. Davis*, 10 Vt. 506, 33 Am. Dec. 213; *Bartlett v. Wilson*, 59 Vt. 23; and *Foster v. Stevens*, 63 Vt. 175].

**4. Tax Must Have Been Received.** — *Magnolia v. Sharman*, 46 Ark. 358; *Americus First Nat. Bank v. Americus*, 68 Ga. 119, 45 Am. Rep. 476; *Otis v. People*, 196 Ill. 546; *Thompson v. Detroit*, 114 Mich. 505; *Raleigh v. Salt Lake City*, 17 Utah 130; *Carton v. Uinta County*, 10 Wyo. 416.

ment of an illegal tax.<sup>1</sup> Thus, it is a settled rule that application must be made to any statutory tribunal that may exist for that purpose, and a taxpayer who fails to make such application cannot pay under protest and then recover back the taxes in an action.<sup>2</sup> But in the case of illegal taxation, no proceeding to set aside the assessment is necessary.<sup>3</sup>

**Demand.** — Prior demand for repayment is required by statute in some states as a prerequisite to an action to recover taxes illegally exacted;<sup>4</sup> but in other jurisdictions no demand is necessary.<sup>5</sup>

**b. WHAT CONSTITUTES VOLUNTARY PAYMENT — In General.** — Where a party pays an illegal demand, with full knowledge of all the facts which render it illegal, without an immediate and urgent necessity therefor to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back. And, on the other hand, where a payment is made to prevent the seizure of the taxpayer's person or property or to relieve it from such seizure it is involuntary.<sup>6</sup>

**1. Taxpayer Must First Pursue His Ordinary Remedy — United States.** — *Balfour v. Portland*, 28 Fed. Rep. 738; *Stanley v. Albany County*, 121 U. S. 535; *Williams v. Albany County*, 122 U. S. 154. But see *Wilmington v. Ricaud*, (C. C. A.) 90 Fed. Rep. 214.

*Arkansas.* — *Magnolia v. Sharman*, 46 Ark. 358.

*Maine.* — *Hemingway v. Machias*, 33 Me. 445; *Rogers v. Greenbush*, 58 Me. 390, 4 Am. Rep. 292; *Waite v. Princeton*, 66 Me. 225.

*Massachusetts.* — *All Saints Parish v. Brookline*, 178 Mass. 404.

*Michigan.* — *Detroit River Sav. Bank v. Detroit*, 114 Mich. 81.

*Minnesota.* — *Clarke v. Stearns County*, 47 Minn. 552, 66 Minn. 304.

*Montana.* — *Barrett v. Shannon*, 19 Mont. 397.

*Nebraska.* — *Chicago, etc., R. Co. v. Nemaha County*, 50 Neb. 393.

*New York.* — *Broderick v. Yonkers*, 22 N. Y. App. Div. 448; *Citizens' Sav. Bank v. New York*, 37 N. Y. App. Div. 560, *affirmed* 166 N. Y. 594.

*North Carolina.* — *Huggins v. Hinson*, Phil. L. (61 N. Car.) 126.

*Pennsylvania.* — *Wharton v. Birmingham*, 37 Pa. St. 371.

*Vermont.* — *Cloud v. Norwich*, 57 Vt. 448.

*Canada.* — *Bogie v. Montreal*, 16 Quebec Super. Ct. 593.

And see *supra*, this title, *Assessment*; *Levy*.  
**2. Statutory Tribunal — United States.** — *Albany County v. Stanley*, 105 U. S. 305; *Stanley v. Albany County*, 121 U. S. 549. But see under a *Montana* statute *Western Ranches v. Custer County*, 89 Fed. Rep. 577; *Union Pac. R. Co. v. Dodge County*, 98 U. S. 541.

*Colorado.* — *Price v. Kramer*, 4 Colo. 546.

*Illinois.* — *Felsenthal v. Johnson*, 104 Ill. 21; *People v. Lots in Ashley*, 122 Ill. 297; *Butternuth v. St. Louis Bridge Co.*, 123 Ill. 535, 5 Am. St. Rep. 546.

*Louisiana.* — *Shattuck v. New Orleans*, 39 La. Ann. 206; *Leeds v. Hardy*, 43 La. Ann. 810.

*Massachusetts.* — *Bourne v. Boston*, 2 Gray (Mass.) 494; *Wright v. Boston*, 9 Cush. (Mass.) 241; *Com. v. Cary Imp. Co.*, 98 Mass. 19. Compare *McGee v. Salem*, 149 Mass. 238 (assess-

ment to former owner — subsequent owner not affected).

*Michigan.* — *St. Joseph First Nat. Bank v. St. Joseph Tp.*, 46 Mich. 530; *Caledonia Tp. v. Rose*, 94 Mich. 216; *Michigan Sav. Bank v. Detroit*, 107 Mich. 246.

*Nevada.* — *State v. Wright*, 4 Nev. 251.

*New York.* — *People v. Duguid*, 68 Hun (N. Y.) 243.

*Pennsylvania.* — *Van Nort's Appeal*, 121 Pa. St. 113.

*Tennessee.* — *Ward v. Alsup*, 100 Tenn. 745.

*Wisconsin.* — *Boorman v. Juneau County*, 76 Wis. 550.

*Wyoming.* — *Johnson County v. Searight Cattle Co.*, 3 Wyo. 777.

**Recovery After Unsuccessful Application to Board of Review.** — See *James v. New Orleans*, 19 La. Ann. 109.

**Presentation to County Court Not Necessary.** — *Centennial Eureka Min. Co. v. Jaub County*, 22 Utah 395.

**3. Proceeding to Set Aside Assessment.** — *Ætna Ins. Co. v. New York*, 153 N. Y. 331; *Ross v. Cayuga County*, 38 Hun (N. Y.) 20; *Union, etc., Bank v. Memphis*, 107 Tenn. 66; *Galveston Gas Co. v. Galveston County*, 54 Tex. 287, 72 Tex. 509.

**4. Demand for Repayment Necessary.** — *Henne v. Los Angeles County*, 129 Cal. 297; *Custer County v. Chicago, etc., R. Co.*, 62 Neb. 657; *Bristol v. Morganton*, 125 N. Car. 365. See also *Richmond, etc., R. Co. v. Reidsville*, 109 N. Car. 494; *Hatwood v. Fayetteville*, 121 N. Car. 207.

**5. Demand Not Necessary.** — *Arapahoe County v. Cutter*, 3 Colo. 349; *Newman v. Livingston County*, 45 N. Y. 676; *Ætna Ins. Co. v. New York*, 153 N. Y. 331, *affirming* 7 N. Y. App. Div. 145; *Babcock v. Granville*, 44 Vt. 325. See also *Dewey v. Niagara County*, 62 N. Y. 294.

**6. When Payment Voluntary — United States.** — *Lamborn v. Dickinson County*, 97 U. S. 181; *Union Pac. R. Co. v. Dodge County*, 98 U. S. 541. Compare *Erschine v. Van Arsdale*, 15 Wall. (U. S.) 75.

*Georgia.* — *Americus First Nat. Bank v. Americus*, 68 Ga. 119, 45 Am. Rep. 476.

*Illinois.* — *Chicago v. Klinkert*, 94 Ill. App. 524.



Payment under Threats that Penalties Will Be Imposed if it is not made have been held to be involuntary.<sup>1</sup> But mere threats of legal prosecution or of adding costs have been held not to render a payment compulsory.<sup>2</sup>

**Payment to Avoid Sale or Imprisonment.** — As a general rule, payment to avoid the sale of real property<sup>3</sup> or to clear the title to real estate<sup>4</sup> has been held not to be voluntary. Thus, the payment of an illegal tax to an officer armed with a warrant authorizing him to enforce the payment by imprisonment or by seizure and sale of property, and about to exercise this authority, is not voluntary and may be recovered back.<sup>5</sup> And actual seizure under the warrant

*Kansas.* — *Wabaunsee County v. Walker*, 8 Kan. 431.

*Maine.* — *Howard v. Augusta*, 74 Me. 79; *Creamer v. Bremen*, 91 Me. 508.

*Michigan.* — *Lyon v. Guthard*, 52 Mich. 271.

*Missouri.* — *Clafin v. McDonough*, 33 Mo. 412, 84 Am. Dec. 54.

*New York.* — *Dutchess County Mut. Ins. Co. v. Poughkeepsie*, 51 Hun (N. Y.) 595.

*Pennsylvania.* — *Grim v. Weissenberg School Dist.*, 57 Pa. St. 433, 98 Am. Dec. 237.

*Texas.* — *Davie v. Galveston*, 16 Tex. Civ. App. 18; *Galveston Gas Co. v. Galveston County*, 54 Tex. 287.

*Vermont.* — *Allen v. Burlington*, 45 Vt. 202.

*Wisconsin.* — *Parcher v. Marathon County*, 52 Wis. 388, 38 Am. Rep. 745.

See generally the titles PAYMENT, vol. 22, p. 613 *et seq.*; SPECIAL or LOCAL ASSESSMENTS, vol. 25, p. 1239 *et seq.*

**Mere Unwillingness to Pay Not Sufficient.** — *Yates v. Royal Ins. Co.*, 200 Ill. 202.

**Mere Assertion of Power to Require Payment Not Duress.** — *Holder v. Galena*, 19 Ill. App. 409.

**Taxes Not Due — Payment Voluntary.** — *Carton v. Uinta County*, 10 Wyo. 416.

**Taxes in Delinquent List — Payment Not Compulsory.** — *Dear v. Varnum*, 80 Cal. 86.

**Payment by Agent Voluntary.** — *Baltimore v. Hussey*, 67 Md. 112. See also *Ætna Ins. Co. v. New York*, 7 N. Y. App. Div. 145, *affirmed* 153 N. Y. 331, wherein, however, no authorized agency existed.

**Duress Removed by Promise to Pay.** — *Gachet v. McCall*, 50 Ala. 307; *Savannah v. Feeley*, 66 Ga. 31.

**Payment to Prevent Discontinuance of Business Involuntary.** — *Swift Co. v. U. S.*, 111 U. S. 29; *Scottish Union, etc., Ins. Co. v. Herriott*, 109 Iowa 606, 77 Am. St. Rep. 548; *Vicksburg v. Butler*, 56 Miss. 72. See also *Ratterman v. American Express Co.*, 49 Ohio St. 608. *Compare Yates v. Royal Ins. Co.*, 200 Ill. 202.

**Whether Payment Voluntary Question of Law.** — *Clarksville v. Montgomery County*, (Tenn. Ch. 1901) 62 S. W. Rep. 33.

**1. Payment to Avoid Penalties and Costs Not Voluntary.** — *Magnolia v. Sharman*, 46 Ark. 358; *Allen v. Burlington*, 45 Vt. 202; *Wyckoff v. King County*, 18 Wash. 256. See also *Kansas Pac. R. Co. v. Wyandotte County*, 16 Kan. 598. *Clarksville v. Montgomery County*, (Tenn. Ch. 1901) 62 S. W. Rep. 33.

**2. Mere Threats Not Coercion.** — *Sonoma County Tax Case*, 13 Fed. Rep. 791; *De Baker v. Carillo*, 52 Cal. 473; *Merrill v. Austin*, 53 Cal. 379; *Falvey v. Hennepin County*, 76 Minn. 262; *St. Anthony, etc., Elevator Co. v. Bottineau County*, 9 N. Dak. 346; *Marietta v. Slocumb*, 6 Ohio St. 471; *Lea v. Memphis*, 9

*Baxt. (Tenn.)* 105. See also *Williams v. Stewart*, 115 Ga. 864; *Preston v. Boston*, 12 Pick. (Mass.) 13. *Compare Sturgis First Nat. Bank v. Watkins*, 21 Mich. 483.

**Payment Voluntary Before Threats Made.** — *Woodland Bank v. Webber*, 52 Cal. 73.

**Payment Voluntary Where Invalidity of Law Would Be Defense.** — *Maxwell v. San Luis Obispo County*, 71 Cal. 466.

**Payment Before Legal Proceedings Begun Voluntary.** — *Wilson v. Pelton*, 40 Ohio St. 306.

**3. Payment to Prevent Sale of Real Property Involuntary.** — *Lindsey v. Allen*, 19 R. I. 721; *Whittaker v. Deadwood*, 12 S. Dak. 608.

**Payment After Injunction Refused Not Voluntary.** — *Shaw v. Allegheny*, 115 Pa. St. 46.

**4. Payment to Clear Title Not Voluntary.** — *Sherman v. Savery*, 2 McCrary (U. S.) 107, 2 Fed. Rep. 505; *State v. Nelson*, 41 Minn. 25; *Adams v. Monroe County*, 18 N. Y. App. Div. 415, *affirmed* 154 N. Y. 619. And see *Galveston Gas. Co. v. Galveston County*, 54 Tex. 287. *Compare Davie v. Galveston*, 16 Tex. Civ. App. 13; *Meredith v. Coker*, 65 Tex. 29.

**Recovery Not Dependent on Institution of Proceedings for Sale.** — *Thompson v. Detroit*, 114 Mich. 502.

**Payment to Secure Recording of Deeds Involuntary.** — *State v. Nelson*, 41 Minn. 25.

**Payment Without Demand or Threat of Levy Voluntary.** — *Gage v. Saginaw*, 128 Mich. 682. See also *Weston v. Luce County*, 102 Mich. 528.

**5. Warrant Held to Constitute Duress — United States.** — *Union Pac. R. Co. v. Dodge County*, 98 U. S. 545; *Little v. Bowers*, 134 U. S. 548; *Montgomery v. Charleston*, (C. C. A.) 99 Fed. Rep. 108.

*California.* — *Guy v. Washburn*, 23 Cal. 111; *Williams v. Corcoran*, 46 Cal. 556; *Smith v. Farrelly*, 52 Cal. 77.

*Connecticut.* — *Atwater v. Woodbridge*, 6 Conn. 223, 16 Am. Dec. 46; *Adam v. Litchfield*, 10 Conn. 127; *Seeley v. Westport*, 47 Conn. 294, 36 Am. Rep. 70.

*Illinois.* — *Kimball v. Corn Exch. Nat. Bank*, 1 Ill. App. 209.

*Kentucky.* — *Mills v. Hopkinsville*, (Ky. 1889) 11 S. W. Rep. 776.

*Massachusetts.* — *Boston, etc., Glass Co. v. Boston*, 4 Met. (Mass.) 181; *Sumner v. First Parish*, 4 Pick. (Mass.) 361; *Preston v. Boston*, 12 Pick. (Mass.) 7; *Perry v. Dover*, 12 Pick. (Mass.) 206; *Amesbury Woollen, etc., Mfg. Co. v. Amesbury*, 17 Mass. 461.

*Minnesota.* — *Dakota County v. Parker*, 7 Minn. 267; *State v. Nelson*, 41 Minn. 27.

*New York.* — *Deady v. Lyons*, 39 N. Y. App. Div. 139; *Dale v. New York*, 71 N. Y. App. Div. 227.

is not necessary to render the payment involuntary.<sup>1</sup> So if the amount of an illegal tax be actually collected by distress and sale of personal property, the payment is, of course, involuntary and recoverable.<sup>2</sup> It has been held in a number of cases, however, that payment of illegal taxes to prevent a sale of real estate is not under compulsion, but is voluntary, as such a sale does not pass title.<sup>3</sup>

**Redemption from a Tax Sale** has in some cases been held to constitute a voluntary payment.<sup>4</sup> But in other cases it has been held that if lands sold for illegal taxes are redeemed the redemption money may be recovered.<sup>5</sup>

**All Payments Are Presumed to Be Voluntary** until the contrary is made to appear.<sup>6</sup>

**c. PROTEST.** — Where the payment is involuntary, protest is not necessary, in the absence of statute, to entitle the taxpayer to recover taxes paid under compulsion.<sup>7</sup> And where illegal taxes are voluntarily paid, a protest will

*Pennsylvania.* — *Luzerne County v. Com.*, 2 Dauph. Co. Rep. (Pa.) 253; *Grim v. Weissenberg School Dist.*, 57 Pa. St. 433, 98 Am. Dec. 237.

*Vermont.* — *Allen v. Burlington*, 45 Vt. 202.

*Wisconsin.* — *Ruggles v. Fond du Lac*, 53 Wis. 436.

*Wyoming.* — See *Carton v. Uinta County*, 10 Wyo. 416.

**Regular Tax Proceedings Have the Force of an Execution** and render payment involuntary. *Union Nat. Bank v. New York*, 51 N. Y. 638, reversing 51 Barb. (N. Y.) 159; *Matter of Edison Electric Illuminating Co.*, 22 N. Y. App. Div. 371, affirmed 155 N. Y. 699. So of tax books in the hands of an officer. *Bright v. Halloman*, 7 Lea (Tenn.) 309. Compare *Lea v. Memphis*, 9 Baxt. (Tenn.) 103.

**Judicial Order Renders Payment Involuntary.** — *Bailey v. Buell*, 50 N. Y. 662, reversing 59 Barb. (N. Y.) 158; *Drake v. Shurtliff*, 24 Hun (N. Y.) 422.

**1. Seizure Not Necessary.** — *Thomas v. Burlington*, 69 Iowa 140; *Atwell v. Zeluff*, 26 Mich. 118; *Howard v. Augusta*, 74 Me. 79; *Preston v. Boston*, 12 Pick. (Mass.) 7; *Claflin v. McDonough*, 33 Mo. 412, 84 Am. Dec. 54; *St. Anthony, etc., Elevator Co. v. Bottineau County*, 9 N. Dak. 346; *Parcher v. Marathon County*, 52 Wis. 388, 38 Am. Rep. 745; *Kelley v. Rhoads*, 7 Wyo. 237, 75 Am. St. Rep. 904.

**Payment to Prevent Issuance of Warrant Involuntary.** — *Wyandotte County v. Kansas City, etc.*, R. Co., 4 Kan. App. 772; *Stowe v. Stowe*, 70 Vt. 609. See also *Kansas Pac. R. Co. v. Wyandotte County*, 16 Kan. 587; *Atchison, etc., R. Co. v. Atchison County*, 47 Kan. 722. See also *Allen v. Burlington*, 45 Vt. 202; *Babcock v. Granville*, 44 Vt. 325.

**Demand Accompanied by Threats to Levy — Payment Involuntary.** — *Raisler v. Athens*, 66 Ala. 198. But see *Woodmere Cemetery Assoc. v. Springwells Tp.*, 130 Mich. 466.

**No Demand or Attempt to Enforce Warrant — Payment Voluntary.** — *Montgomery v. Charleston, (C. C. A.)* 99 Fed. Rep. 113; *Union Pac. R. Co. v. Dodge County*, 98 U. S. 541; *Chicago v. Fidelity Sav. Bank*, 11 Ill. App. 165; *Conkling v. Springfield*, 19 Ill. App. 167; *Dunnell Mfg. Co. v. Newell*, 15 R. I. 233. Compare *Rumford Chemical Works v. Ray*, 19 R. I. 456.

**2. Tax Actually Collected by Distress.** — *Hennel v. Vanderburgh County*, 132 Ind. 32; *Dow v. First Parish*, 5 Met. (Mass.) 73; *Sumner v.*

*First Parish*, 4 Pick. (Mass.) 361; *Inglee v. Bosworth*, 5 Pick. (Mass.) 498, 16 Am. Dec. 419; *Newman v. Livingston County*, 45 N. Y. 682.

**But Payment to Avoid Sale of Property Not Distrainable** has been deemed voluntary. *Sowles v. Soule*, 59 Vt. 131.

**No Recovery until Judgment Set Aside.** — *First Presb. Church v. New Orleans*, 30 La. Ann. 259, 31 Am. Rep. 224.

**3. Payment to Prevent Sale of Realty Voluntary.** — *Stover v. Mitchell*, 45 Ill. 213; *Swanston v. Ijams*, 63 Ill. 165; *Otis v. People*, 196 Ill. 542; *Rogers v. Greenbush*, 58 Me. 390, 4 Am. Rep. 292; *Forrest v. New York*, (Supm. Ct. Spec. T.) 13 Abb. Pr. (N. Y.) 350; *St. Anthony, etc., Elevator Co. v. Bottineau County*, 9 N. Dak. 346. See also *Davie v. Galveston*, 16 Tex. Civ. App. 13.

**Threats, Either Before or After Sale**, to execute a tax deed which, being void upon its face, would not cloud the title do not constitute duress. *Merrill v. Austin*, 53 Cal. 379; *Shane v. St. Paul*, 26 Minn. 543.

**Advertisement of Land for Sale Not Duress.** — *Union Ins. Co. v. Allegheny*, 101 Pa. St. 250. Compare *Thompson v. Detroit*, 114 Mich. 502.

**4. Redemption Regarded as Voluntary Payment.** — *Lamborn v. Dickinson County*, 97 U. S. 181; *Morris v. Sioux County*, 42 Iowa 416; *Sears v. Marshall County*, 59 Iowa 603; *Phillips v. Jefferson County*, 5 Kan. 412; *Wabaunsee County v. Walker*, 8 Kan. 431; *Shane v. St. Paul*, 26 Minn. 543. Compare *Brownlee v. Marion County*, 53 Iowa 487; *Parker v. Cochran*, 64 Iowa 757.

**5. Redemption Money Recoverable.** — *Valentine v. St. Paul*, 34 Minn. 446; *Clapp v. Pinegrove Tp.*, 138 Pa. St. 35; *Marsh v. St. Croix County*, 42 Wis. 355.

**6. Payments Presumed to Be Voluntary.** — *Yates v. Royal Ins. Co.*, 200 Ill. 202; *Meacham v. Newport*, 70 Vt. 67. See also *Clarksville v. Montgomery County*, (Tenn. Ch. 1901) 62 S. W. Rep. 33.

**7. Protest Not Necessary When Payment Involuntary.** — *Yates v. Royal Ins. Co.*, 200 Ill. 202; *Howard v. Augusta*, 74 Me. 79; *Boston, etc., Glass Co. v. Boston*, 4 Met. (Mass.) 181.

**Not Necessary Where Officer Had Notice of Illegality.** — *Meek v. McClure*, 49 Cal. 624. See also *Hays v. Hogan*, 5 Cal. 243; *McMillan v. Richards*, 9 Cal. 417; *Falkner v. Hunt*, 16 Cal. 170.

not enable the taxpayer to recover,<sup>1</sup> unless it is provided by statute that a recovery may be had where the payment was under protest.<sup>2</sup> Where such statutes exist, a substantial compliance with their terms is a prerequisite to the right to recover taxes not paid under compulsion.<sup>3</sup> A protest in writing is generally contemplated by the statutes.<sup>4</sup> Such protest must, as a general rule, state the grounds upon which the party paying the money claims that the demand is illegal, and no recovery can be had upon grounds not named;<sup>5</sup>

**1. Protest Immaterial When Payment Voluntary** — *England*. — *Marriott v. Hampton*, 7 T. R. 265.

*United States*. — *Montgomery v. Charleston*, (C. C. A.) 99 Fed. Rep. 114; *Lamborn v. Dickinson County*, 97 U. S. 181; *Union Pac. R. Co. v. Dodge County*, 98 U. S. 545.

*Alabama*. — *Gachet v. McCall*, 50 Ala. 307; *Raisler v. Athens*, 66 Ala. 194.

*District of Columbia*. — *Georgetown College v. District of Columbia*, *MacArthur & M. (D. C.)* 43.

*Georgia*. — *Americus First Nat. Bank v. Americus*, 68 Ga. 119, 45 Am. Rep. 476.

*Illinois*. — *People v. Miner*, 46 Ill. 374; *Conkling v. Springfield*, 132 Ill. 420.

*Kansas*. — *Wabaunsee County v. Walker*, 8 Kan. 431.

*Michigan*. — *Detroit v. Martin*, 34 Mich. 173, 22 Am. Rep. 512; *Louden v. East Saginaw*, 41 Mich. 18. See also *H. M. Loud, etc., Lumber Co. v. Vienna Tp.*, 120 Mich. 382.

*Minnesota*. — *Falvey v. Hennepin County*, 76 Minn. 257.

*New Hampshire*. — *Amoskeag Mfg. Co. v. Manchester*, 70 N. H. 336.

*North Dakota*. — *St. Anthony, etc., Elevator Co. v. Bottineau County*, 9 N. Dak. 346.

*Ohio*. — *Baker v. Cincinnati*, 11 Ohio St. 534; *Whitbeck v. Minch*, 48 Ohio St. 210.

*Pennsylvania*. — *Prebles v. Pittsburgh*, 101 Pa. St. 304, 47 Am. Rep. 714.

*Vermont*. — *Burnham v. Strafford*, 53 Vt. 610; *Meacham v. Newport*, 70 Vt. 67.

*Wisconsin*. — *Parcher v. Marathon County*, 52 Wis. 388, 38 Am. Rep. 745.

*Wyoming*. — *Carton v. Uinta County*, 10 Wyo. 416.

Compare *Clark v. Greene*, 23 R. I. 118; *Dunnell Mfg. Co. v. Newell*, 15 R. I. 233.

**Agreement that Rights Not Prejudiced — No Recovery**. — *Galveston City Co. v. Galveston*, 56 Tex. 486.

**2. Statutes Allowing Recovery When Payment Made under Protest**. — *Western Ranches v. Custer County*, 89 Fed. Rep. 577 (*Montana* statute); *Wyandotte County v. Kansas City, etc., R. Co.*, 4 Kan. App. 772; *Oliver v. Lynn*, 130 Mass. 143; *Thompson v. Detroit*, 114 Mich. 502; *Cade v. Perrin*, 14 S. Car. 1. See also *White v. Millbrook Tp.*, 60 Mich. 532. And see the statutes of the various states.

**Presentation of Claim Not Condition Precedent to Suit**. — *Western Ranches v. Custer County*, 89 Fed. Rep. 577 (*Montana* statute); *Centennial Eureka Min. Co. v. Juab County*, 22 Utah 395.

In *Nebraska* protest is essential in case of assessment of exempt property or double assessment. *Burlington, etc., R. Co. v. Buffalo County*, 14 Neb. 51; *Caldwell v. Lincoln*, 19 Neb. 569; *Davis v. Otoe County*, 55 Neb. 677; *Chase County v. Chicago, etc., R. Co.*, 58 Neb.

274; *Bankers L. Assoc. v. Douglas County*, 61 Neb. 202; *Chicago, etc., R. Co. v. Lincoln County*, (Neb. 1902) 92 N. W. Rep. 208; *Dakota County v. Chicago, etc., R. Co.*, 63 Neb. 409. But where the tax is invalid on other grounds protest appears not to be essential to recovery. *Dakota County v. Chicago, etc., R. Co.*, 63 Neb. 409. See also *Custer County v. Chicago, etc., R. Co.*, 62 Neb. 657.

*Massachusetts*. — *Taxpayer Need Not Resort to Other Remedies*. — *McGee v. Salem*, 149 Mass. 238.

*Statute Not Applicable to Overvaluation or Overtaxation*. — *Bourne v. Boston*, 2 Gray (Mass.) 494; *Lincoln v. Worcester*, 8 Cush. (Mass.) 55; *Salmond v. Hanover*, 13 Allen (Mass.) 119; *Hicks v. Westport*, 130 Mass. 478; *Boston Mfg. Co. v. Com.*, 144 Mass. 598; *Richardson v. Boston*, 148 Mass. 508; *Norcross v. Milford*, 150 Mass. 237.

*Michigan*. — *Copy of Protest Competent Evidence*. — *Michigan Land, etc., Co. v. Republic Tp.*, 65 Mich. 628.

*Statute Applies to Excessive Taxation*. — See *Solomon v. Oscoda Tp.*, 77 Mich. 365.

*South Carolina*. — *Right Not Available to Subsequent Purchasers*. — *De Soto Gold Min. Co. v. Smith*, 49 S. Car. 188.

*Tennessee*. — *Statute Not Applicable to Unconstitutional Tax*. — *U. S. Express Co. v. Allen*, 39 Fed. Rep. 712. See also *Shelton v. Platt*, 139 U. S. 591.

*Utah*. — *Duress Need Not Be Established*. — *Centennial Eureka Min. Co. v. Juab County*, 22 Utah 395.

*Wisconsin*. — *Statute Applies to School-district Taxes*. — *Matteson v. Rosendale*, 37 Wis. 255.

**3. Bankers' L. Assoc. v. Douglas County**, 61 Neb. 202.

**4. Protest in Writing**. — *Knowles v. Boston*, 129 Mass. 551; *Gage v. Saginaw*, 128 Mich. 682; *Chicago, etc., R. Co. v. Nemaha County*, 50 Neb. 393. And see the cases cited in the last note but one, *supra*.

**Writing Across Tax Bill Sufficient**. — *Borland v. Boston*, 132 Mass. 89, 42 Am. Rep. 424.

**5. No Recovery on Grounds Not Named**. — *Union Pac. R. Co. v. Dodge County*, 98 U. S. 541; *Peninsula Iron, etc., Co. v. Crystal Falls Tp.*, 60 Mich. 79, 521; *Hinds v. Belvidere Tp.*, 107 Mich. 664; *Aurora Iron Min. Co. v. Ironwood*, 119 Mich. 325; *H. M. Loud, etc., Lumber Co. v. Vienna Tp.*, 120 Mich. 382; *Bankers L. Assoc. v. Douglas County*, 61 Neb. 202; *Davis v. Otoe County*, 55 Neb. 677; *Omaha v. Kountze*, 25 Neb. 63. the last case holding that the protest should contain all the material allegations of a petition for the recovery back of taxes unlawfully assessed. But see *Mason v. Johnson*, 51 Cal. 612; *Smith v. Farrelly*, 52 Cal. 77; *Mackay v. San Francisco*, 128 Cal. 686; *Rumford Chemical Works v. Ray*, 19 R. I. 456.

and it should be sufficiently definite to notify the tax collector of the illegality which the taxpayer claims to exist.<sup>1</sup>

d. FRAUD AND MISTAKE. — If it can be shown that a payment of taxes was induced through fraud<sup>2</sup> or mistake of fact,<sup>3</sup> the money so paid may be recovered back. But, as a general rule, money paid under a mistake or in ignorance of the law cannot be recovered.<sup>4</sup>

e. LIMITATION OF ACTIONS. — It is provided by statute in a number of states that actions for the recovery of taxes must be brought within a certain time after payment, and the right to recover is lost if the action is not brought within the time prescribed.<sup>5</sup>

f. INTEREST. — It has been held that the taxpayer is entitled to interest, in the event of recovery, from the time of the illegal exaction.<sup>6</sup>

#### XIV. COLLECTION — 1. Power to Collect. — The power of levying taxes

Where the Tax Was Paid under Threat of Levy the taxpayer is not limited to the reasons stated in the protest. *Babcock v. Beaver Creek Tp.*, 64 Mich. 601; *Woodmere Cemetery Assoc. v. Springwells Tp.*, 130 Mich. 466.

1. Protest Should Be Definite. — *Union Pac. R. Co. v. Dodge County*, 98 U. S. 544; *Meek v. McClure*, 49 Cal. 624; *Rogers v. Greenbush*, 58 Me. 390, 4 Am. Rep. 292; *Whitney v. Port Huron*, 88 Mich. 268, 26 Am. St. Rep. 291. Compare *Centennial Eureka Min. Co. v. Juab County*, 22 Utah 395.

2. Payment Induced by Fraud Recoverable. — *Pacific Postal Tel. Cable Co. v. Dalton*, 119 Cal. 604. See also *Kern Valley Water Co. v. Kern County*, 137 Cal. 511. And see the titles FRAUD AND DECEIT, vol. 14, p. 165; PAYMENT, vol. 22, p. 630.

3. Money Paid under Mistake of Fact May Be Recovered. — *Strusburgh v. New York*, 87 N. Y. 452; *Diefenthaler v. New York*, 111 N. Y. 331; *Lesster v. New York*, 33 N. Y. App. Div. 350, affirmed 161 N. Y. 628; *Mayer v. New York*, 2 Hun (N. Y.) 306; *Allen v. New York*, 4 E. D. Smith (N. Y.) 409; *Woolley v. Staley*, 39 Ohio St. 354; *State v. Lewis*, 8 Ohio Cir. Dec. 276, 15 Ohio Cir. Ct. 279. And see the titles MISTAKE, vol. 20, p. 805; PAYMENT, vol. 22, p. 621 *et seq.*

Excessive Statement of Amount by Auditor. — *Wheeler v. Hennepin County*, 87 Minn. 243.

Taxes Paid Through Mistake as to the Ownership of real estate may be recovered from the real owner. *Fenton v. Way*, 40 Iowa 196; *Union R., etc., Co. v. Skinner*, 9 Mo. App. 189. But not from the county. *Scott v. Chickasaw County*, 53 Iowa 47.

Property Outside of Tax District — Payment Not Recoverable. — *Jackson v. Atlanta*, 61 Ga. 228; *Lafayette, etc., R. Co. v. Pattison*, 41 Ind. 312. See also *San Diego Land, etc., Co. v. La Presa School Dist.*, 122 Cal. 98; *Jackson v. Atlanta*, 61 Ga. 228. But see *Indianapolis v. McAvoy*, 86 Ind. 587, overruling *Lafayette, etc., R. Co. v. Pattison*, 41 Ind. 312; *Freemont, etc., R. Co. v. Holt County*, 28 Neb. 742.

4. Money Paid under Mistake of Law Not Recoverable. — *Brumagim v. Tillinghast*, 18 Cal. 265, 79 Am. Dec. 176; *Yates v. Royal Ins. Co.*, 200 Ill. 202; *Hubbard v. Hickman*, 4 Bush (Ky.) 204; *Manistee Lumber Co. v. Springfield Tp.*, 92 Mich. 277; *Silliman v. Wing*, 7 Hill (N. Y.) 159; *Vanderbeck v. Rochester*, 122 N. Y. 289; *Bristol v. Morganton*, 125 N. Car. 365; *Galves-*

*ton County v. Gorham*, 49 Tex. 279. See also *Graves County v. Mayfield First Nat. Bank*, 108 Ky. 194, and see the titles MISTAKE, vol. 20, p. 805; PAYMENT, vol. 22, p. 628 *et seq.*

Mistake as to Legality of Tax Payments Recoverable. — *Louisville v. Anderson*, 79 Ky. 334, 42 Am. Rep. 220; *New Port v. Ringo*, 87 Ky. 635; *Torbitt v. Louisville*, (Ky. 1887), 4 S. W. Rep. 345; *Delano v. New York*, 32 Hun (N. Y.) 144; *Woolley v. Staley*, 39 Ohio St. 354. *Contra*, *Lester v. Baltimore*, 29 Md. 415, 96 Am. Dec. 542; *Bradley v. Laconia*, 66 N. H. 269; *Custin v. Viroqua*, 67 Wis. 314. See also *Simonson v. West Harrison*, 5 Ind. App. 459; *Gould v. Hennepin County*, 76 Minn. 379.

Ignorance of Exemption — No Recovery. — *Montgomery v. Charleston*, (C. C. A.) 99 Fed. Rep. 825; *Toal v. New York*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 18, affirmed 67 N. Y. App. Div. 619; *Van Hise v. Rensselaer County*, (County Ct.) 21 Misc. (N. Y.) 572.

5. Limitation of Actions. — *Brown v. Painter*, 44 Iowa 368; *Callanan v. Madison County*, 45 Iowa 561; *Hamilton v. Dubuque*, 50 Iowa 213; *Beecher v. Clay County*, 52 Iowa 140; *Bank of Commercial v. Stone*, 108 Ky. 427; *Hatwood v. Fayetteville*, 121 N. Car. 207; *Raleigh v. Salt Lake City*, 17 Utah 130; *Centennial Eureka Min. Co. v. Juab County*, 22 Utah 395; *Plumer v. Marathon County*, 46 Wis. 163.

Limitation of Actions of Assumpsit. — *Garland County v. Gaines*, 47 Ark. 558.

Part of Claim Barred — Recovery for Part Not Barred. — *Magnolia Dist. Tp. v. Independent Dist.*, 80 Iowa 495.

Statute Applicable Only to State Taxes. — *Little Rock, etc., R. Co. v. Williams*, 101 Tenn. 146.

Where Payment Was Compelled from One Who Had No Interest in the property the statute was held not to apply. *Babcock v. Beaver Creek Tp.*, 65 Mich. 479.

6. Interest Recoverable from Date of Payment. — *Erskine v. Van Arsdale*, 15 Wall. (U. S.) 75; *Grand Rapids v. Blakely*, 40 Mich. 367, 40 Am. Rep. 539; *Boston, etc., R. Co. v. State*, 63 N. H. 571; *Amoskeag Mfg. Co. v. Manchester*, 70 N. H. 336; *Galveston County v. Galveston Gas Co.*, 72 Tex. 509. But see *Savings, etc., Soc. v. San Francisco*, 131 Cal. 356, holding that in an action to recover taxes paid under protest no interest could be allowed in the absence of statutory provision therefor.

necessarily carries with it the power to enact all laws deemed proper for the enforcement of their collection,<sup>1</sup> and, as collection is purely a matter for legislative regulation, the courts will not ordinarily interfere with the modes of collection authorized by the statute.<sup>2</sup> Unless there be constitutional restrictions upon legislative action,<sup>3</sup> the choice of methods for the collection of taxes is within the discretion of the legislature.<sup>4</sup>

**2. Collector.** — By whatever name he may be known, it is necessary that there be a person duly authorized to enforce collection. This duty is imposed in the various states upon collectors, as such, or upon treasurers, trustees, sheriffs, constables, and other officers.<sup>5</sup> But where two offices, as those of sheriff and collector, devolve on the same person, the two functions remain distinct.<sup>6</sup>

**a. SELECTION.** — The legislature may provide for the selection of the collector in the manner it sees fit.<sup>7</sup> But the appointment of any individual

**1. Power to Collect.** — *Slack v. Ray*, 26 La. Ann. 674; *Geren v. Gruber*, 26 La. Ann. 694; *Litchfield v. Vernon*, 41 N. Y. 130; *Southern R. Co. v. Kay*, 62 S. Gar. 28; *Languille v. State*, 4 Tex. App. 312.

**2. Legislative Control.** — *Morrison v. Larkin*, 26 La. Ann. 701; *Slack v. Ray*, 26 La. Ann. 675; *State v. Consolidated Virginia Min. Co.*, 16 Nev. 432; *Gibson v. Mason*, 5 Nev. 283; *Singer Sewing Mach. Co. v. Assessors*, 54 N. J. L. 90; *Clegg v. State*, 42 Tex. 605; *Languille v. State*, 4 Tex. App. 312.

**Constitutional Provision** — Where a constitutional provision for the collection of taxes is not self-operating, the previous statutory provisions remain in force until abrogated. *New Orleans v. Wood*, 34 La. Ann. 732.

**Equity Has No Jurisdiction to Restrain the Collection of a Personal Tax**, even though it be illegal, the ordinary legal remedies being ample for the taxpayer's protection. *Williams v. Detroit*, 2 Mich. 560; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654; *Brewer v. Springfield*, 97 Mass. 152; *Durant v. Eaton*, 98 Mass. 469; *Hunnewell v. Charlestown*, 106 Mass. 350; *Rockingham Ten Cent Sav. Bank v. Portsmouth*, 52 N. H. 17.

Nor in general will a court of equity undertake to collect taxes or appoint a receiver for that purpose. *Thompson v. Allen County*, 115 U. S. 550; *People v. Biggins*, 96 Ill. 481; *Stafford County v. Stafford First Nat. Bank*, 48 Kan. 561.

**Must Be Collected by Proper Authorities.** — Taxes can only be collected under legislative authority, state and federal. Hence the United States courts will not appoint a receiver to collect taxes to pay off a judgment recovered in the federal courts, even though it appears that no citizen of the county will undertake to collect the taxes under the appointment of the county authorities. *Thompson v. Allen County*, 13 Fed. Rep. 97.

**3. Constitutional Restriction.** — *Edwards v. Williamson*, 70 Ala. 145. See *Mason v. Rollins*, 2 Biss. (U. S.) 99; *Litchfield v. Vernon*, 41 N. Y. 130; *Languille v. State*, 4 Tex. App. 312.

A judgment creditor of a county who has an interest in a special tax levied under the coercion of a federal court cannot be indirectly deprived of his right to receive the fund appropriated to his debt by a state law requiring the collector to receive only state taxes and county

taxes levied to defray current expenses. *Edwards v. Williamson*, 70 Ala. 145.

**4. Discretion of Legislature.** — *Mason v. Rollins*, 2 Biss. (U. S.) 99; *Falconer v. Shores*, 37 Ark. 386; *People v. Seymour*, 16 Cal. 334, 76 Am. Dec. 521; *State v. Mayhew*, 2 Gill (Md.) 487; *Youngblood v. Sexton*, 32 Mich. 406, 20 Am. Rep. 654; *State v. Central Pac. R. Co.*, 21 Nev. 260; *In re Elizabeth*, 49 N. J. L. 488.

**5. Officer Acting as Collector** — *United States*. — *Indiana Bridge Co. v. Carr*, (C. C. A.) 95 Fed. Rep. 594.

*Arkansas*. — *Falconer v. Shores*, 37 Ark. 386; *Quertermous v. Walls*, 70 Ark. 326.

*Connecticut*. — *Castle v. Lawlor*, 47 Conn. 340.

*Illinois*. — *Kilgore v. People*, 76 Ill. 548; *Wood v. Cook*, 31 Ill. 271; *Walker v. People*, 95 Ill. App. 637.

*Kentucky*. — *Combs v. Breathitt County*, (Ky. 1898) 46 S. W. 505.

*Massachusetts*. — *Hays v. Drake*, 6 Gray (Mass.) 387.

*Montana*. — *Mutual L. Ins. Co. v. Martien*, 27 Mont. 437.

*New Hampshire*. — *Homer v. Cilley*, 14 N. H. 85.

*South Carolina*. — *State v. Irby*, 1 McMull. L. (S. Car.) 485.

*Tennessee*. — *Bailey v. Lockhart*, 4 Yerg. (Tenn.) 567.

*Vermont*. — *Waite v. Hyde Park Lumber Co.*, 65 Vt. 103; *Wilson v. Seavey*, 38 Vt. 221; *Chandler v. Spear*, 22 Vt. 388.

And see the various local statutes.

Where the sheriff is required to act as collector, he is usually given the same authority as though he were elected or appointed collector. *Homer v. Cilley*, 14 N. H. 85.

Clothing a collector with the power of a constable for the purpose of collecting taxes does not make him a constable for other purposes. *Gage v. Dudley*, 64 N. H. 437.

**6. Offices Distinct.** — *Crowell v. Barham*, 57 Ark. 195; *Quertermous v. Walls*, 70 Ark. 326; *Lathrop v. Brittain*, 30 Cal. 680; *People v. Love*, 25 Cal. 528; *People v. Edwards*, 9 Cal. 292.

**7. Selection.** — *Falconer v. Shores*, 37 Ark. 387.

**Right to Office.** — A tax collector, who has been duly elected, and has qualified under a statute making the collectorship an elective office, may maintain a suit in equity to enjoin

to act as collector when the office is already vested in another is void;<sup>1</sup> and, at all events, the collector must be chosen in the manner<sup>2</sup> and possess the qualifications prescribed by law.<sup>3</sup> While the acts of *de facto* collectors done in the regular discharge of their official functions are binding,<sup>4</sup> and their title to the office cannot be collaterally attacked,<sup>5</sup> all taxpayers have such an interest as will authorize them to institute a quo warranto proceeding to test the authority of the collector to exercise his office.<sup>6</sup> The collection of taxes is a ministerial act, hence the collector may act through a deputy,<sup>7</sup> but, in *Arkansas*, it has been held that a collector who is also sheriff cannot, as collector, act through a deputy sheriff.<sup>8</sup> Subject to this right, the duties of the collector can be performed only by the person designated by law.<sup>9</sup> The office of collector is one of confidence, and the public has an interest in its proper performance. Consequently all attempts to delegate his authority or assign his duties to another are void.<sup>10</sup> Upon the refusal of a collector to act or qualify, or upon the happening of a vacancy,<sup>11</sup> or upon his removal from

the council from delivering the tax duplicates to a collector subsequently appointed by it. *Town Council's Appeal*, (Pa. 1888) 15 Atl. Rep. 730.

**Power of Appointment.**—A power to appoint a tax collector is given by statute in certain cases where no election for the office has been held. *Souhegan Nail, etc., Factory v. McConihe*, 7 N. H. 309.

**Sufficiency of Appointment.**—An appointment of a person as "collector" of the town is sufficiently definite where there is no other collector than that of taxes. *Taft v. Barrett*, 58 N. H. 447. *Contra, Lincoln v. Chapin*, 132 Mass. 470.

**Parol Appointment Insufficient.**—The appointment of a tax collector for a town by the selectmen should, in *New Hampshire*, be in writing. *Ainsworth v. Dean*, 21 N. H. 400.

**1. Invalid Appointment.**—*Mutual L. Ins. Co. v. Martien*, 27 Mont. 437; *Odiorne v. Rand*, 59 N. H. 504; *Bailey v. Lockhart*, 4 Yerg. (Tenn.) 567.

**Discretion in Appointing Collector.**—Where county commissioners are authorized to appoint a local assessor from a list of two eligible persons submitted by the local assessors, and the assessors return the names of two, one of whom is not qualified, the commissioners may refuse to appoint either, and may exercise their own discretion and appoint another provided the appointee is properly qualified. *Com. v. Philadelphia County*, 1 S. & R. (Pa.) 382.

**2. Statutes enacted for the protection of the public revenue are generally mandatory.** *Hamilton County v. Arnold*, 65 Ohio St. 479.

**3. Qualifications.**—*Lincoln v. Chapin*, 132 Mass. 470; *Com. v. Philadelphia County*, 1 S. & R. (Pa.) 382.

**4. Acts of De Facto Collectors.**—*School Dist. v. Board of Imp.*, 65 Ark. 343; *Oldtown v. Blake*, 74 Me. 280; *State v. Woodside*, 8 Ired. L. (30 N. Car.) 104. See generally the title *DE FACTO OFFICERS*, vol. 8, p. 771.

**5. Law v. People, 87 Ill. 385; *Souhegan Nail, etc., Factory v. McConihe*, 7 N. H. 309; *Odiorne v. Rand*, 59 N. H. 504.**

**6. Com. v. Philadelphia County, 1 S. & R. (Pa.) 382. See the title *QUO WARRANTO*, vol. 23, p. 594.**

The mere taking of the oath of office is, it seems, a sufficient user on which to base a quo

warranto proceeding against an unauthorized collector. *People v. Callaghan*, 83 Ill. 128.

**7. Deputy Collector.**—*Prater v. Strother*, (Ky. 1890) 13 S. W. Rep. 252; *Walters v. Duke*, 31 La. Ann. 668; *Aldrich v. Aldrich*, 8 Met. (Mass.) 102; *Brady v. French*, 9 Ohio Dec. 195, 6 Ohio N. P. 122. See *Hamilton County v. Arnold*, 65 Ohio St. 479; *Parker v. Southern Bank*, 46 La. Ann. 563. See generally the title *DEPUTY*, vol. 9, p. 368.

In *Aldrich v. Aldrich*, 8 Met. (Mass.) 102, it was held under the *Massachusetts* statute, that a deputy collector who is also a town treasurer may execute a warrant for the collection of taxes, though he was appointed deputy before the warrant was issued and the warrant is directed to the collector only.

**8.** Thus, the deputy of a sheriff may not, as such, distrain for taxes though the sheriff is also collector. *Crowell v. Barham*, 57 Ark. 195.

Nor is the deputy of a sheriff, who is also collector, authorized to deliver the delinquent list to the clerk where the statute requires the "collector" to do such act. *Quertermous v. Walls*, 70 Ark. 326.

**9. Person Designated as Collector.**—*Thompson v. Allen County*, 13 Fed. Rep. 97; *Lathrop v. Brittain*, 30 Cal. 680; *Fremont v. Boling*, 11 Cal. 380; *Butler v. Nevin*, 88 Ill. 575; *Odiorne v. Rand*, 59 N. H. 504; *Johnston v. Wilson*, 2 N. H. 202, 9 Am. Dec. 50; *Cansler v. Penland*, 125 N. Car. 578; *Com. v. Philadelphia County*, 1 S. & R. (Pa.) 382; *Bryan v. Harvey*, 11 Tex. 311; *Waite v. Hyde Park Lumber Co.*, 65 Vt. 103; *Hadley v. Chamberlin*, 11 Vt. 618.

**10. Delegation Invalid.**—The question is one of policy and safety to the public interests. There can be no doubt that the collector may employ a deputy or other private person to assist him, but he cannot delegate his authority to another, as that would tend to injure the service. True, his bond is liable for the amount of collectible taxes, but personal trust and confidence are not secured by the bond. See opinion of Faircloth, C. J., in *Cansler v. Penland*, 125 N. Car. 578. See also *Hadley v. Chamberlin*, 11 Vt. 618.

**11. Vacancy.**—*People v. Callaghan*, 83 Ill. 128; *Ridgway Tp. v. Wheeler*, 00 Pa. St. 450.

**Failure to Qualify.**—In *Falconer v. Shores*, 37 Ark. 386, it was held that upon a failure of the

the district,<sup>1</sup> a new collector may be chosen or appointed.<sup>2</sup>

*b. QUALIFICATION* — (1) *Taking Oath*. — The collector must take oath and give bond as prescribed by law,<sup>3</sup> and one who serves in two offices must take the oath in both capacities.<sup>4</sup> Nor will the official term ordinarily begin until the oath is taken.<sup>5</sup>

(2) *Giving Bond*. — A bond with solvent sureties,<sup>6</sup> in sufficient amount,<sup>7</sup> and in proper form,<sup>8</sup> must be executed by the collector within the time limited by law.<sup>9</sup> Otherwise it may not be approved.<sup>10</sup> Where the statute is merely directory, the giving of an official bond by a collector is not, in the absence of a demand therefor, a condition precedent to his assuming the duties of his office.<sup>11</sup> Generally speaking, mere formal irregularities and mistakes in

sheriff to qualify as collector, by giving bond, the office becomes vacant without a judicial ascertainment of the vacancy, and a new collector may be appointed.

Where the regularly chosen collector refuses to serve or fails to qualify, the duties of the office may devolve *ex officio* on other officers, who are thereupon clothed with all the powers incident to the office. *Williamstown v. Willis*, 15 Gray (Mass.) 427.

If the office of collector is vacant, the district may appoint a new collector, but, in such case, it cannot appoint a collector *pro tem.* or to collect arrearages. *Hadley v. Chamberlin*, 11 Vt. 618.

To warrant a town council in appointing a collector it is not necessary that there should be a vacancy in the office; it is enough that the existing collector had not only neglected and refused to complete the collection, but had actually surrendered the lists committed to him, to the assessor. *Carville v. Additon*, 62 Me. 459.

1. *Removal from District*. — *Gage v. Dudley*, 64 N. H. 437.

*Removal of Collector from Office by the Governor*. — *State v. Johnson*, 30 Fla. 433, 499.

2. *But Mere Default in the Performance of Duties*, accompanied by a delivery of tax warrant to the selectmen of a town, does not *ipso facto* operate as a resignation from the office of collector. *Spaulding v. Northumberland*, 64 N. H. 153.

3. *Taking the Oath*. — *Bradley v. Rapp*, 10 La. Ann. 589; *Oatman v. Barney*, 46 Vt. 594.

Parol proof that a tax collector took the official oath is competent. *Farnsworth Co. v. Rand*, 65 Me. 21.

A defaulting collector who has not accounted for taxes previously collected is usually disqualified by statute and will not be inducted into the office. *Com. v. Philadelphia County*, 1 S. & R. (Pa.) 382.

And generally as to qualifications, see title PUBLIC OFFICERS, vol. 23, pp. 333 *et seq.*

4. *One Person Holding Two Offices*. — *Farnsworth Co. v. Rand*, 65 Me. 21.

5. *People v. Callaghan*, 83 Ill. 128.

The certificate of the oath of a collector describing him as "collector of the town of M." is sufficient. *Taft v. Barrett*, 58 N. H. 447.

6. *Giving Bond*. — *Morrell v. Sylvester*, 1 Me. 248.

7. *Amount of Bond*. — *Oatman v. Barney*, 46 Vt. 594.

It is usual to require from the tax collector a bond for a sum not less than double the ag-

gregate amount of taxes. *Kane v. Garfield*, 60 Vt. 79.

8. *Form of Bond*. — *Calhoun v. Lunsford*, 4 Port. (Ala.) 345; *Edwards v. Williamson*, 70 Ala. 145.

In *King v. Ireland*, 68 Tex. 682, a bond which should have been made payable to the county judge was held good though made payable to the governor.

It is no objection to a bond executed by a tax collector that it was made to the selectmen of the town instead of the town itself. *Sweetser v. Hay*, 2 Gray (Mass.) 49; *Horn v. Whittier*, 6 N. H. 88.

9. *Time of Giving Bond*. — *Ross v. People*, 78 Ill. 375; *Lyons v. Breckinridge County Ct.*, 101 Ky. 715.

*Tardiness in Execution of Bond*. — A bond executed more than a year after the election of a collector is untimely and is *prima facie* invalid in the absence of proof showing the authority for its execution at such late date. *De Soto County v. Dickson*, 34 Miss. 150.

Where the sheriff who is *ex officio* collector gives a proper bond as sheriff but does not give bond as collector until six months after induction into office, the latter bond will be enforced notwithstanding it is dilatory. *James v. State*, 55 Miss. 57, 30 Am. Rep. 496.

*When Approval Relates Back*. — Where a bond is filed in the proper time an acceptance after the statutory period relates back to the time of filing. *Drew v. Morrill*, 62 N. H. 23.

10. *Edwards v. Williamson*, 70 Ala. 145. But see *Johnson v. Logan County*, (Ky. 1901) 64 S. W. Rep. 634; *Lyons v. Breckinridge County Ct.*, 101 Ky. 715.

*Approval*. — It has been held that the approval of a collector's bond is a ministerial act, and that mandamus lies in a proper case to compel the county court to approve it. *Bosely v. Woodruff County Ct.*, 28 Ark. 306.

*Acceptance of Bond*. — When a bond is produced in a trial by the state, it is *prima facie* evidence of acceptance. *McLean v. State*, 8 Heisk. (Tenn.) 22.

*Power of Attorney to Sign a Name as Surety* to a collector's bond may be executed after the date fixed for the giving of the bond, provided the authorities have the power to accept the bond when it is executed. *Johnson v. Logan County*, (Ky. 1901) 64 S. W. Rep. 634.

11. *Bond Not a Condition Precedent*. — *Boothbay v. Giles*, 68 Me. 160; *Scarborough v. Parker*, 53 Me. 252; *Morrell v. Sylvester*, 1 Me. 248. See also *Bosely v. Woodruff County*

the bond are to be disregarded,<sup>1</sup> and the entire absence of bond is a defect which may be cured by statute.<sup>2</sup> Though a collector's bond may be defective as a statutory bond, and not good as such, it may nevertheless be valid as a common-law bond, if entered into voluntarily and otherwise valid as a common-law contract.<sup>3</sup> But where the bond imposes a greater measure of duty than the law requires, the addition will be rejected as surplusage.<sup>4</sup> Where a collector becomes such by virtue of the occupancy of some other office, as that of sheriff or constable, he is nearly always required to qualify for both offices by giving separate bonds.<sup>5</sup> But if the legislature provides otherwise,<sup>6</sup> or omits to require an additional bond, the bond given by the collector in his original capacity will cover the new duty.<sup>7</sup>

c. *DE FACTO* COLLECTORS. — Official acts of a *de facto* collector are valid.<sup>8</sup>

Ct., 28 Ark. 306; *People v. Callaghan*, 83 Ill. 128; *Drew v. Morrill*, 62 N. H. 23.

1. *Irregularities.* — *People v. Love*, 25 Cal. 521; *Trescott v. Moan*, 50 Me. 347; *De Soto County v. Dickson*, 34 Miss. 150; *Horn v. Whittier*, 6 N. H. 88; *Wilder v. Butterfield*, (Supm. Ct. Spec. T.) 50 How. Pr. (N. Y.) 385; *Richardson v. Rogers*, (Supm. Ct. Spec. T.) 50 How. Pr. (N. Y.) 403; *State v. Hill*, 17 W. Va. 452.

The Omission of the Collector's Name from the indebtedness clause in the penal part of the bond is not fatal to its validity. Nor is it affected by the absence of a seal. *Wilder v. Butterfield*, (Supm. Ct. Spec. T.) 50 How. Pr. (N. Y.) 385.

Where a bond properly payable to the county judge is erroneously made payable to the governor, it may be sued on in his name for the use of the county entitled. *King v. Ireland*, 68 Tex. 682. *Contra*, *Calhoun v. Lunsford*, 4 Port. (Ala.) 345.

2. *Absence of Bond Cured.* — *Powers v. Penny*, 59 Miss. 5.

3. *Common-law Bond.* — *U. S. v. Tingey*, 5 Pet. (U. S.) 115; *U. S. v. Howell*, 4 Wash. (U. S.) 620; *Walker v. Chapman*, 22 Ala. 116; *Delker v. Owensboro*, (Ky. 1901) 61 S. W. Rep. 362; *Boothbay v. Giles*, 68 Me. 160; *Gorham v. Hall*, 57 Me. 58; *Scarborough v. Parker*, 53 Me. 252; *State v. Matthews*, 57 Miss. 1; *State v. Harney*, 57 Miss. 863; *James v. State*, 55 Miss. 57, 30 Am. Rep. 496; *French v. State*, 52 Miss. 760; *Taylor v. State*, 51 Miss. 79; *Horn v. Whittier*, 6 N. H. 88.

*Consideration of Voluntary Common-law Bond.* — *Harris v. State*, 55 Miss. 50; *State v. Matthews*, 57 Miss. 1.

Though the statute neglects to require a bond, still if the collector gives one and after induction into office collects taxes, his sureties are liable on the bond in case of default and are estopped from taking advantage of the fact that no bond was required. *Taylor v. State*, 51 Miss. 79; *State v. Harney*, 57 Miss. 863.

*When Liability Attaches.* — Ordinarily bondsmen are liable only for taxes collected after the bond is given. *Lewenthall v. State*, 51 Miss. 645.

*Presence of Seal Not Material.* — *Boothbay v. Giles*, 68 Me. 160; *Nason v. Fowler*, 70 N. H. 291.

*Collector Appointed by Military Authority.* — The bond of a collector appointed by the military government is valid security for those interested, though the collector is not governed

by the state tax laws. *State v. Cooper*, 53 Miss. 615.

4. *Walker v. Chapman*, 22 Ala. 117.

5. *Separate Bonds.* — *Falconer v. Shores*, 37 Ark. 386; *Ex p. McCabe*, 33 Ark. 396; *People v. Ross*, 38 Cal. 76; *Lathrop v. Brittain*, 30 Cal. 680; *People v. Love*, 25 Cal. 521.

*Additional Bond as Collector.* — Where the incumbent of an office, such as sheriff or treasurer, is also made *ex officio* collector, he may be required to give a new bond, but is entitled to a reasonable time in which to comply. *Poe v. State*, 72 Tex. 625. See also *French v. State*, 52 Miss. 759; *Harris v. State*, 55 Miss. 50; *Byrne v. State*, 50 Miss. 688.

In *Arkansas*, the sheriff, being by statute *ex officio* collector, is required to give an additional bond as collector within a specified time and forfeits the office upon failure to do so. *Falconer v. Shores*, 37 Ark. 386.

6. *People v. Ross*, 38 Cal. 76.

7. *Single Bond.* — *Kilgore v. People*, 76 Ill. 548; *Wood v. Cook*, 31 Ill. 271; *French v. State*, 52 Miss. 760.

Under a state statute requiring from the sheriff, an officer elected for two years, a bond, as collector of taxes, conditioned for the payment of the taxes in each and every year, a bond, given at the beginning of the first year of office, conditioned for the payment of the taxes of each of the two years, is a good statutory bond. *Mabry v. Tarver*, 1 Humph. (Tenn.) 94. See also *Nevill v. Day*, 3 Humph. (Tenn.) 38; *Governor v. Porter*, 5 Humph. (Tenn.) 166; *McLean v. State*, 8 Heisk. (Tenn.) 271.

*Separate Accounting on One Bond.* — Where one bond covers liability for taxes collected for two different authorities, as for the township and also for the state and county, the collector must account separately to the respective officers. *Com. v. Miller*, 20 Pa. Co. Ct. 183.

8. *De Facto Collectors — England.* — *Waterloo Bridge Co. v. Cull*, 1 El. & El. 213, 102 E. C. L. 213. 29 L. J. Q. B. 10.

*Illinois.* — *Sullivan v. State*, 66 Ill. 75.

*Maine.* — *Johnson v. Goodridge*, 15 Me. 29; *Trescott v. Moan*, 50 Me. 347.

*Maryland.* — *Waters v. State*, 1 Gill (Md.) 302.

*Massachusetts.* — *Williams v. School Dist. No. 1*, 21 Pick. (Mass.) 75, 32 Am. Dec. 243.

*Michigan.* — *Stockle v. Silsbee*, 41 Mich. 615; *Bird v. Perkins*, 33 Mich. 28; *Johns v. People*, 25 Mich. 409; *Facey v. Fuller*, 13 Mich. 527.

*Mississippi.* — *Taylor v. State*, 51 Miss. 79.



A payment to him discharges taxes,<sup>1</sup> and a taxpayer cannot refuse to pay on the ground that the collector has no right to act as such.<sup>2</sup> Nor can a defaulting collector or his bondsmen set up such defense when sued for moneys collected.<sup>3</sup> Until the contrary is shown in a proper way, collectors, like other officers, are presumed to have been duly appointed.<sup>4</sup>

*d. TERM.* — The duration of the collector's term, as in case of other officers, is largely dependent on statutes and is sufficiently treated elsewhere.<sup>5</sup> While a collector is lawfully in office none other can be appointed in his stead.<sup>6</sup> Unless the office becomes vacant by removal, forfeiture, insanity,<sup>7</sup> resignation,<sup>8</sup> or other sufficient cause, the collector usually holds until his successor is elected and qualified.<sup>9</sup> The power to collect usually extends only to taxes accruing during the term for which the officer is elected,<sup>10</sup> but in some cases he is authorized to collect taxes accruing during the term of a predecessor,<sup>11</sup> and may complete his own collections notwithstanding the subsequent qualification of his own successor.<sup>12</sup>

*e. TERRITORIAL JURISDICTION.* — The collector's authority is in general confined to the territorial bounds of his collection district, and he has no power to act beyond these limits.<sup>13</sup> If he does so he must bring himself within the provisions of the statute authorizing such action.<sup>14</sup> In case the taxpayer removes, the distress warrant is usually forwarded to the sheriff or constable at his new place of residence.<sup>15</sup>

**3. Collecting Taxes — a. TAX LIST.** — The modes of collecting taxes are determined by legislation, and much diversity is necessarily found in the methods pursued in different statutes. The general results are, however, substantially the same. The process of collection properly begins with the

*New Hampshire.* — Tucker v. Aiken, 7 N. H. 113.

*New York.* — Wilcox v. Smith, 5 Wend. (N. Y.) 234, 21 Am. Dec. 213.

*North Carolina.* — State v. Woodside, 8 Ired. L. (30 N. Car.) 104; Burke v. Elliott, 4 Ired. L. (26 N. Car.) 355, 42 Am. Dec. 142.

*Pennsylvania.* — Kingsbury v. Ledyard, 2 W. & S. (Pa.) 37; Com. v. Philadelphia, 27 Pa. St. 497.

*Tennessee.* — Farmers', etc., Bank v. Chester, 6 Humph. (Tenn.) 458, 44 Am. Dec. 318.

See generally, as to validity of the acts of *de facto* officers, title DE FACTO OFFICERS, vol. 8, p. 771.

1. Oldtown v. Blake, 74 Me. 280.

2. Greene v. Walker, 63 Me. 311. See also Payson v. Hall, 30 Me. 319.

3. Liability of Bondsmen. — School Dist. v. Board of Imp., 65 Ark. 343; Orono v. Wedgewood, 44 Me. 49, 69 Am. Dec. 81; Williams v. School Dist. No. 1, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; Nason v. Fowler, 70 N. H. 291; State v. Woodside, 8 Ired. L. (30 N. Car.) 104; Com. v. Stambaugh, 164 Pa. St. 437; Montpelier v. Clarke, 67 Vt. 479.

4. Presumption of Due Appointment. — Tucker v. Aiken, 7 N. H. 113; Eldred v. Sexton, 5 Ohio 215; Capwell v. Hopkins, 10 R. I. 378; Kent v. Atlantic De Laine Co., 8 R. I. 305. See title PRESUMPTIONS, vol. 22, p. 1266.

5. Term. — See title PUBLIC OFFICERS, vol. 23, pp. 404-419.

6. Hadley v. Chamberlin, 11 Vt. 618.

7. Somers v. Burke County, 123 N. Car. 582, 68 Am. St. Rep. 834.

8. Com. v. Ferrell, 17 Pa. Co. Ct. 263.

9. Qualification of Successor. — Haley v. Petty,

42 Ark. 392. See also title PUBLIC OFFICERS, vol. 23, p. 412.

10. Taxes Accruing During Term. — Peck v. Holcombe, 3 Port. (Ala.) 329; Fremont v. Boling, 11 Cal. 380; Castle v. Lawlor, 47 Conn. 340; Skinner v. Roberts, 92 Ga. 366; Hall v. Hall, 23 La. Ann. 135; Fitts v. Hawkins, 2 Hawks (9 N. Car.) 394; Matter of Long, 40 N. Y. App. Div. 152; Otis v. Boyd, 8 Lea (Tenn.) 679.

11. Castle v. Lawlor, 47 Conn. 341.

12. Unfinished Collections. — Pickett v. Allen, 10 Conn. 146; Smith v. Riding, 9 Houst. (Del.) 235; Scarborough v. Parker, 53 Me. 252; Slade v. Governor, 3 Dev. L. (14 N. Car.) 365; Fitts v. Hawkins, 2 Hawks (9 N. Car.) 394; Jones v. Arrington, 94 N. Car. 541. But see Fremont v. Boling, 11 Cal. 380.

The Collector May Continue the Prosecution of an Action to recover the tax, Kellar v. Savage, 20 Me. 199; but may not institute a new one, Gordon v. Lafayette County, 74 Mo. 426.

13. Territorial Jurisdiction. — Mason v. Johnson, 51 Cal. 612; McKay v. Batchellor, 2 Colo. 591; Gage v. Dudley, 64 N. H. 437; State v. Scammon, 22 N. H. 44; Wright v. Jones, 14 Tex. Civ. App. 423.

14. Andrews v. Sellers, 11 Ind. App. 301.

15. Cheever v. Merritt, 5 Allen (Mass.) 563; De Arman v. Williams, 93 Mo. 158. Compare Williamstown v. Willis, 15 Gray (Mass.) 427; Houghton v. Davenport, 23 Pick. (Mass.) 235; Sherman v. Torrey, 99 Mass. 474.

Under the Nebraska statute the claim is forwarded to the new place of domicile for collection by suit or distress. Richards v. Clay County, 40 Neb. 45, 42 Am. St. Rep. 650.

Unorganized County. — Llano Cattle Co. v. Faught, 69 Tex. 492.

delivery of the tax roll or tax list or a duplicate thereof by the assessor or assessing board to the collector.<sup>1</sup> This roll, when it is in due form and comes from the right source,<sup>2</sup> operates with the same effect as a judgment.<sup>3</sup> In a few states the collector, when this roll comes into his hands, is, without more, authorized to proceed at once to the collection of the amounts assessed against the listed taxpayers.<sup>4</sup> In such jurisdictions the law itself imposes the duty to collect, and is sufficient warrant to the collector to proceed. The tax list or roll merely gives him authority to receive the taxes and defines their amount.<sup>5</sup>

**b. COLLECTOR'S GENERAL WARRANT** — (1) *In General*. — In most states, however, the tax roll must be accompanied by a general warrant directing the collector to proceed with the collection. Such warrant constitutes the basis of the collector's authority and is the source of his power.<sup>6</sup> In the absence of such warrant, he cannot proceed to enforce the payment of taxes;<sup>7</sup> and, if he does so proceed, sales subsequently made are void.<sup>8</sup> As the tax roll or

1. *Delivery Presumed*. — *State v. Chicago*, etc., R. Co., 165 Mo. 597.

2. *Requisites of Tax Roll*. — *St. Louis*, etc., R. Co. v. Apperson, 97 Mo. 300; *Dubois v. Webster*, 7 Hun (N. Y.) 371; *Slade v. Governor*, 3 Dev. L. (14 N. Car.) 365; *Kelly v. Craig*, 5 Ired. L. (27 N. Car.) 129; *Texas Land*, etc., Co. v. Hemphill County, (Tex. Civ. App. 1901) 61 S. W. Rep. 333.

*Tax Roll Prima Facie Evidence*. — *Muskegon v. S. K. Martin Lumber Co.*, 86 Mich. 625; if accompanied by certificate, *Newkirk v. Fisher*, 72 Mich. 113.

*Separate Lists*. — Where lists are required to be kept separately for different classes of taxes or for different political subdivisions, the requirement must be obeyed. *People v. Moore*, 1 Idaho 662; *Thayer v. Stearns*, 1 Pick. (Mass.) 482; *Case v. Dean*, 16 Mich. 12; *Wall v. Trumbull*, 16 Mich. 228; *Copp v. Whipple*, 41 N. H. 273.

*Contra in Illinois*. *Thacher v. People*, 79 Ill. 597. See also *Bristol v. Chicago*, 22 Ill. 587.

But a single warrant will suffice to authorize the collection of the several lists. *Thayer v. Stearns*, 1 Pick. (Mass.) 482; *Brackett v. Whidden*, 3 N. H. 19.

3. *Tax Roll Operates as a Judgment*. — *Gossett v. Kent*, 19 Ark. 602; *Yuba County v. Adams*, 7 Cal. 35; *Moss v. Cummings*, 44 Mich. 359; *Brown v. Harris*, 52 Mo. 306; *State v. Lutz*, 65 N. Car. 503; *Gore v. Mastin*, 66 N. Car. 371; *Kirkwood v. Washington County*, 32 Oregon 568; *Southern Oregon Co. v. Coos County*, 30 Oregon 250; *Rhea v. Umatilla County*, 2 Oregon 298.

4. *Tax Roll as Authority for Collecting*. — *Jackson County v. Gullatt*, 84 Ala. 243; *Timberlake v. Brewer*, 59 Ala. 108; *Tallman v. Cooke*, 43 Iowa 330; *Cedar Rapids*, etc., R. Co. v. Carroll County, 41 Iowa 153; *Litchfield v. Hamilton County*, 40 Iowa 66; *Rhodes v. Sexton*, 33 Iowa 540; *Hurley v. Powell*, 31 Iowa 64; *Johnson v. Chase*, 30 Iowa 308; *Parker v. Sexton*, 29 Iowa 421; *Pentland v. Stewart*, 4 Dev. & B. L. (20 N. Car.) 386.

5. *Function of Tax Roll*. — *Jackson County v. Gullatt*, 84 Ala. 243; *East v. Eichelberger*, 69 Ala. 187; *Dudley v. Chilton County*, 66 Ala. 593; *State Auditor v. Jackson County*, 65 Ala. 142; *Timberlake v. Brewer*, 59 Ala. 108.

6. *Collector's General Warrant* — *United States*. — *Utica First Nat. Bank v. Waters*, 19 Blatchf. (U. S.) 242; *Ersine v. Hohnbach*, 14 Wall. (U. S.) 613.

*Florida*. — *Donald v. McKinnon*, 17 Fla. 746.

*Illinois*. — *Ream v. Stone*, 102 Ill. 359.

*Maine*. — *Pearson v. Canney*, 64 Me. 188.

*Michigan*. — *Loud*, etc., *Lumber Co. v. Hagar*, 118 Mich. 452.

*Nebraska*. — *Reynolds v. Fisher*, 43 Neb. 172.

*New York*. — *Bennett v. Robinson*, 42 N. Y. App. Div. 412.

*North Carolina*. — *Peebles v. Taylor*, 121 N. Car. 38; *Slade v. Governor*, 3 Dev. L. (14 N. Car.) 365; *Kelly v. Craig*, 5 Ired. L. (27 N. Car.) 129.

*Oklahoma*. — *Mattocks v. McLain Land*, etc., Co., 11 Okla. 433; *Morrow v. Smith*, 8 Okla. 267.

*Pennsylvania*. — *Hilbish v. Hower*, 58 Pa. St. 93; *Rice v. Burns*, 9 Pa. Super. Ct. 58, 29 Pittsb. Leg. J. N. S. (Pa.) 243, 43 W. N. C. (Pa.) 301.

*Vermont*. — *Buchanan v. Cook*, 70 Vt. 168.

A Provision as to Time for Delivery of the tax roll and warrant is directory only. *Bradley v. Ward*, 58 N. Y. 401.

*Tax List with the Warrant*. — A warrant to be valid must be accompanied by the tax list, but it need not be actually attached thereto. *Picket v. Allen*, 10 Conn. 146; *Barnard v. Graves*, 13 Met. (Mass.) 85; *Bellows v. Weeks*, 41 Vt. 590. The two may be embodied in one instrument. *Bailey v. Ackerman*, 54 N. H. 527.

If a warrant be annexed to the rate bill of one year, it will not justify taking property to satisfy the tax of another year. *Rowell v. Horton*, 57 Vt. 31.

7. *General Warrant as Authority for Collecting*. — *Picket v. Allen*, 10 Conn. 146; *Donald v. McKinnon*, 17 Fla. 746; *Young v. Thomas*, 17 Fla. 169, 35 Am. Rep. 93; *Ream v. Stone*, 102 Ill. 359; *Binkert v. Wabash R. Co.*, 98 Ill. 218; *Hill v. Figley*, 23 Ill. 418; *Corbin v. Hill*, 21 Iowa 70; *Homer v. Cillery*, 14 N. H. 85; *Van Rensselaer v. Whitbeck*, 7 N. Y. 517; *Peebles v. Taylor*, 121 N. Car. 38; *Kelly v. Craig*, 5 Ired. L. (27 N. Car.) 129; *Morrow v. Smith*, 8 Okla. 267.

8. *Sales Void*. — *Donald v. McKinnon*, 17 Fla. 746; *Asper v. Moon*, 24 Utah 241.

list operates as a judgment, so the collector's warrant has the effect and the power of an execution.<sup>1</sup>

(2) *Nature*. — It will conduce to clearness to bear in mind the distinction between the collector's general warrant and the special tax executions or distress warrants issued subsequently by the collector against individual taxpayers. The general warrant is an authority rather than a process, though it is often spoken of as such, and hence it need not run in the name of the state.<sup>2</sup> On the other hand the special warrant is a legal process, but not a judicial process.<sup>3</sup> Though this distinction should be borne in mind as it affords a clew to reconciling some apparently conflicting decisions, it will not serve as a basis of rigid classification. The principles applicable to both sorts of warrants are nearly the same, and in many cases, especially in local taxation, the collector is his own executive officer and proceeds against the taxpayer directly under the general warrant instead of issuing new special process to the sheriff or constable. We accordingly find that the decisions involving general warrants are indifferently cited when special warrants are in question and *vice versa*.<sup>4</sup>

(3) *Requisites*. — The general warrant must emanate from the proper source and be duly authenticated.<sup>5</sup> It must also be directed to the collector or other

1. *Warrant Operating as an Execution* — *United States*. — *Utica First Nat. Bank v. Waters*, 19 Blatchf. (U. S.) 242; *Erskine v. Hohnbach*, 14 Wall. (U. S.) 613.

*Arkansas*. — *Gossett v. Kent*, 19 Ark. 602.

*California*. — *Yuba County v. Adams*, 7 Cal.

35.

*Florida*. — *Donald v. McKinnon*, 17 Fla. 746.

*Georgia*. — *Byars v. Curry*, 75 Ga. 515.

*Kansas*. — *Kansas Pac. R. Co. v. Wyandotte County*, 16 Kan. 597.

*Louisiana*. — *Thibodaux v. Keller*, 29 La. Ann. 508.

*Maine*. — *Nowell v. Tripp*, 61 Me. 426, 14 Am. Rep. 572.

*Massachusetts*. — *Lincoln v. Worcester*, 8 Cush. (Mass.) 55; *Preston v. Boston*, 12 Pick. (Mass.) 14; *Holden v. Eaton*, 8 Pick. (Mass.) 436; *Hubbard v. Garfield*, 102 Mass. 72.

*Michigan*. — *Moss v. Cummings*, 44 Mich. 399; *Bird v. Perkins*, 33 Mich. 28.

*Mississippi*. — *Virden v. Bowers*, 55 Miss. 1.

*New Hampshire*. — *Edes v. Boardman*, 58 N. H. 584.

*New York*. — *Savacool v. Boughton*, 5 Wend. (N. Y.) 171, 21 Am. Dec. 181; *Sheldon v. Van Buskirk*, 2 N. Y. 473.

*North Carolina*. — *Kelly v. Craig*, 5 Ired. L. (27 N. Car.) 129; *Clifton v. Wynne*, 80 N. Car. 145; *Mulford v. Sutton*, 79 N. Car. 276; *Gore v. Mastin*, 66 N. Car. 371; *State v. Lutz*, 65 N. Car. 503.

*Oregon*. — *Kirkwood v. Washington County*, 32 Oregon 568.

*Pennsylvania*. — *Cunningham v. Mitchell*, 67 Pa. St. 78.

*Rhode Island*. — *Greene v. Mumford*, 4 R. I. 318.

The tax roll and warrant together operate as an execution and are to be construed as one. *Bradley v. Ward*, 58 N. Y. 401; *Van Rensselaer v. Witbeck*, 7 N. Y. 517.

2. *General Warrant Not Process*. — *Wisner v. Davenport*, 5 Mich. 501; *Tweed v. Metcalf*, 4 Mich. 579; *Sprague v. Birchard*, 1 Wis. 457.

*Form of General Warrant*. — *Sheldon v. Van Buskirk*, 2 N. Y. 473; *Sprague v. Birchard*, 1 Wis. 457.

3. *Nashville v. Pearl*, 11 Humph. (Tenn.) 249; *Scarritt v. Chapman*, 11 Ill. 443; *Curry v. Hinman*, 11 Ill. 420.

4. As to special warrant, see *infra*, this section, f. 2. *Distress or Summary Seizure and Sale*.

5. *Requisites of Warrant* — *Connecticut*. — *Prince v. Thomas*, 11 Conn. 472; *Goddard v. Seymour*, 30 Conn. 394.

*Illinois*. — *Butler v. Nevin*, 88 Ill. 575.

*Maine*. — *Colby v. Russell*, 3 Me. 227; *Foxcroft v. Nevens*, 4 Me. 72; *Johnson v. Goodridge*, 15 Me. 29; *Bangor v. Lancey*, 21 Me. 472; *School Dist. v. Clark*, 33 Me. 482; *Pearson v. Canney*, 64 Me. 188; *Belfast Sav. Bank v. Kennebec Land, etc., Co.*, 73 Me. 404.

*Massachusetts*. — *Sprague v. Bailey*, 19 Pick. (Mass.) 436.

*Missouri*. — *Brown v. Harris*, 52 Mo. 306.

*New Hampshire*. — *Chase v. Sparhawk*, 22 N. H. 134; *Copp v. Whipple*, 41 N. H. 273.

*New Jersey*. — *Ridgefield v. Goodday*, 65 N. J. L. 153.

*New York*. — *Sheldon v. Van Buskirk*, 2 N. Y. 473.

*Pennsylvania*. — *Stephens v. Wilkins*, 6 Pa. St. 260; *Chalker v. Ives*, 55 Pa. St. 81; *Hilbish v. Hower*, 58 Pa. St. 93; *Garber v. Conner*, 98 Pa. St. 551.

*Vermont*. — *Townsend v. Gray*, 1 D. Chip. (Vt.) 127; *Bellows v. Weeks*, 41 Vt. 590.

The Official Designation of the officers issuing the warrant need not be added. *Sheldon v. Van Buskirk*, 2 N. Y. 473.

General Warrant Must Be under Seal. — *Mattocks v. McLain Land, etc., Co.*, 11 Okla. 433.

Presumption of Due Signature. — *Kellar v. Savage*, 20 Me. 199.

The warrant to a collector of taxes is good if signed by only a majority of the assessors. *Sprague v. Bailey*, 19 Pick. (Mass.) 436. But the signature of two only is sufficient. *Hilbish v. Hower*, 58 Pa. St. 93. See, however, *Spring Valley Coal Co. v. People*, 157 Ill. 543, *distinguishing People v. Smith*, 149 Ill. 549.

When the warrant is properly authenticated, the failure to sign the tax list accompanying it is immaterial. *Hogelskamp v. Weeks*, 37 Mich. 422; *Kane v. Brooklyn*, 114 N. Y. 586.

official who discharges that function, though it need not give his name.<sup>1</sup> A warrant directing an improper disposition of the funds to be collected is no authority.<sup>2</sup> The same is true of a warrant directing the collector to receive something else than money.<sup>3</sup> Though a literal compliance with statutory forms is not required,<sup>4</sup> and mere defects of form and clerical errors do not vitiate,<sup>5</sup> all statutory requirements must be substantially if not strictly complied with.<sup>6</sup> The collector is often required to give notice when the tax roll comes into his hands.<sup>7</sup> This is usually done either by publication or by sending out individual tax bills.<sup>8</sup> Such provisions of the law are intended to subserve the convenience of the taxpayer, and, save where the sale of land is predicated upon them,<sup>9</sup> or the statute is clearly mandatory,<sup>10</sup> a failure strictly to follow them does not avoid the proceedings.<sup>11</sup> It will always be presumed that the proper steps were taken,<sup>12</sup> and the warrant cannot be collaterally attacked.<sup>13</sup>

(4) *Return*.—The general warrant usually contains directions to the collector to make a due return thereof, or the law itself makes provision for a report.<sup>14</sup> This is necessary, otherwise subsequent proceedings, such as to sell land,<sup>15</sup> or to recover the taxes of the collector,<sup>16</sup> could not well be taken, since the collector alone knows what taxpayers are in default. A failure to make a return is fatal to the validity of all subsequent statutory proceedings for the sale of land.<sup>17</sup> The same is true of a failure to make the return within the

But see *Copp v. Whipple*, 41 N. H. 273; *Chase v. Sparhawk*, 22 N. H. 134.

**Jurisdiction of Assessing Board.**—If the affidavit accompanying the tax roll and delivered to the collector with the warrant shows a want of jurisdiction on the part of the board, the warrant is fatally defective. *Westfall v. Preston*, 49 N. Y. 349; *Van Rensselaer v. Witbeck*, 7 N. Y. 517. See also *Smith v. Mosher*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 786; *New York, etc., R. Co. v. Lyon*, 16 Barb. (N. Y.) 651.

1. **Directed to Collector.**—*Loud, etc., Lumber Co. v. Hagar*, 118 Mich. 452; *St. Joseph First Nat. Bank v. St. Joseph Tp.*, 46 Mich. 526.

2. *Sprague v. Birchard*, 1 Wis. 457.

**Direction as to Payment Over.**—A direction in the warrant to pay over the money to the selectmen, instead of the treasurer does not render it invalid; for the law determines this matter and the erroneous instruction may be disregarded. *Clemons v. Lewis*, 36 Vt. 673.

3. *Cheshire v. Howland*, 13 Gray (Mass.) 321.

4. *Wilcox v. Gladwin*, 50 Conn. 77.

5. **Formal Defects.**—*Utica First Nat. Bank v. Waters*, 19 Blatchf. (U. S.) 242; *Keokuk, etc., Bridge Co. v. People*, 161 Ill. 132; *Reynolds v. Fisher*, 43 Neb. 172; *Benton v. Merrill*, 68 N. H. 369; *Buchanan v. Cook*, 70 Vt. 168.

6. **Statutory Requirements.**—*Picket v. Allen*, 10 Conn. 146; *People v. Otis*, 74 Ill. 384.

7. **Notice.**—*Clark v. Smith*, (County Ct.) 31 Misc. (N. Y.) 490; *Vestal v. Morris*, 11 Wash. 451.

**Delinquencies to Be Extended on Tax Lists.**—*Hoben v. Snell*, 94 Iowa 205.

8. **Tax Bills.**—*Louisville Bridge Co. v. Louisville*, 58 S. W. Rep. 598, 22 Ky. L. Rep. 703; *Hoozer v. Buckner*, 11 B. Mon. (Ky.) 183; *State v. Merchants Bank*, 160 Mo. 640; *Barnett v. St. Louis Public Schools*, 61 Mo. App. 539, 1 Mo. App. Rep. 690; *Benton v. Merrill*, 68 N. H. 369; *Asper v. Moon*, 24 Utah 241.

**Tax Bills Prima Facie Evidence of Their Contents.**—*State v. Rau*, 93 Mo. 126; *State v. Phillips*, 137 Mo. 259; *State v. Fullerton*, 143 Mo. 682; *State v. Cunningham*, 153 Mo. 642. *Aliter* where the tax bill shows an erroneous assessment, as where stock is assessed to a bank instead of the stockholders. *State v. Merchants Bank*, 160 Mo. 640.

**When Admissible.**—*Howe v. Moulton*, 87 Me. 120; *Deerfield Tp. v. Harper*, 115 Mich. 678; *State v. Davis*, 131 Mo. 457.

**Burden of Proving that the tax bills bear the proper signature is on the city where the defendant raises that issue.** *Louisville v. Kimbel*, (Ky. 1902) 66 S. W. Rep. 608; *Louisville v. Johnson*, 95 Ky. 254.

**When Sufficiently Specific.**—*Louisville Bridge Co. v. Louisville*, 58 S. W. Rep. 598, 22 Ky. L. Rep. 703; *Harvey v. Gulf States Land, etc., Co.*, 108 La. 550; *Hughes v. Kelley*, 69 Vt. 443.

9. *Benzinger v. Gies*, 87 Md. 704.

10. *Hoben v. Snell*, 94 Iowa 205.

11. **Formal Irregularities.**—*State v. Burr*, 143 Mo. 209; *Clark v. Smith*, (County Ct.) 31 Misc. (N. Y.) 490; *Buchanan v. Cook*, 70 Vt. 168. See also *Wilmot v. Lathrop*, 67 Vt. 671.

12. **Presumption of Regularity.**—*State v. Merchants Bank*, 160 Mo. 640; *State v. Fullerton*, 143 Mo. 682; *Benton v. Merrill*, 68 N. H. 369.

13. *Clark v. Smith*, (County Ct.) 31 Misc. (N. Y.) 490.

**Tax Roll and Warrant admissible as evidence of assessment.** *Howe v. Moulton*, 87 Me. 120; though signed only by the deputy collector, *State v. Miller*, 16 Mo. App. 539. *Compare Deerfield Tp. v. Harper*, 115 Mich. 678.

14. **Return.**—*Upton v. Kennedy*, 36 Mich. 215; *Sheldon v. Van Buskirk*, 2 N. Y. 473; *Mast v. Nacogdoches County*, 71 Tex. 380; *Sprague v. Birchard*, 1 Wis. 457.

15. *Shimmin v. Inman*, 26 Me. 228.

16. *Olean v. King*, 116 N. Y. 355.

17. **Failure to Make Return.**—*Thatcher v. Powell*, 6 Wheat. (U. S.) 119; *Simms v. Greer*,

time limited by law,<sup>1</sup> and of returns prematurely made.<sup>2</sup> But undue delay in making the return does not terminate the authority of an officer to collect thereafter,<sup>3</sup> as the power to collect remains until the taxes are actually paid.<sup>4</sup> Nor does it affect the validity of the tax itself or the tax lien,<sup>5</sup> and, it is presumed, provisions for the extension and renewal of the collector's authority are everywhere found.<sup>6</sup>

**Effect of Return as Evidence.**—The return of the collector, when properly made,<sup>7</sup> is *prima facie* evidence of all matters which the law requires it to state,<sup>8</sup> not only in favor of the officers,<sup>9</sup> but also against them<sup>10</sup> and their sureties.<sup>11</sup> It is usually sufficient proof of the validity of the tax,<sup>12</sup> and it will be presumed that preliminary requirements have been fulfilled.<sup>13</sup> A proper return is also sufficient evidence that the taxes of those who are reported delinquent are unpaid.<sup>14</sup>

**c. DELINQUENT LIST**—(1) *Function and Mode of Compilation.*—The collector's return of his general warrant is chiefly important in respect to the fact that it shows who are in default and affords a basis for the roll of delinquents. This list and the proceedings connected with it constitute a new

83 Ala. 263; *Fleming v. McGee*, 81 Ala. 409; *Wartensleben v. Haithcock*, 80 Ala. 565; *Lawrence v. Zimbleman*, 37 Ark. 643; *People v. Otis*, 74 Ill. 384; *Pickett v. Hartsock*, 15 Ill. 279; *Newkirk v. Fisher*, 72 Mich. 113; *Huntington v. Brantley*, 33 Miss. 451; *State v. Kirby*, 6 N. J. L. 143; *Pitts v. Booth*, 15 Tex. 453.

1. **Dilatory Return.**—*Hickman v. Kempner*, 35 Ark. 505; *Weir v. Kitchens*, 52 Miss. 74; *Huntington v. Brantley*, 33 Miss. 451; *Burns v. Ledbetter*, 54 Tex. 374.

2. **Premature Return.**—*Hickman v. Kempner*, 35 Ark. 505; *Bleidorn v. Abel*, 6 Iowa 6; *Flint v. Sawyer*, 30 Me. 226; *Westfall v. Preston*, 49 N. Y. 349. But see *Jackson v. Cummings*, 15 Ill. 449.

3. **Authority to Collect After Time for Return.**—*Pickett v. Allen*, 10 Conn. 146; *White v. State*, 51 Ga. 252; *Smith v. Messer*, 17 N. H. 420; *Walker v. Miner*, 32 Vt. 769.

The collector cannot, of course, get credit for taxes on lands reported delinquent unless his report is timely. *Chadwell v. State*, 8 Heisk. (Tenn.) 340.

4. **Continuation of Power to Collect.**—*Perry County v. Selma, etc., R. Co.*, 58 Ala. 546; *Jacks v. Dyer*, 31 Ark. 334; *White v. State*, 51 Ga. 252; *Union Trust Co. v. Weber*, 96 Ill. 346; *Oteri v. Parker*, 42 La. Ann. 374; *Bassett v. Porter*, 4 Cush. (Mass.) 487; *Homer v. Cilley*, 14 N. H. 85; *McCracken v. Elder*, 34 Pa. St. 239.

5. **Validity of Tax and Tax Lien.**—*Union Trust Co. v. Weber*, 96 Ill. 346; *Chiniquy v. People*, 78 Ill. 570; *State v. Hutchinson*, 116 Mo. 399; *State v. Hurt*, 113 Mo. 90; *Glover v. Edgewater*, 3 Thomp. & C. (N. Y.) 497.

6. **Extension of Time for Return.**—*Fairfield v. People*, 94 Ill. 244; *Baldwin v. State*, 89 Md. 587; *Bird v. Perkins*, 33 Mich. 28; *Griswold v. Union School Dist.*, 24 Mich. 262; *Putman v. Fife Lake Tp.*, 45 Mich. 125; *Bradley v. Ward*, 58 N. Y. 401; *New Richmond Lumber Co. v. Rogers*, 68 Wis. 608.

An Extension of Time for the collection of taxes does not revive a warrant which has already expired. *Phillips v. New Buffalo Tp.*, 68 Mich. 217.

7. **Regular Return.**—*Putman v. Fife Lake Tp.*, 45 Mich. 125; *Kelly v. Craig*, 5 Ired. L. (27 N. Car.) 129; *Stambaugh v. Carlin*, 35 Ohio St. 209.

8. **Prima Facie Evidence.**—*Mahany v. People*, 138 Ill. 311; *Hosmer v. People*, 96 Ill. 58; *Pike v. People*, 84 Ill. 80; *Fisher v. People*, 84 Ill. 491; *Chiniquy v. People*, 78 Ill. 570; *Goodrich v. Minonk*, 62 Ill. 121; *Muskegon v. S. K. Martin Lumber Co.*, 86 Mich. 625; *Olmsted County v. Barber*, 31 Minn. 256; *State v. Van Every*, 75 Mo. 530; *State v. Nevada Cent. R. Co.*, 26 Nev. 366; *Wood v. Knapp*, 100 N. Y. 109; *Wade v. Kimberley*, 3 Ohio Cir. Dec. 18; 5 Ohio Cir. Ct. 33.

The return is not evidence of anything beyond what the law requires to be stated. *Sullivan v. State*, 66 Ill. 75; *Bristol v. Chicago*, 22 Ill. 587; *State v. Van Every*, 75 Mo. 530; *Com. v. Hart*, 1 Ashm. (Pa.) 77.

Nor is it entitled to probative weight where a return is not required. *Kelley v. Noyes*, 43 N. H. 209; *Hathaway v. Goodrich*, 5 Vt. 65.

A Demand by the collector is sufficiently shown by its return. *Job v. Tebbetts*, 10 Ill. 382; *Taylor v. People*, 7 Ill. 349; *Barnard v. Graves*, 13 Met. (Mass.) 85.

9. **Evidence in Behalf of Collector.**—*Caldwell v. Hawkins*, 40 Me. 527; *Barnard v. Graves*, 13 Met. (Mass.) 85.

10. *Smith v. Mosher*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 786.

11. *Mast v. Nacogdoches County*, 71 Tex. 380.

12. **Return as Evidence of Validity of Tax.**—*Mahany v. People*, 138 Ill. 311; *Burbank v. People*, 90 Ill. 554; *Olmsted County v. Barber*, 31 Minn. 256.

13. **Presumption of Regularity.**—*Pike v. People*, 84 Ill. 80; *Mix v. People*, 81 Ill. 118; *Chiniquy v. People*, 78 Ill. 570; *Caldwell v. Hawkins*, 40 Me. 527.

A return that no personalty could be found is conclusive. If it be false the only recourse of the taxpayer is a personal action against the officer for the false return. *Goodrich v. Minonk*, 62 Ill. 121; *Ottawa v. Macy*, 20 Ill. 413.

14. *Chiniquy v. People*, 78 Ill. 570.

point of departure in the enforcement of taxes, since land cannot be sold under statutory provisions,<sup>1</sup> nor forfeited,<sup>2</sup> nor an action brought to subject it,<sup>3</sup> unless there has been a proper return of delinquency. It is also sometimes a prerequisite to the right of action against the individual taxpayer.<sup>4</sup> Several modes of compulsory collection therefore have their inception in these proceedings, and accordingly provisions in regard to the delinquent list are regarded as mandatory and must be strictly followed.<sup>5</sup> The delinquent list is usually made up by the collector or his clerk,<sup>6</sup> though this duty sometimes falls to another, as, for instance, the comptroller,<sup>7</sup> and is either made up from the tax roll,<sup>8</sup> or is a transcript of the same with a showing as to taxes that are paid and unpaid.<sup>9</sup>

**Return of Delinquency as Declaration.** — The collector's return of delinquency sometimes serves the office of a declaration, and it must then, of course, have sufficient certainty to support a judgment.<sup>10</sup> It must show upon what property, and upon whom, the taxes were imposed.<sup>11</sup> Land must be so described as to be capable of identification.<sup>12</sup>

**1. Return of Delinquency as a Prerequisite to Sale of Land** — *United States*. — *Thatcher v. Powell*, 6 Wheat. (U. S.) 119.

*Alabama*. — *Simms v. Greer*, 83 Ala. 263; *Wartensleben v. Haithcock*, 80 Ala. 565.

*Illinois*. — *Otis v. Chicago*, 62 Ill. 299; *Hills v. Chicago*, 60 Ill. 86.

*Iowa*. — *Hintrager v. McElhinny*, 112 Iowa 325.

*Michigan*. — *Newkirk v. Fisher*, 72 Mich. 113. *Mississippi*. — *Huntington v. Brantley*, 33 Miss. 451.

*North Carolina*. — *Kelly v. Craig*, 5 Ired. L. (27 N. Car.) 129.

*New York*. — *Striker v. Kelly*, 2 Den. (N. Y.) 323; *Thompson v. Burhans*, 61 N. Y. 52; *Johnson v. Elwood*, 53 N. Y. 431; *Tallman v. White*, 2 N. Y. 66.

*Tennessee*. — *Swan v. Knoxville*, 11 Humph. (Tenn.) 130.

*Texas*. — *Burns v. Ledbetter*, 54 Tex. 374. Compare *Auditor Gen. v. Keweenaw Assoc.*, 107 Mich. 405.

By statute, in *Tennessee*, tax sales cannot be impeached for irregularities where it is shown that the tax was in fact unpaid. *Nance v. Hopkins*, 10 Lea (Tenn.) 508.

**2. Forfeiture.** — *Miner v. McLean*, 4 McLean (U. S.) 138; *Hill v. Mason*, 38 Me. 461.

**3. Proceedings Against Land.** — *Morrill v. Swartz*, 39 Ill. 108; *Pidgeon v. People*, 36 Ill. 249; *Pickett v. Hartsock*, 15 Ill. 279; *Taylor v. People*, 7 Ill. 349. See also *Buck v. People*, 78 Ill. 560; *Ogden v. Chicago*, 22 Ill. 592; *Burns v. Ledbetter*, 54 Tex. 377.

In some states the filing of the delinquent list operates as the beginning of a statutory proceeding to subject the land. *Wiggins Ferry Co. v. People*, 101 Ill. 446; *Redwood County v. Winona*, etc., Land Co., 40 Minn. 512; *Chauncey v. Waas*, 35 Minn. 1.

**4. Action Against Taxpayer.** — *Muskegon v. S. K. Martin Lumber Co.*, 86 Mich. 625. *Contra*, by statute, *State v. Northern Belle Mill*, etc., Co., 15 Nev. 385; *State v. Central Pac. R. Co.*, 10 Nev. 47. See *infra*, this section, *f. Compulsory Collection*.

**5. Provisions Mandatory.** — *McChesney v. People*, 174 Ill. 46; *Charles v. Waugh*, 35 Ill. 315; *O'Connor v. Finnegan*, 60 Minn. 455; *Cass County v. Security Imp. Co.*, 7 N. Dak.

528; *Burness v. Multnomah County*, 37 Oregon 460; *Hughes v. Linn County*, 37 Oregon 111; *State v. Chamberlain*, 99 Wis. 503. Compare *Matter of Arnold*, 11 Ohio Dec. 1.

In *Michigan* it is provided by statute that nonprejudicial irregularities shall not invalidate proceedings against delinquents. *Auditor Gen. v. Keweenaw Assoc.*, 107 Mich. 405. Compare the statutes of the other states.

**6. Compiled by Collector.** — *Law v. People*, 80 Ill. 268; *Hannel v. Smith*, 15 Ohio 134.

In *Arkansas*, where the sheriff is *ex officio* collector, it has been held that his deputy is not authorized to file the list with the clerk of the county court, this duty being imposed by statute on the collector. *Quertermous v. Walls*, 70 Ark. 326.

**7. Burns v. Ledbetter, 54 Tex. 374.**

**8. Compiled from Tax Roll.** — *Thompson v. Burhans*, 61 N. Y. 52; *Burness v. Multnomah County*, 37 Oregon 460.

**9. Transcript of Tax Roll.** — *California L. & T. Co. v. Weis*, 118 Cal. 489; *Chiniquy v. People*, 78 Ill. 570; *Hughes v. Linn County*, 37 Oregon 111.

**10. Certainty.** — *Mann v. People*, 102 Ill. 346; *Wiggins Ferry Co. v. People*, 101 Ill. 446.

**11. Description of Property and Taxpayer.** — *California L. & T. Co. v. Weis*, 118 Cal. 489; *Fisher v. People*, 84 Ill. 491; *Halsey v. People*, 84 Ill. 89; *Chiniquy v. People*, 78 Ill. 570; *Bristol v. Chicago*, 22 Ill. 587; *Asper v. Moon*, 24 Utah 241.

**12. Sufficient Description.** — *Davis v. Pacific Imp. Co.*, 137 Cal. 245; *People v. Rickert*, 159 Ill. 496; *Sholl v. People*, 194 Ill. 24; *Halsey v. People*, 84 Ill. 89; *Wilkin v. Keith*, 121 Mich. 66; *Davis v. How*, 52 Minn. 157; *Olivier v. Gurney*, 43 Minn. 69; *Knight v. Alexander*, 38 Minn. 384, 8 Am. St. Rep. 675; *Van Loon v. Engle*, 171 Pa. St. 157, 37 W. N. C. (Pa.) 244; *Burns v. Ledbetter*, 54 Tex. 374.

An omission to state the number of acres where this is shown on the tax roll has been held fatal. *McWilliams v. Great Spirit Springs Co.*, 7 Kan. App. 210. Compare *Burness v. Multnomah County*, 37 Oregon 460.

Abbreviations may be used, and the absence of the dollar mark is not fatal where the amount can be made out with certainty. *Chiniquy v. People*, 78 Ill. 570; *Sholl v. People*, 194 Ill. 24;

**The Return of Delinquency Must Show All Jurisdictional Facts**, such as the year for which the tax was levied,<sup>1</sup> whether proper efforts have been made to collect the taxes out of personalty,<sup>2</sup> and whether the taxes are due to the state or the county.<sup>3</sup> In short, it must appear that the statutes have been strictly complied with.<sup>4</sup>

**Verification.** — The report must be properly verified.<sup>5</sup> Verification is usually made by an affidavit or certificate from the collector showing that the proper steps have been taken and that the taxes reported are delinquent.<sup>6</sup>

**Strict Compliance as to the Form and Contents** of the delinquent report is usually held to be absolutely necessary.<sup>7</sup>

**A Return May Be Amended** where the rights of third parties have not intervened.<sup>8</sup>

**Return of Delinquency as Evidence.** — When in proper form the delinquent list is *prima facie* proof of its recitals.<sup>9</sup>

(2) **Publication.** — When the time fixed for the payment of the tax has elapsed and the delinquent list has been properly filed<sup>10</sup> by the collec-

Muirhead v. Sands, 111 Mich. 487; Chouteau v. Hunt, 44 Minn. 173; State v. Eureka Consol. Min. Co., 8 Nev. 15. And see ABBREVIATIONS, vol. 1, p. 97.

1. **Time of Levy.** — Karnes v. People, 73 Ill. 274. Compare State v. Baldwin, 62 Minn. 518.

2. **Exhaustion of Personalty.** — Thatcher v. Powell, 6 Wheat. (U. S.) 119; Fleming v. McGee, 81 Ala. 409. *Contra*, Taylor v. People, 7 Ill. 349.

3. Morrill v. Swartz, 39 Ill. 108.

4. **Strict Compliance with Statute.** — Thatcher v. Powell, 6 Wheat. (U. S.) 119; Wartensleben v. Haithcock, 80 Ala. 565; People v. Land Owners, 82 Ill. 408; Charles v. Waugh, 35 Ill. 315; Williams v. State, 6 Blackf. (Ind.) 36; Stambaugh v. Carlin, 35 Ohio St. 209; Belden v. State, 46 Tex. 103.

5. **Verification.** — Miner v. McLean, 4 McLean (U. S.) 138; Weston v. People, 84 Ill. 284; Hochlander v. Hochlander, 73 Ill. 618; Hogelskamp v. Weeks, 37 Mich. 422; Upton v. Kennedy, 36 Mich. 215; Thompson v. Burhans, 61 N. Y. 52; Johnson v. Elwood, 53 N. Y. 432; Skinner v. Brown, 17 Ohio St. 33; Hannel v. Smith, 15 Ohio 134; Stambaugh v. Carlin, 35 Ohio St. 209; Harmon v. Stockwell, 9 Ohio 94. See also Mille Lacs County v. Morrison, 22 Minn. 178.

A verification made before the completion of the roll is a nullity. Smith v. Mosher, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 786; Westfall v. Preston, 49 N. Y. 349.

6. **Affidavit and Certificate.** — Fleming v. McGee, 81 Ala. 409; Weston v. People, 84 Ill. 284; Law v. People, 80 Ill. 268; Charles v. Waugh, 35 Ill. 315; Emmons County v. Bismarck First Nat. Bank Lands, 9 N. Dak. 583; Stambaugh v. Carlin, 35 Ohio St. 209; Hannel v. Smith, 15 Ohio 134; McGee v. Sampselle, 47 W. Va. 352.

In *Minnesota*, under a statute declaring that the jurisdiction of the court to sell delinquent lands shall not be affected by errors in making the list, it is held that the failure of the officer to verify it by affidavit will not avoid a sale, especially where the list is certified under seal. Cook v. John Schroeder Lumber Co., 85 Minn. 374; Bennett v. Blatz, 44 Minn. 56.

7. **Form and Contents.** — Thatcher v. Powell, 6 Wheat. (U. S.) 119; Wartensleben v. Haithcock, 80 Ala. 565; Hughes v. Linn County, 37 Oregon 111. Compare Spellman v. Curtenius,

12 Ill. 414; Edwards's Succession, 32 La. Ann. 457; Scheiber v. Kaehler, 49 Wis. 291.

A return of taxes "delinquent or unpaid" where the statute requires a return of taxes "delinquent and unpaid" is insufficient. O'Connor v. Finnegan, 60 Minn. 455; St. Anthony Falls Water Power Co. v. Greely, 11 Minn. 322.

Where the affidavit shows no venue it is a nullity. Thompson v. Burhans, 61 N. Y. 53.

In *Illinois* the affidavit is held not to be jurisdictional, and a failure so to authenticate it is not fatal. Chicago, etc., R. Co. v. People, 174 Ill. 80; Beers v. People, 83 Ill. 488; Chiniquy v. People, 78 Ill. 570.

**Compliance with Statutory Form Is Sufficient.** — Riddle v. Messer, 84 Ala. 236; Simms v. Greer, 83 Ala. 263; Kinsworthy v. Mitchell, 21 Ark. 145; Weston v. People, 84 Ill. 284; Fox v. Turtle, 55 Ill. 377; Morrill v. Swartz, 39 Ill. 108; Bristol v. Chicago, 22 Ill. 587; Morgan v. Camp, 16 Ill. 175; Pickett v. Hartsock, 15 Ill. 279; Job v. Tebbetts, 10 Ill. 376; Taylor v. People, 7 Ill. 349; Dickison v. Reynolds, 48 Mich. 158; Stambaugh v. Carlin, 35 Ohio St. 209.

And the insertion of matter not required will be treated as surplusage. Ogden v. Chicago, 22 Ill. 592; Bristol v. Chicago, 22 Ill. 587.

8. **Amendment.** — McChesney v. People, 178 Ill. 542; Shelbyville Water Co. v. People, 140 Ill. 545; Carville v. Additon, 62 Me. 459; Jaquith v. Putney, 48 N. H. 138.

But not, it seems, after the expiration of the collector's term of office. State v. Phillips, 102 Mo. 664.

9. **Delinquent List as Evidence.** — Maish v. Arizona, 164 U. S. 599; Chicago, etc., R. Co. v. People, 183 Ill. 196.

10. **Time of Filing.** — Hickman v. Kempner, 35 Ark. 505; Boles v. McNeil, 66 Ark. 422; Flint v. Sawyer, 30 Me. 226; Homer v. Cilley, 14 N. H. 85.

The word "immediately" in a statute directing that the list be filed immediately upon making it up, means within a reasonable time. State v. St. Paul Trust Co., 76 Minn. 423; Schulte v. Minneapolis First Nat. Bank, 34 Minn. 48; Cook v. John Schroeder Lumber Co., 85 Minn. 374; Bogart v. Kiene, 85 Minn. 261; Emmons County v. Bismarck First Nat. Bank Lands, 9 N. Dak. 583. See also, in this work, IMMEDIATELY, vol. 15, p. 1021.

tor,<sup>1</sup> notice of delinquency and of application for judgment, where land is involved,<sup>2</sup> is usually given either by posting,<sup>3</sup> or publication in a newspaper.<sup>4</sup> Giving the notice or making publication in the time and manner required is a condition precedent to the validity of subsequent proceedings, and all requirements must be complied with not only in spirit but according to the letter of the law.<sup>5</sup> The order naming the channel of publication must be definite and exact,<sup>6</sup> while the time indicated must be precisely observed.<sup>7</sup> All certificates and affidavits which are required as a means of giving authenticity to the various acts connected with publication, such, for instance, as the order<sup>8</sup> and certificate of publication,<sup>9</sup> as well as the certificate or affidavit of printing,<sup>10</sup> must duly appear.<sup>11</sup> Where particular steps are directed to be perpetuated by

A premature filing of the delinquent list vitiates the proceedings. *Hickman v. Kempner*, 35 Ark. 505.

As to effects of a dilatory filing of the list in *Louisiana*, see *Le Seigneur v. Bessan*, 52 La. Ann. 187.

**Filing.**—Where the list is delivered to the proper officer within the time required, the failure of the clerk to place his official mark of filing thereon does not affect its validity, and it may be subsequently amended. *Mix v. People*, 106 Ill. 425; *McChesney v. People*, 178 Ill. 542.

1. *Quertermous v. Walls*, 70 Ark. 326.

2. **Application for Judgment.**—*Bass v. People*, 159 Ill. 207; *Kipp v. Dawson*, 59 Minn. 82.

3. **Posting.**—*Pitts v. Booth*, 15 Tex. 453; *Iverslie v. Spaulding*, 32 Wis. 394; *Jarvis v. Silliman*, 21 Wis. 600.

4. **Publication.**—*Martin v. Barbour*, 34 Fed. Rep. 701, 140 U. S. 639; *Pennell v. Monroe*, 30 Ark. 661; *Buck v. People*, 78 Ill. 560; *Fox v. Turtle*, 55 Ill. 377; *Hill v. Mason*, 38 Me. 461; *Banning v. McManus*, 51 Minn. 289; *Chouteau v. Hunt*, 44 Minn. 173; *Merriman v. Knight*, 43 Minn. 493.

**Name of Taxpayer.**—Publication of "R. O. Elting" as delinquent is sufficient where the taxpayer's real name as shown by the assessment is "Richard O. Elting." *Elting v. Gould*, 96 Mo. 541. See also *Mosely v. Reily*, 126 Mo. 124; *Cruzen v. Stephens*, 123 Mo. 337, 45 Am. St. Rep. 549; *Fanning v. Krapf*, 68 Iowa 244; *Waltz v. Borroway*, 25 Ind. 380; *Porter v. Stout*, 73 Ind. 3.

5. **Strict Conformity with Statute Required.**—*Morris v. St. Louis Nat. Bank*, 17 Colo. 231; *Abell v. Cross*, 17 Iowa 172; *Breaux v. Negrotto*, 43 La. Ann. 426; *Moulton v. Blaisdell*, 24 Me. 283; *Styles v. Weir*, 26 Miss. 187; *Lagroue v. Rains*, 48 Mo. 536; *Nelson v. Goebel*, 17 Mo. 161; *Pearson v. Lovejoy*, 53 Barb. (N. Y.) 407; *Mathers v. Lewis*, 9 Ohio Cir. Dec. 873. *Contra*, *Noland v. Busby*, 28 Ind. 154.

6. **Designation of Paper.**—An order to give the printing to "F. Daggett, editor of the *Litchfield News-Ledger*," does not properly designate a paper. *Eastman v. Linn*, 26 Minn. 215.

It has been held that authority to publish in the "Fargo Forum" does not authorize publication either in the "Fargo Forum and Daily Republican," or in the "Fargo Forum and Weekly Republican." *Cass County v. Security Imp. Co.*, 7 N. Dak. 528. See also *Russell v. Gilson*, 36 Minn. 366.

**Change of Name.**—The order of publication

is not rendered insufficient where the paper designated changes its name before publication is made. *Reimer v. Newel*, 47 Minn. 237.

Where the "Muskegon Chronicle" is designated, a publication in either the daily or weekly of that name is good. *Waldron v. Auditor Gen.*, 109 Mich. 231.

The notice must be published not only in English, but in an English paper, unless the contrary be expressly provided. *State v. Chamberlain*, 99 Wis. 503.

As to sufficiency of the call for a session to designate the paper, see *Emmons County v. Bismark First Nat. Bank Lands*, 9 N. Dak. 583.

7. **Time of Publication.**—*Ronkendorff v. Taylor*, 4 Pet. (U. S.) 349; *Martin v. Barbour*, 34 Fed. Rep. 701, 140 U. S. 639; *United Copper Min., etc., Co. v. Franks*, 85 Me. 321. *Compare* *Waldron v. Auditor Gen.*, 109 Mich. 231; *Bentley v. Shingler*, 111 Ga. 780.

8. **Order of Publication.**—*Kipp v. Dawson*, 59 Minn. 82; *Cass County v. Security Imp. Co.*, 7 N. Dak. 528.

9. **Certificate.**—*McChesney v. People*, 174 Ill. 46; *Flint v. Sawyer*, 30 Me. 226.

10. **Affidavit of Printing.**—*Morris v. St. Louis Nat. Bank*, 17 Colo. 231; *McChesney v. People*, 174 Ill. 46; *Mims v. Finney County*, 3 Kan. App. 622.

**Transmission of the Affidavit of printing** to the county clerk instead of to the treasurer is not fatal where the circumstances show that it actually reached the right officer. *Douglass v. Craig*, 4 Kan. App. 99.

The head officer of the corporation doing the printing is the proper person to make the printer's affidavit. *Bass v. People*, 159 Ill. 207.

Compensation of the printer should not be paid until the publication is actually made and copies of the delinquent list delivered to the collector. *Brown v. Otose County*, 6 Neb. 111.

11. **Authentication of Publication.**—*Martin v. Barbour*, 34 Fed. Rep. 701, 140 U. S. 639; *People v. Otis*, 74 Ill. 384.

In *Illinois* it is held that an advertisement of delinquency is not rendered ineffective by virtue of an error in reciting the date of the assessment where the taxpayer is not misled and the number of the assessment warrant is given. *Young v. People*, 155 Ill. 247.

**Waiver of Defects.**—Where the taxpayer appears and combats the entry of judgment for delinquent taxes he waives defects as to publication and notice. *Cairo, etc., R. Co. v. Mathews*, 152 Ill. 153; *Karnes v. People*, 73 Ill. 279; *Chicago, etc., R. Co. v. People*, 155 Ill. 276; *Young v. People*, 155 Ill. 247.



record, the record must be made at the proper juncture,<sup>1</sup> and if it be silent as to a material fact, parol evidence is inadmissible to show that the required steps were in fact taken.<sup>2</sup>

**d. MEANS OF INDUCING PAYMENT**—(1) *Abatements Allowed*.—The proper steps having been taken to clothe the collector with authority to receive the taxes and, if need be, to resort to legal process in order to enforce their payment, we must, as preliminary to the subject of compulsory collection, notice certain means adopted by law to induce payment. The least important of these is the allowance of a discount or abatement from the tax bill upon prompt payment or payment before a specified date.<sup>3</sup>

(2) *Imposition of Interest*.—The next step intended to stimulate the public into making timely and voluntary payment is the provision for the imposition of interest where payment is delayed until after the time fixed by law. Taxes, being mere statutory impositions, do not bear interest at common law.<sup>4</sup> Nor do statutes providing for interest on debts, contracts, and judgments apply to taxes,<sup>5</sup> but the revenue laws of nearly all the states allow interest on overdue taxes. This is, of course, collectible as part of the tax itself.<sup>6</sup>

**Certificate of Publication** not admissible in evidence unless properly filed. *McChesney v. People*, 174 Ill. 46. See also *Colvin v. People*, 166 Ill. 82.

**When Proof May Be Filed**.—See *Church v. Noster*, 126 Mich. 547.

The absence of venue in the affidavit to the certificate of publication is not fatal to its validity. *Bass v. People*, 159 Ill. 207. But see as to affidavits to the list of delinquents, *Thompson v. Burhans*, 61 N. Y. 52.

1. **Time of Making Record**.—*Kepley v. Fouke*, 187 Ill. 162.

2. *Martin v. Barbour*, 34 Fed. Rep. 701, 140 U. S. 639. But see *McChesney v. People*, 178 Ill. 542.

3. **Abatements Allowed**.—*Lee v. Templeton*, 13 Gray (Mass.) 476; *Sprague v. Bailey*, 19 Pick. (Mass.) 436; *Ridgway v. O'Neill*, 49 Pa. St. 174.

Payment of taxes within the time prescribed for the allowance of a discount has been held to be a voluntary payment, and the amount cannot be recovered though it be actually paid under protest. *Lee v. Templeton*, 13 Gray (Mass.) 476.

**Discounts on Property Tax but Not on Polls**.—A discount may be allowed on property without allowing a like discount on polls, but discriminations and partiality among the different taxpayers would be unauthorized. *Tobey v. Wareham*, 2 Allen (Mass.) 594; *Ridgway v. O'Neill*, 49 Pa. St. 174.

**Discrimination**.—In a state where railroad property is assessed by a method altogether distinct from that applied to taxes on any other property, it has been held permissible to allow a discount to taxpayers at large which is not granted to the railroads. *Louisville, etc., R. Co. v. Louisville*, (Ky. 1895) 29 S. W. Rep. 865; *Kentucky Railroad Tax Cases*, 115 U. S. 321.

4. **Imposition of Interest**.—*Perry County v. Selma, etc., R. Co.*, 65 Ala. 391; *Perry v. Washburn*, 20 Cal. 350; *People v. Reis*, 76 Cal. 269; *State v. Southwestern R. Co.*, 70 Ga. 11; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *Kentucky Cent. R. Co. v. Pendleton County*, (Ky. 1886) 2 S. W. Rep. 176; *Dupuy's Succes-*

*sion*, 33 La. Ann. 258; *Danforth v. Williams*, 9 Mass. 324; *Camden v. Allen*, 26 N. J. L. 399; *Western Union Tel. Co. v. State*, 55 Tex. 314; *Snaw v. Peckett*, 26 Vt. 482.

5. *Illinois Cent. R. Co. v. Adams*, 78 Miss. 895.

But interest may be charged even upon a penalty itself where there has been a settlement and the law provides for interest on "balances." *Com. v. Cooke*, 50 Pa. St. 201.

6. **Interest Collected as Part of Tax**.—*Murray v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 282; *Hartford v. Hills*, 72 Conn. 599; *Carrington v. People*, 195 Ill. 484; *Bristol v. Chicago*, 22 Ill. 587; *Webster v. Auditor Gen.*, 121 Mich. 668; *U. S. Trust Co. v. Territory*, 10 N. Mex. 416; *Myers v. Park*, 8 Heisk. (Tenn.) 550.

If no time is fixed for the accrual of interest, it runs from expiration of the time allowed for payment. *Harrison v. U. S.*, 20 Ct. Cl. 175.

**Rate**.—Where no rate of interest is specified taxes are to bear the lawful rate under the general law rather than a higher rate permitted upon other taxes. *Swinney v. Beard*, 71 Ill. 27; *Wilmington v. Cronly*, 122 N. Car. 383, 388.

**Interest After Judgment Only**.—*Illinois Cent. R. Co. v. Adams*, 78 Miss. 895; *Wheeling, etc., R. Co. v. Wolfe*, 7 Ohio Cir. Dec. 201; *McCombs v. Rockport*, 14 Tex. Civ. App. 560.

**Interest After Demand and Notice Only**.—*Com. v. Western Union Tel. Co.*, 2 Dauph. Co. Rep. (Pa.) 40; *Com. v. Standard Oil Co.*, 101 Pa. St. 119.

**Delay Incident to Litigation**.—Time lost in litigating against a tax has been counted in determining whether interest shall be added, even though the litigation end in a partial reduction of the tax. *Winnipiseogee Lake Cotton, etc., Mfg. Co. v. Gilford*, 64 N. H. 514; *Western Union Tel. Co. v. State*, 64 N. H. 265. But where the penalty attaches after sale and the sale is enjoined the penalty cannot attach while the injunction lasts. *Challiss v. Baker*, 12 Kan. 253.

**Default Necessary**.—Interest cannot be recovered where there is no default. *e. g.*, where the state auditor should assess and send out notice but fails to do so. *Lake Shore, etc., R. Co. v. People*, 46 Mich. 193.

(3) *Imposition of Penalties.*—The duty of the resident and owner of property to pay his taxes is still further sanctioned by impositions,<sup>1</sup> or, as they are commonly called, penalties,<sup>2</sup> enuring usually to the benefit of the state, county, or other taxing authority.<sup>3</sup> They are imposed for nonpayment, or as a punishment for fraud or evasion in making returns,<sup>4</sup> or for failure to take out a license.<sup>5</sup> The imposition of penalties is a legitimate means of collecting revenue, and the power is incident to the due exercise of the taxing power.<sup>6</sup> Hence, though they may not be imposed unless clearly authorized by statute, penalties are not viewed by the courts with any special disfavor.<sup>7</sup>

*Penalty in Form of Interest.*—Penalties are often disguised under the name of interest.<sup>8</sup> Sometimes what is really interest is called a penalty, but where this is done the so-called penalty must be limited to the lawful rate of interest,<sup>9</sup> and is controlled by principles applicable to interest.<sup>10</sup>

*Penalty as Part of Tax.*—The penalty attaches to the tax and becomes a part of it,<sup>11</sup> though not in such sense as to cause the taxes so penalized to violate the principle of uniformity, nor in such sense as to cause the increased sum of tax and penalty to exceed a constitutional limit.<sup>12</sup> The penalty, like the costs of the suit,<sup>13</sup> may be collected by the same means as the tax to which it attaches;<sup>14</sup> and a penalty cannot be recovered at all where no judgment can

Interest is not chargeable where there is a fixed statutory penalty covering the same period. *People v. Gold*, etc., Tel. Co., 98 N. Y. 67.

1. *High v. Shoemaker*, 22 Cal. 363.

2. *Imposition of Penalties—United States—U. S. v. Brooklyn City*, etc., R. Co., 14 Fed. Rep. 284.

*Arkansas.*—*Worthen v. Badgett*, 32 Ark. 496.

*California.*—*High v. Shoemaker*, 22 Cal. 363.

*Illinois.*—*Bristol v. Chicago*, 22 Ill. 587.

*Iowa.*—*Cedar Rapids*, etc., R. Co. v. *Carroll County*, 41 Iowa 153; *Burlington v. Burlington*, etc., R. Co., 41 Iowa 134.

*Louisiana.*—*Slack v. Ray*, 26 La. Ann. 675.

*Michigan.*—*Silsbee v. Stockle*, 44 Mich. 561; *People v. County Treasurer*, 32 Mich. 260; *Lacey v. Davis*, 4 Mich. 140, 66 Am. Dec. 524.

*Nevada.*—*State v. Consolidated Virginia Min. Co.*, 16 Nev. 432; *State v. Huffaker*, 11 Nev. 300.

*New Jersey.*—*State v. Jersey City*, 37 N. J. L. 39; *Durant v. Jersey City*, 37 N. J. L. 271.

*New York.*—*People v. Horn Silver Min. Co.*, 105 N. Y. 76.

*Ohio.*—*Toledo Bridge Co. v. Yost*, 12 Ohio Cir. Dec. 448, 22 Ohio Cir. Ct. 376.

*Pennsylvania.*—*Com. v. Wyoming Valley Canal Co.*, 50 Pa. St. 410.

*Tennessee.*—*State v. Manz*, 6 Coldw. (Tenn.) 557; *Myers v. Park*, 8 Heisk. (Tenn.) 550.

*Vermont.*—*Shaw v. Peckett*, 26 Vt. 482.

*Wisconsin.*—*Wauwatosa v. Gunyon*, 25 Wis. 271.

3. As between the state and county the penalty should be divided in the same proportion as the taxes. *State v. Huffaker*, 11 Nev. 300. See also *Lake County v. Sulphur Bank Quicksilver Min. Co.*, 68 Cal. 14.

Sometimes the penalty imposed on the delinquent taxpayer goes to an individual, as, for instance, the purchaser at a tax sale. See *Silsbee v. Stockle*, 44 Mich. 561.

4. *Evasion and Fraud.*—*U. S. v. Brooklyn City*, etc., R. Co., 14 Fed. Rep. 284; *Louisville*, etc., R. Co. v. *Com.*, 85 Ky. 198; *Com. v. Cooke*,

50 Pa. St. 201; *Com. v. Wyoming Valley Canal Co.*, 50 Pa. St. 410.

5. *State v. Manz*, 6 Coldw. (Tenn.) 557.

6. *Power to Impose Penalty.*—*Burlington v. Burlington*, etc., R. Co., 41 Iowa 134; *Slack v. Ray*, 26 La. Ann. 674; *State v. Jersey City*, 37 N. J. L. 39.

But in *Georgia* it has been held that municipal authority cannot impose a penalty for the nonpayment of taxes unless the authority is expressly given, a decision based on the ground that the proper remedy is by distress. *Augusta v. Dunbar*, 50 Ga. 387. See, to similar effect, *Ankeny v. Henningsen*, 54 Iowa 29.

7. *Craig v. Flanagan*, 21 Ark. 319.

"Justice to the prompt taxpayers as well as the spirit of our legislation and the dictates of a sound public policy alike require that the courts should rigidly enforce all lawful remedies against wilful delinquents." *McFarland, J.*, in *State v. Duncan*, 3 Lea (Tenn.) 691.

8. *Interest Imposed as a Penalty.*—*Litchfield v. Webster County*, 101 U. S. 773; *People v. Peacock*, 98 Ill. 172; *Bristol v. Chicago*, 22 Ill. 587; *Cedar Rapids*, etc., R. Co. v. *Carroll County*, 41 Iowa 153; *Woolley v. Louisville*, (Ky. 1903) 71 S. W. Rep. 893.

9. *Silsbee v. Stockle*, 44 Mich. 561.

10. *Litchfield v. Webster County*, 101 U. S. 773.

11. *Penalty Becomes Part of the Tax.*—*Kansas Pac. R. Co. v. Amrine*, 10 Kan. 318; *Butler v. Bailly*, 2 Bay (S. Car.) 244. *Contra*, *Ryan v. State*, 5 Neb. 276.

"When prescribed in the case of delinquent taxes they become a part thereof, and are collected in the same manner as the taxes themselves. They are regarded in the same light as interest imposed by law on contracts, which becomes a part of the debt and is collected with it, as a part of it." *Burlington v. Burlington*, etc., R. Co., 41 Iowa 142.

12. *Chicago*, etc., R. Co. v. *Hartshorn*, 30 Fed. Rep. 541; *Tobin v. Hartshorn*, 69 Iowa 648.

13. *People v. Todd*, 23 Cal. 181.

14. *Collectible with the Tax.*—*High v. Shoemaker*, 22 Cal. 363; *Bristol v. Chicago*, 22 Ill.

be had for the tax itself.<sup>1</sup> As a penalty can be collected with the tax and as taxes are often collected by summary process, it follows that penalties imposed in the collection of taxes are apparently an exception to the rule that penalties can be enforced only by due process of law. Hence it has been said that the imposition of an additional burden when taxes become overdue is not a penalty at all, being merely a means of inducing prompt payment.<sup>2</sup>

**Constitutionality.** — Provisions for the imposition of penalties upon delinquent taxpayers who have been given due notice are everywhere sustained as constitutional.<sup>3</sup> But before a penalty can be enforced it is necessary that the entire tax itself should be legal and that the taxpayer should have an opportunity to pay and should be in default in his legal duty.<sup>4</sup> Hence, if part of the tax has not been lawfully levied,<sup>5</sup> or if it is in part excessive,<sup>6</sup> or otherwise illegal,<sup>7</sup> or if the property has escaped assessment,<sup>8</sup> no penalty attaches even to so much of the tax as is good. It has been said that the penalty should be reasonable in amount;<sup>9</sup> but the matter seems to be one of pure legislative discretion. Heavy penalties, amounting sometimes to more than one hundred per cent. of the tax, have been imposed without judicial interference.<sup>10</sup> A court of equity may enjoin the enforcement of a penalty where the state or other party entitled is in default and not entitled by reason of laches to insist upon it, or is in equity estopped to do so.<sup>11</sup> A penalty not equally and

587; *Hancock County v. State*, 119 Ind. 473; *Burlington v. Burlington, etc.*, R. Co., 41 Iowa 134; *Kansas Pac. R. Co. v. Amrine*, 10 Kan. 318; *Baker v. Kelley*, 11 Minn. 480; *State v. Huffaker*, 11 Nev. 300; *Matter of Nichols*, 54 N. Y. 62; *Nance v. Hopkins*, 10 Lea (Tenn.) 508.

1. **Dependent on Validity of Tax.** — *San Bernardino County v. Southern Pac. R. Co.*, 118 U. S. 417; *Savannah, etc.*, R. Co. v. Morton, 71 Ga. 24; *State v. St. Louis, etc.*, R. Co., 71 Mo. 88; *Shaw v. Peckett*, 26 Vt. 482.

2. *High v. Shoemaker*, 22 Cal. 363.

3. **Constitutionality** — *United States*. — *Sharp-leigh v. Surdam*, 1 Flipp. (U. S.) 472; *De Treville v. Smalls*, 98 U. S. 517.

*Arkansas*. — *Scott v. Watkins*, 22 Ark. 556; *Worthen v. Badgett*, 32 Ark. 496.

*California*. — *People v. Seymour*, 16 Cal. 332, 76 Am. Dec. 521; *Dougherty v. Henarie*, 47 Cal. 9.

*Georgia*. — *Weaver v. State*, 89 Ga. 639.

*Illinois*. — *Bristol v. Chicago*, 22 Ill. 587; *Scammon v. Chicago*, 44 Ill. 278; *People v. Smith*, 94 Ill. 226; *McCheaney v. People*, 99 Ill. 219.

*Iowa*. — *Burlington v. Burlington, etc.*, R. Co., 41 Iowa 134; *Ankeny v. Henningsen*, 54 Iowa 31.

*Louisiana*. — *Slack v. Ray*, 26 La. Ann. 674; *Morrison v. Larkin*, 26 La. Ann. 701.

*Missouri*. — *St. Louis v. Sternberg*, 69 Mo. 303; *State v. Moss*, 69 Mo. 495.

*Nevada*. — *State v. Consolidated Virginia Min. Co.*, 16 Nev. 432.

*New York*. — *Matter of Nichols*, 54 N. Y. 62.

*North Carolina*. — *State v. Cohen*, 84 N. Car. 771.

*South Carolina*. — *State v. Hayne*, 4 S. Car. 403; *Ex p. Lynch*, 16 S. Car. 32.

*Tennessee*. — *M'Carroll v. Weeks*, 5 Hayw. (Tenn.) 246; *Myers v. Park*, 8 Heisk. (Tenn.) 550; *Nance v. Hopkins*, 10 Lea (Tenn.) 508.

In *Scammon v. Chicago*, 44 Ill. 269, the *Illinois* court came near holding that the imposi-

tion of a penalty for failure to pay by a certain day was violative of a constitutional provision securing uniformity of taxation, but on rehearing placed the decision in that case on the ground that the taxpayer had no chance to be heard.

It has been suggested that the legality of the penalty is more doubtful where it enures to the benefit of an individual, *e. g.*, a purchaser at a tax sale, rather than the state. *Silsbee v. Stockle*, 44 Mich. 561. But this view is not generally held. *Craig v. Flanagan*, 21 Ark. 319; *Mulligan v. Hintrager*, 18 Iowa 171; *Challiss v. Baker*, 12 Kan. 254.

4. **Necessity for Default.** — *Michigan Cent. R. Co. v. Slack, Holmes* (U. S.) 231; *State v. St. Louis, etc.*, R. Co., 71 Mo. 88.

5. **Illegal Tax.** — *Lake Shore, etc.*, R. Co. v. People, 46 Mich. 193.

6. **Excessive Tax.** — *Pike v. Cummings*, 36 Ohio St. 213. *Contra*, *Winnipiseogee Lake Cotton, etc.*, Mfg. Co. v. Gilford, 64 N. H. 514; *Western Union Tel. Co. v. State*, 64 N. H. 265.

7. *Redwood County v. Winona, etc.*, Land Co., 40 Minn. 512.

8. **No Assessment.** — *Brown County v. Winona, etc.*, Land Co., 39 Minn. 380; *Redwood County v. Winona, etc.*, Land Co., 40 Minn. 512.

9. **Amount of Penalty.** — *Litchfield v. Webster County*, 101 U. S. 773; *Lacey v. Davis*, 4 Mich. 140, 66 Am. Dec. 524.

10. **Matter of Pure Legislative Discretion.** — *Scott v. Watkins*, 22 Ark. 556; *Pope v. Macon*, 23 Ark. 644; *Mulligan v. Hintrager*, 18 Iowa 171; *Louisville, etc.*, R. Co. v. Com., 85 Ky. 198; *Butler v. Bailey*, 2 Bay (S. Car.) 244; *Ex p. Lynch*, 16 S. Car. 35; *State v. Manz*, 6 Coldw. (Tenn.) 557; *Nance v. Hopkins*, 10 Lea (Tenn.) 508; *Potts v. Cooley*, 56 Wis. 45.

11. **Injunction Against Penalty.** — *Litchfield v. Webster County*, 101 U. S. 773; *Stryker v. Polk County*, 22 Iowa 137; *Litchfield v. Hamilton County*, 40 Iowa 66; *Cedar Rapids, etc.*, R. Co. v. Carroll County, 41 Iowa 153. See also *Savannah, etc.*, R. Co. v. Morton, 71 Ga. 24.

uniformly imposed upon all persons in the same class is, of course, vicious;<sup>1</sup> but it has been held that it does not violate the principle of uniformity to allow supervisors to remit penalties already accrued.<sup>2</sup>

**Construction.** — In conformity with the principles applicable to penalties in general, statutes penalizing the nonpayment of taxes are strictly construed<sup>3</sup> and are not given a retroactive effect<sup>4</sup> so as to attach to taxes already levied. But they will attach to taxes already authorized but not levied.<sup>5</sup> When an act imposing a penalty is repealed the penalty is gone, though the statute expressly reserves to the state all taxes accruing or accrued under the repealed law,<sup>6</sup> unless the penalty be also saved;<sup>7</sup> nor will the reimposition of the tax revive the penalty.<sup>8</sup> So, where the penalty, but not the tax, is barred by limitation, a new penalty cannot be attached for the period covered by the old penalty.<sup>9</sup> The same power which imposes a penalty may release it.<sup>10</sup> Nor does such an exercise of legislative authority impair the obligation of a contract, even though, under the act imposing the penalty, it becomes part of the emolument of the collector.<sup>11</sup>

(4) **Restriction of Rights.** — Penalties imposed on delinquent taxpayers not infrequently take the form of restrictions upon the exercise of rights. Thus, provision is often made, by constitution or by statute, that the payment of taxes, particularly of the poll tax for the current or preceding year, shall be a condition precedent to the existence of a right to vote.<sup>12</sup> Similar restrictions are sometimes found in connection with the exercise of rights incident to ownership. Thus, it has been enacted that conveyances shall not be recorded,<sup>13</sup> nor suit maintained on a chose in action, or debt,<sup>14</sup> nor judgment had in actions for the recovery of real property sold for taxes,<sup>15</sup> unless the tax due to the state in respect to the conveyance or subject matter of the suit has been paid and such payment proved in the proper manner. So, also, in some states, it is required that one who would question the validity of a tax must first pay it under protest and then sue to recover it, thus forcing the taxpayer to take the initiative in establishing the invalidity of the tax instead of compelling the state to establish its claim.<sup>16</sup> Such statutes are sustainable only

1. **Non-uniformity.** — *Atlanta, etc., R. Co. v. Wright*, 87 Ga. 487; *State v. Consolidated Virginia Min. Co.*, 16 Nev. 432; *State v. Whittlesey*, 17 Wash. 447.

2. *Beecher v. Webster County*, 50 Iowa 538.

3. **Strict Construction.** — *Erskine v. Milwaukee, etc., R. Co.*, 94 U. S. 619; *Elliott v. East Pennsylvania R. Co.*, 99 U. S. 573. See generally the title **STATUTES**, vol. 26, p. 657 *et seq.*

4. **Not Retroactive.** — *People v. Thatcher*, 95 Ill. 109; *People v. Peacock*, 98 Ill. 172; *Biggins v. People*, 106 Ill. 270; *Galusha v. Wendt*, 114 Iowa 597; *Brown County v. Winona, etc., Land Co.*, 39 Minn. 380; *Redwood County v. Winona, etc., Land Co.*, 40 Minn. 512; *Ryan v. State*, 5 Neb. 276; *State v. Jersey City*, 37 N. J. L. 39; *Drexel v. Com.*, 46 Pa. St. 37; *Fowler v. Fairchild*, 3 Wash. 747. See the title **STATUTES**, vol. 26, p. 692 *et seq.*

5. **Tax Authorized to Be Levied.** — *Durant v. Jersey City*, 37 N. J. L. 271. The same rule applies to statutes imposing interest. *Dougherty v. Henarie*, 47 Cal. 9.

6. **Repeal of Penalty — Reservation of Tax.** — *Snell v. Campbell*, 24 Fed. Rep. 880; *Anding v. Levy*, 57 Miss. 51, 34 Am. Rep. 435; *State v. Jersey City*, 37 N. J. L. 39; *Com. v. Standard Oil Co.*, 101 Pa. St. 119.

7. **Penalty Saved.** — *Chicago, etc., R. Co. v. Hartshorn*, 30 Fed. Rep. 541; *Bartruff v.*

*Remsey*, 15 Iowa 257; *Burlington v. Burlington, etc., R. Co.*, 41 Iowa 134; *Cedar Rapids, etc., R. Co. v. Carroll County*, 41 Iowa 190; *Tobin v. Hartshorn*, 69 Iowa 648.

8. **Penalty Not Revived by Revival of Tax.** — *State v. Jersey City*, 37 N. J. L. 39.

9. *Louisville, etc., R. Co. v. Com.*, 85 Ky. 198.

10. **Release of Penalty.** — *Snell v. Campbell*, 24 Fed. Rep. 880. *Aliter*, as to the taxes themselves. *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56.

11. **Right of Collector to Penalty Not a Contract.** — *Beecher v. Webster County*, 50 Iowa 538; *Wheatley v. Covington*, 11 Bush (Ky.) 18.

12. **Right to Vote.** — *Griffin v. Rising*, 11 Met. (Mass.) 339; *Ratliff v. Beale*, 74 Miss. 247; *Patterson v. Barlow*, 60 Pa. St. 54; *In re Questions, etc.*, 2 Brews. (Pa.) 138.

13. *State v. Ramsey County*, 26 Minn. 521.

14. *Lott v. Dysart*, 45 Ga. 355; *Greene v. Lowry*, 46 Ga. 55.

**Construction.** — Such an act is to be liberally construed in favor of the taxpayer. *Redwine v. Hancock*, 45 Ga. 364.

15. **Restriction of Right to Sue.** — *Tharp v. Hart*, 2 Sneed (Tenn.) 569; *Burrow v. Smith*, 2 Sneed (Tenn.) 566; *Taylor v. Burdett*, 11 Leigh (Va.) 347.

16. *Louisville, etc., R. Co. v. State*, 8 Heisk. (Tenn.) 805.

as revenue measures,<sup>1</sup> and a requirement that the owner of land sold for taxes should deposit double the amount of the purchase money before being allowed to prosecute or defend a suit against the purchaser has been held unconstitutional as imposing an unreasonable hardship upon the right to legal redress.<sup>2</sup> Further illustrations of penalizing delinquency in the payment of taxes by imposing restrictions on rights are found in the provisions of the federal revenue laws requiring documents to be stamped as a condition precedent to their admissibility as evidence, and in statutes enacted in many states requiring nonresident corporations to pay taxes to the state as a condition precedent to the right to do business therein. Both these subjects are fully treated elsewhere in this work.<sup>3</sup>

**c. COLLECTION WITHOUT PROCESS**—(1) *Private Person as Collector*.—In addition to voluntary payment, and payment induced by discounts and by the imposition of penalties, taxes are sometimes collected indirectly and without process by placing the duty to pay the tax on those, not owners, who happen to have lawful possession or control of the property taxed, or who are placed in such position for the purpose of collecting the tax. Executors and administrators,<sup>4</sup> receivers,<sup>5</sup> banks,<sup>6</sup> trustees,<sup>7</sup> and debtors,<sup>8</sup> are among the persons who are thus used as a convenient means of collecting taxes on funds in their keeping or subject to their control. In case of banks the duty of paying taxes due from individual shareholders in respect of their stock is commonly imposed upon the bank itself, thus leaving it to be reimbursed by deducting the amount paid from the dividends.<sup>9</sup> Companies operating grain elevators,<sup>10</sup> and distillers,<sup>11</sup> having the possession of grain and liquor belonging to others, are further illustrations of persons who are required to pay the tax on such goods and reimburse themselves by charging it to the owner and col-

1. *Lott v. Dysart*, 45 Ga. 355.

The taxpayer cannot take advantage of his own default and dismiss his action on the ground that the tax has not been paid, in order to escape judgment upon a set-off. *Scruggs v. Gibson*, 45 Ga. 509.

2. **Unreasonable Restriction of Right to Sue**.—*Stoudenmire v. Brown*, 48 Ala. 699; *Whitworth v. Anderson*, 54 Ala. 33; *Lassitter v. Lee*, 68 Ala. 287; *Wilson v. McKenna*, 52 Ill. 43; *Reed v. Tyler*, 56 Ill. 288; *Senichka v. Lowe*, 74 Ill. 274; *Conway v. Cable*, 37 Ill. 82, 87 Am. Dec. 240; *Curry v. Hinman*, 11 Ill. 420. *Compare Weller v. St. Paul*, 5 Minn. 95.

3. See title **REVENUE LAWS**, vol. 24, pp. 934-935, also title **FOREIGN CORPORATIONS**, vol. 13, pp. 860-865.

4. **Private Person as Collector**.—*Gallup v. Schmidt*, 154 Ind. 196; *Nelson v. Becker*, 63 Minn. 61; *Millett v. Early*, 16 Neb. 266; *Matter of Post*, 5 N. Y. App. Div. 113; *Wolf v. Geoffroy*, 16 Ohio St. 219.

**When Liability Attaches to Executor**.—See *Nelson v. Becker*, 63 Minn. 61.

**As to Mode of Proceeding**, see *State v. Tittmann*, 103 Mo. 553.

**As to Time of Proceeding**, see *Gallup v. Schmidt*, 154 Ind. 196.

5. **Receivers**.—*McRae v. Bowers Dredging Co.*, 90 Fed. Rep. 360; *Palmer v. Pettingill*, 6 Idaho 346; *Covington Gas-light Co. v. Covington*, 84 Ky. 95; *Treasurer v. Dale*, 60 Ohio St. 180.

6. **Banks**.—*McVeagh v. Chicago*, 49 Ill. 318; *State v. Mayhew*, 2 Gill (Md.) 487; *Barney v. State*, 42 Md. 480; *Eyke v. Lange*, 90 Mich. 592.

7. *Com. v. Lehigh Valley R. Co.*, 129 Pa. St. 452.

8. *U. S. v. Baltimore, etc., R. Co.*, 17 Wall. (U. S.) 322.

Debtors who pay the tax due from their creditor in respect to the debt are entitled to credit therefor, although the contract expressly provides that the sum stipulated shall be paid with interest "without any deduction, defalcation, or abatement, for any taxes, charges, or assessments whatever." *Haight v. Pittsburgh, etc., R. Co.*, 6 Wall. (U. S.) 15, *affirming* 1 Abb. (U. S.) 81, 11 Fed. Cas. No. 5,903.

**Taxes on Railroad Bonds** to be retained out of the interest and paid to state by the corporation officers. *Com. v. North Pennsylvania R. Co.*, 129 Pa. St. 460; *Maltby v. Reading, etc., R. Co.*, 52 Pa. St. 140; *Com. v. Lehigh Valley R. Co.*, 129 Pa. St. 452. *Compare Ottawa Glass Co. v. McCaleb*, 81 Ill. 556.

9. **Deduction of Tax from Dividends**.—*National Bank v. Com.*, 9 Wall. (U. S.) 353; *New Orleans v. Louisiana Sav. Bank, etc., Co.*, 31 La. Ann. 826; *Aberdeen First Nat. Bank v. Chehalis County*, 6 Wash. 64. *Compare Ottawa Glass Co. v. McCaleb*, 81 Ill. 556.

**Mandamus Will Lie Against the Bank** to enforce the duty, *State v. Mayhew*, 2 Gill (Md.) 487; *Barney v. State*, 42 Md. 480; unless the statutory remedy is sufficient. *Eyke v. Lange*, 90 Mich. 592. *Compare McVeagh v. Chicago*, 49 Ill. 318.

10. **Elevator Companies**.—*Walton v. Westwood*, 73 Ill. 125; *Lockwood v. Johnson*, 106 Ill. 336; *Minneapolis, etc., Elevator Co. v. Traill County*, 9 N. Dak. 213.

11. **Distillers**.—*Com. v. Gaines*, 80 Ky. 489;

lecting from him. So resident agents are often required to pay taxes owing by nonresidents in respect to the property under their control.<sup>1</sup>

(2) *Property in Legal Custody—Retention of Tax.*—When property is in legal custody it cannot of course be seized by distress or taken in execution. In such case the court having jurisdiction of it will direct the payment of the taxes without the formal institution of any proceedings,<sup>2</sup> and, of course, collectors themselves who happen to have possession of funds of the taxpayer available for the payment of the taxes should retain to the extent of the charge.<sup>3</sup> But such a right of retention is only a cumulative remedy.<sup>4</sup> Receivers have sometimes been appointed for the sole purpose of collecting taxes from a delinquent corporation. This is proper where the continued operation of the corporation is essential to the public convenience and welfare. Thus, a city waterworks plant, being affected with a public use, cannot be seized and sold;<sup>5</sup> hence a receiver may be appointed if its officers fail to pay the tax.<sup>6</sup>

*f. COMPULSORY COLLECTION—(1) In General.*—The revenue laws of the several states provide for the compulsory collection of taxes in divers ways. These may be resolved into two principal modes of procedure. One is by summary process against person or property; the other is by action at law.<sup>7</sup>

(a) *Legislative Regulation of Remedy.*—A general truth underlying compulsory collection is that the whole subject is dependent entirely upon the will of the legislature.<sup>8</sup> It may adopt as many or as few means of collecting its revenue as it sees fit.<sup>9</sup> It may change those already in vogue and put more rigorous measures into effect,<sup>10</sup> but pending proceedings will be governed by the pre-existing law unless the contrary is provided,<sup>11</sup> and the repeal of a law levying taxes will not ordinarily take away the right to collect taxes already accrued, since the repeal will not be given a retroactive effect.<sup>12</sup>

*Monticello Distilling Co. v. Baltimore*, 90 Md. 416; *Fowle v. Kemp*, 92 Md. 630.

1. *Lumber Companies.*—*Palmer v. Corwith*, 3 Pin. (Wis.) 267; *Merrill v. P. B. Champagne Lumber Co.*, 75 Wis. 142; *Spanish River Lumber Co. v. Bay City*, 113 Mich. 181.

2. *Funds in Custodia Legis.*—*Prince George's County v. Clarke*, 36 Md. 206; *Hoglen v. Cohan*, 30 Ohio St. 436. Compare *Smith v. Gatewood*, 3 S. Car. 333.

*Limitations Do Not Run Against Taxes on Funds in Custodia Legis.*—*State v. Tittmann*, 119 Mo. 661.

3. *Retention.*—*Jenkins v. Charleston*, 5 S. Car. 393, 22 Am. Rep. 14.

4. *Cumulative Remedy.*—*Hunt v. Standart*, 15 Ind. 33, 77 Am. Dec. 79.

5. *Waterworks.*—*Louisville Water Co. v. Hamilton*, 81 Ky. 517; *Clark v. Louisville Water Co.*, 90 Ky. 515.

6. *Appointment of Receiver.*—*Covington v. Highlands Dist.*, (Ky. 1902) 68 S. W. Rep. 669; *Covington Gas-light Co. v. Covington*, 84 Ky. 95.

7. As to the collection of taxes by actions at law, see the title TAXATION, ENCYC. OF PL. AND PR., vol. 21, pp. 380-426.

8. *Legislative Power over Remedy.*—*Cowles v. Brittain*, 2 Hawks, (9 N. Car.) 204; *Hagar v. Yolo County*, 47 Cal. 222.

9. *Pritchard v. Madren*, 24 Kan. 487.

10. *Change of Remedy.*—*Edwards v. Williamson*, 70 Ala. 145; *Cowgill v. Long*, 15 Ill. 203; *Hosmer v. People*, 96 Ill. 58; *Biggins v. People*, 106 Ill. 270; *Pritchard v. Madren*, 24

Kan. 487; *Aplin v. Reynolds*, 83 Mich. 471; *State v. Heman*, 70 Mo. 441; *In re Elizabeth*, 49 N. J. L. 488; *Spokane County v. Northern Pac. R. Co.*, 5 Wash. 89.

11. *Change of Remedy Not Retroactive and Does Not Affect Pending Proceedings—Alabama.*—*State v. Sloss*, 83 Ala. 93.

*California.*—*Oakland v. Whipple*, 44 Cal. 303; *People v. Latham*, 53 Cal. 386.

*Idaho.*—*People v. Moore*, 1 Idaho 662.

*Illinois.*—*Karnes v. People*, 73 Ill. 274; *Hosmer v. People*, 96 Ill. 58.

*Louisiana.*—*New Orleans v. Day*, 29 La. Ann. 416; *New Orleans v. Rhenish Westphalian Lloyds*, 31 La. Ann. 784.

*Maine.*—*State v. Waterville Sav. Bank*, 68 Me. 519.

*Mississippi.*—*Brigins v. Chandler*, 60 Miss. 862.

*Missouri.*—*State v. Shepherd*, 74 Mo. 310; *State v. Tufts*, 108 Mo. 418.

*Nevada.*—*Fitch v. Elko County*, 8 Nev. 271.

*Oregon.*—*Smith v. Kelly*, 24 Oregon 464.

*Pennsylvania.*—*Pacific, etc., Tel. Co. v. Com.*, 66 Pa. St. 70.

*Washington.*—*Spokane County v. Northern Pac. R. Co.*, 5 Wash. 89.

*New Remedy Applicable to Taxes Already Accrued.*—*Biggins v. People*, 106 Ill. 270; *York v. Goodwin*, 67 Me. 260.

12. *Repeal of Taxes Not Retroactive.*—*State v. Sloss*, 83 Ala. 93; *Oakland v. Whipple*, 44 Cal. 303; *State v. Waterville Sav. Bank*, 68 Me. 515; *Belvidere v. Warren Co.*, 34 N. J. L. 193; *Smith v. Kelly*, 24 Oregon 464; *Clegg v. State*, 42 Tex.

(b) **Statutory Remedy Exclusive.** — The special means of collection provided by statute are usually ample, and often seemingly contemplate that no other remedies shall be pursued.<sup>1</sup> Accordingly the courts have shown little disposition to bring the general principles of common law or equity to the assistance of the taxing power in collecting its revenue. Thus, although a remedy by action may sometimes be allowed by the courts when no statutory method is expressly authorized,<sup>2</sup> and in rare instances an inadequate statutory remedy may be supplemented by common law, or equity,<sup>3</sup> it is nevertheless generally true that a statutory mode of compulsory collection is exclusive,<sup>4</sup> and where such remedy is provided an action cannot be maintained either at law<sup>5</sup> or in equity<sup>6</sup> to enforce the payment of taxes unless there be a statute expressly to that effect.<sup>7</sup> The doctrine above stated is partly based upon the construction of the revenue laws as a distinct branch of public law, and the consequent implied statutory prohibition upon the use of any other remedy than that specified;<sup>8</sup> and partly perhaps on that aversion to allowing cumulative remedies which is characteristic of the common law. The reason commonly assigned for it, however, is embodied in the proposition that taxes are not debts.<sup>9</sup>

605. And see the title **STATUTES**, vol. 26, pp. 752, 753.

*Contra.* — The repeal of a statute under which taxes are levied puts an end to the right to collect them unless the repealing statute contains a provision preserving the taxes and the right to collect them. *Gorley v. Sewell*, 77 Ind. 317. See also *Mount v. State*, 6 Blackf. (Ind.) 25; *Bleidorn v. Abel*, 6 Iowa 5; *State Revenue Agent v. Hill*, 70 Miss. 106.

1. **Legislative Remedy Exclusive.** — *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 227.

2. **Action Where No Remedy Provided.** — *Merriam v. Moody*, 25 Iowa 163; *Paine v. Spratley*, 5 Kan. 525; *Amite City v. Clementz*, 24 La. Ann. 27; *State v. Severance*, 55 Mo. 378; *Bergen v. Clarkson*, 6 N. J. L. 352; *State v. Williams*, 8 Tex. 384; *Houston, etc., R. Co. v. State*, 39 Tex. 148.

3. **Statutory Lien for Taxes Enforceable in Equity.** — *Perry County v. Selma, etc., R. Co.*, 58 Ala. 546; *Hart v. Tiernan*, 59 Conn. 521; *McInerney v. Reed*, 23 Iowa 410; *Lancaster County v. Trimble*, 34 Neb. 75; *Lancaster County v. Rthsh*, 35 Neb. 119; *Grant v. Bartholomew*, 57 Neb. 673; *New York v. Colgate*, 12 N. Y. 140; *State v. Duncan*, 3 Lea (Tenn.) 679. *Contra*, *Greene County v. Murphy*, 107 N. Car. 36; *McHenry v. Kidder County*, 8 N. Dak. 413.

The lien for taxes is legal in its nature, and must be enforced in the manner provided by the statute. If the statute is defective this is no ground for extending equitable jurisdiction to such a case. *People v. Biggins*, 96 Ill. 481.

4. **Statutory Remedy Exclusive** — *Georgia*. — *State v. Southwestern R. Co.*, 70 Ga. 11.

*Illinois*. — *Biggins v. People*, 96 Ill. 381; *People v. Lee*, 112 Ill. 113.

*Iowa*. — *Cole v. Muscatine*, 14 Iowa 298; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *Crawford County v. Laub*, 110 Iowa 355; *Plymouth County v. Moore*, 114 Iowa 700.

*Kentucky*. — *Johnston v. Louisville*, 11 Bush (Ky.) 527.

*Maine*. — *Packard v. Tisdale*, 50 Me. 376.

*Massachusetts*. — *Crapo v. Stetson*, 8 Met. (Mass.) 393; *Andover, etc., Turnpike Corp. v. Gould*, 6 Mass. 43, 4 Am. Dec. 80; *Macy v. Nantucket*, 121 Mass. 351.

*Michigan*. — *Raynsford v. Phelps*, 43 Mich. 342, 38 Am. Rep. 189.

*Minnesota*. — *Montour v. Purdy*, 11 Minn. 384, 88 Am. Dec. 88; *Faribault v. Misener*, 20 Minn. 396.

*Missouri*. — *Alexander v. Helber*, 35 Mo. 334; *Carondelet v. Picot*, 38 Mo. 125; *State v. Snyder*, 139 Mo. 549.

*Nebraska*. — *Nebraska City v. Nebraska City Hydraulic Gas Light, etc., Co.*, 9 Neb. 339; *Chamberlain v. Woolsey*, (Neb. 1902) 92 N. W. Rep. 181, *affirmed* (Neb. 1903) 95 N. W. Rep. 38.

*New Hampshire*. — *Hibbard v. Clark*, 56 N. H. 158, 22 Am. Rep. 432.

*New Jersey*. — *Camden v. Allen*, 26 N. J. L. 399; *American Glucose Co. v. State*, 43 N. J. Eq. 280.

*North Dakota*. — *McHenry v. Kidder County*, 8 N. Dak. 417.

*South Dakota*. — *Brule County v. King*, 11 S. Dak. 294; *Hanson County v. Gray*, 12 S. Dak. 124.

*Washington*. — *Pierce County v. Merrill*, 19 Wash. 175.

*West Virginia*. — *Board of Education v. Old Dominion Iron Min., etc., Co.*, 18 W. Va. 441.

5. **Action at Law Not Permitted.** — *Baldwin v. Hewitt*, 88 Ky. 673; *Louisville Water Co. v. Com.*, 89 Ky. 244; *Covington v. Highlands Dist.*, (Ky. 1902) 68 S. W. Rep. 669; *Faribault v. Misener*, 20 Minn. 396; *Marye v. Diggs*, 98 Va. 749.

6. **No Bill in Equity Maintainable.** — *Montezuma Valley Water Supply Co. v. Bell*, 20 Colo. 175; *Finnegan v. Fernandina*, 15 Fla. 379, 21 Am. Rep. 292; *Louisville Trust Co. v. Muhlenburg County*, (Ky. 1893) 23 S. W. Rep. 674; *Pierce County v. Merrill*, 19 Wash. 175.

7. **Statutes authorizing actions for the recovery of taxes are to be liberally construed in favor of the maintenance of the action.** *Mason v. Belfast Hotel Co.*, 80 Me. 384.

8. **Construction.** — *Dollar Sav. Bank v. U. S.*, 19 Wall. (U. S.) 239; *Johnston v. Louisville*, 11 Bush (Ky.) 527.

9. **Taxes Not Debts.** — *State v. Southwestern R. Co.*, 70 Ga. 11; *Du Bignon v. Brunswick*, 106 Ga. 317; *Hibbard v. Clark*, 56 N. H. 158, 22 Am. Rep. 432.

Hence an action of debt, it is said, does not lie to recover taxes.<sup>1</sup>

(e) *Contrary Doctrine.* — Recognition of the close analogy between taxes and the *quasi-contractual* duties<sup>2</sup> upon which *indebitatus assumpsit* lies, and the recognition of the fact that taxes are duties imposed by law<sup>3</sup> although not debts in a narrow and technical sense,<sup>4</sup> has had its effect, and a number of American courts have consequently reached a conclusion different from that above indicated. In these jurisdictions it is held that the assessment of taxes creates a legal liability upon which debt or *assumpsit* upon a promise implied by law may be maintained. Hence the statutory remedy in these jurisdictions is not exclusive,<sup>5</sup> and we frequently see the statement in such decisions

1. *Action of Debt Not Maintainable for Recovery of Taxes* — *United States*. — Lane County v. Oregon, 7 Wall. (U. S.) 71; Meriwether v. Garrett, 102 U. S. 472.

Georgia. — Cooper v. Savannah, 4 Ga. 68.

Indiana. — Richards v. Stogsdel, 21 Ind. 74.

Kansas. — Stafford County v. Stafford First Nat. Bank, 48 Kan. 561.

Kentucky. — Turnpike Com'rs v. Louisville, etc., R. Co., (Ky. 1886) 1 S. W. Rep. 671.

Maine. — Packard v. Tisdale, 50 Me. 376.

Massachusetts. — Pierce v. Boston, 3 Met. (Mass.) 520; Crapo v. Stetson, 8 Met. (Mass.) 394.

Michigan. — Detroit v. Jepp, 52 Mich. 458.

Minnesota. — Faribault v. Misener, 20 Minn. 396.

Missouri. — Alexander v. Helber, 35 Mo. 334; Carondelet v. Picot, 38 Mo. 125; State v. Heman, 7 Mo. App. 428.

Nebraska. — Nebraska City v. Nebraska City Hydraulic Gas Light, etc., Co., 9 Neb. 339.

New Hampshire. — Hibbard v. Clark, 56 N. H. 158, 22 Am. Rep. 432.

New Jersey. — Camden v. Allen, 26 N. J. L. 398.

New York. — Durant v. Albany County, 26 Wend. (N. Y.) 66.

North Carolina. — Greene County v. Murphy, 107 N. Car. 36.

Vermont. — Shaw v. Peckett, 26 Vt. 486.

West Virginia. — Board of Education v. Old Dominion Iron Min., etc., Co., 18 W. Va. 441.

**No Remedy at Law.** — It would doubtless be more correct to reverse the proposition above stated and say that taxes are not debts because an action of debt does not lie; since the conclusion that a tax is not a debt is evidently a corollary from the fact that the remedy by an action of debt has never been recognized as a proper one. However this may be, the denial of the right to maintain debt quite effectually closed the courts of common law to actions for the collection of taxes; for taxes are not contractual obligations. Wason v. Bielow, 11 Colo. App. 120; Peirce v. Boston, 3 Met. (Mass.) 520; Gatling v. Carteret County, 92 N. Car. 536, 53 Am. Rep. 432; Webster v. Seymour, 8 Vt. 135; and therefore *assumpsit* cannot by the weight of authority be maintained, Packard v. Tisdale, 50 Me. 376; State v. Yellow Jacket Silver Min. Co., 14 Nev. 220. Neither is case a proper remedy, though this has been suggested. Franklin v. Warwick, etc., Water Co., (R. I. 1902) 52 Atl. Rep. 988. It is perhaps somewhat surprising that *indebitatus assumpsit* was not generally recognized as a proper remedy for the collection of taxes, since,

from an early day, this form of action has been available for the recovery of statutory, official, and customary duties other than taxes. London v. Gorry, 2 Lev. 174, 1 Vent. 298, 3 Keb. 677. Freem. K. B. 433; Barber Surgeons v. Pelson, 2 Lev. 252; Duppa v. Gerrard, 1 Show. 78; Shuttleworth v. Garrett, Comb. 151, 1 Show. 35, 3 Mod. 240. Compare York v. Town, 5 Mod. 444.

In Jonesboro v. M'Kee, 2 Yerg. (Tenn.) 167, it is declared, upon the authority of Blackstone, bk. 3, p. 160, that by becoming a member of a municipal corporation the taxpayer tacitly promises to pay any tax which may be lawfully imposed upon him. But this has been criticised as a refined and ingenious theory; see language of Judge Story in U. S. v. Lyman, 1 Mason, (U. S.) 498, also State v. Yellow Jacket Silver Min. Co., 14 Nev. 220.

2. See dissenting opinion of Beatty, C. J., in State v. Yellow Jacket Silver Min. Co., 14 Nev. 250.

3. **Taxes Are Legal Duties.** — Anniston v. Southern R. Co., 112 Ala. 557.

4. State v. Georgia Co., 112 N. Car. 34. See *supra*, this title, *Definitions and General Principles*.

5. **Statutory Remedy Not Exclusive** — *United States*. — U. S. v. Washington Mills, 2 Cliff. (U. S.) 601; Dollar Sav. Bank v. U. S., 19 Wall. (U. S.) 237; Metcalf v. Robinson, 2 McLean (U. S.) 364; U. S. v. Lyman, 1 Mason (U. S.) 482; Garrett v. Memphis, 5 Fed. Rep. 860.

Alabama. — Perry County v. Selma, etc., R. Co., 58 Ala. 547; Winter v. Montgomery, 79 Ala. 481; Anniston v. Southern R. Co., 112 Ala. 557.

California. — Oakland v. Whipple, 39 Cal. 112.

Iowa. — Dubuque v. Illinois Cent. R. Co., 39 Iowa 56; Burlington v. Burlington, etc., R. Co., 41 Iowa 134.

Louisiana. — Mercier's Succession, 42 La. Ann. 1135.

Maryland. — Baltimore v. Howard, 6 Har. & J. (Md.) 383; Dugan v. Baltimore, 1 Gill & J. (Md.) 499; Eschbach v. Pitts, 6 Md. 71; Appeal Tax Ct. v. Western Maryland R. Co., 50 Md. 275.

Michigan. — Putman v. Fife Lake Tp., 45 Mich. 125.

New Jersey. — Bergen v. Clarkson, 6 N. J. L. 352.

North Carolina. — State v. Georgia Co., 112 N. Car. 34.

Tennessee. — State v. Duncan, 3 Lea (Tenn.) 679; State v. Memphis, etc., R. Co., 14 Lea

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that taxes are debts.<sup>1</sup> Numerous statutory enactments especially authorizing actions for the recovery of taxes have also contributed much to impair what appears to have been originally the true doctrine, and there is perhaps no common-law jurisdiction in which an action in some form and under some conditions may not now be maintained both against the person and property for the recovery of taxes.<sup>2</sup> It is thus seen that there is some direct conflict among the American courts on the question whether an action can, in the absence of statute, be maintained to enforce the payment of taxes. Even in those states, however, where the statutory mode of collection is not exclusive, it is recognized that the remedy specially provided is the normal one and consequently should be exhausted before recourse is had to an action.<sup>3</sup> Such a provision is also found in many of the statutes authorizing a personal action at law,<sup>4</sup> and the exhaustion of personality is everywhere required before a proceeding shall be brought against land.<sup>5</sup>

(d) **Constitutionality of Summary Statutory Remedies.** — In passing upon the validity of statutory proceedings for the collection of taxes the courts recognize the necessity that taxes should be promptly paid,<sup>6</sup> and in determining the bearing of constitutional provisions to the effect that property shall not be taken without due process of law the courts have borne in mind that such provisions were framed in full view of an immemorial practice committing all questions pertaining to the collection of revenue to the legislative department and without any intention radically to change such practice. It is accordingly held that, with us, as in England,<sup>7</sup> the person may be seized and property summarily taken and sold for the payment of taxes under legislative authority.

(Tenn.) 56, 22 Am. & Eng. R. Cas. 201; *Memphis v. Looney*, 9 Baxt. (Tenn.) 130.

1. **Taxes Treated as Debts.** — *Augusta v. Dunbar*, 50 Ga. 387; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *State v. Duncan*, 3 Lea (Tenn.) 685; *Nashville v. Cowan*, 10 Lea (Tenn.) 213; *Rutledge v. Fogg*, 3 Coldw. (Tenn.) 554, 91 Am. Dec. 299; *Marr v. West Tennessee Bank*, 4 Coldw. (Tenn.) 487; *Jonesboro v. M'Kee*, 2 Yerg. (Tenn.) 167. See also dissenting opinion of Strong, J., in *Meriwether v. Garrett*, 102 U. S. 531.

2. **Statutory Allowance of Action at Law.** — *Wason v. Bigelow*, 11 Colo. App. 120; *Durham v. People*, 67 Ill. 414; *Ellis v. People*, 199 Ill. 548; *Twin City Gas Works v. People*, 156 Ill. 387; *Pritchard v. Madren*, 24 Kan. 486; *Greer v. Covington*, 83 Ky. 410; *Covington v. People's Bldg. Assoc.*, (Ky. 1892) 2 S. W. Rep. 323; *Louisville v. Johnson*, 95 Ky. 254; *Illinois Cent. R. Co. v. Adams*, 78 Miss. 895; *State v. Cummings*, 151 Mo. 49; *Alexander v. Helber*, 35 Mo. 334; *McLean v. Myers*, 134 N. Y. 480; *Tripp v. Torrey*, 17 R. I. 359; *Smith v. Clark*, (Va. 1889) 10 S. E. Rep. 4; *Hancock v. Merri-man*, 46 Wis. 159.

In *Louisiana* there is a constitutional provision prohibiting the institution of a suit to enforce the payment of taxes. The sole remedy is by seizure and sale. *Parker v. Southern Bank*, 46 La. Ann. 563.

3. *Greene County v. Murphy*, 107 N. Car. 36.

4. **Statutory Remedy to Be Exhausted Before Action Is Brought.** — *People v. Ballerino*, 99 Cal. 600; *Wason v. Bigelow*, 11 Colo. App. 120; *Doniphan County v. Allen*, 5 Kan. App. 122; *McCallum v. Bethany*, 42 Mich. 457.

It has, however, in some cases been suggested that the remedy by action should not be unnecessarily restricted, and that, where more

convenient and effective, an action can be maintained without previous recourse to the statutory remedy. In other words, the remedies are concurrent. *Anniston v. Southern R. Co.*, 112 Ala. 557; *Greer v. Covington*, 83 Ky. 410; *Lord v. Parker*, 83 Me. 532; *Nalle v. Austin*, (Tex. Civ. App. 1897) 42 S. W. Rep. 780.

Said the Supreme Court of *Montana*, in *Custer County v. Story*, 26 Mont. 517: "The laws of this state provide a summary method of seizure and sale of personal property and sale of realty for enforcing payment of taxes, and also authorize the bringing of a common-law action for the recovery of a personal judgment against the delinquent taxpayer. Neither of these remedies is dependent on the other for its existence or efficiency. The proceeding by action is a remedy in addition only to the others named. But for the statute creating it, the remedy would not exist. The law-making power, having authority to prescribe or withhold altogether a particular remedy, may, in its enactment, invest it with such restrictions as will, in its judgment, best subserve the public good."

5. See *infra*, XV. **Tax Sales — Primary Liability of Personality.**

6. **Necessity for Prompt Payment.** — *State Railroad Tax Cases*, 92 U. S. 575; *Doe v. Deavors*, 11 Ga. 79; *M'Carroll v. Weeks*, 5 Hayw. (Tenn.) 246; *Louisville, etc., R. Co. v. State*, 8 Heisk. (Tenn.) 804.

7. "The nation from whom we inherit the phrase 'due process of law' has never relied upon courts of justice for the collection of her taxes, though she passed through a successful revolution in resistance to unlawful taxation." *Miller, J.*, in *McMillen v. Anderson*, 95 U. S. 41. And see *supra*, this title, **Power of Taxation.**

In other words, summary statutory process for the collection of taxes constitutes due process of law under the American constitutions.<sup>1</sup> Other constitutional questions involved in the various plans adopted for the collection of taxes are viewed from the same standpoint,<sup>2</sup> and, in general, no mode of collection will be held unconstitutional provided the taxpayer be given notice and a chance to be heard<sup>3</sup> at some stage of the proceedings,<sup>4</sup> and this, even though the method prescribed should appear to be harsh, unreasonable, and arbitrary.<sup>5</sup> But, of course, a statute which would wholly take away the right of the taxpayer to appeal to the courts would be of no effect.<sup>6</sup>

(e) *Construction of Statutes Authorizing Summary Proceedings.* — However indulgent the courts may be towards statutory provisions for the collection of taxes on the question of constitutionality, this liberality disappears at once when they come to interpret the particular statutes and to pass upon the validity of acts done in putting them into effect. Thus, while it is true that, in determining

1. *Due Process of Law* — *United States*. — *Greene v. Briggs*, 1 Curt. (U. S.) 311; *Martin v. Mott*, 12 Wheat. (U. S.) 19; *U. S. v. Ferreira*, 13 How. (U. S.) 40; *Murray v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 272; *McMillen v. Anderson*, 95 U. S. 37; *Pearson v. Yewdall*, 95 U. S. 294; *Davidson v. New Orleans*, 96 U. S. 97; *Springer v. U. S.*, 102 U. S. 586; *Kelly v. Pittsburgh*, 104 U. S. 78.

*Kansas*. — *Pritchard v. Madren*, 24 Kan. 486. *Kentucky*. — *Harris v. Wood*, 6 T. B. Mon. (Ky.) 643.

*Michigan*. — *Sears v. Cottrell*, 5 Mich. 251; *Weimer v. Bunbury*, 30 Mich. 201.

*Missouri*. — *Neenan v. Smith*, 50 Mo. 525.

*Nevada*. — *State v. Central Pac. R. Co.*, 21 Nev. 260.

*New York*. — *Taylor v. Porter*, 4 Hill (N. Y.) 146, 40 Am. Dec. 274; *McMahon v. Palmer*, 102 N. Y. 176, 55 Am. Rep. 756; *New York Protestant Episcopal Public School v. Davis*, 31 N. Y. 574.

*South Carolina*. — *State v. Allen*, 2 McCord L. (S. Car.) 55.

*Tennessee*. — *Vanzant v. Waddell*, 2 Yerg. (Tenn.) 260; *Jones v. Perry*, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430; *Louisville, etc., R. Co. v. State*, 8 Heisk. (Tenn.) 805.

See also the title DUE PROCESS OF LAW, vol. 10, p. 287.

Said Ruger, C. J., in *McMahon v. Palmer*, 102 N. Y. 189, 55 Am. Rep. 756: "The proceedings by which taxes for governmental purposes have been assessed, levied, and collected from the citizen have always been regarded as administrative and not judicial in their character, and to constitute due process of law within the meaning of the constitution. Such proceedings have from necessity been exercised by governments during all times, by summary methods of procedure, and to require the deliberation and delay incidental to judicial proceedings in the exercise and enforcement of the taxing power by government would seriously cripple its efficiency, if not destroy its existence. These methods were in exercise and existence long before the adoption of the constitution, and have never been supposed to be affected thereby." See also the opinion of Handy, J., in *Griffin v. Mixon*, 38 Miss. 424.

2. *Constitutionality* — *In General*. — *McMillen v. Anderson*, 95 U. S. 37; *Springer v. U. S.*,

102 U. S. 586; *Kelly v. Pittsburgh*, 104 U. S. 78; *Railroad Tax Cases*, 13 Fed. Rep. 722; *Tift v. Griffin*, 5 Ga. 185; *Harper v. Elberton*, 23 Ga. 566; *Robertson v. State Land Office*, 44 Mich. 274; *Dingey v. Paxton*, 60 Miss. 1038; *State v. Sargeant*, 76 Mo. 557; *Gibson v. Mason*, 5 Nev. 283; *McCarroll v. Weeks*, 5 Hayw. (Tenn.) 246.

3. *Notice and Chance to Be Heard* — *United States*. — *State Railroad Tax Cases*, 92 U. S. 575; *McMillen v. Anderson*, 95 U. S. 41; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701.

*California*. — *Mulligan v. Smith*, 59 Cal. 206. *Illinois*. — *Darling v. Gunn*, 50 Ill. 424.

*Louisiana*. — *New Orleans v. Cannon*, 10 La. Ann. 764.

*Michigan*. — *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535; *Aplin v. Reynolds*, 83 Mich. 471.

*Mississippi*. — *Griffin v. Mixon*, 38 Miss. 424.

*Nevada*. — *State v. Central Pac. R. Co.*, 21 Nev. 260.

*New Jersey*. — *State v. Jersey City*, 24 N. J. L. 662; *State v. Plainfield*, 38 N. J. L. 97.

*New York*. — *Jordan v. Hyatt*, 3 Barb. (N. Y.) 275; *Overing v. Foote*, 65 N. Y. 263; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289.

*Constructive Notice by Publication Enough*. — *New Orleans v. Cannon*, 10 La. Ann. 764; *Matter of De Peyster*, 80 N. Y. 565. But see *Patton v. Green*, 13 Cal. 325.

4. See *Louisville, etc., R. Co. v. State*, 8 Heisk. (Tenn.) 804, where the court sustained a statute requiring those who would question the validity of taxes first to pay the same under protest and then to bring suit against the state for its recovery. Such a remedy was there said to be ample, certain, and sufficiently speedy.

In a proceeding to fix taxes as a charge on land the owner is entitled to be heard before the charge becomes fixed on the land. *Thomas v. Gain*, 35 Mich. 155, 24 Am. Rep. 535.

5. *Arbitrary and Unreasonable Provisions*. — *Sears v. Cottrell*, 5 Mich. 251; *Robertson v. State Land Office*, 44 Mich. 274; *Cowles v. Brittain*, 2 Hawks (9 N. Car.) 204.

6. *Right to Redress*. — *Calhoun v. Fletcher*, 63 Ala. 574; *Aplin v. Reynolds*, 83 Mich. 471; *State v. Central Pac. R. Co.*, 21 Nev. 260. *Compare De Treville v. Smalls*, 98 U. S. 517; *Keely v. Sanders*, 99 U. S. 441; *Allen v. Armstrong*, 16 Iowa 508.

what is required, the statute should receive a reasonable construction,<sup>1</sup> no principle is better established than that which requires strict performance of all the acts required to be done.<sup>2</sup> This is particularly true of steps which are intended for the protection of the taxpayer.<sup>3</sup> In other words, it is often said, statutes providing a summary method for the collection of taxes, being in derogation of common law, must be closely followed.<sup>4</sup> The rule requiring strict conformity to the statutory provisions applies to the officers and servants of the state<sup>5</sup> as well as to those acting under municipal authority,<sup>6</sup> and where the steps taken are such as should appear of record, or among the papers per-

1. **Reasonable Construction.** — *Carville v. Addison*, 62 Me. 459; *King v. Whitcomb*, 1 Met. (Mass.) 328; *Bird v. Perkins*, 33 Mich. 28.

In *Bellows v. Elliot*, 12 Vt. 574, *Williams, C. J.*, said: "In investigating the proceedings under a statute the statute itself should receive a rational and not a forced construction to effect any particular purpose, and we should not be too astute either in finding defects or surmounting them." It seems that the Supreme Court of that state has been more liberal in this respect than others. See further *Spear v. Ditty*, 8 Vt. 419; *Isaacs v. Shattuck*, 12 Vt. 668; *Chandler v. Spear*, 22 Vt. 388; *Harriman v. School Dist. No. 12*, 35 Vt. 311; *Clemons v. Lewis*, 36 Vt. 673. Compare *Mason v. Belfast Hotel Co.*, 89 Me. 384.

The trend of the decisions has been to require substantial performance of the provisions of tax laws, and to import into them nothing that is not required in express terms. *Matter of Veith*, 165 N. Y. 204; *Kane v. Brooklyn*, 114 N. Y. 586; *Ward v. Brooklyn*, 32 N. Y. App. Div. 430, affirmed 164 N. Y. 591.

A more stringent rule is of necessity applied in reference to taxes levied upon the lands of nonresidents, *Thompson v. Burhans*, 61 N. Y. 52; and in proceedings for the sale of lands for taxes where the question of jurisdiction is involved, *Sharp v. Speir*, 4 Hill (N. Y.) 76; *Miller v. Amsterdam*, 149 N. Y. 288; *Matter of Veith*, 165 N. Y. 204.

2. **Strict Conformity with Statutory Provisions** — *United States*. — *Williams v. Peyton*, 4 Wheat. (U. S.) 77; *Thatcher v. Powell*, 6 Wheat. (U. S.) 119; *Early v. Doe*, 16 How. (U. S.) 610.

*Alabama*. — *Lyon v. Hunt*, 11 Ala. 295, 46 Am. Dec. 216; *Scales v. Alvis*, 12 Ala. 617, 46 Am. Dec. 269; *Parker v. Doe*, 20 Ala. 251; *Elliot v. Doe*, 24 Ala. 508; *Gachet v. McCall*, 50 Ala. 307; *Milner v. Clarke*, 61 Ala. 260.

*Arkansas*. — *Pack v. Crawford*, 29 Ark. 489; *Graham v. Parham*, 32 Ark. 676.

*Connecticut*. — *Wilcox v. Gladwin*, 50 Conn. 77.

*Georgia*. — *Dearing v. Charleston Bank*, 5 Ga. 497, 48 Am. Dec. 300; *Barlow v. Sumter County*, 47 Ga. 642.

*Illinois*. — *Allen v. Scott*, 13 Ill. 80; *Chicago v. Rock Island R. Co.*, 20 Ill. 286; *Chicago v. Wright*, 32 Ill. 192; *Charles v. Waugh*, 35 Ill. 315; *Scammon v. Chicago*, 40 Ill. 146; *People v. Otis*, 74 Ill. 384; *Butler v. Nevin*, 88 Ill. 577; *People v. Lee*, 112 Ill. 112.

*Indiana*. — *Veit v. Graff*, 37 Ind. 253; *Gregory v. Wilson*, 52 Ind. 233; *Stevens v. Williams*, 70 Ind. 536.

*Iowa*. — *McGahan v. Carr*, 6 Iowa 331, 71

Am. Dec. 421; *Ankeny v. Henningsen*, 54 Iowa 29.

*Kentucky*. — *Bishop v. Loran*, 4 B. Mon. (Ky.) 116; *M'Call v. Justices*, 1 Bibb (Ky.) 516; *Chiles v. Com.*, 4 J. J. Marsh. (Ky.) 577.

*Maine*. — *Williamsburg v. Lord*, 51 Me. 599. *Massachusetts*. — *Forster v. Forster*, 129 Mass. 561.

*Michigan*. — *Newsom v. Hart*, 14 Mich. 233; *King v. Harrington*, 18 Mich. 213; *Weimer v. Bunbury*, 30 Mich. 201; *Blair v. Compton*, 33 Mich. 414.

*Mississippi*. — *Zecharie v. Bowers*, 1 Smed. & M. (Miss.) 584, 40 Am. Dec. 111.

*Nevada*. — *Ward v. Carson River Wood Co.*, 13 Nev. 44.

*New Hampshire*. — *Cambridge v. Chandler*, 6 N. H. 271; *Homer v. Cilley*, 14 N. H. 85.

*Oregon*. — *Dawson v. Croisan*, 18 Oregon 431.

*Pennsylvania*. — *Drexel v. Com.*, 46 Pa. St. 37; *Com. v. Standard Oil Co.*, 101 Pa. St. 119.

*Tennessee*. — *Michie v. Mullins*, 5 Hayw. (Tenn.) 90; *Glass v. White*, 5 Sneed (Tenn.) 475.

*Vermont*. — *Spear v. Ditty*, 8 Vt. 421; *Bellows v. Elliot*, 12 Vt. 574; *Sumner v. Sherman*, 13 Vt. 612; *Carpenter v. Sawyer*, 17 Vt. 124; *Brown v. Wright*, 17 Vt. 97, 42 Am. Dec. 481; *Judevine v. Jackson*, 18 Vt. 470; *Henry v. Tilson*, 19 Vt. 447; *Chandler v. Spear*, 22 Vt. 388; *Boardman v. Goldsmith*, 48 Vt. 403.

*Wisconsin*. — *Knox v. Petterson*, 21 Wis. 247; *Potts v. Cooley*, 51 Wis. 355; *Emerson v. Thompson*, 59 Wis. 619.

3. **Protection of Taxpayer.** — The precautions prescribed to give the taxpayer effectual opportunity to be heard should receive strict construction in his favor. These are matters which are of the substance of the procedure. A substantial compliance with such statutes, in all matters which are designed for the protection of the taxpayer and the preservation of his rights, is a condition precedent to the legality and validity of the tax. *Albany City Nat. Bank v. Maher*, 19 Blatchf. (U. S.) 181; *Westfall v. Preston*, 49 N. Y. 349; *Clark v. Norton*, 49 N. Y. 243.

4. **Derogation of Common Law.** — *Williams v. State*, 6 Blackf. (Ind.) 36; *McGahan v. Carr*, 6 Iowa 331, 71 Am. Dec. 421; *Rima v. Cowan*, 31 Iowa 127; *Atkins v. Kinnan*, 20 Wend. (N. Y.) 241, 32 Am. Dec. 534; *Kellogg v. McLaughlin*, 8 Ohio 114.

5. **State Officer.** — *People v. Biggins*, 96 Ill. 481.

6. **Municipal Ordinances.** — *Parker v. Doe*, 20 Ala. 251; *Stevens v. Williams*, 70 Ind. 536; *Glass v. White*, 5 Sneed (Tenn.) 475.

taining to the transaction in question, such record or documents must affirmatively show that the required steps were in fact taken.<sup>1</sup>

**False Recitals** may be impeached on direct<sup>2</sup> but not on collateral attack.<sup>3</sup>

(1) **Limitations.** — In accordance with the general rule that limitations do not run against the state,<sup>4</sup> the right to enforce the collection of taxes will not be barred by the effluxion of time,<sup>5</sup> unless the statute expressly so provides,<sup>6</sup> nor will a statute barring the recovery of debts have this effect,<sup>7</sup> since, as we have already seen, taxes are not generally treated as debts. Nor will a limitation on proceedings against real property affect the right to recover personal taxes.<sup>8</sup> But a statute limiting the time within which suits may be brought upon liabilities created by statute includes taxes, both real and personal.<sup>9</sup>

(2) **Distress or Summary Seizure and Sale** — (a) **In General.** — By far the most important means of forcibly collecting taxes, now in use, is found in the statutory summary process by which the taxpayer's property is taken and sold for the satisfaction of the claim. Though the revenue systems of some states have contemplated that taxes assessed against real property shall become a charge on the land itself and be enforced only against the land,<sup>10</sup> it is nevertheless generally provided that personal chattels may be seized for the non-

1. **Record Must Show Compliance.** — *Thatcher v. Powell*, 6 Wheat. (U. S.) 119; *Allen v. Scott*, 13 Ill. 80; *Chicago v. Rock Island R. Co.*, 20 Ill. 286; *Chicago v. Wright*, 32 Ill. 192; *People v. Otis*, 74 Ill. 384; *Richards v. Stogsdel*, 21 Ind. 74; *Abell v. Cross*, 17 Iowa 175; *Little v. Chambers*, 27 Iowa 522; *M'Call v. Justices*, 1 Bibb (Ky.) 516; *Weimer v. Bunbury*, 30 Mich. 201; *Francis v. Washburn*, 5 Hayw. (Tenn.) 294; *Hamilton v. Burum*, 3 Yerg. (Tenn.) 359.

**Parol Evidence Not Admissible to Supplement Recitals.** — *Pack v. Crawford*, 29 Ark. 489.

**Curative Act.** — For an act curing defective notice held unconstitutional as not applying to all sales alike, see *Forster v. Forster*, 129 Mass. 55.

2. **Direct Attack.** — *Clark v. Little*, 41 Iowa 497.

3. **Collateral Attack.** — *Little v. Chambers*, 27 Iowa 522.

4. See the title **LIMITATION OF ACTIONS**, vol. 19, pp. 188-193.

5. **Taxes Not Barred.** — *Hood v. New Orleans*, 49 La. Ann. 1461; *Miramón v. New Orleans*, 52 La. Ann. 1623; *Schott v. Wastenev*, 7 Ohio Cir. Dec. 222, 13 Ohio Cir. Ct. 339, 58 Ohio St. 410; *Hartman v. Hunter*, 4 Ohio Cir. Dec. 200, 8 Ohio Cir. Ct. 623.

**Territories and Counties.** — The doctrine above stated applies to territories as well as to the states of the Union, and also to counties, which are political subdivisions of the state. *Hagerman v. Territory*, (N. Mex. 1901) 66 Pac. Rep. 526.

**As to Time When Statute Begins to Run.** see *Bell v. Stevens*, 116 Iowa 451; *State v. Sage*, 75 Minn. 448; *State v. Edwards*, 136 Mo. 360; *State v. Fullerton*, 143 Mo. 682; *Com. v. Mahon*, 12 Pa. Super. Ct. 616.

**Amnesty Statutes.** — The right to insist on the payment of taxes may be released by the state. *Masonic Temple Co. v. Pfanz*, (Ky. 1899) 52 S. W. Rep. 821. But the right to release taxes that have already accrued in favor of municipalities is sometimes taken away from the legislature by constitutional provision. *Ollivier v. Houston*, 22 Tex. Civ. App. 55.

6. **Statutory Limitations for Taxes.** — *Louisville v. Com.*, (Ky. 1901) 63 S. W. Rep. 580; *Harrington v. Glidden*, 179 Mass. 486, 94 Am. St. Rep. 613; *Wilmington v. Cronly*, 122 N. Car. 383, 388; *Re Butler*, 24 Pittsb. Leg. J. N. S. (Pa.) 421; *Union, etc., Bank v. Memphis*, 101 Tenn. 154; *Hernandez v. San Antonio*, (Tex. Civ. App. 1897) 39 S. W. Rep. 1022; *Abney v. State*, 20 Tex. Civ. App. 101.

**Lis Pendens.** — A taxpayer is precluded from claiming the benefit of the statute for the time during which his own injunction suit to prevent the collection of the tax is pending. *Masonic Temple Co. v. Pfanz*, (Ky. 1899) 52 S. W. Rep. 821. See also, to effect that time consumed in litigation cannot be counted, *Matter of Southern Wood Mfg., etc., Co.*, 49 La. Ann. 926.

7. *Iowa Land Co. v. Douglas County*, 8 S. Dak. 491.

8. *State v. Edwards*, 162 Mo. 660.

9. **Liabilities Created by Statute.** — *Bristol v. Washington County*, 177 U. S. 133; *Louisville, etc., Ferry Co. v. Com.*, 108 Ky. 717; *Pine County v. Lambert*, 57 Minn. 203; *State v. Sage*, 75 Minn. 448; *Custer County v. Story*, 26 Mont. 517. *Contra*, *Hoover v. Engles*, 63 Neb. 688; *Iowa Land Co. v. Douglas County*, 8 S. Dak. 401.

**Tax Is a "Liability or Obligation."** — *Custer County v. Story*, 26 Mont. 517; *Ollivier v. Houston*, 22 Tex. Civ. App. 55.

10. **Real Taxes a Charge on the Land Only.** — *Littler v. McCord*, 38 Ill. App. 147; *Kirkwood v. Magill*, 6 Kan. 540; *State v. Cain*, 18 Neb. 631.

In some states it is provided that each parcel of property shall be liable for its own taxes, and that no parcel shall be liable for the taxes on any other parcel. *Merrick v. Hutt*, 15 Ark. 331; *Howard v. Augusta*, 74 Me. 79; *State v. Sargeant*, 76 Mo. 557.

**Property of Nonresidents.** — In general, where taxes on real estate are assessed to a nonresident, the collector cannot seize and sell personal property to enforce the payment. *Lunt v. Wormell*, 19 Me. 100; *New York, etc., R. Co. v. Lyon*, 16 Barb. (N. Y.) 651.

payment of all taxes,<sup>1</sup> and likewise personal taxes may be fixed on realty;<sup>2</sup> but it is usually required that personalty be exhausted before resorting to the realty.<sup>3</sup> Distress or a statutory remedy in the nature of distress is the usual process against personalty.<sup>4</sup>

(b) **Authority to Distrain or Seize — Special Warrant.** — We have already seen that the collector's general warrant constitutes his authority for proceeding to the compulsory collection of taxes.<sup>5</sup> When the collector himself acts directly under the authority of such general warrant, nothing more is necessary for his protection, since it would be superfluous for him to issue a special warrant to himself.<sup>6</sup> In most cases, however, it is impracticable for the official collector to serve as his own executive officer. Special process is therefore issued by him against delinquent taxpayers, and placed in the hands of the sheriff or constable or such other deputies as are authorized by law to levy execution and make distraint.<sup>7</sup> Such special process is sometimes called a tax execution.<sup>8</sup> The expression commonly used, however, is distress warrant or, simply, warrant, a term which is applied to all statutory process in the nature of distress to enforce the payment of taxes. As we have already stated, the special warrant is legal process,<sup>9</sup> and the principles applicable to it are substantially the same as those governing legal process in general.<sup>10</sup> Like the general warrant it always has the force and effect of an execution so far as authorizing the seizure of property;<sup>11</sup> but it has been held not to be an execution under a statute regulating the fees to be charged in levying executions.<sup>12</sup> It must, of course, be issued in conformity with the statute,<sup>13</sup>

1. **Personalty Liable for All Taxes.** — Schaeffer v. People, 60 Ill. 179; Cones v. Wilson, 14 Ind. 465; Ring v. Ewing, 47 Ind. 246; Blain v. Irby, 25 Kan. 499; Meyer v. Parker, 41 La. Ann. 440; Oteri v. Parker, 42 La. Ann. 374; White v. Martin, 75 Miss. 646, 65 Am. St. Rep. 616; Spiech v. Tierney, 56 Neb. 514; Wright v. Wighton, 84 Pa. St. 103.

2. **Personal Taxes Chargeable on Realty.** — Cairo, etc., R. Co. v. Mathews, 152 Ill. 153; Iowa Land Co. v. Douglas County, 8 S. Dak. 491.

3. **Personalty to Be First Exhausted.** — People v. Smith, 123 Cal. 70; Lynam v. Anderson, 9 Neb. 367; Kean v. Kinnear, 171 Pa. St. 639. See also *infra*, XV. *Tax Sales*.

4. **Distress.** — Distress legally applies and is limited to personal chattels only. Marshall v. Wadsworth, 64 N. H. 386; Saunders v. Russell, 10 Lea (Tenn.) 293. See the title *DISTRESS*, vol. 9, p. 617.

Under a distress warrant for sale of goods and chattels to satisfy tax delinquent land cannot be sold, Estell v. Hawkins, 40 N. J. L. 122; since land can only be reached in the statutory mode provided for its condemnation and sale, Saunders v. Russell, 10 Lea (Tenn.) 293.

5. See *supra*, this section, 3. *b. Collector's General Warrant*.

6. Creswell v. Montgomery, 13 Pa. Super. Ct. 87.

7. **Special Process.** — Doe v. Deavors, 11 Ga. 79.

8. **Tax Executions.** — Smith v. Goldsmith, 63 Ga. 736; Gardner v. Donalson, 80 Ga. 71; Wright v. Central R., etc., Co., 85 Ga. 649; Wilson v. Herrington, 86 Ga. 777; Equitable Bldg., etc., Assoc. v. State, 115 Ga. 746; Hilton v. Singletary, 107 Ga. 821; State v. Allen, 2 McCord L. (S. Car.) 55; State v. Charleston, 4 Rich. L. (S. Car.) 286; State v. Columbia, 6 S. Car. 11; State v. Hodges, 14 Rich. L. (S. Car.) 256.

In Georgia tax executions may be levied on realty as well as personalty. Wilson v. Boyd, 84 Ga. 34; Boyd v. Wilson, 86 Ga. 379. They may also be transferred, but the statutory lien will be lost as against third persons unless they are recorded in the time required by statute. Wilson v. Herrington, 86 Ga. 777; Funkhouser v. Male, 110 Ga. 766; Blalock v. Buchanan, 114 Ga. 564.

9. **Legal Process.** — Nashville v. Pearl, 11 Humph. (Tenn.) 249.

**Need Not Run in the Name of the State.** — The cases which hold that tax warrants are not process in the sense that they are required to run in the name of the state are, in most instances, cases involving general warrants. But the language used is broad enough to include both classes of warrants. Certainly neither the general nor special warrant is judicial process, since it does not issue in judicial proceedings, and, inasmuch as the warrant is purely a statutory creature, the courts are governed by the local statutes in deciding whether the special warrant should run in the name of the commonwealth or not. See Haley v. Elliott, 16 Colo. 159; Scarritt v. Chapman, 11 Ill. 443; Curry v. Hinman, 11 Ill. 420; Nashville v. Pearl, 11 Humph. (Tenn.) 249. See also *supra*, this section, 3. *b. (2) Nature*.

10. Hilbish v. Hower, 58 Pa. St. 93.

11. See *supra*, this section, 3. *b. Collector's General Warrant*.

12. Manhattan R. Co. v. Meres, 38 N. Y. App. Div. 120.

13. **Special Warrant Must Conform to Statute.** — Pearson v. Canney, 64 Me. 188; Weimer v. Bunbury, 30 Mich. 201; Van Wagenen v. Brown, 26 N. J. L. 196; Saunders v. Russell, 10 Lea (Tenn.) 293; Nashville v. Pearl, 11 Humph. (Tenn.) 249.

**The Duty to Issue the Warrant** is usually imposed upon assessors, treasurers, or other

and directed to one authorized to execute it,<sup>1</sup> otherwise it will be void.<sup>2</sup> The warrant can be issued only after the taxpayer to be distrained has become delinquent.<sup>3</sup> Irregularities which do not affect the rights of the taxpayer, and accidental informalities, defects, and omissions do not render the warrant invalid.<sup>4</sup> Thus, it has been held that the absence of a seal<sup>5</sup> or an obvious error in the date of the warrant,<sup>6</sup> or the fact that the collector's signature is printed instead of written,<sup>7</sup> or the fact that the different items of tax are not separated, where a correct total is stated,<sup>8</sup> is not material. So, where the clerk of a court designated himself "clerk of said county" in a warrant issued by him,<sup>9</sup> it has been upheld.<sup>10</sup> On the other hand, a failure to specify the kind<sup>11</sup> of taxes and their amount,<sup>12</sup> or the insertion of instructions to the levying officer to levy upon lands and tenements as well as goods and chattels, or to collect excessive fees,<sup>13</sup> avoids the warrant. So, the omission to state any

officers connected with the administration of the tax laws. *Sprague v. Bailey*, 19 Pick. (Mass.) 436; *People v. Halsey*, 53 Barb. (N. Y.) 547.

**Collector Authorized to Issue.** — *Mullins v. Jersey City*, 61 N. J. L. 135.

**The Right to Issue the Warrant** must be expressly conferred. *Butler v. Nevin*, 88 Ill. 575. And a treasurer of a town who is also collector cannot issue his warrant until the tax has been levied by the town authorities. *Waite v. Hyde Park Lumber Co.*, 65 Vt. 103.

**Mandamus.** — The duty to issue the warrant is ministerial. *Henry v. Sargeant*, 13 N. H. 321; *C. N. Nelson Lumber Co. v. McKinnon*, 61 Minn. 219, and mandamus will lie, in a proper case, to compel the performance of this duty; *People v. Halsey*, 53 Barb. (N. Y.) 547, affirmed 37 N. Y. 344. See generally the title **MANDAMUS**, vol. 19, p. 709.

**Territorial Jurisdiction.** — A county clerk cannot, in the absence of statute, issue a distress warrant to another county for the collection of a privilege tax. *Saunders v. Russell*, 10 Lea (Tenn.) 293.

**1. To Whom Directed.** — *Hays v. Drake*, 6 Gray (Mass.) 387; *Cannell v. Crawford County*, 59 Pa. St. 196; *Harper v. Lindskog*, 13 S. Dak. 524. See also *Keith v. Freeman*, 43 Ark. 296.

A tax execution issued to "all and singular the sheriffs of the state," instead of the sheriff of the particular county where the land lies, is not bad where the sheriff of such county actually executed it. *Bedgood v. McLain*, 89 Ga. 793.

**Official Title.** — Where a warrant is directed to the officer who is to execute it, as such officer, the omission of his name will not invalidate it. *Byars v. Curry*, 75 Ga. 515; *Chandler v. Spear*, 22 Vt. 388; *Wilson v. Seavey*, 38 Vt. 221.

**2. Defective Warrant.** — *Dinsmore v. Westcott*, 25 N. J. Eq. 470; *Stephens v. Wilkins*, 6 Pa. St. 260.

**3. To Issue Only After Delinquency.** — *Muskegon v. S. K. Martin Lumber Co.*, 86 Mich. 625; *Plainfield v. Runyon*, 42 N. J. L. 568; *Pearce v. Torrence*, 2 Grant Cas. (Pa.) 82.

**4. Irregularities and Accidental Defects.** — *United States.* — *Utica First Nat. Bank v. Waters*, 19 Blatchf. (U. S.) 242.

*Connecticut.* — *Picket v. Allen*, 10 Conn. 146.

*Illinois.* — *Union Trust Co. v. Weber*, 96 Ill. 346.

*Iowa.* — *Corbin v. Hill*, 21 Iowa 70.

*Maine.* — *Mussey v. White*, 3 Me. 290; *Bath v. Whitmore*, 79 Me. 182.

*Massachusetts.* — *King v. Whitcomb*, 1 Met. (Mass.) 328; *Barnard v. Graves*, 13 Met. (Mass.) 85.

*Michigan.* — *Tweed v. Metcalf*, 4 Mich. 579; *Bird v. Perkins*, 33 Mich. 28; *Muskegon v. S. K. Martin Lumber Co.*, 86 Mich. 625.

*New Hampshire.* — *Bailey v. Ackerman*, 54 N. H. 527; *Gove v. Newton*, 58 N. H. 359.

*New York.* — *American Tool Co. v. Smith*, 33 Hun (N. Y.) 121.

*South Carolina.* — *State v. Charleston*, 4 Rich. L. (S. Car.) 286.

*Vermont.* — *Chandler v. Spear*, 22 Vt. 388; *Spear v. Braintree*, 24 Vt. 414; *Walker v. Miner*, 32 Vt. 769; *Goodwin v. Perkins*, 39 Vt. 598; *Wing v. Hall*, 47 Vt. 182; *Wells v. Austin*, 59 Vt. 157.

**5. Absence of Seal.** — *C. N. Nelson Lumber Co. v. McKinnon*, 61 Minn. 219; *Nason v. Fowler*, 70 N. H. 291. Compare *Bradford v. Randall*, 5 Pick. (Mass.) 496.

**Where the Law Requires the Comptroller's Signature to Be "Affixed"** to a collector's warrant, the word "countersigned" at the left of his name does not vitiate his signature. *Scammon v. Chicago*, 42 Ill. 192.

**6. Error in Date.** — *Bellows v. Weeks*, 41 Vt. 590.

**7. Printed Signature.** — *Hitchcock v. Latham*, 97 Ga. 253.

**8. Correct Total.** — *Interstate Bldg., etc., Assoc. v. Waters*, 50 S. Car. 459.

**9. C. N. Nelson Lumber Co. v. McKinnon.** 61 Minn. 219.

**10. Time of Sale.** — An erroneous direction as to the time in which a sale is to be made does not vitiate the warrant if the officer subsequently complies with the requirement of the law and disregards the direction contained in the warrant. *King v. Whitcomb*, 1 Met. (Mass.) 329; *Barnard v. Graves*, 13 Met. (Mass.) 85. Compare *Weeks v. Batchelder*, 41 Vt. 317.

**But the Erroneous Recital of the Legislative Act** under which the tax was levied has been held fatal. *Brown v. Wright*, 17 Vt. 97, 42 Am. Dec. 481.

**11. State v. Graham, 2 Hill L. (S. Car.) 457.**

**12. State v. Perkins, 24 N. J. L. 409. Compare *Hopper v. Malleson*, 16 N. J. Eq. 382.**

**13. Saunders v. Russell, 10 Lea (Tenn.) 293.**

fact which under the statutes of the particular state is considered jurisdictional, is fatal.<sup>1</sup>

(c) **What Property May Be Seized.** — As both the general and special warrant for the collection of taxes has the force of an execution, it is the duty of the officer to whom the warrant is issued to levy the same upon such chattels of the delinquent as are distrainable, making a previous demand for the payment of the tax if such be required.<sup>2</sup> It should be observed that property may be exempt both from taxation<sup>3</sup> and from levy and sale upon a common execution<sup>4</sup> and yet be distrainable by statute for unpaid taxes.<sup>5</sup> But where the statute authorizes the tax collector, in general terms, to levy on personal property, it is construed to mean such property as is generally subject to levy and sale under execution,<sup>6</sup> the subject being, of course, entirely dependent upon the statutes of each state.<sup>7</sup> It is not necessary that the property distrained should be that upon which the tax accrued,<sup>8</sup> nor is it material that the property levied on was purchased subsequent to the assessment of taxes,<sup>9</sup> nor that, at the time of the seizure, it is out of the owner's possession.<sup>10</sup> It is generally true that only such property as is owned by the delinquent taxpayer can be subjected to the payment of taxes owing by him,<sup>11</sup> and a levy upon the goods of one, to pay the taxes of another, is void;<sup>12</sup> but, where a lien for taxes is fixed upon chattels, it follows them into the hands of a purchaser and they may be distrained for the tax accruing against the previous owner.<sup>13</sup>

1. **Jurisdictional Facts.** — *Equitable Bldg., etc., Assoc. v. State*, 115 Ga. 746; *Jacques v. Parks*, 96 Me. 268.

2. **Demand.** — *Midland R. Co. v. State*, 11 Ind. App. 433; *C. N. Nelson Lumber Co. v. McKinnon*, 61 Minn. 219; *Clark v. Smith*, (County Ct.) 31 Misc. (N. Y.) 490.

As to what constitutes sufficient demand previous to distress, see *Marshall v. Hunt*, 89 Ill. App. 634; *Clark v. Smith*, (County Ct.) 31 Misc. (N. Y.) 490.

3. See the title **EXEMPTIONS (FROM TAXATION)**, vol. 12, p. 266.

4. See the title **EXEMPTIONS (FROM EXECUTION)**, vol. 12, p. 59.

5. **Exempt Property Distrainable for Taxes.** — *Scales v. Alvis*, 12 Ala. 617, 46 Am. Dec. 269; *Reams v. McHargue*, (Ky. 1901) 63 S. W. Rep. 437.

6. **General Exemption Law Applicable to Distress for Taxes.** — *Kennedy v. Mary Lee Coal, etc., Co.*, 93 Ala. 494; *Doe v. Deavors*, 11 Ga. 79; *Blain v. Irby*, 25 Kan. 499; *Ratliff v. Beale*, 74 Miss. 247; *Souhegan Nail, etc., Factory v. McConihe*, 7 N. H. 309.

7. **Debts, Including Unpaid Wages,** may be taken and sold in Mississippi. *White v. Martin*, 75 Miss. 646, 65 Am. St. Rep. 616.

**Promissory Notes Leviable.** — *Blain v. Irby*, 25 Kan. 499.

**Vessels.** — *Wheeling, etc., Transp. Co. v. Wheeling*, 99 U. S. 273; *Oteri v. Parker*, 42 La. Ann. 374.

**Shares of Stock Not Leviable in the Absence of Statute.** — *Kennedy v. Mary Lee Coal, etc., Co.*, 93 Ala. 494; *Parker v. Citizens Bank*, 49 La. Ann. 105.

**Railroad Superstructure.** — In *Illinois* by statute the rails and superstructure of a railroad may be levied on as personality and sold. *Maus v. Logansport, etc., R. Co.*, 27 Ill. 77.

**As to Effect of Constitutional Exemption of personality from taxation,** see *Reams v. McHargue*,

(Ky. 1901) 63 S. W. Rep. 437; *Ratliff v. Beale*, 74 Miss. 247.

8. **Distress of Other Property than That Taxed.** — *Chicago, etc., R. Co. v. Ellison*, 113 Mich. 30; *Mullins v. Jersey City*, 61 N. J. L. 135; *Russell v. Green*, 10 Okla. 340.

9. **Property Bought After Tax Accrues.** — *Solomon v. Willis*, 89 Ala. 596. Compare *Michigan Lake Superior Power Co. v. Atwood*, 126 Mich. 651, 8 Detroit Leg. N. 163.

10. *Brice v. McCarrell*, 21 Pa. Co. Ct. 512.

**Property Conveyed in Trust for Creditors Can Be Distrained.** — *Wright v. Wigton*, 84 Pa. St. 163; *Morris's Appeal*, 88 Pa. St. 382; *Detwiler's Appeal*, 96 Pa. St. 326; *Kern v. Powell*, 98 Pa. St. 253; *New York Fourth Nat. Bank's Appeal*, 123 Pa. St. 485, 10 Am. St. Rep. 538.

11. **Property Owned by Taxpayer.** — *Horseman v. Municipal Corp.*, 31 Ont. 301; *Houser, etc., Mfg. Co. v. Hargrove*, 129 Cal. 90; *Tousey v. Bell*, 23 Ind. 423; *Fowle v. Kemp*, 92 Md. 630. Compare *Pioneer Fuel Co. v. Molloy*, (Mich. 1902) 91 N. W. Rep. 750, 9 Detroit Leg. N. 470.

**Partnership.** — Partners cannot be dispossessed of their partnership property by a levy made to enforce the payment of taxes owing individually by one member. *Meyer v. Larkin*, 3 Cal. 403; *Cuyahoga County v. Benham*, 9 Ohio Cir. Dec. 847, 18 Ohio Cir. Ct. 862.

**Goods in the Hands of an Assignee for the benefit of creditors** may be distrained for taxes due from the assignor. *Brice v. McCarrell*, 21 Pa. Co. Ct. 512. But in *Michigan* the assignee is entitled to ten days immunity. *Lyon v. Guthard*, 52 Mich. 271.

12. **Seizing Property of Third Person.** — *Atlantic, etc., R. Co. v. Cleins*, 2 Dill. (U. S.) 175; *Dubois v. Webster*, 7 Hun (N. Y.) 371; *Hallock v. Rumsey*, 22 Hun (N. Y.) 89; *Daniels v. Nelson*, 41 Vt. 161, 98 Am. Dec. 577; *Sumner v. Pinney*, 31 Vt. 717.

13. **Lien.** — *Bridwell v. Morton*, 46 Ark. 73; *Anderson v. State*, 23 Miss. 459; *State v.*

**Taking Tenant's Property for Landlord's Taxes.** — It is not unusual to permit the property of a tenant to be seized for taxes owing by the landlord in respect to the premises occupied by the tenant,<sup>1</sup> and possession alone is sometimes made conclusive of title in favor of the distraining officer.<sup>2</sup>

**Taxes Assessed Against Agents.** — Taxes are often assessed against agents and persons in control of property for others. Such persons are usually given a lien on the property for their reimbursement.<sup>3</sup> Where this is done it has been held that the tax becomes a personal charge against the person to whom it is assessed,<sup>4</sup> and it would seem that he might in such case be personally distrained therefor. But it has been held that the property of a bank cannot be seized to enforce the payment of a tax on the shares of the stockholders which the bank is by statute required to pay for them.<sup>5</sup> The same is true of distillers who have been made agents of the state in collecting taxes on liquor not owned by them.<sup>6</sup>

**It Is Settled that Property Affected with a Public Use cannot be distrained.** The wharves of a city,<sup>7</sup> and such property of a gas company as is necessary to operate it,<sup>8</sup> as well as the tools and fuel used by a railroad company in operating the road,<sup>9</sup> come within this principle. The same rule applies to personalty held by a receiver by virtue of his appointment,<sup>10</sup> and generally to all property in the custody of the law.<sup>11</sup> But coal stored by a railroad company for its future use<sup>12</sup> and liquor dispensaries operated under the authority of state laws are not exempt from distress.<sup>13</sup>

Rowse, 49 Mo. 586; Reynolds v. Fisher, 43 Neb. 172 [*overruling* Hill v. Palmer, 32 Neb. 632]; Mills v. Thurston County, 16 Wash. 378.

**Taxes a Lien on Personalty from Time Collector receives his general warrant.** Binkert v. Wabash R. Co., 98 Ill. 205; Farmer L. & T. Co. v. Memminger, 48 Neb. 17.

**No Lien until Distraint or Seizure.** — Maish v. Bird, 22 Fed. Rep. 180; Brice v. McCarrell, 21 Pa. Co. Ct. 512; Moore v. Marsh, 60 Pa. St. 46; Wright v. Wigton, 84 Pa. St. 163.

**Registration of the Tax Lien is required in Louisiana.** Jacob v. Preston, 31 La. Ann. 514.

**1. Property of Tenant Liable for Landlord's Taxes.** — McGregor v. Montgomery, 4 Pa. St. 237; Brice v. McCarrell, 21 Pa. Co. Ct. 512. But see Bartlett v. Wilson, 60 Vt. 644.

**Crops Grown and Matured upon lands are liable to distress and sale for the taxes assessed upon them.** Blodgett v. German Sav. Bank, 69 Ind. 153. See Gregory v. Wilson, 52 Ind. 233.

**2. Possession Sufficient.** — Sears v. Cottrell, 5 Mich. 251; Holt v. Johnson, 14 Johns. (N. Y.) 425; Spencer v. McGowen, 13 Wend. (N. Y.) 256; Gilbert v. Moody, 17 Wend. (N. Y.) 354; Sheldon v. Van Buskirk, 2 N. Y. 473; Hersee v. Porter, 100 N. Y. 403.

**Possession.** — Where possession is ambiguous the property can be seized only for taxes of the real owner; *e. g.*, where the husband's property is used jointly by him and his wife, it cannot be seized for her taxes even though at the time of seizure she has physical possession of it. Hubbell v. Abbott, (County Ct.) 21 Misc. (N. Y.) 780.

Nor has a boarder such possession of his landlord's household furniture used by him as will authorize a seizure of it for the boarder's taxes. Denton v. Carroll, 4 N. Y. App. Div. 532. See also Howard v. Augusta, 74 Me. 79; Stockwell v. Vietch, (Supm. Ct. Gen. T.) 15

Abb. Pr. (N. Y.) 412; Lake Shore, etc., R. Co. v. Roach, 80 N. Y. 339.

**3. Property in Control of Agent.** — Walton v. Westwood, 73 Ill. 125; Lockwood v. Johnson, 106 Ill. 336; Hutchinson v. Board of Equalization, 66 Iowa 35; Orion Tp. v. Axford, 112 Mich. 179; Spanish River Lumber Co. v. Bay City, 113 Mich. 181; Minneapolis, etc., Elevator Co. v. Traill County, 9 N. Dak. 213; Palmer v. Corwith, 3 Pin. (Wis.) 267; Merrill v. Champagne Lumber Co., 75 Wis. 142.

**4. Tax a Personal Charge Against Agent.** — Orion Tp. v. Axford, 112 Mich. 179; Forster v. Brown, 119 Mich. 86; Pioneer Fuel Co. v. Molloy, (Mich. 1902) 91 N. W. Rep. 750.

**5. Lands Not Distrainable for Taxes Owed by Shareholders.** — Seneca First Nat. Bank v. Lyman, 59 Kan. 410 [*reversing* Lyman v. Seneca First Nat. Bank, 6 Kan. App. 74]; Hull v. Southern Development Co., 89 Md. 8.

**6. Fowble v. Kemp, 92 Md. 630.**

**7. Com. v. Louisville, (Ky. 1898) 47 S. W. Rep. 865.**

**8. Covington Gas-light Co. v. Covington, 84 Ky. 94.**

**9. Public Use.** — Chicago, etc., R. Co. v. Forest County, 95 Wis. 80.

**10. Property in Hands of Receiver.** — McRae v. Bowers Dredging Co., 90 Fed. Rep. 360; Adams v. Haskell, 6 Cal. 113, 65 Am. Dec. 491; Palmer v. Pettingill, 6 Idaho 346.

**11. Property in Custody of Law.** — Yuba County v. Adams, 7 Cal. 35; Prince George's County v. Clarke, 36 Md. 206.

Property already attached is subject to a constructive seizure by the collecting officer which will be good when the attachment is dissolved. Bristol v. Murff, 49 La. Ann. 357.

**12. Chicago, etc., R. Co. v. Ellson, 113 Mich. 30.**

**13. Dispensaries.** — Sheffield v. Dispensary Com'rs, 111 Ga. 1.



(a) **Levy and Return.** — The formalities attending seizure and sale are governed by principles which hardly differ from those applicable to other similar legal process such as attachment and execution.<sup>1</sup> The official at whose instance a distress warrant is issued has the right to control it and may withdraw it before levy.<sup>2</sup> The statutory provisions as to the time and mode<sup>3</sup> of levy and sale<sup>4</sup> as well as those concerning the property on which the process is to be levied<sup>5</sup> must be followed, and any substantial deviation from requirements made for the benefit of the taxpayer will render the seizure invalid.<sup>6</sup> The levying officer should exercise a sound discretion as to the property seized, and should select such articles as will best facilitate the satisfaction of the tax with the least hardship and inconvenience to the taxpayer.<sup>7</sup> But a sale cannot be temporarily enjoined merely because the market is unfavorable.<sup>8</sup>

**Actual Custody and Control of the Property by the Collector** or his agent is necessary to make the distress valid,<sup>9</sup> at least as against third persons.<sup>10</sup> The moment seizure is made, the possession of the owner ceases, and the property comes into the custody of the levying officer.<sup>11</sup>

**Amount of Property.** — The collector should, if practicable, distrain no more of the delinquent property than is sufficient to pay the tax.<sup>12</sup>

**Effect of Levy.** — As in case of ordinary executions, a sufficient levy is *prima facie* satisfaction of the tax,<sup>13</sup> and a grossly excessive levy will render the seizure void.<sup>14</sup> Where more property than is necessary to make the tax has been seized, the sale should cease when enough has been sold to satisfy the tax.<sup>15</sup>

**Duty to Make Money After Levy — Return.** — Having once seized property, the collector must make his money. In the absence of statute<sup>16</sup> he has no authority to accept a bond to secure the tax or for the forthcoming of the

1. **Seizure for Taxes Analogous to Seizure and Execution.** — *Georgia v. Atlantic, etc.*, R. Co., 3 Woods (U. S.) 435; *Kennedy v. Mary Lee Coal, etc., Co.*, 93 Ala. 494.

**Presumption of Authority.** — Where a doubt as to the jurisdiction of an officer arises from the non-attachment of a previously unorganized county it will be resolved in favor of the validity of the officer's acts. *Perry v. Hogan*, 5 Kan. App. 463.

2. **Withdrawal of Warrant.** — *Hill v. Allen*, (Tenn. Ch. 1896) 39 S. W. Rep. 892.

**Costs and Fees.** — In such case the costs and fees which would accrue in favor of the officer making the levy do not attach. *Manhattan R. Co. v. Merges*, 167 N. Y. 539, *affirming* 38 N. Y. App. Div. 120; *Hill v. Allen*, (Tenn. Ch. 1896) 39 S. W. Rep. 892.

3. **Time.** — *Veit v. Graff*, 37 Ind. 253; *Le-favour v. Bartlett*, 42 N. H. 555.

**Removal of Taxpayer.** — By statute it is generally provided that the collector may levy forth-with upon the property of persons about to re-move. *Veit v. Graff*, 37 Ind. 253; *Dawson v. Croisan*, 18 Oregon 431.

4. *Taylor v. Robertson*, 16 Utah 330.

5. *Howard v. Augusta*, 74 Me. 79.

6. **Time of Sale.** — The sale of distress must take place in a reasonable time and in a period not shorter than that fixed by statute. *Clemons v. Lewis*, 36 Vt. 673.

Where the officer advertises to sell at a certain time, but fails to do so, he may readvertise for the required time and sell. *Souhegan Nail, etc., Factory v. McConihe*, 7 N. H. 309.

So a sale after the return day is not invalid in *Kansas* where the levy was made in time. *Blain v. Irby*, 25 Kan. 499.

7. *Jewell v. Swain*, 57 N. H. 506.

8. *Breeze v. Haley*, 10 Colo. 5.

9. **Taking Possession.** — *Forth v. Pursley*, 82 Ill. 152; *Dodge v. Way*, 18 Vt. 457.

**Bulky Articles, Constructive Seizure Sufficient.** — *St. Anthony, etc., Elevator Co. v. Bottineau County*, 9 N. Dak. 346; *New Richmond Lumber Co. v. Rogers*, 68 Wis. 608.

10. *Forth v. Pursley*, 82 Ill. 152.

11. **Possession in Law.** — *Belloq v. New Orleans*, 31 La. Ann. 471; *Prevot v. Hennen*, 5 Mart. (La.) 269; *Lacy v. Buhler*, 8 Mart. N. S. (La.) 662.

12. **Amount to Be Taken.** — *Cone v. Forest*, 126 Mass. 97; *Thompson v. Currier*, 24 N. H. 239.

13. **Sufficient Levy.** — *Henry v. Gregory*, 29 Mich. 68; *Campbell v. Wyant*, 26 W. Va. 702.

No satisfaction where the goods are retaken and held on replevin. *Farnsworth Co. v. Rand*, 65 Me. 19.

14. *Chamberlain v. Woolsey*, (Neb. 1902) 92 N. W. Rep. 181, *judgment affirmed* on rehearing (Neb. 1903) 95 N. W. Rep. 38. See as to effects of excessive levy *infra*, this section, *Liability of Collector — To Taxpayer*.

15. **Amount to Be Sold.** — *Stead v. Gascoigne*, 8 Taunt. 527, 4 E. C. L. 198; *Aldred v. Constable*, 6 Q. B. 370, 51 E. C. L. 370; *Williamson v. Dow*, 32 Me. 559; *Seekins v. Goodale*, 61 Me. 400, 14 Am. Rep. 568; *Cone v. Forest*, 126 Mass. 97.

16. **Forthcoming Bond.** — In a few jurisdictions forthcoming bonds or bonds to secure the payment of the tax may be given to secure a release of property seized by the officer. *Curry v. Gila County*, (Ariz. 1898) 53 Pac. Rep. 4; *Miller v. Wisener*, 45 W. Va. 59.

goods, and such a bond is void,<sup>1</sup> it being contrary to public policy that the collection of revenue should be thus postponed. A return of the distress warrant should be made by the officer who serves it, as in case of other process; but if no particular form is prescribed an informal return is sufficient.<sup>2</sup>

(3) *Arrest and Imprisonment.* — The obligation to pay taxes is sometimes reinforced by statutory provisions making the failure to pay a misdemeanor, or providing for summary arrest and imprisonment of the delinquent. As a means of enforcing the payment of taxes on property this method has never been widely adopted in the United States, being limited to a few of the New England states, and is, perhaps, even there becoming obsolete.<sup>3</sup> But fine and imprisonment are still used in various parts of the country to enforce the payment of poll taxes,<sup>4</sup> and it is not unusual to make it a misdemeanor to engage in an occupation classed as a privilege without paying the license fee or tax.<sup>5</sup> There can, of course, from the constitutional standpoint, be no question as to the validity of a statute authorizing arrest and imprisonment for a failure to pay taxes;<sup>6</sup> nor, where this remedy is permitted, will it be taken away by a statute abolishing imprisonment for debt.<sup>7</sup> The right to seize the person of the delinquent must, of course, be expressly conferred by statute.<sup>8</sup> It can be exercised only by the particular person authorized to commit delinquents,<sup>9</sup> and such person can act only upon a warrant in every respect legal.<sup>10</sup>

The *Exhaustion of Personalty* is usually required before resorting to the remedy of arrest and imprisonment.<sup>11</sup> But to get the benefit of such provision the

1. *Forfeiting Bond Invalid.* — *Hardesty v. Price*, 3 Colo. 556. Compare *Packard v. Tisdale*, 50 Me. 376.

2. *Return Not Necessary.* — In *Vermont* no return of the rate bill or warrant under which distress is taken is required. Hence if one is made it has not the conclusive effect of an official return and may be contradicted by parol. *Hathaway v. Goodrich*, 5 Vt. 65; *Spear v. Tilson*, 24 Vt. 420; *Hackett v. Amsden*, 57 Vt. 432.

3. *Judicial Commitment on Application of Collector.* — Under statutes in *New York* it is permissible for the court upon the application of the collector to enforce the tax by attachment or fine and to commit the delinquent to jail for contempt. *McMahon v. Redfield*, 12 Daly (N. Y.) 1; *Matter of McLean*, 62 Hun (N. Y.) 1; *Matter of Nichols*, 54 N. Y. 62.

4. *Imprisonment for Failure to Pay Poll Tax.* — *Reg. v. Morris*, 21 U. C. B. 392; *Draves v. People*, 97 Ill. App. 151; *State v. Jones*, 121 N. Car. 616; *Collection of Poll-Tax*, 21 R. I. 582.

5. See the title *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*, vol. 21, pp. 818-825.

6. *Constitutionality.* — *Murray v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 272; *McMahon v. Palmer*, 102 N. Y. 176, 55 Am. Rep. 796; *Crandall v. James*, 6 R. I. 144; *Bishop v. Tripp*, 15 R. I. 466; *Com. v. Byrne*, 20 Gratt. (Va.) 165. In *Collection of Poll-Tax*, 21 R. I. 582, the Supreme Court of *Rhode Island* said: "The constitution requires simply the conservation, not the extension, of the right of jury trial."

7. *Abolition of Imprisonment for Debt.* — *Appleton v. Hopkins*, 5 Gray (Mass.) 530. Compare *Collection of Poll-Tax*, 21 R. I. 582.

8. *Express Authority Required.* — *St. Louis v. Sternberg*, 69 Mo. 289, 4 Mo. App. 453; *St. Louis v. Green*, 7 Mo. App. 468; *Marshall v. Wadsworth*, 64 N. H. 386; *Shaw v. Peckett*, 26 Vt. 482.

9. *Com. v. Deuel*, 8 Pa. Dist. 431.

10. *Warrant Strictly Construed.* — *Wilcox v. Gladwin*, 50 Conn. 77; *Jacques v. Parks*, 96 Me. 268; *Aldrich v. Aldrich*, 8 Met. (Mass.) 102; *Butler v. Washburn*, 25 N. H. 257; *Gordon v. Clifford*, 28 N. H. 402; *Collection of Poll-Tax*, 21 R. I. 582.

A *Form of the Warrant* for the arrest and commitment of delinquents, as recommended by the *Rhode Island* Supreme Court, appears in *Collection of Poll-Tax*, 21 R. I. 582. See also *Wilcox v. Gladwin*, 50 Conn. 77; *Flint v. Whitney*, 28 Vt. 680.

If the warrant is good, the right to arrest is not affected by the fact that the person arrested was not liable to assessment, *Kelley v. Noyes*, 43 N. H. 209; *Matter of Conklin*, 36 Hun (N. Y.) 588; or that the assessors had no jurisdiction whatever over the taxpayer, *Novell v. Tripp*, 61 Me. 426, 14 Am. Rep. 572.

11. *Exhaustion of Personalty.* — *Wilcox v. Gladwin*, 50 Conn. 77; *Lothrop v. Ide*, 13 Gray (Mass.) 93; *Gordon v. Clifford*, 28 N. H. 402; *Marshall v. Wadsworth*, 64 N. H. 386; *McMahon v. Redfield*, 12 Daly (N. Y.) 1; *Henry v. Tilson*, 19 Vt. 447; *Com. v. Byrne*, 20 Gratt. (Va.) 165.

*Arrest and Imprisonment* operates in *New Hampshire* as a waiver of all right to distrain or proceed against property thereafter. *Butler v. Washburn*, 25 N. H. 251.

In *Rhode Island* arrest and imprisonment is declared to be a cumulative remedy, and would not, it seems, preclude the collector from resorting to the property subsequently. *Collection of Poll-Tax*, 21 R. I. 582.

*Return of Nulla Bona as Evidence.* — In an action against the officer for an unlawful arrest a return of "no goods" is only *prima facie* evidence in his behalf. *Lothrop v. Ide*, 13 Gray (Mass.) 93; *Pickard v. Howe*, 12 Met. (Mass.) 207; *Bruce v. Holden*, 21 Pick. (Mass.) 187; *Barnard v. Graves*, 13 Met. (Mass.) 94; *McMahon v. Redfield*, 12 Daly (N. Y.) 1. *Contra*,

taxpayer should make a distinct and immediate offer of specific property,<sup>1</sup> available for execution,<sup>2</sup> at the time when the officer proposes to take him into custody.<sup>3</sup>

The Warrant of Arrest for the Nonpayment of Taxes Is Treated as Civil Process, and hence one cannot be arrested in his own house upon it if the outer door is shut.<sup>4</sup>

**Arrest After Return Day.** — An arrest can be made by the collector even after the expiration of the time limited for the return of his general warrant.<sup>5</sup>

**4. Liability of Collector** — *a. TO TAXPAYER* — (1) *Protection Afforded by Regular Process.* — A collector who is lawfully appointed,<sup>6</sup> and who acts under the authority of a warrant fair upon its face,<sup>7</sup> is completely protected thereby, and is liable only for wrongs and irregularities directly chargeable to himself,<sup>8</sup>

that the return is conclusive, *Matter of McLean*, 62 Hun (N. Y.) 1.

**1. Offer of Property.** — *Henry v. Tilson*, 19 Vt. 447; *Flint v. Whitney*, 28 Vt. 680.

**2. Kinsley v. Hall, 9 N. H. 190.**

**3. Time of Tender.** — *Lothrop v. Ide*, 13 Gray (Mass.) 93; *Kinsley v. Hall*, 9 N. H. 190; *Osgood v. Welch*, 19 N. H. 105.

A Discharge in Bankruptcy does not discharge the tax, and hence the taxpayer is still liable to arrest. *Aldrich v. Aldrich*, 8 Met. (Mass.) 102. And see the title INSOLVENCY AND BANKRUPTCY, vol. 16, pp. 778, 779.

**4. Warrant for Arrest of Taxpayer Is Civil Process.** — *Fitch v. Loveland*, Kirby (Conn.) 386; *Gordon v. Clifford*, 28 N. H. 402; *Williams v. Spencer*, 5 Johns. (N. Y.) 352; *Hubbard v. Mace*, 17 Johns. (N. Y.) 127.

In order to effect an arrest the officer may lawfully open an outer door where the person avoiding arrest has taken refuge in the house of another. *Gordon v. Clifford*, 28 N. H. 402.

**Copy of Warrant of Commitment to be left with jailer.** *Wilcox v. Gladwin*, 50 Conn. 77; *Foxcroft v. Nevins*, 4 Me. 72; *Gordon v. Clifford*, 28 N. H. 402. This copy must contain a certification by the officer of his acts in connection with the arrest, such as precedent notice and absence of chattels. Such certificate where defective cannot be amended in a subsequent action for false imprisonment, nor is parol proof admissible to cure the defect. *Henry v. Tilson*, 19 Vt. 447.

**5. Arrest After Time for Return of General Warrant.** — *Bassett v. Porter*, 4 Cush. (Mass.) 487. But costs may be denied the officer in such case. *Orneville v. Pearson*, 61 Me. 552.

Detention can be continued only until the tax and all lawful fees are paid. An officer is guilty of false imprisonment who detains the delinquent to enforce the payment of excessive charges. *Wilcox v. Gladwin*, 50 Conn. 77.

**Form of Bond given for release of taxpayer under poor debtor's law, see *Skinner v. Lyford***, 73 Me. 282. Where a collector is summarily seized for a failure to pay over taxes collected by him, no bond is authorized to be taken. *Daggett v. Everett*, 19 Me. 373.

**6. Butler v. Nevin**, 88 Ill. 575. One who has no title to the office of collector is not protected. *Brewster v. Hyde*, 7 N. H. 206.

**7. Warrant Fair on Its Face.** — *Rawson v. Spencer*, 113 Mass. 40; *Underwood v. Robinson*, 106 Mass. 296; *Hubbard v. Garfield*, 102 Mass. 72; *Sherman v. Torrey*, 99 Mass. 472; *Bird v. Perkins*, 33 Mich. 28; *Byles v. Genung*, 52 Mich. 504; *Warrensburg v. Miller*, 77 Mo. 56;

*Savacool v. Boughton*, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181; *Hilbish v. Hower*, 58 Pa. St. 93.

**Process Irregular on Its Face Is No Protection.** — *Atwell v. Zeluff*, 26 Mich. 118; *Mogg v. Hall*, 83 Mich. 576. For instance, where the tax roll is uncertified, *Van Rensselaer v. Witbeck*, 7 N. Y. 517; *Westfall v. Preston*, 49 N. Y. 349; *Smith v. Mosher*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 786, 56 Hun (N. Y.) 643; or lacks the signature and seal of the assessing officer, *St. Louis*, etc., R. Co. v. Apperson, 97 Mo. 300.

**8. Extent of Protection Afforded by Regular Process** — *United States*. — *Utica First Nat. Bank v. Waters*, 19 Blatchf. (U. S.) 242; *Erskine v. Hohnbach*, 14 Wall. (U. S.) 613.

*Alabama*. — *Lott v. Hubbard*, 44 Ala. 593.

*Arkansas*. — *Sanders v. Simmons*, 30 Ark. 274.

*Connecticut*. — *Neth v. Crofut*, 30 Conn. 580; *Watson v. Watson*, 9 Conn. 140, 23 Am. Dec. 324.

*Illinois*. — *Chiniquy v. People*, 78 Ill. 571; *Hill v. Figley*, 25 Ill. 156; *Shaw v. Dennis*, 10 Ill. 405.

*Indiana*. — *Noland v. Busby*, 28 Ind. 154; *Ewing v. Robeson*, 15 Ind. 26.

*Louisiana*. — *Brainard v. Head*, 15 La. Ann. 489.

*Maine*. — *Carville v. Additon*, 62 Me. 459; *Nowell v. Tripp*, 61 Me. 426, 14 Am. Rep. 572; *Seekins v. Goodale*, 61 Me. 400, 14 Am. Rep. 568; *Bethel v. Mason*, 55 Me. 501; *Judkins v. Reed*, 48 Me. 386; *Caldwell v. Hawkins*, 40 Me. 526; *Ford v. Clough*, 8 Me. 342, 23 Am. Dec. 513.

*Massachusetts*. — *Noyes v. Haverhill*, 11 Cush. (Mass.) 338; *Howard v. Proctor*, 7 Gray (Mass.) 128; *Hays v. Drake*, 6 Gray (Mass.) 389; *Aldrich v. Aldrich*, 8 Met. (Mass.) 102; *Upton v. Holden*, 5 Met. (Mass.) 360; *Sprague v. Bailey*, 19 Pick. (Mass.) 436; *Holden v. Eaton*, 8 Pick. (Mass.) 436; *Cone v. Forest*, 126 Mass. 97; *Rawson v. Spencer*, 113 Mass. 40; *Underwood v. Robinson*, 106 Mass. 296; *Hubbard v. Garfield*, 102 Mass. 72; *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145; *Coleman v. Anderson*, 10 Mass. 105; *King v. Whitcomb*, 1 Met. (Mass.) 328.

*Michigan*. — *Byles v. Genung*, 52 Mich. 504; *Silsbee v. Stockle*, 44 Mich. 562; *Moss v. Cummings*, 44 Mich. 359; *Mathews v. Denamore*, 43 Mich. 461; *Bird v. Perkins*, 33 Mich. 28; *Le Roy v. East Saginaw City R. Co.*, 18 Mich. 233, 100 Am. Dec. 162; *Wall v. Trumbull*, 16 Mich. 228.

*Missouri*. — *Brown v. Harris*, 52 Mo. 306;

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even though the tax is illegal,<sup>1</sup> or the property exempt from taxation,<sup>2</sup> unless the exemption be properly claimed.<sup>3</sup> If the process is regular, it protects the officer though it is rendered invalid by reason of some fact not apparent on its face.<sup>4</sup> Nor, in general, is knowledge on the part of the officer material on the question as to whether he should execute the process or not. If a fact comes to his knowledge which shows the tax to be illegal, he may still execute the warrant with impunity, for the law has not made him the judge of the effect of any other facts than those which appear on the process itself.<sup>5</sup> The

North Missouri R. Co. v. Maguire, 49 Mo. 483; Walden v. Dudley, 49 Mo. 419; State v. Dulle, 48 Mo. 282; St. Louis Mut. L. Ins. Co. v. Charles, 47 Mo. 462; St. Louis Bldg., etc., Assoc. v. Lightner, 47 Mo. 393; Glasgow v. Rowse, 43 Mo. 480; Turner v. Franklin, 29 Mo. 285.

*New Hampshire.*—Gove v. Newton, 58 N. H. 359; Kinsley v. Hall, 9 N. H. 190.

*New York.*—Doolittle v. Doolittle, 31 Barb. (N. Y.) 312; Johnson v. Learn, 30 Barb. (N. Y.) 616; Patchin v. Ritter, 27 Barb. (N. Y.) 34; Troy, etc., R. Co. v. Kane, 72 N. Y. 614; Bullis v. Montgomery, 50 N. Y. 352; Abbott v. Yost, 2 Den. (N. Y.) 86; Parker v. Walrod, 16 Wend. (N. Y.) 514, 30 Am. Dec. 124; Reynolds v. Moore, 9 Wend. (N. Y.) 35, 24 Am. Dec. 116; Alexander v. Hoyt, 7 Wend. (N. Y.) 89; Savacool v. Boughton, 5 Wend. (N. Y.) 171, 21 Am. Dec. 181; Lake Shore, etc., R. Co. v. Roach, 80 N. Y. 339; Sheldon v. Van Buskirk, 2 N. Y. 473; Baley v. Wortsman, (Supm. Ct. Gen. T.) 2 N. Y. St. Rep. 246, 41 Hun (N. Y.) 637; Bradley v. Ward, 58 N. Y. 401; Chegary v. Jenkins, 5 N. Y. 376; Strong v. Walton, 47 N. Y. App. Div. 114; Hudler v. Golden, 36 N. Y. 446.

*North Carolina.*—State v. Lutz, 65 N. Car. 503.

*Ohio.*—Loomis v. Spencer, 1 Ohio St. 153.

*Pennsylvania.*—Cunningham v. Mitchell, 67 Pa. St. 78; Billings v. Russell, 23 Pa. St. 189, 62 Am. Dec. 330.

*Rhode Island.*—Peckham v. Bicknell, 11 R. I. 596.

*Wisconsin.*—McLean v. Cook, 23 Wis. 364; Sprague v. Birchard, 1 Wis. 457.

The collector is not a trespasser if any of the several warrants in his possession are valid, though the others are illegal, it being presumed that he acts under the lawful process. Woolsey v. Morris, 96 N. Y. 311; Hays v. Drake, 6 Gray (Mass.) 387; Bird v. Perkins, 33 Mich. 28.

1. *Tax Illegal.*—Prince v. Thomas, 11 Conn. 472; Thames Mfg. Co. v. Lathrop, 7 Conn. 550; Lincoln v. Worcester, 8 Cush. (Mass.) 55; Ranney v. Bader, 67 Mo. 476; Rubey v. Shain, 54 Mo. 207; State v. Dulle, 48 Mo. 282; Abbott v. Yost, 2 Den. (N. Y.) 86; Chegary v. Jenkins, 5 N. Y. 376; Baley v. Wortsman, (Supm. Ct. Gen. T.) 2 N. Y. St. Rep. 246, 41 Hun (N. Y.) 637; Gore v. Mastin, 66 N. Car. 371; State v. Lutz, 65 N. Car. 503. *Aliter*, where the levy is wholly void, *McPike v. Pew*, 48 Mo. 525. And see *Graham v. Parham*, 32 Ark. 676; *Greenwell v. Com.*, 78 Ky. 320; *Huse v. Merriam*, 2 Me. 376; *Baldwin v. McClinch*, 1 Me. 102.

The Remedy of the Taxpayer is to proceed to arrest the collection of the tax, *Ranney v.*

*Bader*, 67 Mo. 476; *Rubey v. Shain*, 54 Mo. 207; *Beach v. Furman*, 9 Johns. (N. Y.) 229; or to proceed against the persons who illegally assess the tax or issue the warrant, *Loomis v. Spencer*, 1 Ohio St. 154; *Thames Mfg. Co. v. Lathrop*, 7 Conn. 550; *Moore v. Allegheny*, 18 Pa. St. 58; *Weimer v. Bunbury*, 30 Mich. 201; *Baley v. Wortsman*, (Supm. Ct. Gen. T.) 2 N. Y. St. Rep. 246, 41 Hun (N. Y.) 637; *Alexander v. Hoyt*, 7 Wend. (N. Y.) 89; *Beach v. Furman*, 9 Johns. (N. Y.) 229; *Kelley v. Noyes*, 43 N. H. 209; *Henry v. Sargeant*, 13 N. H. 321, 40 Am. Dec. 146.

In *Vermont* tax bills and warrants thereon regularly issued are not of themselves sufficient to protect the collector of taxes for township purposes unless supported by proof that the tax was lawfully imposed. *Wheelock v. Archer*, 26 Vt. 380; *Shaw v. Peckett*, 25 Vt. 423; *Spear v. Tilson*, 24 Vt. 420; *Parkhurst v. Sumner*, 23 Vt. 538, 56 Am. Dec. 94; *Downing v. Roberts*, 21 Vt. 441; *Downer v. Woodbury*, 19 Vt. 329; *Collamer v. Drury*, 16 Vt. 574; *Hathaway v. Goodrich*, 5 Vt. 65.

2. *Property Exempt.*—*Erskine v. Hohnbach*, 14 Wall. (U. S.) 613; *Kelley v. Noyes*, 43 N. H. 209; *Blanchard v. Goss*, 2 N. H. 491; *Beach v. Furman*, 9 Johns. (N. Y.) 229; *Moore v. Allegheny*, 18 Pa. St. 55. *Contra*, where the property is specifically exempt by constitutional provision. *Walden v. Dudley*, 49 Mo. 419; *State v. Schacklett*, 37 Mo. 280; *St. Louis Bldg., etc., Assoc. v. Lightner*, 47 Mo. 393; *St. Louis Mut. L. Ins. Co. v. Charles*, 47 Mo. 462.

So, where the person is exempt, as in the case of a minister of the gospel, it has been held that a constable is guilty of a trespass in seizing property under a warrant in every respect regular. *Baldwin v. McClinch*, 1 Me. 102.

3. *Strong v. Walton*, 47 N. Y. App. Div. 114.

4. *Latent Defect.*—*Lott v. Hubbard*, 44 Ala. 593; *Cornell v. Barnes*, 7 Hill (N. Y.) 35; *People v. Warren*, 5 Hill (N. Y.) 440; *Webber v. Gay*, 24 Wend. (N. Y.) 485; *Earl v. Camp*, 16 Wend. (N. Y.) 562.

5. *Knowledge and Opinion of Officer Immaterial.*—*Watson v. Watson*, 9 Conn. 140, 23 Am. Dec. 324; *Kellar v. Savage*, 17 Me. 444, 20 Me. 199; *Smvth v. Titcomb*, 31 Me. 272; *Walden v. Dudley*, 49 Mo. 419; *Clark v. Bragdon*, 37 N. H. 562; *Kelley v. Noyes*, 43 N. H. 209; *State v. Roberts*, 52 N. H. 492; *Roberts v. Holmes*, 54 N. H. 560; *Gove v. Newton*, 58 N. H. 359; *People v. Warren*, 5 Hill (N. Y.) 440; *Cunningham v. Mitchell*, 67 Pa. St. 78.

A collector cannot be held chargeable with notice of irregularities in a tax levy by reason of his having been a member of the taxing board when the tax was levied. *Bird v. Perkins*, 33 Mich. 28; *Wall v. Trumbull*, 16 Mich. 228. *Contra*, *Leachman v. Dougherty*, 81 Ill. 324.

contrary has been held in *Illinois*,<sup>1</sup> and a few decisions apparently supporting the view taken by this court are found elsewhere.<sup>2</sup>

**Only Official Acts Privileged.** — It should be observed that only the official act of the collector is thus privileged. The property taken is not vested in him if the tax be unlawful. Hence, though he cannot sue in trespass,<sup>3</sup> the party aggrieved can maintain detinue or replevin to recover the property wrongfully taken,<sup>4</sup> unless such remedies are denied by statute.<sup>5</sup>

**Not Liable for Taxes Paid under Protest.** — In most states provisions are made for the recovery of illegal taxes paid under protest. Such an action is properly brought against the beneficiary of the tax, and the collector is not suable,<sup>6</sup> unless, as has been held, he still retains the money in his own hands.<sup>7</sup>

(2) **Unauthorized Acts.** — For damage resulting from acts not in conformity with the authority conferred by his process, the collector is personally liable to the party aggrieved.<sup>8</sup> He must not levy too soon,<sup>9</sup> nor hold the property too long before selling,<sup>10</sup> nor sell in a place different from that specified by law,<sup>11</sup> nor make an excessive levy or sale.<sup>12</sup> The collector is bound to accept lawful money in payment of taxes and such other medium as the taxing authorities permit,<sup>13</sup> or are bound by law,<sup>14</sup> or contract,<sup>15</sup> to receive; and if, after the tender of such, the collector proceeds he will be liable for the seizure,<sup>16</sup> although he is prohibited from receiving the particular funds by an unconstitutional statute.<sup>17</sup> An abuse of the authority granted by law done subsequent to the seizure makes the officer liable as trespasser *ab initio*,<sup>18</sup> as where he sells personalty at a sacrifice within two hours after seizure and

1. *Contra*, **Notice of Latent Defect.** — *Barnes v. Barber*, 6 Ill. 406; *Guyer v. Andrews*, 11 Ill. 494; *McDonald v. Wilkie*, 13 Ill. 25, 54 Am. Dec. 423; *Hill v. Figley*, 25 Ill. 156; *Leachman v. Dougherty*, 81 Ill. 324.

2. In *Suydam v. Keys*, 13 Johns. (N. Y.) 444, the fact which rendered the tax void was jurisdictional. The person whose property was seized was a nonresident, and the taxing authorities had power to tax resident inhabitants only. In *Bergen v. Clarkson*, 6 N. J. L. 352, the by-law under which the tax was imposed was void. In *Graham v. Parham*, 32 Ark. 676, the tax exceeded a constitutional limitation. See *Savacool v. Boughton*, 5 Wend. (N. Y.) 171, 21 Am. Dec. 181, where the early New York cases are criticised or distinguished.

3. *Sheldon v. Van Buskirk*, 2 N. Y. 473.

4. **Recovery of Property.** — *Atlantic, etc., R. Co. v. Cleins*, 2 Dill. (U. S.) 175; *McKay v. Batchellor*, 2 Colo. 591; *Morford v. Unger*, 8 Iowa 82; *Beach v. Botsford*, 1 Dougl. (Mich. 199) 40 Am. Dec. 45; *Le Roy v. East Saginaw City R. Co.*, 18 Mich. 233, 100 Am. Dec. 162; *Henry v. Bell*, 75 Mo. 194; *Wright v. Briggs*, 2 Hill (N. Y.) 77; *Dubois v. Webster*, 7 Hun (N. Y.) 371; *Lake Shore, etc., R. Co. v. Roach*, 80 N. Y. 339; *Hudler v. Golden*, 36 N. Y. 446.

5. *Hallock v. Rumsey*, 22 Hun (N. Y.) 87.

6. **Taxes Paid under Protest.** — *Hodgson v. Dexter*, 1 Cranch (U. S.) 345; *Elliott v. Swartwout*, 10 Pet. (U. S.) 137; *Crutchfield v. Wood*, 16 Ala. 702; *Phelan v. San Francisco*, 120 Cal. 1; *Lewis County v. Tate*, 10 Mo. 650; *Enloe v. Hall*, 1 Humph. (Tenn.) 303; *Dickins v. Jones*, 6 Yerg. (Tenn.) 483, 27 Am. Dec. 488. But see *Mendocino Bank v. Chalfant*, 51 Cal. 369.

7. *Hardesty v. Fleming*, 57 Tex. 395.

8. *Meyer v. Larkin*, 3 Cal. 403.

As to liability and burden of proof in case of

negligent injury to chattels distrained, see *Buswell v. Fuller*, 89 Me. 600.

9. *Veit v. Graff*, 37 Ind. 253.

10. **Detention Prior to Sale.** — *Farnsworth Co. v. Rand*, 65 Me. 19; *Brackett v. Vining*, 49 Me. 356; *Pierce v. Benjamin*, 14 Pick. (Mass.) 356, 25 Am. Dec. 396; *Souhegan Nail, etc., Factory v. McConihe*, 7 N. H. 309; *Ordway v. Ferrin*, 3 N. H. 69.

Detention for a short period longer than the law provides, before sale, does not make the officer a trespasser *ab initio*, but if damage results it may be recovered by action. *Bird v. Perkins*, 33 Mich. 28.

11. **Place of Sale.** — *Prince v. Thomas*, 11 Conn. 472.

12. **Excessive Levy.** — *Williamson v. Dow*, 32 Me. 559; *Libby v. Burnham*, 15 Mass. 144; *Cone v. Forest*, 126 Mass. 97; *Thompson v. Currier*, 24 N. H. 239.

In determining what is an excessive levy the officer is allowed to exercise a very liberal discretion. *Com. v. Lightfoot*, 7 B. Mon. (Ky.) 298; *Jewell v. Swain*, 57 N. H. 506.

**Illustrations of Excessive Levy.** — *Roser v. Georgia L. & T. Co.*, (Ga. 1903) 44 S. E. Rep. 994; *Chamberlain v. Woolsey*, (Neb. 1902) 92 N. W. Rep. 181; on rehearing, (Neb. 1903) 95 N. W. Rep. 38. See also 7 ENCYC. OF PL. AND PR., pp. 29 *et seq.*, title DISTRESS.

13. *Sheridan v. Rahway*, 44 N. J. L. 587; *Ysleta v. Lowenstein*, (Tex. Civ. App. 1894) 25 S. W. Rep. 444.

14. *Frier v. State*, 11 Fla. 300; *Sheridan v. Rahway*, 44 N. J. L. 587.

15. *Poindexter v. Greenhow*, 114 U. S. 270.

16. *Willis v. Miller*, 29 Fed. Rep. 238.

17. **Law Prohibiting Receipt of Particular Funds Invalid.** — *White v. Greenhow*, 114 U. S. 307; *Chaffin v. Taylor*, 114 U. S. 309.

18. **Trespass ab Initio** — *England*. — *Six Carpenters Case*, 8 Coke 146.

without any notice to the public. Likewise, if he collects taxes from one in no way liable,<sup>1</sup> or demands and receives more than his list calls for,<sup>2</sup> he must refund, and the fact that the money may still be in the hands of his deputy,<sup>3</sup> or has already been turned over to the local authorities,<sup>4</sup> constitutes no defense.

**b. DUTIES AND LIABILITY TO THE PUBLIC—(1) Duty to Collect—Negligence.**—Unless the taxes should be remitted by competent authority,<sup>5</sup> the collector must proceed to the timely collection of all taxes properly assessed and certified to him,<sup>6</sup> provided, of course, the warrant, general or special, under which he is expected to act is sufficiently regular to afford protection.<sup>7</sup> If so, he should obey its mandate.<sup>8</sup> In collecting the tax he must exercise due diligence, and he is liable for all taxes lost by reason of his negligence.<sup>9</sup> Even where the tax is in part illegal he should collect to the extent of the valid tax if it can be separated.<sup>10</sup> So he is liable for taxes for which he has receipted without receiving payment.<sup>11</sup> He is, of course, not liable for

*California.*—Mendocino Bank v. Chalfant, 51 Cal. 369.

*Connecticut.*—Prince v. Thomas, 11 Conn. 472.

*Indiana.*—Veit v. Graff, 37 Ind. 253.

*Maine.*—Farnsworth Co. v. Rand, 65 Me. 19; Brckett v. Vining, 49 Me. 356.

*Massachusetts.*—Pierce v. Benjamin, 14 Pick. (Mass.) 356, 25 Am. Dec. 396; Libby v. Burnham, 15 Mass. 144.

*New Hampshire.*—Blake v. Johnson, 1 N. H. 91.

*Vermont.*—Wilson v. Seavey, 38 Vt. 221.

1. Blake v. Johnson, 1 N. H. 91.

For example, if he enforces a privilege tax against one not in business, Stewart v. Atlanta Beef Co., 93 Ga. 12, 44 Am. St. Rep. 119; or enforces a local levy against one who is not an inhabitant of the district over which the levying board has jurisdiction, Suydam v. Keys, 13 Johns. (N. Y.) 444.

2. Foss v. Whitehouse, 94 Me. 491.

3. Stewart v. Atlanta Beef Co., 93 Ga. 12, 44 Am. St. Rep. 119.

4. Foss v. Whitehouse, 94 Me. 491.

5. Montgomery County Ct. v. Chenault, (Ky. 1898) 47 S. W. Rep. 457.

**Cancellation or Release of Taxes by County Board,** see Grundysen v. Polk County, 57 Minn. 212; State v. Central Pac. R. Co., 10 Nev. 47.

**6. Duty to Collect.**—Fidelity, etc., Co. v. Mobile County, 124 Ala. 144; People v. Smith, 123 Cal. 70.

**Notice.**—Where, however, he is entitled to notice and it is not given or is not given according to law, the collector is not liable for failure to collect. Adams v. Brennan, 72 Miss. 894.

**When Assessment Unnecessary.**—A sheriff specially empowered to collect taxes on cattle driven into the state for grazing may act without authority from the assessor. Wright v. Stinson, 16 Wash. 368.

**Threat of Injunction Suit** no excuse for delay or failure to collect. Lyons v. Breckinridge County Ct., 101 Ky. 715.

**7. Regularity of Warrant.**—Reynolds v. Lofton, 18 Ga. 47; Barlow v. Sumter County, 47 Ga. 639; School Dist. v. Clark, 33 Me. 482; Bachelder v. Thompson, 41 Me. 539; Frankfort v. White, 41 Me. 537; Orneville v. Pearson, 61 Me. 552; Boothbay v. Giles, 64 Me. 403, 68 Me. 161; Pearson v. Canney, 64 Me. 188; Waldron v. Lee, 5 Pick. (Mass.) 328; Wades-

boro v. Atkinson, 107 N. Car. 317. See also Tunbridge v. Smith, 48 Vt. 648.

**8. Officer Must Obey the Process.**—Utica First Nat. Bank v. Waters, 19 Blatchf. (U. S.) 242; Albany City Nat. Bank v. Maher, 19 Blatchf. (U. S.) 175; Kellar v. Savage, 20 Me. 199; Smyth v. Titcomb, 31 Me. 282; Walden v. Dudley, 49 Mo. 419; Gove v. Newton, 58 N. H. 359.

**9. Taxes Lost Through Negligence.**—Alabama. Jackson County v. Gullatt, 84 Ala. 243.

*California.*—People v. Smith, 123 Cal. 70. *Louisiana.*—Scarborough v. Stevens, 3 Rob. (La.) 147.

*Maine.*—Richmond v. Brown, 66 Me. 373.

*Massachusetts.*—Colerain v. Bell, 9 Met. (Mass.) 499.

*Mississippi.*—Marlar v. State, 62 Miss. 677.

*New Hampshire.*—Pittsburg v. Tabor, 61 N. H. 100.

*New Jersey.*—Painter v. Blairstown Tp., 43 N. J. Eq. 317.

*Tennessee.*—Prince v. Britt, 8 Heisk. (Tenn.) 290; State v. Britt, 8 Heisk. (Tenn.) 298; Governor v. McEwen, 5 Humph. (Tenn.) 241.

**No Default.**—No default on the part of the collector is shown where the failure of the tax-payer to pay is due to a claim on his part that the property is exempt from taxation. Adams v. Stonewall Mfg. Co., 80 Miss. 94.

The collector cannot be charged with negligence in failing to collect where the tax list is not furnished to him in the time prescribed by law. Gutches v. Todd County, 44 Minn. 383.

Where the illegal tax is severable from the rest, the collector must collect so much as is rightly due. Clifton v. Wynne, 80 N. Car. 145.

If he discharges his duty with diligence he cannot be held for sums not actually received. State v. Daspit, 30 La. Ann. 1112; Gutches v. Todd County, 44 Minn. 383.

**10. Separation of Legal from Illegal Tax.**—Mendocino Bank v. Chalfant, 51 Cal. 369; Vassalboro v. Nowell, 75 Me. 245; Clifton v. Wynne, 80 N. Car. 145.

**Ignorance of the Law.**—Where he collects less than what is due, the fact that he acts upon an erroneous construction of a statute is no protection. Sponberg v. Oneida County, 6 Idaho 722.

**11. No Money Paid.**—McWilliams v. Phillips, 51 Miss. 196; State v. Britt, 8 Heisk. (Tenn.) 298; McLean v. State, 8 Heisk. (Tenn.) 22.

taxes which it is not his duty to collect,<sup>1</sup> nor where he is enjoined from collecting,<sup>2</sup> nor where the tax reaches the right destination even though it goes through an improper channel;<sup>3</sup> and before he can be held for a failure to collect it must appear that he was the proper person to make the collection.<sup>4</sup>

(2) *Duty to Keep and Account* — (a) *Safekeeping*. — The collector must safely keep all funds received in his official capacity.<sup>5</sup> Like the treasurer, he is, by the weight of American authority, treated either as a debtor for the moneys received by him,<sup>6</sup> or as an insurer,<sup>7</sup> or is held absolutely liable on grounds of public policy, taken in connection with the terms of his contract,<sup>8</sup> or by virtue of the effect of statutes.<sup>9</sup> Hence he is not considered a mere common-law bailee,<sup>10</sup> and will not be excused where the money is lost by the embezzlement of a deputy<sup>11</sup> over whose appointment he has no control,<sup>12</sup> nor where it is stolen or taken by robbery without negligence on his part,<sup>13</sup> nor where it is lost by fire.<sup>14</sup> Compulsion of the public enemy,<sup>15</sup> and overruling necessity,<sup>16</sup> do, however, exonerate the officer.

*Relaxation of Rule*. — Some of the late American cases show a tendency to relax the rule of strict liability above indicated.<sup>17</sup> Thus, statutory expressions,

1. *No Duty to Collect*. — *West Baton Rouge v. Morris*, 27 La. Ann. 459; *Lincoln v. Chapin*, 132 Mass. 470; *State v. Strong*, (Tenn. Ch. 1897) 47 S. W. Rep. 1103.

2. *Com. v. Masonic Temple Co.*, 89 Ky. 658.

3. *Funds Reaching Destination*. — *Simmons v. Boulton*, 26 La. Ann. 277; *Treasurers v. Hillard*, 8 Rich. L. (S. Car.) 412.

4. *Person to Collect*. — *Montgomery County Ct. v. Chenault*, (Ky. 1898) 47 S. W. Rep. 457; *Machiasport v. Small*, 77 Me. 109; *Williamstown v. Willis*, 15 Gray (Mass.) 427; *Stanberry v. Jordan*, 145 Mo. 371.

5. For a treatment of the liability of officers in general for funds held in their official capacity, see the title *PUBLIC OFFICERS*, vol. 23, p. 372.

6. *Collector Treated as Debtor*. — *U. S. v. Freeman*, 1 Woodb. & M. (U. S.) 45; *Ramsay v. People*, 197 Ill. 572, 90 Am. St. Rep. 177, *affirming* 97 Ill. App. 283; *Hancock v. Hazzard*, 12 Cush. (Mass.) 112, 59 Am. Dec. 171; *Perley v. Muskegon County*, 32 Mich. 132, 20 Am. Rep. 637; *Tillinghast v. Merrill*, 151 N. Y. 135, 56 Am. St. Rep. 612; *Johnstown v. Rodgers*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 262.

7. *Insurer*. — *Adams v. Lee*, 72 Miss. 281; *Griffin v. Levee Com'rs*, 71 Miss. 767; *New Providence Tp. v. McEachron*, 33 N. J. L. 339; *McEachron v. New Providence Tp.*, 35 N. J. L. 528; *U. S. v. Watts*, 1 N. Mex. 553; *Cox v. Blair*, 76 N. Car. 78.

8. *Liable on Contract and by Public Policy*. — *U. S. v. Prescott*, 3 How. (U. S.) 578; *Halbert v. State*, 22 Ind. 125; *District Tp. v. Smith*, 39 Iowa 9, 18 Am. Rep. 39; *Com. v. Godshaw*, 92 Ky. 435; *State v. Harper*, 6 Ohio St. 607, 67 Am. Dec. 363; *Com. v. Comly*, 3 Pa. St. 372; *Omro v. Kaime*, 39 Wis. 468.

9. *Liable by Statute*. — *Thompson v. Township Sixteen North*, 30 Ill. 99; *Rose v. Douglass Tp.*, 52 Kan. 451, 39 Am. St. Rep. 354; *Board of Education v. Jewell*, 44 Minn. 427, 20 Am. St. Rep. 586; *Bush v. Johnson County*, 48 Neb. 1, 58 Am. St. Rep. 673.

10. *Collector Not a Common-law Bailee*. — *U. S. v. Prescott*, 3 How. (U. S.) 578; *Adams v. Lee*, 72 Miss. 281; *State v. Moore*, 74 Mo. 413, 41 Am. Rep. 322; *State v. Powell*, 67 Mo. 395, 29

Am. Rep. 512; *State v. Harper*, 6 Ohio St. 608, 67 Am. Dec. 363.

*Special Bailees*. — "Still they are nothing but bailees. To call them anything else, when they are expressly forbidden to touch or use the public money except as directed, would be an abuse of terms. But they are special bailees, subject to special obligations. It is evident that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility. This is placed on a new basis. To the extent of the amount of their official bonds, it is fixed by special contract; and the policy of the law as to their general responsibility for amounts not covered by such bonds may be fairly presumed to be the same." *U. S. v. Thomas*, 15 Wall. (U. S.) 347.

*Quasi-Bailee*. — The collector is a bailee, or occupies a position analogous to that of a bailee, his liability as such being made greater than that of the ordinary bailee on grounds of public policy. *State v. Houston*, 78 Ala. 576, 56 Am. Rep. 59.

11. *U. S. v. Bryan*, 82 Fed. Rep. 290.

12. *U. S. v. Zabriskie*, 87 Fed. Rep. 714.

13. *Robbery and Theft*. — *U. S. v. Dashiell*, 4 Wall. (U. S.) 182; *District Tp. v. Morton*, 37 Iowa 550; *State v. Nevin*, 19 Nev. 162, 3 Am. St. Rep. 873; *Bladen County v. Clarke*, 73 N. Car. 255. But see *Rose v. Hatch*, 5 Iowa 149; *State v. Lanier*, 31 La. Ann. 423.

14. *Fire*. — *Smythe v. U. S.*, 188 U. S. 156; *District Tp. v. Smith*, 39 Iowa 9, 18 Am. Rep. 39.

15. *U. S. v. Thomas*, 15 Wall. (U. S.) 337. But the compulsion must be actual. *U. S. v. Keebler*, 9 Wall. (U. S.) 83.

16. *Sinking of Ship*. — *U. S. v. Humason*, 6 Sawy. (U. S.) 199.

17. *Relaxation of the Strict Liability of Collectors*. — *Wilson v. People*, 19 Colo. 199, 41 Am. St. Rep. 243; *Rose v. Hatch*, 5 Iowa 149; *State v. Lanier*, 31 La. Ann. 423; *Cumberland County v. Pennell*, 69 Me. 357, 31 Am. Rep. 284; *Livingston v. Woods*, 20 Mont. 91; *Albany County v. Dorr*, 25 Wend. (N. Y.) 440; *People v. Faulkner*, 107 N. Y. 477; *York County v. Watson*, 15 S. Car. 1, 40 Am. Rep. 675. But see *Tillinghast v. Merrill*, 151 N. Y. 135, 56 Am. St. Rep. 612.

often put into bonds, such as "keep and pay over according to law,"<sup>1</sup> "faithfully keep the public money,"<sup>2</sup> and "faithfully discharge the duties of the office,"<sup>3</sup> have been taken as sufficient ground for a more lenient doctrine. In England it is held that the custodian of funds is substantially a bailee.<sup>4</sup>

(b) **Accounting** — *aa. EXTENT OF LIABILITY.* — The collector must pay over all funds which officially come into his hands, or those of his deputy,<sup>5</sup> to the proper authorities,<sup>6</sup> and in the time<sup>7</sup> and manner prescribed by law.<sup>8</sup> He is sometimes required by statute to turn over the identical funds collected.<sup>9</sup> For money actually collected<sup>10</sup> as well as for interest and penalties<sup>11</sup> he is liable both personally and on his bond.<sup>12</sup> So far as his duty to account for moneys received is concerned, it is wholly immaterial that the tax collected by him may have been unconstitutional,<sup>13</sup> or otherwise illegal and void;<sup>14</sup> or that

1. *State v. Copeland*, 96 Tenn. 296, 54 Am. St. Rep. 840.

2. *State v. Houston*, 78 Ala. 576, 56 Am. Rep. 59.

3. *State v. Gramm*, 7 Wyo. 329.

4. **English Rule.** — *Lane v. Cotton*, 1 Ld. Raym. 646; *Walker v. British Guarantee Assoc.*, 18 Q. B. 277, 83 E. C. L. 277.

5. *Williamstown v. Willis*, 15 Gray (Mass.) 427.

6. **Duty to Pay Over.** — *Police Jury v. Brookshier*, 31 La. Ann. 736; *Wellington v. Lawrence*, 73 Me. 125; *Hardyston Tp. v. Harden*, 68 N. J. L. 76; *Street Lighting Dist. No. One v. Drummond*, 63 N. J. L. 493; *People v. Brown*, 55 N. Y. 180.

**Fear of Misappropriation** is no ground for refusal to pay over. *People v. Fitch*, 9 N. Y. App. Div. 439.

**Paying to Officer Who Has Not Given Bond.** — The collector is not personally liable for paying money to a treasurer who is required to increase his bond before receiving the same, when he acts without knowledge that the treasurer has not increased it. *Woodall v. Oden*, 62 Ala. 125; *Morrow v. Wood*, 56 Ala. 1.

The fact that state and county taxes have been accidentally blended does not relieve the collector of the duty to pay over the right amount to the respective authorities, especially where the amount due can be made certain by referring to the law imposing the taxes. *Clifton v. Wynne*, 80 N. Car. 145.

**Special Funds.** — For special taxes appropriated to particular creditors he must ordinarily account to them, but any surplus must be turned over to the public authorities. *Cedar Rapids, etc., R. Co. v. Cowan*, 77 Iowa 535; *Hardy v. Logan County Ct.*, (Ky. 1893) 23 S. W. Rep. 661.

**Preference.** — Under the *Wisconsin* statute, where one officer collects the town, county, and state taxes, the town is given preference over the county, and the state over both. The burden of the delinquencies therefore falls on the county. *Winchester County v. Tozer*, 24 Wis. 312; *Wolff v. Stoddard*, 25 Wis. 503.

7. **Time.** — *Boothbay v. Giles*, 68 Me. 162; *Wheeling v. Black*, 25 W. Va. 266.

8. **Mode of Payment.** — *Baird v. People*, 83 Ill. 387; *Brunswick v. Snow*, 73 Me. 181; *Mason v. Fractional School Dist.*, 34 Mich. 234; *People v. Brown*, 55 N. Y. 180.

9. *State v. Houston*, 78 Ala. 579, 56 Am. Rep. 59.

10. **All Money Collected** — *Arkansas*. — *Crawford v. Carson*, 35 Ark. 565.

*California*. — *People v. Love*, 25 Cal. 520.

*Georgia*. — *Goldsmith v. Kemp*, 58 Ga. 106.

*Illinois*. — *People v. Cooper*, 10 Ill. App. 384.

*Louisiana*. — *Copley v. Dinkgrave*, 7 La. Ann. 595; *Duncan v. State*, 7 La. Ann. 377; *Buffington v. Dinkgrave*, 4 La. Ann. 550.

*Maine*. — *Orneville v. Pearson*, 61 Me. 552.

*Massachusetts*. — *Adams v. Farnsworth*, 15 Gray (Mass.) 423; *Morse v. Lowell*, 7 Met. (Mass.) 152; *Lincoln v. Chapin*, 132 Mass. 470. *North Carolina*. — *Clifton v. Wynne*, 80 N. Car. 145; *Wake County v. Magnin*, 78 N. Car. 181.

*Ohio*. — *Feigert v. State*, 31 Ohio St. 432.

*Tennessee*. — *State v. Britt*, 8 Heisk. (Tenn.) 298; *Waters v. Edmondson*, 8 Heisk. (Tenn.) 384; *McLean v. State*, 8 Heisk. (Tenn.) 22.

*Texas*. — *Webb County v. Gonzales*, 69 Tex. 455; *Boggs v. State*, 46 Tex. 10.

11. **Interest and Penalties.** — *Wheeling v. Black*, 25 W. Va. 266.

12. **Liable on Bond.** — *Baird v. State*, 83 Ill. 387; *Delker v. Owensboro*, (Ky. 1901) 61 S. W. Rep. 362; *Pulaski County v. Elrod*, (Ky. 1902) 66 S. W. Rep. 1017; *Orono v. Wedgewood*, 44 Me. 49, 69 Am. Dec. 81.

**Money Received from Preceding Term.** — A collector whose bond provides for the payment of moneys collected by him by virtue of his office is liable thereon for moneys received by him from the collection of a preceding term. *Haley v. Petty*, 42 Ark. 392.

A town does not lose its right of recourse upon the bond of a defaulting collector by reason of the fact that it makes good the amount due the state. *Richmond v. Toothaker*, 69 Me. 451.

13. **Unconstitutional Tax.** — *Lovington v. Board of Trustees*, 99 Ill. 564; *Street Lighting Dist. No. One v. Drummond*, 63 N. J. L. 493; *McGuire v. Williams*, 123 N. Car. 349; *Wilson v. State*, 1 Lea (Tenn.) 316; *Chandler v. State*, 1 Lea (Tenn.) 296.

14. **Illegal Tax** — *United States*. — *Bell v. Mobile, etc., R. Co.*, 4 Wall. (U. S.) 598.

*Alabama*. — *Thompson v. Stickney*, 6 Ala. 579.

*California*. — *San Francisco v. Ford*, 52 Cal. 198.

*Indiana*. — *State v. Cunningham*, 8 Blackf. (Ind.) 339.

*Maine*. — *Smyth v. Titcomb*, 31 Me. 272.

*Maryland*. — *Waters v. State*, 1 Gill (Md.)



it was improperly collected, as under the authority of a defective assessment or warrant,<sup>1</sup> or even without any warrant at all.<sup>2</sup> Nor is it relevant to show that he himself was merely a *de facto* collector and had no title to the office.<sup>3</sup> He cannot impeach his own acts or question the right of the state or other political division, at whose instance the tax was collected, to receive the same. Having accepted the money as collector he is estopped from denying the validity of the tax.<sup>4</sup> Though the taxpayer might properly refuse to pay the tax,<sup>5</sup> and though the collector might be justified in refusing to collect

302; *State v. Baltimore, etc., R. Co.*, 34 Md. 344; *O'Neal v. School Com'rs*, 27 Md. 227.

*Michigan*.—*Silabee v. Stockle*, 44 Mich. 562.  
*Mississippi*.—*Dogan v. Griffin*, 51 Miss. 782.

*New York*.—*Williams v. Holden*, 4 Wend. (N. Y.) 223; *Olean v. King*, 116 N. Y. 355.

*North Carolina*.—*Clifton v. Wynne*, 80 N. Car. 145; *Hewlett v. Nutt*, 79 N. Car. 263.

*Ohio*.—*Feigert v. State*, 31 Ohio St. 432.

*Pennsylvania*.—*Com. v. Philadelphia*, 27 Pa. St. 497; *Moore v. Allegheny*, 18 Pa. St. 55.

*Texas*.—*Mast v. Nacogdoches County*, 71 Tex. 380; *Webb County v. Gonzales*, 69 Tex. 455.

*Vermont*.—*Pawlet v. Kelley*, 69 Vt. 398.

*Wisconsin*.—*Battles v. Doll*, 113 Wis. 357.

That the tax was paid under protest is no defense. *San Francisco v. Ford*, 52 Cal. 198; *People v. Austin*, 46 Cal. 520.

**Taxpayer's Title.**—Nor can the collector set up that the taxpayer had no title to the property on which the tax was levied. *State v. Seibert*, 148 Mo. 408.

The question of constitutional authority to levy a tax can arise only between the collector and the person taxed before payment, and between the state and the person taxed after payment. *Waters v. State*, 1 Gill (Md.) 302.

**Criminal Liability.**—But, it seems, before a collector can be held criminally liable for tax collected such tax must be lawfully assessed. *Buck v. Com.*, 90 Pa. St. 110.

1. **Irregular Assessment.**—*Brunswick v. Snow*, 73 Me. 177; *Trescott v. Moan*, 50 Me. 347; *Scarborough v. Parker*, 53 Me. 252; *Williamstown v. Willis*, 15 Gray (Mass.) 427; *Mississippi County v. Jackson*, 51 Mo. 23; *Nason v. Fowler*, 70 N. H. 291.

After a tax collector has acted under the ordinance of a police jury, and collected taxes laid by it, neither he nor his sureties can contest the legality of the ordinance. *Police Jury v. Brookshier*, 31 La. Ann. 736.

2. **Taxes Collected Without Warrant.**—*State v. Woodside*, 8 Ired. L. (30 N. Car.) 104; *Com. v. Black*, 15 Pa. Co. Ct. 664. See also *Slade v. Governor*, 3 Dev. L. (14 N. Car.) 365; *Kelly v. Craig*, 5 Ired. L. (27 N. Car.) 131.

3. **De Facto Collector.**—*Kellar v. Savage*, 20 Me. 199; *Ford v. Clough*, 8 Me. 334, 23 Am. Dec. 513; *Billingsley v. State*, 14 Md. 369; *Northumberland v. Cobleigh*, 59 N. H. 250; *Pittsburg v. Danforth*, 56 N. H. 272; *Com. v. Stambaugh*, 164 Pa. St. 437.

4. **Estoppel.**—*United States*.—*King v. U. S.*, 99 U. S. 229.

*Arkansas*.—*Scott v. Watkins*, 22 Ark. 536.

*Florida*.—*State v. Rushing*, 17 Fla. 226; *Frier v. State*, 11 Fla. 300.

*Georgia*.—*Arnett v. Griffin*, 60 Ga. 349;

*Walden v. Lee County*, 60 Ga. 296; *Wilkinson v. Bennett*, 56 Ga. 290.

*Illinois*.—*Lovington v. Board of Trustees*, 99 Ill. 564; *People v. Cooper*, 10 Ill. App. 384.

*Louisiana*.—*Scarborough v. Stevens*, 3 Rob. (La.) 147; *McGuire v. Bry*, 3 Rob. (La.) 196.

*Maine*.—*Brunswick v. Snow*, 73 Me. 177; *Gorham v. Hall*, 57 Me. 58; *Trescott v. Moan*, 50 Me. 347; *Orono v. Wedgewood*, 44 Me. 49, 69 Am. Dec. 81; *School Dist. v. Clark*, 33 Me. 482; *Kellar v. Savage*, 17 Me. 445; *Johnson v. Goodridge*, 15 Me. 29; *Ford v. Clough*, 8 Me. 334, 23 Am. Dec. 513; *Hale v. Cushing*, 2 Me. 218.

*Maryland*.—*Billingsley v. State*, 14 Md. 369.

*Massachusetts*.—*Williamstown v. Willis*, 15 Gray (Mass.) 427; *Cheshire v. Howland*, 13 Gray (Mass.) 321; *Great Barrington v. Austin*, 8 Gray (Mass.) 444; *Wendell v. Fleming*, 8 Gray (Mass.) 613; *Spencer v. Jones*, 6 Gray (Mass.) 502; *Sandwich v. Fish*, 2 Gray (Mass.) 298; *Colerain v. Bell*, 9 Met. (Mass.) 499; *Pease v. Smith*, 24 Pick. (Mass.) 122; *Sprague v. Bailey*, 19 Pick. (Mass.) 436; *Briggs v. Murdock*, 13 Pick. (Mass.) 305; *Lincoln v. Chapin*, 132 Mass. 470.

*Michigan*.—*Berrien County v. Bunbury*, 45 Mich. 79.

*Mississippi*.—*State v. Harney*, 57 Miss. 863; *Taylor v. State*, 51 Miss. 79; *Dogan v. Griffin*, 51 Miss. 782.

*Missouri*.—*Mississippi County v. Jackson*, 51 Mo. 23.

*New Hampshire*.—*Tucker v. Aiken*, 7 N. H. 113; *Horn v. Whittier*, 6 N. H. 88; *Charleton v. Whitcher*, 5 N. H. 196; *Meredith v. Ladd*, 2 N. H. 517; *Johnston v. Wilson*, 2 N. H. 202, 9 Am. Dec. 50.

*New York*.—*Murdock v. Aikin*, 29 Barb. (N. Y.) 59; *People v. Brown*, 55 N. Y. 180; *Ross v. Curtis*, 31 N. Y. 605.

*North Carolina*.—*State v. Woodside*, 8 Ired. L. (30 N. Car.) 104; *Clifton v. Wynne*, 80 N. Car. 145; *Hewlett v. Nutt*, 79 N. Car. 263; *Prince v. McNeill*, 77 N. Car. 398.

*Pennsylvania*.—*Com. v. Titman*, 148 Pa. St. 168; *Ridgway Tp. v. Wheeler*, 90 Pa. St. 450; *Com. v. Philadelphia*, 27 Pa. St. 497.

*South Carolina*.—*Treasurers v. Hilliard*, 8 Rich. L. (S. Car.) 412.

*Tennessee*.—*Jones v. Scanland*, 6 Humph. (Tenn.) 195, 44 Am. Dec. 300; *Wilson v. State*, 1 Lea (Tenn.) 316; *Governor v. Montgomery*, 2 Swan (Tenn.) 613.

*Texas*.—*Webb County v. Gonzales*, 69 Tex. 455; *State v. Middleton*, 57 Tex. 185; *Swan v. State*, 48 Tex. 121; *Morris v. State*, 47 Tex. 583.

5. **Though Taxpayer Not Bound to Pay.**—*People v. Cooper*, 10 Ill. App. 384; *Trescott v. Moan*, 50 Me. 374; *Orono v. Wedgewood*, 44

it,<sup>1</sup> if the tax is actually paid into the collector's hands, the trust attaches and the right of the taxing authorities to insist upon payment over is perfect.

*bb. THE ACCOUNTING.* — The collector must settle<sup>2</sup> with the state, county, or other authorities at the time<sup>3</sup> and in the manner prescribed by law;<sup>4</sup> otherwise he will not be discharged,<sup>5</sup> or will forfeit his commissions,<sup>6</sup> or may be subjected to a penalty;<sup>7</sup> since public policy requires that the collector should be strictly held to the performance of his full duty.<sup>8</sup>

*Time of Settlement.* — In the absence of statute the settlement must be made and money paid over in a reasonable time after collection.<sup>9</sup> But the collector should, of course, keep the funds in his own hands until some one is clothed with rightful authority to demand and receive the same.<sup>10</sup> If he fails to settle at the proper time,<sup>11</sup> or delays payment after the account is taken,<sup>12</sup> he may be charged with interest<sup>13</sup> and with such penalties as are fixed by law,<sup>14</sup> unless there is no one to whom the payment may properly be made,<sup>15</sup> or unless no

Me. 49, 69 Am. Dec. 81; *Kellar v. Savage*, 20 Me. 199; *Johnson v. Goodridge*, 15 Me. 29; *Ford v. Clough*, 8 Me. 334, 23 Am. Dec. 513; *Clifton v. Wynne*, 80 N. Car. 145; *Lyndon v. Miller*, 36 Vt. 329. And see *Moss v. Riddle*, 5 Cranch (U. S.) 351; *Ham v. Greve*, 34 Ind. 18; *Burks v. Wonterline*, 6 Bush (Ky.) 20; *Lynn v. Cumberland*, 77 Md. 449; *Lincoln v. Chapin*, 132 Mass. 470; *Mississippi County v. Jackson*, 51 Mo. 23.

1. *Nor Collector Bound to Proceed—Georgia.* — *Barlow v. Sumter County*, 47 Ga. 639; *Reynolds v. Lofton*, 18 Ga. 47.

*Kentucky.* — *Palmer v. Craddock, Sneed* (Ky.) 182.

*Maine.* — *Boothbay v. Giles*, 64 Me. 403; *Orneville v. Pearson*, 61 Me. 552; *Trescott v. Moan*, 50 Me. 347; *Frankfort v. White*, 41 Me. 537.

*Massachusetts.* — *Adams v. Farnsworth*, 15 Gray (Mass.) 423; *Cheshire v. Howland*, 13 Gray (Mass.) 321; *Sandwich v. Fish*, 2 Gray (Mass.) 298; *Lincoln v. Chapin*, 132 Mass. 470. *Michigan.* — *Weimer v. Bunbury*, 30 Mich. 201.

*Vermont.* — *Tunbridge v. Smith*, 48 Vt. 648.

2. *Bill for an Accounting.* — *New Orleans v. Fisher*, 180 U. S. 185.

It has been held that the words "account for and pay over," found in a treasurer's bond, do not create two separate duties, namely, to account and to pay over. The accounting is preliminary and part of the duty to pay. This view would hardly be taken had not the common-law action of account, which was based directly on the duty to account, become obsolete in modern times. *Franklin v. Kirby*, 25 Wis. 498. See generally, on obligation to account, article by C. C. Langdell, 2 Harv. Law Rev. 243 *et seq.*

*Settlement or Refusal to Settle Prerequisite to action against defaulting collector.* *Com. v. McClure*, (Ky. 1899) 49 S. W. Rep. 789.

3. *Time for Accounting.* — *Moeng v. People*, 138 Ill. 513; *Ross v. Walton*, 67 N. J. L. 688, 52 Atl. Rep. 1132; *Com. v. Ferrell*, 17 Pa. Co. Ct. 263.

The state auditor has no power to extend the time for settlement fixed by law. *State v. Lanier*, 31 La. Ann. 423.

4. *Mode of Accounting.* — *Simmons v. Boullet*, 26 La. Ann. 277; *Pettitt v. State*, 8 Heisk (Tenn.) 320.

5. *Wood v. State*, 8 Heisk. (Tenn.) 329.

6. *Commissions Forfeited.* — *Walker County v. Fidelity, etc., Co.*, 107 Fed. Rep. 851, 47 C. C. A. 15; *Police Jury v. Brookshier*, 31 La. Ann. 736; *State v. Alsop*, 91 Mo. 172.

7. *Tillery v. Candler*, 118 N. Car. 888.

8. *Strict Performance Required.* — *State v. Guilbeau*, 37 La. Ann. 718; *McLean v. State*, 8 Heisk. (Tenn.) 22.

9. *Houston v. Russell*, 52 Vt. 110.

10. *To Whom Payable.* — *Dodge v. People*, 113 Ill. 491; *Pence v. Nelson County*, 107 Ky. 66.

11. *Ross v. Walton*, 67 N. J. L. 688, 52 Atl. Rep. 1132, *affirming* 63 N. J. L. 435.

The end of the fiscal year is the proper date from which to charge interest where the time of collection is not known. *Cordray v. State*, 55 Tex. 140.

But where the delay is due to a request of the authorities to whom the collector should account he is not liable for interest. *Hardy v. Logan County Ct.*, (Ky. 1893) 23 S. W. Rep. 661.

12. *Whaley v. Com.*, 110 Ky. 154.

13. *Interest Imposed.* — *Justices v. Fennimore*, 1 N. J. L. 220; *Sheridan v. Stevenson*, 44 N. J. L. 371; *Sheridan v. Van Winkle*, 43 N. J. L. 125; *Chenango County v. Birdsall*, 4 Wend. (N. Y.) 453; *Glover v. Wilson*, 6 Pa. St. 290. See also *State v. Lott*, 69 Ala. 147; *Hartford v. Franey*, 47 Conn. 76; *Brunswick v. Snow*, 73 Me. 177; *Chosen Freeholders v. Vanarsdale*, 42 N. J. L. 536; *State v. Marion County*, 36 Oregon 371; *McLean v. State*, 8 Heisk. (Tenn.) 22; *Hawkins v. Minor*, 5 Call (Va.) 118; *Wheeling v. Black*, 25 W. Va. 266.

*Interest on Damages* received against a collector cannot be charged until the claim is put into judgment. *Gaskins v. Com.*, 1 Call (Va.) 194.

*Interest from Time of Demand.* — *Cheshire v. Howland*, 13 Gray (Mass.) 321.

14. *Penalties Imposed.* — *James v. Governor*, 1 Ala. 605; *Christian v. Ashley County*, 24 Ark. 142; *Carnall v. Crawford County*, 11 Ark. 604; *Lawson v. Pulaski County*, 3 Ark. 1; *Tappan v. People*, 67 Ill. 330; *Bates v. Knott County Ct.*, (Ky. 1902) 67 S. W. Rep. 1006; *State v. Lewenthall*, 55 Miss. 589; *Williamson v. Jones*, 127 N. Car. 178.

*No Notice to Collector Required.* — *Carnall v. Crawford County*, 11 Ark. 604.

15. *No One to Whom Payment Should Be Made.* — *Bates v. Knott County Ct.*, (Ky. 1902) 67

demand is made when this is necessary.<sup>1</sup>

Receipts given by the collector to taxpayers,<sup>2</sup> or to the collector by the treasurer,<sup>3</sup> are *prima facie* proof that payment was made as stated.<sup>4</sup>

*cc. STATEMENT OF ACCOUNT.* — In making settlement,<sup>5</sup> the collector should be charged with all collections made by him,<sup>6</sup> or rather with all valid<sup>7</sup> assessments turned over to him,<sup>8</sup> as the burden of proof is generally on him to show how much he has failed to collect and the reason therefor.<sup>9</sup> He should be credited with commissions<sup>10</sup> and releases,<sup>11</sup> and with such allowances, exonerations, and delinquencies as are approved by the proper authorities,<sup>12</sup> as well as with payments duly made,<sup>13</sup> but not with mere customary perquisites unsanctioned by law.<sup>14</sup>

*dd. MEDIUM OF PAYMENT.* — Since taxes must be collected in money or receivable

S. W. Rep. 1006; *Pence v. Nelson County*, 107 Ky. 66.

1. *Pence v. Nelson County*, 107 Ky. 66.

2. *Taxpayers' Receipts.* — *Hardy v. Logan County Ct.*, (Ky. 1893) 23 S. W. Rep. 661; *North British, etc., Ins. Co. v. Craig*, 106 Tenn. 621; *Ward v. Marion County*, 26 Tex. Civ. App. 361.

3. *Receipts from Treasurer.* — *Walling v. Morgan County*, 126 Ala. 326; *Mendocino County v. Johnson*, 125 Cal. 337; *Welch v. Coulborn*, 3 Houst. (Del.) 647.

4. But see *Montgomery County Ct. v. Chenault*, (Ky. 1898) 47 S. W. Rep. 457.

5. *Separate Account of Each Different Tax Should Be Stated.* — *School Dist. v. Pitts*, 184 Pa. St. 156. See also *Combs v. Breathitt County*, (Ky. 1898) 46 S. W. Rep. 505, where it is held that claims for the different taxes are separable in suits on the bond.

6. *Chargeable with All Collections.* — *Boothbay v. Giles*, 64 Me. 403; *Trescott v. Moan*, 50 Me. 347; *Cheshire v. Howland*, 13 Gray (Mass.) 321; *Adams v. Conner*, 73 Miss. 425; *Ferrisburg v. Martin*, 60 Vt. 330.

*Burden of Proof.* — *Mendocino County v. Johnson*, 125 Cal. 337.

*Earnings of the Trust Fund.* — Money paid by a bank to a salaried collector in consideration of the deposit of collections in the bank, but not technically as interest, must be surrendered by the collector. *Hughes v. People*, 82 Ill. 78.

*Set-off Against State Not Allowed.* — *Aplin v. Van Tassel*, 73 Mich. 28.

7. *If the Warrant Accompanying the Tax Lists Is Defective*, the collector cannot be held liable for the noncollection of the taxes. *Boothbay v. Giles*, 68 Me. 160, 64 Me. 403; *Orneville v. Pearson*, 61 Me. 552; *Frankfort v. White*, 41 Me. 537.

8. *Prima Facie Chargeable with Entire Tax Roll.* — *Timberlake v. Brewer*, 59 Ala. 108; *Bates v. Knott County Ct.*, (Ky. 1902) 67 S. W. Rep. 1006; *State v. Lake*, 45 La. Ann. 1207; *State v. Gilbeau*, 37 La. Ann. 718; *Police Jury v. Brookshier*, 31 La. Ann. 736; *Sandwich v. Fish*, 2 Gray (Mass.) 298; *Boykin v. State*, 50 Miss. 375; *Com. v. Stambaugh*, 164 Pa. St. 437; *Houston County v. Dwyer*, 59 Tex. 113; *Cordray v. State*, 55 Tex. 141; *Montpelier v. Clarke*, 67 Vt. 479.

9. *Scarborough v. Stevens*, 3 Rob. (La.) 147.

10. *Commissions.* — *Lawson v. Pulaski County*, 3 Ark. 1; *Adams v. Conner*, 73 Miss. 425.

11. *Pettitt v. State*, 8 Heisk. (Tenn.) 320.

12. *Delinquencies and Allowances.* — *Bates v. Knott County Ct.*, (Ky. 1902) 67 S. W. Rep. 1006; *Montgomery County Ct. v. Chenault*, (Ky. 1898) 47 S. W. Rep. 457; *Hardy v. Logan County Ct.*, (Ky. 1893) 23 S. W. Rep. 661; *Reams v. McHargue*, (Ky. 1901) 63 S. W. Rep. 437; *Brunswick v. Snow*, 73 Me. 177; *Auditor General v. Monroe County*, 36 Mich. 70; *Stevens v. Saginaw County*, 62 Mich. 579; *Boykin v. State*, 50 Miss. 375.

*Legislative Exoneration* of a collector and his sureties, for funds lost by robbery, is valid. *Board of Education v. McLandsborough*, 36 Ohio St. 227, 38 Am. Rep. 582; *State v. Board of Education*, 38 Ohio St. 6.

In *Louisiana*, a verification of the delinquent list accompanied by an oath that the collector has exhausted all legal means to collect is required before he can be credited with delinquencies. *State v. Viator*, 37 La. Ann. 734; *State v. Gilbeau*, 37 La. Ann. 718.

13. *Payments.* — *Walling v. Morgan County*, 126 Ala. 326; *Frownfelter v. State*, 66 Md. 80.

*How Payments to Be Credited.* — *Orneville v. Pearson*, 61 Me. 552; *Pawlet v. Kelley*, 69 Vt. 398; *Taylor v. La. Follette*, 49 W. Va. 478.

*Payments Must, as Against Sureties*, be credited to the year for which the taxes were assessed. *U. S. v. Irving*, 1 How. (U. S.) 250; *Boring v. Williams*, 17 Ala. 510. See also *U. S. v. January*, 7 Cranch (U. S.) 572; *Postmaster Gen. v. Norvell*, Gilp. (U. S.) 106.

*Payments Made Before the Time Fixed by Law* for the settlement will operate by relation and will be considered as having been made at the proper date. *Wyman v. Smith*, 45 Me. 522.

*Payment Incorrectly Credited.* — If the collector has actually paid over money he is none the less entitled to credit though the officer receiving it may have credited it to the wrong fund, *Walling v. Morgan County*, 126 Ala. 326; and if the money has reached the right destination it is immaterial that there may have been irregularities in the manner of payment. *Mendocino County v. Johnson*, 125 Cal. 337.

14. *Perquisites.* — *Walling v. Morgan County*, 126 Ala. 326; *Essex v. French*, 50 Vt. 413.

Money paid by a bank in consideration of the deposit of collections therein is not a perquisite which the collector may retain. *Hughes v. People*, 82 Ill. 78.

funds,<sup>1</sup> nothing else will be accepted in settling with the collector.<sup>2</sup> If he turns over receivable funds, it must appear that the identical funds were taken in payment of taxes,<sup>3</sup> since he is not allowed to speculate in office by buying up claims against the state or county.<sup>4</sup>

*cc. EFFECT OF SETTLEMENT.* — Generally speaking a settlement with the auditing officer is not conclusive,<sup>5</sup> and errors may be shown<sup>6</sup> upon a proper proceeding to surcharge and correct it;<sup>7</sup> but if in all respects regular, it will, in the absence of collusion, fraud, or mistake, be binding on the state or county,<sup>8</sup> as well as on the collector,<sup>9</sup> especially if no appeal be taken when such proceeding is available.<sup>10</sup> Nor will a settlement long acquiesced in be opened after receipts are lost.<sup>11</sup>

*c. LIABILITY OF SURETIES ON BOND OF COLLECTOR*—(1) *In General.* — The general doctrines bearing on the liability of sureties on official bonds are elsewhere treated,<sup>12</sup> and consequently only a few principles particularly applicable to sureties on the bond of collectors will be here treated. The rule that the law is to be strictly applied in favor of the sureties on the bond is recognized,<sup>13</sup> but considerations of public policy embodied in legislation rather than in judicial decisions have somewhat restricted the application of this principle. The amount stated in the bond<sup>14</sup> and the period fixed by law for the term of liability under the bond<sup>15</sup> are two limitations behind which

1. *Medium of Payment.* — *U. S. v. Morgan*, 11 How. (U. S.) 154; *Johnson v. U. S.*, 5 Mason (U. S.) 425; *Miltnerberger v. Cooke*, 18 Wall. (U. S.) 421; *Smith v. Speed*, 50 Ala. 276; *Askew v. Columbia County*, 32 Ark. 270; *Frier v. State*, 11 Fla. 300; *Crutcher v. Sterling*, 1 Idaho 306; *Newsom v. Thighen*, 30 Miss. 414; *McWilliams v. Phillips*, 51 Miss. 196; *Sheridan v. Rahway*, 44 N. J. L. 587; *Ward v. Marion County*, 26 Tex. Civ. App. 361. And see *Lawson v. Pulaski County*, 3 Ark. 1; *Wellington v. Lawrence*, 73 Me. 125; *Sawyer v. Springfield*, 40 Vt. 305. See also *supra*, this title, *Payment and Tender*—*Medium of Payment*.

2. *Payments by Collector.* — *Smith v. Speed*, 50 Ala. 276; *Frier v. State*, 11 Fla. 300; *Crutcher v. Sterling*, 1 Idaho 306; *McLean v. State*, 8 Heisk. (Tenn.) 206; *Sawyer v. Springfield*, 40 Vt. 305.

3. *Receivable Funds to Be Paid Over Only as Received.* — *Burgess v. Winston*, 28 Fed. Rep. 559; *Smith v. Speed*, 50 Ala. 276; *Frier v. State*, 11 Fla. 300; *Com. v. Rhodes*, 5 T. B. Mon. (Ky.) 319; *Police Jury v. Brookshier*, 31 La. Ann. 736; *Simmons v. Boullt*, 26 La. Ann. 277; *Elliott v. Miller*, 8 Mich. 132. But see *Askew v. Columbia County*, 32 Ark. 270.

Receivable funds taken in payment of taxes but not turned over must be accounted for at par. *McLean v. State*, 8 Heisk. (Tenn.) 22.

4. *Speculation in Claims Prohibited.* — *Police Jury v. Brookshier*, 31 La. Ann. 736; *West Baton Rouge v. Morris*, 27 La. Ann. 459.

5. *Settlement Not Conclusive.* — *State v. Brewer*, 64 Ala. 287; *Wilson v. State*, 51 Ark. 212; *Bates v. Knott County Ct.*, (Ky. 1902) 67 S. W. Rep. 1006; *Justices v. Fennimore*, 1 N. J. L. 220; *Moore County v. MacRae*, 89 N. Car. 95. See also *Kilpatrick v. Pickens County*, 66 Ala. 422; *Washington County v. Parlier*, 10 Ill. 232; *Kinney v. State*, 4 Ill. 357; *O'Neal v. School Com'rs*, 27 Md. 227.

6. *Mistakes.* — *People v. Cooper*, 10 Ill. App. 384; *Lyons v. Breckinridge County Ct.*, 101 Ky. 715.

7. *Com. v. McClure*, (Ky. 1899) 49 S. W. Rep. 789.

8. *Settlement Binding on State in Absence of Fraud or Mistake.* — *Com. v. McClure*, (Ky. 1899) 49 S. W. Rep. 789; *State v. Hawkins*, 169 Mo. 615; *Com. v. Scanlan*, 202 Pa. St. 250.

9. *Binding on Collector.* — *Pulaski County v. Watson*, 106 Ky. 500; *State v. Shipman*, 125 Mo. 436.

10. *No Appeal Taken.* — *Com. v. Black*, 15 Pa. Co. Ct. 664; *Com. v. Gruver*, 13 Pa. Super. Ct. 553.

11. *Montgomery County Ct. v. Chenault*, (Ky. 1898) 47 S. W. Rep. 457.

12. See the titles *PUBLIC OFFICERS*, vol. 23, p. 361 *et seq.*; *SURETYSHIP*, *ante*, p. 436.

13. *Strict Interpretation in Favor of Surety.* — *U. S. v. Cheeseman*, 3 Sawy. (U. S.) 424; *Brewer v. King*, 63 Ala. 511; *Morrow v. Wood*, 56 Ala. 1; *Wilmington v. Horn*, 2 Harr. (Del.) 190; *State v. Montague*, 34 Fla. 32; *Robinson v. Epping*, 24 Fla. 237; *Lafayette v. James*, 92 Ind. 240, 47 Am. Rep. 140; *Board of Education v. Rader*, 42 W. Va. 178.

14. *Sureties Bound in Several Sums.* — Each surety is liable only for the sum for which he obligates himself, although it be less than the entire penalty of the bond, and all the sureties, though liable in different amounts, can be held for no more than the full amount due the state. *Police Jury v. Brookshier*, 31 La. Ann. 736.

15. *Term of Liability.* — *Leadley v. Evans*, 2 Bing. 32, 9 E. C. L. 306; *Arlington v. Merricke*, 2 Saund. 411; *Farrar v. U. S.*, 5 Pct. (U. S.) 373; *Norridgewock v. Hale*, 80 Me. 362; *Bigelow v. Bridge*, 8 Mass. 275; *Conover v. Middletown Tp.*, 42 N. J. L. 382; *Patterson v. Freehold Tp.*, 38 N. J. L. 255; *Prince v. McNeill*, 77 N. Car. 398; *Miller v. Com.*, 8 Pa. St. 444; *Public Account Com'rs v. Greenwood*, 1 Desaus. (S. Car.) 450. But see *Com. v. Stambaugh*, 164 Pa. St. 437.

*Current Year.* — *Sullivan County v. Midden*—  
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the sureties are, of course, safely intrenched.<sup>1</sup> Inasmuch as liability attaches to the sureties solely by virtue of the terms of the bond, the sureties are entitled to stand upon it,<sup>2</sup> and are ordinarily responsible for the performance of such duties only as are incident to the office at the time the bond is executed.<sup>3</sup> And if the legislature imposes other duties on the collector after the execution of the bond the liability of the sureties will not be enlarged,<sup>4</sup> unless the language of the bond,<sup>5</sup> or, *a fortiori*, the law in force at its date<sup>6</sup> by a fair and reasonable construction bring the new duties within the scope of the bond. Of course, where the bond is executed subsequent to the passage of an act imposing a new duty the sureties will be liable for its breach,<sup>7</sup> unless when the new duty is attached a special bond is required to be given for its performance.<sup>8</sup>

(2) *Liability on General and Special Bonds.*—The general rule is that where a collector is required to perform a duty special in its nature and to give a special bond for its faithful performance, no liability attaches therefor to his general bondsmen<sup>9</sup> in the absence of an express declaration in the bond or an express statutory provision to the effect that they shall be so liable.<sup>10</sup> Thus, the sureties on the general bond of a collector are not liable

dorf, 7 Pa. Super. Ct. 71, 42 W. N. C. (Pa.) 135.

**No Period of Time Fixed.**—Where by law the bond is conditioned for the payment of the taxes collected under a particular assessment, the time of collection is immaterial, and the sureties are liable for sums collected before the bond is executed. *Combs v. Breathitt County*, (Ky. 1896) 38 S. W. Rep. 138. See also *State v. Baldwin*, 14 S. Car. 135.

**Election and Qualification of Successor.**—Where by law the term of the principal is for a fixed period and "until the election and qualification of his successor," the sureties by the weight of authority are not liable for a defalcation occurring after the term fixed by law is ended but before a successor is qualified. It is the duty of the public authorities to have a successor elected and qualified at the proper time, and they cannot, by suffering the incumbent to hold over, prolong the liability of the sureties beyond the period contemplated in the bond. *Peppin v. Cooper*, 2 B. & Ald. 431; *Leadley v. Evans*, 2 Bing. 32, 9 E. C. L. 306; *Liverpool Water Works Co. v. Atkinson*, 6 East 507; *Wilmington v. Horn*, 2 Harr. (Del.) 190; *State v. Powell*, 40 La. Ann. 240, 8 Am. St. Rep. 522; *Bigelow v. Bridge*, 8 Mass. 275.

There are, however, some well-considered decisions and a number of dicta to the effect that the sureties may be liable, but only for such reasonable time as is proper for the qualification of a successor. *State v. Powell*, 40 La. Ann. 240, 8 Am. St. Rep. 522; *Chelmsford Co. v. Demarest*, 7 Gray (Mass.) 1; *Dover v. Twombly*, 42 N. H. 59; *Rahway v. Crowell*, 40 N. J. L. 207, 29 Am. Rep. 224.

1. *Brewer v. King*, 63 Ala. 511.

2. *Holt v. McLean*, 75 N. Car. 347.

**General Words in the Conclusion of the bond** are restricted by preceding particular words to duties of like kind with those specified. *Jones v. Montfort*, 3 Dev. & B. L. (20 N. Car.) 73; *Governor v. Matlock*, 1 Dev. L. (12 N. Car.) 214; *Crumpler v. Governor*, 1 Dev. L. (12 N. Car.) 52; *Governor v. Barr*, 1 Dev. L. (12 N. Car.) 63.

3. **Duties Incident to Office at Time the Bond Is**

**Executed.**—*U. S. v. Kirkpatrick*, 9 Wheat. (U. S.) 720; *Morrow v. Wood*, 56 Ala. 1; *Lafayette v. James*, 92 Ind. 240, 47 Am. Rep. 140.

4. *Com. v. Toms*, 45 Pa. St. 408.

This rule applies with especial force where the new duties are not such as have some natural relation to the ordinary duties imposed upon the officer giving the bond. *U. S. v. Cheeseman*, 3 Sawy. (U. S.) 424. See also the cases cited in the next preceding note.

5. **Language of Bond.**—The words "in all things faithfully and truly to execute the duties of the office according to law," "faithfully to discharge the duties of the office during his continuance in office," and "the due performance of the duties of his office," have been held sufficiently general to cover duties subsequently imposed by statute, where such duties are germane to those already imposed on the officer. *Bartlett v. Governor*, 2 Bibb (Ky.) 586; *Board of Education v. Quick*, 99 N. Y. 138; *People v. Vilas*, 36 N. Y. 469; *Dawson v. State*, 38 Ohio St. 1; *Brobst v. Skillen*, 16 Ohio St. 387, 88 Am. Dec. 458; *King v. Nichols*, 16 Ohio St. 80.

*Contra*, where the general words are restricted by previous particular words. *Crumpler v. Governor*, 1 Dev. L. (12 N. Car.) 52.

6. **Sureties Answerable by Statute for the Performance of Additional Duties.**—*Morrow v. Wood*, 56 Ala. 1; *Brewer v. King*, 63 Ala. 511.

7. *Marquette County v. Ward*, 50 Mich. 174.

8. **Special Bond Required for New Duties.**—*State v. Bradshaw*, 10 Ired. L. (32 N. Car.) 229; *County Board of Education v. Bateman*, 102 N. Car. 52, 11 Am. St. Rep. 708.

9. **No Liability on the General Bond Where Special Bond Required.**—*Anderson v. Thompson*, 10 Bush (Ky.) 132; *Williams v. Morton*, 38 Me. 52, 61 Am. Dec. 229; *Waters v. State*, 1 Gill (Md.) 302; *Lyman v. Conkey*, 1 Met. (Mass.) 317; *State v. Young*, 23 Minn. 551; *State v. Johnson*, 55 Mo. 80; *Henderson v. Coover*, 4 Nev. 429; *Crumpler v. Governor*, 1 Dev. L. (12 N. Car.) 52; *State v. Corey*, 16 Ohio St. 17; *Board of Education v. Rader*, 42 W. Va. 178; *Milwaukee County v. Ehlers*, 45 Wis. 281.

10. Under late statutes in Kentucky, the sheriff, as *ex officio* collector of taxes, gives a gen-

for railroad taxes,<sup>1</sup> or school funds,<sup>2</sup> especially where the giving of the special bond is considered a condition precedent to the right of the officer to collect such funds at all.<sup>3</sup>

(3) *Liability for Funds Collected*—(a) *Estoppel of the Sureties*.—The bond of a collector nearly always contains a provision to the effect that the collector shall pay over all moneys collected by him.<sup>4</sup> Under this clause sureties are liable, as we have already seen that the collector himself is liable,<sup>5</sup> for all moneys which come into his hands by virtue of his office.<sup>6</sup> They are liable for money in his official possession at the time the bond is given, though collected before that time;<sup>7</sup> or though it is in his hands as his own successor.<sup>8</sup> And where money is collected by the officer it is immaterial that he may have acted too soon,<sup>9</sup> or even without a warrant,<sup>10</sup> or tax list,<sup>11</sup> or that his warrant or the tax list may have been irregular,<sup>12</sup> or the assessment itself,<sup>13</sup> or part of it,<sup>14</sup> illegal or void,<sup>15</sup> the collector and his bondsmen being estopped to deny its validity.<sup>16</sup> Nor is it material that it may have been the duty of another to collect the money,<sup>17</sup> or that the collector himself may have been ineligible to the office,<sup>18</sup> unless the collection of the funds in question was wholly beyond the bounds

eral bond for the faithful performance of all duties, but the county authorities may require an additional bond to cover the county levy. If none such is given the sureties on the general bond are liable for all shortages, state or county. *Indiana Bridge Co. v. Carr*, (C. C. A.) 95 Fed. Rep. 594; *Lyons v. Breckinridge County*, 101 Ky. 715; *Whaley v. Com.*, 110 Ky. 154; *Howard v. Com.*, 105 Ky. 604; *Pulaski County v. Watson*, 106 Ky. 500; *Catron v. Com.*, (Ky. 1899) 52 S. W. Rep. 929. If, however, a county levy bond is executed, this exonerates the sureties on the general bond from liability for those taxes. *Lyons v. Breckinridge County Ct.*, 101 Ky. 715; *Whaley v. Com.*, 110 Ky. 154; *Fidelity, etc., Co. v. Com.*, 104 Ky. 579, 583.

1. *Railroad Taxes*.—*McLean v. State*, 8 Heisk. (Tenn.) 270. *Aliter* in *Kentucky*, *Lyons v. Breckinridge County Ct.*, 101 Ky. 715.

2. *School Funds*.—County Board of Education *v. Bateman*, 102 N. Car. 52, 11 Am. St. Rep. 708; *State v. Starnes*, 5 Lea (Tenn.) 545; *State v. Poling*, 44 W. Va. 312; Board of Education *v. Rader*, 42 W. Va. 178; Board of Education *v. Rader*, 42 W. Va. 182. See also *White v. East Saginaw*, 43 Mich. 567; *Broad v. Paris*, 66 Tex. 119; *Findley v. Findley*, 42 W. Va. 383; *State v. Hill*, 17 W. Va. 452; *Milwaukee County v. Pabst*, 70 Wis. 352.

3. *Giving Special Bond a Condition of Right to Collect*.—*Anderson v. Thompson*, 10 Bush (Ky.) 134.

4. *But the Omission of a Clause Providing for Payment Over* is not fatal, where such obligation is placed on the bondsmen by law. *State v. Hill*, 17 W. Va. 452.

5. See *supra* this section, 4. b. (2) (b) *Accounting—Extent of Liability*.

6. *Moneys Officially Received*.—*Walker v. People*, 95 Ill. App. 637; *Lyons v. Breckinridge County Ct.*, 101 Ky. 715; *Hewlett v. Nutt*, 79 N. Car. 263.

7. *Money on Hand*.—*Conover v. Middletown Tp.*, 42 N. J. L. 382.

8. *Collector Succeeding Himself*.—*Sidner v. Alexander*, 31 Ohio St. 378.

9. *Combs v. Breathitt County*, (Ky. 1898) 46 S. W. Rep. 505.

10. *Collecting Without Warrant*.—*Johnson v. Goodridge*, 15 Me. 29; *Harrisburg v. Guiles*, 192 Pa. St. 191; *Cannell v. Crawford County*, 59 Pa. St. 196; *Com. v. Black*, 15 Pa. Co. Ct. 664.

11. *Funds Collected Without Tax List*.—*Combs v. Breathitt County*, (Ky. 1898) 46 S. W. Rep. 505; *McGuire v. Williams*, 123 N. Car. 349. See also *King v. U. S.*, 99 U. S. 229.

12. *Irregular Warrant or List—United States*.—*Moss v. Riddle*, 5 Cranch (U. S.) 351.

*Florida*.—*State v. Rushing*, 17 Fla. 226; *Frier v. State*, 11 Fla. 300.

*Indiana*.—*Ham v. Greve*, 34 Ind. 18.

*Kentucky*.—*Burks v. Wonerline*, 6 Bush (Ky.) 20.

*Maine*.—*Brunswick v. Snow*, 73 Me. 177; *Trescott v. Moan*, 50 Me. 347; *Orono v. Wedgewood*, 44 Me. 49, 69 Am. Dec. 81; *Johnson v. Goodridge*, 15 Me. 29; *Ford v. Clough*, 8 Me. 334, 23 Am. Dec. 513.

*Massachusetts*.—*Williamstown v. Willis*, 15 Gray (Mass.) 427; *New Hampshire Sav. Bank v. Varnum*, 1 Met. (Mass.) 34; *Sandwich v. Fish*, 2 Gray (Mass.) 298.

*North Carolina*.—*State v. Woodside*, 8 Ired. L. (30 N. Car.) 104.

*Texas*.—*State v. Middleton*, 57 Tex. 185.

*Vermont*.—*Pawlet v. Kelley*, 69 Vt. 398; *Montpelier v. Clarke*, 67 Vt. 479.

13. *Illegal Assessment*.—*Cunningham v. Mitchell*, 67 Pa. St. 78; *Moore v. Allegheny*, 18 Pa. St. 55.

14. *Fidelity, etc., Co. v. Mobile County*, 124 Ala. 144. *Contra*, where the limit of the tax rate is fixed by the constitution. *Whaley v. Com.*, (three judges dissenting) 110 Ky. 154. See also *Osenton v. Burnett*, (Ky. 1897) 41 S. W. Rep. 270.

15. *Void Assessment*.—*McGuire v. Williams*, 123 N. Car. 349.

16. *Estoppel of Sureties*.—*Boring v. Williams*, 17 Ala. 510; *McGuire v. Williams*, 123 N. Car. 349.

17. *Combs v. Breathitt County*, (Ky. 1898) 46 S. W. Rep. 505.

18. *Collector Ineligible*.—*Wade v. Mt. Sterling*, (Ky. 1896) 33 S. W. Rep. 1113; *State v. Powell*, 40 La. Ann. 234, 8 Am. St. Rep. 522; *Lyndon v. Miller*, 36 Vt. 329.

of his authority.<sup>1</sup> It is sufficient that he is a *de facto* collector.<sup>2</sup>

(b) *Diversion of Fund.* — Where the collector himself treats the taxes as paid the sureties will be held though no money is received by him. Thus, if he gives a receipt for taxes in payment of a private debt,<sup>3</sup> or diverts a check given for taxes to the payment of county claims,<sup>4</sup> the sureties are liable.

(c) *Misappropriation and Conflicting Liabilities under Different Bonds.* — Likewise, it has been held that where funds protected by one bond are used to pay off indebtedness incurred under another bond the sureties whose undertaking covers the misused funds are liable,<sup>5</sup> and those whose bond is thus satisfied are discharged,<sup>6</sup> especially where the officer to whom the money is turned over is ignorant of the source from which the money is derived.<sup>7</sup> But if the treasurer knows of the misappropriation,<sup>8</sup> or there is ground for equitable contribution or subrogation,<sup>9</sup> the payment will be applied in exoneration of the bond under which the money was collected. Some courts indeed go so far as to hold, in contravention of the doctrine stated above, that in all cases where a misappropriation is in fact shown, money paid over by a collector will be credited to the bond under which it is collected,<sup>10</sup> it being sufficient, in the opinion of these courts, that the money collected has actually reached the treasury.<sup>11</sup> This view, once the prevailing doctrine, has in recent years been greatly weakened.<sup>12</sup>

(4) *Liability for All Official Acts.* — Sometimes, by virtue of statutes, the liability of the sureties extends to all official acts of the collector, ministerial or judicial, and includes wrongful seizures and sales of property to enforce collection;<sup>13</sup> but where the bond merely provides for collection and payment over, advertising fees personally due from the collector cannot be recovered in an action on his bond.<sup>14</sup>

(5) *Indulgence to Collectors.* — By the weight of authority mere indulgence to collectors as regards the time of accounting will not release the sureties

1. *Collection Wholly Without Authority.* — Kepp v. Wiggett, 10 C. B. 35, 70 E. C. L. 35; Com. v. Reinhart, 15 Pa. Co. Ct. 487.

2. *De Facto Collector.* — Police Jury v. Brookshier, 31 La. Ann. 736; Billingsley v. State, 14 Md. 369; Seabrook v. Brown, 71 N. H. 618; Waters v. Edmondson, 8 Heisk. (Tenn.) 384.

3. *Receipt for Taxes Given in Payment of Debt.* — Ward v. Marion County, 26 Tex. Civ. App. 361. But see Com. v. Mahon, 12 Pa. Super. Ct. 616, where there was merely an agreement to divert the tax but no receipt was given.

4. *Combs v. Breathitt County*, (Ky. 1898) 46 S. W. Rep. 505.

5. *Misappropriation of Funds.* — Walker County v. Fidelity, etc., Co., 107 Fed. Rep. 851, 47 C. C. A. 15; People v. Hammond, 109 Cal. 384; State v. Powell, 40 La. Ann. 234, 8 Am. St. Rep. 522; State v. Hayes, 7 La. Ann. 118; Sandwich v. Fish, 2 Gray (Mass.) 208; Myers v. State, (Md.) 4 Cent. Rep. 344; Pine County v. Willard, 39 Minn. 125, 12 Am. St. Rep. 622; State v. Sooy, 39 N. J. L. 539; Com. v. Knettle, 182 Pa. St. 176; Carpenter v. Corinth, 62 Vt. 111.

6. *Bondsman Discharged Where the Liability Covered by Their Bond is paid off with funds collected under a different bond.* McGuire v. Williams, 123 N. Car. 349; Board of Education v. Bladen County, 113 N. Car. 379; Liles v. Rogers, 113 N. Car. 197, 37 Am. St. Rep. 627.

7. *Treasurer Ignorant of Misappropriation.* — State v. Smith, 26 Mo. 226, 72 Am. Dec. 204; Chapman v. Com., 25 Gratt. (Va.) 742; Lyndon v. Miller, 36 Vt. 329.

8. *Boring v. Williams*, 17 Ala. 510.

9. *Equitable Relief.* — Pickering v. Day, 2 Del. Ch. 333; McGuire v. Williams, 123 N. Car. 349.

10. *Payment to Be Applied to Bond under Which the Money Is Collected.* — U. S. v. January, 7 Cranch (U. S.) 575; Postmaster Gen. v. Norvell, Gilp. (U. S.) 106; Jones v. U. S., 7 How. (U. S.) 688; Myers v. U. S., 1 McLean (U. S.) 496; Boring v. Williams, 17 Ala. 510; Pickering v. Day, 2 Del. Ch. 367; Porter v. Stanley, 47 Me. 515, 74 Am. Dec. 501; State v. Alsop, 91 Mo. 172; State v. Middleton, 57 Tex. 185.

11. *Funds Reaching Destination.* — U. S. v. Irving, 1 How. (U. S.) 261; People v. Smith, 12 Ill. 281. Compare Bogart v. Mathe, 51 N. J. L. 216.

12. *Weakening of the Older Doctrine.* — See Gwynne v. Burnell, 7 Cl. & F. 572, 2 Bing. N. Cas. 7, 29 E. C. L. 228; 9 Bing. 544, 23 E. C. L. 375; U. S. v. Wardwell, 5 Mason (U. S.) 82; Postmaster Gen. v. Furber, 4 Mason (U. S.) 333; Walker County v. Fidelity, etc., Co., 107 Fed. Rep. 851, 47 C. C. A. 15; State v. Sooy, 39 N. J. L. 539; Stone v. Seymour, 15 Wend. (N. Y.) 19; Seymour v. Van Slyck, 8 Wend. (N. Y.) 403. And see cases cited in the preceding notes.

13. *Liability of Sureties for All Official Acts.* — Palmer v. Pettingill, 6 Idaho 346; Chamberlain Banking House v. Woolsey, 60 Neb. 516. Compare Eaton v. Kelly, 72 N. Car. 110.

14. *Advertising Fees.* — State v. Montague, 34 Fla. 32.

although it be granted by legislative act and thus made compulsory on the state officials who are to take action against the collector.<sup>1</sup> But the contrary has been held.<sup>2</sup> Nor will they be discharged by delay, short of the statutory period, in enforcing the bond.<sup>3</sup> The statute begins to run in favor of the sureties from the breach of the bond.<sup>4</sup>

**5. Remedies Against Defaulting Collectors — a. SUMMARY REMEDY — (1) *In General.*** — In order to secure promptness on the part of the officer in paying over money collected by him, the public authorities are permitted to pursue a defaulting collector and his sureties by means of summary process. Thus, summary judgment may be obtained against the collector and his sureties on motion or order to show cause,<sup>5</sup> or an execution, extent, or warrant of distress may be issued against them by the treasurer or other proper officer.<sup>6</sup> Such remedy is not generally exclusive, and the state may pursue it or proceed by common-law action;<sup>7</sup> but it has been held, where imprisonment on civil process is permitted, that the use of the latter means of coercion deprives the state of the right subsequently to proceed by action.<sup>8</sup>

**Lien of Collector's Bond.** — Further to protect the public, the bond of the collector is usually made a lien on the real estate of both principal and sureties.<sup>9</sup> In a word, it is given the effect of a judgment<sup>10</sup> or mortgage,<sup>11</sup> and gives to the state or county a right to priority of payment out of the realty over the general creditors of a collector or surety who is insolvent.<sup>12</sup>

**(2) *Nature and Validity.*** — The collector, by accepting the office, and his

**1. Legislative Indulgence.** — *State v. Carleton*, 1 Gill (Md.) 249; *State v. Swinney*, 60 Miss. 39, 45 Am. Rep. 405; *Prairie v. Worth*, 78 N. Car. 169; *Smith v. Com.*, 25 Gratt. (Va.) 780; *Com. v. Holmes*, 25 Gratt. (Va.) 771; *Bennett v. McWhorter*, 2 W. Va. 441.

Especially where the sureties give their consent. *Crawford v. Richeson*, 101 Ill. 351. See also *Olean v. King*, 116 N. Y. 355.

**2. Release of Sureties by Legislative Indulgence.** — *People v. McHatton*, 7 Ill. 638; *Davis v. People*, 6 Ill. 409; *Warner v. Campbell*, 26 Ill. 282; *Warner v. Crane*, 20 Ill. 148; *State v. Roberts*, 68 Mo. 234, 30 Am. Rep. 788; *Johnson v. Hacker*, 8 Heisk. (Tenn.) 388.

**3. Delay in Enforcing the Bond.** — *State v. Guilbeau*, 37 La. Ann. 718; *Police Jury v. Brookshier*, 31 La. Ann. 736. And see *Northumberland v. Cobleigh*, 59 N. H. 250.

**4. Limitations.** — *Moore County v. MacRae*, 89 N. Car. 95. See also *Barker v. Munroe*, 4 Dev. L. (15 N. Car.) 412; *Coomer v. Little*, Conf. Rep. (1 N. Car.) 92. Compare *Housman v. Long*, (Ky. 1902) 66 S. W. Rep. 821.

**5. Summary Judgment on Motion.** — *Armstrong v. State*, Minor (Ala.) 160; *Boring v. Williams*, 17 Ala. 510; *Carmichael v. Hays*, 66 Ala. 543; *State v. McBride*, 76 Ala. 51; *Stamphill v. Franklin County*, 86 Ala. 392; *Com. v. Rodes*, 5 T. B. Mon. (Ky.) 318; *De Soto County v. Dickson*, 34 Miss. 150; *Owens v. Andrew County Ct.*, 49 Mo. 372; *Brown v. State*, 8 Heisk. (Tenn.) 871; *Akers v. Burch*, 12 Heisk. (Tenn.) 606; *Mallory v. Miller*, 2 Yerg. (Tenn.) 113.

**6. Tax Execution, Extent, Distress Warrant.** — *Murray v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 272; *Crawford v. Carson*, 35 Ark. 565; *Bassett v. Governor*, 11 Ga. 207; *Scarborough v. Stevens*, 3 Rob. (La.) 147; *Doggett v. Everett*, 19 Me. 373; *Smyth v. Titcomb*, 31 Me. 281; *School Dist. v. Clark*, 33 Me. 484; *Waldron v. Lee*, 5 Pick. (Mass.) 323; *Weimer v.*

*Bunbury*, 30 Mich. 201; *Bringard v. Stellwagen*, 41 Mich. 54; *Ayer v. Goss*, 71 N. H. 66; *Myers v. Com.*, 34 Pa. St. 270; *Mt. Holly v. French*, (Vt. 1902) 52 Atl. Rep. 1038; *Hackett v. Amsden*, 57 Vt. 432.

A state comptroller in issuing an execution, under the *Georgia* statutes, against a defaulting collector, acts in an executive capacity, and the courts will not interfere with such process by prescribing the evidence necessary to justify the comptroller in issuing it. *Scofield v. Perkerson*, 46 Ga. 350; *Wilson v. Wright*, 83 Ga. 38.

**7. Statutory Remedy Against Collector Not Exclusive.** — *Gorham v. Hall*, 57 Me. 59; *Akers v. Burch*, 12 Heisk. (Tenn.) 606.

**8. Arrest and Imprisonment.** — *Hartland v. Hackett*, 57 Vt. 92. Compare *Hellings v. Com.*, 5 Rawle (Pa.) 64.

**9. Wallace's Estate**, 59 Pa. St. 401.

**After-acquired Lands Subject to Lien.** — *Baker v. Schuessler*, 85 Ala. 541; *Crawford v. Richeson*, 101 Ill. 351; *Pearce v. State*, 49 La. Ann. 643.

A subsequent purchaser from the collector takes land subject not only to the lien but to the right of his sureties to be subrogated. *Irby v. Livingston*, 81 Ga. 281.

**In Georgia**, the homestead is also liable for the collector's default. *Davis v. State*, 60 Ga. 76. *Contra*, in Illinois, *Crawford v. Richeson*, 101 Ill. 351.

**10. Lien Operates as Judgment.** — *Wilder v. Butterfield*, (Supm. Ct. Spec. T.) 50 How. Pr. (N. Y.) 385; *Upham v. Paddock*, 13 Hun (N. Y.) 571.

**11. Pearce v. State**, 49 La. Ann. 643.

**The Lien May Be Foreclosed in Equity.** — *Chatfield v. Campbell*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 355; *Crisfield v. Murdock*, 127 N. Y. 315. See also *ENCYC. OF PL. AND PR.*, vol. 13, p. 126, title LIENS.

**12. Chatfield v. Campbell**, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 355.



sureties by giving the bond under the existing laws providing for such summary remedies, impliedly agree to make them a part of the contract.<sup>1</sup> They are also upheld upon the ground of necessity,<sup>2</sup> and, like the summary remedies used against the taxpayer,<sup>3</sup> they are in harmony with those constitutional provisions which prohibit deprivation of property without process of law and which guarantee the right of trial by jury.<sup>4</sup>

(3) *Construction.* — As summary process against defaulting collectors is in derogation of common law, a strict compliance with all statutory provisions is required, and no intendment will be made in its favor.<sup>5</sup> The bond itself must be in statutory form. Otherwise a summary proceeding cannot be based upon it.<sup>6</sup> If the bond is not sufficiently formal to constitute a statutory bond, but is yet good as a common-law bond, it can be enforced only by common-law remedies.<sup>7</sup>

*Summary Process Only While Collector Is in Office.* — Summary process, it has been held, lies against the collector only while he remains in office.<sup>8</sup> Hence it is not maintainable against one who has been ousted on *quo warranto* proceedings,<sup>9</sup> nor against the sureties after the principal is dead.<sup>10</sup>

*Notice of Motion.* — Where the procedure is by motion for summary judgment some sort of notice is always required to be given to the collector against whom summary judgment is to be taken. But no particular formality is required as to the contents of the notice or the manner in which it is given.<sup>11</sup>

1. *Summary Remedy Impliedly Included in the Contract.* — *Head v. Missouri University*, 19 Wall. (U. S.) 526; *State v. Carleton*, 1 Gill (Md.) 249; *Weimer v. Bunbury*, 30 Mich. 201; *Lewis v. Garrett*, 5 How. (Miss.) 434; *Oats v. Darden*, 1 Murph. (5 N. Car.) 500; *Prairie v. Jenkins*, 75 N. Car. 545; *Bunting v. Gales*, 77 N. Car. 283; *Prairie v. Worth*, 78 N. Car. 169; *Worth v. Cox*, 89 N. Car. 44.

2. *Grounded on Public Exigency.* — *Tift v. Griffin*, 5 Ga. 185; *Weimer v. Bunbury*, 30 Mich. 201; *State v. Allen*, 2 McCord L. (S. Car.) 56; *In re Hackett*, 53 Vt. 354.

3. See *supra*, this section, *Compulsory Collection*.

4. *Constitutionality.* — *Murray v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 272; *Armstrong v. State, Minor* (Ala.) 160; *Weimer v. Bunbury*, 30 Mich. 201; *Bringard v. Stellwagen*, 41 Mich. 54; *Lewis v. Garrett*, 5 How. (Miss.) 434; *In re Hackett*, 53 Vt. 354.

*Searches and Seizures.* — Nor are they invalid as authorizing unreasonable seizures. *Weimer v. Bunbury*, 30 Mich. 201.

*Defense.* — It is permissible to restrict the defense both as to its mode and its matter. *Eve v. State*, 21 Ga. 50; *Manning v. Phillips*, 65 Ga. 548; *Com. v. Rodes*, 5 T. B. Mon. (Ky.) 318.

5. *Construction — Alabama.* — *Collier v. Powell*, 23 Ala. 579.

*Arkansas.* — *Lawson v. Pulaski County*, 3 Ark. 1; *Carnall v. Crawford County*, 11 Ark. 604; *Lee v. State*, 22 Ark. 235; *Ex p. Christian*, 23 Ark. 641; *Christian v. Ashley County*, 24 Ark. 142; *Crawford v. Carson*, 35 Ark. 565.

*Georgia.* — *Tift v. Griffin*, 5 Ga. 185; *Bassett v. Governor*, 11 Ga. 207; *Walden v. Lee County*, 60 Ga. 296; *Cahn v. Wright*, 66 Ga. 119.

*Maine.* — *Daggett v. Everett*, 19 Me. 373; *Smyth v. Titcomb*, 31 Me. 272; *School Dist. v. Clark*, 33 Me. 482.

*Maryland.* — *Prather v. Johnson*, 3 Har. & J. (Md.) 487; *Sprigg v. State*, 54 Md. 480.

*Massachusetts.* — *Waldron v. Lee*, 5 Pick. (Mass.) 323.

*Michigan.* — *Hartford F. Ins. Co. v. Owen*, 30 Mich. 441; *Denison v. Smith*, 33 Mich. 155; *Clark v. Adams*, 33 Mich. 159; *Clark v. Lichtenberg*, 33 Mich. 307; *Houghton County v. Rees*, 34 Mich. 481; *Smalley v. Lightall*, 37 Mich. 348; *Alverson v. Dennison*, 40 Mich. 179; *Bringard v. Stellwagen*, 41 Mich. 54.

*Mississippi.* — *De Soto County v. Dickson*, 34 Miss. 150.

*New Hampshire.* — *Ayer v. Goss*, 71 N. H. 66.

*Pennsylvania.* — *Warner v. Emory*, 3 Yeates (Pa.) 50; *Myers v. Com.*, 34 Pa. St. 270.

*Tennessee.* — *Mallory v. Miller*, 2 Yerg. (Tenn.) 113; *Boughton v. State*, 7 Humph. (Tenn.) 193; *Nashville v. Smith*, 86 Tenn. 213.

6. *Statutory Bond Required.* — *Lee County v. Walden*, 68 Ga. 664; *Bradley v. Rapp*, 10 La. Ann. 589; *De Soto County v. Dickson*, 34 Miss. 150; *Mallory v. Miller*, 2 Yerg. (Tenn.) 113; *State v. Starnes*, 5 Lea (Tenn.) 545; *Boughton v. State*, 7 Humph. (Tenn.) 193.

7. *Mallory v. Miller*, 2 Yerg. (Tenn.) 113. And see the title *SURETYSHIP*, *ante*, p. 426.

A motion is maintainable on a bond although its penalty is less than the law requires, *Mabry v. Tarver*, 1 Humph. (Tenn.) 94; but not on a bond conditioned in a larger sum than that fixed by law, *State Bank v. Twitty*, 2 Hawks (9 N. Car.) 5; *Governor v. Matlock*, 2 Hawks (9 N. Car.) 366; nor on a bond covering collections for two years when the law requires a bond for one year, *Boughton v. State*, 7 Humph. (Tenn.) 193.

8. *Owens v. Andrew County Ct.*, 49 Mo. 372.

9. *Hartley v. State*, 3 Ga. 233.

10. *Collier v. Powell*, 23 Ala. 579.

11. *Informal Notice to Collector Sufficient.* — *Armstrong v. State, Minor* (Ala.) 160; *Collier v. Powell*, 23 Ala. 579; *Timberlake v. Brewer*, 59 Ala. 108; *Com. v. Rodes*, 5 T. B. Mon. (Ky.) 318; *Mt. Holly v. French*, (Vt. 1902) 52 Atl.

**Process Must Show Facts.** — In general, where the proceeding is by distress or immediate execution against the person or property, the facts which authorize the issuance of the process must appear upon its face,<sup>1</sup> or the officer executing it will become a trespasser.<sup>2</sup>

**Recovery Usually Limited to Taxes Actually Collected.** — The recovery on summary motion is usually limited to taxes actually collected,<sup>3</sup> together with such penalties as have accrued,<sup>4</sup> and the state, in order to recover for a negligent failure to collect, is required to proceed by action at common law.<sup>5</sup> In some states the collector may, however, be summarily held liable for taxes which he has negligently failed to collect. Where this is permitted he can, of course, always show that the warrant under which he was expected to act was defective and gave no authority to enforce payment.<sup>6</sup>

**Disposal of Fund.** — Money collected from a defaulting collector on summary process issued by a state officer should forthwith be turned over to him, and cannot be detained until the rights of private persons thereto are adjudicated.<sup>7</sup>

**b. REMEDY BY CIVIL ACTION** — (1) *In General.* — The duty of the collector to pay over funds collected by him may be enforced by mandamus,<sup>8</sup> whether parties entitled thereto be public officials or private individuals.<sup>9</sup> And for moneys collected and not paid over or for a negligent failure to collect, he may be sued individually at common law.<sup>10</sup> If preferred, suit may be brought on the official bond.<sup>11</sup>

Rep. 1038. See also *Orr v. Duvall*, 1 Ala. 262; *Mason v. Brazier*, 1 Ala. 635; and *contra*, *Wilson v. Lilly*, 1 Blackf. (Ind.) 357; *Dawson v. Shaver*, 1 Blackf. (Ind.) 204; *Lemon v. Hay*, 1 Blackf. (Ind.) 227, where it is held that the notice must have the precision of a declaration.

**Service** on a collector who is also sheriff is, in *Missouri*, made by the sheriff of an adjoining county. *Phillips v. Robbins*, 59 Mo. 107.

**1. Jurisdictional Facts.** — A recital that the collector is in default is a statement of a legal conclusion, and does not authorize the issue of the warrant. *Weimer v. Bunbury*, 30 Mich. 201.

As to form of warrant in *Louisiana*, see *Scarborough v. Stevens*, 3 Rob. (La.) 147.

**Need Not Run in the Name of the Commonwealth.** — *Com. v. Ruff*, 3 Rawle (Pa.) 95.

**2. Weimer v. Bunbury**, 30 Mich. 201.

**Demand** necessary before arrest, *Ayer v. Goss*, 71 N. H. 66.

**3. Taxes** actually collected, but previously credited to the collector as insolvent, may be charged to him. *Wilson v. Wright*, 83 Ga. 38.

**4. Penalty.** — *State v. Lewenthall*, 55 Miss. 589; *Owens v. Andrew County Ct.*, 49 Mo. 372.

**Interest.** — The penalty usually takes the place of interest, and the latter begins to accrue only after judgment. *James v. Governor*, 1 Ala. 605; *Covington, etc., Bridge Co. v. Mayer*, 31 Ohio St. 317. See also *State v. McBride*, 76 Ala. 57.

**Certificate of Auditing Officer Admissible as Evidence Against Collector.** — *Murray v. Hoboken Land, etc., Co.*, 18 How. (U. S.) 272; *Johnson v. Thompson*, 4 Bibb (Ky.) 294; *Com. v. Rodes*, 5 T. B. Mon. (Ky.) 318; *State v. Powell*, 40 La. Ann. 241; *Prather v. Johnson*, 3 Har. & J. (Md.) 487; *Milburn v. State*, 1 Md. 1; *Billingsley v. State*, 14 Md. 369.

**5. Dudley v. Chilton County**, 66 Ala. 593.

**6. Defective Warrant.** — *Snow v. Winchell*, 74 Me. 408; *Pearson v. Canney*, 64 Me. 188;

*Weimer v. Bunbury*, 30 Mich. 201. But see *Harrisburg v. Guiles*, 192 Pa. St. 191.

**7. Disposition of Fund.** — *Goldsmith v. Kemp*, 58 Ga. 106; *Wilson v. Wright*, 83 Ga. 38.

**8. Mandamus.** — *Smyth v. Titcomb*, 31 Me. 272; *People v. Brown*, 55 N. Y. 180; *Ross v. Curtiss*, 31 N. Y. 606; *State v. Staley*, 38 Ohio St. 259.

**9. People v. Brown**, 55 N. Y. 180. See also *People v. Mead*, 36 N. Y. 224.

**10. Common-law Action.** — *Baird v. People*, 83 Ill. 387; *Helvey v. Huntington County*, 6 Blackf. (Ind.) 317; *Richmond v. Brown*, 66 Me. 373; *Adams v. Farnsworth*, 15 Gray (Mass.) 423; *Spencer v. Perry*, 18 Mich. 394; *Dogan v. Griffin*, 51 Miss. 782; *Wentworth v. Gove*, 45 N. H. 160.

**Form of Action.** — Assumpsit on the common count for money had and received, *Hindman v. Aledo*, 6 Ill. App. 436; *Richmond v. Brown*, 66 Me. 373; *O'Neal v. School Com'rs*, 27 Md. 227; *Adams v. Farnsworth*, 15 Gray (Mass.) 423; *Wentworth v. Gove*, 45 N. H. 160. On a bond of the collector, special assumpsit is a proper remedy, *Com. v. Gruver*, 13 Pa. Super. Ct. 553. Special action on the case, *School Dist. No. 2 v. Tebbetts*, 67 Me. 239; *Bailey v. Butterfield*, 14 Me. 112; *Charleston v. Stacy*, 10 Vt. 562. Action of debt, *M'Millan v. Eastman*, 4 Mass. 378; *School Dist. No. 2 v. Tebbetts*, 67 Me. 239; *Bailey v. Butterfield*, 14 Me. 112. See also *Tappan v. People*, 67 Ill. 339.

**Criminal Proceedings.** — The collector may, of course, also be criminally prosecuted for his embezzlement or defalcation. *State v. Green*, 87 Mo. 583; *State v. Dale*, 8 Oregon 229; *Com. v. McCullough*, 19 Pa. Super. Ct. 412.

But an officer who collects illegal taxes cannot be held on the charge of obtaining money under false pretenses where there is a statute expressly making such act a misdemeanor. *State v. Green*, 87 Mo. 583.

**11. Boykin v. State**, 50 Miss. 375. And see *supra*, this section, *Liability of Sureties on Bond of Collector*.

**No Jurisdiction in Equity.** — As the legal remedies are ample, equity will not entertain a bill against a collector.<sup>1</sup>

**Necessity of Demand.** — Actions against collectors do not materially differ from like actions in other cases. No demand is necessary,<sup>2</sup> unless required by statute,<sup>3</sup> or unless the officer is to be subjected to a penalty;<sup>4</sup> as, in general, the institution of suit is a sufficient demand and notice.<sup>5</sup>

(2) **Who Entitled to Sue.** — The right of action against a defaulting collector is usually lodged in the person or persons to whom the money in his hands should be paid.<sup>6</sup> Sometimes the state's attorney,<sup>7</sup> or an auditor,<sup>8</sup> is authorized to sue on his own motion, and, if the proper authorities fail to sue, taxpayers, who are also citizens of the state,<sup>9</sup> may institute the proper proceedings.

(3) **Burden of Proof.** — In actions against a collector he is *prima facie* liable for the full amount of all assessment rolls, lists, and warrants turned over to him,<sup>10</sup> provided they are sufficiently regular to afford protection if he acts under them.<sup>11</sup> He must be able to show that he has complied with the full measure of his duty in the effort to collect and has exhausted his authority. Proof of the receipt of money by the collector, and of his subsequent failure to pay it over, is, of course, always sufficient to sustain the action,<sup>12</sup> and the

1. **Bill in Equity Not Maintainable.** — Ramsay v. Clinton County, 92 Ill. 225; Baird v. People, 83 Ill. 387; Clinton County v. Schuster, 82 Ill. 137; Kilgore v. People, 76 Ill. 548; Hindman v. Aledo, 6 Ill. App. 436.

But of course equitable rights, such as the subrogation of sureties, Livingston v. Anderson, 80 Ga. 175, and the right to enforce a lien to satisfy a judgment, Turner v. Teague, 73 Ala. 554, frequently make it necessary for the court of equity to interpose.

2. **Demand Unnecessary.** — Carnall v. Crawford County, 11 Ark. 604; Janvier v. Vandever, 3 Harr. (Del.) 29; Wentworth v. Gove, 45 N. H. 160; Hicks v. Burns, 38 N. H. 151; Watson v. Walker, 23 N. H. 471; Brewster v. Van Ness, 18 Johns. (N. Y.) 133; Dygert v. Crane, 1 Wend. (N. Y.) 539; McGuire v. Williams, 123 N. Car. 349; Houston v. Russell, 52 Vt. 110.

3. **Demand Required by Statute.** — Pulaski County v. Elrod, (Ky. 1902) 66 S. W. Rep. 1017; Com. v. McClure, (Ky. 1899) 49 S. W. Rep. 789.

**Demand from Unauthorized Person** is of no effect. Com. v. McClure, (Ky. 1899) 49 S. W. Rep. 789.

**Collectors and Their Bondsmen Are Affected with Legal Notice** of all requirements pertaining to the discharge of their duties. It is a part of the contract. Worth v. Cox, 89 N. Car. 44.

**Preliminary Statement of Account — Notice.** — Where, as preliminary to proceedings against a defaulting collector, the county court is required to adjust his accounts according to its best information, he is not entitled to notice. Carnall v. Crawford County, 11 Ark. 604.

**Demand by a Lawfully Authorized Party** is necessary where the collector who is guilty of no breach holds the funds of a defunct village corporation. Dodge v. People, 113 Ill. 491.

**Informal Demand Sufficient.** — Sweetser v. Hay, 2 Gray (Mass.) 49.

4. Tappan v. People, 67 Ill. 339.

5. **Bringing Suit — Sufficient Notice.** — McGuire v. Williams, 123 N. Car. 349; Lehigh Crane

Iron Co. v. Com., 55 Pa. St. 448; Philadelphia v. Com., 52 Pa. St. 451.

6. **Who May Sue.** — Solano County v. Nevada, 27 Cal. 465; Clifton v. Wynne, 80 N. Car. 145; Walton v. Jones, 7 Utah 462.

But county commissioners have been allowed to sue a delinquent collector, notwithstanding the fact that he should make payment to the treasurer. Gibson County v. Harrington, 1 Blackf. (Ind.) 260. See also Wescott v. Thees, 89 N. Car. 55; Caldwell v. Fayette County, 80 Ind. 99.

7. **State's Attorney.** — People v. Love, 25 Cal. 520.

8. **Auditor.** — Gauntt v. State, 81 Ind. 137; Pepper v. State, 22 Ind. 399; State v. Harris, 52 Miss. 686.

9. **Resident Taxpayers.** — State v. Harris, 52 Miss. 686; French v. State, 53 Miss. 651.

10. **Burden of Proof — Alabama.** — Jackson County v. Gullatt, 84 Ala. 243; Timberlake v. Brewer, 59 Ala. 108; Boring v. Williams, 17 Ala. 510; Thompson v. Stickney, 6 Ala. 579.

**California.** — People v. Smith, 123 Cal. 70. **Louisiana.** — Scarborough v. Stevens, 3 Rob. (La.) 147; State v. Powell, 40 La. Ann. 241; Police Jury v. Brookshier, 31 La. Ann. 736; Police Jury v. Comeau, 10 La. Ann. 695.

**Maine.** — Gorham v. Hall, 57 Me. 58. **Massachusetts.** — Colerain v. Bell, 9 Met. (Mass.) 503.

**Minnesota.** — Gutches v. Todd County, 44 Minn. 383.

**Missouri.** — Howard v. State, 8 Mo. 362. **South Carolina.** — Treasurers v. Cleary, 3 Rich. L. (S. Car.) 372.

**Texas.** — Houston County v. Dwyer, 59 Tex. 113; Cordray v. State, 55 Tex. 141; Swan v. State, 48 Tex. 121; Morris v. State, 47 Tex. 593; Lockhart v. Houston, 45 Tex. 317; Shaw v. State, 43 Tex. 359; Allbright v. Governor, 25 Tex. 687; Burnett v. Henderson, 21 Tex. 590. 11. Olean v. King, 116 N. Y. 355.

12. Where receipts are given in payment of the collector's personal debt, both he and his sureties must make the amount good. Ward v. Marion County, 26 Tex. Civ. App. 361.

burden of proof is on him to show that he has disposed of the money properly,<sup>1</sup> or such other defense as negatives liability.<sup>2</sup> But accountants with the state or other taxing authorities are never allowed to set off an independent claim against their indebtedness for collections.<sup>3</sup>

**8. Compensation of Collectors — a. IN GENERAL.** — The right of a duly authorized collecting officer to be paid for his services, as well as the amount of his compensation and the time and manner of its payment, depends wholly upon the express provisions of law,<sup>4</sup> and the terms of the statutes must, of course, be substantially complied with.<sup>5</sup> The power to fix the compensation of the collector is often delegated, expressly or by implication, to local and municipal authorities<sup>6</sup> who are also sometimes given the discretion to allow additional compensation.<sup>7</sup> Sometimes the power to fix a reasonable compensation is lodged with the officer to whom the collector must account.<sup>8</sup> One who accepts the office of collector is bound to fulfil its duties notwithstanding the compensation be inadequate, and such circumstance gives him

**1. Burden of Showing Proper Disposition of Funds.** — *Coons v. People*, 76 Ill. 383; *Trescott v. Moan*, 50 Me. 347; *Cheshire v. Howland*, 13 Gray (Mass.) 321; *Houston County v. Dwyer*, 59 Tex. 113; *Cordray v. State*, 55 Tex. 141; *Swan v. State*, 48 Tex. 121; *Shaw v. State*, 43 Tex. 359; *Carpenter v. Corinth*, 62 Vt. 111; *Ferrisburg v. Martin*, 60 Vt. 330.

**Certified Statements from the State Auditor's or Comptroller's Office** are *prima facie* proof of the state of the collector's account with that office. *State v. Brewer*, 64 Ala. 287; *State v. Brewer*, 61 Ala. 318; *State v. Lake*, 45 La. Ann. 1207; *Cheshire v. Howland*, 13 Gray (Mass.) 321; *Anderson v. State*, 8 Heisk. (Tenn.) 13; *McLean v. State*, 8 Heisk. (Tenn.) 22; *Wood v. State*, 8 Heisk. (Tenn.) 329. *Contra*, *Allbright v. Governor*, 25 Tex. 687.

**Auditor's Report**, as distinguished from an auditor's settlement, is admissible in *Pennsylvania*. *Com. v. Peroth*, 31 Pittsb. Leg. J. N. S. (Pa.) 225.

**Treasury Transcripts of Collector's Accounts Admissible.** — *U. S. v. Hunt*, 105 U. S. 183.

**Collector's Books and Receipts as Best Evidence.** — *Gibson v. State*, 59 Miss. 341; *State v. Lewenthall*, 55 Miss. 589.

**2. Instructions from a Superior Officer** such as the comptroller may, it seems, be good defense in so far as the state revenue laws subject the collector to the control of the comptroller. *Allbright v. Governor*, 25 Tex. 689.

**Discharge in Bankruptcy No Defense.** — A claim against a defaulting collector is a fiduciary claim and will not be discharged in bankruptcy, *Richmond v. Brown*, 66 Me. 375; unless the authorities entitled to the money prove it in the bankruptcy proceedings against the collector, in which case it was discharged under the Bankruptcy Act of 1867. *Morse v. Lowell*, 7 Met. (Mass.) 152. See *Fed. Stat. Annot.* vol. 1, pp. 578-580.

**3. Set-off Not Permitted.** — *Shaver v. Robinson*, 59 Ala. 195; *Finnegan v. Fernandina*, 15 Fla. 379, 21 Am. Rep. 292; *Com. v. Rodes*, 5 T. B. Mon. (Ky.) 318; *Hibbard v. Clark*, 56 N. H. 155, 22 Am. Rep. 432; *Cobb v. Elizabeth City*, 75 N. Car. 1; *Byers v. State*, 2 Ohio 107; *Wilson v. Lewistown*, 1 W. & S. (Pa.) 428; *State v. Baldwin*, 14 S. Car. 135.

**4. Minix v. Magoffin County**, (Ky. 1895) 32 S. W. Rep. 165.

**Compensation to Be Fixed Before Collector Can Act.** — *Hamilton County v. Arnold*, 65 Ohio St. 479.

**Compensation Dependent on Statute.** — *State v. Brewer*, 64 Ala. 287; *Solano County v. Neville*, 27 Cal. 465; *Miner v. Solano County*, 26 Cal. 115; *State v. Guilbeau*, 37 La. Ann. 718; *State v. Baldwin*, 14 S. Car. 135; *State v. Murphy*, 101 Tenn. 515; *State v. Spurgeon*, 90 Tenn. 650; *Ramsey v. State*, 78 Tex. 602.

**Compensation of Deputies.** — Unless there is some provision in the law for the appointment of deputies at public expense, the burden falls on the collector individually. *Fremont County v. Brandon*, 6 Idaho 482.

On compensation of officers in general, see title **PUBLIC OFFICERS**, vol. 23, pp. 385-404.

**5. Harriman Imp. Co. v. McNutt**, (Tenn. Ch. 1896) 37 S. W. Rep. 396.

**Construction of Statutes.** — In interpreting laws governing the allowance of collectors' commissions the courts hold a very even balance, but, in doing as they would be done by, they possibly show some slight disposition to resolve doubts in favor of the allowance of the fees. In a case where the collector's certificates of sale were too prolix it was said that the court would not presume that they had been spun out to increase the cost bill, *Hamer v. Weber County*, 11 Utah 1. For illustrations of commissioners allowed in doubtful cases, see *Waukegan v. Foote*, 91 Ill. App. 588; *Board of Education v. Ziegenhein*, 156 Mo. 313; *State v. Wolfe*, (Tex. Civ. App. 1899) 51 S. W. Rep. 657. But the statutes will not be given a retroactive effect. *Duvall v. Perkins*, 77 Md. 582.

**6. Delegation of Right to Fix Compensation.** — *Hughes v. People*, 82 Ill. 78; *Broadwell v. People*, 76 Ill. 554; *Cheever v. Merritt*, 5 Allen (Mass.) 563; *State v. Mudgett*, 21 Wash. 99.

**7. Additional Compensation.** — *Treasurers v. Burger*, 3 Rich. L. (S. Car.) 357.

**8. Auditor Fixes Commission for the Collection of Poll Tax.** — *Shaver v. Robinson*, 59 Ala. 195. **Comptroller to Allow Reasonable Fees to Attorney Acting as Back Tax Collector.** — *People v. Central Pac. R. Co.*, 105 Cal. 576; *State v. Murphy*, 101 Tenn. 515.

**Back Tax Collector's Fees to Be Adjusted with Trustee.** — *State v. Murphy*, 101 Tenn. 515.

no right to recover more.<sup>1</sup> He is on no better ground where no compensation at all is allowed,<sup>2</sup> for the right to recover on a *quantum meruit* is not recognized in connection with public service.<sup>3</sup>

**b. COMPENSATION DEPENDENT ON MAKING THE MONEY.** — The right of a collector to be paid generally depends on the collection of the tax,<sup>4</sup> or the performance of proper<sup>5</sup> and effective service,<sup>6</sup> and where the collector fails to make the money,<sup>7</sup> even though he is only prevented from doing so by the withdrawal of a distress warrant at the instance of a state officer,<sup>8</sup> he will get no commission. So, if land sold for taxes be bid in by the state,<sup>9</sup> or the distress warrant is returned "no property found,"<sup>10</sup> the collector is entitled to no commission, unless the statutes so provide.<sup>11</sup> A collector who exacts excessive fees may incur a forfeiture of his entire compensation,<sup>12</sup> or some other penalty;<sup>13</sup> and defaulters are entitled to no compensation whatever.<sup>14</sup>

**1. Inadequate Compensation.** — *Miner v. Solano County*, 26 Cal. 115; *Thralls v. Sumner County*, 24 Kan. 594; *Labette County v. Franklin*, 16 Kan. 450; *School Com'rs v. Wasson*, 74 Ind. 134; *Treasurers v. Burger*, 3 Rich. L. (S. Car.) 357; *Garber v. Conner*, 98 Pa. St. 551.

**2. Ex Officio Collector.** — A sheriff or treasurer whose compensation as such is fixed is entitled to no additional compensation for his services as *ex officio* collector. *Hughes v. People*, 82 Ill. 78; *Broadwell v. People*, 76 Ill. 555; *Price v. Adamson*, 37 Mo. 151; *Lane v. Coos County*, 10 Oregon 124.

**No Compensation for Collecting School Money.** — *Fremont County v. Brandon*, 6 Idaho 482; *Gorman v. Boise County*, 1 Idaho 647. *Compare* *Fountain County v. La Tourette*, 60 Ind. 460.

**Nor for Collecting a Fund Specially Levied to Pay Off Bonds.** — *Merrill v. Marshall County*, 74 Iowa 24.

**Collector Not Entitled to Be Reimbursed for Expenses Incurred in Collecting.** — *State v. Brewer*, 64 Ala. 287; *Payne v. Washington County*, 25 Fla. 798; *Thralls v. Sumner County*, 24 Kan. 594; *State v. Crutchfield*, (Tenn. Ch. 1899) 52 S. W. Rep. 335; *People v. Long*, 13 Ill. 629; *Gilchrist v. Wilkes-Barre*, 142 Pa. St. 114; unless there be an express provision to that effect, *People v. Long*, 13 Ill. 629; *Titus v. Howard County*, 17 Kan. 363; *Carville v. Addison*, 62 Me. 459; *Gilchrist v. Wilkes-Barre*, 142 Pa. St. 114; *Taylor v. Umatilla County*, 6 Oregon 402. Nor can the collector bind the state for expenses in excess of what has been appropriated therefor. *Philadelphia v. Flanigen*, 47 Pa. St. 21.

**3. Officer Cannot Recover on a Quantum Meruit.** — *Locke v. Central*, 4 Colo. 65, 34 Am. Rep. 66; *Gilchrist v. Wilkes-Barre*, 142 Pa. St. 120; *State v. Baldwin*, 14 S. Car. 135.

**4. Making the Money.** — *Thralls v. Sumner County*, 24 Kan. 594; *Gordon v. Lafayette County*, 74 Mo. 426; *Miles v. Miller*, 5 Neb. 269; *State v. Murphy*, 101 Tenn. 515; *State v. Spurgeon*, 99 Tenn. 659; *State v. Crutchfield*, (Tenn. Ch. 1899) 52 S. W. Rep. 335.

**5. Proper Service.** — *Minix v. Magoffin County*, (Ky. 1895) 32 S. W. Rep. 749; *Cleveland v. McCravy*, 46 S. Car. 252; *Harriman Imp. Co. v. McNutt*, (Tenn. Ch. 1896) 37 S. W. Rep. 396.

**6. Effective Service.** — *Titus v. Howard County*, 17 Kan. 363; *Gordon v. Lafayette County*, 74 Mo. 426; *Miles v. Miller*, 5 Neb. 269; *Manhattan R. Co. v. Merges*, 38 N. Y.

App. Div. 120; *Smith v. New York*, 37 N. Y. 518.

**No Commission on Void Sale.** — *Hamer v. Weber County*, 11 Utah 1. *Aliter*, as to clerical officers, *Aldrich v. Pickard*, 14 Lea (Tenn.) 456; and where the sale is only voidable, *Hamer v. Weber County*, 11 Utah 1.

**7. Failure to Make the Money.** — *Titus v. Howard County*, 17 Kan. 363; *Labette County v. Franklin*, 16 Kan. 450; *Anderson v. Hawks*, 70 Miss. 639; *Yazoo, etc., R. Co. v. Love*, 69 Miss. 109; *Wynne v. Mississippi, etc., R. Co.*, 45 Miss. 569.

**8. Hill v. Allen**, (Tenn. Ch. 1896) 39 S. W. Rep. 892. *Compare* *Wheatly v. Covington*, 11 Bush (Ky.) 18.

**The Collector Has No Vested Right to Collect Taxes Committed to Him**, and he is entitled to no commissions on moneys paid in response to notices from him after his official authority ends. *Brady v. French*, 9 Ohio Dec. 202, 6 Ohio N. P. 127.

**No Commission on abatement for prompt payment**, *Com. v. Scott*, 7 Pa. Co. Ct. 409; nor on funds received officially from predecessor, *Randolph County v. Trogdon*, 75 N. Car. 350; *Bright v. Hewes*, 18 La. Ann. 666; nor on funds recovered in a suit brought by a district attorney, *Boggs v. Placer County*, 65 Cal. 561.

**9. Lands Bid In by State.** — *State v. Brewer*, 64 Ala. 287; *State v. Kinne*, 41 N. H. 238; *Dean v. State*, 54 Tex. 313. See also *Miner v. Solano County*, 26 Cal. 115; *Fremont County v. Brandon*, 6 Idaho 482; *Hamer v. Weber County*, 11 Utah 1.

**10. "Nulla Bona" Return.** — *Chapel v. Ramsey County*, 71 Minn. 18, *overruling* *Schmid v. Brown County*, 44 Minn. 67.

**11. Compensation Allowed by Statute.** — *Akers v. Burch*, 12 Heisk. (Tenn.) 606; *Ogden City v. Hamer*, 12 Utah 337. See also *Payne v. Washington County*, 25 Fla. 798; *Hamer v. Weber County*, 11 Utah 1.

**12. Forfeiture of Commission.** — *Foss v. Whitehouse*, 94 Me. 491.

**A Mere Failure to Collect** will not operate as a general forfeiture of commissions on taxes actually collected. *State v. Bloxham*, 33 Fla. 482.

**13. One who has no right to any fees whatever** cannot be subjected to a penalty for exacting excessive fees. *Garber v. Conner*, 98 Pa. St. 551.

**14. Defaulters Entitled to No Compensation.** — *Walker County v. Fidelity, etc., Co.*, 107 Fed.

This rule is enforced against their sureties also.<sup>1</sup>

c. **MODE OF PAYMENT.** — The collector sometimes receives a fixed salary;<sup>2</sup> but he is nearly always paid commissions in gross on the total amount collected.<sup>3</sup> In such case he ordinarily retains his commissions,<sup>4</sup> but such right is dependent upon statute,<sup>5</sup> and each tax, whether poll, school, state, or county, must bear its own expense,<sup>6</sup> even though the whole tax be expressly appropriated to a particular purpose.<sup>7</sup> It is not unusual to add the collector's

Rep. 851, 47 C. C. A. 15; *Police Jury v. Brookshier*, 31 La. Ann. 736; *State v. Alsup*, 91 Mo. 172.

1. Said *Pardee, J.*, in *Walker County v. Fidelity, etc., Co.*, 107 Fed. Rep. 854, 47 C. C. A. 15: "On general principles, a defaulting tax collector ought not to be entitled to commissions on the amounts he has collected from taxpayers and failed to pay over to the proper authorities. He has not performed the full work for which the commissions were intended to pay, and he is an unfaithful trustee. The sureties on a defaulting tax collector's bond, who refuse to pay up the defalcation, and compel litigation, ought not to be entitled to credit for the amount of commissions on any sum the tax collector has collected. The public ought not to be compelled to pay the commissions for collecting the taxes, and at the same time be at the expense of litigating with the sureties on the defaulting tax collector's bond to recover the same money."

2. **Salary.** — *Yolo County v. Colgan*, 132 Cal. 265, 84 Am. St. Rep. 41; *People v. Benson*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 135.

**Salaried Collector.** — One who is paid a fixed sum in lieu of all other compensation for collecting taxes is a salaried officer. *Castle v. Lawlor*, 47 Conn. 340.

3. **Commissions in Gross on Moneys Collected** — *Florida.* — *State v. Drew*, 16 Fla. 303.

*Idaho.* — *Gorman v. Boise County*, 1 Idaho 647.

*Indiana.* — *Fountain County v. La Tourette*, 60 Ind. 460; *Harrison County v. Benson*, 83 Ind. 470.

*Kentucky.* — *Little v. Strow*, 66 S. W. Rep. 282, 23 Ky. L. Rep. 1829; *Pence v. Nelson County*, 107 Ky. 66; *Pendleton County v. McMillan*, 104 Ky. 816; *Montgomery County Ct. v. Chenault*, (Ky. 1898) 47 S. W. Rep. 457; *Boltz v. Newport*, (Ky. 1900) 59 S. W. Rep. 503.

*Mississippi.* — *Miller v. Delta, etc., Land Co.*, 74 Miss. 110.

*Missouri.* — *State v. Hawkins*, 169 Mo. 615.

*Nebraska.* — *State v. Cornell*, 54 Neb. 647.

*North Carolina.* — *Randolph County v. Trogdon*, 75 N. Car. 350.

*Pennsylvania.* — *Com. v. Scott*, 7 Pa. Co. Ct. 409.

*Tennessee.* — *Davidson County v. De Grove*, 2 Coldw. (Tenn.) 494.

**Mode of Compensation.** — Where commissions are paid in gross, taxes derived from different sources and applicable to different purposes are taken in the aggregate in calculating commissions. Thus, in *Kentucky*, poll, *ad valorem*, and special taxes are taken together in estimating the commission on county taxes. *Montgomery County Ct. v. Chenault*, (Ky. 1898) 47 S. W. Rep. 457; *Little v. Strow*, (Ky. 1902) 66

S. W. Rep. 282; *Pence v. Nelson County*, 107 Ky. 66; *Pendleton County v. McMillan*, 104 Ky. 816.

In *Nebraska* both state and county taxes are lumped in fixing a compensation of the collector of state and county taxes. *State v. Cornell*, 54 Neb. 647.

In *Tennessee*, in calculating the commissions of the collector, state and county taxes have been treated as separate. *Davidson County v. De Grove*, 2 Coldw. (Tenn.) 494.

**Collection by Lowest Bidder.** — Under *Pennsylvania* local statutes now repealed, the collection of local taxes has sometimes been let to the lowest bidder. This is merely an incident in choosing the collector, and is not an illustration of farming out the collection of taxes. For various local questions incident to the abolition of this mode of compensating collectors, see *Sides v. Lancaster County*, 9 Pa. Dist. 609, 17 Lanc. L. Rev. 275; *Ephrata Tp. v. Lancaster County*, 17 Lanc. L. Rev. (Pa.) 317; *Buckwalter v. Lancaster County*, 16 Lanc. L. Rev. (Pa.) 84.

4. **Retaining Commissions.** — *Shaver v. Robinson*, 59 Ala. 195; *Wilson v. State*, 51 Ark. 212; *Sacramento County v. Colgan*, 114 Cal. 246; *Waycross v. Board of Education*, 87 Ga. 22; *State v. Donnelly*, 20 Nev. 214; *Cameron County v. School Dist.*, 117 Pa. St. 149; *Biehn v. Bucks County*, 132 Pa. St. 561, 19 Am. St. Rep. 607; *Ramsey v. State*, 78 Tex. 602.

**Excessive Retention.** — Where the comptroller erroneously permits a collector to retain too much the state may recover the excess. *State v. Murphy*, 101 Tenn. 515. See also *Wilson v. State*, 51 Ark. 212. And where too little is retained the authorities should pay the balance due by giving a proper order. *Harrison County v. Benson*, 83 Ind. 470.

**Fees of Attorney.** — Attorney who has a lien on taxes recovered for a reasonable fee may retain therefor. *Washington County v. Clapp*, 83 Minn. 512.

5. **Right of Retention Statutory.** — *Shaver v. Robinson*, 59 Ala. 195; *Merrill v. Marshall County*, 74 Iowa 24; *State v. Guilbeau*, 37 La. Ann. 718; *State v. Baldwin*, 14 S. Car. 135.

**Right of Retention Granted by Legislature Cannot Be Taken Away by a City.** — *Bloomington v. Calhoun*, 86 Ill. App. 491.

In *Nevada*, by statute, the collector's claim for compensation is prior to the right of the state to the funds collected. *Grimes v. Goodell*, 3 Nev. 70.

6. **Each Tax to Bear Its Own Expense.** — *Shaver v. Robinson*, 59 Ala. 195; *State v. Crutchfield*, (Tenn. Ch. 1800) 52 S. W. Rep. 335; *State v. Murphy*, 101 Tenn. 515. See also *State v. Drew*, 16 Fla. 303; *Davidson County v. De Grove*, 2 Coldw. (Tenn.) 494.

7. **Tax Appropriated to Special Purpose.** — *Waycross v. Board of Education*, 87 Ga. 22; *People*

commissions to the individual assessments and thus collect them with the tax itself from the taxpayer.<sup>1</sup> Where this is done no liability attaches to the state or county for the collector's commission.

**XV. TAX SALES — 1. Personal Property — a. NOTICE OF SALE.** — Statutory provisions in regard to notice of the time and place of sale must be strictly complied with,<sup>2</sup> but in determining the sufficiency of the notice in these respects the body of the notice will be construed in its entirety and according to its reasonable import.<sup>3</sup>

**b. CONDUCT OF SALE.** — *The Property Must Be Sold Openly and to the Highest Bidder,* and there must be an opportunity for competitive bidding.<sup>4</sup>

**Time of Sale.** — Where the officer is required to keep the property a specified time before offering it for sale, the sale is illegal if the full time be not given,<sup>5</sup> and, likewise, if the sale be made after the expiration of the time limited by statute for the purpose, it is irregular, and the officer becomes a trespasser *ab initio*.<sup>6</sup>

**Adjournment of Sale.** — The officer may adjourn the sale in his discretion, his power for that purpose being identical with that of an officer having an execution for collection;<sup>7</sup> but the adjournment must be to a definite time,

*v. Wiltshire*, 92 Ill. 260; *Cameron County v. School Dist.*, 117 Pa. St. 149.

**1. Commissions Collectible with the Tax.** — *School Com'rs v. Wasson*, 74 Ind. 134; *Seidenstricker v. State*, 2 Gill (Md.) 374; *McKinnon v. Carlton County*, 71 Minn. 481; *Chapel v. Ramsey County*, 71 Minn. 18; *Manhattan R. Co. v. Merges*, 167 N. Y. 539, *affirming* 38 N. Y. App. Div. 120.

**Fees of Back Tax Attorney Collectible as Costs.** — *State v. Edwards*, 144 Mo. 467.

But municipal authorities, in the exercise of a special power to tax, cannot, it has been said, thus increase the burden of the taxpayer. *Jonas v. Cincinnati*, 18 Ohio 318.

**Where Several Tracts of Land Are Sold for Taxes Assessed Against One Individual,** or several tracts belonging to different individuals are included in one advertisement, the collector is usually entitled to only one fee, which must be apportioned against the different parcels sold or among the several owners. *Aplin v. Baker*, 84 Mich. 113; *Benton v. Goodale*, 66 N. H. 424; *Eustis v. Henrietta*, 91 Tex. 325; *Whatcom County v. Fairhaven Land Co.*, 7 Wash. 101. But see *Bagley v. Shoppach*, 47 Ark. 72; *State v. Baldwin University*, 97 Tenn. 358.

**2. Notice of Sale.** — *Ward v. Carson River Wood Co.*, 13 Nev. 44.

**In Massachusetts** it has been held that the notice of sale need not contain the name of the owner of the property, the amount of the tax, or a description of the property. *Barnard v. Graves*, 13 Met. (Mass.) 85.

**Signature of Officer.** — A notice of sale issued by a collector who is also a constable is not vitiated by reason of being signed by the officer as "constable" instead of "collector." *Barnard v. Graves*, 13 Met. (Mass.) 85.

**3. Notice Reasonably Construed.** — *Lyle v. Jacques*, 101 Ill. 644; *Rawson v. Spencer*, 113 Mass. 40. See also *Barnard v. Graves*, 13 Met. (Mass.) 85.

**Vermont Statute.** — Under a Vermont statute requiring the officer to have possession of the goods four days before advertising, and to advertise six days before selling, the officer might advertise or sell within a reasonable time after

the expiration of the period stated. *Clemons v. Lewis*, 36 Vt. 674.

**4. Sale to Highest Bidder.** — *Shimer v. Mosher*, 39 Hun (N. Y.) 153.

**Purchase by Collector — Sale Voidable.** — Where at a sale of goods for the nonpayment of taxes the collector becomes the purchaser, the sale is voidable at the instance of the owner of the goods. *Pierce v. Benjamin*, 14 Pick. (Mass.) 356, 25 Am. Dec. 396.

**Inadequacy of Price,** alone, will not render a sale invalid. So, where a note and mortgage are sold under a tax warrant, and are purchased by the maker, for a sum less than their face value, the sale will not be disturbed on that account. *Irby v. Blain*, 31 Kan. 716.

**Place of Sale.** — In *Carville v. Additon*, 62 Me. 459, it was held that a town collector may sell distrained property outside the limits of the town in which the property was seized.

**5. Time of Sale.** — *Mason v. Thomas*, 36 N. H. 302; *Lefavour v. Bartlett*, 42 N. H. 555; *Clemons v. Lewis*, 36 Vt. 674.

**Computation of Time.** — *Carville v. Additon*, 62 Me. 459; *Souhegan Nail, etc., Factory v. McConihe*, 7 N. H. 309; *Mason v. Thomas*, 36 N. H. 302.

**6. Sale After Time Limited.** — *Noyes v. Haverhill*, 11 Cush. (Mass.) 338; *Pierce v. Benjamin*, 14 Pick. (Mass.) 356, 25 Am. Dec. 396; *Brackett v. Vining*, 49 Me. 356.

**Sale under Second Advertisement.** — In *Souhegan Nail, etc., Factory v. McConihe*, 7 N. H. 309, it was held that where the sale was not made at the time fixed therefor, the officer was guilty of nothing more than nonfeasance, and might sell the goods under a second advertisement for the requisite period.

**Sale After Return Day of Writ.** — Where a tax execution is levied upon personal property before the return day, the property may be sold after the return day without further process, the officer being possessed of substantially the same power in this respect as sheriffs acting under executions. *Blain v. Irby*, 25 Kan. 490; *Keystone Lumber Co. v. Penderson*, 93 Wis. 466.

**7. Adjournment.** — *Spear v. Tilson*, 24 Vt. 420,

and a sale before the time to which the adjournment is made is void.<sup>1</sup>

**Amount to Be Sold.** — The property should be sold in separate parcels, and only so much should be sold as is required to pay the taxes, charges, and costs.<sup>2</sup>

**The Warrant Is a Full Protection** to the collector in so far as he does not exceed the authority conferred therein.<sup>3</sup>

**c. RETURN.** — The return of the tax collector is *prima facie* evidence of the fact; stated therein.<sup>4</sup>

**2. Lands — a. PREREQUISITES OF RIGHT TO SELL — (1) Grant of Authority.** — There can be no power to sell land summarily to enforce the collection of taxes, except by virtue of an express grant of authority to that effect.<sup>5</sup>

**Statutes Strictly Construed.** — Statutes purporting to confer the authority to sell, being in derogation of the right of property, must be strictly construed,<sup>6</sup> and statutes which confer such authority are exclusive in their effect, and their provisions must be strictly followed.<sup>7</sup>

**1. Sale Before Time Specified.** — *Buzzell v. Johnson*, 54 Vt. 90. In this case the sale was had at ten A. M. under an adjournment until one P. M. The property brought a fair price, which was applied to the taxes due; the attorney of the tax debtor was present, knew of the mistake, but said nothing. The sale was held to be irregular and void.

**Mistake Not Calculated to Mislead.** — Where the notice of adjournment erroneously stated the hour to which the sale was adjourned as four A. M. instead of four P. M., and the officer rectified the mistake on the day of the sale, the mistake was so obvious that the sale was not vitiated thereby. *Wheelock v. Archer*, 26 Vt. 380.

**2. Distinct Articles to Be Sold Separately.** — *Seekins v. Goodale*, 61 Me. 400, 14 Am. Rep. 568 [explaining *Williamson v. Dow*, 32 Me. 559]; *Leaton v. Murphy*, 78 Mich. 77; *Shimer v. Mosher*, 39 Hun (N. Y.) 153. See also *Denton v. Carroll*, 4 N. Y. App. Div. 532.

**Property in Bulk to Be Divided.** — *Ward v. Carson River Wood Co.*, 13 Nev. 44.

**Sale Valid Except as to Excess.** — Where the officer after selling enough to pay the sum due sells other personal property distrained, he will not become a trespasser *ab initio* as to any of the articles sold except such as he has sold in excess of his authority. *Seekins v. Goodale*, 61 Me. 400, 14 Am. Rep. 568, explaining *Williamson v. Dow*, 32 Me. 559.

**3. Officer Protected by Warrant.** — *Carville v. Additon*, 62 Me. 459; *Seekins v. Goodale*, 61 Me. 400, 14 Am. Rep. 568.

**4. Return Prima Facie Correct.** — *Barnard v. Graves*, 13 Met. (Mass.) 85; *Johnson v. Allen*, 48 N. H. 235.

**In New Hampshire** the collector's warrant is not a returnable process. *Kelley v. Noyes*, 43 N. H. 209; *Johnson v. Allen*, 48 N. H. 235; *Hoitt v. Burnham*, 61 N. H. 620.

**Failure to Make Return.** — In *Spear v. Tilson*, 24 Vt. 420, it was held that the neglect of the officer to make a return could not render him a trespasser *ab initio*, and that his acts, in such case, might be shown by parol.

**Need Not Specify Day of Sale.** — In *Picket v. Allen*, 10 Conn. 146, the court expressed the opinion that the return need not specify on what day the sale occurred.

**5. No Power to Sell Without Express Grant.** — *Ham v. Miller*, 20 Iowa 450; *McInerney v. Reed*,

23 Iowa 410; *Merriam v. Moody*, 25 Iowa 163; *Dubuque v. Harrison*, 34 Iowa 163; *Smith v. Ryan*, 88 Ky. 636; *Brown v. Veazie*, 25 Me. 359; *Bergen v. Clarkson*, 6 N. J. L. 352; *Sharp v. Speir*, 4 Hill (N. Y.) 76; *Quimby v. Wood*, 19 R. I. 571. See also *Beaty v. Knowler*, 4 Pet. (U. S.) 152.

**Instances in Which Power Had Been Granted.** — See *Placerville v. Wilcox*, 35 Cal. 21; *Jennings v. Rudd*, 40 Ga. 49; *Haskel v. Burlington*, 30 Iowa 232; *Augustine v. Jennings*, 42 Iowa 198; *Ide v. Finneran*, 29 Kan. 569; *Grant v. Bartholomew*, 57 Neb. 673.

**Under the Common Law**, only goods, chattels, and profits of land could be taken on execution. *Johnson v. Hahn*, 4 Neb. 139.

**The Law in Effect at the Time of Sale Controls** the validity of the sale, and not the law which was in effect when the proceeding under which the sale occurred was commenced. *Driggers v. Cassady*, 71 Ala. 529.

**Power of Sale for "Tax" but Not for "Assessment."** — There is a well-defined distinction between a tax and an assessment, and authority to sell land to satisfy taxes does not carry with it the power to sell for an assessment for benefits. *Sharp v. Speir*, 4 Hill (N. Y.) 76. See also *Allen v. Galveston*, 51 Tex. 302.

**Tax Against Property Distinct from Tax Against Owner.** — Power given to a city to sell lands for taxes imposed thereon does not authorize a sale for taxes which by the charter are to be imposed merely upon owners and occupants. *Sharp v. Speir*, 4 Hill (N. Y.) 76.

**Power to Sell Land Sold or Forfeited to the State** does not imply authority to sell the land of a delinquent taxpayer in satisfaction of taxes due the state. *Prescott v. Payne*, 44 La. Ann. 650. See also *Leathem, etc., Lumber Co. v. Nalty*, 109 La. 325.

**Constitutionality of Grant.** — In *Texas* it has been held that a grant of power to a city to prosecute suits for taxes due it is not in violation of the constitution of the state. *Nalle v. Austin*, (Tex. Civ. App. 1897) 42 S. W. Rep. 780. See also *League v. State*, (Tex. Civ. App. 1900) 56 S. W. Rep. 262, affirmed 93 Tex. 553.

**6. Strict Construction to Be Given.** — *Merriam v. Moody*, 25 Iowa 163; *Cahoon v. Coe*, 57 N. H. 556; *Sharp v. Speir*, 4 Hill (N. Y.) 76.

**7. Statutes to Be Strictly Followed.** — *Thatcher v. Powell*, 6 Wheat. (U. S.) 119; *Muskegon Lumber Co. v. Brown*, 66 Ark. 539; *Tolman v.*



**Inference Cannot Supply the Power of Sale,** and accordingly a grant of authority to assess and collect taxes does not carry with it the power to collect by sale.<sup>1</sup> Nor will a grant to a municipal corporation, in its charter, of power to provide by ordinance for the collection of taxes, confer authority to sell and convey land for the nonpayment of taxes.<sup>2</sup>

**Power by Necessary Implication.** — Where, however, the grant of power to assess and collect is accompanied by provisions distinctly and unequivocally assuming the existence of the power to sell, it must be regarded as a legislative interpretation recognizing the existence of such power.<sup>3</sup>

**Statutes Not Retroactive.** — In the absence of clear legislative intent that statutes granting the power to sell should have a retroactive operation, a prospective operation alone will be given them.<sup>4</sup>

(2) **Validity of Tax.** — The validity of the tax which is sought to be enforced is essential to the right of sale, and it has frequently been held that an injunction will lie to prevent a sale for invalid taxes.<sup>5</sup> But it has been held that an injunction is not appropriate where the tax is actually owing,<sup>6</sup> or an adequate remedy at law is available.<sup>7</sup>

(3) **Nonpayment of Tax.** — It is, of course, necessary that there be taxes due and unpaid before the right of sale will exist;<sup>8</sup> and a tender of the

Hobbs, 68 Me. 316; *Corondelet v. Picot*, 38 Mo. 125; *Logan County v. Carnahan*, (Neb. 1902) 92 N. W. Rep. 984, *affirmed* (Neb. 1903) 95 N. W. Rep. 812; *Jackson v. Shepard*, 7 Cow. (N. Y.) 88, 17 Am. Dec. 502; *Frazier v. Prince*, 8 Okla. 253; *Hughes v. Linn County*, 37 Oregon 111; *Wistar v. Kammerer*, 2 Yeates (Pa.) 100; *Sheafer v. Mitchell*, 109 Tenn. 181.

**The Control of Congress,** by its legislative acts, over the sale of lands for taxes within municipalities under its jurisdiction, is exclusive, and will not be affected by municipal ordinances. *Thompson v. Roe*, 22 How. (U. S.) 422.

1. **Power of Sale Not Inferred from Power to Collect.** — *Ham v. Miller*, 20 Iowa 450; *McInerny v. Reed*, 23 Iowa 410; *Merriam v. Moody*, 25 Iowa 163; *Dubuque v. Harrison*, 34 Iowa 163.

**Grant Failing to Include Power of Sale Not Nugatory.** — Where a provision in a city charter gives authority to levy and collect taxes, but is silent as to the mode of collection, the provision is not nugatory on this account, but may be given effect by judicial proceedings to collect the tax. *McInerny v. Reed*, 23 Iowa 410 [citing *New York v. Colgate*, 12 N. Y. 140]; *Merriam v. Moody*, 25 Iowa 163; *Dubuque v. Harrison*, 34 Iowa 163; *Paine v. Spratley*, 5 Kan. 525.

2. **Power to Sell Not Inferred from Power to Provide for Collection.** — *Merriam v. Moody*, 25 Iowa 163; *Paine v. Spratley*, 5 Kan. 525.

3. **Power by Necessary Implication.** — *St. Louis v. Russell*, 9 Mo. 507. In this case the court considered it doubtful whether the provision in the charter of 1841 of the city of St. Louis, which authorized the city to levy and collect taxes on all personal property, conferred power to sell land, but held that another section of the charter, which gives to the city authorities power to direct by ordinance the manner in which property, real or personal, which has been sold for taxes, shall be redeemed, confers the power of sale by necessary implication. See also *Carondelet v. Picot*, 38 Mo. 125.

4. **Statutes Not Retroactive.** — *Dallam v. Oliver*, 3 Gill (Md.) 445; *Norris v. Hall*, 124

Mich. 170; *Nowlen v. Hall*, 128 Mich. 274. See also *Danforth v. McCook County*, 11 S. Dak. 258, 74 Am. St. Rep. 808; *State v. Whittlesey*, 17 Wash. 447.

**Retroactive Effect Given — Louisiana.** — Under the clause of the constitution of Louisiana of 1879 authorizing the legislature to direct a mode of sale of property on which taxes prior to 1879 were due, it was competent for the legislature to direct the sale of property which had forfeited to the state for the nonpayment of taxes, and property on which taxes levied prior to 1879 were due. *Castillo v. McConnico*, 47 La. Ann. 1473.

**A Washington Statute,** passed March 15, 1897, providing for the collection of delinquent taxes, was held to govern the collection of taxes for the previous year which did not become delinquent until after the passage of the act. *State v. Whittlesey*, 17 Wash. 447.

5. See the title **INJUNCTIONS**, vol. 16, p. 337.

**Sale for Invalid Taxes Enjoined.** — *Brown v. French*, 80 Fed. Rep. 166; *Northern Pac. R. Co. v. Kurtzman*, 82 Fed. Rep. 241; *Pickett v. Russell*, 42 Fla. 116; *Auditor Gen. v. Pioneer Iron Co.*, 123 Mich. 521; *Noll v. Morgan*, 82 Mo. App. 112; *Chicago, etc., R. Co. v. Cass County*, 51 Neb. 369; *Hughes v. Linn County*, 37 Oregon 111; *Alexander v. Henderson*, 105 Tenn. 431.

6. **Taxes Actually Due.** — *Ayers v. Widmayer*, 188 Ill. 121; *Cobban v. Hinds*, 23 Mont. 338; *Alliance Trust Co. v. Multnomah County*, 38 Oregon 433.

7. **Adequate Legal Remedy.** — *White v. Raymond*, 188 Ill. 298; *Ayers v. Widmayer*, 188 Ill. 121.

8. **Nonpayment of Tax.** — *Gunn v. Thompson*, 70 Ark. 500; *Lefebvre v. Negrotto*, 44 La. Ann. 792; *Brown v. Pontchartrain Land Co.*, 48 La. Ann. 1188; *McHarg v. Halden*, 83 Minn. 489; *Den v. Lucey*, 1 Murph. (5 N. Car.) 311; *Nickum v. Gaston*, 28 Oregon 322. See also *Virden v. Bowers*, 55 Miss. 1; *Wistar v. Kammerer*, 2 Yeates (Pa.) 100; *Wilson v. Cantrell*, 40 S. Car. 114.

**Where the Amount Assessed Is Excessive and**  
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amount due defeats the right of sale.<sup>1</sup>

(4) *Liability of Property*—(a) *In General*.—Property sold in satisfaction of taxes must be such property as is liable to be subjected for that purpose.<sup>2</sup> Under the various statutes controlling this subject, sales have been held void because the property sold was owned by the public,<sup>3</sup> or was included in the delinquent's exemptions,<sup>4</sup> or was the subject of pending litigation upon the question of its liability to sale.<sup>5</sup>

(b) *Primary Liability of Personalty*—aa. *WHERE PRIMARILY LIABLE*.—In a number of states, under statutory provisions, real property cannot be sold for the satisfaction of delinquent taxes, if the owner has within the jurisdiction personal property sufficient to satisfy the tax claim, or until the personal property, if there be any, shall have been exhausted;<sup>6</sup> and equity will restrain a

the sum lawfully due has been paid, an injunction will lie to restrain a sale for the satisfaction of the illegal excess. *Macomb v. Lake County*, 9 S. Dak. 466.

*Irregularity Cured by Lapse of Time*.—Where a tract of land is in fact owned by more than one person, but is unoccupied, and to all appearances is a single tract, and is assessed as such, the fact that an owner had paid his proportionate share of the tax rendered a sale of the entire tract invalid as to him, but it was held that the sale would not be set aside where application was not seasonably made. *Marsh v. Ne-ha-sa-ne Park Assoc.*, 25 N. Y. App. Div. 34, *reversing* 18 Misc. (N. Y.) 314.

*Part Payment of Tax*.—The fact that the taxes were paid for one of the years for which the land was sold will not invalidate the sale. *Hurley v. Powell*, 31 Iowa 64; *Eldridge v. Kuehl*, 27 Iowa 160.

*Where Land Is Assessed Against Two Persons Separately*, one of whom has paid the taxes, a sale of the land will be void. *Boggess v. Scott*, 48 W. Va. 316; *Albright v. Byers-Allen Lumber Co.*, 204 Pa. St. 71.

*Evidence upon Issue as to Payment*.—In an injunction suit to restrain a sale for taxes, evidence may be introduced showing that receipts for taxes for specified years do not cover all the taxes due for such years and that a certain amount of taxes is still unpaid. *Kock v. Triche*, 52 La. Ann. 825.

*By Whom Taxes Paid*.—It seems to be immaterial by whom the payment was made if it was in fact accepted by the officers authorized to receive it. *Nickum v. Gaston*, 28 Oregon 322.

*Presumption of Payment by Lapse of Time*.—*McLaughlin v. Kain*, 45 Pa. St. 113.

*Presumption of Nonpayment*.—See *Wallace v. International Paper Co.*, 70 N. Y. App. Div. 298.

1. *Tender*.—*Dakota Loan, etc., Co. v. Codington County*, 9 S. Dak. 159, in which it was held that a person who has tendered the valid portion of an assessed tax is entitled to an injunction to restrain the collection of void excess.

*Tender of Insufficient Amount*.—A tender of the taxes due on land, but not of the owner's poll tax or the tax due on his personal property, is no defense to a proceeding to subject the land to sale. *Driggers v. Cassady*, 71 Ala. 529.

2. *Liability of Property*.—*Waycross Lumber Co. v. Burbage*, 97 Ga. 611; *Hobson v. Dutton*, 9 Kan. 477; *Louisville, etc., R. Co. v. Buford*,

73 Miss. 494; *Deloughrey v. Hinds*, 23 Mont. 260; *Toy v. McHugh*, 62 Neb. 820; *McClements v. Downey*, 2 Pa. Super. Ct. 443; *Quimby v. Wood*, 19 R. I. 571. See *supra*, this title, *Persons and Things Taxable—Real Property*. See also the titles EXEMPTIONS (FROM EXECUTION), vol. 12, p. 179; EXEMPTIONS (FROM TAXATION), vol. 12, p. 266.

*Property Must Belong to Delinquent*.—*Thibodaux v. Keller*, 29 La. Ann. 508. Compare *Smith v. Cassidy*, 75 Miss. 916.

*Only Life Estate Liable During Possession of Life Tenant*.—*Ferguson v. Quinn*, 97 Tenn. 46.

*Railroad Liable as "Land"*.—*Purifoy v. Lamar*, 112 Ala. 123.

*Property Bought for the State*.—Under a *Louisiana* statute providing for the purchase and resale by the state of lands offered for sale for taxes, it has been held that property bid in by the state is still subject to taxation and liable to be sold for the satisfaction of such taxes. *Gulf States Land, etc., Co. v. Parker*, 72 Fed. Rep. 399; *Reinach v. Duplantier*, 46 La. Ann. 152; *Remick v. Lang*, 47 La. Ann. 915.

*Possession of Receiver No Objection to Sale*.—*Metcalfe v. Commonwealth Land, etc., Co.*, 68 S. W. Rep. 1100, 24 Ky. L. Rep. 527.

*Decedent's Estate Liable*.—*White v. Portland*, 68 Conn. 293.

3. *Public Property*.—*Independent School Dist. v. Hewitt*, 105 Iowa 663; *Smith v. St. Paul*, 72 Minn. 472; *Winfrede Coal Co. v. Board of Education*, 47 W. Va. 132; *Gilbert v. Pier*, 102 Wis. 334.

4. *Delinquent's Exemptions*.—*Stewart v. Corbin*, 25 Iowa 144, *following* *Penn v. Clemans*, 19 Iowa 372. Compare *Bitzer v. Becke*, (Iowa 1902) 89 N. W. Rep. 193.

5. *Pending Litigation as to Liability*.—*Yazoo, etc., R. Co. v. West*, 78 Miss. 789.

6. *Personalty Primarily Liable—Alabama*.—*Scales v. Alvis*, 12 Ala. 617, 46 Am. Dec. 269; *Stoudenmire v. Brown*, 57 Ala. 481.

*Arkansas*.—*Jones v. McLain*, 23 Ark. 432.

*Dakota*.—*Frost v. Flick*, 1 Dak. 126.

*Illinois*.—See *Mt. Carmel Light, etc., Co. v. People*, 166 Ill. 199; *Matzenbaugh v. People*, 194 Ill. 108, 88 Am. St. Rep. 134.

*Indiana*.—*Cones v. Wilson*, 14 Ind. 465; *Ring v. Ewing*, 47 Ind. 246; *Helms v. Wagner*, 102 Ind. 385.

*Iowa*.—*Stewart v. Corbin*, 25 Iowa 144.

*Kentucky*.—*Turner v. Pewee Valley*, 100 Ky. 288; *Wheeler v. Bramel*, (Ky. 1888) 8 S.

threatened sale of real estate in disregard of the right of the delinquent to have his personalty first subjected.<sup>1</sup> A sale of land made under such conditions is a nullity and confers no title upon the purchaser.<sup>2</sup> So, also, if there was sufficient personal property to discharge the taxes, which is lost by reason of the negligence or misconduct of the officer, a sale of land will be void.<sup>3</sup>

**Diligence Required of Officer.** — The officer must make diligent effort to discover the personal property of the delinquent,<sup>4</sup> but if, after diligent effort, such property is not found, a sale of real estate will be valid although there may have been personal property.<sup>5</sup>

**Proof of Compliance with Law.** — Usually, before a sale of real estate can be lawfully made, there must be evidence, in the nature of a return by the proper officer, showing the want of sufficient personalty out of which to satisfy the tax.<sup>6</sup> The return is generally *prima facie* evidence of the insufficiency of the

W. Rep. 199; *Julian v. Stephens*, (Ky. 1889) 11 S. W. Rep. 6; *Com. v. Three Forks Coal Co.*, 95 Ky. 273.

*Michigan.* — See *Deerfield Tp. v. Harper*, 115 Mich. 678.

*New York.* — *Jackson v. Shepard*, 7 Cow. (N. Y.) 88, 17 Am. Dec. 502.

*Pennsylvania.* — *Kean v. Kinnear*, 171 Pa. St. 639; *Simpson v. Meyers*, 197 Pa. St. 522; *Davis v. Beers*, 204 Pa. St. 288.

*Tennessee.* — *Hatcher v. Powell*, 6 Wheat. (U. S.) 119.

*Vermont.* — *Hutchins v. Moody*, 37 Vt. 313.

*Wisconsin.* — *Allen v. Allen*, 114 Wis. 615.

**Tax Collected by Different Collectors.** — Where a tax is divided according to its objects among several collectors, and there is sufficient personal property to pay the claim of one collector, but not of all, the personalty must be applied to such claim, and a return of *nulla bona* by each collector is unwarranted. *Davis v. Beers*, 204 Pa. St. 288.

**1. Threatened Sale Enjoined.** — *Abbott v. Edgerton*, 53 Ind. 196; *Turner v. Pewee Valley*, 100 Ky. 288; *Allen v. Perrine*, 103 Ky. 516; *Middlesboro v. New South Brewing, etc., Co.*, 108 Ky. 351.

**Execution of Deed Enjoined.** — *Morrison v. Bank of Commerce*, 81 Ind. 335.

**Right to Object Belongs Exclusively to Delinquent.** — *Frost v. Flick*, 1 Dak. 126.

**2. Sale Without Exhausting Personalty Invalid.** — *Catterlin v. Douglass*, 17 Ind. 213; *Bowen v. Donovan*, 32 Ind. 379; *Schrodt v. Deputy*, 88 Ind. 90; *Pitcher v. Dove*, 99 Ind. 175; *Helms v. Wagner*, 102 Ind. 385; *Michigan Mut. L. Ins. Co. v. Kroh*, 102 Ind. 515; *Wheeler v. Bramel*, (Ky. 1888) 8 S. W. Rep. 199; *Julian v. Stephens*, (Ky. 1889) 11 S. W. Rep. 6; *Jackson v. Shepard*, 7 Cow. (N. Y.) 88, 17 Am. Dec. 502; *Simpson v. Meyers*, 197 Pa. St. 522; *Allen v. Allen*, 114 Wis. 615.

**Owner Concluded by Judgment of Court.** — A sale of land under a decree in a judicial proceeding cannot be attacked by the owner on the ground that he was possessed of personalty sufficient to satisfy the demand. Having failed to offer that defense on the trial he is concluded by the judgment of the court. *Driggers v. Cassady*, 71 Ada. 529.

**Purchaser to Be Made Whole.** — Before equity will set aside a sale, the amount necessary to redeem must be paid or tendered to the purchaser. *McWhinney v. Brinker*, 64 Ind. 360;

*Harrison v. Haas*, 25 Ind. 281; *Volger v. Sidener*, 86 Ind. 545.

**Land Illegally Sold Still Liable.** — Where an illegal sale is set aside the land is not thereby discharged from lien of the taxes, but will be again placed on the delinquent list. *McWhinney v. Brinker*, 64 Ind. 360.

**In Indiana,** according to the later decisions, the sale of realty is ineffectual to convey title, but is effectual to transfer the lien of the state for taxes due, and is therefore not absolutely void. *St. Clair v. McClure*, 111 Ind. 467; *State v. Casteel*, 110 Ind. 174.

**3. Sale Void Where Personalty Lost by Fault of Officer.** — *Allen v. Perrine*, 103 Ky. 516; *Campbell v. Wyant*, 26 W. Va. 702.

**4. Diligent Search Required.** — *Doe v. Minge*, 56 Ala. 121; *Stoudenmire v. Brown*, 57 Ala. 481; *Kean v. Kinnear*, 171 Pa. St. 639.

**Mere Demand for Personalty Insufficient.** — *Mt. Carmel Light, etc., Co. v. People*, 166 Ill. 199.

**5. Where No Personalty Found, Sale of Land Valid.** — *Matzenbaugh v. People*, 194 Ill. 108, 88 Am. St. Rep. 134.

**Literal Construction Given Statute.** — In *Scales v. Alvis*, 12 Ala. 617, 46 Am. Dec. 269, it was held that a statute unconditionally forbidding the sale of realty if the delinquent had personal property in the county would be given a literal construction, and that the inability of the officer to find the property or the refusal of the delinquent to surrender it would not be considered.

**6. Return Necessary.** — *Belden v. State*, 46 Tex. 103; *Thatcher v. Powell*, 6 Wheat. (U. S.) 119.

**In Alabama** the affidavit which the officer is required to make and file, as to his inability to find the personal property after diligent search, is a jurisdictional fact without which the court has no power to grant an order to sell land, and if the affidavit is not made until after the sale, it cannot retroact so as to impart validity to the decree and to the sale. *Wartensleben v. Haitcock*, 80 Ala. 565; *Fleming v. McGee*, 81 Ala. 409; *Simms v. Greer*, 83 Ala. 263; *Feagin v. Jones*, 94 Ala. 597.

**Affidavit Unnecessary When Land Assessed to "Unknown Owner."** — *Cary v. Holmes*, 109 Ala. 217.

**Return on Date Named in Statute Not Jurisdictional.** — *Conley v. McMillan*, 120 Mich. 694.

In *South Dakota*, under a statute making a

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personalty.<sup>1</sup> The value of the deed as evidence of that fact varies in different states according to statutes controlling.<sup>2</sup>

*bb. WHERE NOT PRIMARILY LIABLE.* — In some states the personal property of the delinquent need not be exhausted before recourse can be had to real estate.<sup>3</sup>

(5) *Regularity of Preliminary Proceedings.* — It is essential to the right of the officer to sell that there shall have been a substantial compliance with the law in respect to the various proceedings which have already been treated in this article.<sup>4</sup>

(6) *Notice* — (a) *In General.* — The first step required of the officer who is to sell is that he shall give notice of the intended sale. In order that the delin-

sale of land for the taxes on personal property valid, without exhaustion of the personalty, the absence of any return showing the want of personal property, although required by another statute, will not vitiate the sale. *Danforth v. McCook County*, 11 S. Dak. 258, 74 Am. St. Rep. 808. See also *Iowa Land Co. v. Douglas County*, 8 S. Dak. 491.

In *Illinois* it has been held that where the form of the return is prescribed by statute and the statute does not require a statement as to the inability of the officer to make the amount of the tax out of the personal property, a return made in the prescribed form is sufficient, and it will be presumed that the officer did his duty in proceeding first against the personalty. *Taylor v. People*, 7 Ill. 349; *Job v. Tebbetts*, 10 Ill. 376; *Ottawa v. Macy*, 20 Ill. 413; *Goodrich v. Minonk*, 62 Ill. 121.

*Officer Liable in Damages for False Return.* — *Ottawa v. Macy*, 20 Ill. 413; *Kean v. Kinnear*, 171 Pa. St. 639; *Harris v. Davis*, 24 Pa. Co. Ct. 373.

1. *Return Prima Facie Evidence.* — *King v. People*, 193 Ill. 530. See also *Ottawa v. Macy*, 20 Ill. 413; *Goodrich v. Minonk*, 62 Ill. 121.

*Right of Purchaser to Rely on Return.* — A bona fide purchaser at a tax sale of realty has a right to rely upon the return of *nulla bona* as the best evidence that there was no personal property which could be found and sold for the payment of the taxes, and his title will not be defeated by merely showing that, as a matter of fact, there was personal property. *Interstate Bldg., etc., Assoc. v. Waters*, 50 S. Car. 459.

2. *Deed Prima Facie Evidence Only as to Its Recitals.* — *Ellis v. Kenyon*, 25 Ind. 134.

*Deed Not Prima Facie Evidence.* — *Stoudenmire v. Brown*, 57 Ala. 481; *Keepfer v. Force*, 86 Ind. 81; *Jackson v. Shepard*, 7 Cow. (N. Y.) 88, 17 Am. Dec. 502.

In *Iowa* the deed is conclusive evidence that the officer complied with his duty in attempting to make the tax by a sale of personalty before selling the realty. *Stewart v. Corbin*, 25 Iowa 144.

*Sufficiency of Recital in Deed.* — In *Jones v. McLain*, 23 Ark. 432, it was held that the recital that the taxpayer failed to pay on demand, and "not knowing of any personal property" whereon to levy, etc., is not a direct and satisfactory mode of reciting that sufficient personalty could not be found, but that such recital might be considered sufficient to place the burden of proof upon the taxpayer to show that he had personalty.

*Competency of Deed.* — In *Indiana* it has been held that a deed which does not recite that the personal property of the delinquent was insufficient is not competent evidence of title until that fact is shown *aliunde*. *Ward v. Montgomery*, 57 Ind. 276; *Smith v. Kyler*, 74 Ind. 575; *Woolen v. Rockafeller*, 81 Ind. 208.

And the testimony of the county auditor that the records of his office show that there was no personal property assessed to the delinquent in but one of the two years in which the taxes on the land became delinquent is not a sufficient showing as to the want of personal property to make the deed competent. *Smith v. Kyler*, 74 Ind. 575.

*Constitutionality of Statutes.* — In *Doe v. Minge*, 56 Ala. 121, it was held that a statute which made a tax deed *prima facie* evidence of the validity of the sale would be upheld, but that a statute making the deed conclusive evidence is unconstitutional.

In *State v. Whittlesey*, 17 Wash. 447, it was held that a statute making a deed conclusive evidence of regularity, excepting cases where the tax had been paid or the land was not liable, is constitutional.

3. *Personalty Not Primarily Liable* — *United States.* — See *Beaty v. Knowler*, 4 Pet. (U. S.) 152.

*Colorado.* — *Cramer v. Armstrong*, 28 Colo. 496.

*Georgia.* — *Smith v. Jones*, 40 Ga. 39; *Plant v. Eichberg*, 65 Ga. 64.

*Maryland.* — See *Dyer v. Boswell*, 39 Md. 465.

*Mississippi.* — *Virden v. Bowers*, 55 Miss. 1; *West v. Duncan*, 42 Fed. Rep. 430.

In *Nebraska* since the Act of 1877 land may be sold without first exhausting the personalty. *Kittle v. Shervin*, 11 Neb. 65; *Lancaster County v. Rush*, 35 Neb. 119; *Kelley v. Wehn*, 63 Neb. 410. The contrary rule prevailed prior to that statute. *Johnson v. Hahn*, 4 Neb. 139; *Richardson County v. Miles*, 7 Neb. 118; *Wilhelm v. Russell*, 8 Neb. 120.

*New Jersey.* — See *Martin v. Carron*, 26 N. J. L. 228; *State v. Newark*, 42 N. J. L. 38.

*South Carolina.* — See *Interstate Bldg., etc., Assoc. v. Waters*, 50 S. Car. 459.

*South Dakota.* — *Iowa Land Co. v. Douglas County*, 8 S. Dak. 491; *Danforth v. McCook County*, 11 S. Dak. 258, 74 Am. St. Rep. 808.

*Texas.* — See *Nalle v. Austin*, (Tex. Civ. App. 1897) 42 S. W. Rep. 780.

*West Virginia.* — *Campbell v. Wyant*, 26 W. Va. 702.

4. See *supra*, the subdivisions of this article.

quent may not be deprived of his property without being put upon his guard, and that competitive bidders may be brought together at the sale, it is necessary in every instance that notice be given,<sup>1</sup> and such notice must be given in substantial compliance with the statutes or the sale will be void.<sup>2</sup> Where the statute prescribes what notice shall be given, such statutory notice is sufficient.<sup>3</sup> Whether the requirements respecting the notice of sale have been complied with, is a mixed question of law and fact for the determination of both court and jury.<sup>4</sup>

**By Whom Given — Signature of Officer.** — The notice must be given by an officer duly authorized to act,<sup>5</sup> and should be officially signed by the officer<sup>6</sup> as of a named county, but the failure of the signature to show the officer's county will not vitiate the notice where the identity of the county is readily apparent.<sup>7</sup>

**(b) Notice to Delinquent.** — In some states, in addition to the general notice of sale, it is required that the delinquent shall be given personal notice.<sup>8</sup>

**Who a Delinquent.** — By "delinquent," in a statute providing for personal notice of the proposed sale, is meant the legal owner.<sup>9</sup> A mortgagee is such an owner and entitled to notice,<sup>10</sup> and each tenant in common who is to be

1. **Necessity for Notice.** — *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 349; *Thweatt v. Black*, 30 Ark. 732; *Ex p. Tax Sale of Lot No. 172*, 42 Md. 196; *Richardson v. Simpson*, 82 Md. 155; *Styles v. Weir*, 26 Miss. 187; *Blalock v. Gaddis*, 33 Miss. 452; *Lyon County v. Ross*, 24 Nev. 102; *Lafferty v. Byers*, 5 Ohio 458; *Cuttle v. Brockway*, 32 Pa. St. 45; *Nalle v. Fenwick*, 4 Rand. (Va.) 585.

**Curative Statute.** — Failure to give the notice required by statute is fatal to the validity of the sale, and cannot be cured by a legislative enactment. *McCord v. Sullivan*, 85 Minn. 344, 89 Am. St. Rep. 561.

2. **Sale Vitiates by Defective Notice.** — *Marx v. Hanthorn*, 30 Fed. Rep. 579, affirmed 148 U. S. 172; *Thatcher v. Powell*, 6 Wheat. (U. S.) 119; *Johnson v. Harper*, 107 Ala. 706; *Morris v. St. Louis Nat. Bank*, 17 Colo. 231; *Daniel v. Taylor*, 33 Fla. 636; *Drake v. Ogden*, 128 Ill. 603; *Norres v. Hays*, 44 La. Ann. 907; *Brown v. Veazie*, 25 Me. 359; *Hobbs v. Clements*, 32 Me. 67; *Smith v. Kipp*, 49 Minn. 119.

**Mere Informalities in the notice do not vitiate.** *Thweatt v. Black*, 30 Ark. 732.

**Notice of Assessment Not Equivalent to Notice of Sale.** — *Genella v. Vincent*, 50 La. Ann. 956.

3. **Statutory Notice Sufficient.** — *Davis v. Pacific Imp. Co.*, 137 Cal. 245; *Matter of New Orleans*, 51 La. Ann. 972; *Landis v. Sea Isle City*, 66 N. J. L. 558; *Nance v. Hopkins*, 10 Lea (Tenn.) 508.

4. **Sufficiency of Notice Is Question for Court and Jury.** — *Cooley v. O'Connor*, 12 Wall. (U. S.) 391.

5. **Must Be Given by Authorized Person.** — *Langdon v. Poor*, 20 Vt. 13.

6. **Official Signature.** — *Spear v. Ditty*, 9 Vt. 282.

7. **Signature of Officer as of Named County.** — *Towle v. St. Paul Permanent Loan Co.*, 84 Minn. 105; *Sheldon v. Coates*, 10 Ohio 278.

8. **Notice to Delinquent — Alabama.** — *Riddle v. Messer*, 84 Ala. 236.

*Louisiana.* — *Foreman v. Hinchcliffe*, 106 La. 225; *Villey v. Jarreau*, 33 La. Ann. 291; *Concordia v. Bertron*, 46 La. Ann. 356; *Montgomery v. Marydale Land, etc., Co.*, 46 La. Ann. 403.

*Maine.* — *Brown v. Veazie*, 25 Me. 359.

*Michigan.* — *Fowler v. Campbell*, 100 Mich. 398.

*Pennsylvania.* — *Fryer v. Magill*, 163 Pa. St. 340.

*Texas.* — *Bean v. Brownwood*, 91 Tex. 684; *Hollywood v. Welhausen*, 28 Tex. Civ. App. 541.

*Utah.* — *Olsen v. Bagley*, 10 Utah 492.

*Virginia.* — See *Thomas v. Jones*, 94 Va. 756; *Virginia Bldg., etc., Co. v. Glenn*, 99 Va. 460.

**A Delinquent Who Is Present at the Sale cannot complain of his failure to receive notice of the sale.** *Bean v. Brownwood*, (Tex. Civ. App. 1898) 43 S. W. Rep. 1036.

**Sufficiency of Notice.** — *Lancy v. Snow*, 180 Mass. 411.

**Sufficiency of Proof of Personal Service.** — *Riddle v. Messer*, 84 Ala. 236; *In re New Orleans*, 52 La. Ann. 1073; *Montgomery v. Marydale Land, etc., Co.*, 46 La. Ann. 403.

**Diligent Steps to Make the Notice Effectual must be taken by the officer.** *Genella v. Vincent*, 50 La. Ann. 956; *Morse v. South*, 80 Fed. Rep. 206.

**Mailing Notice to Delinquent.** — Under a statute directing that notice be mailed to the delinquent, but declaring errors and mistakes in proceedings for the collection of taxes mere irregularities, the failure of the officer to mail such notice does not affect the title of the purchaser. *Sanders v. Earp*, 118 N. Car. 275. See also *Davis v. Cass*, 72 Miss. 985.

9. **"Delinquent" Means Legal Owner.** — *Adolph v. Richardson*, 52 La. Ann. 1156; *Hill v. Nicholson*, 92 N. Car. 24.

**Where Land Is Assessed to Another than the Owner,** and notice of sale is given to the person assessed but not to the true owner of the property, a sale is absolutely void. *Thibodaux v. Keller*, 29 La. Ann. 508; *Workmen's Bank v. Lannes*, 30 La. Ann. 871; *Lague v. Boagni*, 32 La. Ann. 912.

**After the Death of the Owner,** the notice must be given to his heirs or personal representative, and a notice addressed to his "estate" and left at his former residence is totally insufficient. *Carlisle v. Watts*, 78 Ala. 486. See also *Hoyle v. Southern Athletic Club*, 48 La. Ann. 870.

10. **Notice to Mortgagee.** — *Hill v. Nicholson*,

affected by the sale must be given notice thereof.<sup>1</sup>

**Occupant of Land — Unknown Owner.** — It is sometimes provided that notice shall be given to the occupant of the land,<sup>2</sup> or that notice be given an "unknown owner" by publication.<sup>3</sup>

(a) **Contents of Notice — aa. IN GENERAL.** — The notice to be valid must state correctly all the material matters required by the statutes. Thus, misdescriptions of the tax, as to its nature and purpose, have been held to vitiate the notice and sale;<sup>4</sup> and where it is required to state the year or years for which the tax was assessed, a misstatement in that regard is fatal.<sup>5</sup> So, when required by statute, the notice must state that a certain period has elapsed since the assessment.<sup>6</sup>

**bb. AMOUNT OF TAX.** — The notice is required to state the amount of tax for which the sale is to be made.<sup>7</sup> A material error in the statement of the amount will vitiate the notice and sale,<sup>8</sup> but the validity of the notice will not

92 N. Car. 24; *Whitehurst v. Gaskill*, 69 N. Car. 449, 12 Am. Rep. 655; *Matter of Macay*, 84 N. Car. 63.

1. **Notice to Tenants in Common.** — *Howze v. Dew*, 90 Ala. 178, 24 Am. St. Rep. 783; *Thurston v. Miller*, 10 R. I. 358.

2. **Notice to Occupant.** — *Smith v. Gage*, 12 Fed. Rep. 32; *Gage v. Bailey*, 102 Ill. 11; *Lambert v. Craig*, 45 La. Ann. 1109; *Leland v. Bennett*, 5 Hill (N. Y.) 287. See also *Pickett v. Southern Athletic Club*, 47 La. Ann. 1605.

**Who Is Not an Occupant.** — Under a statute requiring notice of sale to be given to the occupant of the lands, one who has erected a hunting lodge, hut, or house, to be occasionally used for hunting or fishing purposes, but who claims no ownership in the land, is not an actual occupant within the meaning of the statute. *People v. Campbell*, 67 Hun (N. Y.) 590. See also *Drake v. Ogden*, 128 Ill. 603, holding that one who places a few stacks of hay on a tract of land occupied by another, without any agreement to pay rent but with the owner's permission, is not an occupant.

**Notice to Agent** — Under a *Georgia* statute providing that personal notice should be given to the "owner, or tenant in possession if the owner is unknown," it was held that the resident agent of a nonresident owner should have been given notice of a sale of the owner's property, the agent having paid the taxes on the property for several years and his name being entered on the city books as the agent of such owner. *McPhee v. Venable*, 77 Ga. 772.

3. **Notice to "Unknown Owner."** — *Wellman v. Willis*, 52 La. Ann. 1445.

**Unknown Owner Defined.** — An unknown owner, on whom service may be legally made by publication, is a person whose address is unknown to the collector, and who does not live in the parish and has no agent there. *Webre v. Lutchter*, 45 La. Ann. 574.

4. **Fatal Misdescription.** — In *Pierce v. Richardson*, 37 N. H. 307, it was held that an advertisement which calls a "state, county, and school tax" a "money tax" was fatally erroneous.

In *Langdon v. Poor*, 20 Vt. 13, it was held that where the tax is described as being "for the purpose of making and repairing and building bridges," whereas the tax authorized by the statute was "for the purpose of making and repairing roads and building bridges," the sale under the advertisement was void.

5. **Misstatement of Year.** — *Knowlton v. Moore*, 136 Mass. 32.

**Where Taxes for Two Years Are Assessed** the notice must state separately the amount assessed for each year. *Lancy v. Snow*, 180 Mass. 411.

**Year of Tax Judgment Sufficiently Stated.** — A notice which states that the sale is to be made in pursuance of a judgment entered on the 15th day of April for taxes remaining unpaid and delinquent on the first Monday in January of a specified year, sufficiently designates the year in which the tax judgment was rendered. *Towle v. St. Paul Permanent Loan Co.*, 84 Minn. 105.

6. **Lapse of Period Since Assessment.** — *Hobbs v. Clements*, 32 Me. 67.

7. **Amount of Tax to Be Stated.** — *Clarke v. Rowan*, 53 Ala. 400; *National Bank v. Baker Hill Iron Co.*, 108 Ala. 635; *Tolman v. Hobbs*, 68 Me. 316.

In *Mather v. Darst*, 13 S. Dak. 75, it was held that a notice of sale which stated the amount of the tax as the "amount sold for," instead of "the amount of taxes due" as required by the statute, was substantially defective, and that all subsequent proceedings were consequently invalid.

**Amounts Due on Separate Lots to Be Stated Separately.** — *Washington v. Pratt*, 8 Wheat. (U. S.) 681.

**Taxes for Different Years to Be So Stated.** — *National Bank v. Baker Hill Iron Co.*, 108 Ala. 635.

**Land and Personalty Taxes to Be Stated Separately.** — *Derry Nat. Bank v. Griffin*, 68 N. H. 183.

**More Figures placed in a column** headed "Amt" opposite the respective descriptions, without anything to indicate whether they were intended to represent dollars, cents, or something else, are not a sufficient statement of the amount of tax. *Bonham v. Weymouth*, 39 Minn. 92; *Coombs v. O'Neal*, 1 MacArthur (D. C.) 405.

**Interest Up to the Date of Sale Need Not Be Included.** — *Stevens v. Paulsen*, 64 Neb. 488.

**All Costs to Be Included.** — *Elliot v. Doe*, 24 Ala. 508.

8. **Errors Held to Be Fatal.** — Where a notice of sale stated the amount of tax to be four dollars and twelve cents and the true amount was three dollars and thirty cents, the sale was void. *Alexander v. Pitts*, 7 Cush. (Mass.) 503.

Where the advertisement gave as the sum

be affected by an error of a trifling sum<sup>1</sup> or a mistake in respect to an unimportant matter.<sup>2</sup>

*cc. TIME AND PLACE OF SALE.* — It is essential to the validity of the sale that the notice should state the time<sup>3</sup> and place of sale.<sup>4</sup>

*Statement that Sale Will Be Public.* — If so required by statute, the notice must state that the sale will be public;<sup>5</sup> otherwise it need not so state.<sup>6</sup>

*dd. DESCRIPTION OF PROPERTY.* — The notice must contain a description of the property to be sold, sufficient to identify the premises,<sup>7</sup> the degree of definite-

due an amount including both state and county taxes, and the latter was illegal and therefore not due, the sale was adjudged void. *Clarke v. Strickland*, 2 Curt. (U. S.) 439.

*Mistake Corrected Before Sale.* — In *Thweatt v. Black*, 30 Ark. 732, it was held that an erroneous advertisement of land for the taxes of three years, when only the taxes for one year are due, will not vitiate, if the mistake is discovered, and the lands are sold for only the taxes that are in fact due.

If, however, such a mistake is not corrected, but is carried into the sale, it will be fatal. *Kinsworthy v. Mitchell*, 21 Ark. 145.

1. *A Discrepancy of Ten Cents between the amount of tax as stated in the notice, and the amount actually due, will not invalidate the notice, as the law does not take notice of trifles.* *Burt v. Hasselman*, 139 Ind. 196.

2. *Transposition of State and County Taxes.* — In *Scott v. Watkins*, 22 Ark. 556, it was held that the transposition, in the advertisement, of the state and county taxes, did not affect the validity of the sale, as the state and county taxes are not required to be stated separately.

*Effect of Second Advertisement.* — A second advertisement of sale which improperly includes taxes for which the land has already been advertised, but which is not shown to have misled the owner or intending purchasers, will not vitiate a sale according to the first advertisement. *People v. Coler*, 46 N. Y. App. Div. 237.

3. *Time of Sale to Be Stated.* — *Lovejoy v. Lunt*, 48 Me. 377; *Blalock v. Gaddis*, 33 Miss. 452; *Olsen v. Bagley*, 10 Utah 492.

*Failure to State Year.* — The failure of the notice to specify the year in which the sale is to be made is not fatal, where the body of the notice and controlling statutes indicate clearly the time of the sale. *Towle v. St. Paul Permanent Loan Co.*, 84 Minn. 105; *Ireland v. George*, 41 Kan. 751; *Taft v. Barrett*, 58 N. H. 447.

4. *Place of Sale to Be Stated.* — *Midlothian Iron Min. Co. v. Dahlby*, 108 Wis. 195; *Lovejoy v. Lunt*, 48 Me. 377; *Blalock v. Gaddis*, 33 Miss. 452.

"At My Office" is a sufficient designation of the place of sale where the heading of the notice indicates that it issued from the office of a certain official of a named county. *Ireland v. George*, 41 Kan. 751.

*Naming Court House Instead of Auditor's Office* as the place of sale was held to be sufficient where the auditor's office was in the court house. *Whitney v. Bailey*, 88 Minn. 247.

*Name of County.* — In *Sheldon v. Coates*, 10 Ohio 278, it was held that a notice which stated that the sale would be "at the court house in Warren," but failed to add the words "Trumbull County," was nevertheless sufficient, the court taking judicial notice of the fact that at

the date of the advertisement there was no township in the state by that name except in that particular county.

*Place to Be Named with Certainty.* — A notice which states that the sale will take place at the court-house or "at such other place as may hereafter be designated," is fatally defective. *Ex p. Tax Sale of Lot No. 172*, 42 Md. 196.

*Where the Statute Prescribes the Form of Notice,* it is sufficient to follow it, although it does not specially name the place of sale. *Clark v. Mowyer*, 5 Mich. 462; *Nance v. Hopkins*, 10 Lea (Tenn.) 508; *Wisner v. Davenport*, 5 Mich. 501.

*The Deed Will Be Set Aside* upon application within the period of limitation, for the failure of the notice to mention the place of sale. *Corbin v. Young*, 24 Kan. 199; *Russell v. Hudson*, 24 Kan. 571.

*Omission in Notice Not Cured by Recital in Deed.* — *Henderson v. White*, 69 Tex. 103.

5. *Statement that Sale Will Be Public Required.* — The omission to state in the notice that the sale will be "at public auction," as required by statute, renders the sale voidable. *Hafey v. Bronson*, 33 Kan. 598; *Hoffman v. Groll*, 35 Kan. 652; *Belz v. Bird*, 31 Kan. 139.

6. *Statement Not Required.* — *Langley v. Batchelder*, 69 N. H. 566.

Under a *Kansas* statute requiring the notice to state that the sale will be conducted by the county treasurer, it was held that the omission of that statement renders the sale voidable. *Casner v. Gahlman*, 60 Kan. 857, *affirming* 6 Kan. App. 295; *York-Ritchie Exch., etc., Co. v. Mitchell*, 6 Kan. App. 317.

7. *Arkansas.* — *Cooper v. Lee*, 59 Ark. 460.

*Georgia.* — *Morris v. Davis*, 75 Ga. 169.

*Iowa.* — *Allen v. Armstrong*, 16 Iowa 508.

*Louisiana.* — *Jacques v. Kopman*, 6 La. Ann. 542; *Thibodaux v. Keller*, 29 La. Ann. 508. See also *Matter of New Orleans*, 51 La. Ann. 972.

*Maine.* — *Greene v. Lunt*, 58 Me. 518; *Nason v. Ricker*, 63 Me. 381.

*Maryland.* — *Guissebert v. Etchison*, 51 Md. 478; *Richardson v. Simpson*, 82 Md. 155.

*Massachusetts.* — *Farnum v. Buffum*, 4 Cush. (Mass.) 260.

*New Jersey.* — *Hunt v. State*, 48 N. J. L. 613.

*New York.* — *Smith v. Walker*, 56 N. Y. Super. Ct. 391; *Dever v. Hagerty*, 43 N. Y. App. Div. 354.

*North Dakota.* — *Sweigle v. Gates*, 9 N. Dak. 538; *Lee v. Crawford*, 10 N. Dak. 482.

*Ohio.* — *Lafferty v. Byers*, 5 Ohio 458.

*Tennessee.* — *Henderson v. Staritt*, 4 Sneed (Tenn.) 470; *Finley v. Gaut*, 8 Baxt. (Tenn.) 148.

*Presumption in Supreme Court.* — Unless the contrary appears the Supreme Court will in-

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ness required depending largely upon the surroundings of the subject-matter described.<sup>1</sup>

**Errors and Inaccuracies.** — The description is vitiated by errors calculated to mislead,<sup>2</sup> but mere inaccuracies, notwithstanding which the property may be recognized, are not fatal.<sup>3</sup>

dulge a presumption that the notice of sale contained a sufficient description of the property. *Lee v. Crawford*, 10 N. Dak. 482.

**In Iowa** it has been held that the accidental omission of the description of certain lands from the list of lands advertised will not vitiate the sale, provided the taxes were in fact due, the tax deed not being conclusive evidence of the regularity of the notice. *Shawler v. Johnson*, 52 Iowa 473; *Hurley v. Powell*, 31 Iowa 64; *Madson v. Sexton*, 37 Iowa 562.

**Lien Conveyed by Uncertain Description.** — In *Indiana* it has been held that although a description is so uncertain as to render a sale ineffective, the purchaser may thereby acquire a lien on the property for the purchase money. *Millikan v. Lafayette*, 118 Ind. 323.

**Defects in Description Not Cured by Information Given on Day of Sale.** — *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 349.

**Distinct Lots to Be Described Separately.** — *Cruger v. Dougherty*, 1 Lans. (N. Y.) 464.

**Description Must Be Generally Intelligible.** — A description which is intelligible only to persons of more than average intelligence, or can only be understood by persons familiar with the locality in which the land lies, is insufficient. *Cooper v. Lee*, 59 Ark. 460; *Murphy v. Hall*, 68 Wis. 202.

**Describing Property as a Part of Certain Tract or Division** without designating the particular part intended is totally insufficient. *Millett v. Mullen*, 95 Me. 400; *Bidwell v. Coleman*, 11 Minn. 78; *Treon v. Emerick*, 6 Ohio 391. See also *Dane v. Glennon*, 72 Ala. 160; *Lafferty v. Byers*, 5 Ohio 458; *Douglas v. Dangerfield*, 10 Ohio 152.

But in *People v. McGuire*, 126 N. Y. 419, it was held that an advertisement of a portion of a city lot numbered 112, as "lot No. 112 part," and stating that further particulars might be obtained at the office of the collector, was sufficient, *reversing* (Brooklyn City Ct. Gen. T.) 8 N. Y. Supp. 852.

**Improper Advertisement of "Undivided Portion."** — An advertisement of a certain tract "or such undivided portion thereof as may be necessary" to satisfy the taxes, invalidates the sale. *Wall v. Wall*, 124 Mass. 65; *Sanford v. Sanford*, 135 Mass. 314.

And a statute which attempts retroactively to validate such sales is unconstitutional. *Forster v. Forster*, 129 Mass. 559.

**Descriptions Too Indefinite.** — A description as a certain number of lots of certain dimensions in a certain square between certain streets, without giving their respective numbers, is too vague to identify the property. *Marin v. New Orleans*, 30 La. Ann. 293. See also *Jacques v. Kopman*, 6 La. Ann. 542; *Carmichael v. Aikin*, 13 La. 205.

The description "Land, east corner Congress and Exchange streets, extending through to Market," is insufficient. *Bingham v. Smith*, 64 Me. 450.

**Advertisement to Sell Tract "or So Much Thereof as May Be Necessary" Held Legal.** — *Schmoel v. Galloway Tp.*, 44 N. J. L. 145.

**Where a Portion of a Designated Tract Is Excepted**, such portion must be identified or the description will be void for uncertainty. *Pickering v. Lomax*, 120 Ill. 289.

**The Advertisement in Gross of a Tract Assessed in Parcels** does not affect the validity of the description. *Henderson v. Oliver*, 32 Iowa 512.

**Description According to New Map.** — Where a parcel of land, which by the former division of the town was embraced in "lot 6," was assessed and sold under a different description contained in a new map of the town, which had been recognized by the town officers and the citizens, but which had not been formally adopted, it was held that the owner, not knowing of the new map, was not affected by the sale. *Richter v. Beaumont*, 67 Miss. 285.

**Property Taken from One Town and Annexed to Another.** — Under a statute requiring that the notice of sale of land situated in a place the name of which has been changed by an act of the commonwealth shall specify the former name as well as the name last known, it was held that where land has been taken from one town and annexed to another, the name of the former town as well as of the latter must be expressed in the advertisement. *Porter v. Whitney*, 1 Me. 306.

**Tract to Be Advertised in Entirety.** — In *Iowa* it has been held that where taxes are delinquent upon the whole or any part of one contiguous tract belonging to the same owner, the entire tract should be advertised in a single description. *Iowa R. Land Co. v. Sac County*, 39 Iowa 124; *Cedar Rapids, etc., R. Co. v. Carroll County*, 41 Iowa 153.

**1. Degree of Definiteness Depending on Circumstances.** — *State v. Woodbridge Tp.*, 42 N. J. L. 401.

**2. Notice Vitiating by Misleading Description.** — *Patrick v. Davis*, 15 Ark. 363; *Currie v. Fowler*, 5 J. J. Marsh. (Ky.) 145; *Richardson v. Simpson*, 82 Md. 155; *Knight v. Alexander*, 38 Minn. 384, 8 Am. St. Rep. 675; *Dever v. Hagerty*, 43 N. Y. App. Div. 354; *Edwards v. Lyman*, 122 N. Car. 741.

**Lands Described as Situated in the Wrong County.** — When lands are described as situated in a certain county, which lie partly in another county, the sale will be void as to the lands lying in the county not mentioned. *Williams v. Harris*, 4 Sneed (Tenn.) 332.

**Incorrectly Naming Grantor.** — In *Whitmore v. Learned*, 70 Me. 276, it was held that where the property was described as "house and lot bought of David Harris," such person being only one of three grantors, and merely joined in the deed for the purpose of releasing whatever interest he might have in right of his wife, the description is both imperfect and inaccurate.

**3. Alvord v. Collin**, 20 Pick. (Mass.) 418



**What Certainty Required.** — The requirements of the law will be met if the description informs the owner and the public with reasonable certainty what property is to be sold.<sup>1</sup> Such information, however, must be contained in the notice, and a description which merely enables a prospective purchaser to ascertain the location of the land by inquiry is insufficient.<sup>2</sup>

**If the Notice Does Not Sufficiently Describe the Property,** it is void, and acts done in pursuance thereof are of no effect.<sup>3</sup>

**Name of Owner or Occupant.** — It is essential to the validity of the sale, under some statutes, that the notice contain, as a further description of the property, the name of the owner<sup>4</sup> or occupant;<sup>5</sup> and designating the lands as belonging to another than the true owner is such a misdescription as will invalidate the sale.<sup>6</sup>

**Abbreviations,** in giving the description, are not objectionable,<sup>7</sup> but they must be intelligible,<sup>8</sup> and such as are of common usage and generally understood.<sup>9</sup>

**Improved Lands Described as Wild.** — In *Gardner v. Donaldson*, 80 Ga. 71, it was held that the sale is not void because the lands are described as wild, when in fact they are improved, as the collector has power to issue execution against either. See also *Langley v. Batchelder*, 69 N. H. 566.

**1. Description Reasonably Certain.** — *Doherty v. Real Estate Title Ins., etc., Co.*, 85 Minn. 518; *Keely v. Sanders*, 99 U. S. 441; *Boles v. McNeil*, 66 Ark. 422; *French v. Patterson*, 61 Me. 203; *Cooper v. Holmes*, 71 Md. 20; *McQuade v. Jaffray*, 47 Minn. 326; *Smith v. Messer*, 17 N. H. 420; *State v. Woodbridge Tp.*, 42 N. J. L. 401.

**Conformity to Description in Delinquent's Deed Sufficient.** — *Talle v. De Monasterio*, 48 La. Ann. 1232.

**A Description Sufficient for the Invoice is adequate for the advertisement for sale.** *Langley v. Batchelder*, 69 N. H. 566.

**Description Not Necessarily Same as Contained in List.** — *Smith v. Messer*, 17 N. H. 420.

**Failure to Name the City or County in which the lands are situated is not fatal,** where the land tax book of the city containing such information is referred to in the advertisement. *Comfort v. Ballingal*, 134 Mo. 281.

**A Description Distinguishing the Land from Any Other Tract in the State,** although descriptive of a certain tract in another state, is sufficient. *Leigh v. Green*, 64 Neb. 533.

**Describing a Block by the figures and word "15 entire," printed in a column headed "Block," among descriptions in a special addition to a certain village, was held to be sufficient.** *Mann v. Carson*, 120 Mich. 631.

**Tract Divided into Several Lots.** — The fact that a parcel of land, advertised and sold as one lot, was divided into six lots by heavy stone walls, does not invalidate the sale where the tract as a whole is described correctly. *Howland v. Pettey*, 15 R. I. 603.

**Description in Second Notice Unnecessary.** — Under a Michigan statute providing that notice shall precede a sale of lands bid in by the state and left unredeemed, it was held to be not essential to such notice that it contain a description of the property where the notice of the first sale was duly given. *Garner v. Wallace*, 118 Mich. 387.

**2. Sufficiency of Description.** — *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 349. See also *Murphy v. Hall*, 68 Wis. 202.

**3. Notice Not Describing Land Void.** — *Morris v. Davis*, 75 Ga. 169; *Smith v. Kipp*, 49 Minn. 119; *Dever v. Hagerty*, 43 N. Y. App. Div. 354; *Edwards v. Lyman*, 122 N. Car. 741; *Lee v. Crawford*, 10 N. Dak. 482.

**4. Name of Owner.** — *Washington v. Pratt*, 8 Wheat. (U. S.) 681; *Marx v. Hanthorn*, 30 Fed. Rep. 579, affirmed 148 U. S. 172; *Farnum v. Buffum*, 4 Cush. (Mass.) 260; *Styles v. Weir*, 26 Miss. 187. See also *Bogges v. Scott*, 48 W. Va. 316.

**Words Misdescriptive of Owner.** — Where the advertisement gave the full name of the owner, who was a male person, the addition of the words "her estate or heirs" does not affect the validity of the notice. *Castello v. McConnico*, 168 U. S. 674.

**Giving Name Incorrectly Invalidates Sale.** — *Marx v. Hanthorn*, 148 U. S. 172; *Harness v. Cravens*, 126 Mo. 233. See also *Turner v. Gregory*, 151 Mo. 100.

**5. New Hampshire Statute.** — *Amoskeag Sav. Bank v. Alger*, 66 N. H. 414.

**Unimproved Lands** need not, under the statute, be advertised in the name of the occupant. *Langley v. Batchelder*, 69 N. H. 566.

**6. Name of Another than Owner.** — *Milner v. Clarke*, 61 Ala. 258; *Gardner v. Brown*, 1 Humph. (Tenn.) 354. See also *Sargent v. Bean*, 7 Gray (Mass.) 125.

**Including Name of Person Not an Owner.** — Where the lands were described as belonging to D. and P., when in fact they had never belonged to such parties, but had been owned by D. ever since their severance from the public domain, the notice was adjudged void. *Denègre v. Gèrac*, 35 La. Ann. 952.

**Giving Name of Previous Owner in Ignorance of Conveyance.** — But in *Alvord v. Collin*, 20 Pick. (Mass.) 418, it was held that the advertisement of lands in the name of the previous owner, in ignorance of a subsequent conveyance, would not vitiate a description accurate in all other respects.

**Name of Person to Whom Lands Taxed Sufficient.** — *Langley v. Batchelder*, 69 N. H. 566.

**7. Abbreviations.** — *Boles v. McNeil*, 66 Ark. 422; *Sibley v. Smith*, 2 Mich. 486.

**8. Abbreviation Must Be Intelligible.** — *Griffin v. Creppin*, 60 Me. 270.

**9. Abbreviations in Common Usage.** — *Cooper v. Lee*, 59 Ark. 460; *Power v. Larabee*, 2 N. Dak. 141.

**The Incorrect Use of Ditto Symbols will not**  
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(d) **Method of Advertisement** — *aa. IN GENERAL.* — The method by which the notice is to be advertised is entirely a matter of statutory regulation, but it may be generally stated that the requirements of statutes, both as to advertisement by publication in newspapers and by posting notices, are mandatory, and must be strictly complied with, or the sale will be void.<sup>1</sup>

*bb. ADVERTISEMENT IN NEWSPAPERS* — **What Papers.** — It is essential to the validity of the sale that the notice be published in such newspapers as the statute requires.<sup>2</sup>

**Supplement.** — There is no objection, however, to the publication being made in a supplement of the paper, provided its circulation is co-extensive with that of the paper itself.<sup>3</sup>

**What Language.** — Under a provision that all legal proceedings shall be in the English language, the advertisement of sale must be made in English and in a paper printed in the English language,<sup>4</sup> and when it is required by statute that publication be made in several languages it is fatal to the notice and sale if the advertisement does not so appear.<sup>5</sup>

**Intervals of Publication.** — The notice must be published at the intervals and for the full length of time specified in the statute,<sup>6</sup> but statutes requiring the

vitate the notice when the identity of the land appears from another part of the description. *Doherty v. Real Estate Title Ins., etc., Co.*, 85 Minn. 518.

**1. Statutes Mandatory** — *United States.* — *Early v. Doe*, 16 How. (U. S.) 610; *Williams v. Peyton*, 4 Wheat. (U. S.) 77; *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 349; *Hodgdon v. Burleigh*, 4 Fed. Rep. 111.

*Alabama.* — *Elliot v. Doe*, 24 Ala. 508; *Dane v. Glennon*, 72 Ala. 160; *McKinnon v. Mixon*, 128 Ala. 612.

*Arkansas.* — *Thweatt v. Howard*, 68 Ark. 426.

*Colorado.* — *Gomer v. Chaffee*, 6 Colo. 314.

*Florida.* — *Daniel v. Taylor*, 33 Fla. 636.

*Illinois.* — *Langlois v. Stewart*, 156 Ill. 609. *Louisiana.* — See *Matter of Lake*, 40 La. Ann. 142; *In re Douglas*, 41 La. Ann. 765; *Henderson v. Ellerman*, 47 La. Ann. 306.

*Maine.* — *Brown v. Veazie*, 25 Me. 359; *Hobbs v. Clements*, 32 Me. 67.

*Maryland.* — *Baumgardner v. Fowler*, 82 Md. 631.

*Minnesota.* — *McCord v. Sullivan*, 85 Minn. 344, 89 Am. St. Rep. 561; *Olson v. Phillips*, 80 Minn. 339.

*New Mexico.* — *Blackwell v. Albuquerque First Nat. Bank*, 10 N. Mex. 555.

*Pennsylvania.* — *Wistar v. Kammerer*, 2 Yeates (Pa.) 100.

*Tennessee.* — *Henderson v. Staritt*, 4 Sneed (Tenn.) 470.

*Virginia.* — *Allen v. Smith*, 1 Leigh (Va.) 231.

*West Virginia.* — *Sommers v. Ward*, 41 W. Va. 76.

**Deed Showing that Requisite Notice Was Not Given, Void.** — *Moore v. Brown*, 4 McLean (U. S.) 211, *affirmed* 11 How. (U. S.) 414; *Dow v. Chandler*, 85 Mo. 245.

**Statute Directory.** — In *Den v. Lucey*, 1 Murph. (5 N. Car.) 311, it was held that the acts prescribing the contents of the notice and the manner of advertisement are merely directory to that officer, and that his neglect to observe these directions may make him liable

in damages, but will not affect the title of the purchaser unless there is collusion between him and the officer. See also *Sanders v. Earp*, 118 N. Car. 275.

And in *Mississippi* it seems that no defect or error in the advertisement will of itself invalidate the sale. *Virden v. Bowers*, 55 Miss. 1.

**2. Publication in Papers Intended by Statute.** — *West v. State*, 69 Ark. 659, 61 S. W. Rep. 918; *Doe v. Sweetser*, 2 Ind. 649; *Ely v. Azoy*, (Supm. Ct. Spec. T.) 39 Misc. (N. Y.) 669; *Hughey v. Horrel*, 2 Ohio 231; *Isaac v. Shattuck*, 12 Vt. 668.

**Changes in Management of Paper During the Period of Advertisement.** — Where a statute required the notice to be published in the newspaper of the public printer of the state, and during the running of the advertisement the paper ceased to be a state paper, the publication was held to be insufficient. *Bussey v. Leavitt*, 12 Me. 378.

**Half of Paper Printed Elsewhere** — **Patent Invalid.** — Under a statute requiring the notice to be published in a paper printed in the county, the fact that half of the paper was printed elsewhere, as is the custom with small papers, does not affect the validity of the publication. *Hart v. Smith*, 44 Wis. 213.

The "Nearest Newspaper to the County" was held to be the paper whose place of publication was the shortest distance from the county line. *Weer v. Hahn*, 15 Ill. 299.

**3. Publication in Supplement.** — *Tully v. Bauer*, 52 Cal. 487; *Davis v. Simms*, 4 Bibb (Ky.) 465; *Wilkin v. Keith*, 121 Mich. 66; *Mann v. Carson*, 120 Mich. 631; *Whitney v. Bailey*, 88 Minn. 247; *Zahradnicek v. Selby*, 15 Neb. 579.

**4. Publication in English Language.** — *Visscher v. Ottawa Circuit Judge*, 116 Mich. 666.

**5. Publication in Several Languages.** — *Delogny v. Smith*, 3 La. 418; *Young v. Martin*, 2 Yeates (Pa.) 312; *Wistar v. Kammerer*, 2 Yeates (Pa.) 100.

**6. Publication at Intervals and for Period Required by Statute** — *United States.* — *Early v. Doe*, 16 How. (U. S.) 610; *Hodgdon v. Bur-*

notice to be published once a week for a specified period are complied with if the notice be published upon any day of each week for the required length of time.<sup>1</sup>

**When Publication to Begin.** — It seems that statutes fixing the time when the publication is to commence are mandatory in so far only as to require it to begin in time to be published for the prescribed period preceding the sale.<sup>2</sup> But where the language of the statute is that publication shall be "immediately" after a certain day, it must be made so soon thereafter as may be reasonably done.<sup>3</sup>

**The Publication Must Be Continuous** and immediately preceding the sale,<sup>4</sup> but

leigh, 4 Fed. Rep. 111; *Martin v. Barbour*, 34 Fed. Rep. 701, affirmed 140 U. S. 639.

*Alabama.* — *Pope v. Headen*, 5 Ala. 433; *Clarke v. Rowan*, 53 Ala. 400.

*Georgia.* — *Bentley v. Shingler*, 111 Ga. 780.

*Louisiana.* — *Person v. O'Neal*, 32 La. Ann. 228.

*New Jersey.* — *State v. Hand*, 41 N. J. L. 517.

*North Dakota.* — *Dever v. Cornwell*, 10 N. Dak. 123.

*Pennsylvania.* — *Wistar v. Kammerer*, 2 Yeates (Pa.) 100.

*Tennessee.* — *Finley v. Gaut*, 8 Baxt. (Tenn.) 148.

*Texas.* — *Cordray v. Neuhaus*, 25 Tex. Civ. App. 247.

*Wisconsin.* — *Ramsay v. Hommel*, 68 Wis. 12.

But see *Cobban v. Hinds*, 23 Mont. 338.

**Publication for Thirty Days.** — The requirement that the notice shall be published at least thirty days before the date of the sale is complied with by one insertion of the notice each calendar week for a period of thirty days immediately preceding the sale, the first of the insertions being at least thirty days before the sale. *Montford v. Allen*, 111 Ga. 18.

**Computation of Time—Excluding First Day and Including Day of Sale.** — *Carpenter v. Shinnars*, 108 Cal. 359; *O'Hara v. Parker*, 27 Oregon 156.

**Excluding First Day and Day of Sale.** — *Steuart v. Meyer*, 54 Md. 454.

**Date of Publication Fixed by Date of Newspaper.** — Under a statute requiring the first publication of the notice in a newspaper to be eight weeks before the day of sale, the date of the paper is ordinarily to be considered as the date of its publication. And evidence tending to prove that the paper was actually printed, and delivered to local subscribers, on the afternoon of the day before such printed date, is not competent evidence to show that the paper was published the day before its date. *Schoff v. Gould*, 52 N. H. 512.

In *Fitch v. Pinckard*, 5 Ill. 69, to prove the notice and advertisement, newspapers were introduced, published in 1837, containing the notice and advertisement dated "1836." It was held that it was not permissible to show that the date was a mistake and that it was intended for 1837.

**Two Irregular Advertisements for the Statutory Period** cannot be coupled together so as to authorize the sale; so where, under a statute requiring three months' advertisement, the officer advertised the property for sale on a day in the

following month, but, discovering his mistake, did not sell the property, and changed the date of sale as stated in the advertisement to a day three months from the first appearance of the notice, and continued the publication of the notice to such day, at which time the sale took place, it was held that the collector had no authority to sell although the delinquent was personally notified of the different time fixed for the sale and consented thereto. *Scales v. Alvis*, 12 Ala. 617, 46 Am. Dec. 269.

In *South Carolina*, under a statute requiring publication to be made weekly for two weeks, it has been held that where there had been two weekly insertions of the notice a sale could be made whether the full period of fourteen days had expired or not. *Ebaugh v. Mullinax*, 40 S. Car. 244, following *Ex p. Alexander*, 35 S. Car. 409.

**Injunction.** — In *Cobban v. Hinds*, 23 Mont. 338, it was held that an injunction would not lie to prevent a sale because the publication was for less than the statutory period.

**1. Weekly Notice of Publication.** — *Ronkendorf v. Taylor*, 4 Pet. (U. S.) 349; *Hansen v. Mauberret*, 52 La. Ann. 1565; *In re New Orleans*, 52 La. Ann. 1073; *Monroe v. Winegar*, 128 Mich. 309.

**Daily Publication Not Required.** — Under a statute requiring publication for three weeks, publication twice a week for the period prescribed was held sufficient. *Thurston v. Miller*, 10 R. I. 358.

**2. Time for Commencing Publication.** — *Miller v. Delta, etc., Land Co.*, 74 Miss. 110; *Chamberlin v. Taylor*, 36 Hun (N. Y.) 24. See also *Stout v. Coates*, 35 Kan. 382.

**Reasons for Postponement of Publication.** — A statute making "mistake or inadvertence" reasons for postponing the advertisement of the sale does not permit a delay for "want of time to prepare the delinquent tax list." *Mathers v. Lewis*, 9 Ohio Cir. Dec. 873, 18 Ohio Cir. Ct. 134.

**3. Publication to Commence Within Reasonable Time.** — *Doe v. Flagler*, 1 Ind. 542, in which an unexplained delay of fifty days was held to defeat the right to sell.

**4. Period of Publication Immediately to Precede Sale.** — In *Deligny v. Smith*, 3 La. 418, it was held that a statute requiring the publication of notice for three months prior to the sale means three consecutive months immediately preceding the sale, as otherwise the publication of the notice might be at such intervals as to defeat the objects desired to be obtained.

**New York Statute.** — Under a statute requiring the sale to be made not less than thirty days

need not extend to the very day of sale.<sup>1</sup>

cc. **ADVERTISEMENT BY POSTING NOTICES.** — Unless the notices are posted for the length of time<sup>2</sup> and at public places such as are prescribed by statute, the sale will be void.<sup>3</sup>

**What a Public Place.** — The question whether a particular place is a "public place," within the meaning of a statute regulating the posting of notices of sale, is held to be a question partly of fact and partly of law. The nature and situation of the place, and the uses to which it is applied, are matters of fact to be settled by the jury; when these are settled, whether the place will be considered a public place within the intent of the statute is purely a question of law.<sup>4</sup> Certain places, the nature and uses of which are well known, will be presumed by the court to be public for the purpose of posting notices of tax sales.<sup>5</sup>

**When a Law Expressly Requires Printed Notices** to be posted, a sale under a written notice is void.<sup>6</sup>

dd. **PROOF OF PROPER NOTICE.** — Under statutory provisions, proof, in the form of an affidavit or certificate, showing that the notice of sale was sufficient in form and advertised according to law, is required to be furnished by the tax officer,<sup>7</sup> or the publisher, printer, or manager of the newspaper in which the notice was published.<sup>8</sup> This affidavit or certificate must be made a part of

after the first publication of the notice, it was held that where the notice was first published on March 15th the sale was properly made on April 14th. *Kane v. Brooklyn*, 114 N. Y. 586.

1. **Need Not Extend to Day of Sale.** — *Davis v. Magoun*, 109 Iowa 308; *McCurdy v. Baker*, 11 Kan. 111; *Whitaker v. Beach*, 12 Kan. 492; *Watkins v. Inge*, 24 Kan. 612; *Textor v. Shipley*, 86 Md. 424.

2. **Length of Time.** — *Farnum v. Buffum*, 4 Cush. (Mass.) 260; *Cummings v. Holt*, 56 Vt. 384.

3. **Place of Posting.** — *Doe v. Sweetser*, 2 Ind. 649; *Baumgardner v. Fowler*, 82 Md. 631; *Jones v. Landis Tp.*, 50 N. J. L. 374; *Jarvis v. Silliman*, 21 Wis. 600; *Ramsay v. Hommel*, 68 Wis. 12.

**Wisconsin Statute.** — Failure by the county treasurer to post a notice of a tax sale in a conspicuous place in his office, as required by statute, will render invalid a deed founded upon such sale. *Morrow v. Lander*, 77 Wis. 77.

But posting the notice on the inside of the door of the treasurer's office is a compliance with the statute. *Allen v. Allen*, 114 Wis. 615.

"**The Most Public Places.**" — Under a statute requiring the notices of sale to be posted at "the most public places in the county," a posting at the court house and three other of the most public places in the county is sufficient. *Prince George's County v. Clarke*, 36 Md. 207.

**Iowa — Irregularities Not Fatal.** — A statute of Iowa providing that tax sales shall not be vitiated by irregularities in "the advertisement" refers equally to posting notice and publication in newspapers. *Davis v. Magoun*, 109 Iowa 308.

4. **What Is a "Public Place," Mixed Question of Law and Fact.** — *Tidd v. Smith*, 3 N. H. 178; *Cahoon v. Coe*, 57 N. H. 576. See also *Hart v. Smith*, 44 Wis. 213.

The term "Public Place" means a place at which the inhabitants of a community and other

persons most frequently meet, or resort, or have occasion to be, so that a notice posted there would, for that reason, be most likely to be seen. *Russell v. Dyer*, 40 N. H. 173. See also *Wells v. Burbank*, 17 N. H. 411; *Austin v. Soule*, 36 Vt. 645; *Alger v. Curry*, 40 Vt. 437.

**Places Not Public.** — A shoemaker's shop is not, as a matter of law, a public place. *Tidd v. Smith*, 3 N. H. 178.

In *Cambridge v. Chandler*, 6 N. H. 271, the advertisement was put upon a board that was fixed in the sand by the side of a certain river. There was no settlement nor inhabitant in Cambridge at that time; hunters were accustomed to pass up and down the river, and there was a public highway laid out through that place, leading from another point in the state to an adjoining state. It was held that the notice was not posted in a public place.

5. **Places Presumed to Be Public.** — *Hart v. Smith*, 44 Wis. 213, holding that post-offices and a certain store are presumptively public places.

In *Hoitt v. Burnham*, 61 N. H. 620, the court held that a certain inn and post-office were *prima facie* public places, no evidence being introduced as to the character of either.

And in *Scammon v. Scammon*, 28 N. H. 419, it is held, that for the purpose of posting a notice, a meetinghouse is *prima facie* a public place.

6. **Printed Notice Required — Written Notice Insufficient.** — *Lagroue v. Rains*, 48 Mo. 536.

7. **Proof to Be Furnished by Officer.** — *Taylor v. State*, 65 Ark. 595; *King v. Sears*, 91 Ga. 577; *Doe v. Sweetser*, 2 Ind. 649; *Bowler v. Brown*, 84 Me. 376; *Cook v. John Schroeder Lumber Co.*, 85 Minn. 374; *Jones v. Landis Tp.*, 50 N. J. L. 374; *Landis v. Vineland*, 60 N. J. L. 271; *Magruder v. Esmay*, 35 Ohio St. 221.

8. **Printer's Certificate.** — *Morris v. St. Louis Nat. Bank*, 17 Colo. 231; *Charlton v. Kelly*, 24 Colo. 273, reversing 7 Colo. App. 301; *Daniel v. Taylor*, 33 Fla. 636; *Fox v. Cross*, 39 Kan. 350; *Mann v. Carson*, 120 Mich. 631.

the record,<sup>1</sup> and should be so made within the time prescribed by statute.<sup>2</sup>

**Contents of Certificate.** — The certificate must state facts and not conclusions of law,<sup>3</sup> and must show positively and unequivocally a compliance with every requirement of the statute in reference to the giving of the notice, leaving nothing to inference or conjecture,<sup>4</sup> as parol evidence is not admissible in proof of facts required to appear of record.<sup>5</sup>

**The Affidavit or Certificate Is Presumptive Evidence of its recitals.**<sup>6</sup>

**Miscellaneous Matters of Proof.** — In the notes will be found a few miscellaneous decisions upon the burden of proof as to the sufficiency of the notice and presumptions that may arise in regard thereto.<sup>7</sup>

**1. Certificate Must Be Made Part of Record.** — *Dick v. Foraker*, 155 U. S. 404; *Logan v. Eastern Arkansas Land Co.*, 68 Ark. 248; *Texas Delta Land Co. v. Sholars*, 105 La. 357; *Brooks v. Auditor Gen.*, 119 Mich. 329; *Kellogg v. McLaughlin*, 8 Ohio 114; *Culver v. Hayden*, 1 Vt. 359. See also *Coit v. Wells*, 2 Vt. 318; *Isaacs v. Shattuck*, 12 Vt. 668; *Carpenter v. Sawyer*, 17 Vt. 121.

**The Loss of the Proof of publication**, which is shown to have been duly filed, will not be held to have defeated the jurisdiction. *Hoffman v. Pack*, 123 Mich. 74.

**2. Must Be Recorded within Prescribed Time.** — *Martin v. Barbour*, 34 Fed. Rep. 701, *affirmed* 140 U. S. 639.

**Statutes Construed.** — A statute requiring the advertisement to be recorded within ten days after the sale does not prohibit its being recorded after the completion of the publication and thirteen days before the sale. *Stieff v. Hartwell*, 35 Fla. 606.

Under a *Wisconsin* statute requiring the printer to transmit to the county treasurer the certificate of publication immediately after the last appearance of the notice, and providing that if such certificate be not so transmitted within six days the printer shall not be paid for the publication, a failure to file the certificate for ten days was held not to invalidate the sale. *Allen v. Allen*, 114 Wis. 615.

In *Kansas*, where the proof of the publication of notice is not transmitted to the county treasurer within the time prescribed by the statute, the charge for such publication may not be included in the amount for which the property is sold; and if it is included, the sale will be void. *Fox v. Cross*, 39 Kan. 350.

In *New Hampshire* it has been held that a statute requiring the officer to lodge, within ten days, with the town clerk, the newspapers containing the advertisements of the sale, is in this regard directory merely. *Smith v. Messer*, 17 N. H. 420. See also *Cahoon v. Coe*, 52 N. H. 518.

**3. Facts and Not Conclusions to Be Stated.** — *King v. Sears*, 91 Ga. 577; *Hart v. Smith*, 44 Wis. 213; *Wisconsin Cent. R. Co. v. Wisconsin River Land Co.*, 71 Wis. 94.

**4. Must Show Compliance with Statute in Every Particular.** — *West v. State*, 69 Ark. 659, 61 S. W. Rep. 918; *Morris v. St. Louis Nat. Bank*, 17 Colo. 231 [*distinguished* *Haley v. Elliott*, 20 Colo. 392]; *Doe v. Sweetser*, 2 Ind. 640; *Lovejoy v. Lunt*, 48 Me. 377; *Tolman v. Hobbs*, 68 Me. 316; *Prince George's County v. Clarke*, 36 Md. 207; *Fennum v. Buffum*, 4 Cush. (Mass.) 260; *Nelson v. Pierce*, 6 N. H. 194; *Magruder*

*v. Esmay*, 35 Ohio St. 221; *Wistar v. Kammerer*, 2 Yeates (Pa.) 100; *Jarvis v. Silliman*, 21 Wis. 600; *Hilgers v. Quinney*, 51 Wis. 62; *Morris v. Carmichael*, 68 Wis. 133.

**Insufficient Certificate.** — An affidavit of the posting of the notice in four specified places, "the same being four public places in the village of N.," etc., does not show that it was posted in four public places in the county, since the places may have been public so far as the village was concerned, and yet not public so far as the whole county was concerned. *Ramsay v. Hommel*, 68 Wis. 12.

**Delivery of Paper to Subscribers to Be Shown.** — Under a *Colorado* statute requiring the affidavit of publication to state that the several issues of the paper containing the notice were delivered to the subscribers, an affidavit which does not contain this statement is insufficient. *Rustin v. Merchants', etc., Tunnel Co.*, 23 Colo. 351.

**The Use of "At" Instead of "In."** — Stating that the notices were posted "at" instead of "in" certain places does not affect the validity of the affidavit. *Allen v. Allen*, 114 Wis. 615.

**Sufficient Notice Shown.** — *Boyle v. West*, 107 La. 347; *Garner v. Wallace*, 118 Mich. 387; *Spaulding v. O'Connor*, 119 Mich. 45; *Mann v. Carson*, 120 Mich. 631.

**That the Paper Is Published in the County Where the Land Is Situated** may be shown by the order and petition, where the affidavit does not recite that fact. *Wynkoop v. Grand Traverse Circuit Judge*, 113 Mich. 381.

**Record Competent Evidence for Delinquent.** — *Daniel v. Taylor*, 33 Fla. 636.

**5. Insufficiency of Record Not Curable by Parol.** — *Martin v. Barbour*, 34 Fed. Rep. 701; *Rustin v. Merchants', etc., Tunnel Co.*, 23 Colo. 351; *Comfort v. Ballingal*, 134 Mo. 281; *Jones v. Landis Tp.*, 50 N. J. L. 374; *Iverslie v. Spaulding*, 32 Wis. 394, *distinguishing* *Adams v. Wright*, 14 Wis. 408.

In *Rhode Island* it has been held that where the return of the collector fails to recite that notice was given, the claimant under the deed may show that fact in whatever way he can. *Thurston v. Miller*, 10 R. I. 358.

**6. Affidavit Prima Facie Correct.** — *Delogny v. Smith*, 3 La. 418; *Hart v. Smith*, 44 Wis. 213.

**7. Burden of Proof on Purchaser.** — *Williams v. Peyton*, 4 Wheat. (U. S.) 77; *Johnson v. Harper*, 107 Ala. 706; *Cummings v. Holt*, 56 Vt. 384; *Allen v. Smith*, 1 Leigh (Va.) 231; *Nalle v. Fenwick*, 4 Rand. (Va.) 585.

In *Georgia* the Statutory Presumption that the Advertisement Was Regular is not overcome by the fact that the newspaper does not have on

*b. CONDUCT OF SALE* — (1) *Time*. — Unless the sale be held at the very time prescribed at law it will be wholly void.<sup>1</sup> And a sale made at a time other than that stated in the notice, being nugatory of the very purpose of the notice, is without legal effect.<sup>2</sup>

*Adjournment*. — It being the duty of the officer to conduct the sale for the best interests of all concerned, he may adjourn the sale if he deems it necessary.<sup>3</sup> But the sale must have been opened on the day fixed,<sup>4</sup> and the adjournment must be to a definite time,<sup>5</sup> at which time the sale must occur.<sup>6</sup>

file, and cannot furnish, certain copies of the paper in which the advertisement ought to have appeared. *Bedgood v. McLain*, 94 Ga. 283.

*Presumption that Notices Were Posted in Proper Township*. — Where the sheriff's return showed the proper posting of notices of sale in a certain township without stating that the land was in that township, it would be presumed that the notice complied with the requirements of law, the contrary not appearing. *Woolen v. Rockafeller*, 81 Ind. 208.

*Dead Prima Facie Evidence* of the sufficiency of the notice. *Jarvis v. Silliman*, 21 Wis. 600.

*Conclusiveness of Evidence*. — In *Ireland v. George*, 41 Kan. 751, it was held that where some evidence is offered tending to show that a delinquent tax notice was duly posted in four public places as required by law, such evidence is conclusive when approved by the trial court; and in the absence of all proof, such duty is presumed to have been performed. See also *Hart v. Smith*, 44 Wis. 213.

In *Iowa* the tax deed is conclusive of the regularity of the notice of sale. *Madson v. Sexton*, 37 Iowa 562. But see *Allen v. Armstrong*, 16 Iowa 508.

1. *Time of Sale*. — *Arkansas*. — *Hogins v. Bra-shears*, 13 Ark. 242; *McDermott v. Scully*, 27 Ark. 226; *Vernon v. Nelson*, 33 Ark. 748; *Allen v. Ozark Land Co.*, 55 Ark. 549; *Penrose v. Doherty*, 70 Ark. 256.

*Colorado*. — *Gomer v. Chaffee*, 6 Colo. 314.

*Illinois*. — *Essington v. Neill*, 21 Ill. 139.

*Iowa*. — *Chandler v. Keeler*, 46 Iowa 596.

*Kansas*. — *Park v. Tinkham*, 9 Kan. 615; *Entrekin v. Chambers*, 11 Kan. 368. See also *Haynes v. Heller*, 12 Kan. 381.

*Louisiana*. — *Flower v. Beasley*, 52 La. Ann. 2054.

*Michigan*. — *Houghton County v. Auditor Gen.*, 41 Mich. 28.

*Mississippi*. — *McGehee v. Martin*, 53 Miss. 519; *Mead v. Day*, 54 Miss. 58; *Harkreader v. Clayton*, 56 Miss. 384, 31 Am. Rep. 369; *Mayer v. Peebles*, 58 Miss. 628; *Caston v. Caston*, 60 Miss. 475; *O'Flinn v. McInnis*, 80 Miss. 125; *Brown v. Sharp*, (Miss. 1902) 31 So. Rep. 712.

*North Carolina*. — *Taylor v. Allen*, 67 N. Car. 346. See also *Avery v. Rose*, 4 Dev. L. (15 N. Car.) 549.

*South Carolina*. — *Roddy v. Purdy*, 10 S. Car. 137; *Dougherty v. Crawford*, 14 S. Car. 628.

*Tennessee*. — *Conrad v. Darden*, 4 Yerg. (Tenn.) 307.

*Construction of Statutes*. — For cases construing various statutes in relation to the time of sale, see *Spain v. Johnson*, 31 Ark. 314; *McConnell v. Day*, 61 Ark. 464; *White v. Portland*, 68 Conn. 293; *Bestor v. Powell*, 7 Ill. 119; *Hope v. Sawyer*, 14 Ill. 254; *Polk v. Hill*, 15 Ill. 131; *Hooker v. Bond*, 118 Mich. 255; *Youngs v. Povey*, 127 Mich. 297; *Brougher v.*

*Conley*, 62 Miss. 358; *Mathers v. Bull*, 9 Ohio Dec. 408, 10 Ohio Cir. Dec. 515, 19 Ohio Cir. Ct. 657; *Shell v. Duncan*, 31 S. Car. 547; *Little v. Gibbs*, 8 Utah 261.

*Sale Before Default*. — A sale before the expiration of the period fixed by statute, during which the delinquent is privileged to pay the taxes and prevent a sale, is void. *Orr v. Travacrer*, 21 Iowa 68; *Person v. O'Neal*, 32 La. Ann. 228; *Davis v. Schmidt*, 68 Miss. 736.

*Iowa*. — *Delay Allowed to Advertise Sale*. — *Eldridge v. Kuehl*, 27 Iowa 160; *Sully v. Kuehl*, 30 Iowa 275; *Love v. Welch*, 33 Iowa 192; *Easton v. Savery*, 44 Iowa 654.

*Kansas*. — *Sale Delayed by Injunction*. — *Patter-son v. Carruth*, 13 Kan. 494. See also *Morrill v. Douglass*, 17 Kan. 291; *Jordan v. Kyle*, 27 Kan. 190.

*Sale to Be Kept Open Required Length of Time*. — *State v. Farney*, 36 Neb. 537.

*Sale Void When Taxes Barred by Statute*. — *State v. Bellin*, 79 Minn. 131.

*Sale at Wrong Hour Validated by Legislation*. — *Jones v. Landis Tp.*, 50 N. J. L. 374.

*Legislature Without Power to Extend Time by Private Act*. — *Taylor v. Allen*, 67 N. Car. 346.

*Failure of Officer's Certificate to Show Day of Sale*. — *Bloomstein v. Brien*, 3 Tenn. Ch. 55.

*Return as to Time and Place of Sale Prima Facie Correct*. — *Spear v. Ditty*, 8 Vt. 419.

In *Iowa* the tax deed is conclusive evidence that there was a compliance with the law in respect to the time of sale. *Shawler v. Johnson*, 52 Iowa 472.

2. *Must Be at Time Stated in Notice*. — *Prin-dle v. Campbell*, 9 Minn. 212; *Sheehy v. Hinds*, 27 Minn. 259; *Wilkins v. Huse*, 10 Ohio 140; *Cooke v. Pennington*, 15 S. Car. 185.

3. *Adjournment of Sale*. — *Butler v. Delano*, 42 Iowa 350; *Burns v. Lyon*, 4 Watts (Pa.) 363; *Wells v. Austin*, 59 Vt. 157.

*Further Advertisement Held Unnecessary*. — *Hurley v. Street*, 29 Iowa 429.

*Proof of Adjournment*. — In *Iowa* the tax deed is *prima facie* evidence of a proper adjournment to the day on which the sale took place, and such adjournment need not appear of record. *Bullis v. Marsh*, 56 Iowa 747. See also *Lorain v. Smith*, 37 Iowa 67. But the presumption arising from the deed may be overcome by proof. *Thompson v. Ware*, 43 Iowa 455.

*Curative Statute*. — Where a sale is void because adjourned to a time not authorized by statute, an act subsequently passed does not impart validity to such sale. *Collins v. Sher-wood*, 50 W. Va. 133.

4. *Sale to Be Opened on Day Fixed*. — *Sullivan v. Donnell*, 90 Mo. 278.

5. *Adjournment Must Be to Definite Time*. — *Buzzell v. Johnson*, 54 Vt. 90.

6. *Sale to Occur at Time to Which Adjourned*. — *Buzzell v. Johnson*, 54 Vt. 90; *Butler v.*

An adjournment from day to day means from one day to its succeeding day.<sup>1</sup>

(2) *Place*. — The sale must be conducted at the place designated by statute.<sup>2</sup> Where the statute requires the sale to be held before the court house door it has been held that a sale inside the court house is a nullity.<sup>3</sup>

(3) *By What Officer Conducted*. — In each state the officer who is to make the sale is designated by statute — the sheriff, treasurer, auditor, or the collector himself, being usually named. A sale by any other than the officer designated for the purpose, or his deputy, is unauthorized and void.<sup>4</sup> The sale, being an official act, cannot be made by an officer whose term of office has expired.<sup>5</sup>

**Where a County Is Divided** after land therein is assessed for taxes and returned delinquent, and before it is sold, and by such division the land is included within a new county, the sale for such taxes should be made by the proper officer of the old county.<sup>6</sup>

(4) *Quantity to Be Sold* — (a) *In General*. — The law, in its purpose to protect the interests of the delinquents as well as to collect the tax, does not favor, and usually will not permit, the sale of a greater quantity of land than is necessary to pay the taxes and charges,<sup>7</sup> and a sale of an entire tract, the

Delano, 42 Iowa 350, in which it was held that where it was announced that the sale would be adjourned "from day to day," but was not resumed on the following days, the sale, when it was made, was irregular and void.

1. *Adjournment from Day to Day*. — Burns v. Lyon, 4 Watts (Pa.) 363.

**Month's Adjournment Unauthorized**. — A statute providing for the continuance of the sale from day to day, when it is not completed on the day fixed, does not authorize an adjournment for a month. Collins v. Sherwood, 50 W. Va. 133.

2. *Place of Sale*. — Park v. Tinkham, 9 Kan. 615; Richards v. Cole, 31 Kan. 205; Nixon v. Biloxi, 76 Miss. 810; Rubey v. Huntsman, 32 Mo. 501, 82 Am. Dec. 143; White v. Wilkinson, 51 W. Va. 196.

**Sale Must Be at Place Advertised**. — Sommers v. Ward, 41 W. Va. 76.

**Sale Necessarily Removed to Larger Room**. — Where the statute required the sale to be held in the office of the county auditor and the sale was opened at such place, but the room proved to be too small to accommodate the large number of bidders present, some of whom could not get within hearing distance, it was held that the sale was properly removed to the courtroom. Whitney v. Bailey, 88 Minn. 247.

**Where the Statute Is Silent as to Place of sale**, the officer is nevertheless bound to hold the sale at the place where the object of the sale will be most likely to be accomplished; viz., the collection of the tax at the least cost to the taxpayer. Rice v. Johnson, 20 Ga. 639.

In *Howland v. Pettet*, 15 R. I. 603, it was held that a sale at the sheriff's office, about twenty miles from the lands sold, will be upheld, where it appears that the officer acted in good faith, that no objection was made by the complainant to the place of sale during the time the advertisement was running, and that no steps were taken to set it aside for more than five years after the sale.

3. *Before Court House Door*. — Smith v. Cox, 115 Ala. 503; Rubey v. Huntsman, 32 Mo. 501, 82 Am. Dec. 143; McNair v. Jensen, 33 Mo. 312. See also Vasser v. George, 47 Miss. 713.

**Where the Court House Had Been Destroyed**, a sale was properly conducted at the door of a building which had been designated by the proper authorities as the court house, although court was actually held at a different place. Thayer v. Hartman, 78 Miss. 590.

4. **Sale Void Unless by Proper Officer or Deputy**. — Hull v. Greeley, 31 Fla. 471; Hall v. Collins, 117 Mich. 617; Loose v. Navarre, 95 Mich. 603. See also Garrick v. Chamberlain, 97 Ill. 620; Hoffman v. Pack, 123 Mich. 74; Ensign v. Barse, 107 N. Y. 329.

**Sale May Be by Deputy**. — Villey v. Jarreau, 33 La. Ann. 291; Chapman v. Doe, 2 Leigh (Va.) 329; Wilson v. Doe, 7 Leigh (Va.) 22.

**Indiana — Sale by Auditor Instead of Treasurer**. — In Indiana it has been held that a sale by the auditor, instead of the treasurer as provided by statute, is not invalid if otherwise regular. Gable v. Seiben, 137 Ind. 155.

**Disinterestedness of Officer**. — The fact that the officer acquired an interest in the property some time after the sale does not show that he was disqualified to sell. New Orleans Pac. R. Co. v. Kelly, 52 La. Ann. 1741. See also Shelley v. Smith, 97 Iowa 259; Mixon v. Clevenger, 74 Miss. 67.

5. **Sale by Officer After Expiration of Term of Office**. — Fremont v. Boling, 11 Cal. 380; McCullough v. Hunter, 90 Va. 699; Cuttle v. Brockway, 32 Pa. St. 45.

**In Arkansas** it has been held that the collector for a particular year is the only officer authorized to collect taxes for that year, and although his term expires before the day fixed for the sale of lands for such taxes, no one other than himself or his deputy may sell; it is only when the collector dies or is removed from office, or is otherwise disqualified to act, that the actual collector may sell. Hogins v. Brashears, 13 Ark. 242; Twombly v. Kimbrough, 24 Ark. 459.

**A Sale under a Levy Made by a Predecessor in office** has been held to be unauthorized. Duvall v. Perkins, 77 Md. 582.

6. **Division of County**. — Hilliard v. Griffin, 72 Iowa 331; Collins v. Storm, 75 Iowa 36; Austin v. Holt, 32 Wis. 478.

7. **Can Sell No More than Necessary** — *United*

value of which vastly exceeds the amount to be satisfied, will be declared invalid.<sup>1</sup> This rule, outside of any positive enactment of law, has been declared to rest on principles of obvious policy and universal justice.<sup>2</sup>

**Statutes Authorizing Sale of Whole Tract.**—In one instance a law requiring the entire tract to be sold, in all cases, without regard to the fact that a division thereof might be made without injury, and the taxes paid by a sale of part, was adjudged unconstitutional,<sup>3</sup> but in another instance a similar statute has been upheld.<sup>4</sup> Under a statute making it optional with the officer to sell the whole or a part, a sale of the whole was upheld, although a part might conveniently have been sold.<sup>5</sup>

(b) **Sale in Parcels.**—A sale *en masse* of several lots or parcels of land which in fact are separate and distinct is irregular and cannot be upheld,<sup>6</sup> and a

*States.*—*Stead v. Course*, 4 Cranch (U. S.) 403.

*Alabama.*—*Clarke v. Rowan*, 53 Ala. 400; *National Bank v. Baker Hill Iron Co.*, 108 Ala. 635.

*Illinois.*—*Glos v. Swigart*, 54 Ill. App. 316.

*Kentucky.*—See *Woolley v. Louisville*, (Ky. 1903) 71 S. W. Rep. 893.

*Maine.*—*Loomis v. Pingree*, 43 Me. 299; *Straw v. Poor*, 74 Me. 53.

*Maryland.*—*Guisebert v. Etchison*, 51 Md. 478.

*Missouri.*—*Corrigan v. Schmidt*, 126 Mo. 304.

*New Hampshire.*—*Ainsworth v. Dean*, 21 N. H. 400; *Jaquith v. Putney*, 48 N. H. 138.

*Texas.*—*Bean v. Brownwood*, 91 Tex. 684.

In *Maine*, in order to authorize the sale of the whole, it must distinctly appear of record that such sale was required to pay the taxes and charges. *French v. Patterson*, 61 Me. 209; *Whitmore v. Learned*, 70 Me. 276; *Lovejoy v. Lunt*, 48 Me. 378; *Wiggin v. Temple*, 73 Me. 380; *Straw v. Poor*, 74 Me. 53; *Brookings v. Woodin*, 74 Me. 222.

**Presumed that Officer Sold No More than Necessary.**—*Ives v. Lynn*, 7 Conn. 505.

**Texas—Foreclosure of Tax Lien.**—Tex. Rev. Stat. (1895), art. 5184, providing that only so much property be sold as is necessary to satisfy the taxes thereon, has no application to proceedings in foreclosure of tax liens. *Master-son v. State*, 17 Tex. Civ. App. 91.

In *Illinois*, Where Several Adjoining Tracts Are Levied upon, it is the duty of the sheriff to offer each tract separately, and if no bids are made for one tract, to add another to it, and so on until all the pieces are offered, and if no bid is made, then to sell all the tracts *en masse* for a reasonable bid. *Douthett v. Kettle*, 104 Ill. 356. See also *Phelps v. Conover*, 25 Ill. 309; *Morris v. Robey*, 73 Ill. 462.

**Sale in Fee After Sale for Term of Years.**—*Devine v. Franks*, (N. J. 1900) 47 Atl. Rep. 228. **Standing Timber.**—In *Pennsylvania*, standing timber on unseated lands cannot be sold separately from the land. With seated or improved lands it is different. *Treasurers' Deeds*, 7 Pa. Dist. 427.

**1. Sale of Excessive Quantity.**—*Commercial Bank v. Sandford*, 99 Fed. Rep. 154; *Williamson v. White*, 101 Ga. 276, 65 Am. St. Rep. 302; *Mixon v. Stanley*, 100 Ga. 372; *Norres v. Hays*, 44 La. Ann. 907; *Dyer v. Boswell*, 39 Md. 471; *Cunningham v. White*, 2 Pa. Dist.

531; *Edwards v. Harnberger*, (Tex. Civ. App. 1900) 55 S. W. Rep. 42.

**Two Tenements on the Same Lot**, each worth several thousand dollars, were sold to satisfy a tax of less than one hundred dollars, and the sale was held to be absolutely null and void. *Doane v. Chittenden*, 25 Ga. 103. See also *Morris v. Davis*, 75 Ga. 169.

**Collateral Attack.**—In *Missouri* the sale may not be impeached in a collateral proceeding, for the neglect of the officer to sell the land, by its smallest legal subdivision. *Flynn v. Edwards*, 36 Fed. Rep. 873; *Wellshear v. Kelley*, 69 Mo. 343; *Brown v. Walker*, 85 Mo. 262.

**2. Rule Independent of Statutes.**—*Cooley on Taxation* (2d ed.) 496; *Margraff v. Cunningham*, 57 Md. 585. See also *Brinson v. Lassiter*, 81 Ga. 40.

**Principle Generally Applicable to Judicial Sale.**—In *Dyer v. Boswell*, 39 Md. 471, it was declared that the statute restricting the quantity of property to be sold for taxes merely asserts a general principle which is applicable to sales made by sheriffs and collectors, and has been often enforced upon grounds of equity and reason.

**3. Unconstitutional.**—*Martin v. Snowden*, 18 Gratt. (Va.) 100.

**Where the Law Charged Each Tract with a Distinct Tax**, the sale of two tracts was held to be not illegal, although the receipts from either were more than sufficient to pay the taxes on both. *Lawton v. U. S.*, 21 Ct. Cl. 44. See also *State v. Sargent*, 12 Mo. App. 236.

**4. Statute Requiring Sale of Whole.**—*Richards v. Howell*, 60 Ark. 215, holding that an offer by the officer to sell the smallest quantity that the bidder would accept and pay the taxes, invalidated the sale, although the bidder would not accept a quantity less than the entire tract, since the statute required the whole tract to be sold to the highest bidder.

**5. Sale of Whole Tract Upheld.**—*Southworth v. Edmonds*, 152 Mass. 203.

**6. Distinct Parcels Must Be Sold Separately.**—*Alabama.*—*National Bank v. Baker Hill Iron Co.*, 108 Ala. 635.

*Arkansas.*—*Pack v. Crawford*, 29 Ark. 489; *Cocks v. Simmons*, 55 Ark. 104, 29 Am. St. Rep. 28; *Salinger v. Gunn*, 61 Ark. 414.

*California.*—*Terrill v. Groves*, 18 Cal. 149.

*Georgia.*—*Morris v. Davis*, 75 Ga. 169.

*Indiana.*—*O'Brien v. Coulter*, 2 Blackf. (Ind.) 421.

*Iowa.*—*Penn v. Clemans*, 19 Iowa 372;



deed showing that this course was pursued is void upon its face.<sup>1</sup> But it has been held that several adjoining parcels which are compactly situated and which are used and occupied as a single tract may, for the purposes of taxation, be listed and valued together, and sold for a single consideration and as a single parcel.<sup>2</sup> Where the sale is by parcels, and the sale of one or more lots or parcels produces the amount actually due on all the land of the delinquent, the officer cannot lawfully proceed to sell further.<sup>3</sup>

**Statutes Requiring Sale of Smallest Sufficient Quantity.**—In some states the officer is required, under statutes which have been held to be mandatory, to sell only the smallest quantity that any purchaser will take and pay the taxes and costs,<sup>4</sup> or to offer a portion of the land of a specified acreage, before resorting

*Byam v. Cook*, 21 Iowa 392; *Harper v. Sexton*, 22 Iowa 442; *Ware v. Thompson*, 29 Iowa 65.

*Kansas*.—*Long v. Wolf*, 25 Kan. 522.

*Louisiana*.—*Gulf State Land, etc., Co. v. Fasnacht*, 47 La. Ann. 1294.

*Maine*.—*Wallingford v. Fiske*, 24 Me. 390; *Nason v. Ricker*, 63 Me. 381.

*Massachusetts*.—*Hayden v. Foster*, 13 Pick. (Mass.) 492; *Barnes v. Boardman*, 149 Mass. 106.

*Minnesota*.—*Farnham v. Jones*, 32 Minn. 7; *Sanborn v. Mueller*, 38 Minn. 27; *Brown v. Setzer*, 39 Minn. 317.

*Mississippi*.—*Speed v. McKnight*, 76 Miss. 723; *Higdon v. Salter*, 76 Miss. 766; *Baskins v. Doe*, 24 Miss. 431.

*Missouri*.—*State v. Richardson*, 21 Mo. 420; *Keene v. Barnes*, 29 Mo. 377; *Yeaman v. Lepp*, 167 Mo. 61.

*Montana*.—*Casey v. Wright*, 14 Mont. 315.

*New York*.—*Andrus v. Wheeler*, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 412. See also *Marsh v. Ne-ha-sa-ne Park Assoc.*, 25 N. Y. App. Div. 34, reversing (Supm. Ct. Tr. T.) 18 Misc. (N. Y.) 314.

*Oregon*.—*Brentano v. Brentano*, 41 Oregon 15.

*Pennsylvania*.—*Woodburn v. Wireman*, 27 Pa. St. 18; *Morton v. Harris*, 9 Watts (Pa.) 319.

*Tennessee*.—*Sheafer v. Mitchell*, 109 Tenn. 181.

*Texas*.—See *Cordray v. Neuhaus*, 25 Tex. Civ. App. 247.

**Bona Fide Grantee of Purchaser Protected.**—In *Martin v. Ragsdale*, 49 Iowa 589, it was held that a grantee in good faith from the purchaser of lands sold *en masse* will be protected if he had no notice of the irregularity.

**1. Deed Void on Face.**—*Walker v. Moore*, 2 Dill. (U. S.) 256; *Pettus v. Wallace*, 29 Ark. 476; *Crane v. Randolph*, 30 Ark. 579; *Montgomery v. Birge*, 31 Ark. 491; *Boardman v. Bourne*, 20 Iowa 134; *Ferguson v. Heath*, 21 Iowa 438; *Ackley v. Sexton*, 24 Iowa 320; *Martin v. Cole*, 38 Iowa 141; *Norres v. Hays*, 44 La. Ann. 907; *Tucker v. Whittlesey*, 74 Wis. 74.

**Including Two Lots in One Deed**, however, does not raise any presumption that the lots were sold *en masse*. *Towle v. Holt*, 14 Neb. 221; *Gage v. Bailey*, 102 Ill. 11. See also *Walker v. Boh*, 32 Kan. 354.

**Deed Showing Compliance with Law.**—A purchaser of lots sold separately is entitled to a deed reciting that fact, so that it may appear

that the sale was conducted legally. *State v. Richardson*, 21 Mo. 420.

**Compliance with Law Sufficiently Shown.**—A deed showing that the several tracts conveyed were advertised separately, and that the purchasers offered to pay for them separately, was held to show sufficiently that the lots were separately sold. *Waddingham v. Dickson*, 17 Colo. 223.

**2. Certain Lots Sold Together.**—*McQuesten v. Swope*, 12 Kan. 32; *Hall v. Dodge*, 18 Kan. 277; *Dodge v. Emmons*, 34 Kan. 732; *Mack v. Price*, 35 Kan. 134; *Roth v. Gabbert*, 123 Mo. 21; *Pettibone v. Fitzgerald*, 62 Neb. 869; *Jones v. Landis Tp.*, 50 N. J. L. 374; *Howland v. Pettey*, 15 R. I. 603; *Brien v. O'Shaughnessy*, 3 Lea (Tenn.) 724.

**Two City Lots Constituting a Homestead** and surrounded by a common inclosure were properly sold in one parcel. *Springer v. U. S.*, 102 U. S. 586.

**A City Lot**, within the meaning of a statute providing for the sale of "lots in towns and cities" for delinquent taxes, may consist of a thirty-acre tract within the corporate limits. *Texarkana Water Co. v. State*, 62 Ark. 188.

**3. Sale Must End When Taxes Satisfied.**—*Washington v. Pratt*, 8 Wheat. (U. S.) 681.

**Order of Selling Changed for Accommodation of Bidders.**—Where the officer, in the early part of a tax sale, offered the property in the order prescribed by statute, but ascertaining that there were bidders present who were anxious to leave but desired to bid on certain pieces of property, offered such pieces out of their regular order, there was no irregularity sufficient to invalidate the sale. *Cook v. John Schroeder Lumber Co.*, 85 Minn. 374.

**4. Smallest Quantity That Will Satisfy Tax—United States.**—*French v. Edwards*, 13 Wall. (U. S.) 506; *LeRoy v. Reeves*, 5 Sawy. (U. S.) 102; *Mora v. Nunez*, 10 Fed. Rep. 634; *Commercial Bank v. Sandford*, 99 Fed. Rep. 154, 103 Fed. Rep. 98.

*Arizona*.—*Jacobs v. Buckalew*, (Ariz. 1895) 42 Pac. Rep. 619.

*California*.—*Gillis v. Barnett*, 38 Cal. 393; *Carpenter v. Gann*, 51 Cal. 193; *Hewell v. Lane*, 53 Cal. 213; *Frink v. Roe*, 70 Cal. 297; *Reynolds v. Lincoln*, 71 Cal. 183.

*Louisiana*.—*Bristol v. Murff*, 49 La. Ann. 357.

*Maine*.—*Lovejoy v. Lunt*, 48 Me. 377.

*Michigan*.—*Hall v. Collins*, 117 Mich. 617.

*Missouri*.—*Corrigan v. Schmidt*, 126 Mo. 304.

to a sale of the whole.<sup>1</sup> If, however, the least quantity that will bring the amount due be the whole tract, a sale of the whole will be sustained.<sup>2</sup>

(e) **Sale According to Assessment.**—The question as to the lots or parcels in which the land is to be sold is controlled, as a general rule, by the assessment list.<sup>3</sup> If several parcels of land, separately assessed, be sold in a lump, the sale will be declared invalid,<sup>4</sup> and distinct parcels, assessed as an entirety and for a lump sum, cannot be sold separately,<sup>5</sup> nor can a single tract, so assessed, be sold in parts.<sup>6</sup>

**The Officer Is Not Permitted to Apportion the Tax** and sell the parcels separately, each for its proportionate share of the whole tax,<sup>7</sup> and such a sale may not be upheld by testimony that the apportionment of the tax was a fair one.<sup>8</sup>

**Division Which Decreases Value to Be Made.**—*Bean v. Brownwood*, (Tex. Civ. App. 1898) 43 S. W. Rep. 1036.

**Bona Fide Sale Upheld.**—In *Wilson v. Cantrell*, 40 S. Car. 114, the sale of an entire tract, without any effort to divide it, was sustained, there being no suggestion of fraud or unfairness.

**A Statute Making the Deed Conclusive** evidence of the validity of the sale and of the purchaser's title does not cure a failure of the officer to offer for sale the least quantity of property which would have satisfied the taxes. *Roth v. Gabbert*, 123 Mo. 21.

**1. Offering Specified Number of Acres.**—*Herring v. Moses*, 71 Miss. 620; *Herron v. Jennings*, (Miss. 1902) 31 So. Rep. 965; *Yeaman v. Lepp*, 167 Mo. 61.

**In Mississippi**, under Code, § 521 (Code 1892, § 3813), the officer is required to "first offer forty acres, and if the first parcel so offered do not produce the amount due, then he shall offer another similar subdivision, and so on until the requisite amount be produced." Accordingly, where the officer first offered forty acres, then another forty acres, then the remainder, without receiving a bid, and then sold the whole tract, the sale was held to be void. *Gregory v. Brogan*, 74 Miss. 694. See also *Hodge v. Wilson*, 12 Smed. & M. (Miss.) 500; *Boisgerard v. Doe*, 23 Miss. 122; *Ray v. Murdock*, 36 Miss. 692, in which a similar construction is placed upon a former statute.

**2. Sale of Whole in Absence of Bidder for Part.**—*Schmoele v. Galloway Tp.*, 44 N. J. L. 145; *Hewes v. McLellan*, 80 Cal. 393. See also *Wallace v. Berger*, 25 Iowa 456.

**Sale of Whole Void Although No Bid Made on Part.**—In *Hobbs v. Hamlet*, 106 Ga. 403, a sale of an undivided one-half interest in twelve hundred and twenty-five acres of land worth from five to six dollars per acre, for a tax of sixteen dollars and twenty cents, was held to be so excessive as to vitiate the sale, although portions of the property were unsuccessfully offered.

**3. Sale According to Assessment.**—*Ballance v. Forsyth*, 13 How. (U. S.) 18; *McQuesten v. Swope*, 12 Kan. 32; *Hayden v. Foster*, 13 Pick. (Mass.) 492; *State v. Sargeant*, 76 Mo. 557; *O'Neil v. Tyler*, 3 N. Dak. 47.

**Where Only a Part of a Tract Is Assessed** a sale of the whole is a nullity. *Reems v. Recorder of Mortgages*, 47 La. Ann. 1138.

**Texas—May Sell Other Property than That Assessed.**—*Brymer v. Taylor*, 5 Tex. Civ. App. 103.

**Presumption that Sale Was According to Assessment.**—*Corburn v. Crittenden*, 62 Miss. 125.

**Partial Validity of Assessment and Sale.**—Where property was assessed and sold as belonging entirely to a certain heir, who in fact was the owner of only a one-half interest, the sale was held to be valid in respect to the one-half, on the principle that the greater includes the less. *Marti v. Wall*, 51 La. Ann. 946.

**Statutory Remedy Must Be Followed.**—In *Montana* it has been held that equity will not enjoin a sale of separate lots under an assessment in gross, where no application has been made to the board of equalization to have the alleged irregularity in the assessment corrected as provided by statute. *Cobban v. Hinds*, 23 Mont. 338; *Deloughrey v. Hinds*, 23 Mont. 260.

**4. Tracts Separately Assessed.**—*Andrews v. Senter*, 32 Me. 394; *Higdon v. Salter*, 76 Miss. 766; *Hewes v. Seal*, 80 Miss. 437; *Yeaman v. Lepp*, 167 Mo. 61; *State v. Hand*, 41 N. J. L. 517; *Hasbrouck Heights Co. v. Township Committee*, 66 N. J. L. 102; *Dever v. Hagerty*, 43 N. Y. App. Div. 354; *Allen v. Courtney*, 24 Tex. Civ. App. 86.

**Tax Lien on Several Tracts Not Enforceable Against One.**—*Meyer v. Burritt*, 60 Conn. 117; *Hellman v. Burritt*, 62 Conn. 438.

**5. Tracts Assessed En Masse.**—*Moulton v. Doran*, 10 Minn. 67; *House v. Gumble*, 78 Miss. 259; *Willey v. Scoville*, 9 Ohio 43; *Woodburn v. Wireman*, 27 Pa. St. 18; *Morristown v. King*, 11 Lea (Tenn.) 669. See also *Marsh v. Ne-ha-sa-ne Park Assoc.*, 25 N. Y. App. Div. 34, reversing (Supm. Ct. Tr. T.) 18 Misc. (N. Y.) 314.

**Tracts of Land Containing as Much as Forty Acres** may be sold without division if so assessed. *Stewart v. Corbin*, 25 Iowa 144, following *Corbin v. De Wolf*, 25 Iowa 124.

**6. Single Tract So Assessed Not Divisible.**—*Shaw v. Kirkwood*, 24 Kan. 476; *Heil v. Redden*, 38 Kan. 255; *Allen v. Morse*, 72 Me. 502; *Roberts v. Fargo First Nat. Bank*, 8 N. Dak. 504.

**Sale by Parcels Unnecessary under Statute.**—In *Keely v. Sanders*, 99 U. S. 441, it was held, under a statute requiring the commissioners to sell the "lot or parcel of land" upon which the tax was assessed, it is not necessary that the land should have been sold in parcels.

**7. Apportionment Not Permissible.**—*Wyman v. Baer*, 46 Mich. 418; *O'Neil v. Tyler*, 3 N. Dak. 47.

**8. Sale Not Sustained by Evidence of Fair Apportionment.**—*Kregelo v. Flint*, 25 Kan. 695.

**Undivided Interest.** — Without express statutory authority, the officer may not, when the assessment is of an entire tract, sell an undivided interest in the land so as to constitute the purchaser a tenant in common with the owner,<sup>1</sup> unless the interest of the delinquent is already an undivided one.<sup>2</sup>

**Designation of Part Sold.** — If less than the whole tract be sold, the portion offered must be so designated as to enable a prospective purchaser to identify it<sup>3</sup> or the sale will be void.<sup>4</sup>

(5) *Amount for Which Sale to Be Made* — (a) *In General.* — The amount for which a tax sale may be made is a question depending for the most part upon the terms of the statutes. Under some statutes a sale is void if made for less than the whole amount of taxes, interest, and costs.<sup>5</sup> But under other statutes a valid sale may be made for less than the whole amount due,<sup>6</sup> and such

1. **Sale of Undivided Interest Not Permitted.** — *Clarke v. Strickland*, 2 Curt. (U. S.) 439; *Roberts v. Chan Tin Pen*, 23 Cal. 260; *Cragin v. Henry*, 40 Iowa 158; *Corbin v. Inslee*, 24 Kan. 154; *Auld v. McAllaster*, 43 Kan. 162; *Loud v. Penniman*, 19 Pick. (Mass.) 539; *Wall v. Wall*, 124 Mass. 65; *Forster v. Forster*, 129 Mass. 559; *Sanford v. Sanford*, 135 Mass. 314; *Jordan v. Hyatt*, 3 Barb. (N. Y.) 275.

In *Maine* the statutory requirement that the officer is to sell "so much of such real estate or interest as is necessary to pay the tax," etc., means that he is to sell an undivided fraction of the whole. To sell a separate and distinct portion of the farm would be as illegal as to sell the whole when it is only necessary to sell a part. *Allen v. Morse*, 72 Me. 502.

2. **Where Delinquent Owns Undivided Interest.** — *Harper v. Rowe*, 55 Cal. 132; *Townsend Sav. Bank v. Todd*, 47 Conn. 190; *Boyle v. West*, 107 La. 347.

**Payment by the Owner of an Undivided Interest**, of the taxes due by him, necessarily renders valid a sale of the residue upon default in the payment of the taxes thereon. *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 349; *Payne v. Danley*, 18 Ark. 441, 68 Am. Dec. 187; *Peirce v. Weare*, 41 Iowa 378. See also *Lawrence v. Miller*, 86 Ill. 502.

3. **Designation of Part Sold.** — *Townsend Sav. Bank v. Todd*, 47 Conn. 190; *Jacobs v. Buckalew*, (Ariz. 1895) 42 Pac. Rep. 619; *Gulf State Land, etc., Co. v. Fasnacht*, 47 La. Ann. 1294; *Hodge v. Wilson*, 12 Smed. & M. (Miss.) 498.

In *California*, the owner of the lands may designate, prior to the commencement of the sale, the portion he wishes offered; if he does not so designate, then the officer shall do so. But the designation, whether by the owner or the officer, must precede the actual sale to the purchaser; and it must be by metes and bounds, so that the purchaser may know its exact boundaries. *Roberts v. Chan Tin Pen*, 23 Cal. 259.

In *Illinois*, the quantity sold, when less than the whole, must be taken from the eastern portion of the tract, and the line drawn due north and south, and far enough west of the most eastern point of the tract to make the requisite quantity. *Spellman v. Curtenius*, 12 Ill. 409.

**Sufficiency of Designation.** — See *Cocks v. Simmons*, 55 Ark. 104, 29 Am. St. Rep. 28; *Coxe v. Blanden*, 1 Watts (Pa.) 533, 26 Am. Dec. 83; *Nance v. Hopkins*, 10 Lea (Tenn.) 508; *Wands v. Brien*, 13 Lea (Tenn.) 732; *Sheafe v. Wait*, 30 Vt. 735.

4. **Failure to Designate Vitiates Sale.** — *Nelson v. Abernathy*, 74 Miss. 164.

**Curative Statute.** — The failure of the officer to designate the property he sells invalidates the sale notwithstanding a statute providing that the validity of the tax sale shall not be affected by errors in conducting it. *Nelson v. Abernathy*, 74 Miss. 164.

5. **Sale for Insufficient Amount Void.** — *State v. Helmer*, 10 Neb. 25; *O'Donohue v. Hendrix*, 13 Neb. 257; *Tillotson v. Small*, 13 Neb. 202; *McGavock v. Pollack*, 13 Neb. 535; *Adams v. Osgood*, 42 Neb. 450; *Medland v. Connell*, 57 Neb. 10; *Grant v. Bartholomew*, 57 Neb. 673. But see *Carman v. Harris*, 61 Neb. 635.

**No Bid Receivable for Less than Whole Amount.** — Where the statute provides that no bid shall be received or sale made except for a sum covering the whole amount of taxes and costs, a sale made for a less sum is void. *Renshaw v. Imboden*, 31 La. Ann. 661; *Waddill v. Walton*, 42 La. Ann. 763; *Carey v. Cagney*, 109 La. 77; *Douglass v. Lowell*, 60 Kan. 239; *Detroit F. & M. Ins. Co. v. Wood*, 118 Mich. 31; *Hughes v. Jordan*, 118 Mich. 27. See also *Heywood v. Weber County*, 18 Utah 57.

**Lands Bid In by State.** — In *Michigan*, where it is provided by statute that lands bid in by the state may be purchased by persons applying therefor and tendering the amount of taxes and costs due, an applicant who tenders such amount together with the current taxes is entitled to the property as against other applicants who failed to tender such current taxes. *Wilkin v. Keith*, 121 Mich. 66; *Hall v. Mann*, 122 Mich. 13; *Moore v. Auditor Gen.*, 122 Mich. 599. See also *Cockburn v. Auditor Gen.*, 120 Mich. 643; *Munroe v. Winegar*, 128 Mich. 309. This statute does not apply to public sales. *Berkey v. Burchard*, 119 Mich. 105.

In *Virginia*, it has been held under a statute providing for the purchase of lands bought in by the state, that an applicant for the purchase of such lands, in specifying the amounts and charges he will pay for the land, must mention the accrued interest. *Lewis v. Coons*, 96 Va. 506. See also *Brown v. Christian*, 96 Va. 254.

**Taxes Omitted Not Discharged.** — *Fishel v. Stark*, 49 La. Ann. 855; *Medland v. Connell*, 57 Neb. 10. See also *Countryman v. Wasson*, 78 Minn. 244; *People v. Buffalo*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 170. But compare *supra*, this title, *Tax Lien — Termination of Lien — Effect of Alienation, Judicial Sale, Etc.*

6. **Sale Not Defeated by Inadequacy of Amount.** — In *Iowa*, the fact that the land is not sold

sale will sometimes operate as a satisfaction and discharge of all taxes due, releasing the delinquent from further liability,<sup>1</sup> and freeing the property in the hands of the purchaser from all liens for taxes.<sup>2</sup> But where the owner of the property, knowing that the taxes are less than the law requires, allows the sale to be made, and becomes the purchaser himself, the state may subject the same land to the satisfaction of the deficiency.<sup>3</sup>

**A Deficiency of a Mere Trifle** will not affect the validity of the sale.<sup>4</sup>

(b) **Excessive Amount.** — In the absence of validating statutes, a sale of property for the satisfaction of an amount of taxes in excess of the amount lawfully due is without jurisdiction and void, both as to the illegal excess, and the amount for which the sale might lawfully have been made.<sup>5</sup> It is a presumption of law that when the land has been sold for taxes, in part illegal, some portion of the land is taken to satisfy an illegal demand, and would not have

for all the delinquent taxes is an irregularity merely, which will not defeat the sale after the execution and recording of the tax deed made in pursuance thereof. *Kessey v. Connell*, 68 Iowa 430; *Hough v. Easley*, 47 Iowa 330; *Shoemaker v. Lacey*, 38 Iowa 277; *Preston v. Van Gorder*, 31 Iowa 250.

**In New York a Sale Made for One Assessment Only**, when there are other taxes in arrears, is valid. *People v. Coler*, 46 N. Y. App. Div. 237.

**Sale of Land for City Taxes.** — In *Pennsylvania*, under a statutory provision that lands shall not be sold for city taxes unless the amount of the taxes due shall exceed twenty dollars, there may be a sale under a lien for less than that amount, if all the taxes against such land aggregate more than twenty dollars. *Bole v. McKelvy*, 189 Pa. St. 505.

**Two Sales of Same Property.** — Where land was sold for the taxes of later years and was subsequently sold for the taxes of prior years, the first sale gave a paramount title. *Bowman v. Thompson*, 36 Iowa 505. But see *Crowell v. Merrill*, 60 Iowa 53, in which a second sale of land for railroad taxes was upheld.

**In Massachusetts** the same land may be sold at separate sales for the taxes of two successive years. In such case the purchaser at the second sale and for the later tax acquires title to the property. *Keen v. Sheehan*, 154 Mass. 208. But a single sale under two warrants for the taxes of two years is valid. *Lancy v. Snow*, 180 Mass. 411.

**Validity of Sale Where Price Is Not Refunded.** — Where a county made a sale of land for one-tenth of the taxes due, but the price paid was not refunded to the purchaser, it was held that the sale was binding between the county and the purchaser. *Munger v. Halden*, 83 Minn. 490.

**Sale for City Taxes After Sale for State Taxes.** — *West v. Negrotto*, 52 La. Ann. 381.

**1. Owner Released.** — *Phillips v. Wilmarth*, 98 Iowa 32.

**2. Property Freed from Tax Liens.** — *Thorington v. Montgomery*, 88 Ala. 548; *Law v. People*, 116 Ill. 244; *Preston v. Van Gorder*, 31 Iowa 250; *Bradley v. Hintrager*, 61 Iowa 337.

**3. Purchase by Owner.** — *Shelley v. St. Charles County*, 28 Fed. Rep. 875; *State v. Eddy*, 41 W. Va. 95. See also *Thorington v. Montgomery*, 94 Ala. 266; *Bowman v. Eckstien*, 46 Iowa 583.

**4. Trivial Deficiency Not Fatal.** — *Ireland v.*

*George*, 41 Kan. 751; *London, etc., Mortg. Co. v. Gibson*, 77 Minn. 394.

**8. Sale for Excessive Taxes Void** — *United States*. — *Hodgdon v. Burleigh*, 4 Fed. Rep. 111.

*California*. — *Hardenburgh v. Kidd*, 10 Cal. 402; *Wills v. Austin*, 53 Cal. 152; *Boston Tunnel Co. v. McKenzie*, 67 Cal. 485; *Knox v. Higby*, 76 Cal. 264; *Miller v. Williams*, 135 Cal. 183.

*Colorado*. — *Cramer v. Armstrong*, 28 Colo. 496.

*Dakota*. — *Bode v. New England Invest. Co.*, 6 Dak. 499.

*Florida*. — *Brown v. Snell*, 6 Fla. 741; *Graham v. Florida Land, etc., Co.*, 33 Fla. 356.

*Illinois*. — *McLaughlin v. Thompson*, 55 Ill. 249; *Drake v. Ogden*, 128 Ill. 603.

*Indiana*. — *McQuilkin v. Doe*, 8 Blackf. (Ind.) 581; *Noble v. Indianapolis*, 16 Ind. 506.

*Kansas*. — *McQuesten v. Swope*, 12 Kan. 32.

*Kentucky*. — *Smith v. Ryan*, 88 Ky. 636; *Carlisle v. Cassady*, (Ky. 1898) 46 S. W. Rep. 490; *Fish v. Genett*, (Ky. 1900) 56 S. W. Rep. 813.

*Louisiana*. — *Rougelot v. Quick*, 34 La. Ann. 123; *Hansen v. Mauberret*, 52 La. Ann. 1565.

*Maine*. — *Elwell v. Shaw*, 1 Me. 339; *Barker v. Blake*, 36 Me. 433.

*Massachusetts*. — *Bangs v. Snow*, 1 Mass. 181; *Libby v. Burnham*, 15 Mass. 144.

*Michigan*. — *Hammontree v. Lott*, 40 Mich. 190; *Tillotson v. Webber*, 96 Mich. 144.

*Mississippi*. — *Dogan v. Griffin*, 51 Miss. 782; *Beard v. Green*, 51 Miss. 856; *Shattuck v. Daniel*, 52 Miss. 834; *Gamble v. Witty*, 55 Miss. 26; *Peterson v. Kittredge*, 65 Miss. 33.

*Nebraska*. — *McCann v. Merriam*, 11 Neb. 241; *Covell v. Young*, 11 Neb. 510. But see the later case of *Hall v. Moore*, (Neb. 1902) 92 N. W. Rep. 294.

*New Hampshire*. — *Butterick v. Nashua Iron, etc., Co.*, 59 N. H. 392.

*New Jersey*. — *State v. Jersey City*, 37 N. J. L. 39.

*New York*. — *People v. Hagadorn*, 36 Hun (N. Y.) 610, affirmed 104 N. Y. 516; *Turner v. Boyce*, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 502; *Loomis v. Semper*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 567.

*North Dakota*. — *Lee v. Crawford*, 10 N. Dak. 482.

*Ohio*. — *Kemper v. McClelland*, 19 Ohio 308; *Younglove v. Hackman*, 43 Ohio St. 69.

*Rhode Island*. — *Young v. Joslin*, 13 R. I. 675.

*Utah*. — *Asper v. Moon*, 24 Utah 241.

been sold at all if only what was lawful had been called for.<sup>1</sup> And so, if the sale be made for a sum including costs and charges not lawfully taxable, it is void.<sup>2</sup>

Even When the Excess Is a Very Insignificant Sum the sale cannot be upheld.<sup>3</sup> The maxim *de minimis non curat lex* can scarcely be said to have any application to tax sales,<sup>4</sup> the rule being that the sale is void if the excess is as much as the smallest fractional coin authorized by law.<sup>5</sup> There is authority, however,

*Vermont*.—Drew v. Davis, 10 Vt. 506, 33 Am. Dec. 213; Cummings v. Holt, 56 Vt. 384.

**The Deed Is Void on Its Face** when it shows that a portion of the taxes for which the land was sold could not have been legally levied. Wills v. Austin, 53 Cal. 152.

**A Double Error**, which unlawfully increases one item, but decreases another so that the total amount is brought below that which might legally be collected, does not invalidate the sale. Hammond v. Carter, 155 Ill. 579.

**Payment of Legal Taxes Condition Precedent to Relief**.—Hansen v. Mauberret, 52 La. Ann. 1565.

**Officer Liable as Trespasser**.—Libby v. Burnham, 15 Mass. 144; Drew v. Davis, 10 Vt. 506, 33 Am. Dec. 213.

**Injunction—Execution of Deed Enjoined**.—Axtell v. Gerlach, 67 Cal. 483.

**Collection Enjoined**.—Knapp v. King County, 17 Wash. 567.

**Injunction Superseded by Statutory Remedy**.—Cobban v. Hinds, 23 Mont. 338.

**Redress of Purchaser**.—A purchaser at a tax sale which proves to be invalid is entitled to be reimbursed to the extent of the legal taxes and charges, but not the illegal excess. Younglove v. Hackman, 43 Ohio St. 69.

**The Costs of the Illegal Sale** are not required to be paid by the delinquent, and cannot be collected by a purchaser who has paid them as part of the purchase price. Covell v. Young, 11 Neb. 510.

**Designation of Commission as "Penalty" Immaterial**.—Fish v. Genett, (Ky. 1900) 56 S. W. Rep. 813.

**Amount Sold For Determined by Record**.—Cooper v. Freeman Lumber Co., 61 Ark. 36.

**Poll Tax Properly Included**.—A statute making the failure to pay poll tax a misdemeanor, does not take away the right of the state to collect the tax by a sale of property. Wilson v. Cantrell, 40 S. Car. 114.

**1. Presumption**.—Silsbee v. Stockle, 44 Mich. 569.

**2. Excessive Costs and Charges—Arkansas**.—Pack v. Crawford, 29 Ark. 489; Cooper v. Freeman Lumber Co., 61 Ark. 36; Darter v. Houser, 63 Ark. 475; Muskegon Lumber Co. v. Brown, 66 Ark. 539.

*California*.—Harper v. Rowe, 53 Cal. 233.

*Illinois*.—Fuller v. Shedd, 161 Ill. 462, 52 Am. St. Rep. 380.

*Kansas*.—Genthner v. Lewis, 24 Kan. 310; Haggood v. Morten, 28 Kan. 764; Board of Regents v. Linscott, 30 Kan. 240; Harris v. Curran, 32 Kan. 580; Truesdell v. Peck, 2 Kan. App. 533.

*Michigan*.—Case v. Dean, 16 Mich. 12; Wagar v. Bowley, 104 Mich. 38.

*North Dakota*.—Lee v. Crawford, 10 N. Dak. 482.

*Texas*.—Eustis v. Henrietta, 91 Tex. 325;

May v. Jackson, (Tex. Civ. App. 1903) 73 S. W. Rep. 988.

*Utah*.—Olsen v. Bagley, 10 Utah 492.

*Wisconsin*.—Kimball v. Ballard, 19 Wis. 601, 88 Am. Dec. 705; Pierce v. Schutt, 20 Wis. 423.

**Illegal Interest**.—Rellstab v. Belmar, 58 N. J. L. 489; Landis v. Vineland, (N. J. 1899) 43 Atl. Rep. 569.

**Costs Not Accrued at Time of Judgment**.—A sale under a judgment which includes costs not accrued at the time of its rendition, but to accrue subsequently, passes no title. Combs v. Goff, 127 Ill. 431; Gage v. Lyons, 138 Ill. 590; Gage v. Goudy, 141 Ill. 215.

**Including Forfeited Fees**.—Under a Kansas statute providing that the printer shall forfeit his fees for failure to transmit to the county treasurer within a specified time the proof of the publication of the notice, where the statute was not complied with, the inclusion of such fees in the amount for which the land is sold, invalidates the sale. Fox v. Cross, 39 Kan. 350; Blanchard v. Hatcher, 40 Kan. 350; Jackson v. Challiss, 41 Kan. 249; Douglass v. Craig, 58 Kan. 814, 48 Pac. Rep. 917; Douglass v. Walker, 57 Kan. 328, reversing 2 Kan. App. 706.

**Price of Revenue Stamp Required by Unconstitutional Statute**.—Including the sum of five cents for United States revenue stamp, imposed by an unauthorized Act of Congress upon each certificate, renders the sale void. Barden v. Columbia County, 33 Wis. 445, 14 Am. Rep. 762; Baker v. Columbia County, 39 Wis. 447.

**Sale Not Open to Attack After Period of Limitation**.—Milledge v. Coleman, 47 Wis. 184.

**A Statute Curing Irregularity** has no validating effect on a sale made for an excessive sum. Cooper v. Freeman Lumber Co., 61 Ark. 36.

**What Are Proper Costs**.—See Sayers v. O'Connor, 124 Mich. 256; Baker v. Cox, 79 Miss. 306.

**3. Sale Vitiated by Trifling Excess**.—In the following cases sales have been held invalid by reason of unlawful excess varying in amount from five cents to one dollar: Goodrum v. Ayers, 56 Ark. 93; Cooper v. Freeman Lumber Co., 61 Ark. 36; Salinger v. Gunn, 61 Ark. 414; Harper v. Rowe, 53 Cal. 233; Huse v. Merriam, 2 Me. 376; Boyden v. Moore, 5 Mass. 365; Burroughs v. Goff, 64 Mich. 464; Wells v. Burbank, 17 N. H. 303.

**4. Maxim Not Applicable**.—Miller v. Williams, 135 Cal. 183; Huse v. Merriam, 2 Me. 376; Wells v. Burbank, 17 N. H. 393.

**5. Excess of Smallest Coin Fatal**.—Treadwell v. Patterson, 51 Cal. 637; Doland v. Mooney, 79 Cal. 137; Glidden v. Chase, 35 Me. 90, 56 Am. Dec. 690; Boyden v. Moore, 5 Mass. 365.

**Reason for Rule**.—A trivial sum exacted of each taxpayer becomes a matter of importance as applied to the body of the taxpayers at large, and may become important in amount to each individual owner of property by reason of the

to the effect that a slight miscalculation by the officer in computing the amount of taxes and costs, by which property is sold for a small sum more than the amount actually due, but which does not materially change the result or work any appreciable injury to the owner, will not vitiate the sale;<sup>1</sup> and it seems that where a certain sum is claimed to be excessive but is not clearly shown to be so, and there are possible explanations therefor consistent with its legality, the presumption will be that it was lawfully included in the amount for which the sale was made.<sup>2</sup>

**Statutes Changing Rule.** — In some states it has been held, under special statutes so providing, that a sale is not rendered invalid because a portion of the amount for which the sale is made is illegal or erroneous, if the amount includes taxes for which the property might lawfully have been sold.<sup>3</sup> Where the constitutionality of such a statute was directly assailed it was upheld on the ground that the power to sell arises from the portion of the tax which is legal, and that, as the illegal portion is refunded to the owner, he is not prejudiced thereby.<sup>4</sup> In one instance, the statute was held unconstitutional,<sup>5</sup> and it is undoubtedly true that a legislature cannot give such a statute a retroactive operation, as that would deprive the owner of his property without process of law.<sup>6</sup>

(6) *Opportunity for Competition at Sale.* — The sale is required to be made publicly and fairly, with an opportunity for competition in the bidding.<sup>7</sup> As

continued exactions of successive years. *Lufkin v. Galveston*, 73 Tex. 340.

1. *Immaterial Excess.* — *O'Grady v. Barnhisel*, 23 Cal. 287; *Havard v. Day*, 62 Miss. 748.

In *New York*, where the officer returned four cents too much, the mistake was held not to invalidate the sale; the maxim *de minimis*, etc., being held to apply. *Colman v. Shattuck*, 62 N. Y. 353.

In *Ohio*, the sale is not affected by an overcharge of tax subsequent to the forfeiture to the state for nonpayment. *Winder v. Sterling*, 7 Ohio (pt. ii.) 191.

2. *Unexplained Costs Presumed to Be Legal.* — *Drennan v. Beierlein*, 49 Mich. 272; *Salls v. Barons*, 40 Kan. 697; *Crooks v. Whitford*, 47 Mich. 283.

*Variance between Certificate and Deed.* — The recital by the deed of an amount fifty cents in excess of that in the certificate was held not to show an excessive sale, the presumption being in favor of the regularity of official action. *Doland v. Mooney*, 79 Cal. 137.

3. *Sale Supported by Valid Taxes — Georgia.* — *Montford v. Allen*, 111 Ga. 18.

In *Barnes v. Lewis*, 98 Ga. 558, it was held that where lands held in trust were sold for an amount improperly including the poll tax of the trustee, the purchaser obtained title against the *cestuis que trustent*.

*Iowa.* — *Sully v. Kuehl*, 30 Iowa 275; *Hurley v. Powell*, 31 Iowa 64; *Rhodes v. Sexton*, 33 Iowa 540; *Genther v. Fuller*, 36 Iowa 604; *Corning Town Co. v. Davis*, 44 Iowa 622; *Parker v. Cochran*, 64 Iowa 757.

*Louisiana.* — *Clifford v. Michiner*, 49 La. Ann. 1511.

*Massachusetts.* — *Cone v. Forest*, 126 Mass. 97; *Southworth v. Edmonds*, 152 Mass. 203.

*Missouri.* — *Bird v. Sellers*, 113 Mo. 580.

*North Dakota.* — *Shuttuck v. Smith*, 6 N. Dak. 56.

*South Carolina.* — See *Wilson v. Cantrell*, 40 S. Car. 114.

*Sale Valid unless True Amount Tendered.* — *Carter v. Hadley*, 59 Miss. 130; *Corburn v. Crittenden*, 62 Miss. 125; *Lewis v. Vicksburg*, etc., R. Co., 67 Miss. 82; *Cornelius v. Dunn*, 17 Pa. Co. Ct. 566; *Wheeler v. Winn*, 53 Pa. St. 122, 91 Am. Dec. 186.

In *Nebraska*, owing to the omission of the legislature to provide a seal for the county treasurer, a tax sale does not divest the title of the owner but only operates as an assignment of the tax lien, and consequently a sale for an excessive amount is not invalid. *Hall v. Moore*, (Neb. 1902) 92 N. W. Rep. 294.

*Evidence of Illegal Taxes Is Incompetent* upon the question as to the validity of the sale, since, under the statute, the partial invalidity of the tax is immaterial. *Eldridge v. Kuehl*, 27 Iowa 160.

4. *Constitutional.* — *Parker v. Sexton*, 29 Iowa 421.

5. *Unconstitutional.* — Mich. Comp. L., § 1129, providing that no sale shall be held invalid unless it be made to appear that all legal taxes are paid or tendered, and that all taxes shall be presumed to be legally assessed until the contrary is affirmatively shown, is unconstitutional so far as it sustains sales for taxes which are in part illegal. *Silsbee v. Stockle*, 44 Mich. 561.

6. *Curative Statute Not Retroactive.* — Where a sale is made for a sum in excess of that authorized by law and is consequently void, the title of the owner remains the same after the sale as before it, and it is clearly beyond the power of the legislature, at a subsequent time, to divest a title which no process of law had impaired. *Harper v. Rowe*, 53 Cal. 233.

7. *Opportunity for Competition.* — *Brown v. Hogle*, 30 Ill. 119; *Stevens v. Williams*, 70 Ind. 536; *Burdick v. Bingham*, 38 Minn. 482; *Lyon County v. Ross*, 24 Nev. 102; *Cuttle v. Brockway*, 32 Pa. St. 45.

*County Not to Compete in Bidding.* — *Lovelace v. Tabor Mines*, etc., Co., 29 Colo. 62. See also *Charlton v. Kelly*, 24 Colo. 273.

a general rule, fraud is perpetrated upon the owner and the sale rendered void by any conduct on the part of the officer which prevents the attendance of bidders, or a fair competition among those who are present,<sup>1</sup> or any arrangement between the officer and the purchaser whereby a private sale is substituted for the public sale contemplated by law.<sup>2</sup> A misrepresentation by the

**Necessity for Competition When State the Purchaser.**—*Lyon County v. Ross*, 24 Nev. 102. See also *Andrus v. Wheeler*, 22 N. Y. App. Div. 596.

**Right to Sell at Private Sale.**—In *Nebraska*, where lands had been advertised, and not sold for lack of bidders, the treasurer could sell the same at private sale, and was not required to give notice of, or invite competition at, such sale. *Kittle v. Shervin*, 11 Neb. 65.

**Report Prior to Private Sale.**—But he had no right to sell at a private sale until after his report of sales of land at public sale was made, and filed in the office of the county clerk. *State v. Helmer*, 10 Neb. 25; *Medland v. Connell*, 57 Neb. 10; *Johnson v. Finley*, 54 Neb. 733; *Medland v. Linton*, 60 Neb. 249; *Gallentine v. Fullerton*, (Neb. 1903) 93 N. W. Rep. 932.

**Recitals in Deed.**—And a deed purporting to have been founded on a private sale must recite that the land had been previously exposed for sale at a public sale, and not sold for lack of bidders. *Ludden v. Hansen*, 17 Neb. 354.

**Auction Sale to Be Shown by Record.**—The record must show that the sale was made by auction. A recital in the deed to that effect is no evidence that the sale was so made. *Nason v. Ricker*, 63 Me. 381.

**1. Prevention of Competition by Officer.**—*Townsend Sav. Bank v. Todd*, 47 Conn. 190; *Gage v. Graham*, 57 Ill. 144; *Bickford v. Poor*, 68 N. H. 443. See also *Twombly v. Kimbrough*, 24 Ark. 460.

**Interference by Equity.**—Tax sales, whenever characterized by fraud or unfairness, should be set aside, or the purchaser be required to hold the title in trust for the owner. A court of equity is the proper tribunal to afford relief. *Slater v. Maxwell*, 6 Wall. (U. S.) 268; *Schenk v. Peay*, 1 Dill. (U. S.) 267.

In *Massachusetts* it was held that a sale is not invalidated by reason of the fact that the officer announces at the sale that he hopes no one will bid more than the amount of the taxes, interest, and charges, because of the difficulty in disposing of the surplus. *Southworth v. Edmonds*, 152 Mass. 203.

**Inadequacy of Price** does not, in itself, constitute a valid objection to the sale. *Slater v. Maxwell*, 6 Wall. (U. S.) 268; *Crosby v. Bonnowsky*, 29 Tex. Civ. App. 455.

**Owner Held Not Prejudiced.**—In *Howland v. Pettet*, 15 R. I. 603, it was held that an understanding among the bidders that the owner was to receive the land back upon reimbursing the purchaser was not prejudicial to the owner where the land was offered to him by the purchaser for the price paid, with costs and expenses, which offer he did not accept, though able to do so, and never at any time offered to redeem the land.

**2. Fraud and Collusion.**—A tax deed is void as to a mortgagee who purchased under foreclosure of his mortgage after the execution of

the deed, where the mortgagor, in his capacity as county treasurer, fraudulently informed the mortgagee that there were no unpaid taxes on the land, and by collusion with the grantee in the deed attempted to cut off the mortgagee's interest by a sale for taxes. *Christian v. Soderberg*, 118 Mich. 47.

**Facts Vitiating Sale.**—Where the officer does not sell the lands at public auction, as required by law, but simply allows persons who desire to purchase, to hand him slips of paper describing the lands which they wish to purchase, and the officer then at his leisure enters these lands on his books as regularly sold at public auction and issues to the purchaser certificates in ordinary form, such a sale is illegal and voidable if not void, and may be proven so by testimony as to the general conduct of the officer without identifying any particular tract illegally sold. *Young v. Rheinecker*, 25 Kan. 366. See also *Arn v. Hoppin*, 25 Kan. 707.

**Delivery of Certificate Enjoined.**—Where the owner of property sold for taxes was prevented from placing a bid thereon at the sale by reason of collusion between the officer and the purchaser, equity will restrain the delivery of the certificate of sale. *Glos v. Swigart*, 156 Ill. 229.

**Iowa.**—Where the person wishing to buy, handed to the officer a list of the lands on which he was willing to bid the amount of taxes due, and there being no competition such bid was received, and the land regarded as sold, without any public announcement, the sale was upheld. *Leavitt v. Watson*, 37 Iowa 93, followed in *Slocum v. Slocum*, 70 Iowa 259. Compare *Butler v. Delano*, 42 Iowa 350, in which it was declared that this case went to the very verge in sustaining tax sales, but perhaps not beyond the requirement of the law creating presumptions in favor of the validity of tax sales. Followed in *Thompson v. Ware*, 43 Iowa 455; *Miller v. Corbin*, 46 Iowa 150; *Chandler v. Keeler*, 46 Iowa 596; *Truesdell v. Green*, 57 Iowa 215.

**Irregularity Cured by Lapse of Time.**—Where a person gave money to the officer and requested that lands for which there were no bidders be struck off to him, and at the sale, certain lots, being publicly offered without receiving a bid, were struck off to him, the officer acting in good faith in so doing, it was held that while the sale did not comply with the statute it was a sale in fact and that the irregularity was cured by lapse of time. *Dodge v. Emmons*, 34 Kan. 732.

**Collateral Attack.**—In *Wallace v. International Paper Co.*, 70 N. Y. App. Div. 298, it was held that an erroneous statement made by the comptroller to the owner of certain lands, to the effect that there was no unpaid tax thereon for a certain year, does not render a subsequent sale of the land for such unpaid tax

purchaser to prevent competition,<sup>1</sup> or a combination among the purchasers to the effect that they will not bid against each other, or that they will take turns in bidding, will render the sale void.<sup>2</sup> But an agreement between two or more persons to bid jointly, if not made to prevent competition, but for the purpose of protecting their own interest, is not fraudulent.<sup>3</sup> And the mere fact that one acts as the agent of two purchasers, or that two agents act for one purchaser,<sup>4</sup> or that both principal and agent are present and bid,<sup>5</sup> does not *per se* constitute a fraudulent and illegal combination. Nor is an illegal combination to be implied from the fact that there is no competition among the parties present.<sup>6</sup> The fraud on the part of the purchaser at the sale will not defeat the title of a subsequent purchaser for value, and without notice of the fraud.<sup>7</sup> And it has been held that the purchaser at the sale will not be affected by the fraud of others, to which he is not a party, and of which he was ignorant.<sup>8</sup>

(7) *Terms of Sale.* — The sale must be for cash, unless credit is expressly authorized to be given.<sup>9</sup> But it seems that, while a definite stipulation for credit

void, but at most merely voidable and not open to collateral attack.

1. *Misrepresentation by Purchaser to Prevent Competition.* — Where the purchaser prevented competition by representing that it was useless to purchase, as the owner would defeat the sale by redemption, and thereby he was enabled to buy for a trifling amount, the sale was adjudged void. *Slater v. Maxwell*, 6 Wall. (U. S.) 268.

One who induces others to refrain from bidding at the sale by representing that he desires to buy in the land for the defendant in the tax suit, and who so purchases at such sale, will be treated as the trustee for the defendant, or the latter may have the sale set aside. *Merrett v. Poulter*, 96 Mo. 237.

2. *Illegal Combination Among Purchasers.* — *Singer Mfg. Co. v. Yarger*, 12 Fed. Rep. 487; *Kerwer v. Allen*, 31 Iowa 578; *Easton v. Mawkinney*, 37 Iowa 601; *Johns v. Thomas*, 47 Iowa 441; *Frank v. Arnold*, 73 Iowa 370.

3. *Legitimate Agreements.* — *Morrison v. Bank of Commerce*, 81 Ind. 335. See also *Hunt v. Elliott*, 80 Ind. 245, 41 Am. Rep. 794; *Phippen v. Stickney*, 3 Met. (Mass.) 384; *National Bank of Metropolis v. Sprague*, 20 N. J. Eq. 159.

*Instance of Unlawful Agreement.* — An agreement among several that they will advance funds and one shall buy, so as to prevent competition, and afterwards divide the land purchased, is fraudulent, and equity will relieve against the purchase. *Dudley v. Little*, 2 Ohio 504, 15 Am. Dec. 575.

*A Joint Purchase by Two Persons* does not show that there was a combination to prevent competition. *Kerr v. Kipp*, 37 Minn. 25.

4. *Pearson v. Robinson*, 44 Iowa 413.

5. *Jury v. Day*, 54 Iowa 573.

6. *Leak of Competition Among Bidders.* — *Beeson v. Johns*, 59 Iowa 166; *Gallaher v. Head*, 108 Iowa 588; *Davis v. Harrington*, 35 Kan. 196.

7. *Innocent Purchasers.* — *Van Shaack v. Robbins*, 36 Iowa 201; *Sibley v. Bullis*, 40 Iowa 429; *Huston v. Markley*, 49 Iowa 162; *Martin v. Ragsdale*, 49 Iowa 589. See also *Eldridge v. Kuehl*, 27 Iowa 161.

*Grantee under Quit-claim Deed.* — One who holds under a quit-claim deed from the assignee of a tax certificate void for fraudulent com-

bination, is not entitled to protection as an innocent purchaser. *Watson v. Phelps*, 40 Iowa 482; *Light v. West*, 42 Iowa 138; *Springer v. Bartle*, 46 Iowa 688; *Merrett v. Poulter*, 96 Mo. 237.

8. *Fraud Not Affecting Purchaser.* — *Case v. Dean*, 16 Mich. 12; *Boyd v. Wilson*, 86 Ga. 379; *Martin v. Cole*, 38 Iowa 141; *Eldridge v. Kuehl*, 27 Iowa 161.

9. *Sale for Cash.* — *Cushing v. Longfellow*, 26 Me. 306; *Donnel v. Bellas*, 34 Pa. St. 157; *Brooke v. Turner*, 95 Va. 696. See also *Green v. Hellman*, 61 Neb. 875; *Henderson v. Hughes County*, 13 S. Dak. 576.

*The Meaning of the Word "Forthwith" in a statute requiring the purchaser at a tax sale to pay "forthwith,"* has been held to be, as soon as the officer, in the orderly conduct of the business of his office, is prepared to receive and receipt for the moneys to be paid. *Leavitt v. S. D. Mercer Co.*, 64 Neb. 31, *modifying* 61 Neb. 874.

*Liability of Purchaser.* — Under an Iowa statute requiring the officer to proceed as if no sale had been made, where the purchase price is not paid forthwith, an officer who pays the price for which lands were bid off on failure of the bidder to pay, cannot maintain an action against the bidder therefor, since there was in fact no sale and the bidder cannot be bound. *Sheldon v. Steele*, 114 Iowa 616.

*A Statute Requiring a Deposit of fifty dollars by bidders as an evidence of good faith* has been held to be reasonable. *Whelen v. Stilwell*, (Neb. 1903) 93 N. W. Rep. 189.

*A Bid by the Officer for the county need not be paid at the time.* *McCauslin v. McGuire*, 14 Kan. 234.

*Officer Not Estopped to Show Nonpayment.* — Under an Indiana statute making the officer liable to the holder of a certificate of sale for taxes previously satisfied by sale, the officer in defending a suit for such taxes is not estopped from showing that, at the sale, payment was made by a certain "ditch certificate" on which no cash was ever realized and which he had no authority to receive. *Baldwin v. Shill*, 3 Ind. App. 291.

*North Carolina.* — Under a statute requiring the purchaser to pay the amount of the taxes immediately, take a receipt, and have the same



before the sale would be fatal, yet, in the absence of any such stipulation, the sale will not be invalidated by the fact that the purchase price was not immediately paid,<sup>1</sup> or that the officer accepted the promissory note of the purchaser for part of the purchase money.<sup>2</sup>

Where the Law Requires the Sale to Be Made to the "Highest Bidder," this method must be pursued, and the officer may not substitute another person therefor.<sup>3</sup> By the "highest bidder" in these statutes is ordinarily meant the one who will pay the taxes and the incidental expenses, for the least quantity of land.<sup>4</sup>

c. PROCEEDINGS AFTER SALE—(1) *Disposition of Surplus*.—Where the sale produces a surplus over and above the amount necessary to discharge the taxes and legitimate charges, the surplus must be paid to the owner whose property was sold.<sup>5</sup> A statute providing for the payment of the surplus to the owner has been held to mean the owner at the time of the sale, regardless of who was owner at the time of the assessment.<sup>6</sup> Where there are two claimants to the surplus, and the officer does not interplead, but decides between them, and pays the money to the wrong person, he is personally liable for the amount to the person entitled thereto.<sup>7</sup>

(2) *Report and Record*.—The statutes of the various states provide for a report by the officer of his proceedings in the tax sale.<sup>8</sup> These statutes, as

registered, it has been held that a purchaser who fails to observe the mandate of the statute obtains no title. *Hays v. Hunt*, 85 N. Car. 303.

**Pennsylvania—Surplus Bond.**—In Pennsylvania it has been held that a statute requiring the officer to take a bond for whatever surplus there is, over and above the taxes and costs, is mandatory, and the taking of such bond is indispensable to the validity of the sale. *Rupert v. Delp*, 7 Pa. Super. Ct. 209; *Cuttle v. Brockway*, 24 Pa. St. 145; *Donnel v. Bellas*, 34 Pa. St. 157; *Connelly v. Nedrow*, 6 Watts (Pa.) 451.

**Omission to File Bond Not Fatal.**—*White v. Willard*, 1 Watts (Pa.) 42; *Burns v. Lyon*, 4 Watts (Pa.) 363; *McDonald v. Maus*, 8 Watts (Pa.) 364; *Dreibach v. Berger*, 6 W. & S. (Pa.) 564.

**Proof that Bond Was Given.**—*Devinney v. Reynolds*, 1 W. & S. (Pa.) 328; *Dreibach v. Berger*, 6 W. & S. (Pa.) 564; *White v. Willard*, 1 Watts (Pa.) 42; *Fager v. Campbell*, 5 Watts (Pa.) 287; *Robinson v. Williams*, 6 Watts (Pa.) 281; *Bartholemew v. Leech*, 7 Watts (Pa.) 472; *Lackawanna Iron, etc., Co. v. Fales*, 55 Pa. St. 90; *Huzzard v. Trego*, 35 Pa. St. 9; *Alexander v. Bush*, 46 Pa. St. 62.

**Various Matters** pertaining to the surplus bond are decided in the following cases: *Sutton v. Nelson*, 10 S. & R. (Pa.) 238; *Devinney v. Reynolds*, 1 W. & S. (Pa.) 328; *Frick v. Sterrett*, 4 W. & S. (Pa.) 269; *Turner v. Waterson*, 4 W. & S. (Pa.) 171; *Gibson v. Robbins*, 9 Watts (Pa.) 156; *Rogers v. Johnson*, 67 Pa. St. 43.

1. **Immediate Payment Not Essential.**—*Anderson v. Ryder*, 46 Cal. 135; *Maina v. Elliott*, 51 Cal. 8; *Judah v. Brothers*, 72 Miss. 616.

2. **Receiving Note of Purchaser.**—*Longfellow v. Quimby*, 29 Me. 196, 48 Am. Dec. 525.

**Security for Payment.**—In *Buffalo v. Balcom*, 134 N. Y. 532, it was held that there is no rule of public policy which requires tax sales to be made for cash, and that a city may, when not contrary to its charter, allow the sale to be made upon credit, with such security as the

authorities may deem sufficient to protect the interests of the city.

3. **Highest Bidder.**—*Keene v. Houghton*, 19 Me. 368; *Cardigan v. Page*, 6 N. H. 182; *Bean v. Thompson*, 19 N. H. 290, 49 Am. Dec. 154.

**Evidence.**—Where the record of the sale shows that its terms were that the highest bidder should be the purchaser, and then shows that M. was the purchaser, this is evidence that M. was the highest bidder. *Smith v. Messer*, 17 N. H. 420.

4. **"Highest Bidder" Defined.**—*Lovejoy v. Lunt*, 48 Me. 377.

5. **Payment of Surplus to Owner.**—*People v. Palmer*, 10 N. Y. App. Div. 395; *McDuffee v. Collins*, 117 Ala. 487; *Thompson v. Cox*, 42 W. Va. 566.

**A Mortgagee Whose Interest Is Not Assessed** has been held not to be a person to whom the surplus proceeds of a sale of the mortgaged premises should be paid, where the statute provided that such interest be assessed and that the mortgagee be regarded, for the purposes of taxation, as a joint owner of the property. *Worcester v. Boston*, 179 Mass. 41.

**Mortgagee in Possession, Legal Owner.**—*Sutherland v. Brooklyn*, 156 N. Y. 605, reversing 87 Hun (N. Y.) 82.

6. **Owner at Time of Sale.**—*Worcester v. Boston*, 179 Mass. 41.

7. **Officer Personally Liable.**—*McDuffee v. Collins*, 117 Ala. 487.

8. **What Acts Must Be Recited.**—Acts in the proceeding of sale which are prerequisite to the right of sale must be shown by the return to have been performed. *De Forest v. Thompson*, 40 Fed. Rep. 375; *Tax Title Cases*, 105 Tenn. 243.

But where the omission to perform a certain act would be a mere irregularity, the failure of the report to recite that such act was done is not fatal. *Dumphy v. Auditor Gen.*, 123 Mich. 354; *Burns v. Ford*, 124 Mich. 274.

**Unreported Sale Invalid Against Subsequent Purchaser.**—Under a statute of the *District of Columbia*, requiring the collector to report the

a rule, are mandatory, and require the return to recite, according to the provisions of each particular statute, facts showing the sufficiency of the notice of sale,<sup>1</sup> the time and place of sale,<sup>2</sup> a description of the land,<sup>3</sup> and the estate therein sold,<sup>4</sup> and, where an entire tract is sold, that this course was necessary to pay the taxes due.<sup>5</sup> The return should also state the name of the purchaser<sup>6</sup> and the amount for which the property sold.<sup>7</sup> The return must be made by the officer who conducted the sale,<sup>8</sup> must be officially signed,<sup>9</sup> and filed within the time prescribed by statute.<sup>10</sup> It is not intended by the fore-

sale to the recorder of deeds, a sale of which there has been no report to the recorder is invalid, as against one who afterwards purchased the land for the full value thereof, and without notice of the sale. *King v. District of Columbia, MacArthur & M. (D. C.) 36.*

**Report by Reference to Tax Records.**—In *Michigan* it has been held that a report reciting the mere fact of the sale and "referring to the tax record for the particulars thereof," is sufficient. *Jenison v. Conklin, 114 Mich. 9.*

**Unattested Copy a Sufficient Report.**—*Benton v. Merrill, 68 N. H. 369.*

**Presumptions.**—It has been provided in certain jurisdictions that, in the absence of evidence to the contrary, the report will be presumed to have been duly filed. *Upton v. Kennedy, 36 Mich. 215; Church v. Nester, 126 Mich. 547; Henderson v. Hughes County, 13 S. Dak. 576.* But see *McFadden v. Brady, 120 Mich. 699.*

**Erasure in Record of Sale Presumed to Have Been Made to Correct Mistake.**—*Henderson v. Oliver, 32 Iowa 512.*

1. **Due Notice.**—See *supra*, this section, 2. a. (6) (d.) *dd. Proof of Proper Notice.*

2. **Time and Place.**—*Millard v. Truax, 99 Mich. 157.*

In *West Virginia* the officer is not required to state in his return that the sale was held at the court house door and between certain hours. *Winning v. Eakin, 44 W. Va. 19.*

In *New Jersey* it has been held that the return need not show the time of sale or an adjournment, but that these matters may be supplied by proof *aliunde*. *Jones v. Landis Tp., 50 N. J. L. 374.*

3. **Description of Land.**—*De Forest v. Thompson, 40 Fed. Rep. 375 [approved Cook v. Lasher, (C. C. A.) 73 Fed. Rep. 701]; Lasher v. McCreery, 66 Fed. Rep. 834; Ellis v. Clark, 39 Fla. 714; Ladd v. Dickey, 84 Me. 190; National Bank of Republic v. Louisville, etc., R. Co., 72 Miss. 447; Zingerling v. Henderson, (Miss. 1895) 18 So. Rep. 432; Bond v. Pettit, 89 Va. 474; Orr v. Wiley, 19 W. Va. 150.*

**Sufficiency of Description.**—*Pryor v. Hardwick, (Ky. 1893) 22 S. W. Rep. 545; Textor v. Shipley, 86 Md. 424.* See also *Winning v. Eakin, 44 W. Va. 19.*

**Statute Held Directory.**—*Allen v. Allen, 114 Wis. 615.*

4. **Estate Sold.**—*Bond v. Pettit, 89 Va. 474.*

**Curative Statute.**—Under a statute curing irregularities in the report it has been held that the failure of the report to recite the estate of the owner, when the owner was not mislead or prejudiced thereby, does not affect the validity of the tax deed. *State v. Sponaugle, 45 W. Va. 415.*

5. **Necessity for Selling Whole Tract.**—*McGrath v. Wallace, 116 Cal. 548; Lovejoy v. Lunt, 48 Me. 377.*

6. **Name of Purchaser.**—*Donohoe v. Hartless, 33 Mo. 335.*

7. **Amount for Which Sold.**—*McGrath v. Wallace, 116 Cal. 548; Donohoe v. Hartless, 33 Mo. 335.*

**Parol Evidence** is incompetent to show that lands sold for a price other than that stated in the record. *Salinger v. Gunn, 61 Ark. 414.*

In *Rhode Island*, the collector's return is not invalidated by an omission to state the amount of the bid, provided the claimant under the deed can in any way prove a compliance with the statute in this particular. *Thurston v. Miller, 10 R. I. 358.*

**Years for Which Taxes Were Due.**—*Bond v. Pettit, 89 Va. 474.*

8. **Report by Selling Officer.**—*Taylor v. Forrest, 96 Md. 529.*

**Attestation by Officer.**—In *Cardigan v. Page, 6 N. H. 182*, it was held that the account of sale, if stated by the officer's clerk and attested and filed by the officer himself, is sufficient.

9. **Official Signature.**—*Tensas Delta Land Co. v. Sholars, 105 La. 357; Taylor v. French, 19 Vt. 49.*

10. **Time of Filing.**—*United States.*—*De Forest v. Thompson, 40 Fed. Rep. 375 [approved Cook v. Lasher, (C. C. A.) 73 Fed. Rep. 701]; Lasher v. McCreery, 66 Fed. Rep. 834.*

*Maine.*—*Shimmin v. Inman, 26 Me. 228; Pinkham v. Morang, 40 Me. 587.*

*Nebraska.*—*Richardson County v. Miles, 7 Neb. 118.*

*New Hampshire.*—*Cardigan v. Page, 6 N. H. 182.*

*New Jersey.*—*Landis v. Vineland, 61 N. J. L. 424.*

*New York.*—*Tilden v. Duden, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 292.*

*North Carolina.*—*Taylor v. Allen, 67 N. Car. 346.*

*Vermont.*—*Richardson v. Dorr, 5 Vt. 9; Sumner v. Sherman, 13 Vt. 609; Taylor v. French, 19 Vt. 49.*

*Virginia.*—*Bond v. Pettit, 89 Vt. 474.*

**Curative Provision in Constitution.**—A provision in the constitution of *Mississippi* that the courts shall apply the same liberal principles in favor of tax sales as sales by execution, cures the failure of the clerk to file the proper return within the time prescribed. *Wolfe v. Murphy, 60 Miss. 1.* See also *Hopkins v. Sandridge, 31 Miss. 668.*

**Rights of Purchaser Protected.**—*Brien v. O'Shaughnessy, 3 Lea (Tenn.) 724.*

In *West Virginia* it is provided that the recorder shall note the time of filing the report

going to lay down any general rule, but merely to direct the practitioner to the statutes and decisions of his own state upon the particular requisites of the return. When required by statute, the report of the sale must be verified,<sup>1</sup> and the affidavit must be in the form prescribed.<sup>2</sup> The provisions that the officer's return shall be recorded are also imperative.<sup>3</sup>

(3) *Confirmation.* — In states where the judicial confirmation of tax sales is provided for by statute, the sale is not complete and no title vests thereby until the sale is confirmed.<sup>4</sup>

*Notice Is Required to Be Given to the Owner* that he may have an opportunity to oppose the confirmation,<sup>5</sup> but no one will be heard to object who is not adversely interested.<sup>6</sup>

*The Court Will Refuse to Confirm* the sale when it is shown to have been fraudulent<sup>7</sup> or irregular.<sup>8</sup>

so that it may appear of record that the return was made within the time prescribed by statute. *De Forest v. Thompson*, 40 Fed. Rep. 375; *Barton v. Gilchrist*, 19 W. Va. 223; *Simpson v. Edmiston*, 23 W. Va. 675; *McCallister v. Cottrille*, 24 W. Va. 173.

*Reasonable Compliance with Statute.* — A statute requiring the report to be filed within ten days after the sale was held to have been sufficiently complied with by filing eleven days after the sale. *Langley v. Batchelder*, 69 N. H. 566.

*Michigan Statute.* — Under a statute requiring the treasurer to make a report of tax sales, after the confirmation thereof, to the auditor general, a report twelve days after the confirmation was seasonably made. *Youngs v. Peters*, 118 Mich. 45; *Detroit F. & M. Ins. Co. v. Wood*, 118 Mich. 31.

*Parol Evidence.* — In *Thurston v. Miller*, 10 R. I. 358, it was held that parol evidence is competent to show that the return of the sale was filed within the time required.

*Amendment of Return.* — See *French v. Edwards*, 5 Sawy. (U. S.) 266; *McGrath v. Wallace*, 116 Cal. 548; *Morrison v. St. Louis, etc., R. Co.*, 96 Mo. 602; *Jaquith v. Putney*, 48 N. H. 138; *Taft v. Barrett*, 58 N. H. 447; *Langley v. Batchelder*, 69 N. H. 566.

1. *Verification.* — *Millard v. Truax*, 99 Mich. 157. See also *National Bank of Republic v. Louisville, etc., R. Co.*, 72 Miss. 447; *Condon v. Galbraith*, 106 Tenn. 14.

2. In *West Virginia* under a statute requiring the sheriff's affidavit to the list to be in this form: "I am not now, nor have I at any time been, directly or indirectly interested in the purchase of any of said real estate," etc. In the affidavit objected to, the words italicized in the prescribed affidavit were omitted, and it was held to be neither in form nor in substance the affidavit required by law. *De Forest v. Thompson*, 40 Fed. Rep. 375 [*approved Cook v. Lasher*, (C. C. A.) 73 Fed. Rep. 701]; *Jackson v. Kittle*, 34 W. Va. 207; *McClain v. Batton*, 50 W. Va. 121.

*Curative Statute.* — As to the effect of curative statute in *West Virginia* upon the foregoing rule, see *Winning v. Eakin*, 44 W. Va. 19.

*Defect Not Curable by Parol.* — *Bogges v. Scott*, 48 W. Va. 316.

3. *Record of Report.* — *Quertermous v. Walls*, 70 Ark. 326; *Beale v. Brown*, 6 Mackey (D. C.) 574; *Green v. Craft*, 28 Miss. 70; *Lippincott v. Pensauken Tp.*, 62 N. J. L. 177; *Culver v. Hayden*, 1 Vt. 359; *Sumner v. Sherman*, 13 Vt.

609; *Taylor v. French*, 19 Vt. 49; *Lane v. James*, 25 Vt. 482.

In *New Hampshire*, if the return of the officer of his proceedings in making the sale is put upon file in the clerk's office, it is not necessary that it should be copied into the record. *Gibson v. Bailey*, 9 N. H. 168.

*Secondary Evidence* is competent to establish the contents of papers relating to the sale which have been destroyed by fire, and it is held that such papers are not a part of the record proper, and need not be replaced by copies under the direction of the court. *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235, 90 Am. Dec. 575.

*Discrepancy Between Affidavit and Record.* — It seems that, if the original affidavit is in due form, the fact that it is incorrectly transcribed into the record will not affect its validity. *Winning v. Eakin*, 44 W. Va. 19.

4. *Necessity for Confirmation.* — *Boon v. Simmons*, 88 Va. 259; *Neal v. Andrews*, 53 Ark. 445; *Northrop v. Devore*, 11 Ohio 359; *Cordray v. Neuhaus*, 25 Tex. Civ. App. 247.

*Order Equivalent to Confirmation.* — Where the court enters an order for the execution of a deed and for possession of the premises, this is tantamount to a confirmation, though prior thereto the usual confirmation was made by a court not legally constituted. *Miller v. Reynolds*, (Ark. 1890) 13 S. W. Rep. 597.

In *Michigan* the tax sale becomes confirmed by the failure of the owner to file objections within a specified time, and no formal confirmation is necessary. *Conley v. McMillan*, 120 Mich. 694.

In *Louisiana* a sale under a judgment in a tax suit need not be approved by the auditor except as involving the right to pay costs out of state funds. *Willis v. Ruddock Cypress Co.*, 108 La. 255.

5. *Decree to Recite the Fact of Notice.* — *Condon v. Galbraith*, 106 Tenn. 14.

*Notice Dispensed With.* — Under a *Maryland* statute providing for the confirmation or annulment of tax sales after notice to the parties by advertisement, it was held that where the preliminary examination revealed the fact that the sale was not made in conformity with the law, the court might set the sale aside without the required notice. *Ex p. Tax Sale of Lot No. 172*, 42 Md. 196.

6. *Only Persons Adversely Interested.* — *Black v. Percifield*, 1 Ark. 472.

7. *Fraud.* — *Hunt v. McFadgen*, 20 Ark. 277.

8. *Irregularity.* — *Beardsley v. Hill*, (Ark.

The Order of Confirmation must identify the sale which it confirms.<sup>1</sup>

**Conclusiveness of Confirmation.** — The confirmation may be conclusive<sup>2</sup> or only presumptive evidence of the regularity of the sale.<sup>3</sup>

(4) **Certificate.** — The various statutes regulating tax sales usually require, as a part of, and essential to, the sale, a proper certificate of sale.<sup>4</sup> The certificate must be executed at the time of the sale or within a reasonable time thereafter,<sup>5</sup> and it is required, as a rule, to recite the fact of sale and the name of the purchaser, to give a description of the property which will identify the premises, and to state such other matters as the particular statutes prescribe.<sup>6</sup> The certificate must be properly signed<sup>7</sup> and when executed by an officer of another state, it must carry proof that it bears the genuine signature of an officer of such state, authorized by law to execute it.<sup>8</sup>

The Purpose and Effect of the Certificate is not to pass title to the land, but simply to place in the hands of the purchaser evidence that he is entitled to the execution of a deed, or to receive the money necessary to effect redemption.<sup>9</sup> The certificate is usually made *prima facie* evidence of the validity of the sale, and of the regularity of the various proceedings by which the sale was accom-

1903) 72 S. W. Rep. 372; Prince George's County v. Clarke, 36 Md. 206; *Ex p.* Tax Sale of Lot No. 172, 42 Md. 196.

1. **Identification of Sale.** — Northrop v. Devore, 11 Ohio 359, holding that an order which incorrectly states the day of the sale is no evidence that the sale was passed upon by the court, and confers no title.

**Last Order Proved by Secondary Evidence.** — Cooper v. Holmes, 71 Md. 21.

2. **Decree Conclusiva.** — Boehm v. Botsford, 52 Ark. 400. See also Worthen v. Ratcliffe, 42 Ark. 330.

**Irregularities Cured by Confirmation.** — Shefferly v. Auditor Gen., 120 Mich. 455; Martin v. Hawkins, 62 Ark. 421.

**Decree Not Appealable.** — Hull v. Southern Development Co., 89 Md. 8.

3. **Presumptive Evidence.** — Porter v. Dooley, 66 Ark. 1; Guisebert v. Etchison, 51 Md. 478; Steuart v. Meyer, 54 Md. 454; Cooper v. Holmes, 71 Md. 20. See also Prince George's County v. Clarke, 36 Md. 206.

**Confirmation Cannot Validate Void Sale.** — Beardsley v. Hill, (Ark. 1903) 72 S. W. Rep. 372.

**Confirmation Subject to Collateral Attack.** — Condon v. Galbraith, 106 Tenn. 14.

4. **Purchase by United States.** — Where, under the Act of Congress of 1863, providing for the levy and collection of a direct tax, the United States became the purchaser, it was necessary to issue a certificate of sale as well as where the purchase was by another. Cooley v. O'Connor, 12 Wall. (U. S.) 391; De Treville v. Smalls, 98 U. S. 517.

**Payment of Taxes Prerequisite of Certificate.** — It has been held that the payment of all delinquent taxes up to the time of the issuance of the certificate of sale is essential to its validity. Doherty v. Real Estate Title Ins., etc., Co., 85 Minn. 518, following Security Trust Co. v. Heyderstaedt, 64 Minn. 409. See also Million v. Welts, 29 Wash. 106.

**Separate Certificates for Separate Parcels.** — Weeks v. Merkle, 6 Okla. 714.

5. **Time of Execution.** — Stewart v. Minneapolis, etc., R. Co., 36 Minn. 355; Gilfillan v.

Chatterton, 37 Minn. 11, 5 Am. St. Rep. 810; Kipp v. Hill, 40 Minn. 188.

6. **Person Presumed to Be Purchaser.** — Leavitt v. S. D. Mercer Co., 64 Neb. 31, modifying 61 Neb. 874.

**Description of Premises.** — Smith v. Blackiston, 82 Iowa 240; Lyon County v. Goddard, 22 Kan. 389; Clark v. Holdridge, 112 N. Y. App. Div. 613; Quinby v. North American Coal, etc., Co., 2 Heisk. (Tenn.) 596; Murphy v. Hall, 68 Wis. 202; Reinhart v. Oconto County, 69 Wis. 352; Cate v. Werder, 114 Wis. 122.

**Years for Which the Taxes Were Due.** — Cushman v. Taylor, (Neb. 1902) 90 N. W. Rep. 207.

**Place of Sale.** — Whitney v. Bailey, 88 Minn. 247.

7. **Certificate Signed by Two of Three Commissioners.** — Cooley v. O'Connor, 12 Wall. (U. S.) 391; Billings v. Stark, 15 Fla. 297; Hill v. Vanderpool, 15 Fla. 128.

**Signature as "Register" Instead of Clerk.** — Where the statute requires the certificate to be signed by the clerk, as such, but the certificate is attached to the record in which the officer describes himself as clerk and register, it is sufficient that he signs the certificate as register. Mersereau v. Miller, 112 Mich. 103. See also Sheldon v. Coates, 10 Ohio 278.

8. **Proof of Signature.** — Ward v. Carson River Wood Co., 13 Nev. 44.

9. **Purpose and Effect of Certificate.** — Rice v. White, 8 Ohio 216; Dolph v. Barney, 5 Oregon 191; Horn v. Garry, 49 Wis. 464.

**Holder Cannot Maintain Ejectment.** — Hibbard v. Brown, 51 Ala. 469; Costley v. Allen, 56 Ala. 198.

**Enjoining Removal of Buildings.** — In Phillips v. Myers, 55 Iowa 265, it was held that the holder of the certificate has a lien on the property, dating from the rendition of the judgment, and may maintain an action to enjoin the removal of buildings.

**Mandamus to Compel Execution of Deed.** — The holder of a valid certificate to whom a deed, fatally defective in form, has been issued, may compel the execution of a sufficient deed by mandamus. State v. Winn, 19 Wis. 304, 88 Am. Dec. 689.

plished,<sup>1</sup> but the presumption thus created may be overcome by showing that the sale was unlawfully or irregularly made.<sup>2</sup>

**Equitable Interference.** — Where the owner of the land makes no offer to pay the taxes justly due, equity will not, on account of mere irregularities, decree the cancellation of the certificate<sup>3</sup> or enjoin its assessment.<sup>4</sup>

**Discrepancy Between Certificate and Record of Sale.** — In the event of a discrepancy between the certificate of sale and the record of sale, it seems that the record will control.<sup>5</sup>

**When the Certificate Is Required to Be Recorded,** it must be done within a reasonable time.<sup>6</sup>

**Assignment of Certificate.** — The certificate is not a negotiable instrument, and the owner's interest in the land will not pass by a mere delivery of the certificate,<sup>7</sup> but the statutes generally give the purchaser the right to assign his certificate and provide the manner in which a valid assignment shall be made.<sup>8</sup>

**1. Certificate Prima Facie Evidence of Validity of Sale.** — *De Treville v. Smalls*, 98 U. S. 517; *Keely v. Sanders*, 99 U. S. 441; *Sherry v. McKinley*, 99 U. S. 496; *Billings v. Stark*, 15 Fla. 297; *Lee v. Breezly*, 54 Iowa 660; *Bennett v. Blatz*, 44 Minn. 56; *Bryant v. Estabrook*, 16 Neb. 217; *Darr v. Berquist*, 63 Neb. 713; *Ure v. Reichenberg*, 63 Neb. 809; *Ryan v. West*, 63 Neb. 894; *Gallentine v. Fullerton*, (Neb. 1903) 93 N. W. Rep. 932; *Overing v. Foote*, 43 N. Y. 290.

**Statute Constitutional.** — A statute making the certificate *prima facie* evidence of the facts therein recited is not unconstitutional as impairing the right of trial by jury. *State v. Van Every*, 75 Mo. 530.

**When Proven by Parol.** — The certificate has the *prima facie* effect given it by statute, even where, on account of its loss or destruction, its contents are proved by parol. *Mitchell v. McFarland*, 47 Minn. 535.

**Presumption Not Overcome by Missing Affidavit.** — The presumption of regularity arising from the certificate of sale is not overcome by the fact that the records do not contain the affidavit of the posting of the notice of sale required by statute. *Cook v. John Schroeder Lumber Co.*, 85 Minn. 374.

**Insufficient Certificate No Evidence.** — Where the certificate fails to recite any matter which under the law is a matter of substance, it is invalid as a statutory certificate of sale and a conveyance, and is incompetent evidence for any purpose in the case. *Farnham v. Jones*, 32 Minn. 7; *Gilfillan v. Hobart*, 35 Minn. 185; *Vanderlinde v. Canfield*, 40 Minn. 541.

**In California,** the certificate is not evidence of any matters not therein recited, nor of any matter necessarily preceding its valid existence. *Hall v. Theisen*, 61 Cal. 524.

**In Kentucky,** it has been held that the certificate cannot be used to prove the jurisdiction of the officer making the sale. *Smith v. Ryan*, 88 Ky. 636.

**A Statute Giving Presumptive Validity to the Deed** does not necessarily operate to give any special force to a certificate of sale. *Quinby v. North American Coal, etc., Co.*, 2 Heisk. (Tenn.) 596.

**2. Overcoming Presumption.** — *Roberts v. Fargo First Nat. Bank*, 8 N. Dak. 504.

**Certificate Not Conclusive as to Ownership of Property.** — Under a certificate of sale of

island lands by *United States* tax commissioners, the vacant marshes surrounding the island being the property of the state, and, therefore, not taxable under the Act of Congress, did not pass, and evidence may be introduced to establish the ownership of the state. *State v. Pinckney*, 22 S. Car. 484.

**3. Payment of Taxes Required Before Cancellation of Certificate.** — *Craig v. Pollock*, 5 Dill. (U. S.) 449; *Wood v. Helmer*, 10 Neb. 65; *Hart v. Smith*, 44 Wis. 213. See also *MacKinnon v. Auditor-Gen.*, 130 Mich. 552.

**4. Enjoining Assignment.** — *Hagaman v. Cloud County*, 19 Kan. 394.

**5. Discrepancy Between Certificate and Record.** — *McCready v. Sexton*, 29 Iowa 356, 4 Am. Rep. 214; *Henderson v. Oliver*, 32 Iowa 512; *Clark v. Thompson*, 37 Iowa 536; *Kneeland v. Hull*, 116 Mich. 55. *Contra*, *McQuade v. Jaffray*, 47 Minn. 326.

**6. Recording Certificate.** — *Reeds v. Morton*, 9 Mo. 878, holding that where the certificate was not recorded until after the period of redemption had expired and a deed been made, the deed was void, since the failure to record the certificate deprived the owner of the notice of sale and opportunity to redeem which the law intended he should have.

**Fees for Recording the Certificate** where voluntarily paid, under a mistake of law, cannot be recovered. *Morgan Park v. Knopf*, 199 Ill. 444.

**7. Not Negotiable Instrument.** — *Horn v. Garry*, 49 Wis. 464. See also *White v. Brooklyn*, 122 N. Y. 53.

**8. Statutory Manner of Assignment.** — See *Green v. Hellman*, 61 Neb. 875; *State v. Winn*, 19 Wis. 304, 88 Am. Dec. 689; *Hyde v. Kenosha County*, 43 Wis. 129; *Horn v. Garry*, 49 Wis. 464; *Smith v. Todd*, 55 Wis. 459; *Jackson v. Jacksonport*, 56 Wis. 310; *Dreutzer v. Smith*, 56 Wis. 292; *Potts v. Cooley*, 56 Wis. 45; *Love-lace v. Tabor Mines, etc., Co.*, 29 Colo. 62.

**Mere Signature Insufficient Assignment.** — Under a statute providing that the certificate "shall be assignable by indorsement," it was held that the terms of the assignment must be written upon the instrument as well as the name of the assignor. *Territory v. Perea*, 6 N. Mex. 531.

But in *Iowa* it has been held, under a similar statute that the indorsement in blank and delivery of the certificate to another person, with intent to transfer the property therein, rendered

An assignment in due form vests in the assignee all the right and title in the land which the certificate conferred upon the purchaser, but no more;<sup>1</sup> for the certificate in the hands of an assignee is chargeable with all the infirmities that would affect it in the possession of the original holder.<sup>2</sup> However, where the owner buys his own land at an illegal sale, and assigns for a valuable consideration his certificate, he cannot be heard to say that the certificate is invalid in the hands of the assignee or those claiming under him, on the ground that the sale was void;<sup>3</sup> nor may a purchaser, after he has assigned the certificate, reinvest himself with ownership thereof by fraudulently procuring the certificate to be redelivered to him, and erasing the assignment, and having a deed made to himself.<sup>4</sup>

**Descent to Heir at Law.** — Upon the death of the purchaser, the certificate will descend to the heir at law.<sup>5</sup>

**XVI. FORFEITURE FOR NONCOMPLIANCE WITH TAX LAWS — 1. In General.** — It is provided by statute in some of the states that lands on which taxes are, or ought to be, assessed shall be forfeited to the state in case of the failure or refusal of the owner to comply with specified legal requirements designed to facilitate the collection of the revenue.<sup>6</sup>

such other person the lawful holder of the certificate. *Swan v. Whaley*, 75 Iowa 623.

**Designation of Assignee.** — An assignment of a tax sale certificate to "J. M. Quimby" is no evidence of right thereby in "J. M. Quimby & Co." *Quimby v. North American Coal, etc., Co.*, 2 Heisk. (Tenn.) 596.

**Who May Acquire Certificate.** — *Stubblefield v. Borders*, 92 Ill. 279; *Coleman v. Hart*, 37 Wis. 180.

**Evidence of Assignment.** — Where the certificate is issued to one person and the deed to another, there must be some evidence of an assignment of the certificate by the original purchaser. *Florida Sav. Bank v. Brittain*, 20 Fla. 507.

**Burden of Proof as to Bona Fides of Assignment.** Where the assignor denies that the assignment was for value, and contends that it was for another purpose than to transfer the title, he must establish it. *Bird v. Jones*, 37 Ark. 195.

**Where Fraud in the Sale Is Established,** and the assignment is also alleged to have been fraudulent, the assignee must show affirmatively that he is a *bona fide* purchaser for value. *Light v. West*, 42 Iowa 138.

**Rights of Assignee of Original Certificate as Against Purchaser of Duplicate.** — The purchaser of a duplicate certificate cannot acquire a title thereunder as against or superior to that of a subsequent assignee of the original certificate, who purchased it and obtained a deed thereon without notice of the issue of the duplicate or of the rights of the holder thereof. *Griswold v. Wilson*, 36 Iowa 156.

**Merger of Certificate in Legal Title.** — Where the legal owner of the land becomes the owner of the certificates covering the same, and afterwards releases to another all his estate, title, interest, and claim, in and to the land, his interest therein by virtue of the certificate passes with the legal title by the conveyance, and becomes merged in the legal title, so that no valid tax deed may thereafter be issued on the certificate. *Bennett v. Keehn*, 57 Wis. 582.

**Ambiguous Indorsement Explained by Parol.** — An indorsement upon the certificate of sale by the officer acknowledging the receipt of an

amount in full of the taxes, interest, and costs, but not showing whether the money was received in redemption of the lands or in consideration of the assignment of the certificate, may be explained by parol. *Woodman v. Clapp*, 21 Wis. 350.

**1. Rights of Assignee.** — *Bird v. Jones*, 37 Ark. 195; *Smith v. Stephenson*, 45 Iowa 645; *McCauslin v. McGuire*, 14 Kan. 234; *Green v. Hellman*, 61 Neb. 875; *Horn v. Garry*, 49 Wis. 464.

**2. Infirmities in Certificate.** — *Singer Mfg. Co. v. Yarger*, 12 Fed. Rep. 487; *Baldwin v. Shill*, 3 Ind. App. 291; *Watson v. Phelps*, 40 Iowa 482; *Light v. West*, 42 Iowa 138; *Besore v. Dosh*, 43 Iowa 211. See also *Bassett v. Welch*, 22 Wis. 175.

**3. Estoppel to Assert Invalidity.** — *Kinsworthy v. Mitchell*, 21 Ark. 145.

**4. Fraudulent Erasure of Assignment.** — *Bird v. Jones*, 37 Ark. 195.

**5. Descent of Certificate.** — *Rice v. White*, 8 Ohio 216.

**6. Forfeitures — Statutory Provisions in General** — *United States*. — *Schenk v. Peay*, 1 Dill. (U. S.) 268; *U. S. v. Repentigny*, 5 Wall. (U. S.) 211.

*Kentucky*. — *Barbour v. Nelson*, 1 Litt. (Ky.) 59; *Robinson v. Huff*, 3 Litt. (Ky.) 38; *Marshall v. McDaniel*, 12 Bush (Ky.) 378.

*Louisiana*. — *Hall v. Hall*, 23 La. Ann. 135; *Morrison v. Larkin*, 26 La. Ann. 699.

*Maine*. — *Hodgdon v. Wight*, 36 Me. 326; *Tolman v. Hobbs*, 68 Me. 316.

*Minnesota*. — *Baker v. Kelly*, 11 Minn. 480.

*Missouri*. — *State v. Heman*, 70 Mo. 441, 7 Mo. App. 420.

*South Carolina*. — *State v. Thompson*, 18 S. Car. 538.

*Virginia*. — *Staats v. Board*, 10 Gratt. (Va.) 400; *Hale v. Branscum*, 10 Gratt. (Va.) 418; *Wild v. Serpell*, 10 Gratt. (Va.) 405; *Martin v. Snowden*, 18 Gratt. (Va.) 100; *Kinney v. Beverley*, 2 Hen. & M. (Va.) 318.

*West Virginia*. — *Yokum v. Fickey*, 37 W. Va. 762; *State v. Cheney*, 45 W. Va. 478.

*Contra*, *Griffin v. Mixon*, 38 Miss. 42.

**2. Nature of Title Acquired by State.** — The rule generally adopted is that a forfeiture vests in the state the absolute title to the property forfeited;<sup>1</sup> and if the state has two distinct titles, a subsequent sale by the state passes both titles.<sup>2</sup> But in some states the forfeiture is treated as merely vesting the title in the state as security for taxes, and the title of the owner can only be defeated by showing forfeiture and sale by the state.<sup>3</sup> The forfeiture is to the state, and, where it has once accrued, no possession adverse to the proprietor can run against the state.<sup>4</sup>

**3. Sale of Forfeited Lands.** — Provision is usually, if not always, made for the sale by the state or county of the lands which it has acquired by forfeiture,<sup>5</sup> payment of the taxes charged being made out of the proceeds of the sale.<sup>6</sup>

**4. Constitutionality — Construction of Statutes.** — Statutes providing for forfeiture for noncompliance with tax laws are usually held to be constitutional, even where the title is vested in the state without an inquisition of office.<sup>7</sup> Sometimes an inquisition of office, or other adjudication to which the owner is a party, is deemed necessary to divest title,<sup>8</sup> and a statute will

In America, Forfeitures Were First Directed for nonperformance of tax laws by the legislature of Virginia, several years before the adoption of the Constitution of the United States, in order to determine the titles to unoccupied lands and to promote their settlement. *Martin v. Snowden*, 18 Gratt. (Va.) 100.

**Listing in Good Faith.** — When a taxpayer in good faith has listed the lands as his own, the lands are not forfeited because he has not complied with certain formalities in obtaining title. *Lohr v. Miller*, 12 Gratt. (Va.) 452.

**Payment of Taxes on Land Sufficiently Described** to identify it will preclude a forfeiture under another description which is inaccurate. *Kelly v. Salinger*, 53 Ark. 114.

**Forfeiture Not Avoided by Payment of Current Taxes.** — The owner of land on which back taxes are due cannot avoid a forfeiture thereof by paying the current taxes. *Biggins v. People*, 106 Ill. 270.

**Payment of Amount Chargeable to Tenant in Common Does Not Preclude Forfeiture.** — *Smith v. Tharp*, 17 W. Va. 221.

**A Forfeiture Declared After Due Payment of Taxes** is void, and the state takes no title to convey to a purchaser. *Davis v. Hare*, 32 Ark. 387.

**Where Land Is in Two Counties** it is not subject to forfeiture because not entered in the tax books of both counties. *State v. Cheney*, 45 W. Va. 478.

**1. State Acquires Absolute Title.** — *Hodgdon v. Burleigh*, 4 Fed. Rep. 111; *Hall v. Hall*, 23 La. Ann. 135. And see *Buckley v. Osburn*, 8 Ohio 180; *Wild v. Serpell*, 10 Gratt. (Va.) 405; *McClure v. Maitland*, 24 W. Va. 561; *Yokum v. Fickey*, 37 W. Va. 762.

**2. Sale Passes All Titles Held by State.** — *Smith v. Chapman*, 10 Gratt. (Va.) 445.

**3. State Holds Land as Security for Taxes.** — *Bennett v. Hunter*, 9 Wall. (U. S.) 326; *State v. Heman*, 70 Mo. 441; *Thevenin v. Slocum*, 16 Ohio 519.

**Property Struck Off to the County** does not thereby become subject to the control of the county commissioners. *Morrill v. Douglass*, 14 Kan. 307. See also *supra*, this title, *Tax Sales*.

**4. No Title Adverse to the Proprietor Can Run Against the State.** — *Staats v. Board*, 10 Gratt. (Va.) 400; *Hale v. Branscum*, 10 Gratt. (Va.) 418.

**5. Sale of Forfeited Lands.** — *Hodgdon v. Burleigh*, 4 Fed. Rep. 111; *Newby v. Brownlee*, 23 Fed. Rep. 320; *Miller v. Reynolds*, (Ark. 1890) 13 S. W. Rep. 597; *Bender v. Dungan*, 99 Mo. 126; *Buckley v. Osburn*, 8 Ohio 180; *Hannel v. Smith*, 15 Ohio 134; *Woodward v. Sloan*, 27 Ohio St. 592; *Lombard v. White*, 76 Wis. 445.

**6. Taxes to Be Paid Out of Proceeds of Sale.** — See *State v. Purcel*, 31 Ohio St. 352.

**Whenever Forfeited Land Has Been Sold for More than the Taxes Due**, the surplus should be placed to the credit of the former proprietor. *Thevenin v. Slocum*, 16 Ohio 519.

**7. Constitutionality of Statutes** — *United States*. — *Smith v. Maryland*, 6 Cranch (U. S.) 286; *Schenk v. Peay*, 1 Dill. (U. S.) 267; *U. S. v. Repentigny*, 5 Wall. (U. S.) 211; *Bennett v. Hunter*, 9 Wall. (U. S.) 326. *Contra*, *Fairfax v. Hunter*, 7 Cranch (U. S.) 603.

*Kentucky*. — *Fry v. Smith*, 2 Dana (Ky.) 38; *White v. White*, 2 Met. (Ky.) 185.

*Louisiana*. — *Morrison v. Larkin*, 26 La. Ann. 699.

*Massachusetts*. — *Wilbur v. Tobey*, 16 Pick. (Mass.) 177.

*Mississippi*. — *Martin v. Dix*, 52 Miss. 59; 24 Am. Rep. 661. *Contra*, *Griffin v. Mixon*, 38 Miss. 424.

*New Hampshire*. — *Montgomery v. Dorion*, 7 N. H. 475.

*Pennsylvania*. — *Rubeck v. Gardner*, 7 Watts (Pa.) 455.

*South Carolina*. — *Owens v. Owens*, 25 S. Car. 155.

*Tennessee*. — *Puckett v. State*, 1 Sneed (Tenn.) 355.

*Virginia*. — *Wild v. Serpell*, 10 Gratt. (Va.) 405; *Flanagan v. Grimmer*, 10 Gratt. (Va.) 421; *Usher v. Pride*, 15 Gratt. (Va.) 190; *Martin v. Snowden*, 18 Gratt. (Va.) 127. *Contra*, *Com. v. Hite*, 6 Leigh (Va.) 588, 29 Am. Dec. 226.

*West Virginia*. — *Yokum v. Fickey*, 37 W. Va. 762; *State v. Swann*, 46 W. Va. 128.

**8. Inquisition of Office Necessary.** — *Marshall*

not be construed to divest title without inquisition of office, except by express terms or necessary implication.<sup>1</sup> The statutes providing for the forfeiture of lands for nonpayment of taxes are in derogation of common law and must be construed strictly. Doubtful words and phrases must be interpreted in favor of the owner. All statutory provisions must be strictly observed.<sup>2</sup>

**5. Action to Test Validity of Forfeiture.** — An action to test the validity of a forfeiture may be maintained by any person interested therein against the county in which the lands are situated,<sup>3</sup> or, if they have been sold, against the purchaser.<sup>4</sup>

**6. Redemption.** — Usually a period of redemption is allowed the proprietor,<sup>5</sup> and special provision is sometimes made for persons under disability.<sup>6</sup> Sometimes a further period to redeem is given by subsequent statutes.<sup>7</sup>

**7. Waiver.** — Strict forfeiture may be waived, both by the state's extension of the time for payment by acknowledging the right of the owner to any balance which may remain in the treasury after sale, and by the continued levy and assessment of taxes after the title in the state is supposed to be complete by forfeiture.<sup>8</sup> But where the legislature extends the time for redemption the owner must avail himself of the extension in order to release the forfeiture.<sup>9</sup>

*v. McDaniel*, 12 Bush (Ky.) 378; *Harlan v. Seaton*, 18 B. Mon. (Ky.) 312; *Barbour v. Nelson*, 1 Litt. (Ky.) 60; *Robinson v. Huff*, 3 Litt. (Ky.) 38; *Hill v. Lund*, 13 Minn. 451; *Kinney v. Beverly*, 1 Hen. & M. (Va.) 531.

In the above cases *Nichols v. Nichols*, Plowd. 484, and *Dowtie's Case*, 3 Coke 10, are relied on as authority for the position that inquest of office is necessary to perfect the title of the state.

**1. Construction of Statutes Divesting Title Without Inquisition.** — *Fairfax v. Hunter*, 7 Cranch (U. S.) 603; *Bennett v. Hunter*, 9 Wall. (U. S.) 326; *Schenk v. Peay*, 1 Dill. (U. S.) 267; *Dickerson v. Acosta*, 15 Fla. 614; *Barbour v. Nelson*, 1 Litt. (Ky.) 60; *Martin v. Snowden*, 18 Gratt. (Va.) 100.

**2. Forfeiture Laws Strictly Construed.** — *United States.* — *Bennett v. Hunter*, 9 Wall. (U. S.) 326; *Clarke v. Strickland*, 2 Curt. (U. S.) 439; *Schenk v. Peay*, 1 Dill. (U. S.) 267; *Hodgdon v. Burleigh*, 4 Fed. Rep. 111.

*Arkansas.* — *Biscoe v. Coulter*, 18 Ark. 423; *Davis v. Hare*, 32 Ark. 386.

*Florida.* — *Dickerson v. Acosta*, 15 Fla. 614. *Illinois.* — *Garrett v. Doe*, 2 Ill. 335, 30 Am. Dec. 653; *Scott v. People*, 2 Ill. App. 642; *Smith v. People*, 3 Ill. App. 380; *Vetter v. People*, 3 Ill. App. 385.

*Indiana.* — *Dentler v. State*, 4 Blackf. (Ind.) 258; *Williams v. State*, 6 Blackf. (Ind.) 36.

*Louisiana.* — *Baton Rouge Oil Works*, 34 La. Ann. 255.

*Maine.* — *Moulton v. Blaisdell*, 24 Me. 283; *Flint v. Sawyer*, 30 Me. 226; *Hill v. Mason*, 38 Me. 461; *Adams v. Larabee*, 46 Me. 516; *Tolman v. Hobbs*, 68 Me. 317.

*Minnesota.* — *St. Anthony Falls Water Power Co. v. Greely*, 11 Minn. 321; *Baker v. Kelley*, 11 Minn. 480; *Stearns County v. Smith*, 25 Minn. 131; *Bonham v. Weymouth*, 39 Minn. 92; *West v. St. Paul, etc., R. Co.*, 40 Minn. 189.

*Mississippi.* — *Hopkins v. Sandidge*, 31 Miss. 668; *Mayson v. Banks*, 59 Miss. 447.

*North Carolina.* — *Doe v. Bryan*, 2 Hawks (9 N. Car.) 17.

*Ohio.* — *Hannel v. Smith*, 15 Ohio 134;

*Thevenin v. Slocum*, 16 Ohio 519; *Woodward v. Sloan*, 27 Ohio St. 592; *Magruder v. Esmay*, 35 Ohio St. 222.

*South Carolina.* — *State v. Thompson*, 18 S. Car. 538; *Owens v. Owens*, 25 S. Car. 155.

*Virginia.* — *Kinney v. Beverley*, 2 Hen. & M. (Va.) 318; *Martin v. Snowden*, 18 Gratt. (Va.) 100.

*West Virginia.* — *Kenna v. Quarrier*, 3 W. Va. 210; *Twiggs v. Chevallie*, 4 W. Va. 463.

And see generally the title STATUTES, vol. 26, p. 662 *et seq.*

**3. Action Against County to Test Validity of Forfeiture.** — *Willard v. Redwood County*, 22 Minn. 61.

**4. Action Against Purchaser.** — *Tolman v. Hobbs*, 68 Me. 316; *Chandler v. Wilson*, 77 Me. 76; *Ketchum v. Mullinix*, 92 Mo. 118.

**5. Proprietor May Redeem from Forfeiture.** — *Braxton v. Rich*, 47 Fed. Rep. 178; *Hall v. Hall*, 23 La. Ann. 135; *Morrison v. Larkin*, 26 La. Ann. 699; *Garner v. Anderson*, 27 La. Ann. 338; *Waggoner v. Wolf*, 28 W. Va. 820. See also *infra*, this title, *Redemption from Tax Sales*.

**6. Persons under Disability.** — *Barbour v. Nelson*, 1 Litt. (Ky.) 59; *Marshall v. McDaniel*, 12 Bush (Ky.) 378; *Hill v. Mason*, 38 Me. 461; *Reynolds v. Lieper*, 7 Ohio 17.

**7. Extension of Period of Redemption.** — *Clarke v. Strickland*, 2 Curt. (U. S.) 439; *Hodgdon v. Burleigh*, 4 Fed. Rep. 111; *Hodgdon v. Wight*, 36 Me. 326.

**8. Waiver of Forfeiture.** — *Clarke v. Strickland*, 2 Curt. (U. S.) 439; *Hodgdon v. Burleigh*, 4 Fed. Rep. 111; *State v. Heman*, 70 Mo. 441.

But see *Hodgdon v. Wight*, 36 Me. 326, wherein it is held that the assessment and collection of taxes subsequent to the forfeiture does not operate as a waiver of the forfeiture.

**Causing Lands to Be Listed for Taxation to an Occupier** is not a waiver by the state of its right to a forfeiture. *Crane v. Reeder*, 25 Mich. 303.

**9. Owner Must Avail Himself of Extension.** — *McMillan v. Robbins*, 5 Ohio 28; *Staats v. Board*, 10 Gratt. (Va.) 400; *Usher v. Pride*, 15 Gratt. (Va.) 190; *Smith v. Tharp*, 17 W. Va. 221,



On the other hand, the failure on the part of the state to comply with the conditions of a statute extending the time of redemption may be remedied by legislation.<sup>1</sup> A county board has no power to set aside a forfeiture when it has once accrued.<sup>2</sup> Neither the possession of the land nor the entry of it on the commissioners' books, after the land becomes under those acts absolutely forfeited, can divest the title of the state.<sup>3</sup>

#### **XVII. REDEMPTION FROM TAX SALES — 1. Definition and Distinction —**

*a.* **DEFINITION.** — Literally the word "redemption" signifies a buying back or repurchase; but in its legal sense it means the recovery or repurchase of property which has been sold or forfeited for nonpayment of a charge on it.<sup>4</sup>

*b.* **AS DISTINGUISHED FROM PURCHASE.** — It is often difficult to distinguish between a redemption and a purchase of the tax purchaser's interest. In general, a payment by the owner or by one acting or supposing himself to act in the owner's interest will be construed as a redemption, while it is regarded as a sale if the payment is made by a stranger.<sup>5</sup>

**2. Nature of Right —***a.* **IN GENERAL.** — In the absence of agreement the right of redemption does not exist except as permitted by statute,<sup>6</sup> and it can be exercised only as the statute prescribes.<sup>7</sup> The owner of the property may effect redemption by contract with the holder of the certificate.<sup>8</sup> But if he elects to take that course, he must know at his peril whether the one with whom he deals is the owner of the certificate,<sup>9</sup> and the agreement, if oral, must be certain and unambiguous in its terms and must be taken advantage of within a reasonable time.<sup>10</sup>

*b.* **CHARACTERISTICS OF RIGHT.** — The right of redemption is an interest in land, which may be conveyed or devised, and which descends in the same manner as other real property.<sup>11</sup> But it cannot be attached in an action at

1. *Hodgdon v. Wight*, 36 Me. 326.

2. *County Board Cannot Set Aside Forfeiture.* — *Madison County v. Smith*, 95 Ill. 328.

3. *Neither Possession of Land nor Entry on Commissioners' Books Waives Forfeiture.* — *Smith v. Tharp*, 17 W. Va. 221; *Yokum v. Fickey*, 37 W. Va. 762.

4. *Redemption Defined.* — See REDEEM — REDEMPTION, vol. 24, p. 214. See also Cent. Dict., "Redemption."

Redemption is a proceeding by which the owner of property which has been sold or appropriated to satisfy some lien or charge may reclaim it before his title is finally extinguished. *Evans v. Pike*, 118 U. S. 241.

5. *Distinguished from Purchase.* — *Gould v. Day*, 94 U. S. 405; *Miller v. Ziegler*, 31 Kan. 417; *Jones v. Miami County*, 30 Kan. 278; *Faler v. McRae*, 56 Miss. 227; *Coxe v. Sartwell*, 21 Pa. St. 480; *Coxe v. Wolcott*, 27 Pa. St. 154; *Jenks v. Wright*, 61 Pa. St. 410. But see *Arthurs v. King*, 95 Pa. St. 167.

6. *If One Buys a Tax Title Falsely Representing That He Is Acting in the Interest of the Owner*, there is a purchase, not a redemption, the one buying being under no agreement with the owner. *Culbertson v. Munson*, 104 Ind. 451.

7. *Redemption by Agent.* — Where one, supposing himself to be an agent, paid his own money and took an assignment of the certificate of purchase, it was held that a ratification would be presumed, and that the transaction was a redemption, not a purchase. *Houston v. Buer*, 117 Ill. 324.

8. *Whether Redemption or Purchase Is Question for Jury.* — *Coxe v. Wolcott*, 27 Pa. St. 154.

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9. *Redemption a Statutory Right.* — *United States.* — *Keely v. Sanders*, 99 U. S. 441.

*Alabama.* — *Boyd v. Holt*, 62 Ala. 296.

*Arkansas.* — *Smith v. Macon*, 20 Ark. 17; *Thompson v. Sherrill*, 51 Ark. 453.

*Illinois.* — *Gage v. Scales*, 100 Ill. 218.

*Iowa.* — *Pearson v. Robinson*, 44 Iowa 413; *McGee v. Bailey*, 86 Iowa 513.

*Michigan.* — *Dumphy v. Hilton*, 121 Mich. 315.

*Missouri.* — *State v. Evans*, 53 Mo. App. 663; *Gillespie v. Stone*, 70 Mo. 505.

*New York.* — *Levy v. Newman*, 130 N. Y. 11. *North Carolina.* — See also *McMillan v. Hogan*, 129 N. Car. 314.

*Pennsylvania.* — *Metz v. Hipps*, 96 Pa. St. 15.

7. *Compliance with Statute Necessary.* — *Keely v. Sanders*, 99 U. S. 441; *Craig v. Flanagan*, 21 Ark. 319; *Pope v. Macon*, 23 Ark. 644; *Thompson v. Sherrill*, 51 Ark. 453; *Hartman v. Reid*, (Colo. App. 1902) 68 Pac. Rep. 787; *Medland v. Walker*, 96 Iowa 175; *Mitchell v. Green*, 10 Met. (Mass.) 101; *Peavy v. Wood*, 71 Miss. 981.

8. *May Rest on Valid Agreement.* — *Swan v. Whaley*, 75 Iowa 623; *Gillespie v. Stone*, 70 Mo. 505; *State v. Evans*, 53 Mo. App. 663.

9. *Agreement Must Be with Real Holder of Tax Title.* — *Swan v. Whaley*, 75 Iowa 623.

10. *Agreement Must Be Taken Advantage of Within Reasonable Time.* — *Converse v. Brown*, 200 Ill. 166.

11. *Right of Redemption — Interest in Land.* — *Neil v. Rozier*, 49 Ark. 551; *Stout v. Merrill*, 35 Iowa 47; *O'Day v. Bowker*, 143 Mass. 59. But see *McConnell v. Swepston*, 66 Ark. 141.

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law.<sup>1</sup> Neither the issuing of a deed to the purchaser before the expiration of the statutory period<sup>2</sup> nor a judgment can deprive a person of the right.<sup>3</sup>

c. **NECESSITY FOR NOTICE.** — No notice of an intention to redeem is necessary,<sup>4</sup> nor is it requisite to give a notice that the land has been redeemed.<sup>5</sup>

3. **Construction of Redemption Statutes.** — It may be stated as a general rule that statutes conferring the right of redemption are construed liberally in favor of him whose land has been sold for taxes.<sup>6</sup>

4. **Effect of Redemption — a. IN GENERAL.** — The effect of redemption is to divest the outstanding legal title on the payment of what is due to the holder of such title.<sup>7</sup> After redemption a tax deed to the purchaser effects nothing,<sup>8</sup> and if the sale is confirmed the confirmation will be set aside.<sup>9</sup> If the purchaser had another title than the tax title he may assert it, notwithstanding the exercise of the right of redemption.<sup>10</sup>

b. **REDEMPTION BY OWNER.** — If the owner pays the redemption money, the effect is to restore the land and the title thereto precisely as they were held prior to the tax sale.<sup>11</sup>

c. **REDEMPTION BY GRANTEE OF OWNER.** — Where a grantee of the owner redeems from a tax sale, the land is not thereby freed from the lien of a mort.

1. **Right of Redemption Not Attachable at Law.** — *Adams v. Mills*, 126 Mass. 278. See generally the title **ATTACHMENT**, vol. 3, p. 209 *et seq.*

2. **Premature Deed Does Not Affect Right.** — *Reed v. Thompson*, 56 Iowa 455; *Swope v. Prior*, 58 Iowa 412; *Wood v. Coad*, (Iowa 1903) 94 N. W. Rep. 264.

3. **Judgment Cannot Take Right Away.** — *Anderson v. Batson*, (Ky.) 1896) 37 S. W. Rep. 84.

4. **Notice of Intention to Redeem Not Necessary.** — *Rich v. Palmer*, 7 Oregon 133.

5. **Notice that Land Has Been Redeemed Not Necessary.** — *Coxe v. Sartwell*, 21 Pa. St. 480.

6. **Redemption Statutes Construed in Favor of Owner — United States.** — *Schenk v. Peay*, 1 Dill. (U. S.) 267; *Corbett v. Nutt*, 18 Gratt. (Va.) 624, 10 Wall. (U. S.) 464; *Dubois v. Hepburn*, 10 Pet. (U. S.) 1; *Keely v. Sanders*, 99 U. S. 441.

*Alabama.* — *Boyd v. Holt*, 62 Ala. 296.

*California.* — *Cooper v. Shepardson*, 51 Cal. 298.

*Florida.* — *Henry v. Florida Land, etc., Co.*, 38 Fla. 269.

*Georgia.* — *Mixon v. Stanley*, 100 Ga. 372.

*Iowa.* — *Burton v. Hintrager*, 18 Iowa 348; *Penn v. Clemans*, 19 Iowa 372; *Rice v. Nelson*, 27 Iowa 148; *Corning Town Co. v. Davis*, 44 Iowa 622; *Foster v. Bowman*, 55 Iowa 237.

*Kansas.* — *Douglass v. McKeever*, 54 Kan. 767.

*Louisiana.* — *Winchester v. Cain*, 1 Rob. (La.) 421; *Alter v. Shepherd*, 27 La. Ann. 207.

*Maine.* — *Millett v. Mullen*, 95 Me. 400.

*Minnesota.* — *Merrill v. Dearing*, 32 Minn. 479.

*Mississippi.* — *Bonds v. Greer*, 56 Miss. 710.

*New Jersey.* — *State v. Woodbridge Tp.*, 47 N. J. L. 142.

*North Carolina.* — See also *McMillan v. Hogan*, 129 N. Car. 314.

*Ohio.* — *Masterson v. Beasley*, 3 Ohio 301.

*Oregon.* — *Rich v. Palmer*, 6 Oregon 339.

*Pennsylvania.* — *Patterson v. Brindle*, 9 Watts (Pa.) 98; *Gault's Appeal*, 33 Pa. St. 94.

*South Carolina.* — *Ebaugh v. Mullinax*, 40 S. Car. 244.

*South Dakota.* — *Buell v. Boylan*, 10 S. Dak. 180.

*West Virginia.* — *Wyatt v. Simpson*, 8 W. Va. 394; *Danser v. Johnson*, 25 W. Va. 385; *Poling v. Parsons*, 38 W. Va. 80; *Powell v. Smallwood*, 48 W. Va. 298; *Clark v. McClaugherty*, (W. Va. 1903) 44 S. E. Rep. 269.

*Wisconsin.* — *Jones v. Collins*, 16 Wis. 594; *Karr v. Washburn*, 56 Wis. 303.

See also the title **STATUTES**, vol. 26, p. 677.

7. **Redemption Divests Outstanding Legal Title.** — *Loudon v. Spellman*, (C. C. A.) 80 Fed. Rep. 592; *Jackson v. Neal*, 136 Ind. 173; *Lake v. Gray*, 35 Iowa 44; *Taylor v. Moise*, 52 La. Ann. 2016; *State v. Johnson*, 83 Minn. 496; *State v. Butler*, (Minn. 1903) 94 N. W. Rep. 688; *Phillips v. Zerbe Run, etc., Imp. Co.*, 25 Pa. St. 56. See also *Frazier v. Johnson*, 65 N. J. L. 673.

8. **Deed to Purchaser After Redemption Is Invalid.** — *Cooper v. Shepardson*, 51 Cal. 298; *Hartman v. Anderson*, 48 Iowa 309; *Hunt v. Seymour*, 76 Iowa 751; *Stokes v. Allen*, 15 S. Dak. 421. See also *Merrimon v. Lyman*, 124 N. Car. 434.

**Subsequent Assignment of Tax Certificate by Purchaser Does Not Affect Redemption.** — *Doud v. Blood*, 89 Iowa 237.

9. **Confirmation of Sale After Redemption Will Be Set Aside.** — *Adair v. Scott*, 53 Ark. 480.

10. **Purchaser May Assert Title Other than Tax Title After Redemption.** — *Terrell v. Gimmell*, 20 Iowa 393.

**Lien of Earlier Tax Sale Not Affected by Redemption from Later Sale.** — *Gray v. Coan*, 40 Iowa 327; *Chard v. Holt*, 136 N. Y. 30; *Cooper v. Bushley*, 72 Pa. St. 252.

11. **Redemption by Owner.** — *Thorington v. Montgomery*, 88 Ala. 548; *Winter v. Montgomery*, 101 Ala. 649; *Scott v. Brown*, 106 Ala. 604; *Ivey v. Griffin*, 94 Ga. 689; *Jackson v. Neal*, 136 Ind. 173; *State v. Johnson*, 83 Minn. 496; *State v. Butler*, (Minn. 1903) 94 N. W. Rep. 688; *Frazier v. Johnson*, 65 N. J. L. 673. See also *Clark v. McClaugherty*, (W. Va. 1903) 44 S. E. Rep. 269.

gagee whose mortgage was executed before the land was allowed to go to the tax sale and prior to the conveyance to the grantee.<sup>1</sup>

*d.* REDEMPTION BY MORTGAGEE OR OTHER LIENHOLDER. — Where a mortgagee or other lienholder redeems, he has a lien upon the land for the amount paid, with interest thereon, in like manner as if the sum had been included in his mortgage or lien.<sup>2</sup>

*e.* REDEMPTION BY OCCUPANT. — A redemption by the occupant of land gives him no lien for the moneys paid. His redemption is simply for the protection of such right of occupancy as he may have independently of the redemption. The mere fact of redemption gives to the occupant no interest in the land or no right of occupancy as against a deed given by the owner of the land to a third person.<sup>3</sup>

*f.* REDEMPTION BY ONE OF SEVERAL LIENHOLDERS. — Where land on which there are several liens is redeemed by one of the lienholders, the title to the land and the liens thereon stand in the same condition as though no sale for delinquent taxes had taken place.<sup>4</sup>

*g.* EFFECT OF PARAMOUNT TITLE. — It has been held that a redemption, in case there is a paramount title, will inure to the benefit of the true owner.<sup>5</sup>

**5. Who May Redeem** — *a.* IN GENERAL. — Any right which in law or equity amounts to an ownership in the land; any right of entry on it to its possession or enjoyment, or any part of it, which can be deemed an estate in it, makes the person the owner, so far as it is necessary to give him the right to redeem.<sup>6</sup>

**1. Redemption by Grantee of Owner.** — Shrigley *v.* Black, 66 Kan. 213.

**2. Redemption by Mortgagee or Other Lienholder.** — Ragor *v.* Lomax, 22 Ill. App. 628; Frazier *v.* Johnson, 65 N. J. L. 673; Eagle F. Ins. Co. *v.* Pell, 2 Edw. (N. Y.) 631; Burr *v.* Veeder, 3 Wend. (N. Y.) 412; Marshall *v.* Davies, 78 N. Y. 414; Sidenberg *v.* Ely, 90 N. Y. 257, 43 Am. Rep. 163.

**3. Occupant Acquires No Interest in Land Redeemed by Him.** — Willey *v.* Greenfield, 64 N. Y. App. Div. 220.

**4. Redemption by One of Several Lienholders.** — Ellsworth *v.* Low, 62 Iowa 178.

**5. Effect of Paramount Title.** — Levick *v.* Brothline, 74 Pa. St. 149.

**Redemption by Holder of Adverse Title inures to the benefit of the real owner.** Greene *v.* Williams, 58 Miss. 752; Jamison *v.* Thompson, 65 Miss. 516.

**6. Who May Redeem — General Rule** — *United States.* — Dubois *v.* Hepburn, 10 Pet. (U. S.) 1. *Arkansas.* — Woodward *v.* Campbell, 39 Ark. 580; Sanders *v.* Ellis, 42 Ark. 215; Seger *v.* Spurlock, 59 Ark. 147.

*Colorado.* — Hartman *v.* Reid, (Colo. App. 1902) 68 Pac. Rep. 787.

*Georgia.* — Mixon *v.* Stanley, 100 Ga. 372.

*Indiana.* — Gable *v.* Seiben, 137 Ind. 155.

*Iowa.* — Adams *v.* Beale, 19 Iowa 61; Rice *v.* Nelson, 27 Iowa 148; Cowdry *v.* Cuthbert, 71 Iowa 733; Paxton *v.* Ross, 89 Iowa 661; Swan *v.* Harvey, 117 Iowa 58; Busch *v.* Hall, (Iowa 1903) 93 N. W. Rep. 356.

*Massachusetts.* — Stone *v.* Stone, 163 Mass. 474.

*Minnesota.* — Kipp *v.* Fitch, 73 Minn. 65.

*New Jersey.* — Frazier *v.* Johnson, 65 N. J. L. 673.

*New York.* — People *v.* Palmer, 10 N. Y. App. Div. 395.

*West Virginia.* — Clark *v.* McClaugherty, (W. Va. 1903) 44 S. E. Rep. 269.

*Wisconsin.* — Campbell *v.* Packard, 61 Wis. 88.

**Purchaser of Right to Redeem Must Show Right to Be Valid.** — McGowan *v.* Smith, 68 Ark. 215.

**Purchaser at Subsequent Tax Sale.** — McBride *v.* Hoey, 1 P. & W. (Pa.) 54.

**Judgment or Other Lien Creditor of Owner.** — Schenk *v.* Peay, 1 Dill. (U. S.) 267; Bacon *v.* Curtiss, 2 Root (Conn.) 39; Swan *v.* Harvey, 117 Iowa 58; Basso *v.* Benker, 33 La. Ann. 432; W. 'e *v.* Drexel, 60 Minn. 164; Ayres *v.* Dozier, (Tenn. Ch. 1899) 52 S. W. Rep. 662; Van Landingham *v.* Buena Vista Imp. Co., 99 Va. 37.

**Guardian.** — Witt *v.* Mewhirter, 57 Iowa 545.

**Trustee or Custal Que Trust.** — Corbett *v.* Nutt, 10 Wall. (U. S.) 464; Elliott *v.* Shaffer, 30 W. Va. 347; Clark *v.* McClaugherty, (W. Va. 1903) 44 S. E. Rep. 269; Karr *v.* Washburn, 56 Wis. 303.

**Holder of Deed for an Unassigned Dower.** — Rice *v.* Nelson, 27 Iowa 148.

**Administrator or Executor of Deceased Owner.** — White *v.* Smith, 68 Iowa 313; Bowers *v.* Williams, 34 Miss. 324.

**Purchaser at Sheriff's Sale.** — Gable *v.* Seiben, 137 Ind. 155; Byington *v.* Walsh, 11 Iowa 27; Shearer *v.* Woodburn, 10 Pa. St. 511.

**Person Claiming under Executory Contract to Purchase.** — Woodward *v.* Campbell, 39 Ark. 580; Rogers *v.* Rutter, 11 Gray (Mass.) 410.

**Holder of Equitable Title.** — Cowdry *v.* Cuthbert, 71 Iowa 733; McKee *v.* Spiro, 107 Mo. 452; Plumb *v.* Robinson, 13 Ohio St. 298.

**One in Possession under Color of Title.** — Foster *v.* Bowman, 55 Iowa 237; Brown *v.* Day, 78 Pa. St. 129.

**Person to Whom Land Is Assessed.** — Townshend *v.* Shaffer, 30 W. Va. 176.

**Corporation Holding under Irregular Condemnation Proceedings.** — Garmoe *v.* Sturgeon, 65 Iowa 147.

**Wife May Redeem Her Interest in Husband's Land.** — Adams *v.* Beal, 19 Iowa 61; Rice *v.*

Conversely one having no interest in the property cannot redeem.<sup>1</sup>

The Title of the person seeking to redeem need not be shown to be flawless.<sup>2</sup>

*b. OWNERS.*—The owner is given the right to redeem.<sup>3</sup> The original owner may exercise this right although there is an outstanding tax title.<sup>4</sup> The right cannot be defeated by showing an outstanding paramount title,<sup>5</sup> and it is immaterial to whom the lands were assessed.<sup>6</sup>

*c. AGENT OF OWNER.*—Any payment by an agent or other person occupying a confidential relation to the owner will inure to the benefit of the owner, even though made with the agent's own money.<sup>7</sup>

The Authority of the Agent may be established by slight evidence,<sup>8</sup> and it has been held that such authority will be presumed.<sup>9</sup>

*c. PART OWNERS*—(1) *In General.*—A part owner of the land sold is entitled to redeem, but he must redeem the whole if it was properly included in one sale, and must pay the whole amount due.<sup>10</sup>

Nelson, 27 Iowa 148; Piffner v. Krapfel, 28 Iowa 27; Nevin v. Allen, (Ky. 1894) 26 S. W. Rep. 180. See also Tucker v. Tucker, 108 N. Car. 235.

*Husband May Redeem His Interest in Wife's Land.*—Dubois v. Hepburn, 10 Pet. (U. S.) 1.

*Remainderman May Redeem if Tenant for Life Fails to Do So.*—Tucker v. Tucker, 108 N. Car. 235.

*Lessee of Property Sold.*—Byington v. Rider, 9 Iowa 566.

*Holder under Title Bond of Donation Claim.*—Rich v. Palmer, 7 Oregon 133.

*Occupant May Redeem.*—Stokes v. Allen, 15 S. Dak. 421; Frazier v. Johnson, 65 N. J. L. 673; Campbell v. Packard, 61 Wis. 88.

*Surviving Minor May Redeem Entire Homestead.*—Seger v. Spurlock, 59 Ark. 147.

*Purchaser at Invalid Subsequent Sale Cannot Redeem.*—Byington v. Buckwalter, 7 Iowa 512, 74 Am. Dec. 279; Penn v. Clemans, 19 Iowa 372; Staples v. Mayer, 44 La. Ann. 628; McBride v. Hoey, 2 Watts (Pa.) 436; Trego v. Huzzard, 19 Pa. St. 441; Huzzard v. Trego, 35 Pa. St. 9; State v. Belcher, (W. Va. 1903) 44 S. E. Rep. 216.

*In Massachusetts the right to redeem is given to only the owner of the land and the mortgagee of record.* Silva v. Turner, 166 Mass. 407.

*1. One Without Interest Cannot Redeem.*—Wood v. Welpton, 29 Fed. Rep. 405; Hartman v. Reid, (Colo. App. 1902) 68 Pac. Rep. 787; Byington v. Buckwalter, 7 Iowa 512, 74 Am. Dec. 279; Penn v. Clemans, 19 Iowa 372; Lynn v. Morse, 76 Iowa 665; Whitaker v. Ashbey, 43 La. Ann. 117; Sheets v. Paine, 10 N. Dak. 103; McBride v. Hoey, 2 Watts (Pa.) 443; Eaton v. North, 25 Wis. 514; Cousins v. Allen, 28 Wis. 232; Rutledge v. Price County, 66 Wis. 35.

*If, However, the Purchaser Accepts the Money the redemption inures to the benefit of the owner and is complete and operative.* 2 Desty on Taxation, p. 880; Cooley on Taxation (2d ed.), p. 540; Burroughs on Taxation, § 125; Levick v. Brotherline, 74 Pa. St. 149.

*2. Title Need Not Be Absolute.*—Gable v. Seiben, 137 Ind. 155; Garmoe v. Sturgeon, 65 Iowa 147; Paxton v. Ross, 89 Iowa 661; Logan v. Logan, (Tex. Civ. App. 1903) 72 S. W. Rep. 416.

*3. Owner May Redeem.*—Rich v. Braxton, 158 U. S. 375; Hartman v. Reid, (Colo. App. 1902) 68 Pac. Rep. 787; Holcombe v. Beauchamp, 107

Ga. 711; Richardson v. Carner, 112 Ga. 103; Gable v. Seiben, 137 Ind. 155; Silva v. Turner, 166 Mass. 407; Clark v. Lancy, 178 Mass. 460; Frazier v. Johnson, 65 N. J. L. 673; Stokes v. Allen, 15 S. Dak. 421; Ayres v. Dozier, (Tenn. Ch. 1899) 52 S. W. Rep. 662; Logan v. Logan, (Tex. Civ. App. 1903) 72 S. W. Rep. 416; Yokum v. Fickey, 37 W. Va. 762.

*Redemption by Co-owner.*—The redemption of land by one tenant in common inures to the benefit of a cotenant. Donnor v. Quartermas, 90 Ala. 164, 24 Am. St. Rep. 778; Scott v. Brown, 106 Ala. 604.

*Where Property Has Been Sold at a Sheriff's Sale,* and the purchaser takes possession, and the owner acknowledges such possession and pays rent, he cannot redeem. Whitaker v. Ashbey, 43 La. Ann. 117.

*4. Original Owner May Redeem.*—Lancaster v. County Auditor, 2 Dill. (U. S.) 478.

*"Previous Owner."*—Where the statute provides that the "previous owner" may redeem, this means the person in whose name the land was returned delinquent. Dooly v. Christian, 96 Va. 534.

*5. Outstanding Paramount Title Does Not Defeat Redemption.*—Jamison v. Thompson, 65 Miss. 516.

*6. Owner May Redeem Lands Assessed to "Unknown."*—Lynam v. Anderson, 9 Neb. 367.

*7. Agent of Owner May Redeem.*—Hartman v. Reid, (Colo. App. 1902) 68 Pac. Rep. 787; Houston v. Buer, 117 Ill. 324; McBride v. Hoey, 2 Watts (Pa.) 443.

*Power of Attorney to Protect Interests of Owner Authorizes Redemption.*—Townshend v. Shaffer, 30 W. Va. 176.

*Power of Attorney to Sell Land Authorizes Redemption.*—McCord v. Bergautz, 7 Watts (Pa.) 487.

*Agent with Power to Take Care of Land May Redeem After Death of Principal.*—Patterson v. Brindle, 0 Watts (Pa.) 98.

*8. Authority of Agent Established by Slight Evidence.*—Trego v. Huzzard, 19 Pa. St. 441.

*9. Authority Presumed.*—State v. Harper, 26 Neb. 761.

*10. Part Owner May Redeem.*—United States v. O'Reilly v. Holt, 4 Woods (U. S.) 615.

*California.*—People v. McEwen, 23 Cal. 54; Quinn v. Kennev, 47 Cal. 147.

*Illinois.*—Busch v. Huston, 75 Ill. 343.

*Iowa.*—Curl v. Watson, 25 Iowa 35, 95 Am. Dec. 763.

(2) *Under Statutes.* — A part owner may be permitted by statute to redeem his share in the lands sold<sup>1</sup> although the right to redeem the whole interest is not abrogated thereby.<sup>2</sup>

(3) *Minors.* — Where minors are cotenants with adults, and the period for redemption for the latter has expired, the minors may redeem only their interest in the land. This right does not extend to the minors' adult cotenants.<sup>3</sup>

c. **MORTGAGEES** — (1) *In General.* — A mortgagee's title is sufficient to enable him to redeem the mortgaged premises.<sup>4</sup>

(2) *Purchaser at Foreclosure Sale.* — The right of a mortgagee to redeem the mortgaged land from a tax sale does not depend on his continuing to be a mortgagee, but such right is an interest in the land which, on foreclosure of the mortgage, passes to its purchaser at the foreclosure sale.<sup>5</sup>

6. **Period for Redemption** — a. **IN GENERAL.** — Statutes fix the time within which redemption may be made.<sup>6</sup>

*Maine.* — *Watkins v. Eaton*, 30 Me. 529, 50 Am. Dec. 637.

*Massachusetts.* — *Hurley v. Hurley*, 148 Mass. 444.

*Minnesota.* — *State v. Schaack*, 28 Minn. 358.

*Oregon.* — *Rich v. Palmer*, 6 Oregon 339.

*Pennsylvania.* — *Maul v. Rider*, 51 Pa. St. 377; *Alexander v. Ellis*, 123 Pa. St. 81. See also *Halsey v. Blood*, 29 Pa. St. 319.

*Rhode Island.* — *Chace v. Durfee*, 16 R. I. 248.

*West Virginia.* — *Smith v. Tharp*, 17 W. Va. 221.

1. **Statute May Permit Redemption of Co-owner's Interest.** — *People v. Treasurer*, 8 Mich. 14, 77 Am. Dec. 433. See also *Loomis v. Pingree*, 43 Me. 299. And see generally the statutes of the several states.

2. *Loomis v. Pingree*, 43 Me. 299.

3. **Where Minors Are Cotenants with Adults.** — *Jacobs v. Porter*, 34 Iowa 341; *Stout v. Merrill*, 35 Iowa 47; *Miller v. Porter*, 35 Iowa 166; *Wilson v. Sykes*, 67 Miss. 617.

4. **Mortgagees May Redeem** — *United States.* — *Dubois v. Hepburn*, 10 Pet. (U. S.) 1.

*Colorado.* — *Stratton v. People*, (Colo. App. 1902) 70 Pac. Rep. 157.

*Illinois.* — *Glos v. Evanston, etc., Bldg., etc., Assoc.*, 186 Ill. 586.

*Iowa.* — *Lloyd v. Bunce*, 41 Iowa 660; *Ellsworth v. Low*, 62 Iowa 178; *Griffith v. Utley*, 76 Iowa 292; *Wilkin v. Wilkin*, 91 Iowa 652; *Busch v. Hall*, (Iowa 1903) 93 N. W. Rep. 356.

*Kansas.* — *Leitzbach v. Jackman*, 28 Kan. 527.

*Louisiana.* — *Alter v. Shepherd*, 27 La. Ann. 207; *Montgomery v. Burton*, 31 La. Ann. 330; *Shannon v. Lane*, 33 La. Ann. 489; *Rondez v. Buras*, 34 La. Ann. 1245.

*Massachusetts.* — *Hawes v. Howland*, 136 Mass. 267; *Keith v. Wheeler*, 159 Mass. 161; *Silva v. Turner*, 166 Mass. 407; *McGauley v. Sullivan*, 174 Mass. 303; *Perry v. Lancy*, 179 Mass. 183.

*New Jersey.* — *Duncan v. Smith*, 31 N. J. L. 325; *Frazier v. Johnson*, 65 N. J. L. 673.

*New York.* — *People v. Edwards*, 56 Hun (N. Y.) 377; *Sidenberg v. Ely*, 90 N. Y. 257, 43 Am. Rep. 163; *People v. Palmer*, 10 N. Y. App. Div. 395; *Barker v. Miller*, 32 N. Y. App. Div. 364; *People v. Morgan*, 85 N. Y. App. Div. 292.

*Ohio.* — *Plumb v. Robinson*, 13 Ohio St. 304.

*South Dakota.* — *Buell v. Boylan*, 10 S. Dak. 180.

*West Virginia.* — *Elliott v. Shaffer*, 30 W. Va. 347.

**Mortgagees Need Not Hold Record Title at Time of Tax Sale.** — *Hawes v. Howland*, 136 Mass. 267.

**Mortgagees May Redeem Before Condition Broken.** — *Plumb v. Robinson*, 13 Ohio St. 304.

**Heir of Mortgagee May Redeem.** — *Burton v. Hintrager*, 18 Iowa 348.

**Administrator of Mortgagee May Redeem.** — *Ellsworth v. Low*, 62 Iowa 178.

**Assignee of Mortgagee May Redeem.** — *Faxon v. Wallace*, 98 Mass. 44; *McGauley v. Sullivan*, 174 Mass. 303; *Manhattan Trust Co. v. Richards Trust Co.*, 13 S. Dak. 377.

**Guardian as Mortgagee.** — Where a guardian holds a mortgage on the land in trust for his ward, either the guardian or the ward may redeem. *Witt v. Mewhirter*, 57 Iowa 545.

**Where a Mortgage Does Not Pass Title to the Mortgagee** such mortgagee cannot redeem. *Mixon v. Stanley*, 100 Ga. 372.

5. **Purchaser at Foreclosure Sale May Redeem.** — *McGauley v. Sullivan*, 174 Mass. 303; *Lancy v. Abington Sav. Bank*, 177 Mass. 431; *Downey v. Lancy*, 178 Mass. 465; *Barry v. Lancy*, 179 Mass. 112; *People v. Morgan*, 85 N. Y. App. Div. 292.

6. **Period for Redemption** — *Georgia.* — *Millen v. Howell*, 81 Ga. 653; *Wood v. Henry*, 107 Ga. 389.

*Illinois.* — *Eggleston v. Gage*, 33 Ill. App. 184; *Gage v. Parker*, 103 Ill. 528.

*Indiana.* — *Gable v. Seiben*, 137 Ind. 155.

*Iowa.* — *Pearson v. Robinson*, 44 Iowa 413; *Reed v. Thompson*, 56 Iowa 455; *Swope v. Prior*, 58 Iowa 412; *Long v. Smith*, 62 Iowa 329; *Stevens v. Murphy*, 91 Iowa 356, 51 Am. St. Rep. 348; *Cornoy v. Wetmore*, 92 Iowa 100; *Medland v. Walker*, 96 Iowa 175; *Smith v. Callanan*, 103 Iowa 218; *Funson v. Bradt*, 105 Iowa 471; *Chicago, etc., R. Co. v. Kelley*, 105 Iowa 106; *Busch v. Hall*, (Iowa 1903) 93 N. W. Rep. 356; *Wood v. Coad*, (Iowa 1903) 94 N. W. Rep. 264; *Bitzer v. Becke*, (Iowa 1903) 94 N. W. Rep. 287.

*Kansas.* — *Mathews v. Buckingham*, 22 Kan. 166; *Douglass v. McKeever*, 54 Kan. 767; *Douglass v. Lowell*, 55 Kan. 574.

*Kentucky.* — *Tug River Coal Co. v. Brewer*, 71 Ky. 402.

**b. WHEN PERIOD BEGINS TO RUN.**—As a general rule the time for redemption begins to run from the date of the sale, in the absence of an express statutory provision on the subject.<sup>1</sup>

**What Is Date of Sale.**—There is some conflict as to when the sale is completed so as to start the running of the redemption period. The rule generally adopted is that the real time is when the bid is accepted,<sup>2</sup> but there are many cases that hold that the sale is not complete until the execution and recording of the deed.<sup>3</sup>

**Time Fixed by Statute.**—Sometimes the date from which the time for redemption begins to run is fixed by statute.<sup>4</sup>

**c. COMPUTATION OF TIME.**—In computing the period for redemption the day of sale is excluded,<sup>5</sup> and where the last day falls on Sunday the right to redeem extends through the next day.<sup>6</sup>

**d. EXTENSION OF PERIOD FOR REDEMPTION**—(1) *In General.*—While, as a general rule, there can be no redemption after the expiration of the period limited by statute,<sup>7</sup> the time may be extended in certain instances.

*Louisiana.*—Winchester v. Cain, 1 Rob. (La.) 421.

*Massachusetts.*—Keith v. Wheeler, 159 Mass. 161; Widensum v. Bender, 172 Mass. 436; Perry v. Lancy, 179 Mass. 183.

*Michigan.*—Muirhead v. Sands, 111 Mich. 487.

*Minnesota.*—Kenaston v. Great Northern R. Co., 59 Minn. 35; Cole v. Lamm, 81 Minn. 463; Sterling v. Urquhart, 88 Minn. 495.

*Mississippi.*—Heard v. Walton, 39 Miss. 388.

*Missouri.*—McKee v. Spiro, 107 Mo. 452.

*Nebraska.*—Iodence v. Peters, 64 Neb. 425; Logan County v. Carnahan, (Neb. 1903) 95 N. W. Rep. 812.

*New Jersey.*—State v. Woodbridge Tp., 47 N. J. L. 142; Frazier v. Johnson, 65 N. J. L. 673.

*New York.*—Chard v. Holt, 136 N. Y. 30.

*North Carolina.*—Tiddy v. Graves, 126 N. Car. 620.

*Pennsylvania.*—McCormack v. Russell, 25 Pa. St. 185; Gault's Appeal, 33 Pa. St. 94.

*Texas.*—San Antonio v. Berry, 92 Tex. 319; Berry v. San Antonio, (Tex. Civ. App. 1898) 46 S. W. Rep. 273.

*Washington.*—State v. Cranney, 30 Wash. 594.

*Wisconsin.*—Lander v. Bromley, 79 Wis. 372.

And see generally the statutes of the several states.

**1. When Period Begins to Run in General.**—*Alabama.*—Jones v. Randle, 68 Ala. 259; Lassitter v. Lee, 68 Ala. 287; Pugh v. Youngblood, 69 Ala. 296.

*Georgia.*—Boyd v. Wilson, 86 Ga. 379.

*Illinois.*—Coombs v. Steere, 8 Ill. App. 147.

*Iowa.*—Eldridge v. Kuehl, 27 Iowa 160; Henderson v. Oliver, 28 Iowa 20; McCready v. Sexton, 29 Iowa 356, 4 Am. Rep. 214; Thomas v. Stickle, 32 Iowa 71; Stevens v. Cassady, 59 Iowa 113.

*Kansas.*—Doudna v. Harlan, 45 Kan. 484.

*Louisiana.*—Taylor v. Moise, 52 La. Ann. 2016.

*Massachusetts.*—Clark v. Lancy, 178 Mass. 460.

*Minnesota.*—Kipp v. Fitch, 73 Minn. 65.

*New York.*—People v. Cady, 105 N. Y. 299.

*Pennsylvania.*—Robb v. Bowen, 9 Pa. St. 71; Cromelien v. Brink, 29 Pa. St. 522; Johnston v. Jackson, 70 Pa. St. 164; Rockland, etc., Coal, etc., Co. v. McCalmont, 72 Pa. St. 221.

*Washington.*—State v. Maple, 16 Wash. 430.

**2. Period Begins When Bid Is Accepted.**—Boyd v. Wilson, 86 Ga. 379; Coombs v. Steere, 8 Ill. App. 147; Stevens v. Cassady, 59 Iowa 113; Doudna v. Harlan, 45 Kan. 484; People v. Cady, 105 N. Y. 299; Cromelien v. Brink, 29 Pa. St. 522; Rockland, etc., Coal, etc., Co. v. McCalmont, 72 Pa. St. 221.

**3. Period Begins When Deed Is Executed and Recorded.**—Jones v. Randle, 68 Ala. 259; Lassitter v. Lee, 68 Ala. 287; Pugh v. Youngblood, 69 Ala. 296; Eldridge v. Kuehl, 27 Iowa 160; Henderson v. Oliver, 28 Iowa 20; McCready v. Sexton, 29 Iowa 356, 4 Am. Rep. 214; Thomas v. Stickle, 32 Iowa 71; Johnston v. Jackson, 70 Pa. St. 164.

**4. Period Begins When Properly Acknowledged Deed Is Filed.**—Berthold v. Hoskins, 38 Fed. Rep. 772; West v. Duncan, 42 Fed. Rep. 430. And see generally the statutes of the several states.

**5. Day of Sale Not Included in Computation of Time.**—Hare v. Carnall, 39 Ark. 196; Cable v. Coates, 36 Kan. 191; Richards v. Thompson, 43 Kan. 209. See title TIME, COMPUTATION OF. See also Gladwin v. French, 112 Mass. 186.

**6. Sunday Not Included in Computation of Time.**—Gage v. Davis, 129 Ill. 236, 16 Am. St. Rep. 260. See also Hill v. Timmermeyer, 36 Kan. 252.

**7. Redemption Must Be Within Statutory Period.**—*Arkansas.*—Smith v. Macon, 20 Ark. 17; Thweatt v. Black, 30 Ark. 732.

*Georgia.*—Montford v. Allen, 111 Ga. 18.

*Iowa.*—Spengin v. Forry, 37 Iowa 242; Pearson v. Robinson, 44 Iowa 413; Scofield v. McDowell, 47 Iowa 129; Long v. Smith, 62 Iowa 329; Meredith v. Phelps, 65 Iowa 118; Bitzer v. Becke, (Iowa 1902) 89 N. W. Rep. 193.

*Louisiana.*—Blood v. Negrotto, 47 La. Ann. 1132.

*Michigan.*—Paine v. Boynton, 124 Mich. 194.

*Mississippi.*—Le Blanc v. Illinois Cent. R. Co., 72 Miss. 669.

*North Carolina.*—McMillan v. Hogan, 129 N. Car. 314.

(2) *By Statute.* — Any statutory extension of the period for redemption vests a substantial property right in the redemptioner, and is as much a portion of the redemption period as the original time.<sup>1</sup>

(3) *Court May Extend Time on Equitable Grounds.* — The court may extend the statutory period within which redemption is to be made if the circumstances render it equitable,<sup>2</sup> but if the redemptioner does not redeem within the proper time, but depends on an unauthorized extension by the court, he loses his right.<sup>3</sup>

(4) *Waiver of Requirements as to Time.* — The purchaser, by express agreement,<sup>4</sup> or by the receipt of the money after the period allowed for redemption has expired, may waive a strict compliance with the requirements as to time. Payment thus accepted by him will constitute a perfect redemption.<sup>5</sup>

A Public Officer, however, cannot waive the purchaser's right, and acceptance by him will not work a redemption.<sup>6</sup>

*e. PERSONS UNDER DISABILITY* — (1) *In General.* — The same strict rules apply to persons under disability as to others, unless the statute otherwise provides.<sup>7</sup>

(2) *Statutory Provisions.* — Statutes usually provide for an extension of time in favor of minors, married women, idiots, insane persons, and others under disabilities.<sup>8</sup>

(3) *Nature of Title.* — An infant, to bring himself within the statute, must have been the owner of the property at the time of the tax sale.<sup>9</sup> So must a

*Wisconsin.* — McIntosh v. Marathon Land Co., 110 Wis. 296.

*Period Expires Even When No Deed Has Been Executed to Purchaser.* — Pearson v. Robinson, 44 Iowa 413; Long v. Smith, 62 Iowa 329; Ellsworth v. Low, 62 Iowa 178.

1. *Time May Be Extended by Statute.* — State v. Halden, 62 Minn. 246; Cole v. Lamm, 81 Minn. 463.

2. *Court May Extend Time on Equitable Grounds.* — Shoemaker v. Lacey, 38 Iowa 277; Long v. Smith, 62 Iowa 329; Teabout v. Jaffray, 74 Iowa 28, 7 Am. St. Rep. 466; Bitzer v. Becke, (Iowa 1902) 89 N. W. Rep. 193; Clark v. Lancy, 178 Mass. 460; Widersum v. Bender, 172 Mass. 436; Perry v. Lancy, 179 Mass. 183; Barry v. Lancy, 179 Mass. 112; Harney v. Charles, 45 Mo. 157; Manhattan Trust Co. v. Richards Trust Co., 13 S. Dak. 377; MacKay v. Smith, 27 Wash. 442.

3. Bitzer v. Becke, (Iowa 1902) 89 N. W. Rep. 193.

4. *Purchaser May Waive Requirements as to Time.* — Shoemaker v. Porter, 41 Iowa 197; Rogers v. Johnson, 70 Pa. St. 224.

A Waiver May Be Conditional, but the condition must be strictly performed in order to entitle the redemptioner to the benefit of it. McCulloch v. Dodge, 6 R. I. 346.

5. *Acceptance of Redemption Money Waives Requirements as to Time.* — Blackwell on Tax Titles (5th ed.), vol. 2, § 716; Thweatt v. Black, 30 Ark. 732; Henry v. Florida Land, etc., Co., 38 Fla. 269; Byington v. Hampton, 13 Iowa 23; Cox v. Wolcott, 27 Pa. St. 154; Philadelphia v. Miller, 49 Pa. St. 440.

6. *Public Officer Cannot Waive Purchaser's Right.* — Thornton v. Smith, 36 Ark. 508; People v. Hegeman, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 567.

7. *General Rule as to Persons under Disability.* — Dumphrey v. Hilton, 121 Mich. 315; Smith v. Macon, 20 Ark. 17; Thompson v. Sherrill, 51 Ark. 453; Little Rock Junction R. Co. v. Burke,

53 Ark. 430; Dawson v. Dawson, 106 Ga. 45; Hood v. Mathers, 2 A. K. Marsh. (Ky.) 558; Levy v. Newman, 130 N. Y. 11; McMillan v. Hogan, 129 N. Car. 314; McCormack v. Russell, 25 Pa. St. 185.

8. *Time Extended in Favor of Persons under Disability* — *United States.* — Harding v. Vaughn, 36 Fed. Rep. 742; Loudon v. Spellman, (C. C. A.) 80 Fed. Rep. 592; Rich v. Braxton, 158 U. S. 375.

*Arkansas.* — Carroll v. Johnson, 41 Ark. 59; Neil v. Rodier, 49 Ark. 551; Thompson v. Sherrill, 51 Ark. 453; Little Rock Junction R. Co. v. Burke, 53 Ark. 430; Burgett v. McCray, 61 Ark. 456.

*Indiana.* — Ethel v. Batchelder, 90 Ind. 520; Wagner v. Stewart, 143 Ind. 78; Ristine v. Johnson, 143 Ind. 44.

*Iowa.* — Myers v. Copeland, 20 Iowa 22; Jacobs v. Porter, 34 Iowa 341; Stout v. Merrill, 35 Iowa 47; McGee v. Bailey, 86 Iowa 513; Hall v. Cardell, 111 Iowa 206; Hawley v. Griffin, (Iowa 1900) 82 N. W. Rep. 905; Bemis v. Plato, (Iowa 1903) 93 N. W. Rep. 83.

*Mississippi.* — Price v. Ferguson, 66 Miss. 404. *New York.* — Levy v. Newman, 50 Hun (N. Y.) 438.

*North Carolina.* — McMillan v. Hogan, 129 N. Car. 314.

*West Virginia.* — Powell v. Smallwood, 48 W. Va. 298.

*Wisconsin.* — Dayton v. Relf, 34 Wis. 86; Karr v. Washburn, 56 Wis. 303; Tucker v. Whittlesey, 74 Wis. 74.

9. *Infant Must Have Been Owner at Time of Sale.* — Black on Tax Titles (2d ed.), § 374; Burton v. Hintrager, 18 Iowa 348; Tallman v. Cooke, 39 Iowa 402; Stevens v. Cassady, 59 Iowa 113; Pearsons v. American Invest. Co., 83 Iowa 358; Hall v. Cardell, 111 Iowa 206; Doudna v. Harlan, 45 Kan. 484; Kulp v. Kulp, 51 Kan. 341; McMillan v. Hogan, 129 N. Car. 314; McCormack v. Russell, 25 Pa. St. 185.

married woman.<sup>1</sup> One claiming under such a statute must show himself to be within its terms.<sup>2</sup>

(4) *Effect of Extension.*—Statutes giving a person under disability a longer time to redeem merely extend the period; they do not otherwise affect the right of the former owner,<sup>3</sup> nor suspend the right of the purchaser to take out his deed at the time allowed by statute. His title is at most subject to be defeated by redemption after the removal of disability.<sup>4</sup> Such statutes grant an additional privilege, and do not take away the right to redeem during the continuance of the disability.<sup>5</sup>

(5) *What May Be Redeemed.*—As the right to redeem after the usual period has expired rests on statutes, only such interests as are included therein may be redeemed.<sup>6</sup>

(6) *Effect of Subsequent Statute.*—The extension of the time for redemption given to minors cannot be divested by a statute passed after forfeiture.<sup>7</sup>

**7. Payment and Tender**—*a. IN GENERAL.*—Payment and tender are alike effectual to revest title in the former owner.<sup>8</sup> If payment or tender is properly performed, it makes no difference whether or not it is entered correctly on the record, or whether the officer issues a proper certificate.<sup>9</sup> Tender must be of the whole amount,<sup>10</sup> and must be continuous,<sup>11</sup> unconditional,<sup>12</sup> and made in good faith. If made collusively, on an agreement that the money shall be refunded, it has no effect.<sup>13</sup> Where the owner has until a certain time to redeem, a tender on that day by the owner or agent is sufficient.<sup>14</sup> A mere offer to redeem without tender is generally inoperative.<sup>15</sup>

**1. Married Woman Must Have Owned Land at Time of Sale.**—See *Finch v. Brown*, 8 Ill. 488, which holds that the *feme covert* must own the land sold at the time of sale. If it belonged to her husband at that time, her contingent right of dower does not entitle her to redeem.

**2. Redemptioner Must Show Himself Within Terms of Statute.**—*Harding v. Vaughn*, 36 Fed. Rep. 742.

**3. Effect of Extension.**—*Dayton v. Relf*, 34 Wis. 86.

**4. Right of Purchaser to Deed Not Suspended.**—*Ethel v. Batchelder*, 90 Ind. 520; *Powell v. Smallwood*, 48 W. Va. 298.

**5. Redemption May Be Made During Disability.**—*Powell v. Smallwood*, 48 W. Va. 298; *Witt v. Mewhirter*, 57 Iowa 545; *Strang v. Burris*, 61 Iowa 375; *Goodrich v. Florer*, 27 Minn. 97. Thus a married woman, together with her husband, may institute proceedings to redeem during the continuance of the coverture. *Plumb v. Robinson*, 13 Ohio St. 298.

**6. Interest That May Be Redeemed.**—*Adams v. Beale*, 19 Iowa 61; *Jacobs v. Porter*, 34 Iowa 341; *Stout v. Merrill*, 35 Iowa 47; *Williamson v. Russell*, 18 W. Va. 612.

**7. Extension Cannot Be Divested by Statute Subsequent to Forfeiture.**—*Moore v. Irby*, 69 Ark. 102.

**8. Payment and Tender Effect Redemption.**—*Arkansas.*—*Bender v. Bean*, 52 Ark. 132. *Connecticut.*—*Gen. Stat. Conn.* (1888), § 3893.

*Florida.*—*Soutter v. Miller*, 15 Fla. 625. *Indiana.*—*Goddard v. Renner*, 57 Ind. 532; *Taggart v. McKinsey*, 85 Ind. 392; *Jackson v. Neal*, 136 Ind. 173.

*Iowa.*—*Corning Town Co. v. Davis*, 44 Iowa 622; *Heaton v. Knight*, 63 Iowa 686; *Sickles v. Union Invest. Co.*, 100 Iowa 450.

*Kansas.*—*State v. Haughey*, 5 Kan. 625;

*Mathews v. Buckingham*, 22 Kan. 166; *Olin v. Rohrbaugh*, 28 Kan. 412; *Smith v. Frankfort*, 2 Kan. App. 411.

*Louisiana.*—*Brooks v. Hardwick*, 5 La. Ann. 675; *Basso v. Benker*, 33 La. Ann. 432; *Spanier v. De Voe*, 52 La. Ann. 581.

*Maine.*—*Loomis v. Pingree*, 43 Me. 299.

*New Jersey.*—*State v. Woodbridge Tp.*, 47 N. J. L. 142.

*Pennsylvania.*—*Coxe v. Sartwell*, 21 Pa. St. 480; *Broughton v. Journeay*, 51 Pa. St. 31.

*Texas.*—*Burns v. Ledbetter*, 54 Tex. 374.

*West Virginia.*—*Sperry v. Gibson*, 3 W. Va. 522; *Wyatt v. Simpson*, 8 W. Va. 394.

**9. Payment or Tender Not Affected by Improper Entry or Certificate.**—*Cooper v. Shepardson*, 51 Cal. 298; *Chapin v. Curtenius*, 15 Ill. 427; *Fenton v. Way*, 40 Iowa 196; *Corbin v. Stewart*, 44 Iowa 543; *Burke v. Cutler*, 78 Iowa 299; *Wyatt v. Simpson*, 8 W. Va. 394.

**10. Tender Must Be of Whole Amount.**—*Lamar v. Sheppard*, 84 Ga. 561; *Holcombe v. Beauchamp*, 101 Ga. 711; *Nicodemus v. Young*, 90 Iowa 423; *Fitts v. Huff*, 63 Miss. 594; *Sanford v. Moore*, 58 Neb. 654; *State v. Carson City Sav. Bank*, 17 Nev. 146. As to the requisites of a tender in general, see the title TENDER.

**11. Tender Must Be Continuous.**—*Hamlett v. Tallman*, 30 Ark. 505.

**12. Tender Must Be Unconditional.**—*Bacon v. Conn. Smed. & M. Ch. (Miss.)* 348; *Halsey v. Blood*, 29 Pa. St. 319.

**13. Tender Must Be Made in Good Faith.**—*Woodbury v. Shackelford*, 19 Wis. 55.

**14. Tender May Be Made on Last Day for Redemption.**—*Thomas v. Nichols*, 127 N. Car. 319.

**15. Offer to Redeem Without Tender Inoperative.**—*Read v. Dingess*, (C. C. A.) 60 Fed. Rep. 21; *Shoemaker v. Porter*, 41 Iowa 197; *Poin-dexter v. Doolittle*, 54 Iowa 52.



**b. REFUSAL TO ACCEPT.** — If a tender of payment is refused solely on the ground that there is no right to redeem, the sufficiency of the tender not being questioned, it has been held to work a redemption.<sup>1</sup> But where the redemptioner, on the refusal to accept the money, withdraws his money and leaves the purchaser in possession for several years, the right of redemption is thereby abandoned.<sup>2</sup> If a mortgagee makes tender, and the purchaser refuses to accept, the mortgagee may enforce the mortgage.<sup>3</sup>

**c. EFFECT OF TENDER.** — Tender relieves the owner from all liability for costs and subsequent charges,<sup>4</sup> and the purchaser in possession is bound for rents accruing after that date.<sup>5</sup> A deed made after tender or payment is void.<sup>6</sup>

**d. EFFECT OF ERRONEOUSLY MARKING LAND "REDEEMED."** — The marking of the land by mistake as "redeemed" avails nothing to the owner who has not paid or tendered the redemption money.<sup>7</sup>

**e. KIND OF MONEY REQUIRED.** — Sometimes statutes designate the kind of money required for tender or payment.<sup>8</sup> If the public officer whose duty it is to receive payment disregards the statutory requirement, he may be compelled to pay over lawful money to the holder of the tax title redeemed.<sup>9</sup> Payment by check may be good, if not objected to.<sup>10</sup>

**f. TO WHOM MADE.** — The statutes provide, frequently, that tender or payment must be made to the person possessing the tax title at the time of redemption;<sup>11</sup> for example, to the purchaser or his agent,<sup>12</sup> or to the purchaser's assignee.<sup>13</sup> An ineffectual assignment does not make it necessary to pay or tender to the assignee.<sup>14</sup> The statutes provide, sometimes, for payment or tender to some specified public officer;<sup>15</sup> this being done, the redemption is effectual even though such officer withholds the money.<sup>16</sup> When the statutes stipulate the person to whom payment or tender may be made, they do not, as a general rule, preclude payment or tender to any other person entitled to receive it.<sup>17</sup>

1. Refusal to Accept on Ground that No Right to Redeem Exists. — *Bender v. Bean*, 52 Ark. 132.

2. Abandonment of Right of Redemption. — *Glos v. Evanston, etc., Bldg., etc., Assoc.*, 86 Ill. App. 651; *Cooper v. Cook*, 108 Iowa 301.

3. Mortgagee May Enforce Mortgage if Tender Is Refused. — *Montgomery v. Burton*, 31 La. Ann. 330; *Taylor v. Moise*, 52 La. Ann. 2016.

4. Tender Relieves Owner from Costs and Subsequent Charges. — *Cole v. Moore*, 34 Ark. 582; *Russell v. Hudson*, 28 Kan. 99.

5. Rents Subsequent to Tender. — *Seger v. Spurlock*, 59 Ark. 147.

6. Deed Made After Tender or Payment Is Void. — *Gage v. Bailey*, 115 Ill. 646; *Fenton v. Way*, 40 Iowa 196; *Mathews v. Buckingham*, 22 Kan. 166; *Olin v. Rohrbaugh*, 28 Kan. 413; *Leitzbach v. Jackman*, 28 Kan. 524.

7. Erroneously Marking Land "Redeemed" No Aid to Owner. — *State v. School, etc., Lands*, 13 Wis. 409.

8. Kind of Money Required. — "Lawful money of the United States" is the medium usually specified. See the statutes of the several states.

In *Iowa* a county cannot redeem in its own warrants. *Reeves v. Bremer County*, 73 Iowa 165.

9. Public Officer Must Pay Over Lawful Money. — *Murphy v. Smith*, 49 Ark. 37.

10. Payment May Be by Check. — *Townshend v. Shaffer*, 30 W. Va. 176. As to payments generally by check, see the title PAYMENT, vol. 22, p. 569 *et seq.*

11. Thweatt v. Black, 30 Ark. 732; *Banks v. Bingham*, 3 Yerg. (Tenn.) 312.

12. Tender May Be Made to Purchaser or Agent — *Keith v. Freeman*, 43 Ark. 296; *Danser v. Johnson*, 25 W. Va. 380.

Tender to Original Purchaser After Assignment of His Interest. — *Wheelwright v. Lemore*, 56 Fed. Rep. 163.

13. Tender to Purchaser's Assignee. — *Thweatt v. Black*, 30 Ark. 732; *Taylor v. Courtney*, 15 Neb. 190.

Where the Redemptioner Has No Knowledge of the Assignment tender to the purchaser is sufficient. *Douglass v. McKeever*, 54 Kan. 767; *Faxon v. Wallace*, 101 Mass. 444.

14. *Rice v. Bates*, 68 Iowa 393; *Faxon v. Wallace*, 98 Mass. 44, 101 Mass. 444.

15. Payment or Tender May Be Made to Public Officer. — *Clark v. Lancy*, 178 Mass. 460; *Barry v. Lancy*, 179 Mass. 112.

If Redemption Money Is Sent to the Proper Officer in the name of the person to whom the land is assessed and by one purporting to be her agent, the proof of ownership is sufficient to justify the officer in issuing a redemption certificate. *State v. Cranney*, 30 Wash. 594.

Payment to an Officer Not Authorized to Receive It does not affect redemption. *Everson v. Woodbury County*, (Iowa 1902) 91 N. W. Rep. 900.

16. Redemption Need Not Show that Officer Paid Purchaser. — *Corbett v. Nutt*, 18 Gratt. (Va.) 624, 10 Wall. (U. S.) 464.

17. Statute Does Not Preclude Payment to Persons Not Specified. — *State v. Woodbridge Tp.*, 47 N. J. L. 142, *overruling* 46 N. J. L. 109; *Broughton v. Journey*, 51 Pa. St. 31.

g. WHEN DISPENSED WITH — (1) *Conduct of Purchaser.* — A tender of the amount necessary to redeem may be excused by the conduct of the purchaser, as where he waives the requirement,<sup>1</sup> refuses to receive the money,<sup>2</sup> evades the redemptioner so that a tender cannot be made,<sup>3</sup> or prevents payment or tender within the time by fraud or deception.<sup>4</sup>

(2) *When Amount Cannot Be Discovered.* — Tender and payment may be excused if the amount cannot be discovered.<sup>5</sup>

h. MISTAKE OR FRAUD OF OFFICER. — One seeking to redeem may rely on information given him as to time and amount by the proper officer in response to his inquiries.<sup>6</sup> Thus, if the officer states that no taxes are due or if the amount named be too small, the redemption is valid if the sum given be actually paid or tendered,<sup>7</sup> but not otherwise.<sup>8</sup> If the owner be led by the officer to believe that there has been but one tax sale, and redemption is made from that, the owner may redeem from an undisclosed sale, on discovering the fact, even though the statutory time has elapsed.<sup>9</sup> The inquiry made of the officer must, however, be specific,<sup>10</sup> and refer to matters which it is his duty to disclose.<sup>11</sup>

i. EQUITABLE REDEMPTION. — Payment may be made otherwise than by the passing of money from the owner to the purchaser. If the latter is indebted to the former, the money due on the debt may be applied toward the redemption price, and if as great, such application may constitute an equitable redemption.<sup>12</sup>

8. Amount — a. IN GENERAL. — The amount required for redemption is usually the sum of the purchaser's bid, with a specified interest by way of penalty, together with costs and subsequent taxes paid by the purchaser, with interest.<sup>13</sup> The tax to be paid by the redemptioner includes state, county,

But in Oregon payment must be made to the sheriff, not to the certificate holder. *Rich v. Palmer*, 7 Oregon 133.

1. *Purchaser May Waive Tender and Payment.* — *Bright v. Boyd*, 1 Story (U. S.) 478.

2. *Refusal of Purchaser to Receive Amount.* — *Carden v. Spilman*, 1 Shannon Tenn. Cas. 10; *Rogers v. Tindall*, 99 Tenn. 356; *Pearson v. Douglass*, 1 Baxt. (Tenn.) 151; *Ayres v. Dozier*, (Tenn. Ch. 1899) 52 S. W. Rep. 662; *Poling v. Parsons*, 38 W. Va. 80.

3. *Evading Redemptioner.* — *Perry v. Lancy*, 179 Mass. 183.

4. *Fraud of Purchaser Excuses Payment and Tender.* — *Converse v. Rankin*, 115 Ill. 398; *Laing v. McKee*, 13 Mich. 124, 87 Am. Dec. 738; *Koon v. Snodgrass*, 18 W. Va. 320.

5. *Inability to Discover Amount Excuses Tender and Payment.* — *Brooks v. Hardwick*, 5 La. Ann. 675; *Miller v. Montagne*, 32 La. Ann. 1290; *Wederstrandt v. Freyhan*, 34 La. Ann. 705.

6. *Redemptioner May Rely on Statements of Officer.* — *Corning Town Co. v. Davis*, 44 Iowa 622; *Hintrager v. Mahoney*, 78 Iowa 537; *Gage v. Scales*, 100 Ill. 218; *Price v. Mott*, 52 Pa. St. 315; *Mather v. Hutchinson*, 25 Wis. 27. See also *Harmon v. Steed*, 49 Fed. Rep. 779.

7. *Fraud or Misconduct of Officer Does Not Prejudice Redemptioner.* — *Martin v. Barbour*, 34 Fed. Rep. 701; *Kinsworthy v. Austin*, 23 Ark. 375.

8. *Amount Named by Officer Must Be Tendered.* — *Gage v. Scales*, 100 Ill. 218; *Converse v. Rankin*, 115 Ill. 398; *Noble v. Bullis*, 23 Iowa 559, 92 Am. Dec. 442; *Corning Town Co. v. Davis*, 44 Iowa 622; *Iowa Falls, etc., R. Co. v. Storm Lake Bank*, 55 Iowa 606; *Hintrager v. Mahoney*, 78 Iowa 537; *Forrest v. Henry*, 33 Minn. 434; *People v. Registrar of Arrears*, 114

N. Y. 19; *Randall v. Dailey*, 66 Wis. 285; *Gould v. Sullivan*, 84 Wis. 659, 36 Am. St. Rep. 955. But see *Van Benthuyzen v. Sawyer*, 36 N. Y. 150.

8. *Misstatement of Officer No Excuse for Failure to Redeem.* — *Ellsworth v. Cordrey*, 63 Iowa 675.

9. *Redemption May Be Made from Undisclosed Tax Sale After Statutory Period.* — *Noble v. Bullis*, 23 Iowa 559, 92 Am. Dec. 442.

10. *Inquiry Made of Officer Must Be Specific.* — *Moore v. Hamlin*, 38 Iowa 482; *Lamb v. Irwin*, 69 Pa. St. 436.

11. *Inquiry Must Be Within Scope of Officer's Duty.* — *State v. Tufts*, 108 Mo. 418.

12. *Equitable Redemption.* — *Gaskins v. Blake*, 27 Miss. 675.

Where Value of Use Exceeds Redemption Amount. — But where the purchaser's grantee enters upon the land before the time of redemption has expired under a voidable deed, and makes use of it, and the value of his use, which has been created almost wholly by his improvements, exceeds the redemption amount, there is no equitable redemption. *Babcock v. Bonebrake*, 77 Iowa 710.

Where, by Statute, Title Does Not Vest until the Deed Is Recorded, the entry and receipt of profits before recording, but after the expiration of the period of redemption, do not constitute an equitable redemption. *Spenglin v. Forry*, 37 Iowa 242.

13. *Amount Necessary to Effect Redemption — United States.* — *Rice v. Jerome*, (C. C. A.) 97 Fed. Rep. 719.

*Alabama.* — *Turner v. White*, 97 Ala. 545. *California.* — *San Francisco, etc., Land Co. v. Banbury*, 106 Cal. 129; *Collier v. Shaffer*,

and municipal taxes.<sup>1</sup> The whole amount must be paid in order to insure redemption, even though certain of the items may be barred by the statute of limitations.<sup>2</sup> In some cases, however, where the deficiency is small, the courts have relaxed the rule.<sup>3</sup> If the sum actually paid at the sale was less than the amount of taxes and other charges, this fact will not affect the amount to be tendered,<sup>4</sup> and if the payment is to an assignee of the purchaser it is immaterial what his rights may have cost him.<sup>5</sup>

**b. WHEN LOTS ARE ASSESSED AND SOLD SEPARATELY.** — Where lots are assessed and sold separately, redemption of any one lot must be made by tendering the whole amount due on it.<sup>6</sup>

**c. WHERE LAND IS IMPROPERLY GROUPED AND SOLD.** — If the land of the one redeeming was improperly grouped and sold with other land of his

137 Cal. 319; *San Diego Invest. Co. v. Shaffer*, 137 Cal. 323.

*Colorado.* — *Mitchell v. Arkell*, 3 Colo. App. 253; *Morris v. St. Louis Nat. Bank*, 17 Colo. 231; *Knowles v. Martin*, 20 Colo. 393; *Crisman v. Johnson*, 23 Colo. 264, 58 Am. St. Rep. 224; *Rustin v. Merchants', etc., Tunnel Co.*, 23 Colo. 351; *Charlton v. Kelly*, 24 Colo. 273; *Statton v. People*, (Colo. App. 1902) 70 Pac. Rep. 157.

*Georgia.* — *Holcombe v. Beauchamp*, 101 Ga. 711.

*Illinois.* — *Comstock v. Cover*, 35 Ill. 470; *Connecticut Mut. L. Ins. Co. v. Stinson*, 62 Ill. App. 319.

*Indiana.* — *Gable v. Seiben*, 137 Ind. 155; *Ristine v. Johnson*, 143 Ind. 44.

*Iowa.* — *Byington v. Rider*, 9 Iowa 566; *Mulligan v. Hintrager*, 18 Iowa 171; *Augustine v. Jennings*, 42 Iowa 198; *Hintrager v. McElhinny*, 112 Iowa 325.

*Kansas.* — *Estes v. Stebbins*, 25 Kan. 315; *Douglass v. McKeever*, 54 Kan. 767.

*Minnesota.* — *Berglund v. Graves*, 72 Minn. 148; *McLachlan v. Carpenter*, 75 Minn. 17; *State v. Johnson*, 83 Minn. 496; *Midland Co. v. Eby*, (Minn. 1903) 93 N. W. Rep. 707; *State v. Butler*, (Minn. 1903) 94 N. W. Rep. 688.

*Missouri.* — *State v. Tufts*, 108 Mo. 418.

*Nebraska.* — *Kittle v. Shervin*, 11 Neb. 65; *Swan v. Huse*, 15 Neb. 465.

*New Jersey.* — *Frazier v. Johnson*, 65 N. J. L. 673.

*Texas.* — *League v. State*, 93 Tex. 553.

*Virginia.* — *Dooley v. Christian*, 96 Va. 534.

*West Virginia.* — *Tebbetts v. Charleston*, 33 W. Va. 705; *State v. King*, 47 W. Va. 437.

And see generally the statutes of the several states.

**Penalty Not to Be Added to Costs and Expenses of Sale.** — Where the statute provides that the amount necessary to redeem shall be the tax due at the time of sale with interest thereon at the rate of ten per cent. per annum, and fifty per cent. penalty thereon, and also all costs and expenses which may have accrued by reason of such delinquency and sale, and the costs and expenses of such redemption, the fifty per cent. penalty does not include the costs and expenses of sale. *Cummings v. Cone*, 4 Idaho 259.

**Fee to Officer for Making Estimate of Amount.** — Where at the time of sale the statute provides that the county auditor shall receive a fee for making out the estimate, and such statute is repealed prior to the redemption, the owner

is not obliged to pay such fee. *Collier v. Shaffer*, 137 Cal. 319.

**1. Amount to Include State, County, and Municipal Taxes.** — *Wartensleben v. Haithcock*, 80 Ala. 565; *Turner v. White*, 97 Ala. 545; *Cobb v. Vary*, 120 Ala. 263.

**2. Whole Amount Must Be Paid.** — *Lamar v. Sheppard*, 84 Ga. 561; *Long v. Smith*, 67 Iowa 22; *Everson v. Woodbury County*, (Iowa 1902) 91 N. W. Rep. 900; *Chace v. Durfee*, 16 R. I. 248.

**Purchaser May Agree to Accept Less than Full Amount.** — *Jordan v. Brown*, 56 Iowa 281; *Darrow v. Union County*, 87 Iowa 164.

**Where Land Is Sold for Taxes and under a Judgment at the same time, the whole amount paid, and not the amount of the taxes only, must be tendered.** *Clover v. Fleming*, 81 Ga. 247.

**Where the County Issues a Certificate of Redemption, purporting to be a receipt in full for all that was due upon the various payments, made by the purchaser prior to the time of redemption, the redemption is good although it is for a less amount than that claimed by the purchaser.** *Meagher v. Sprague*, 31 Wash. 549.

**Taxes Paid Subsequent to the Sale, but before the deed is made, cannot be recovered unless so provided in the statute.** *Stephens v. Holmes*, 26 Ark. 48.

**Taxes Paid by the Purchaser Subsequent to Redemption cannot be recovered unless the statute so provides.** *Byington v. Allen*, 11 Iowa 3; *Byington v. Walsh*, 11 Iowa 27; *Byington v. Wood*, 12 Iowa 479; *Byington v. Hampton*, 13 Iowa 23.

**If the Statute Provides for the Payment of Subsequent Taxes, the payment of the purchase money and premium, without such taxes, will not effect a redemption.** *Harmon v. Steed*, 49 Fed. Rep. 779.

**Amount Includes Taxes Levied and Due Prior to Sale.** — Taxes levied and due prior to the sale are not part of amount due. *Sheppard v. Clark*, 58 Iowa 371.

**3. Small Deficiency in Amount Immaterial.** — *Kraus v. Montgomery*, 114 Ind. 103; *Robert v. Western Land Assoc.*, 43 Minn. 3; *State v. Harper*, 26 Neb. 761.

**4. Amount Paid at Sale Does Not Affect Amount Necessary to Redeem.** — *Soper v. Espeset*, 63 Iowa 326.

**5. Assignee of Purchaser.** — *Culbertson v. Munson*, 104 Ind. 451.

**6. When Lots Are Assessed and Sold Separately.** — *People v. McEwen*, 23 Cal. 54.

own, or of others, he may exercise his right by tendering the proportionate amount due on the piece sought to be redeemed.<sup>1</sup>

*d. IMPROVEMENTS.* — Sometimes the statute provides that the purchaser shall be reimbursed for improvements.<sup>2</sup>

*e. RENTS AND PROFITS.* — A purchaser who has been in possession and has received the rents and profits must account for the same.<sup>3</sup>

**9. Notice to Redeem — a. IN GENERAL.** — As a general rule the statutes require notice to be given, by publication or otherwise,<sup>4</sup> of the expiration of the time allowed for redemption, and of the purchaser's intention to apply for a deed.<sup>5</sup> Notice is necessary to terminate the period of redemption,<sup>6</sup> and it is a condition precedent to the right of the purchaser to demand a deed.<sup>7</sup> A deed issued without the notice or on a defective notice does not terminate the period for redemption,<sup>8</sup> and neither does a deed executed before the expiration of the time named in the notice.<sup>9</sup> One who founds ejectment on a tax title must prove that notice was given, where notice is necessary.<sup>10</sup> The surrender

1. *When Land Is Improperly Grouped and Sold.* — Penn v. Clemans, 19 Iowa 372; Dietrick v. Mason, 57 Pa. St. 40.

2. *Purchaser May Be Reimbursed for Improvements.* — Bender v. Bean, 52 Ark. 132; Boatmen's Sav. Bank v. Grewe, 101 Mo. 625; Towle v. Holt, 14 Neb. 221; Lynch v. Brudie, 63 Pa. St. 206.

*Bona Fide Purchaser.* — Improvements may be allowed to one believing himself to be a *bona fide* purchaser. Seger v. Spurlock, 59 Ark. 147; House v. Stone, 64 Tex. 677.

3. *Purchaser at Tax Sale Not Entitled to Rents and Profits.* — Mayo v. Woods, 31 Cal. 269; Jones v. Johnson, 60 Ga. 260; Hintrager v. McElhinny, 112 Iowa 325; Smith v. Specht, 58 N. J. Eq. 47.

*In an Action to Subject Land of a Debtor to Payment of His Debts,* where it is sought to redeem land of the debtor sold for taxes, the amount of the purchaser's liability for waste and rent collected may be set off against the sum required to redeem. Van Landingham v. Buena Vista Imp. Co., 99 Va. 37.

*Where the Mortgagee Redeems,* rents and profits will not be deducted from the amount to be paid, where it appears that the purchaser did not receive them, and that the owner who was in possession is insolvent. Cornoy v. Wetmore, 92 Iowa 100.

4. *Notice to Be Given by Publication or Otherwise.* — Glos v. Evanston, etc., Bldg., etc., Assoc., 186 Ill. 586. And see the statutes of the several states.

5. See various local statutes; and see Emeric v. Alvarado, 90 Cal. 444, as to the *California* statute.

6. *Notice Necessary to Terminate Period of Redemption.* — McQuitty v. Doudna, 101 Iowa 144; Busch v. Hall, (Iowa 1903) 93 N. W. Rep. 356; Kipp v. Fitch, 73 Minn. 65; State v. Peltier, 86 Minn. 181. See also Hintrager v. McElhinny, 112 Iowa 325.

7. *Notice Condition Precedent to Right to Deed.* — Ellsworth v. Van Ort, 67 Iowa 222; Chicago, etc., R. Co. v. Kelley, 105 Iowa 106; Huron Land Co. v. Robarge, 128 Mich. 686; Caulkins v. Chamberlain, 37 Hun (N. Y.) 163.

*A Notice Defective in Substance Will Not Support a Tax Title.* — Gage v. Bailey, 100 Ill. 530; Wisner v. Chamberlin, 117 Ill. 568; Gage v. Mayer, 117 Ill. 632; Long v. Smith, 62 Iowa

329; Adams v. Griffin, 66 Iowa 125; Long v. Wolf, 25 Kan. 522; Simonton v. Hays, 32 Hun (N. Y.) 286; People v. Cady, 56 N. Y. Super. Ct. 180.

8. *Deed Issued on Insufficient Notice — United States.* — Gage v. Bani, 141 U. S. 344.

*Kansas.* — Long v. Wolf, 25 Kan. 522; Blackstone v. Sherwood, 31 Kan. 35.

*Illinois.* — Holbrook v. Fellows, 38 Ill. 440; Wilson v. McKenna, 52 Ill. 43; Dalton v. Lucas, 63 Ill. 337; Gage v. Bailey, 100 Ill. 530; Wisner v. Chamberlin, 117 Ill. 568; Gage v. Lyons, 138 Ill. 590.

*Indiana.* — Gavin v. Shuman, 23 Ind. 32.

*Iowa.* — Long v. Smith, 62 Iowa 329; Slyfield v. Barnum, 71 Iowa 245; Swan v. Harvey, 117 Iowa 58; Busch v. Hall, (Iowa 1903) 93 N. W. Rep. 356. See also Swope v. Prior, 58 Iowa 412.

*Minnesota.* — Merrill v. Dearing, 32 Minn. 479; Kipp v. Fitch, 73 Minn. 65.

*New York.* — People v. Walsh, 22 Hun (N. Y.) 139; Doughty v. Hope, 3 Den. (N. Y.) 594. *Pennsylvania.* — Arthurs v. Smathers, 38 Pa. St. 40.

The doctrine that the claimant under a tax title must show that he gave the notice prescribed by the constitution has reference to cases where a paramount title is claimed under such deed, and not to cases where such deed is merely color of title under the statute of limitations. Morrison v. Norman, 47 Ill. 477.

*Presumption as to Notice.* — After deed has been made it will be presumed that the notice, if needed, was given. Garmoe v. Sturgeon, 65 Iowa 147.

9. *Premature Deed Does Not Terminate Redemption Period.* — Barnard v. Hoyt, 63 Ill. 341; Swope v. Prior, 58 Iowa 412. See also Morrison v. Norman, 47 Ill. 477; Holbrook v. Fellows, 38 Ill. 440.

10. *Ejectment Founded on Tax Title.* — Holbrook v. Fellows, 38 Ill. 440; Nelson v. Central Land Co., 35 Minn. 408; Sanborn v. Mueller, 38 Minn. 27.

*In Illinois,* under the statute, the tax deed is void if it does not allege that notice has been given. Smith v. Prall, 133 Ill. 308.

*If the Statute Prescribes that the Notice Be Recorded,* the recording is a condition precedent to the issuing of the deed. Reeds v. Morton, 9 Mo. 878.

of the tax certificate on a bad notice does not make valid a deed prematurely issued.<sup>1</sup> A notice served too soon is bad.<sup>2</sup> Notice need not be served on the premises.<sup>3</sup>

*b. BY WHOM SERVED.* — Notice shall be served or caused to be served by the purchaser or his assignee.<sup>4</sup>

*c. GENERAL REQUISITES.* — A compliance with the statutory requirements is essential.<sup>5</sup> The notice must be precise and full.<sup>6</sup> It should be written or printed, or partly written and partly printed.<sup>7</sup> More than one tract of land may be included in the same notice.<sup>8</sup> The notice must be addressed to the proper person,<sup>9</sup> and must be signed by the holder of the certificate of purchase

1. *Surrender of Tax Certificate on Insufficient Notice.* — Long v. Smith, 62 Iowa 329.

2. *Notice Served Too Soon.* — Donahue v. O'Connor, 45 N. Y. Super. Ct. 278; Smith v. Walker, 56 N. Y. Super. Ct. 391; Lockwood v. Gehlert, 127 N. Y. 241, 53 Hun (N. Y.) 15; Arthurs v. Smathers, 38 Pa. St. 40.

3. *Notice Need Not Be Served on Premises.* — Gage v. Bailey, 102 Ill. 11.

4. *By Whom Notice Should Be Served.* — Glos v. Evanston, etc., Bldg., etc., Assoc., 186 Ill. 586; Funson v. Bradt, 105 Iowa 471.

If the person who gives the notice is not at that time the lawful holder of the certificate of purchase, it is as if no notice had been given. Sickles v. Union Invest. Co., 109 Iowa 450.

In *Minnesota* notice is to be served by the sheriff as an ordinary summons in a civil action. Sterling v. Urquhart, 88 Minn. 495.

*Notice Served by a Stranger*, without any authority from the purchaser, is not sufficient. San Francisco, etc., Land Co. v. Banbury, 106 Cal. 129; Smith v. Callanan, 103 Iowa 218.

5. *General Requisites of Notice* — *California.* — Reed v. Lyon, 96 Cal. 501.

*Illinois.* — Bailey v. Smith, 178 Ill. 72.

*Iowa.* — Rice v. Bates, 68 Iowa 393; Bradley v. Brown, 75 Iowa 180; Callanan v. Raymond, 75 Iowa 307; Snell v. Dubuque, etc., R. Co., 88 Iowa 442; Cornoy v. Wetmore, 92 Iowa 100; Medland v. Walker, 96 Iowa 175.

*Kansas.* — Casner v. Gahlman, 6 Kan. App. 295; Blackstone v. Sherwood, 31 Kan. 35.

*Minnesota.* — State v. Nord, 73 Minn. 1, 72 Am. St. Rep. 594; Gahre v. Berry, 82 Minn. 200; Walker v. Martin, 87 Minn. 489.

*Nebraska.* — Thomsen v. Dickey, 42 Neb. 314.

*New York.* — Sharpe v. Johnson, 4 Hill (N. Y.) 92, 40 Am. Dec. 259; Sharpe v. Speir, 4 Hill (N. Y.) 76; Matter of Lesseritz, 78 Hun (N. Y.) 563; Thompson v. Burhans, 61 N. Y. 52; May v. Traphagen, 139 N. Y. 478; Sanders v. Downs, 141 N. Y. 422; Clason v. Baldwin, 152 N. Y. 204.

*North Carolina.* — Thomas v. Nichols, 127 N. Car. 319.

*Pennsylvania.* — Broughton v. Journeay, 51 Pa. St. 31.

*Notice Must Conform to the Statute as It Stood at the Time of the Tax Sale.* — Kipp v. Johnson, 73 Minn. 34.

A *Notice Given After the Statutory Time* cannot be rendered valid by extending the time for redemption. Thomas v. Nichols, 127 N. Car. 319.

6. *Notice Must Be Full* — *California.* — Landregan v. Peppin, 86 Cal. 122.

*Illinois.* — Garrick v. Chamberlain, 97 Ill. 620; Taylor v. Wright, 121 Ill. 455; Gage v.

Davis, 129 Ill. 236, 16 Am. St. Rep. 260; Brophy v. Harding, 137 Ill. 621; Harrell v. Enterprise Sav. Bank, 183 Ill. 538.

*Iowa.* — Poindexter v. Doolittle, 54 Iowa 52; Griffith v. Utley, 76 Iowa 292.

*Kansas.* — Long v. Wolf, 25 Kan. 522; Blackstone v. Sherwood, 31 Kan. 35.

*Minnesota.* — Robert v. Western Land Assoc., 43 Minn. 3; Kipp v. Fitch, 73 Minn. 65.

*New York.* — Smith v. Buhler, 121 N. Y. 213.

*Pennsylvania.* — Broughton v. Journeay, 51 Pa. St. 31.

A *Mistatement of the Year* for which the land was taxed is immaterial where it otherwise appears in the notice. Gage v. Schmidt, 104 Ill. 106.

Where the *Caption Gives the State and County* It is sufficient, although the state and county are not named in direct connection with the description of the land. This is so if any one would understand from the whole document that the land described is in the city and county named and in the caption. Sickles v. Union Invest. Co., 109 Iowa 450.

The Words "*Subject to Any and All Unpaid Taxes*" are not equivalent to actual notice of the sale for taxes. Keith v. Wheeler, 159 Mass. 161. And see Crocker's Notes to Pub. Stat. Mass., c. 120, § 4; Parker v. Osgood, 3 Allen (Mass.) 487; Lamb v. Pierce, 113 Mass. 72.

Where the Term "*Redemption from the Assignment*" Instead of "*Redemption from the Sale*" is used, the notice is not invalidated. McNamara v. Fink, 71 Minn. 66.

The *Notice Need Not Be Dated*, and if it is served within the proper time it is immaterial if the date is wrong. Clarke v. Mead, 102 Cal. 516.

Neither the *Loose Grammar Nor Incorrect Punctuation* will vitiate a notice, or overrule or control its real meaning. Patterson v. Grettum, 83 Minn. 69.

The *Burden Is on the Person* wishing to redeem to show that the expiration notice served was insufficient. Knudson v. Litchfield, 87 Iowa 111.

For a *Notice Sufficient* to comply with the statute requiring that the notice specify a "day certain," on which to make the redemption, see Hennessey v. Volkening, (N. Y. Super. Ct. Tr. T.) 30 Abb. N. Cas. (N. Y.) 100.

7. *Notice Should Be Written or Printed.* — Glos v. Evanston, etc., Bldg., etc., Assoc., 186 Ill. 586; Thomsen v. Dickey, 42 Neb. 314.

8. *More than One Tract May Be Included.* — Drake v. Ogden, 128 Ill. 603; Hammond v. Carter, 155 Ill. 579.

9. *Notice Must Be Addressed to Proper Person.* — Hartley v. Boynton, 17 Fed. Rep. 873; Adams

or by his agent or attorney.<sup>1</sup>

*d. CONTENTS OF NOTICE — Description of Land in General.* — The notice must contain a description of the land sufficiently full to identify it;<sup>2</sup> the date of sale;<sup>3</sup> and whether the land was sold for a tax or a special assessment.<sup>4</sup>

*Names of Owner and Purchaser.* — The name of the owner should be given, although its omission has been held not a fatal defect;<sup>5</sup> and the name of the purchaser should be stated.<sup>6</sup>

*Expiration of Time to Redeem.* — It is also held that the notice must state clearly and directly when the period allowed for redemption expires.<sup>7</sup>

*Amount Due.* — Usually the notice is required to state the amount necessary for redemption.<sup>8</sup> The amount stated must be correct, and a mistake renders the notice bad.<sup>9</sup>

*e. TO WHOM GIVEN.* — The statutes vary somewhat as to the person or

*v. Burdick*, 68 Iowa 666; *Wilson v. Russell*, 73 Iowa 395; *Lynn v. Morse*, 76 Iowa 665. And see *infra*, this division of this section, *e. To Whom Given*.

**An Immaterial Variance Does Not Invalidate the Notice**, as where it is directed to "Corleas" instead of "Corlis," the names being *idem sonans*. *Nycum v. Raymond*, 73 Iowa 224.

1. *Shelley v. Smith*, 97 Iowa 259; *Medland v. Walker*, 96 Iowa 175; *Funson v. Bradt*, 105 Iowa 471.

2. **Description Must Identify Land.** — *Taylor v. Wright*, 121 Ill. 455; *Medland v. Walker*, 96 Iowa 175; *Shelley v. Smith*, 97 Iowa 259; *Funson v. Bradt*, 105 Iowa 471; *Casner v. Gahlman*, 6 Kan. App. 295; *Reimer v. Newell*, 47 Minn. 237; *Thomsen v. Dickey*, 42 Neb. 314; *Thompson v. Burhans*, 61 N. Y. 53; *Clason v. Baldwin*, 152 N. Y. 204; *Stokes v. Allen*, 15 S. Dak. 421.

**If the Description is the Same as on the Tax Records** and is by reference to a recorded plot of a city, town, or subdivision, it is sufficient, even though the county and state are not given. *Sperry v. Goodwin*, 44 Minn. 207.

3. **Notice Should State the Date of Sale.** — *Medland v. Walker*, 96 Iowa 175; *Shelley v. Smith*, 97 Iowa 259; *Funson v. Bradt*, 105 Iowa 471.

4. **Whether Sale Was for Tax or Special Assessment.** — *Gage v. Bani*, 141 U. S. 344; *Gage v. Waterman*, 121 Ill. 115; *Taylor v. Wright*, 121 Ill. 455; *Stillwell v. Brammell*, 124 Ill. 338; *Gage v. Davis*, 129 Ill. 236, 16 Am. St. Rep. 260; *Brophy v. Harding*, 137 Ill. 621; *Gage v. Du Puy*, 137 Ill. 652; *Gage v. Webb*, 141 Ill. 533; *Bailey v. Smith*, 178 Ill. 72; *Harrell v. Enterprise Sav. Bank*, 183 Ill. 538; *Thomsen v. Dickey*, 42 Neb. 314.

5. **Name of Owner Should Be Stated.** — *Hartley v. Boynton*, 17 Fed. Rep. 873; *Shoup v. Central Branch Union Pac. R. Co.*, 24 Kan. 547.

6. **Name of Purchaser Should Be Stated.** — *Medland v. Walker*, 96 Iowa 175; *Shelley v. Smith*, 97 Iowa 259; *Funson v. Bradt*, 105 Iowa 471; *Stokes v. Allen*, 15 S. Dak. 421.

7. **Notice Should State When Time to Redeem Expires** — *California*. — *Landregan v. Peppin*, 86 Cal. 122.

*Illinois*. — *Wilson v. McKenna*, 52 Ill. 43; *Barnard v. Hoyt*, 63 Ill. 341; *Gage v. Bailey*, 100 Ill. 530; *Wisner v. Chamberlin*, 117 Ill. 569; *Gage v. Stewart*, 127 Ill. 207, 11 Am. St. Rep. 116; *Gage v. Davis*, 129 Ill. 236, 16 Am. St. Rep. 260; *Benefield v. Albert*, 132 Ill. 665; *Glos v. Evanston*, etc., Bldg., etc., Assoc., 186 Ill. 586.

*Iowa*. — *Medland v. Walker*, 96 Iowa 175; *Shelley v. Smith*, 97 Iowa 259; *Funson v. Bradt*, 105 Iowa 471.

*Kansas*. — *Blackstone v. Sherwood*, 31 Kan. 35; *English v. Williamson*, 34 Kan. 212; *Hill v. Timmermeyer*, 36 Kan. 252; *Torrington v. Rickershauser*, 41 Kan. 486; *Jackson v. Challiss*, 41 Kan. 247. But see *Hicks v. Nelson*, 45 Kan. 47, 23 Am. St. Rep. 709.

*Minnesota*. — *Kenaston v. Great Northern R. Co.*, 59 Minn. 35; *Peterson v. Mast*, 61 Minn. 118; *State v. Halden*, 62 Minn. 246; *Clary v. O'Shea*, 72 Minn. 105, 71 Am. St. Rep. 465; *State v. Nord*, 73 Minn. 1, 72 Am. St. Rep. 594; *Kipp v. Johnson*, 73 Minn. 34; *Kipp v. Robinson*, 75 Minn. 1; *Gahre v. Berry*, 82 Minn. 200; *Sterling v. Urquhart*, 88 Minn. 495.

*Nebraska*. — *Thomsen v. Dickey*, 42 Neb. 314.

*New York*. — *Simonton v. Hays*, 32 Hun (N. Y.) 286; *Willis v. Gehlert*, 34 Hun (N. Y.) 566; *Bensel v. Gray*, 44 N. Y. Super. Ct. 372, *affirmed* 80 N. Y. 517; *Donahue v. O'Connor*, 45 N. Y. Super. Ct. 278; *Clason v. Baldwin*, 152 N. Y. 204.

*South Dakota*. — *Stokes v. Allen*, 15 S. Dak. 421.

**A Notice that at an Indefinite Time the Purchaser Will Apply for the Deed** fixes no time when the right of redemption will expire. *California*, etc., *R. Co. v. Mecartney*, 104 Cal. 616.

**Where the Notice States that the Redemption Must Be Made "On or Before the Expiration of Two Years"** the notice complies not only substantially but literally with the law specifying "a day certain" on which redemption is required. *Hennessey v. Volkening*, (N. Y. Super. Ct. Tr. T.) 30 Abb. N. Cas. (N. Y.) 100.

**A Notice Which States a Longer Time than the Statutory Period** is void, as well as one which states a shorter time. *Wisner v. Chamberlin*, 117 Ill. 568; *Benefield v. Albert*, 132 Ill. 665; *Kipp v. Johnson*, 73 Minn. 34; *State v. Nord*, 73 Minn. 1, 72 Am. St. Rep. 594. See also *Mather v. Curley*, 75 Minn. 248, 74 Am. St. Rep. 462.

8. **Notice Shall State the Amount Required to Redeem.** — *Casner v. Gahlman*, 6 Kan. App. 295; *Sterling v. Urquhart*, 88 Minn. 495; *Midland Co. v. Eby*, (Minn. 1903) 93 N. W. Rep. 707.

9. **Statement of Amount Must Be Correct.** — *Reed v. Lyon*, 96 Cal. 501.

**An Error of Three Cents in Computing Interest** will not invalidate the notice. *Robert v. Western Land Assoc.*, 43 Minn. 3.

persons to whom notice must be given. In some states it is sufficient to serve the notice on either the owner or the occupant of the land, while in others it is provided that the notice shall be served on the occupant and also on the owner and the person to whom the land was assessed, if the two last-named persons are to be found in the county.<sup>1</sup> The fact that the occupant is unknown to the purchaser will not dispense with notice,<sup>2</sup> nor will the fact that the one in possession had in fact no interest in the land.<sup>3</sup>

Where the Land Is Taxed as Unknown, and no person is in the occupancy of it, it is not necessary to serve notice on any person.<sup>4</sup>

Notice to One Member of a Firm, where land is assessed to the firm, is insufficient.<sup>5</sup>

A Mortgagee in the absence of a statutory provision is not entitled to a notice.<sup>6</sup>

A Corporation requires the same notice as does an individual.<sup>7</sup>

**f. PUBLICATION.** — If no person is in actual possession or occupancy of the land, and the person in whose name the property is taxed or specially assessed cannot, upon diligent inquiry, be found in the county, the purchaser or his

**1. Persons Entitled to Notice — Arizona.** — *Hale v. Hughes*, (Ariz. 1899) 56 Pac. Rep. 732.

**California.** — *Hall v. Capps*, 107 Cal. 513; *Simmons v. McCarthy*, 118 Cal. 622; *Miller v. Williams*, 135 Cal. 183.

**Illinois.** — *Palmer v. Riddle*, 180 Ill. 461; *Burton v. Perry*, 146 Ill. 71; *Glos v. Evanston*, etc., Bldg., etc., Assoc., 186 Ill. 586; *Gage v. Bailey*, 100 Ill. 530; *Gonzalia v. Bartelsman*, 143 Ill. 634; *Lauer v. Weber*, 177 Ill. 115; *Taylor v. Wright*, 121 Ill. 455.

**Iowa.** — *Parker v. Cochran*, 64 Iowa 757; *Garmoe v. Sturgeon*, 65 Iowa 147; *Slyfield v. Barnum*, 71 Iowa 245; *Bowers v. Hallock*, 71 Iowa 218; *Callanan v. Raymond*, 75 Iowa 307; *Bradley v. Brown*, 75 Iowa 180; *Steele v. Murry*, 80 Iowa 336; *Cahalan v. Van Sant*, 87 Iowa 593; *Cornoy v. Wetmore*, 92 Iowa 100; *Medland v. Walker*, 96 Iowa 175; *Shelly v. Smith*, 97 Iowa 259; *Crawford v. Liddle*, 101 Iowa 148; *Smith v. Callanan*, 103 Iowa 218; *Chicago, etc., R. Co. v. Kelley*, 105 Iowa 106; *Funson v. Bradt*, 105 Iowa 471; *Hint-rager v. McElhinny*, 112 Iowa 325; *Hawkeye Loan, etc., Co. v. Gordon*, 115 Iowa 561.

**Minnesota.** — *Western Land Assoc. v. McComber*, 41 Minn. 20; *Wakefield v. Day*, 41 Minn. 344; *Sperry v. Goodwin*, 44 Minn. 207; *Mitchell v. McFarland*, 47 Minn. 535; *Eide v. Clarke*, 57 Minn. 397; *State v. Halden*, 62 Minn. 246; *Snyder v. Ingalls*, 70 Minn. 16; *Sterling v. Urquhart*, 88 Minn. 495.

**Nebraska.** — *Thomsen v. Dickey*, 42 Neb. 314; *Van Etten v. Medland*, 53 Neb. 569.

**New York.** — *Hand v. Ballou*, 12 N. Y. 541; *Turner v. Boyce*, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 502; *Smith v. Buhler*, 121 N. Y. 213; *People v. Wemple*, 144 N. Y. 478; *Comstock v. Beardsley*, 15 Wend. (N. Y.) 348.

**North Carolina.** — *Thomas v. Nichols*, 127 N. Car. 319.

**Washington.** — *Herrick v. Niecz*, 16 Wash. 74.

**Wisconsin.** — *Towne v. Salentine*, 92 Wis. 404.

And see the statutes of the several states.

**Acts Sufficient to Constitute Occupancy.** — *Ellsworth v. Low*, 62 Iowa 178; *Sapp v. Walker*, 66 Iowa 497; *Callanan v. Raymond*, 75 Iowa 307; *Brown v. Pool*, 81 Iowa 455; *Cahalan v. Van Sant*, 87 Iowa 593; *Shelley v. Smith*, 97

Iowa 259; *Comstock v. Beardsley*, 15 Wend. (N. Y.) 348.

**Occupation of Part of Land Sufficient.** — *Comstock v. Beardsley*, 15 Wend. (N. Y.) 348; *Bush v. Davison*, 16 Wend. (N. Y.) 556; *Leland v. Bennett*, 5 Hill (N. Y.) 286; *Harison v. Caswell*, 17 N. Y. App. Div. 252.

**Acts Insufficient to Constitute Occupancy.** — *Gage v. Schmidt*, 104 Ill. 106; *People v. Campbell*, 143 N. Y. 335; *People v. Turner*, 145 N. Y. 451; *Drake v. Ogden*, 128 Ill. 603; *Rowland v. Brown*, 75 Iowa 679; *Brown v. Pool*, 81 Iowa 455.

**Accidental Encroachments Not Occupancy.** — *Smith v. Sanger*, 4 N. Y. 577.

**Death of Owner Does Not Excuse Notice.** — *Kessey v. Connell*, 68 Iowa 430.

If the owner dies, the notice must be given to his successor in interest; a notice addressed merely to his estate is insufficient. *McGee v. Fleming*, 82 Ala. 276.

**Where the Owner Assigns for the Benefit of Creditors** the purchaser need not give notice to the assignee or make him a party. *Wyman v. Baker*, 83 Minn. 427.

**The Fact That the Person Assessed Was the Purchaser's Wife** does not dispense with the necessity of notice. *Western Land Assoc. v. McComber*, 41 Minn. 20.

**Notice to the Husband** is not sufficient where the land is owned by the wife. *Cotes v. Rohrbeck*, 139 Ill. 532.

**2. Occupant Unknown to Purchaser Entitled to Notice.** — *Combs v. Goff*, 127 Ill. 431.

**3. Occupant Need Have No Interest in Land.** — *Clifton Heights Land Co. v. Randell*, 82 Iowa 89.

**4. Land Without Occupant Taxed to Unknown.** — *Fuller v. Armstrong*, 53 Iowa 683; *Tuttle v. Griffin*, 64 Iowa 455; *Chambers v. Haddock*, 64 Iowa 556; *Parker v. Cochran*, 64 Iowa 757; *Meredith v. Phelps*, 65 Iowa 118; *Lawrence v. Hornick*, 81 Iowa 193.

**5. Notice Must Be to Each Member of Firm.** — *Gage v. Reid*, 118 Ill. 35; *Hughes v. Carne*, 135 Ill. 519.

**6. Mortgagee Not Entitled to Notice.** — *Smyth v. Neff*, 123 Ill. 310; *Glos v. Evanston*, etc., Bldg., etc., Assoc., 186 Ill. 586.

**7. Corporations Entitled to Notice.** — *Garmoe v. Sturgeon*, 65 Iowa 147.

assignee should publish the notice.<sup>1</sup> The making of diligent inquiry, and the failure to find as a result thereof, must precede publication.<sup>2</sup> The inquiry must be such as will enable the affiant to ascertain that the party as to whom the inquiry has been made cannot be found in the county.<sup>3</sup> Notice by publication may be made where the name of the owner is unknown as well as where the land is assessed in the name of a known owner. If it is required to be addressed to any one, it can be addressed to the "unknown owner."<sup>4</sup> If notice can be given personally, notwithstanding nonresidence, such a notice is generally good, although notice by publication might be equally so.<sup>5</sup> If the publication is to be in a newspaper printed in the county, one published there answers this description, although actually printed elsewhere.<sup>6</sup> If it is to be in the nearest newspaper to the county, the one published in the town nearest the county line is the proper one.<sup>7</sup> The statutes generally require that the notice be published a certain number of times at stated intervals.<sup>8</sup> Unless the statutory provisions are complied with, the conveyance to the purchaser at the tax sale is void.<sup>9</sup> Provisions sometimes exist requiring notice by posting.<sup>10</sup> Where the statute requires that the redemption notice be posted, an omission to do this is fatal to the tax deed.<sup>11</sup>

**g. AFFIDAVITS OF SERVICE AND PUBLICATION — (1) In General.** — Where the statutes provide for an affidavit of service or publication, to be filed with the officer whose duty it is to execute the tax deed, the service of notice is not complete until this is done,<sup>12</sup> and the affidavit is a prerequisite to the validity of the tax deed.<sup>13</sup> It must be made by the person designated by the statute. Unless so made, it is, in legal effect, no notice.<sup>14</sup> It cannot be

**1. Publication of Notice.** — *Coulter v. Stafford*, (C. C. A.) 56 Fed. Rep. 564; *Frew v. Taylor*, 106 Ill. 159; *Burton v. Perry*, 146 Ill. 71; *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196; *McQuity v. Doudna*, 101 Iowa 144; *Funson v. Bradt*, 105 Iowa 471; *Hawkeye Loan, etc., Co. v. Gordon*, 115 Iowa 561; *State v. Halden*, 62 Minn. 246; *Thomsen v. Dickey*, 42 Neb. 314. See generally the title PUBLICATION, vol. 23, p. 307.

**2. Diligent Inquiry Must Precede Publication.** — *Burton v. Perry*, 146 Ill. 71; *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196.

**3. Nature of Diligent Inquiry Necessary.** — *Gage v. Schmidt*, 104 Ill. 106; *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196.

**4. Publication May Be Made Where the Name of Owner Is Unknown.** — *State v. Halden*, 62 Minn. 246.

**5. Personal Service May Be Made on Nonresident.** — *Baker v. Crabb*, 73 Iowa 416.

**Personal Service, Though Made in Another State, supersedes the necessity for publication.** *Seymour v. Harrison*, 85 Iowa 130.

**6. Publication May Be in Newspaper Printed Outside the County.** — *Nycum v. Raymond*, 73 Iowa 224.

**Notice May Be Published in a Weekly Newspaper.** — *Coulter v. Stafford*, (C. C. A.) 56 Fed. Rep. 564.

**7. Publication to Be in Newspaper Nearest County Line.** — *Weer v. Hahn*, 15 Ill. 299.

**8. Publication to Be for Stated Number of Times.** — *Coulter v. Stafford*, (C. C. A.) 56 Fed. Rep. 564; *Gage v. Schmidt*, 104 Ill. 106; *Burton v. Perry*, 146 Ill. 71; *Funson v. Bradt*, 105 Iowa 471; *State v. Gayhart*, 34 Neb. 192; *Doughty v. Hope*, 3 Den. (N. Y.) 594, 1 N. Y. 79.

**9. Statutory Provisions Must Be Complied with.** — *James v. Wilkinson*, 2 Kan. App. 361; *Westbrook v. Willey*, 47 N. Y. 457; *Bunner v. East-*

*man*, 50 Barb. (N. Y.) 639. But see *Wright v. Sperry*, 21 Wis. 336.

**10. Notice May Be Posted.** — *Hall v. Capps*, 107 Cal. 513; *Simmons v. McCarthy*, 118 Cal. 622; *Miller v. Williams*, 135 Cal. 183; *Stout v. Coates*, 35 Kan. 382; *Washington v. Hosp*, 43 Kan. 324, 19 Am. St. Rep. 141. And see the title PUBLICATION, vol. 23, p. 307.

**The Notice by Posting Is Complete** when the notices have been posted in the required number of public places. *Washington v. Hosp*, 43 Kan. 324, 19 Am. St. Rep. 141.

**11. Failure to Post Fatal to Tax Deed.** — *Stout v. Coates*, 35 Kan. 382; *Choat v. Phelps*, 63 Kan. 762.

**12. Service Not Complete until Affidavit Is Filed.** — *Knudson v. Litchfield*, 87 Iowa 111; *Stevens v. Murphy*, 91 Iowa 356, 51 Am. St. Rep. 348; *Medland v. Walker*, 96 Iowa 175; *Funson v. Bradt*, 105 Iowa 471; *Hintrager v. McElhinny*, 112 Iowa 325. See generally the title PUBLICATION, vol. 23, p. 307.

**13. Affidavit Prerequisite to Tax Deed — California.** — *Hall v. Capps*, 107 Cal. 513; *Miller v. Williams*, 135 Cal. 183.

**Illinois.** — *Williams v. Underhill*, 58 Ill. 137; *Gage v. Hervey*, 111 Ill. 305; *Davis v. Gossnell*, 113 Ill. 121; *Gage v. Mayer*, 117 Ill. 632; *Stillwell v. Brammell*, 124 Ill. 338; *Smith v. Prall*, 133 Ill. 308; *Palmer v. Riddle*, 180 Ill. 461. See also *Dalton v. Lucas*, 63 Ill. 337.

**Iowa.** — *American Missionary Assoc. v. Smith*, 59 Iowa 704; *Ellsworth v. Cordrey*, 63 Iowa 675; *Smith v. Heath*, 80 Iowa 231; *McQuity v. Doudna*, 101 Iowa 144.

**New York.** — *Lockwood v. Gehlert*, 53 Hun (N. Y.) 15.

**14. Must Be Made by Person Designated by Statute.** — *Wood v. Coad*, (Iowa 1903) 94 N. W. Rep. 264.

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made by the proprietor or publisher of the newspaper unless such person is the agent or attorney of the certificate holder.<sup>1</sup> If so made, however, the defect cannot be taken advantage of after the lapse of the statutory period within which the action to set the deed aside may be brought.<sup>2</sup>

(2) *Contents of Affidavit.*—The affidavit must show a compliance with the statute regarding notice.<sup>3</sup>

*The Day on Which Service Was Made* must be stated. A mere general statement that notice was served is not sufficient.<sup>4</sup>

*The Owner of the Land* at the time the notice was served should be named.<sup>5</sup>

*The Person in Possession* when notice was served must be named.<sup>6</sup>

*The Fact that the Property Was Occupied* must be shown, and it must be stated that the person on whom notice was served was the occupant.<sup>7</sup>

*The Person of Whom Diligent Inquiry Was Made* need not be specified.<sup>8</sup>

*The Affidavit Must Be Signed*, and unless this is done the proof of service is insufficient.<sup>9</sup>

*A Copy of the Notice Need Not Be Attached* to the affidavit, nor need a copy be filed with the treasurer.<sup>10</sup> Omissions in the affidavit cannot be cured, nor can defects be supplied by parol testimony.<sup>11</sup>

*Effect of Publication After Proof Is Made.*—Where notices are duly published in accordance with the statute, and proof of publication is made the day after the last publication, it is immaterial if such last publication was continued several days after the proof was made.<sup>12</sup>

*Fees for Serving Notice and Making Proof.*—Where the statute provides that the person giving notice is entitled to an additional charge for serving the notice and making proof, the amount is not due until proof of such service is made and left with the tax collector.<sup>13</sup>

**10. Evidence**—*a. CERTIFICATE OF REDEMPTION.*—Where the statute provides that a certificate of redemption shall issue, the certificate is evidence of the fact of payment,<sup>14</sup> but not of the right to redeem, nor of the age of the

affidavit as proof of service of notice, and the affidavit does not show that the attorney served the notice, and there is no other proof of such fact, the affidavit is insufficient. *Funson v. Bradt*, 105 Iowa 471.

**1. Publisher of Newspaper Cannot Make Affidavit.**—*American Missionary Assoc. v. Smith*, 59 Iowa 704; *Ellsworth v. Cordrey*, 63 Iowa 675; *Adams v. Griffin*, 66 Iowa 125; *Sweeley v. Van Steenburg*, 69 Iowa 696. See also *Funson v. Bradt*, 105 Iowa 471.

If the affidavit of the agent makes the statement of the affidavit of the publisher as to the publication of the notice a part of the agent's affidavit, the proof of publication is sufficient. *Stull v. Moore*, 70 Iowa 149; *Smith v. Heath*, 80 Iowa 231. See also *Funson v. Bradt*, 105 Iowa 471.

**2. Affidavit by Publisher Good After Statutory Period.**—*Trulock v. Bentley*, 67 Iowa 502.

**3. Affidavit Must State Everything Essential.**—*Gage v. Schmidt*, 104 Ill. 106; *Price v. England*, 109 Ill. 394; *Gage v. Hervey*, 111 Ill. 305; *Davis v. Gossnell*, 113 Ill. 121; *Stillwell v. Brammell*, 124 Ill. 338; *Brickey v. English*, 129 Ill. 646; *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196; *Sullivan v. Eddy*, 164 Ill. 391; *Harrell v. Enterprise Sav. Bank*, 183 Ill. 538; *Ellsworth v. Van Ort*, 67 Iowa 222; *Caulkins v. Chamberlain*, 37 Hun (N. Y.) 163.

**4. Must State on What Day Service Was Made.**—*Wilkin v. Wilkin*, 91 Iowa 653.

**5. Owner of Land Should Be Named.**—*Lauer v. Weber*, 177 Ill. 115.

**6. Person in Possession Must Be Named.**—*Wisner v. Chamberlin*, 117 Ill. 568.

**7. Occupancy of Property and Service upon Occupant Must Be Shown.**—*Simmons v. McCarthy*, 118 Cal. 622.

**8. Need Not Specify Person of Whom Diligent Inquiry Was Made.**—*Gage v. Schmidt*, 104 Ill. 106.

**9. Affidavit Must Be Signed.**—*Crenshaw v. Taylor*, 70 Iowa 386; *Lynn v. Morse*, 76 Iowa 665; *Cornoy v. Wetmore*, 92 Iowa 100.

**When Signed by Agent Must State Who Is Principal.**—*Taylor v. Wright*, 121 Ill. 455.

**10. Copy of Notice Need Not Be Attached to Affidavit Nor Filed.**—*Knudson v. Litchfield*, 87 Iowa 111.

**11. Omissions Cannot Be Cured nor Defects Supplied by Parol.**—*Gage v. Mayer*, 117 Ill. 632.

**12. Publication May Continue After Proof Is Made.**—*Cook v. John Schroeder Lumber Co.*, 85 Minn. 374.

**13. Fees for Serving Notice and Making Proof.**—*Reed v. Lyon*, 96 Cal. 501.

**14. Certificate of Redemption Evidence of Payment.**—*Chapin v. Curtenius*, 15 Ill. 427; *Henrichsen v. Hodgen*, 67 Ill. 179; *Byington v. Rider*, 9 Iowa 569; *Shelton v. Dunn*, 6 Kan. 128; *Hardy v. Brown*, (Tex. Civ. App. 1898) 46 S. W. Rep. 385. See also *Rice v. Nelson*, 27 Iowa 148.

redemption, nor other facts;<sup>1</sup> neither is it a muniment of title in itself.<sup>2</sup>

*b.* BOOKS OF REDEMPTION. — The books of redemption are competent evidence.<sup>3</sup>

*c.* TAX DEED. — A tax deed is presumptive evidence not only of the fact of giving the notice, but also that the notice was in due form of law.<sup>4</sup>

*d.* AFFIDAVIT OF PUBLICATION. — An affidavit by the purchaser that notice has been posted and published in every issue of a designated newspaper during the proper period is *prima facie* evidence of such publication.<sup>5</sup>

*e.* RECEIPT OF OFFICER AUTHORIZED TO RECEIVE PAYMENT. — The receipt of the officer authorized to receive payment of the taxes is admissible to prove the fact of redemption.<sup>6</sup>

*f.* EVIDENCE TO SHOW RIGHT TO REDEEM. — The facts on which the right of redemption is based may be shown by evidence other than the affidavit of such facts. And a failure of the officer to file the affidavit will not defeat the redemption.<sup>7</sup>

*g.* EVIDENCE TO PROVE TENDER AND PAYMENT. — Tender and payment are matters *in pais*, which may always be shown by parol evidence in order to defeat a tax title.<sup>8</sup>

*h.* EVIDENCE TO PROVE OCCUPANCY. — Where proof of the occupancy is made in the application to redeem, and is supported by affidavits, such application and affidavits are admissible to show such occupancy.<sup>9</sup>

*i.* EVIDENCE TO SHOW RESIDENCE OF OWNER. — Where the place of residence of the owner, a married woman, at the time of the assessment is in issue in a suit to redeem between third parties, neither of whom claims under the owner's husband, it is proper to exclude evidence tending to show where the husband was assessed. His acts and admissions in regard to payment and assessment of taxes are inadmissible so far as the residence of his wife is concerned.<sup>10</sup>

*j.* BURDEN OF PROVING PROPER NOTICE. — The burden is on the party claiming under the tax deed to show that he has complied with the statute relative to notice.<sup>11</sup>

*k.* PROOF OF TITLE NOT NECESSARY FOR REDEMPTION. — No proof of title need be deduced before the officer to whom redemption money is to be paid. It is enough to show some connection with the title, past or present, by deed, descent, contract, or possession.<sup>12</sup>

11. *Equitable Jurisdiction* — *a.* IN GENERAL. — Redemption cannot be had in a court of equity, in the absence of a statute giving it jurisdiction.<sup>13</sup> The statutes, however, sometimes grant power to the court to entertain jurisdiction

1. Certificate Not Evidence of Facts Other than Payment. — *Henrichsen v. Hodgen*, 67 Ill. 179; *Jewell v. Truhn*, 38 Minn. 433; *Danforth v. McCook County*, 11 S. Dak. 258, 74 Am. St. Rep. 808.

2. Not a Muniment of Title. — *Boykin v. Smith*, 65 Ala. 294.

3. Books of Redemption Competent Evidence. — *Gage v. Parker*, 103 Ill. 528; *Huzzard v. Trego*, 35 Pa. St. 9.

An Entry Purporting to Show a Redemption Is Not Admissible where it appears that such entry was made after the tax deeds had been issued and recorded and after the time in which a redemption could be made. *McIntosh v. Marathon Land Co.*, 110 Wis. 296.

4. Tax Deed Presumptive Evidence of the Giving of Notice. — *Fuller v. Armstrong*, 53 Iowa 683; *Chambers v. Haddock*, 64 Iowa 556; *Baker v. Crabb*, 73 Iowa 412; *Knudson v. Litchfield*, 87 Iowa 111; *McQuity v. Doudna*, 101 Iowa

144; *Chard v. Holt*, 136 N. Y. 30. See also *Herrick v. Niesz*, 16 Wash. 74.

5. Affidavit Is Prima Facie Evidence of Publication. — *Walsh v. Burke*, 134 Cal. 594.

6. Receipt of Officer. — *Taylor v. Steele*, 1 A. K. Marsh. (Ky.) 316.

7. Evidence of Right to Redeem. — *Chapin v. Curtenius*, 15 Ill. 427.

8. Tender and Payment May Be Shown by Parol. — *Cooper v. Shepardson*, 51 Cal. 298.

9. Evidence to Prove Occupancy. — *People v. Wemple*, 80 Hun (N. Y.) 504.

10. Evidence to Show Residence of Owner. — *Downey v. Lacy*, 178 Mass. 465.

11. Burden of Proving Proper Notice. — *Walsh v. Burke*, 134 Cal. 594.

12. Proof of Title Not Necessary for Redemption. — *Cummings v. Wilson*, 59 Iowa 14; *Master-son v. Beasley*, 3 Ohio 301.

13. Redemption Not Within Equity Jurisdiction. — *Mitchell v. Green*, 10 Met. (Mass.) 101,

of a bill to redeem.<sup>1</sup> Such a suit cannot be the means of determining the validity of the tax title; that is assumed.<sup>2</sup> The petitioner must offer to "do equity;" he must be ready to pay all past dues, whether outlawed or not.<sup>3</sup> If the bill be brought by a part owner it need not describe his interest.<sup>4</sup> Such a bill does not lie merely to redeem land from the lien of a tax paid by another part owner.<sup>5</sup> The decree will be that the purchaser quitclaim to the owner.<sup>6</sup>

An Injunction to Restrain the Execution of the Tax Deed will be granted if tender<sup>a</sup> has been properly made and refused.<sup>7</sup>

A Writ of Mandamus May Be Allowed in such a case to compel the officer to accept the money and grant the redemption.<sup>8</sup>

*b.* WHERE VOID TAX DEED IS ISSUED. — Where a void tax deed is issued the claim of the purchaser may be removed as a cloud upon the owner's title,<sup>9</sup> or it may be treated as a nullity and the land recovered from the tax purchaser in an action of ejectment.<sup>10</sup>

*c.* FORECLOSURE OF RIGHT OF REDEMPTION. — The statutes of many states provide that the right of redemption may be foreclosed.<sup>11</sup> The statutory provisions must be strictly followed.<sup>12</sup> An action to foreclose cannot be maintained after redemption, for the purpose of securing costs.<sup>13</sup> Only those made parties to a bill to foreclose are bound by the decree.<sup>14</sup>

**XVIII. DISTRIBUTION AND DISPOSITION OF AVAILS OF TAXATION** — Each Year's Income Should Pay Each Year's Expenses. — It has sometimes been provided by state constitutions that no indebtedness or liability incurred in any one year shall be paid out of the income or revenue of any future year.<sup>15</sup> But it has been recognized in many cases that where no such constitutional provision exists, a debt arising in one year may constitute a prior claim against the revenue of a subsequent year, and that, if necessary, an increased assessment may be made in order to pay such debt.<sup>16</sup>

Funds Should Be Used for the Specific Purposes Intended. — It is a very generally recognized rule that in appropriating or disposing of tax funds, money raised for a specific purpose cannot be used for any other purpose.<sup>17</sup> It has been held,

1. **Statutes May Confer Jurisdiction on Equity Courts.** — *Craig v. Flanagan*, 21 Ark. 319; *Fuller v. Butler*, 72 Iowa 729; *Serrin v. Brush*, 74 Iowa 489; *Callanan v. Lewis*, 79 Iowa 452; *Smith v. Smith*, 150 Mass. 73; *Culver v. Watson*, 28 N. J. Eq. 548.

2. **Suit in Equity Cannot Be to Determine Validity of Tax Title.** — *Chace v. Durfee*, 16 R. I. 248. But see *Goodrich v. Florer*, 27 Minn. 97.

3. **Petitioner Must Be Ready to Do Equity.** — *Barke v. Early*, 72 Iowa 273.

4. **Part Owner Need Not Describe His Interest.** — *Rich v. Palmer*, 6 Oregon 339.

5. *Chace v. Durfee*, 16 R. I. 248.

6. **Decree.** — *Simonds v. Towne*, 4 Gray (Mass.) 603.

7. **Injunction to Restrain Execution of Tax Deed.** — *Koon v. Snodgrass*, 18 W. Va. 320.

8. **Officer May Be Compelled to Accept Money.** — *State v. Haughey*, 5 Kan. 625; *People v. Treasurer*, 8 Mich. 14, 77 Am. Dec. 433; *People v. Registrar of Arrears*, 114 N. Y. 19.

9. **Claim under Void Tax Deed May Be Removed as Cloud on Title.** — *Smith v. Gage*, 11 Biss. (U. S.) 217; *Reed v. Tyler*, 56 Ill. 288; *Smith v. Smith*, 150 Mass. 73.

For a Form in Such a Suit under the codes of civil procedure, see Maxwell on Code Pleading, pp. 676, 677.

10. **Void Tax Sale May Be Declared a Nullity.** — *Cooper v. Shepardson*, 51 Cal. 298.

11. **Right of Redemption May Be Foreclosed.** — *Atkins v. Paige*, 50 Iowa 666; *Durbin v. Platto*, 47 Wis. 484.

12. **Statute Must Be Strictly Complied with.** — *Dentler v. State*, 4 Blackf. (Ind.) 258; *McGahen v. Carr*, 6 Iowa 331, 71 Am. Dec. 421; *Gaylord v. Scarff*, 6 Iowa 179; *Byington v. Buckwalter*, 7 Iowa 512, 74 Am. Dec. 279; *Abell v. Cross*, 17 Iowa 171; *Carter v. Hadley*, 59 Miss. 130; *Peet v. O'Brien*, 5 Neb. 360; *McNish v. Perrine*, 14 Neb. 582; *Dayton v. Relf*, 34 Wis. 86.

13. **Two Rivers Mfg. Co. v. Beyer, 74 Wis. 210, 17 Am. St. Rep. 131.**

14. *Corrigan v. Bell*, 73 Mo. 53; *Coe v. Manseau*, 62 Wis. 81.

15. **Each Year's Income Should Pay Each Year's Expenses.** — *San Francisco Gas Co. v. Brickwedel*, 62 Cal. 641.

16. **Prior Claims Generally Payable.** — *State v. State Auditor*, 32 La. Ann. 89; *In re Limitation of Taxation*, 3 S. Dak. 456; *State v. Cobb*, 8 S. Car. 123; *Freeman v. Huron*, 10 S. Dak. 368.

A debt of a former year is not repudiated by a provision forbidding the revenue of one year to be appropriated to the debt of another, but the legislature may, by taxation and appropriation, provide for the payment of such claim. *State v. Johnson*, 28 La. Ann. 511.

17. **Funds Should Be Used for the Specific Purposes Intended** — *California*. — *Carter v. Tilgh-*

however, that where there is no statute or rule of law forbidding it a tax raised professedly for one purpose may be applied to any other legitimate purpose.<sup>1</sup>

**Taxes to Pay Interest on Railroad Bonds.** — Money raised by taxation in a town or county is sometimes appropriated by the legislature to the payment of interest on bonds issued to aid in the construction of a railroad. In such case the fund so raised is regarded as a trust fund in the hands of the county or township treasurer which may not be diverted by him to any other use.<sup>2</sup>

**Power of Legislature to Apply Tax Funds.** — The power of the legislature to apply funds raised by taxation, either state, county, or municipal, is limited only by the constitution of the state, and when such power is exercised within constitutional limits such legislative appropriation does not amount to the taking of property without just compensation, nor to the impairing of the obligation of any contract.<sup>3</sup> But an appropriation by the legislature in excess of the constitutional limitation is void and imposes no obligation on the people or on a subsequent legislature to raise money thus improperly appropriated.<sup>4</sup>

**Appropriation by County and Municipal Authorities.** — The power of county and municipal authorities to dispose of tax funds in their hands is usually regulated by statute or municipal charter, and within such limitations such authorities have a rather wide discretion in the application of funds in their hands.<sup>5</sup> Such authorities are, however, regarded as, to a certain extent, trustees of the fund committed to them, and the court may interfere to prevent the misuse of such fund,<sup>6</sup> or to compel its application to the purposes provided by statute or charter.<sup>7</sup>

#### **XIX. MUNICIPAL TAXATION — 1. Scope of Section.** — The general principles

man, 119 Cal. 104. See also *Meyer v. Widber*, 126 Cal. 252.

*Florida.* — *Chamberlain v. Tampa*, 40 Fla. 74.

*Georgia.* — *Koger v. Hunter*, 102 Ga. 76.

*Illinois.* — *Aurora v. Chicago*, etc., R. Co., 119 Ill. 246, affirming 19 Ill. App. 360.

*Kansas.* — *State v. Emporia*, 57 Kan. 710.

*Kentucky.* — *Collins v. Henderson*, 11 Bush (Ky.) 74; *Board of Education v. Public Library*, (Ky. 1902) 68 S. W. Rep. 10.

*Missouri.* — *State v. Cottengin*, 172 Mo. 129.

*Nebraska.* — *Union Pac. R. Co. v. Dawson County*, 12 Neb. 254.

*New York.* — *People v. Comptroller*, 152 N. Y. 399.

*South Dakota.* — *In re Limitation of Taxation*, 3 S. Dak. 456.

*Wisconsin.* — *State v. Haben*, 22 Wis. 660.

And see generally the title *TAXES*, vol. 26, p. 472 et seq.

1. **Tax Applicable to Any Legitimate Purpose.** — *Long v. Richmond County*, 76 N. Car. 273.

2. **Taxes to Pay Interest on Railroad Bonds.** — *United States.* — *Maenhaut v. New Orleans*, 2 Woods (U. S.) 108; *Ranger v. New Orleans*, 2 Woods (U. S.) 128; *Coler v. Stanly County*, 89 Fed. Rep. 257.

*Kansas.* — *State v. Marion County*, 21 Kan. 419; *National Bank v. Barber*, 24 Kan. 534.

*New York.* — *Bridges v. Sullivan County*, 92 N. Y. 570; *Clark v. Sheldon*, 134 N. Y. 333; *Ulster County v. State*, 79 N. Y. App. Div. 277.

*North Carolina.* — *Brown v. Hertford County*, 100 N. Car. 92.

3. **Power of Legislature to Apply Tax Funds.** — *California.* — *Irwin v. Exton*, 125 Cal. 622.

*Colorado.* — *In re Appropriations*, 13 Colo. 316.

*Illinois.* — *People v. Power*, 25 Ill. 187;

*Sangamon County v. Springfield*, 63 Ill. 66; *Logan County v. Lincoln*, 81 Ill. 156.

*Louisiana.* — *State v. Clinton*, 28 La. Ann. 400.

*Missouri.* — *State v. St. Louis County Ct.*, 34 Mo. 546. See also *St. Louis v. Shields*, 52 Mo. 351.

*North Carolina.* — *Brown v. Hertford County*, 100 N. Car. 92.

An act of the legislature appropriating money for one purpose will repeal a former act appropriating it for another purpose. *State v. St. Louis County Ct.*, 34 Mo. 546.

4. **Appropriations Beyond Constitutional Limits.** *Void.* — *In re Appropriations*, 13 Colo. 316; *People v. Kings County*, 52 N. Y. 556.

5. **Appropriation by County and Municipal Authorities.** — *Alabama.* — *White v. Decatur*, 119 Ala. 476.

*Illinois.* — *People v. Cairo*, 50 Ill. 154; *Fuller v. Heath*, 89 Ill. 296.

*Iowa.* — *Coy v. Lyons City*, 17 Iowa 1, 85 Am. Dec. 539.

*Kansas.* — *Osborne County v. Blake*, 25 Kan. 336.

*Mississippi.* — *Paxton v. Baum*, 59 Miss. 531.

*Nebraska.* — *State v. Harvey*, 12 Neb. 31.

*New Jersey.* — *Sheehey v. Hoboken*, 62 N. J. L. 182.

*New York.* — *People v. Fitch*, 151 N. Y. 673; *Matter of Taxpayers*, 157 N. Y. 78; *Hunt v. New York*, 47 N. Y. App. Div. 295.

*North Carolina.* — *Long v. Richmond County*, 76 N. Car. 273.

*Wisconsin.* — *State v. Bell*, 111 Wis. 601.

6. *Winston v. Tennessee*, etc., R. Co., 2 Baxt. (Tenn.) 60.

7. *East St. Louis v. U. S.*, 116 U. S. 321; *East St. Louis v. Underwood*, 105 Ill. 308.

which apply to all classes of taxation have already been dealt with in the preceding general sections of this title, and certain phases of municipal taxation will be found fully discussed under other titles.<sup>1</sup> It is the purpose of this section to treat of such questions only as are peculiar to taxation by municipalities and *quasi* municipalities for the purposes of defraying expenses and discharging obligations which they are authorized to assume, or which are imposed on them for other than state purposes.<sup>2</sup>

**2. Power to Tax**—*a.* GRANT BY STATE—(1) *In General.*—Municipal and *quasi*-municipal corporations possess no inherent power of taxation. In exercising this attribute of sovereignty they act merely as instrumentalities of the state, and consequently they have no authority to levy taxes unless such power be expressly or by necessary implication delegated to them by constitutional provision or legislative enactment.<sup>3</sup>

1. See the titles EXEMPTIONS (FROM TAXATION), vol. 12, p. 266; MUNICIPAL AID, vol. 20, p. 1082; MUNICIPAL SECURITIES, vol. 21, p. 13; OCCUPATION, BUSINESS, AND PRIVILEGE TAXES, vol. 21, p. 770; SPECIAL OR LOCAL ASSESSMENTS, vol. 25, p. 1166; TAXATION (CORPORATE), *post*; TAX TITLES, *post*.

2. Public Taxes Are Distinguished from Local Municipal Taxes, such as town, parish, district, and village taxes, in Morgan v. Cree, 46 Vt. 773, 14 Am. Rep. 640.

3. No Taxing Power Inherent in Municipality—United States.—Carroll County v. U. S., 18 Wall. (U. S.) 71; Heine v. Levee Com'rs, 19 Wall. (U. S.) 660; U. S. v. New Orleans, 98 U. S. 381; U. S. v. Macon County, 99 U. S. 582; Meriwether v. Garrett, 102 U. S. 472; Taxing Dist. v. Loague, 129 U. S. 493; St. Louis v. Western Union Tel. Co., 39 Fed. Rep. 59; Cleveland v. U. S., (C. C. A.) 111 Fed. Rep. 341.

Alabama.—Hare v. Kennerly, 83 Ala. 608.

Arkansas.—Vance v. Little Rock, 30 Ark. 439.

Florida.—Bassett v. Jacksonville, 19 Fla. 664.

Georgia.—Sayannah v. Hartridge, 8 Ga. 23; Vanover v. Davis, 27 Ga. 354; Albany Bottling Co. v. Watson, 103 Ga. 503.

Illinois.—Allen v. Peoria, etc., R. Co., 44 Ill. 85; Highway Com'rs v. Newell, 80 Ill. 587; Alton & Etna Ins. Co., 82 Ill. 45; Mee v. Paddock, 83 Ill. 494. And see Watts v. McCleave, 16 Ill. App. 272.

Iowa.—Faxton v. McCosh, 12 Iowa 527; Tallman v. Treasurer, 12 Iowa 531; Clark v. Davenport, 14 Iowa 494; Iowa Homestead Co. v. Webster County, 21 Iowa 221; Chicago, etc., R. Co. v. Davenport, 51 Iowa 451. And see Clapp v. Cedar County, 5 Iowa 15, 68 Am. Dec. 678; Rice v. Walker, 44 Iowa 458.

Kansas.—Leavenworth v. Norton, 1 Kan. 432; Phelps v. Lodge, 60 Kan. 122.

Kentucky.—Slack v. Maysville, etc., R. Co., 13 B. Mon. (Ky.) 1; Kniper v. Louisville, 7 Bush (Ky.) 599; Caldwell v. Rupert, 10 Bush (Ky.) 182; Wheatly v. Covington, 11 Bush (Ky.) 18.

Louisiana.—Plaquemine v. Roth, 29 La. Ann. 261; State v. Shreveport, 33 La. Ann. 1179.

Massachusetts.—Dillingham v. Snow, 5 Mass. 547; Stetson v. Kempton, 13 Mass. 272, 7 Am. Dec. 145.

Michigan.—Ryerson v. Laketon Tp., 52 Mich. 509.

Minnesota.—Sewall v. St. Paul, 20 Minn. 511.

Mississippi.—Daily v. Swope, 47 Miss. 367; Beck v. Allen, 58 Miss. 143.

Missouri.—State v. Macon County Ct., 68 Mo. 29; Henry v. Bell, 75 Mo. 194; State v. Van Every, 75 Mo. 530.

Nebraska.—Wheeler v. Plattsmouth, 7 Neb. 270; Burlington, etc., R. Co. v. York County, 7 Neb. 487.

New Hampshire.—Concord v. Boscawen, 17 N. H. 465; Lisbon v. Bath, 21 N. H. 319.

New Jersey.—State v. Saalman, 37 N. J. L. 156.

New York.—Sharp v. Speir, 4 Hill (N. Y.) 76; Sharp v. Johnson, 4 Hill (N. Y.) 92, 40 Am. Dec. 259; Matter of Second Ave. M. E. Church, 66 N. Y. 395.

North Carolina.—Asheville v. Means, 7 Ired. L. (29 N. Car.) 406; Winston v. Taylor, 99 N. Car. 210; Edgerton v. Goldsboro Water Co., 126 N. Car. 93.

Ohio.—Mays v. Cincinnati, 1 Ohio St. 269; Zanesville v. Richards, 5 Ohio St. 590.

Oregon.—Corbett v. Portland, 31 Oregon 407.

Rhode Island.—Sherman v. Benford, 10 R. I. 559.

South Carolina.—State v. Kelly, 45 S. Car. 457.

Tennessee.—Columbia v. Guest, 3 Head (Tenn.) 413.

Texas.—Ft. Worth v. Davis, 57 Tex. 225; Jodon v. Brenham, 57 Tex. 655; Corpus Christi v. Woessner, 58 Tex. 462; Conklin v. El Paso, (Tex. Civ. App. 1897) 44 S. W. Rep. 879; People's Nat. Bank v. Ennis, (Tex. Civ. App. 1899) 50 S. W. Rep. 632.

Virginia.—Bull v. Read, 13 Gratt. (Va.) 87; Richmond v. Daniel, 14 Gratt. (Va.) 385; Virginia, etc., R. Co. v. Washington County, 30 Gratt. (Va.) 471; Green v. Ward, 82 Va. 324.

West Virginia.—Probasco v. Moundsville, 11 W. Va. 501.

Wisconsin.—Weeks v. Milwaukee, 10 Wis. 242.

As to the Legislature's Right to Delegate the taxing power, see *supra*, this title, IV. 5. *b.* Power of Taxation—Delegation of Power—Political Divisions of State.

Positive Enactment or Well-defined Usage Essential.—Cushing v. Newburyport, 10 Met. (Mass.) 508.

The Words "Authority of Law," when used with reference to the power of a municipality

**Constitutional Provisions Conferring the Power to Tax** on municipal authorities are sometimes self-executing in so far as not to require further action on the part of the legislature,<sup>1</sup> but usually such a provision requires a legislative enactment to make it effectual.<sup>2</sup>

**Power Measured by Charter.** — The charter or act of incorporation is ordinarily the source and measure of the taxing power of the municipality,<sup>3</sup> and such power cannot be acquired by prescription,<sup>4</sup> nor can it be imparted by a federal court.<sup>5</sup>

(2) **Construction of Statutes Granting Power.** — A statute granting to a municipality authority to levy taxes must be strictly construed.<sup>6</sup> Thus the

to tax, can refer only to an act of the legislature, the law-making power under the constitution, duly passed and approved. *Reineman v. Covington, etc., R. Co., 7 Neb. 310.*

**Grant of Power a Franchise.** — So far as the power to tax exists in a municipal corporation, it is by grant, and is called a franchise. *O'Byrne v. Savannah, 41 Ga. 331, 5 Am. Rep. 532.*

**Retrospective Taxes.** — Unless there is some constitutional restriction, the legislature may authorize the municipality to levy and collect retrospective taxes, and, for this purpose, to use the assessment roll of a previous year. *Fairfield v. People, 94 Ill. 244; Cowgill v. Long, 15 Ill. 202.*

**In an Action by the Municipality to Recover Taxes,** the defendant may set up in defense that no authority was ever granted the plaintiff to levy such tax. *Conklin v. El Paso, (Tex. Civ. App. 1897) 44 S. W. Rep. 879.*

**Effect of Unrestricted Delegation.** — When the legislature confers upon a municipality general powers of taxation it grants all the powers possessed by itself in respect to the imposition of taxes. *Newport News, etc., R. Co. v. Newport News, 100 Va. 157; Woodall v. Lynchburg, 100 Va. 318.* And see *Henderson Bridge Co. v. Henderson, 173 U. S. 592; Henderson v. Hughes County, 13 S. Dak. 576.*

1. **Self-executing Provision.** — *Davis v. Green, 40 La. Ann. 281,* construing article 214 of the Louisiana Constitution.

2. **Legislation Required** — *State v. St. Louis, etc., R. Co., 74 Mo. 163; State v. Kelly, 45 S. Car. 457.*

**The Adoption of a New State Constitution** does not take away the existing powers of taxation in municipalities until the legislature can pass such statutes as are necessary to make its provisions effective. *Byrne v. Covington, (Ky. 1893) 21 S. W. Rep. 1050; Long v. Louisville, 97 Ky. 364.*

3. **Power Derived from Charter.** — *New Iberia v. Migue, 32 La. Ann. 923; St. Louis v. Russell, 9 Mo. 507; Weinstein v. Newbern, 71 N. Car. 536; Cobb v. Elizabeth City, 75 N. Car. 1; Jonas v. Cincinnati, 18 Ohio 318; Probasco v. Moundsville, 11 W. Va. 501.* See also *Baltimore v. Gorter, 93 Md. 1; Baltimore v. Robert Poole, etc., Co., (Md. 1903) 54 Atl. Rep. 681; State Tax Com'rs v. Assessors, 124 Mich. 401.*

**The Taxing Power May Be Exercised under General Statutes** independently of special charter provisions. *Rodman-Heath Cotton Mills v. Waxhaw, 130 N. Car. 293.*

In *Spring v. Collector, 78 Ill. 101,* it was

held that an authority to incorporated cities, to levy taxes annually, to a certain extent, applies as well to cities incorporated under special charters as to those incorporated under general acts.

By the Illinois Act of 1883, power is conferred on cities not organized under the general law, but acting under special charters, to levy, in addition to the municipal taxes authorized by their charters, taxes for distinct objects named — as a sewer-fund tax and a water-fund tax — to be levied at the discretion of the legislative authority of the city. *Thatcher v. Chicago, etc., R. Co., 120 Ill. 560.*

**How Far General Laws Apply.** — Municipal taxation is distinct and independent of state and county taxation; and general tax laws apply to municipalities only so far as, by the provisions of the laws imposing and regulating municipal taxation, they are either expressly or impliedly adopted. *Troy v. Mutual Bank, 20 N. Y. 387; American Transp. Co. v. Buffalo, 20 N. Y. 388, note.*

See also *People v. Willis, 133 N. Y. 383,* wherein a statute applicable to only one kind of property and relating to town taxation only, and which could not be carried out in relation to village taxation without further legislation, was held not to warrant taxation by a village.

4. **Cannot Be Acquired by Prescription.** — The exercise of a municipal authority by one town, over a portion of the territory of another, and the acquiescence of the latter for a period of more than twenty years, will not authorize the former to levy and collect taxes on persons dwelling in such territory. *Ham v. Sawyer, 38 Me. 37.*

5. **Cannot Be Imparted by U. S. Courts.** — *Vance v. Little Rock, 30 Ark. 435.*

6. **Grant of Power Strictly Construed.** — *Keese v. Denver, 10 Colo. 113; Mee v. Paddock, 83 Ill. 494; Leavenworth v. Norton, 1 Kan. 432; Bussey v. Gilmore, 3 Me. 191; Sioux City, etc., R. Co. v. Washington County, 3 Neb. 42; Wheeler v. Plattsmouth, 7 Neb. 270; Corbett v. Portland, 31 Oregon 407.* See also the title *STATUTES, vol. 26, p. 667.* And see generally the title *MUNICIPAL CORPORATIONS, vol. 20, p. 1140.*

**No Power to Impose Taxes for Past Years** is conferred by a statute authorizing the mayor and aldermen to levy annual municipal taxes. *Adams v. Greenville, 77 Miss. 881.*

**Ordinance Beyond Power Granted Void.** — The ordinances of municipal corporations are subject to revision by the courts, and though large discretion is allowed, when an ordinance imposing a tax is found not to be in conformity

enumeration of particular objects of taxation is deemed to be an exclusion of all others not enumerated;<sup>1</sup> and where general taxation alone is authorized, the sum required may not be raised by special taxation,<sup>2</sup> nor will a grant of power to impose a special tax confer authority to accomplish the same purpose by a general tax.<sup>3</sup> It is presumed that the legislature in granting the power has clearly indicated its intention,<sup>4</sup> and doubts or ambiguities arising from the terms used by the legislature must be resolved against the municipality and in favor of the taxpayers.<sup>5</sup> But the courts must not defeat the legislative

to the charter, or not reasonably incident to powers contained in the charter, it will be held to be void. *Cape Girardeau v. Riley*, 72 Mo. 220.

**Proviso in Act Limiting Power.** — Where the act granting to a municipality the power to tax contains a proviso, such power is limited by the proviso. "The grant or enactment is to be read, not as if the larger power was ever given, but as if no more was ever given than is contained within the terms or bounds of the proviso." *Matter of Second Ave. M. E. Church*, 66 N. Y. 395.

**Within Statutory Limits Favored by Courts.** — In *Kyle v. Malin*, 8 Ind. 34, it was held that municipal corporations are to be held strictly within the limits prescribed by statute, but within those limits they are favored by the courts.

In *Stockle v. Silsbee*, 41 Mich. 615, it was held that the action of a board of supervisors in voting money is presumably lawful.

**Extension of Time.** — In *Brunswick v. Finney*, 54 Ga. 318, it was held that, under a city charter requiring the payment of a tax in quarterly instalments at such times as the mayor and council shall direct, the council may indulge the taxpayers for the first and second quarters, and make the instalments payable in the second or third quarter; but they cannot make any instalment payable before it would be due under the charter.

**1. Objects Not Enumerated Deemed Excluded.** — *Baldwin v. Montgomery*, 53 Ala. 437; *Savannah v. Hartridge*, 8 Ga. 23; *Primm v. Belleville*, 59 Ill. 142; *Plaquemine v. Roth*, 29 La. Ann. 261; *St. Louis v. Laughlin*, 49 Mo. 559; *Concord v. Boscawen*, 17 N. H. 465; *Newark v. State Board of Taxation*, 67 N. J. L. 246; *Jonas v. Cincinnati*, 18 Ohio 318; *Charleston v. Condry*, 4 Rich. L. (S. Car.) 254.

**Can Only Be Levied for Specified Purposes.** — All taxes authorized for specified purposes must be levied for the purpose named. *Webster v. People*, 98 Ill. 343.

**The Words "All Necessary Expenses"** cannot be construed to enlarge a power to tax for specific purposes. *Beatty v. Knowler*, 4 Pet. (U. S.) 152.

**What Not an Enumeration.** — An authority to towns to vote money for certain specified purposes and other necessary charges, is not intended to be an enumeration of objects and purposes for which towns may raise money, but a mere expression of a few prominent objects by way of instance, and a general reference to others extending to all other matters falling within their rights and duties. *Van Sicklen v. Burlington*, 27 Vt. 70; *Willard v. Newburyport*, 12 Pick. (Mass.) 230.

**2. General Taxation Alone Authorized.** — *Wright*

*v. Chicago*, 20 Ill. 252; *Webster v. People*, 98 Ill. 343; *Clark v. Davenport*, 14 Iowa 494; *Bussey v. Gilmore*, 3 Me. 191; *Annapolis v. Harwood*, 32 Md. 471, 3 Am. Rep. 161; *Corbett v. Portland*, 31 Oregon 407.

**Where the Expense of Keeping Up Bridges** is a duty imposed upon a county, it is included in a tax for general county purposes, and a special bridge tax is unauthorized. *Nashville, etc., R. Co. v. Franklin County*, 5 Lea (Tenn.) 707; *Nashville, etc., R. Co. v. Hodges*, 7 Lea (Tenn.) 663.

**Independent Statutes.** — A statute authorizing a board of police of the several counties to raise revenue for the support of the poor, and one authorizing them to raise revenue for general county purposes, are distinct and independent statutes, and the tax contemplated by the former may be levied and collected, even though the power conferred by the latter has been exhausted. *Coulson v. Harris*, 43 Miss. 728.

**Special Assessments Distinguished from General Taxation.** — Between the right to make special assessments for local improvements, and that of taxation for general corporate purposes, there is a clear distinction involving in their exercise essentially different powers and principles. One is not included in the other, nor can one be exercised any more than the other, without a grant of authority from the legislature. *Fairfield v. Ratcliff*, 20 Iowa 396. See generally the title SPECIAL AND LOCAL ASSESSMENTS.

**3. Webster v. People**, 98 Ill. 343.

**4. Legislature Presumed to Have Expressed Intention.** — *Baldwin v. Montgomery*, 53 Ala. 437; *State v. Brewer*, 64 Ala. 287; *Highway Com'rs v. Newell*, 80 Ill. 587; *Alton v. Aetna Ins. Co.*, 82 Ill. 45; *New Iberia v. Mignes*, 32 La. Ann. 923; *Crowell v. Hopkinton*, 45 N. H. 9.

**5. Doubts Resolved Against Taxing Power.** — *State Bank v. Savannah*, Dudley (Ga.) 130; *Savannah v. Hartridge*, 8 Ga. 23; *English v. People*, 96 Ill. 566; *Clark v. Davenport*, 14 Iowa 494; *Corbett v. Portland*, 31 Oregon 407; *Randolph v. Metcalf*, 6 Coldw. (Tenn.) 400; *Dean v. Charlton*, 27 Wis. 522. And see *Worthen v. Badgett*, 32 Ark. 496; *Sewall v. Jones*, 9 Pick. (Mass.) 412; *Ontario Bank v. Bunnell*, 10 Wend. (N. Y.) 186.

**An Ordinance Imposing a Tax** must be strictly construed against the city and in favor of the citizen. *Metropolitan L. Ins. Co. v. Darenkamp*, 66 S. W. Rep. 1125, 23 Ky. L. Rep. 2249.

**When an Ordinance Levying a Tax Will Admit of Two Constructions**, it should receive that which is consistent with the power given, not that which is in violation of it. *Baltimore v. Hughes*, 1 Gill & J. (Md.) 480, 19 Am. Dec. 243.

intent by turning the language used from its natural and obvious meaning,<sup>1</sup> nor are powers expressly granted or necessarily implied to be defeated or impaired by a strict construction.<sup>2</sup>

**b. POWER BY NECESSARY IMPLICATION — When Power Implied.** — When a municipal corporation is created, the power of taxation is vested in it as an essential attribute for all the purposes of its existence, unless its exercise be expressly prohibited.<sup>3</sup> And where authority is granted by the legislature to a municipality having power to levy taxes to contract a debt for a specific object, and no special provision is made for its payment, the power to levy taxes sufficient to meet, at maturity, the obligation to be incurred is conclusively implied, unless there is in the act itself, or in some general statute or in the constitution, a restriction upon the power of taxation which repels the inference.<sup>4</sup> And if the debt be for an extraordinary purpose, requiring special

**1. Language Must Not Be Turned from Obvious Import.** — *Dean v. Charlton*, 27 Wis. 522.

**2. Clear Grant of Power Not to Be Defeated.** — *Kyle v. Malin*, 8 Ind. 34. See also *Smith v. Madison*, 7 Ind. 86.

**3. Power Implied for Purposes of Municipal Existence.** — *U. S. v. New Orleans*, 98 U. S. 381; *Security Sav. Bank, etc., Co. v. Hinton*, 97 Cal. 214; *Galena v. Corwith*, 48 Ill. 423, 95 Am. Dec. 557. See also *Merriam v. Moody*, 25 Iowa 163; *Williamsport v. Com.*, 84 Pa. St. 487, 24 Am. Rep. 208.

**To Pay Claim Against Town.** — A town or its officers, duly authorized to settle a disputed claim against it, upon doing so in the exercise of good faith and sound discretion, may enforce a tax duly levied upon its citizens to raise money for its payment. *Vose v. Frankfort*, 64 Me. 229.

**4. Implied Power to Tax — United States.** — *Citizens' Sav., etc., Assoc. v. Topeka*, 20 Wall. (U. S.) 660; *U. S. v. New Orleans*, 98 U. S. 381; *U. S. v. Macon County*, 99 U. S. 589; *Ralls County Ct. v. U. S.*, 105 U. S. 733; *Ottawa v. Carey*, 108 U. S. 110; *Quincy v. Jackson*, 113 U. S. 332; *Scotland County Ct. v. U. S.*, 140 U. S. 41; *Sibley v. Mobile*, 3 Woods (U. S.) 535; *Ex p. Parsons*, 1 Hughes (U. S.) 282; *U. S. v. Howard County Ct.*, 2 Fed. Rep. 1; *U. S. v. Independent School Dist.*, 20 Fed. Rep. 294; *Hamilton Gas-Light, etc., Co. v. Hamilton*, 37 Fed. Rep. 832; *U. S. v. Key West*, (C. C. A.) 78 Fed. Rep. 88; *U. S. v. Kent*, 107 Fed. Rep. 190, affirmed (C. C. A.) 113 Fed. Rep. 232; *Cleveland v. U. S.*, (C. C. A.) 111 Fed. Rep. 341; *U. S. v. Capdevielle*, (C. C. A.) 118 Fed. Rep. 809.

*Alabama.* — *Gibbons v. Mobile, etc., R. Co.*, 36 Ala. 439.

*Florida.* — *Stockton v. Powell*, 29 Fla. 1.

*Georgia.* — *Black v. Cohen*, 52 Ga. 621.

*Illinois.* — *Galena v. Corwith*, 48 Ill. 423, 95 Am. Dec. 557; *Hyde Park v. Ingalls*, 87 Ill. 11; *Peoria, etc., R. Co. v. People*, 116 Ill. 401.

*Indiana.* — *Young v. Tipton County*, 137 Ind. 323.

*Iowa.* — *Coy v. Lyons City*, 17 Iowa 1, 85 Am. Dec. 539; *Sioux City, etc., R. Co. v. Osceola County*, 52 Iowa 26; *Taylor v. McFadden*, 84 Iowa 262.

*Massachusetts.* — *Lowell v. Boston*, 111 Mass. 460, 15 Am. Rep. 39.

*New Mexico.* — *Laughlin v. Santa Fe County*, 3 N. Mex. 264.

*North Carolina.* — *Charlotte v. Shepard*, 122 N. Car. 602; *Slocumb v. Fayetteville*, 125 N. Car. 362.

*Oregon.* — *Stratton v. Oregon City*, 35 Oregon 409.

*Pennsylvania.* — *Com. v. Allegheny County*, 37 Pa. St. 277; *Com. v. Perkins*, 43 Pa. St. 400; *Millvale Borough*, 162 Pa. St. 374, 14 Pa. Co. Ct. 82.

*South Carolina.* — *Feldman v. Charleston*, 23 S. Car. 57, 55 Am. Rep. 6; *Wilson v. Florence*, 40 S. Car. 426.

*Tennessee.* — *State v. Bristol*, 109 Tenn. 315.

*Texas.* — *Muller v. Denison*, 1 Tex. Civ. App. 293; *Nalle v. Austin*, (Tex. Civ. App. 1893) 21 S. W. Rep. 375.

*Wisconsin.* — *Oconto City Water Supply Co. v. Oconto*, 105 Wis. 76.

See also *Kelley v. Milan*, 127 U. S. 139; *New Orleans v. Lockett*, 3 La. Ann. 99; *State v. Clinton County*, 6 Ohio St. 280; *State v. Milwaukee*, 25 Wis. 122.

In *Ralls County Ct. v. U. S.*, 105 U. S. 733. Waite, C. J., said: "The power to tax is necessarily an ingredient of such a power to contract, as, ordinarily, political bodies can only meet their pecuniary obligations through the instrumentality of taxation."

**Authority to Tax for City Purposes** involves the power to tax to pay debts contracted for city purposes or for city improvements. *Shepard v. Kaysville*, 16 Utah 340.

**Tax to Pay Interest on Bonds.** — In *Davey v. Galveston County*, 45 Tex. 291, it was held that an act authorizing the issue and sale of bonds for certain purposes, and a levy of a special tax to meet the same, is sufficient to authorize a tax to pay interest on the bonds.

**Power Not Precluded by Constitutional Provision.** — A constitutional provision authorizing the legislature to grant to municipalities power to impose taxes "in such manner as shall be prescribed by law," does not preclude an implied power of taxation on the theory that the manner of imposing the tax would not thereby be "prescribed," since the general law fixes the manner of levying taxes. *State v. Bristol*, 109 Tenn. 315.

**Provision Requiring Restriction of Taxing Power.** — A constitutional provision requiring the legislature to restrict the taxing power of municipalities to prevent abuse of taxation does not prevent a delegation of the taxing power by



authority for its creation, a general limitation on the power of taxation for ordinary municipal purposes will not exclude such inference.<sup>1</sup>

**When Power Not Implied.** — This implied power of taxation depends on the assumption that the legislature must have intended to confer it, and such inference is repelled by evidence of a contrary legislative intent, as, for instance, where the statute giving the power to create the debt, or some other existing law, provides means for its payment,<sup>2</sup> or expressly limits the power of taxation therefor.<sup>3</sup> No doubtful inference from other powers granted, or from obscure provisions of the law, nor mere matter of convenience or necessity, will be sufficient to establish an implied power of taxation.<sup>4</sup> Thus the power is not to be implied from authority to enact by-laws for the good government of the municipality,<sup>5</sup> or from a mere grant of police power to regulate certain callings.<sup>6</sup>

**c. LIMITATIONS ON POWER — (1) Constitutional Restrictions.** — Municipal corporations being merely instrumentalities of the state for purposes of taxation, it follows that limitations set on the taxing power of the state by either the federal or the state constitution will usually apply also to municipal taxation.<sup>7</sup> Where, however, the constitutional provision is evidently intended to

implication. *Oconto City Water Supply Co. v. Oconto*, 105 Wis. 76.

**Louisiana — Ordinance Must Provide Means of Payment.** — In Louisiana, where bonds are issued as security for a debt it is essential that the ordinance creating the debt shall provide the means of paying the principal and interest thereon. *Knox v. Baton Rouge*, 36 La. Ann. 427.

**1. General Limitation Does not Exclude Implied Power.** — *Quincy v. Jackson*, 113 U. S. 332; *Cleveland v. U. S.*, (C. C. A.) 111 Fed. Rep. 341; *U. S. v. Capdevielle*, (C. C. A.) 118 Fed. Rep. 809; *Millvale Borough*, 162 Pa. St. 374; *Nalle v. Austin*, (Tex. Civ. App. 1893) 21 S. W. Rep. 375.

**2. Means of Payment Provided by Legislature.** — *U. S. v. New Orleans*, 2 Woods (U. S.) 230; *Cleveland v. U. S.*, (C. C. A.) 111 Fed. Rep. 341.

**Right to Make Additional Levy.** — Where the act authorizing the creation of an indebtedness provides for the levying of a special tax to meet it, and the municipality, in accordance therewith, levies a tax sufficient on its face for such purpose, there is no implied power to levy an additional tax thereafter on the ground that the first levy proved insufficient in fact because of the nonpayment of some of the taxes levied. *Gay v. New Whatcom*, 26 Wash. 389.

**3. Taxing Power Expressly Limited.** — *U. S. v. Macon County*, 99 U. S. 582.

**4. Implication Must Be Clear and Necessary.** — *Basnett v. Jacksonville*, 19 Fla. 664; *Corbett v. Portland*, 31 Oregon 407.

**The Power to Tax Will Not Be Enlarged by Construction** so as to authorize taxation for purposes other than those specified in the charter. *Beatty v. Knowler*, 4 Pet. (U. S.) 152.

**Necessity for Submission to Voters.** — Where the state constitution forbids municipal taxation without first submitting the proposition to the voters, except for "necessary expenses," there is no implied power to tax for special purposes without the consent of the voters. *Edgerton v. Goldsboro Water Co.*, 126 N. Car. 93.

But where the voters have authorized the creation of debts and the issue of bonds, the implied power to levy taxes to pay such debts

exists without any further vote being taken. *Charlotte v. Shepard*, 122 N. Car. 602. But see *Hamlin v. Meadville*, 6 Neb. 227.

**Power to Erect Public Buildings.** — Where the power of taxation is limited to seven mills on the dollar, a power of a city to raise more than that for the purpose of erecting hospitals, poor-houses, market-houses, etc., is not necessarily implied from a provision in the charter making it the duty of its officers to erect such buildings. *Leavenworth v. Norton*, 1 Kan. 432, approved in *Burnes v. Atchison*, 2 Kan. 454.

**5. Not Implied from Power to Enact By-laws.** — *Asheville v. Means*, 7 Ired. L. (29 N. Car.) 406. And see *Mays v. Cincinnati*, 1 Ohio St. 268. But in such case, they may prevent the sale of liquor without a license. *Heisembrittle v. Charleston*, 2 McMull. L. (S. Car.) 233; *Charleston v. Ahrens*, 4 Strobb. L. (S. Car.) 241.

**6. Not Implied from Grant of Police Power.** — *St. Louis v. Western Union Tel. Co.*, 39 Fed. Rep. 59; *Kip v. Paterson*, 26 N. J. L. 298; *State v. Hoboken*, 33 N. J. L. 280; *North Hudson County R. Co. v. Hoboken*, 41 N. J. L. 71; *Cape May v. Cape May Transp. Co.*, 64 N. J. L. 80; *Cincinnati v. Bryson*, 15 Ohio 625, 45 Am. Dec. 593; *Mays v. Cincinnati*, 1 Ohio St. 268; *Columbia v. Beasley*, 1 Humph. (Tenn.) 232, 34 Am. Dec. 646. See also *Dunham v. Rochester*, 5 Cow. (N. Y.) 462. And see the title *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*, vol. 22, p. 782 *et seq.*

**7. Constitutional Limitations** on the taxing power have already been fully discussed. See *supra*, this title, *Power of Taxation — Constitutional Restrictions*.

See also the following cases: *Henderson Bridge Co. v. Henderson*, 173 U. S. 592; *Elyton Land Co. v. Birmingham*, 89 Ala. 477; *State v. Southern R. Co.*, 115 Ala. 250; *Spann v. Webster County*, 64 Ga. 498; *New Orleans v. Firemen's Ins. Co.*, 41 La. Ann. 1142; *State v. Van Every*, 75 Mo. 530; *Arnold v. Hawkins*, 95 Mo. 569; *Lamar Water, etc. Co. v. Lamar*, 128 Mo. 188; *Austin v. Nalle*, 85 Tex. 520; *Muller v. Denison*, 1 Tex. Civ. App. 293; *Texas Water, etc., Co. v. Cleburne*, 1 Tex. Civ. App. 580; *Hebard v. Ashland County*, 55 Wis. 145.

apply to state taxation only, it will not operate as a restriction on municipal corporations.<sup>1</sup>

A Limitation on the Power to Contract Indebtedness operates as a restriction on the power to tax to satisfy it.<sup>2</sup>

(2) *Legislative Restrictions*—(a) *In General*.—The legislature, having authority to delegate the taxing power to municipalities,<sup>3</sup> may also place limitations on the exercise of such power,<sup>4</sup> and restrictions thus imposed by the legislature

**Special Taxes** levied upon districts having territorial limits different from the municipality levying the tax, must likewise be kept within the constitutional limits. *In re* House Bill, No. 165, 15 Colo. 595.

**Louisiana—Limit on Parish or Municipal Taxation.**—La. Const., art. 209, imposing a limit of ten mills on parish or municipal taxation, does not restrict a parish and a city to that amount jointly; each may levy its taxes up to that limit. *Washington State Bank v. Baillio*, 47 La. Ann. 1471.

**1. Provision Intended to Apply to State Taxation Only.**—*York v. Chicago*, etc., R. Co., 56 Neb. 572.

**Provision Requiring Submission to Voters.**—In *People v. Flagg*, 46 N. Y. 401, 11 Am. L. Reg. N. S. 80, it was held that constitutional provisions prohibiting the contracting of any debt by or in behalf of the state, unless authorized by a law submitted to the people, do not apply to the debts of cities or subordinate municipal divisions, but to those of the state itself.

**Territory—Federal Statute Applying Only to Municipalities.**—24 Stat. at Large, c. 818, § 4, restricting the powers of municipal corporations to contract debts, was held not to limit the power of the territorial legislature to tax property in municipalities. *Guthrie v. Territory*, 1 Okla. 188.

**2. Limitation on Indebtedness Limits Taxing Power.**—*Springfield v. Edwards*, 84 Ill. 626; *Law v. People*, 87 Ill. 385; *Howell v. Peoria*, 90 Ill. 104; *Baltimore*, etc., R. Co. v. *People*, 200 Ill. 541; *Reineman v. Covington*, etc., R. Co., 7 Neb. 310; *Johnston v. Becker County*, 27 Minn. 64; *State v. Medbery*, 7 Ohio St. 522; *Hebard v. Ashland County*, 55 Wis. 145. And see *Jonas v. Cincinnati*, 18 Ohio 318.

But in *Habersham County v. Porter Mfg. Co.*, 103 Ga. 613, it was held that the power of municipalities to tax for the purpose of meeting legitimate obligations was not limited by Ga. Const., art. 7, § 7, par. 1, restricting the power of municipalities to incur debts.

**Future or Contingent Debts.**—A debt payable in the future, or upon a contingency, or on the happening of some future event, is within a constitutional restriction upon the amount of municipal indebtedness, as well as a debt payable presently and absolutely, and it makes no difference whether the debt be for current expenses or for something else. *Springfield v. Edwards*, 84 Ill. 626.

3. See *supra*, this title, *Power of Taxation—Delegation of Power*.

**4. Legislature May Limit Rate of Municipal Taxation.**—Most of the questions which arise in regard to the rate of municipal taxation depend entirely on the construction of local statutes, which are liable to constant change by the legislature. Therefore it is practically impos-

sible to derive general principles from the decisions, and it is deemed sufficient here to refer the reader to the following decisions which construe statutory limitations on the taxing power of municipal corporations:

**United States.**—*Kimball v. Grant County*, 21 Fed. Rep. 145; *C. N. Nelson Lumber Co. v. Loraine*, 24 Fed. Rep. 456; *U. S. v. Kent*, 107 Fed. Rep. 190, *affirmed* (C. C. A.) 113 Fed. Rep. 232; *Cleveland v. U. S.*, (C. C. A.) 111 Fed. Rep. 341.

**Arkansas.**—*Vaughan v. Bowie*, 30 Ark. 278.  
**California.**—*Santa Barbara v. Eldred*, 95 Cal. 378.

**Illinois.**—*Binkert v. Jansen*, 94 Ill. 283; *Baltimore*, etc., R. Co. v. *People*, 200 Ill. 541.

**Kansas.**—*Manley v. Emlen*, 46 Kan. 655; *Columbus Water Works Co. v. Columbus*, 48 Kan. 99; *Stewart v. Kansas Town Co.*, 50 Kan. 553; *Stewart v. Adams*, 50 Kan. 568.

**Minnesota.**—*Johnston v. Becker County*, 27 Minn. 64.

**Mississippi.**—*Warren County v. Klein*, 51 Miss. 807.

**Nebraska.**—*Wheeler v. Plattsmouth*, 7 Neb. 270; *Dawson County v. Clark*, 58 Neb. 756.

**North Carolina.**—*Weinstein v. Newbern*, 71 N. Car. 536; *Cobb v. Elizabeth City*, 75 N. Car. 1.

**Ohio.**—*Jonas v. Cincinnati*, 18 Ohio 318.

**Oregon.**—*Corbett v. Portland*, 31 Oregon 407.

**Texas.**—*Sandmeyer v. Harris*, 7 Tex. Civ. App. 515.

**Washington.**—*Port Townsend v. Sheehan*, 6 Wash. 220.

**West Virginia.**—*Knight v. West Union*, 45 W. Va. 194.

**Wisconsin.**—*Howard v. Oshkosh*, 33 Wis. 309; *Somo Lumber Co. v. Lincoln County*, 110 Wis. 286.

**Illinois—Rate Based on Valuation of Preceding Year.**—Under the Illinois City and Village Act, art. 8, § 1, the rate per cent. fixed by a city must be based on the valuation of the "current" year, but such rate cannot exceed two per cent. on the valuation of the "preceding" year. *People v. Lake Erie*, etc., R. Co., 167 Ill. 283.

**Tax Assessed Before Limit Takes Effect.**—A tax assessed prior to the time when a limit upon the rate takes effect, but not finally passed until afterwards, is subject to the limit. *Overall v. Ruenzi*, 67 Mo. 203; *St. Joseph Board of Public Schools v. Patten*, 62 Mo. 444.

**Increase of Maximum Rate.**—Under the laws of some of the states, the maximum rate may be increased by a vote of the district upon which it is imposed, taken in a prescribed manner, and when the rate is so increased, the in-

must be observed.<sup>1</sup>

**In Some States the Constitution Expressly Requires** the legislature to limit the taxing power of municipalities.<sup>2</sup>

**Within the Prescribed Limit** the fixing of tax rates is a matter within the discretion of the municipality, and the courts will not interfere except in cases of manifest abuse.<sup>3</sup>

**If No Limit Is Prescribed**, the power of the municipality in fixing the rate of taxation for legitimate municipal purposes is unlimited.<sup>4</sup>

**Limit Not Binding on Legislature.** — In imposing a limit on the rate of municipal taxation, the legislature does not bind itself, and may afterwards enlarge the

creased rate becomes the maximum limit. *Chicago, etc., R. Co. v. Lamkin*, 97 Mo. 496.

**Judicial Notice.** — All legislative acts conferring or restricting the revenue powers of a municipality are, in their nature, public laws, whether so declared in terms or not, and courts are bound to take judicial notice of them in all proceedings affecting revenue matters. *Binkert v. Jansen*, 94 Ill. 283.

**1. Legislative Restrictions Must Be Observed.** — *Beck v. Allen*, 58 Miss. 143.

**Limit on Poll Tax.** — If, at an annual meeting, a town has voted to raise so much money as to require the assessment of the full sum allowed by law to be assessed upon polls in any one year, a tax subsequently voted must be assessed only upon property. *Freeland v. Hastings*, 10 Allen (Mass.) 570.

**Creditor Charged with Notice of Limitation.** — A creditor is required to take notice of statutes prohibiting or limiting the exercise of the taxing power of a municipality to raise money for the payment of the debt. *Rees v. Watertown*, 19 Wall. (U. S.) 107.

**Poor Taxes Are Current Expenses.** — Taxes levied for the support of the poor are to be regarded as current expenses of the county, within a statute limiting the amount which can be raised within any year for current expenses. *Atchison, etc., R. Co. v. Wilhelm*, 33 Kan. 206. And see *Kansas City, etc., R. Co. v. Albright*, 33 Kan. 211.

**Contributions to Construction of Public Work.** — A statute conferring the power and duty to construct a public work according to a designated plan, with a separate clause authorizing the board charged with the duty to call on certain municipalities for such sums as they deem proper for the expense, providing the amount to be paid shall not exceed a specified sum, limits the amount of contribution by each, but does not limit the entire cost of the work. *People v. Kelly*, (Ct. App.) 5 Abb. N. Cas. (N. Y.) 383, 76 N. Y. 489.

**2. In South Carolina** it is held that such provision does not require the legislature to limit the rate of taxation, but only to restrict the municipality as to the subjects and objects of the tax imposed; and authority to a city to tax without any limit on the rate of taxation is not in violation of the constitution. *State v. Beaufort*, 39 S. Car. 5.

**In South Dakota** it has been held that such a constitutional provision is not self-executing, and if the legislature fail to restrict the rate of taxation, the court cannot say that a tax is in excess of the power of the municipality. *Henderson v. Hughes County*, 13 S. Dak. 576.

**In North Carolina** it has been held that such a constitutional provision is not violated by a charter empowering a town "to levy and collect taxes on all persons and subjects of taxation which it is in the power of the general assembly to tax for state and county purposes." *State v. Irvin*, 126 N. Car. 989.

**3. Within Limit Tax Rate Discretionary.** — *Baltimore, etc., R. Co. v. People*, 200 Ill. 623; *Scovill v. Cleveland*, 1 Ohio St. 126; *Dwyer v. Hockworth*, 57 Tex. 245; *Muller v. Denison*, 1 Tex. Civ. App. 293; *Brown v. Hoadley*, 12 Vt. 472; *Chandler v. Bradish*, 23 Vt. 416. And see *McDonald v. Louisville*, 68 S. W. Rep. 413, 24 Ky. L. Rep. 271.

**Power of Council to Fix Rate under Baltimore Charter.** — See *Baltimore v. Gorter*, 93 Md. 1; *Baltimore v. Robert Poole, etc., Co.*, (Md. 1903) 54 Atl. Rep. 681.

**A Levy Which Imposes a Tax Smaller** than that which by law might have been imposed, is good. *Hollister v. Bennett*, 9 Ohio 83.

**Tax Producing Greater Amount than Required.** — The collection of a tax which does not exceed the rate limited by law cannot be defeated on the ground that it will produce a greater amount than is required by the appropriation ordinance, in the absence of any showing of abuse of discretion in fixing the tax rate. *Baltimore, etc., R. Co. v. People*, 200 Ill. 541.

**No Presumption Against Propriety of Levy.** — A court will not assume, in the absence of any proof, that a tax voted would raise more money than was needed, so that there would be a balance to be applied to an unlawful debt. *Greenbanks v. Boutwell*, 43 Vt. 207.

**Aggregate of Taxes Not Exceeding Limit.** — There may be different rates for different taxes in the same year, provided the aggregate does not exceed the limit fixed by law. *Benoist v. St. Louis*, 19 Mo. 179.

*In Alvord v. Collin*, 20 Pick. (Mass.) 418, where one list of school taxes, and another of county taxes, was made, under a vote to raise a certain sum for the support of schools and another sum for contingent expenses, and on the first list the sum assessed exceeded the sum voted for schools, but the aggregate of both was less than the amount authorized to be raised by taxation, the assessment was held valid.

**4. Power Unlimited Where No Limit Prescribed.** — *Beck v. Allen*, 58 Miss. 143.

**Where Limit Not Applicable.** — Where a limitation on the rate of taxation does not apply, a municipality may levy, assess, and collect such taxes as are necessary to the accomplishment of a proper object. *Texas, etc., R. Co. v. Harrison County*, 54 Tex. 119.

same,<sup>1</sup> or repeal it, either expressly or impliedly by inconsistent legislation.<sup>2</sup> But a general law regulating the rate will not be deemed to take away greater powers granted to municipalities by special charter provisions unless it appears that the legislature intended such act to apply to them.<sup>3</sup>

(b) **Effect of Limitation on Special Grants of Taxing Power — When Special Grant Not Controlled by Limitation.** — Whether or not a limitation upon the power to tax for general municipal purposes is to be taken as controlling a grant of authority to impose taxation for special purposes, is a question of legislative intent to be gathered from the statutes themselves. Such a limitation is not inconsistent with a grant of power, either express or necessarily implied, to levy special taxes in excess of it,<sup>4</sup> and, as a general rule, a restriction on general rates of taxation will not apply to special taxes imposed to meet special burdens unless expressly made applicable to them.<sup>5</sup> And where items embraced in a levy

1. **Legislature May Enlarge Limit.** — U. S. v. Key West, (C. C. A.) 78 Fed. Rep. 88; *People v. Burr*, 13 Cal. 343; *Mohmking v. Bowes*, 65 N. J. L. 469. And see *State v. Beaufort*, 39 S. Car. 5; *Baltimore, etc., R. Co. v. People*, 200 Ill. 623.

**What an Enlargement.** — A grant of authority by the legislature to county commissioners to create a debt and provide for the payment thereof is an enlargement of the power to tax to meet the demand, and an implied repeal of any conflicting statutory implication. *Com. v. Allegheny County*, 40 Pa. St. 349; *Com. v. Pittsburgh*, 34 Pa. St. 496; *East St. Louis v. People*, 124 Ill. 655.

2. **May Repeal Limitation.** — *Com. v. Allegheny County*, 40 Pa. St. 348.

**What Not a Repeal.** — A general law requiring a city to make a return of taxes which it requires to be levied, to the clerk of the county, does not work a repeal of a provision in its charter prohibiting it from levying over a certain rate per cent. *Edwards v. People*, 88 Ill. 340; *Kinsey v. Pulaski County*, 2 Dill. (U. S.) 253.

3. **Charter Provisions Not Repealed by General Law.** — *Cicero v. McCarthy*, 172 Ill. 279; *People v. Knopf*, 186 Ill. 457; *Baltimore, etc., R. Co. v. People*, 200 Ill. 623.

4. **Limitation May Be Exceeded under Special Grant of Power — United States.** — *Butz v. Muscatine*, 8 Wall. (U. S.) 575; *Ralls County Ct. v. U. S.*, 105 U. S. 733; *Quincy v. Jackson*, 113 U. S. 332; *U. S. v. Key West*, (C. C. A.) 78 Fed. Rep. 88; *Helena v. U. S.*, (C. C. A.) 104 Fed. Rep. 113.

*Illinois.* — *Chicago, etc., R. Co. v. Baldridge*, 177 Ill. 229.

*Iowa.* — *Sioux City, etc., R. Co. v. Osceola County*, 52 Iowa 26.

*Maryland.* — *Watts v. Port Deposit*, 46 Md. 500.

*Massachusetts.* — *Taft v. Wood*, 14 Pick. (Mass.) 362.

*Michigan.* — *Crooks v. Whitford*, 47 Mich. 283.

*Minnesota.* — *McCormick v. Fitch*, 14 Minn. 252.

*Nebraska.* — *Dawson County v. Clark*, 58 Neb. 756.

*Pennsylvania.* — *Com. v. Pittsburgh*, 34 Pa. St. 496; *Millvale Borough*, 162 Pa. St. 374.

*Tennessee.* — *Nashville, etc., R. Co. v. Hodges*, 7 Lea (Tenn.) 663.

*Texas.* — *Austin v. Gulf, etc., R. Co.*, 45 Tex. 234; *Austin v. Nalle*, 85 Tex. 520; *Sherman v. Langham*, 92 Tex. 13.

**May Exceed Limit to Pay Judgments.** — Power is sometimes conferred by statute on municipal corporations to levy taxes in excess of the general limitation to pay judgments. *Helena v. U. S.*, (C. C. A.) 104 Fed. Rep. 113 (construing the Montana statutes); *Dawson County v. Clark*, 58 Neb. 756; *Omaha v. State*, (Neb. 1903) 94 N. W. Rep. 979. And see *Britton v. Platte City*, 2 Dill. (U. S.) 1; *Rice v. Walker*, 44 Iowa 458.

**Increase of Limit — Judgment on Previous Claim.** — A village which obtains a right to levy a higher rate, by reorganization under the general incorporation law, may raise money at such higher rate to pay a judgment upon a claim accruing before the reorganization. *Carney v. Marseilles*, 136 Ill. 401, 29 Am. St. Rep. 328.

**Authority to Construct Wharves, Etc.** — A general provision authorizing a municipality to create a debt upon compliance with certain formalities, but restraining it to a certain rate of taxation, and authorizing it to construct wharves, docks, piers, etc., the expense of which might far exceed the annual revenues of a municipality at the general rate of taxes, empowers it to create a debt for these undertakings only. *Lafayette v. Cox*, 5 Ind. 38.

5. **Not Applicable Where Not Expressly Made So — United States.** — *Quincy v. Jackson*, 113 U. S. 332; *Cleveland v. U. S.*, (C. C. A.) 111 Fed. Rep. 341; *U. S. v. Capdevielle*, (C. C. A.) 118 Fed. Rep. 809. And see *U. S. v. New Orleans*, 98 U. S. 381; *Wolff v. New Orleans*, 103 U. S. 358; *Macon County v. Huidekoper*, 134 U. S. 332.

*California.* — *McCracken v. San Francisco*, 16 Cal. 591.

*Georgia.* — *Waller v. Perkins*, 52 Ga. 234.

*Illinois.* — *Peoria, etc., R. Co. v. People*, 116 Ill. 401. And see *Sparland v. Barnes*, 98 Ill. 595.

*Indiana.* — *Brocaw v. Gibson County*, 73 Ind. 543.

*Iowa.* — *Rice v. Walker*, 44 Iowa 458; *Grune-wald v. Cedar Rapids*, (Iowa 1902) 91 N. W. Rep. 1059.

*Maine.* — *Stevens v. Anson*, 73 Me. 489.

*Mississippi.* — *Beck v. Allen*, 58 Miss. 143.

*Missouri.* — *Lamar Water, etc., Co. v. Lamar*,

are not within the scope of the limitation, they will be excluded from consideration in determining whether the limit has been exceeded.<sup>1</sup>

**When Limitation Controls.** — But, on the other hand, if it appear that the legislature intended to prescribe a maximum rate for the entire taxing power of the municipality for all purposes, the limitation must be taken as controlling grants of power to tax for special purposes, unless the municipality is expressly authorized to exceed the limit, or the power is necessarily implied from the terms of the grant.<sup>2</sup> Thus, it is held that, in the face of an evident legislative intent that the limitation shall not be exceeded, it cannot be enlarged by implication from general provisions conferring the power to contract, make improvements, erect usual and ordinary buildings, and incur liability.<sup>3</sup> Nor, where such intent is apparent, is there any duty on a municipality, under a special authority to pay judgments, to levy a special tax in excess of the limit to pay a judgment against it for ordinary indebtedness;<sup>4</sup> though where the judgment is founded on a contract, the obligation of which such a restriction would impair, the rule has been held otherwise.<sup>5</sup>

128 Mo. 188, *overruling* State v. Columbia, 111 Mo. 365.

*Nebraska.* — Omaha v. State, (Neb. 1903) 94 N. W. Rep. 979.

*New Mexico.* — Laughlin v. Santa Fe County, 3 N. Mex. 264.

*Pennsylvania.* — Com. v. Pittsburgh, 34 Pa. St. 496; Com. v. Allegheny County, 40 Pa. St. 348; Millvale Borough, 14 Pa. Co. Ct. 82.

*Tennessee.* — Nashville, etc., R. Co. v. Franklin County, 5 Lea (Tenn.) 707.

*Texas.* — Nalle v. Austin, (Tex. Civ. App. 1893) 21 S. W. Rep. 375. And see Dean v. Lufkin, 54 Tex. 265.

*Wisconsin.* — Soens v. Racine, 10 Wis. 271; Oconto City Water Supply Co. v. Oconto, 105 Wis. 76.

1. **Items Outside Limit Excluded.** — Wabash R. Co. v. People, 187 Ill. 289; Warren County v. Klein, 51 Miss. 808; Sherman v. Laugham, 92 Tex. 15. And see Pope County v. Sloan, 92 Ill. 177; Texas, etc., R. Co. v. Harrison County, 54 Tex. 119.

2. **Special Taxes Controlled by Limitation.** — Georgia. — Couper v. Rowe, 42 Ga. 229; Barlow v. Ordinary, 47 Ga. 639; Waller v. Perkins, 52 Ga. 233; Arnett v. Griffin, 60 Ga. 350.

*Illinois.* — Jackson County v. Brush, 77 Ill. 59; People v. Lake Erie, etc., R. Co., 167 Ill. 283.

*Indiana.* — Bish v. Stout, 77 Ind. 255.

*Iowa.* — Clark v. Davenport, 14 Iowa 494; Dumphy v. Humboldt County, 58 Iowa 273.

*Kansas.* — Leavenworth v. Norton, 1 Kan. 432; Burnes v. Atchison, 2 Kan. 454; Chicago, etc., R. Co. v. Stanfield, 7 Kan. App. 274; McIntire v. Williamson, 8 Kan. App. 711.

*Michigan.* — Schneewind v. Niles, 103 Mich. 301.

*Mississippi.* — Beck v. Allen, 58 Miss. 143.

*Nebraska.* — State v. Lancaster County, 6 Neb. 214; Reineman v. Covington, etc., R. Co., 7 Neb. 310; Jones v. Hulburt, 13 Neb. 127; Burlington, etc., R. Co. v. Clay County, 13 Neb. 367; State v. Gosper County, 14 Neb. 22.

*Oregon.* — Corbett v. Portland, 31 Oregon 407.

*Texas.* — Denison v. Foster, 90 Tex. 22.

**County Limited to State Rate.** — In Nashville, etc., R. Co. v. Franklin County, 5 Lea (Tenn.) 707, it was held that a statutory provision that

the rate of taxation for county purposes should not exceed the rate of state taxation for the time being, prohibits the counties, after making a levy for general county taxation, from making an additional levy for special purposes, unless specially authorized by law.

**Extra Levy for Prospective Purposes.** — Where the charter of a city, construed in connection with the state constitution, allowed the levy of an extra tax, on the approval of the voters, for the accomplishment of measures to be carried out in the future, it was held that such extra tax could not be imposed for the payment of existing indebtedness. Denison v. Foster, 90 Tex. 22.

3. **Limitation Not Enlarged by Implication.** — Carroll County v. U. S., 18 Wall. (U. S.) 71; Cleveland v. U. S., (C. C. A.) 111 Fed. Rep. 341; Binkert v. Jansen, 94 Ill. 283; Weber v. Traubel, 95 Ill. 427; People v. Lake Erie, etc., R. Co., 167 Ill. 283; Dollahon v. Whittaker, 187 Ill. 84; Baltimore, etc., R. Co. v. People, 200 Ill. 541; State v. New Orleans, 23 La. Ann. 358; Wheeler v. Plattsmouth, 7 Neb. 270; Reineman v. Covington, etc., R. Co., 7 Neb. 310; Corbett v. Portland, 31 Oregon 407; Kane v. School Dist., 52 Wis. 502. And see Pike County v. Rowland, 94 Pa. St. 238; State v. Columbia, 111 Mo. 365.

**When No Necessary Implication.** — The power of a municipality to raise more than the amount limited by law for the erection of certain works, is not necessarily implied from a provision making it the duty of its officers to erect such works. Leavenworth v. Norton, 1 Kan. 432.

4. **Cannot Exceed Limit to Pay Judgments.** — Carroll County v. U. S., 18 Wall. (U. S.) 71, *distinguishing* Butz v. Muscatine, 8 Wall. (U. S.) 575; Cleveland v. U. S., (C. C. A.) 111 Fed. Rep. 341; Chicago, etc., R. Co. v. People, 177 Ill. 91; Osborne County v. Blake, 25 Kan. 356; Chicago, etc., R. Co. v. Stanfield, 7 Kan. App. 274; Witkowski v. Bradley, 35 La. Ann. 904; Arnold v. Hawkins, 95 Mo. 569; Dawson County v. Clark, 58 Neb. 756; State v. Royse, (Neb. 1902) 91 N. W. Rep. 559; Raton Waterworks Co. v. Raton, 9 N. Mex. 70; Corbett v. Portland, 31 Oregon 407.

5. **Cannot Impair Obligation of Contracts.** — See Withowski v. Bradley, 35 La. Ann. 904; Favrot v. East Baton Rouge, 34 La. Ann. 491.

(c) **Effect of Taxation in Excess of Limit.**—Where the legislature has fixed a maximum tax rate for municipal corporations, any taxation in excess of such limitation is void,<sup>1</sup> and equity will enjoin the collection of such an excessive tax.<sup>2</sup> The fact that a city has not in past years levied taxes up to the limit does not enlarge its powers for subsequent years and authorize it to tax in excess of such limit.<sup>3</sup> And where taxes have been imposed up to the prescribed limit, an additional levy cannot be sustained on the ground that the assessor has rated the taxable property below its real value, the presumption being that the assessor has done his duty.<sup>4</sup> Nor can an attempt to tax in

**Must Show that Judgment Founded on Contract.**—A party claiming a mandamus to compel the levy of a tax in excess of the limit, to pay his judgment, must allege and prove that it was founded upon a contract. *State v. Police Jury*, 32 La. Ann. 884.

**The Court May Look Behind the Judgment** to ascertain the nature of the claim on which it is founded, and such claim retains its original nature after it has been reduced to judgment. *East St. Louis v. Underwood*, 105 Ill. 308; *State v. Royse*, (Neb. 1902) 91 N. W. Rep. 559.

**Bonds Issued in Satisfaction of Judgments.**—In Iowa, the validity of negotiable bonds of a county, issued in satisfaction of judgments, in the hands of innocent holders for value, cannot be questioned by showing that the judgments were rendered upon warrants issued in excess of a constitutional limit upon the right to incur debts, and a tax levied to pay such bonds may be enforced. *Sioux City, etc., R. Co. v. Osceola County*, 52 Iowa 26; *Sioux City, etc., R. Co. v. Osceola County*, 45 Iowa 168.

**1. Levy Beyond Statutory Limitation Void**—*United States*.—*Sibley v. Mobile*, 3 Woods (U. S.) 535; *U. S. v. Kent*, 107 Fed. Rep. 190, affirmed (C. C. A.) 113 Fed. Rep. 232.

*Arkansas*.—*Worthen v. Badgett*, 32 Ark. 496; *Cope v. Collins*, 37 Ark. 649.

*Illinois*.—*Thatcher v. People*, 93 Ill. 240; *Weber v. Traubel*, 95 Ill. 427; *Chicago, etc., R. Co. v. People*, 177 Ill. 91; *Schulenburg, etc., Lumber Co. v. East St. Louis*, 63 Ill. App. 214.

*Iowa*.—*Clark v. Davenport*, 14 Iowa 494; *Jeffries v. Lawrence*, 42 Iowa 498; *Sterling School Furniture Co. v. Harvey*, 45 Iowa 466.

*Kansas*.—*Atchison, etc., R. Co. v. Woodcock*, 18 Kan. 20; *Osborne County v. Blake*, 25 Kan. 358; *Atchison, etc., R. Co. v. Atchison County*, 47 Kan. 722; *Stewart v. Kansas Town Co.*, 50 Kan. 553; *Phelps v. Lodge*, 60 Kan. 122; *Chicago, etc., R. Co. v. Stanfield*, 7 Kan. App. 274.

*Louisiana*.—*Gonzales v. Lindsay*, 30 La. Ann. 1085; *Witkowski v. Bradley*, 35 La. Ann. 904.

*Maine*.—*Elwell v. Shaw*, 1 Me. 339.

*Michigan*.—*Wattles v. Lapeer*, 40 Mich. 624; *Connors v. Detroit*, 41 Mich. 129; *Flint, etc., R. Co. v. Auditor Gen.*, 41 Mich. 635; *Silbee v. Stockle*, 44 Mich. 561; *Boyce v. Sebring*, 66 Mich. 210; *Seymour v. Peters*, 67 Mich. 415; *Schneewind v. Niles*, 103 Mich. 301.

*Mississippi*.—*Beard v. Lee County*, 51 Miss. 542; *Boguechitto v. Lewis*, 75 Miss. 741.

*Missouri*.—*Benoist v. St. Louis*, 19 Mo. 179; *Lamar Water, etc., Co. v. Lamar*, 128 Mo. 188.

*Nebraska*.—*Wheeler v. Plattsmouth*, 7 Neb. 270; *Reineman v. Covington, etc., R. Co.*, 7

Neb. 310; *Burlington, etc., R. Co. v. York County*, 7 Neb. 487; *Union Pac. R. Co. v. Dawson County*, 12 Neb. 254; *State v. Gosper County*, 14 Neb. 22; *Dawson County v. Clark*, 58 Neb. 756; *State v. Royse*, (Neb. 1902) 91 N. W. Rep. 559.

*New Mexico*.—*Raton Waterworks Co. v. Raton*, 9 N. Mex. 70.

*Ohio*.—*Kemper v. McClelland*, 19 Ohio 324; *State v. Humphreys*, 25 Ohio St. 520; *State v. Strader*, 25 Ohio St. 527; *Cleveland v. Heisley*, 41 Ohio St. 670.

*Oregon*.—*Corbett v. Portland*, 31 Oregon 407; *Gadsby v. Portland*, 38 Oregon 135.

*Texas*.—*Blessing v. Galveston*, 42 Tex. 643; *Dean v. Lufkin*, 54 Tex. 265; *Conklin v. El Paso*, (Tex. Civ. App. 1897) 44 S. W. Rep. 879.

*Wisconsin*.—*Somo Lumber Co. v. Lincoln County*, 110 Wis. 286.

**Presumption in Favor of Legality.**—Where a tax is levied, which might have been authorized by either of two statutes, but which would be excessive if levied under one of them, it will be presumed to have been levied under the other. *Lima v. McBride*, 34 Ohio St. 338.

**Illegality of Levy Must Be Shown.**—The levy of a school tax of three per cent. is not shown to be illegal, when the law allows a tax of that amount for building purposes if it is not shown in what district the property taxed is situated, or what rate was required to be levied in each district. *Gage v. Bailey*, 102 Ill. 11.

**2. Equity Will Enjoin Collection.**—*Tygart's Valley Bank v. Philippi*, 38 W. Va. 219.

**3. Excess of Limit Not Authorized by Failure to Tax in Past Years.**—*Cleveland v. U. S.*, (C. C. A.) 111 Fed. Rep. 341.

But in *Bowen v. West*, 10 Colo. App. 322, it was held that a city which had not for several years levied any water tax to pay its contractual indebtedness to the water company might levy a tax for that purpose aggregating so much as would have been raised by levying the authorized tax in each of the years within that period.

**In Texas**, where the fiscal year of a city was changed so as to begin three months later than formerly, it was held that a levy purporting to be for the fiscal year but at a rate in excess of the limit because including the three extra months, was invalid as to the excess. *San Antonio v. Raley*, (Tex. Civ. App. 1895) 32 S. W. Rep. 180; *San Antonio v. Berry*, 92 Tex. 319. But see *Hernandez v. San Antonio*, (Tex. Civ. App. 1897) 39 S. W. Rep. 1022, in which the peculiar circumstances of the case were held sufficient to justify the levy.

**4. Insufficient Assessment Not Ground for New Levy.**—*Gadsby v. Portland*, 38 Oregon 135.

excess of the limit be upheld as an exercise of the police power, where its real and professed object is to raise revenue.<sup>1</sup>

**Interest and Penalties May Be Added Above Limit.** — Interest on taxes due and penalties for delinquencies may be added over and above the limit.<sup>2</sup>

**How Far Tax Void.** — A levy in excess of the limit does not invalidate the whole tax, if the part within the limit can be separated by computation from that in excess of it.<sup>3</sup> And where a levy does not itself exceed the limit, it is not invalidated by a subsequent levy which taken together with the former is in excess of the limit.<sup>4</sup>

(3) **Effect of Limitation on Pre-existing Debts.** — A limitation, either constitutional or legislative, is not applicable to taxes levied in payment of debts created prior to its adoption, where, at the time such indebtedness was incurred, the municipality had power to impose taxation sufficient to discharge it.<sup>5</sup>

**d. WITHDRAWAL OR ALTERATION OF POWER.** — In the absence of constitutional restrictions, the power of municipal corporations to levy taxes—except so far as vested rights are concerned—may be enlarged, abridged, or entirely withdrawn, at the pleasure of the legislature.<sup>6</sup> The legislature can

1. **Not Sustainable as Exercise of Police Power.** — *Gadsby v. Portland*, 38 Oregon 135.

2. **Interest and Penalties May Be Added.** — *Chicago, etc., R. Co. v. Hartshorn*, 30 Fed. Rep. 541.

**The Penalty Pertains to the Remedy**, and is no part of the tax when levied. *Tobin v. Hartshorn*, 69 Iowa 648.

3. **Invalid as to Excess Only.** — *Vance v. Little Rock*, 30 Ark. 435; *Tampa v. Mugge*, 40 Fla. 326; *Mix v. People*, 72 Ill. 241; *Chambers v. Myrick*, 61 Miss. 459; *Burlington, etc., R. Co. v. York County*, 7 Neb. 487; *State v. McClurg*, 27 N. J. L. 253; *Mowry v. Mowry*, 20 R. I. 74; *Bright v. Halloman*, 7 Lea (Tenn.) 309; *San Antonio v. Berry*, 92 Tex. 319; *Wright v. San Antonio*, (Tex. Civ. App. 1899) 50 S. W. Rep. 406. See also *De Fremery v. Austin*, 53 Cal. 380; *Frazer v. Siebern*, 16 Ohio St. 614; *Nalle v. Austin*, (Tex. Civ. App. 1897) 42 S. W. Rep. 780.

**The Entire Levy Is Void** if the limit is exceeded by a sum which is spread upon the whole roll. *San Antonio v. Raley*, (Tex. Civ. App. 1895) 32 S. W. Rep. 180.

4. **Not Invalidated by Subsequent Levy.** — *Basnett v. El Paso*, 88 Tex. 168.

5. **Not Applicable to Pre-existing Debts.** — *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535; *Wolff v. New Orleans*, 103 U. S. 358; *Ralls County Ct. v. U. S.*, 105 U. S. 733; *Quincy v. Jackson*, 113 U. S. 332; *Mason v. Shawneetown*, 77 Ill. 533; *Chiniquy v. People*, 78 Ill. 570; *Stanberry v. Jordan*, 145 Mo. 371; *State v. Kearney*, 49 Neb. 325, 337; *Texas, etc., R. Co. v. Harrison County*, 54 Tex. 119; *Dean v. Lufkin*, 54 Tex. 265. And see *Houston v. Voorhies*, 70 Tex. 356. See generally *supra*, this title, *Power of Taxation* — *Constitutional Restrictions* — *Restrictions on Rate*. See also the cases cited *infra*, this section, *Withdrawal or Alteration of Power*.

**Power to Subscribe to Railroad Stock.** — A railroad company's charter having conferred on municipalities power to subscribe to its stock, and, by implication, power to levy taxes to meet the obligation, it was held that a subsequent general law limiting the rate of taxation had

no application. *Peoria, etc., R. Co. v. People*, 116 Ill. 401.

**Judgment Obtained After Limit Attached.** — Where the indebtedness was incurred before but was not reduced to judgment till after the limitation took effect, it was held that the claim was more binding on the moneys raised by regular taxation than simple contract debts incurred by the municipality subsequent to the taking effect of the limitation. *People v. Edgewater*, (Supm. Ct. Gen. T.) 51 How. Pr. (N. Y.) 280.

6. **Legislature May Alter Power at Will.** — *United States.* — *Wadsworth v. Eau Claire County*, 102 U. S. 534; *Wolff v. New Orleans*, 103 U. S. 358; *Williamson v. New Jersey*, 130 U. S. 189; *U. S. v. Key West*, (C. C. A.) 78 Fed. Rep. 88.

*Arkansas.* — See *Parr v. Matthews*, 50 Ark. 390.

*California.* — *People v. Burr*, 13 Cal. 343.

*Florida.* — *Basnett v. Jacksonville*, 19 Fla. 664.

*Georgia.* — *Du Bignon v. Brunswick*, 106 Ga. 317.

*Illinois.* — *People v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278. And see *Gutzwiller v. People*, 14 Ill. 142; *Sangamon County v. Springfield*, 63 Ill. 66.

*Kentucky.* — *Covington, etc., R. Co. v. Kenton County Ct.*, 12 B. Mon. (Ky.) 144. And see *Com. v. Louisville*, 5 B. Mon. (Ky.) 293.

*Louisiana.* — *Police Jury v. Shreveport*, 5 La. Ann. 661.

*Maine.* — *Augusta v. North*, 57 Me. 392, 2 Am. Rep. 55.

*Missouri.* — *St. Louis v. Allen*, 13 Mo. 400; *State v. St. Louis, etc., R. Co.*, 9 Mo. App. 532.

*New Jersey.* — *Mohinking v. Bowes*, 65 N. J. L. 469.

*New York.* — See *People v. Morris*, 13 Wend. (N. Y.) 325.

*North Carolina.* — *Wallace v. Sharon Tp.*, 84 N. Car. 164; *Lilly v. Taylor*, 88 N. Car. 495.

*Pennsylvania.* — *Com. v. Allegheny County*, 40 Pa. St. 348; *Philadelphia v. Fox*, 64 Pa. St. 169.

*South Carolina.* — See *State v. Kelly*, 45 S. Car. 457.

take away the taxing power even after the tax has been legally assessed,<sup>1</sup> or a note authorizing a levy has been taken,<sup>2</sup> but it cannot entirely release the payment of taxes already levied.<sup>3</sup>

**Withdrawal or Alteration of the Power Will Not Be Presumed** in the absence of a clear expression of the legislative intent.<sup>4</sup>

**Cannot Impair Obligation of Contracts.** — Laws in force when an indebtedness is incurred, which provide for taxation to pay it, enter into the contract with the creditor and constitute a part of it,<sup>5</sup> and consequently the law withdrawing the taxing power is void if it would operate an impairment of the obligation of contracts entered into on a pledge, either express or implied, that the taxing power should be exercised for their fulfilment.<sup>6</sup> But an act enlarging the

*Texas.* — *Blessing v. Galveston*, 42 Tex. 642.

*Vermont.* — *Atkins v. Randolph*, 31 Vt. 226.

*Virginia.* — *Richmond v. Richmond, etc.*, R. Co., 21 Gratt. (Va.) 604.

*Washington.* — *State v. Carson*, 6 Wash. 250.

As to legislative control of municipal corporations generally, see the title MUNICIPAL CORPORATIONS, vol. 20, p. 1218 *et seq.*

**Grant of Power Not a Contract.** — The grant of the power of taxation by the legislature does not form such a contract between the state and the municipality as to be within the constitutional prohibition against laws impairing the obligation of contracts. *Williamson v. New Jersey*, 130 U. S. 189.

**Delegating Power May Alter Authority.** — A municipal corporation can only raise money and apply it to a particular purpose by virtue of a delegated authority, and the same authority that grants the power may alter the law and direct it to a different object. *St. Louis v. Shields*, 52 Mo. 354.

**Statute Authorizing Vote Confers Mere Privilege.** — A statute providing for taking the vote of the people of certain counties in relation to a tax to be laid confers a mere privilege upon the people, and when the right has not been exercised it confers no rights which prevent the legislature from repealing the statute. *Covington, etc., R. Co. v. Kenton County Ct.*, 12 B. Mon. (Ky.) 144.

**Montana — Ordinances Not Repealed by Constitution.** — The constitution of Montana, adopted at the time of its admission as a state, and the subsequent revenue law of 1891, did not repeal the prior ordinances of cities relating to the levy and collection of municipal taxes so as to invalidate all subsequent proceedings relating thereto, unless had under the general revenue law. *Lockey v. Walker*, 12 Mont. 577.

**Quasi Municipality.** — The power of the legislature to abolish, at its discretion, school districts and other districts established by its authority for special municipal purposes, is undoubted. *Whitney v. Stow*, 111 Mass. 368; *Blackstone v. Taft*, 4 Gray (Mass.) 250; *Weymouth, etc., Fire Dist. v. Norfolk County*, 108 Mass. 142.

**1. After Assessment.** — *Pickton v. Fargo*, 10 N. Dak. 469, 476; *State v. St. Louis, etc.*, R. Co., 9 Mo. App. 532, wherein it was held that the legislature might, by a retrospective act which takes effect before a municipal tax becomes due, annul it and vest in another body the right to levy the tax for that year.

**2. After Vote Taken.** — *Covington, etc., R. Co. v. Kenton County Ct.*, 12 B. Mon. (Ky.) 150.

**3. Cannot Release Payment of Levied Tax.** — *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56.

**4. Alteration Not Presumed.** — *People v. Knopf*, 186 Ill. 457; *People v. Long Island City*, 76 N. Y. 20; *Orange, etc., R. Co. v. Alexandria*, 17 Gratt. (Va.) 184; *State v. Carson*, 6 Wash. 250. And see *Reclamation Dist. No. 3 v. Goldman*, 61 Cal. 205; *Doggett v. Walter*, 15 Fla. 355; *New Orleans v. Hart*, 14 La. Ann. 815; *Kinney v. Zimbleman*, 36 Tex. 554.

In *Fuller v. Heath*, 89 Ill. 296, it was held that the adoption of a general incorporation law relating to cities, and the passage of a general school law, do not modify or impair any former special laws authorizing a city as a public agency to levy and collect taxes for school purposes.

**5. Existing Laws Enter into Contract.** — *Rees v. Watertown*, 19 Wall. (U. S.) 107; *Maenhaut v. New Orleans*, 2 Woods (U. S.) 108; *Ranger v. New Orleans*, 2 Woods (U. S.) 128; *Milner v. Pensacola*, 2 Woods (U. S.) 632; *Sibley v. Mobile*, 3 Woods (U. S.) 535; *U. S. v. Jefferson County*, 5 Dill. (U. S.) 310; *U. S. v. Howard County Ct.*, 2 Fed. Rep. 1; *Brodie v. McCabe*, 33 Ark. 690; *Middleport v. Aetna L. Ins. Co.*, 82 Ill. 562; *Board of Education v. Louisville, etc., R. Co.*, 62 S. W. Rep. 1125, 23 Ky. L. Rep. 376; *State v. Young*, 29 Minn. 474; *Beck v. Allen*, 58 Miss. 143; *Mercer County v. Pittsburgh, etc., R. Co.*, 27 Pa. St. 389. And see generally the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1030.

**Taxing Power Existing When Contract Made.** — Where, at the time the debt was incurred or the bonds were issued, there existed a power of taxation sufficient to pay them, with the accruing interest, such power enters into and forms part of the contract, and cannot be taken away by subsequent legislation. *Scotland County Ct. v. U. S.*, 140 U. S. 41; *Von Hoffman v. Quincy*, 4 Wall. (U. S.) 535; *Milner v. Pensacola*, 2 Woods (U. S.) 632; *Saloy v. New Orleans*, 33 La. Ann. 79. And see *Butz v. Muscatine*, 8 Wall. (U. S.) 583; *Welch v. Ste. Genevieve*, 1 Dill. (U. S.) 134.

**Where Bonds Have Been Issued** under an authority providing for the levy of taxes for their protection, the holder thereof has a right to look to the taxing provision as a part of his security, and to demand at the proper time that it be exercised in his favor. The measure of that right is the constitutional limit of the power which the legislature could grant to the municipality when the contract was made. *Brodie v. McCabe*, 33 Ark. 690.

**6. Cannot Impair Contract Obligations.** — *United States.* — *Von Hoffman v. Quincy*, 4



taxing power after the time a contract is entered into may be repealed.<sup>1</sup>

On the Dissolution of a Municipal Corporation the taxing power reverts to the state.<sup>2</sup>

**c. POWER TO IMPOSE SPECIAL TAXES.** — The power of the legislature to authorize municipal corporations to engage in, or aid in the prosecution of, private enterprises partaking of a public nature, and to levy special taxes to meet the obligations thereby incurred, has been already discussed elsewhere in this work.<sup>3</sup>

**Special Authority Required.** — Special taxation is not authorized under a general power to tax; special authority is necessary to its imposition.<sup>4</sup>

**3. How Power Exercised — a. CONFORMITY TO STATE METHODS.** — It is not essential that the system of taxation in a municipality be made to conform exactly to that of the state either as to the rate or the manner of imposition,<sup>5</sup>

Wall. (U. S.) 535; *Galena v. Amy*, 5 Wall. (U. S.) 705; *Lee County v. Rogers*, 7 Wall. (U. S.) 181; *Mt. Pleasant v. Beckwith*, 100 U. S. 514; *Wolff v. New Orleans*, 103 U. S. 358; *Louisiana v. Pillsbury*, 105 U. S. 278; *Mobile v. Watson*, 116 U. S. 289; *U. S. v. Mobile*, 4 Woods (U. S.) 536; *Lansing v. County Treasurer*, 1 Dill. (U. S.) 522; *Garrett v. Memphis*, 5 Fed. Rep. 860; *Amy v. Galena*, 7 Fed. Rep. 163.

*Arkansas.* — *Brodie v. McCabe*, 33 Ark. 690.

*Florida.* — *Basnett v. Jacksonville*, 19 Fla. 664.

*Iowa.* — *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56.

*Kentucky.* — *Board of Education v. Louisville, etc.*, R. Co., 62 S. W. Rep. 1125, 23 Ky. L. Rep. 376.

*Mississippi.* — *Gibbs v. Green*, 54 Miss. 592.

*Missouri.* — *St. Louis v. Russell*, 9 Mo. 308.

*New Jersey.* — *Munday v. Rahway*, 43 N. J. L. 338.

*Ohio.* — *Goodale v. Fennell*, 27 Ohio St. 426, 22 Am. Rep. 321.

See also *Covington, etc., R. Co. v. Kenton County Ct.*, 12 B. Mon. (Ky.) 144; *New Orleans v. Southern Bank*, 15 La. Ann. 89; *Dupérier v. Police Jury*, 31 La. Ann. 709; *State v. New Orleans*, 34 La. Ann. 477; *State v. Mississippi River Bridge Co.*, 134 Mo. 321; *State v. Madison*, 15 Wis. 30; *Smith v. Appleton*, 19 Wis. 468; *State v. Milwaukee*, 25 Wis. 122. And see generally the title MUNICIPAL CORPORATIONS, vol. 20, p. 1222.

**Different Mode of Payment Cannot Be Substituted.** — A creditor of a county cannot be compelled to accept another and an essentially different mode of payment from that provided by his contract, that is to say, by the laws existing at the time he became a creditor of the county; and if there were funds in the treasury of the county applicable to such payment at the time he made demand therefor, which were raised under the law as it stood at the time of the contract, he has a right to be paid from these funds, and the legislature cannot deprive him of it without his consent. *Rose v. Estudillo*, 39 Cal. 270.

**Municipality Cannot Escape Contract Obligations.** — A municipality cannot, by its own ordinances, under the guise of taxation, relieve itself from performing to the letter all that it expressly contracted to perform. *Murray v. Charleston*, 96 U. S. 432.

**1. Enlargement of Power After Contract Made.** — *U. S. v. Howard County Ct.*, 2 Fed. Rep. 1.

**2. Taxing Power Reverts to State.** — *Meriwether v. Garrett*, 102 U. S. 472. As to the effect of

dissolution generally, see the title MUNICIPAL CORPORATIONS, vol. 20, p. 1237.

In *Hare v. Kennerly*, 83 Ala. 608, it was held that the legislature, having dissolved the corporate existence of a city, may exercise the power of taxation given it within the constitutional limit.

**Ordinances Remaining in Force.** — In *Florida* the ordinances in force in such defunct corporations remain in force until altered or repealed by the commissioners appointed by the governor. *Provisional Municipality v. Sullivan*, 23 Fla. 1.

**3.** See the title MUNICIPAL AID, vol. 20, p. 1082.

**4. Special Authority Necessary — United States.** — *Thomson v. Lee County*, 3 Wall. (U. S.) 330; *Marsh v. Fulton County*, 10 Wall. (U. S.) 676; *Pendleton County v. Amy*, 13 Wall. (U. S.) 297; *Kenicott v. Wayne County*, 16 Wall. (U. S.) 452; *St. Joseph Tp. v. Rogers*, 16 Wall. (U. S.) 644; *Carroll County v. U. S.*, 18 Wall. (U. S.) 71; *South Ottawa v. Perkins*, 94 U. S. 260; *McClure v. Oxford Tp.*, 94 U. S. 429; *Ottawa v. Carey*, 108 U. S. 110; *Lewis v. Shreveport*, 108 U. S. 282; *Dixon County v. Field*, 111 U. S. 83; *Concord v. Robinson*, 121 U. S. 165; *Kelley v. Milan*, 127 U. S. 139; *Norton v. Taxing Dist.*, 129 U. S. 479; *Commercial Nat. Bank v. Iola*, 2 Dill. (U. S.) 353.

*Florida.* — *Tampa v. Mugge*, 40 Fla. 326.

*Illinois.* — *Allen v. Peoria, etc.*, R. Co., 44 Ill. 85; *Pitzman v. Freeburg*, 92 Ill. 111; *Gaddis v. Richland County*, 92 Ill. 119; *Welch v. Post*, 99 Ill. 471; *Pana v. Lippincott*, 2 Ill. App. 466.

*Indiana.* — *Lafayette v. Cox*, 5 Ind. 38; *Delaware County v. McClintock*, 51 Ind. 325.

*Kansas.* — *Leavenworth County v. Miller*, 7 Kan. 479, 12 Am. Rep. 425.

*Kentucky.* — *Bullock v. Curry*, 2 Met. (Ky.) 171; *Byrne v. Covington*, (Ky. 1893) 21 S. W. Rep. 1050.

*Nebraska.* — *Hamlin v. Meadville*, 6 Neb. 227.

*New York.* — *Squire v. Cartwright*, 67 Hun (N. Y.) 218.

*Oregon.* — *Corbett v. Portland*, 31 Oregon 407.

*Tennessee.* — *Tax-payers v. Tennessee Cent. R. Co.*, 11 Lea (Tenn.) 330.

And see the titles MUNICIPAL AID, vol. 20, p. 1082; MUNICIPAL SECURITIES, vol. 21, p. 13.

**5. Need Not Conform to State System.** — *Turlock Irrigation Dist. v. Williams*, 76 Cal. 360; *State v. Milburn*, 9 Gill (Md.) 97; *Firemen's Ins. Co.*

but a local departure from the general policy of the state in imposing taxes will not be justified unless expressly authorized.<sup>1</sup>

**b. CONFORMITY TO STATUTORY REQUIREMENTS.** — Where the statute conferring the power to tax prescribes the mode to be pursued in its performance, a valid tax can be imposed only by following the prescribed method.<sup>2</sup>

**By Whom Power to Be Exercised.** — Thus, the power conferred on the municipi-

*v. Baltimore*, 23 Md. 296; *Daily v. Swope*, 47 Miss. 367; *Nashville v. Althrop*, 5 Coldw. (Tenn.) 554; *Adams v. Somerville*, 2 Head (Tenn.) 363; *Dallas v. Dallas Consol. Electric St. R. Co.*, 95 Tex. 268; *Eustis v. Henrietta*, (Tex. Civ. App. 1896) 37 S. W. Rep. 632.

**The State May Give a Municipality Power** to decide for itself as to the method of imposing the municipal taxes, in the absence of any constitutional restriction. *State v. Aitken*, 62 Neb. 428.

In *Virginia*, the power of the general assembly to authorize municipal corporations to levy taxes for their peculiar purposes, is not limited by article 4, section 22 *et seq.*, of the constitution of Virginia, which relates to taxation for purposes of state revenue. *Gilkeson v. Frederick County*, 13 Gratt. (Va.) 577.

In *New York*, state and county taxation forms a subject of the general provisions of the Revised Statutes relating to taxes, and municipal taxation is governed by these general rules only so far as the provisions of the law are either expressly or impliedly adopted by laws imposing municipal taxes. *Troy v. Mutual Bank*, 20 N. Y. 387.

**Time of Levy Left to Council.** — In *San Luis Obispo v. Pettit*, 87 Cal. 499, it was held that the Municipal Corporation Act of 1883, p. 273, providing that an assessment, levy, and collection of city and town taxes shall conform to that of the state and county taxes, except as to the times thereof, did not prohibit the levy and collection at that time, but the selection of the time was left to the discretion of the council.

**A City May Place a Higher Value** upon property than that placed upon it by the state, but not an overvaluation. *Fulgum v. Nashville*, 8 Lea (Tenn.) 635.

**General Law Made Applicable.** — Where a city charter directs that the municipal taxes shall be levied "according to law" this means in accordance with the general tax laws in existence when the tax is levied, although the general law may have been different at the time the charter was granted. *Ontario Bank v. Bunnell*, 10 Wend. (N. Y.) 186; *Newman v. North Yakima*, 7 Wash. 220.

**1. Unauthorized Departure from General Policy Not Justified.** — *Sanders v. Butler*, 30 Ga. 679; *Howell v. Cassopolis*, 35 Mich. 471; *Ontario Bank v. Bunnell*, 10 Wend. (N. Y.) 184.

**2. Must Be Strictly Pursued — United States.** — *Beaty v. Knowler*, 4 Pet. (U. S.) 153; *Rees v. Watertown*, 19 Wall. (U. S.) 107.

*Alabama.* — *Montgomery v. State*, 38 Ala. 162; *Mobile v. Baldwin*, 57 Ala. 61, 29 Am. Rep. 712; *Hare v. Kennerly*, 83 Ala. 608.

*California.* — *Taylor v. Donner*, 31 Cal. 480; *Dranga v. Rowe*, 127 Cal. 506; *Board of Education v. San Diego*, 128 Cal. 369. And see *Smith v. Davis*, 30 Cal. 536; *Smith v. Cofran*, 34 Cal. 310.

*Colorado.* — *Keese v. Denver*, 10 Colo. 113. *Illinois.* — *Fitch v. Pinkard*, 5 Ill. 69; *Chicago v. Wright*, 32 Ill. 192; *Scammon v. Chicago*, 40 Ill. 146; *Mix v. People*, 72 Ill. 241; *Alton v. Aetna Ins. Co.*, 82 Ill. 45; *Gaddis v. Richland County*, 92 Ill. 119; *Webster v. People*, 98 Ill. 343; *Spring Valley Coal Co. v. People*, 157 Ill. 543; *Indiana, etc., R. Co. v. People*, 201 Ill. 351.

*Indiana.* — *Kyle v. Malin*, 8 Ind. 34; *Harmony Tp. v. Osborne*, 9 Ind. 458; *Fahlor v. Wells County*, 101 Ind. 167.

*Iowa.* — *Clark v. Davenport*, 14 Iowa 494; *Fairfield v. Ratcliff*, 20 Iowa 396; *Iowa R. Land Co. v. Sac County*, 39 Iowa 124. And see *Cedar Rapids, etc., R. Co. v. Redmond*, (Iowa 1903) 94 N. W. Rep. 1096.

*Kansas.* — *Leavenworth v. Norton*, 1 Kan. 432; *Burnes v. Atchison*, 2 Kan. 454; *Sloan v. Beebe*, 24 Kan. 343; *Marion County v. Barker*, 25 Kan. 258; *Tull v. Royston*, 30 Kan. 619; *State v. Addis*, 59 Kan. 762; *Atchison, etc., R. Co. v. Maxwell*, 10 Kan. App. 370.

*Kentucky.* — *Kaye v. Hall*, 13 B. Mon. (Ky.) 455; *Kniper v. Louisville*, 7 Bush (Ky.) 599; *Campbell County Ct. v. Taylor*, 8 Bush (Ky.) 206; *Murray v. Tucker*, 10 Bush (Ky.) 240; *Somerset v. Somerset Banking Co.*, 109 Ky. 549; *Springfield v. People's Deposit Bank*, 63 S. W. Rep. 271, 23 Ky. L. Rep. 519.

*Louisiana.* — *Rabassa v. New Orleans*, 3 Mart. (La.) 218; *New Orleans v. Southern Bank*, 15 La. Ann. 89; *State v. Shreveport*, 33 La. Ann. 1179.

*Maine.* — *Huse v. Merriam*, 2 Me. 375.

*Maryland.* — *Henderson v. Baltimore*, 8 Md. 352.

*Massachusetts.* — *Joyner v. School Dist. No. Three*, 3 Cush. (Mass.) 567; *Gustin v. School Dist. No. Five*, 10 Gray (Mass.) 85; *Holmes v. Baker*, 16 Gray (Mass.) 259.

*Michigan.* — *Steckert v. East Saginaw*, 22 Mich. 104; *Pontiac v. Axford*, 49 Mich. 69; *Ryerson v. Laketon Tp.*, 52 Mich. 509.

*Minnesota.* — *In re Cloquet Lumber Co.*, 61 Minn. 233. And see *McComb v. Bell*, 2 Minn. 295.

*Mississippi.* — *Warren County v. Klein*, 51 Miss. 807. See also *Gamble v. Witty*, 55 Miss. 26. But compare *Wolfe v. Murphy*, 60 Miss. 1.

*Missouri.* — *Ruggles v. Collier*, 43 Mo. 353; *St. Louis v. Laughlin*, 49 Mo. 559; *Trenton v. Coyle*, 107 Mo. 193; *State v. Mississippi River Bridge Co.*, 134 Mo. 321. And see *St. Joseph v. Anthony*, 30 Mo. 537.

*Nebraska.* — *Turner v. Althaus*, 6 Neb. 54; *Hamlin v. Meadville*, 6 Neb. 227; *Wheeler v. Plattsmouth*, 7 Neb. 270; *Burlington, etc., R. Co. v. York County*, 7 Neb. 487; *Curtis v. South Omaha*, (Neb. 1903) 93 N. W. Rep. 743.

*New Jersey.* — *State v. Jersey City*, 25 N. J. L. 309, 26 N. J. L. 444; *Carron v. Martin*, 26

pality must be called into exercise by the proper functionaries,<sup>1</sup> and it cannot be redelegated to any other officer, board, or body.<sup>2</sup>

**Time of Levy.** — And so, if the statute prescribes the time for levying, the tax, to be valid, must be levied at the prescribed time.<sup>3</sup> But when a statutory

N. J. L. 594, 69 Am. Dec. 584; *Shackelton v. Guttenberg*, 39 N. J. L. 660. And see *State v. Reeves*, 28 N. J. L. 520.

*New York.* — *Sharp v. Speir*, 4 Hill (N. Y.) 76; *Sharp v. Johnson*, 4 Hill (N. Y.) 92; *In re Douglass*, 46 N. Y. 42; *Merritt v. Portchester*, 71 N. Y. 309, 27 Am. Rep. 47; *Rathbun v. Acker*, 18 Barb. (N. Y.) 393; *Matter of Turfler*, 44 Barb. (N. Y.) 46; *People v. New Rochelle*, 17 N. Y. App. Div. 603; *Rochester v. Bloss*, 77 N. Y. App. Div. 28; *Matter of Wood*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 561.

*North Carolina.* — *Asheville v. Means*, 7 Ired. L. (29 N. Car.) 406; *Winston v. Taylor*, 99 N. Car. 210; *Charlotte v. Shepard*, 122 N. Car. 602.

*North Dakota.* — *Engstad v. Dinnie*, 8 N. Dak. 1.

*Ohio.* — *Jonas v. Cincinnati*, 18 Ohio 318; *Mays v. Cincinnati*, 1 Ohio St. 268; *State v. Harris*, 17 Ohio St. 608. And see *State v. Hagerty*, 3 Ohio Cir. Dec. 12, 5 Ohio Cir. Ct. 22.

*Oregon.* — *Oregon Steam Nav. Co. v. Portland*, 2 Oregon 8.

*South Carolina.* — *Columbia v. Hunt*, 5 Rich. L. (S. Car.) 550. And see *State v. Hagood*, 13 S. Car. 46.

*Texas.* — *Wood v. Galveston*, 76 Tex. 132; *People's Nat. Bank v. Ennis* (Tex. Civ. App. 1899) 50 S. W. Rep. 632; *Miller v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 522.

*Vermont.* — *Henry v. Chester*, 15 Vt. 460; *Walker v. Burlington*, 56 Vt. 131.

*Virginia.* — *Richmond v. Daniel*, 14 Gratt. (Va.) 385; *Virginia, etc., R. Co. v. Washington County*, 30 Gratt. (Va.) 471; *Green v. Ward*, 82 Va. 324. And see *Richmond v. Richmond, etc., R. Co.*, 21 Gratt. (Va.) 604.

*West Virginia.* — See *Wells v. Board of Education*, 20 W. Va. 157.

**Extension of Tax Without Levy.** — A tax extended by the proper officer, without any levy having been made, is void. *St. Louis, etc., R. Co. v. Apperson*, 97 Mo. 300.

**Place of Levy.** — A levy of taxes made by a board of supervisors while holding its session, at a place where it was not authorized by law to hold a session, is void. *Capital State Bank v. Lewis*, 64 Miss. 727. And see *Johnson v. Futch*, 57 Miss. 73; *Gamble v. Witty*, 55 Miss. 26.

**Specification of Purpose.** — Where a tax is ordered for a specific purpose it must appear to have been levied for that purpose. *Louisville, etc., R. Co. v. Com.*, 89 Ky. 531.

And where a levy is void because its purpose is not specified, no subsequent specification can cure the illegality. *Dean v. Lufkin*, 54 Tex. 265.

But when a statute requires taxes to be laid specifically for each separate purpose, it is not illegal to assess a tax of a certain per cent. in gross, and then define in detail the percentage for each specific purpose. *Brunswick v. Finney*, 54 Ga. 317.

**Publication of Ordinance — Necessity and Sufficiency.** — *Law v. People*, 87 Ill. 385; *Mix v. People*, 106 Ill. 425.

**Right to Make Subsequent Levy.** — Where a tax is void for failure to comply with the statutory requirements, a proper levy may be made subsequently. *Somerset v. Somerset Banking Co.*, 109 Ky. 549.

**1. Proper Functionaries Must Exercise.** — *Hyde Park v. Ingalls*, 87 Ill. 11; *Gaddis v. Richland County*, 92 Ill. 119; *Webster v. People*, 98 Ill. 343; *O'Neil v. Tyler*, 3 N. Dak. 47.

**2. Cannot Redelegate Power — California.** — *Oakland v. Carpenter*, 13 Cal. 540.

*Georgia.* — *Johnston v. Macon*, 62 Ga. 645.

*Iowa.* — *McInerney v. Reed*, 23 Iowa 410; *State v. Des Moines*, 103 Iowa 76, 64 Am. St. Rep. 157.

*Kentucky.* — *Mercer County Ct. v. Kentucky River Nav. Co.*, 8 Bush (Ky.) 300.

*Michigan.* — *Scofield v. Lansing*, 17 Mich. 437.

*Missouri.* — *Ruggles v. Collier*, 43 Mo. 353; *St. Louis v. Clemens*, 43 Mo. 395.

*New Jersey.* — *State v. Koster*, 38 N. J. L. 308.

*New York.* — *Robinson v. Dodge*, 18 Johns. (N. Y.) 351; *Trumbull v. White*, 5 Hill (N. Y.) 46; *Thompson v. Schermerhorn*, 6 N. Y. 92, 55 Am. Dec. 385; *Davis v. Read*, 65 N. Y. 566.

*North Carolina.* — *Richmond, etc., R. Co. v. Brogden*, 74 N. Car. 707.

*Texas.* — See *Bassett v. El Paso*, (Tex. Civ. App. 1894) 28 S. W. Rep. 554.

*Virginia.* — *Ould v. Richmond*, 23 Gratt. (Va.) 471, 14 Am. Rep. 139.

**The Supervisors of a County cannot delegate their authority to license trades and callings to others, or make its exercise depend upon the consent of others; the power vested in them is a public trust which can be executed only in consonance with the general purposes of the municipality, and in subordination to the general laws and policy of the state.** *In re Quong Woo*, 13 Fed. Rep. 229.

**Delegation to Township Committee.** — A resolution, at a town meeting, to raise as much as the township committee shall direct, is illegal and will be set aside. *State v. Sickles*, 24 N. J. L. 125.

**Where the Duty of Levying Taxes Is Imposed on the County Clerk,** its clerk cannot certify the amount due from any taxpayer, simply from a certificate from the city clerk as to the city rate of taxation, and without an order from the court. *Kansas v. Hannibal, etc., R. Co.*, 81 Mo. 285.

**3. Must Be Made at Prescribed Time — Arkansas.** — *Martin v. McDiarmid*, 55 Ark. 213.

*Illinois.* — *Webster v. French*, 12 Ill. 302; *Cowgill v. Long*, 15 Ill. 202; *McLoughlin v. Thompson*, 55 Ill. 249; *Mix v. People*, 72 Ill. 241; *People v. Cooper*, 10 Ill. App. 384.

*Indiana.* — *Doe v. McQuilkin*, 8 Blackf. (Ind.) 335; *Wilson v. Hamilton County*, 68 Ind. 507. And see *Kratli v. Larrew*, 104 Ind. 363.

provision as to time is directory only, a failure to comply strictly with it will not vitiate the tax.<sup>1</sup>

**Conditions Precedent.** — In order for the municipality to impose a valid tax, the municipal authorities must comply with all the conditions precedent prescribed by the legislature, such as a requirement for the submission of the proposition to the voters or taxpayers,<sup>2</sup> or the sanction or petition of a designated number of the taxpayers to be affected by the tax,<sup>3</sup> or the consent or recommendation of a designated officer, person, or body.<sup>4</sup> So, also, where the statute calls for an appropriation ordinance, or certificate, or estimate of the amount required to be raised, such requirement must be fulfilled or the levy will be invalid.<sup>5</sup>

*Iowa.* — *Scott v. Union County*, 63 Iowa 583.

*Louisiana.* — *State v. Shreveport*, 33 La. Ann.

1179.

*Maryland.* — *Wells v. Hyattsville*, 77 Md. 125.

*Mississippi.* — *Beard v. Lee County*, 51 Miss. 542; *Gamble v. Witty*, 55 Miss. 27; *Smith v. Nelson*, 57 Miss. 138; *Harris v. Stockett*, 58 Miss. 825; *Wolfe v. Murphy*, 60 Miss. 1; *Briggs v. Chandler*, 60 Miss. 862.

*Texas.* — *Free v. Scarborough*, 70 Tex. 672.

*Vermont.* — *Henry v. Chester*, 15 Vt. 460.

**Amendment of Original Levy.** — In *McCready v. Lansdale*, 58 Miss. 878, where a levy of county taxes was made at the proper time, but at a subsequent meeting an order was made purporting to set aside the former levy, and make a new one reducing the rate, it was held that, as the order changing the levy did not impose any taxes, but was a mere reduction of the levy made at the proper time, it would be considered to be an amendment to the former levy; and that the levy was good. See also *Fairfield v. People*, 94 Ill. 244.

**Adjourned Meeting.** — In *Hubbard v. Winsor*, 15 Mich. 146, where the law required supervisors to act at their session in October, and they met in pursuance thereof, but fixed the amount of taxes for the ensuing year at a subsequent adjourned meeting, it was held that the session in October embraced all adjournments, although they might run into another month, and that the law merely referred to it by way of designation. See also *State v. Hannibal*, etc., R. Co., 101 Mo. 136.

**1. Directory Statutes.** — *Perry County v. Seliga*, etc., R. Co., 58 Ala. 546, 65 Ala. 391; *Hill v. Wolfe*, 28 Iowa 577; *Easton v. Savery*, 44 Iowa 654; *Perrin v. Benson*, 49 Iowa 325; *Wells v. Burbank*, 17 N. H. 393; *State v. Harris*, 17 Ohio St. 608; *Gearhart v. Dixon*, 1 Pa. St. 224. See also *Ohio*, etc., R. Co. v. *People*, 119 Ill. 207.

**Duty to Make Levy Absolute.** — In *Peed v. Milikan*, 79 Ind. 86, it was held that where the law requires a levy to be made by a particular session of the board authorized to make it, the duty to make the levy is absolute, and if for any reason there is a failure to make it at the prescribed time, the power to make it is not thereby lost, but may be afterwards exercised. See also *Sackett v. State*, 74 Ind. 486; *Gearhart v. Dixon*, 1 Pa. St. 224.

**2. Submission to Voters.** — See *infra*, this section. *Submission to Popular Vote.*

**3. Necessity for Petition** — *Georgia.* — *Couper v. Rowe*, 42 Ga. 229.

*Illinois.* — *People v. Oldtown*, 88 Ill. 202.

*Iowa.* — *West v. Whitaker*, 37 Iowa 598.

*Kentucky.* — *Covington v. Casey*, 3 Bush (Ky.) 698.

*Maryland.* — *Henderson v. Baltimore*, 8 Md. 352.

*Michigan.* — *Steckert v. East Saginaw*, 22 Mich. 104.

*North Carolina.* — *Cain v. Davie County*, 86 N. Car. 8.

*Ohio.* — *Robinson v. Logan*, 31 Ohio St. 466.

*Wisconsin.* — *Dean v. Madison*, 9 Wis. 402; *State v. Portage*, 12 Wis. 562; *Jenkins v. Rock County*, 15 Wis. 11.

**Sufficiency of Petition.** — See the titles MUNICIPAL AID, vol. 20, p. 1107; LOCAL OPTION, vol. 19, p. 497 *et seq.*; SPECIAL OR LOCAL ASSESSMENTS, vol. 25, p. 1207 *et seq.*

**Mere Ambiguity or Uncertainty in the Phraseology** of a petition for an appropriation will not vitiate the levy of the tax, when it is apparent that no interested party was, or could be, misled or deceived thereby, or could misapprehend the intention and purpose of the petitioners. *Scott v. Hansheer*, 94 Ind. 1; *Jussen v. Lake County*, 95 Ind. 567.

**Certificate of Assent — Conclusiveness.** — Where commissioners are appointed for the purpose of procuring the assent of a designated number of electors, their certificate, executed and recorded as required by law, is conclusive as to all matters committed to them, and concludes all questions as to the assenting of the required majority. *St. Johnsbury First Nat. Bank v. Concord*, 50 Vt. 257.

**4. Consent or Recommendation.** — *Reynolds v. Lofton*, 18 Ga. 47; *Barlow v. Ordinary*, 47 Ga. 639; *Solomon v. Tarver*, 52 Ga. 405; *State v. Wabash*, etc., R. Co., 97 Mo. 296; *Kitchen v. Smith*, 101 Pa. St. 452.

**Failure or Refusal to Recommend.** — Under statutes requiring certain taxes to be levied only upon a recommendation of some designated board or body, if such board or body fails or refuses to recommend a tax sufficient to pay the necessary current expenses, and any debts that may be in judgment against the municipality, it may, as a general rule, levy a tax of its own motion sufficient to meet such expenses and liabilities. See *Waller v. Perkins*, 52 Ga. 233; *Couper v. Rowe*, 42 Ga. 229; *Arnett v. Griffin*, 60 Ga. 349.

**5. Appropriation Ordinance, Certificate, or Estimate.** — *State v. Gadsden County*, 17 Fla. 418; *Misner v. Bullard*, 43 Ill. 470; *Weber v. Ohio*, etc., R. Co., 108 Ill. 451; *Riverside Co. v. Howell*, 113 Ill. 256; *Smith v. Crittenden*, 16 Mich. 152; *Hogelskamp v. Weeks*, 37 Mich. 422;

**c. IRREGULARITIES AND INFORMALITIES.**—While a departure in any material respect from the legislative requirements is fatal to an attempt to exercise the taxing power, yet mere irregularities or informalities not going to the substance will usually not be allowed to defeat the tax.<sup>1</sup>

*State v. Harvey*, 12 Neb. 31; *Burlington, etc., R. Co. v. Lancaster County*, 12 Neb. 324; *Burlington, etc., R. Co. v. Saunders County*, 16 Neb. 123; *Arnold v. Juneau County*, 43 Wis. 627.

But see *Raley v. Guinn*, 76 Mo. 263, where the failure of the county court to ascertain and enter of record the sum necessary for county purposes, before levying a tax, was held but an irregularity not invalidating the entire county levy.

**Sufficiency of Form.**—See *State v. Gadsden County*, 17 Fla. 418; *Gage v. Bailey*, 102 Ill. 11; *Hogelskamp v. Weeks*, 37 Mich. 422; *Harding v. Bader*, 75 Mich. 316; *Burlington, etc., R. Co. v. Lancaster County*, 12 Neb. 324; *Dent v. Bryce*, 16 S. Car. 1.

**A Levy Made in Excess of the Published Estimate** is not void in *Nebraska*, though the county commissioners are rendered liable for the penalty prescribed, for including such excess in their levy. *State v. Wise*, 12 Neb. 313.

But in *McIntosh v. People*, 93 Ill. 540, it was held that the amount stated in the appropriation ordinance was a limit upon the amount that could be levied, although it was not essential that the whole of such amount be levied.

**Time of Filing Certificate.**—In *Smith v. Crittenden*, 16 Mich. 152, a statute directing a certificate to the supervisors of the township of town indebtedness, to be filed on or before the first Monday of October in each year, was held to be directory, and a tax levied upon a certificate filed after the first but before the second Monday was held valid. See also *Chiniquy v. People*, 78 Ill. 570; *Thatcher v. People*, 79 Ill. 597.

In *Illinois*, if the certificate is not filed in season, the levy cannot be made in any succeeding year for back taxes. *Weber v. Ohio, etc., R. Co.*, 108 Ill. 451. And see *Shawneetown First Nat. Bank v. Cook*, 77 Ill. 622; *Mix v. People*, 72 Ill. 241.

**1. Informalities and Irregularities Do Not Invalidate.**—*California.*—*Lake County v. Sulphur Bank Quicksilver Min. Co.*, 66 Cal. 17. And see *O'Grady v. Barnhisel*, 23 Cal. 287.

*Illinois.*—*State v. Allen*, 43 Ill. 456; *Clayton v. Chicago*, 44 Ill. 280; *Mix v. People*, 72 Ill. 241; *Buck v. People*, 78 Ill. 560; *Thatcher v. People*, 79 Ill. 597; *Davis v. Brace*, 82 Ill. 542; *Law v. People*, 87 Ill. 385; *Edwards v. People*, 88 Ill. 340.

*Indiana.*—*Bittinger v. Bell*, 65 Ind. 445; *Mustard v. Hoppess*, 69 Ind. 324; *Peed v. Millikan*, 79 Ind. 86.

*Iowa.*—*West v. Whitaker*, 37 Iowa 598; *Milwaukee, etc., R. Co. v. Kossuth County*, 41 Iowa 57; *Tallman v. Cooke*, 43 Iowa 330; *Sioux City, etc., R. Co. v. Osceola County*, 45 Iowa 176; *Snell v. Ft. Dodge*, 45 Iowa 564; *Casady v. Lowry*, 49 Iowa 523; *Bartemeyer v. Rohlfis*, 71 Iowa 582.

*Kansas.*—*Jefferson County v. Johnson*, 23 Kan. 717; *Torrington v. Rickershauser*, 41 Kan. 486.

*Michigan.*—*Case v. Dean*, 16 Mich. 12; *Up-*

*ton v. Kennedy*, 36 Mich. 215; *Wattles v. Lapeer*, 40 Mich. 624; *Silsbee v. Stockle*, 44 Mich. 561; *Boyce v. Auditor Gen.*, 90 Mich. 314.

*Minnesota.*—See *St. Louis County v. Nettleton*, 22 Minn. 356.

*Missouri.*—See *State v. Hannibal, etc., R. Co.*, 101 Mo. 136.

*Nebraska.*—*State v. Wise*, 12 Neb. 313; *Burlington, etc., R. Co. v. Lancaster County*, 12 Neb. 324; *Hull v. Kearney County*, 13 Neb. 539.

*Texas.*—*Labadie v. Dean*, 47 Tex. 90; *Texas, etc., R. Co. v. Harrison County*, 54 Tex. 119.

*Vermont.*—*Henry v. Chester*, 15 Vt. 460.

By Statute in some states it is provided that informalities which do not prejudice the substantial rights of the taxpayers shall not vitiate the tax. *Spring Valley Coal Co. v. People*, 157 Ill. 543; *People v. Chicago, etc., R. Co.*, 189 Ill. 397; *Auditor-Gen. v. Sparrow*, 116 Mich. 574. And see *Southern Warehouse, etc., Co. v. Mechanics' Trust Co.*, (Ky. 1900) 56 S. W. Rep. 162.

Such statutes are to be liberally construed for the purpose of sustaining the tax. *Auditor-Gen. v. Hutchinson*, 113 Mich. 245.

**Directory Provisions** in a statute need not be strictly followed. *State v. West Duluth Land Co.*, 75 Minn. 456; *Wingate v. Ketner*, 8 Wash. 94.

**Designation of Tax Not Material.**—A levy is legal if made for a proper purpose without reference to the name by which the tax is designated. *Burlington, etc., R. Co. v. Cass County*, 16 Neb. 136.

**Sufficient Description of Tax.**—In *Shontz v. Evans*, 40 Iowa 139, it was held that the levying of a tax described as "railroad tax, five mills," is sufficiently explicit, when the purpose and object of the tax and the beneficiary corporation can be ascertained *aliunde*.

**Where the Levy Is Capable of Being Construed as Based on Either of Two Acts**, if it would be valid under one but not the other, that construction will be adopted which will sustain the levy. *Lima v. McBride*, 34 Ohio St. 338.

**Intent to Make Levy under Other Law.**—Where there is a law authorizing a levy, the levy is valid, even though it was intended to be made under a different law. *Davis v. Brace*, 82 Ill. 542.

**Presumption in Favor of Regularity.**—In the absence of any showing to the contrary it will be presumed that in imposing the tax the municipality has observed all the statutory requisites. *Fonda v. Louisville*, (Ky. 1899) 40 S. W. Rep. 785; *Powell v. Louisville*, (Ky. 1899) 52 S. W. Rep. 798; *Sherley v. Louisville*, (Ky. 1899) 53 S. W. Rep. 530; *Southern Warehouse, etc., Co. v. Mechanics' Trust Co.*, (Ky. 1900) 56 S. W. Rep. 162; *Auditor Gen. v. Hutchinson*, 113 Mich. 245; *Berry v. San Antonio*, (Tex. Civ. App. 1898) 46 S. W. Rep. 273. And see *Keokuk, etc., Bridge Co. v. People*, 161 Ill. 132.

**Sufficient Compliance.**—In the following cases the requirements of the statutes were held to have been sufficiently complied with: *Otis v.*

*d. EFFECT OF PARTIAL INVALIDITY.* — In some courts the view has been maintained that a levy which is illegal as to part is wholly void.<sup>1</sup> But, according to the weight of both reason and authority, a tax levy containing illegal items will not be entirely invalid if the part which is legal can be separated from that which is illegal,<sup>2</sup> though, if the parts be not separable, the tax is void *in toto*.<sup>3</sup>

**4. Compelling Exercise of Taxing Power** — *a. LEGISLATIVE COMPULSION* — **Matters of General Public Interest.** — As regards matters of general interest, and duties which municipalities owe to the state at large, the control of the latter is complete, and the legislature may, by mandatory act, compel the levy of a tax necessary to the performance of such public duties and functions as fall within the general scope and object of the municipal organization.<sup>4</sup> Thus, the legislature may compel the corporation to levy taxes for the construction of a highway,<sup>5</sup> or of a bridge,<sup>6</sup> or for the improvement of a river or harbor within its

People, 196 Ill. 542; *Burch v. Owensboro*, (Ky. 1896) 36 S. W. Rep. 12; *Lord v. Cooper*, 19 N. Y. App. Div. 535; *People v. Schoonover*, 47 N. Y. App. Div. 278; *People v. Wright*, 68 Hun (N. Y.) 264; *Henderson v. Hughes County*, 13 S. Dak. 576.

**1. Levy Illegal in Part Wholly Void.** — See *Basnett v. Jacksonville*, 19 Fla. 664; *Elwell v. Shaw*, 1 Me. 339; *Gerry v. Stoneham*, 1 Allen (Mass.) 319; *Lacey v. Davis*, 4 Mich. 140, 66 Am. Dec. 524; *Case v. Dean*, 16 Mich. 12; *Hall v. Kellogg*, 16 Mich. 135; *Rogers v. White*, 68 Mich. 10; *Hewitt v. White*, 78 Mich. 117; *Gamble v. Witty*, 55 Miss. 26; *Capital State Bank v. Lewis*, 64 Miss. 727; *Wells v. Burbank*, 17 N. H. 393; *State v. Hagood*, 13 S. Car. 46; *Dean v. Lufkin*, 54 Tex. 265; *Drew v. Davis*, 10 Vt. 506, 33 Am. Dec. 213; *Johnson v. Colburn*, 36 Vt. 693. And see *supra*, this section, *Effect of Taxation in Excess of Limit*.

**2. Not Wholly Void if Separable** — *Arkansas.* — *Vance v. Little Rock*, 30 Ark. 435.

*California.* — *Jones v. Gillis*, 45 Cal. 541; *Stokes v. Geddes*, 46 Cal. 17; *De Fremery v. Austin*, 53 Cal. 380.

*Illinois.* — *State v. Allen*, 43 Ill. 456; *Allen v. Peoria*, etc., R. Co., 44 Ill. 85; *Lafin v. Chicago*, 48 Ill. 449; *People v. Nichols*, 49 Ill. 517; *Mix v. People*, 72 Ill. 241; *Law v. People*, 87 Ill. 385; *Fuller v. Heath*, 89 Ill. 296.

*Iowa.* — *Eldridge v. Kuehl*, 27 Iowa 160; *Parker v. Sexton*, 29 Iowa 421; *Sully v. Kuehl*, 30 Iowa 275; *Hurley v. Powell*, 31 Iowa 64; *Rhodes v. Sexton*, 33 Iowa 540.

*Nebraska.* — *Burlington*, etc., R. Co. v. *York County*, 7 Neb. 487.

*New Hampshire.* — *Taft v. Barrett*, 58 N. H. 447.

*New Jersey.* — *State v. McClurg*, 27 N. J. L. 253; *Press Printing Co. v. Assessors*, 51 N. J. L. 75.

*Ohio.* — *Cummings v. Fitch*, 40 Ohio St. 56.  
*Pennsylvania.* — *Dietrick v. Mason*, 57 Pa. St. 40.

*Tennessee.* — *Bright v. Halloman*, 7 Lea (Tenn.) 309.

**3. If Inseparable Entire Levy Void.** — *Worthen v. Badgett*, 32 Ark. 496; *Hubbard v. Brainard*, 35 Conn. 563; *First Ecclesiastical Soc. v. Hartford*, 38 Conn. 274; *State v. Humphreys*, 25 Ohio St. 520. And see *Bailey v. Haywood*, 70 Mich. 188.

**4. Legislature May Compel Levy of Tax.** — *People v. Detroit*, 28 Mich. 228, 15 Am. Rep.

202; *People v. Flagg*, 46 N. Y. 401; *Duanesburgh v. Jenkins*, 57 N. Y. 177; *State v. Franklin County*, 35 Ohio St. 458; *Newman v. Justices*, 5 Sneed (Tenn.) 695. See also *People v. Burr*, 13 Cal. 343; *Shaw v. Dennis*, 10 Ill. 405; *Slack v. Maysville*, etc., R. Co., 13 B. Mon. (Ky.) 1; *Com. v. Newburyport*, 103 Mass. 129; *State v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622. And as to legislative control over municipal corporations in general, see the title MUNICIPAL CORPORATIONS, vol. 20, p. 1218.

**Mandatory Statute.** — In *Phelps v. Lodge*, 60 Kan. 122, it was held that a statute providing that the city council "may" provide for the payment of the city's debts was mandatory, the "may" being construed as "must."

**The Legislature Can Compel Local Improvements** which, in its judgment, will promote the health of the people and advance the public good, and in the exercise of this power it may abate nuisances, construct and repair highways, open canals for irrigating arid districts, and perform many other similar acts for the public good, all at the expense of those who are to be chiefly and more immediately benefited by the improvement. *Hagar v. Yolo County*, 47 Cal. 222; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701. See generally the title SPECIAL OR LOCAL ASSESSMENTS, vol. 25, p. 1166. And it may compel the payment of the police expenses. *State v. St. Louis County Ct.*, 34 Mo. 546. And see *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572; *People v. Mahaney*, 13 Mich. 481.

**Losses Caused by Riot.** — Statutes which will result in requiring contributions from the taxpayers of local communities to make good losses of persons who have suffered through the acts of rioters, are constitutional and valid and within the general scope of legislative authority. *Darlington v. New York*, 31 N. Y. 164, 88 Am. Dec. 248.

**Damage Caused by Removal of County Seat.** — The legislature may compel a county to pay the damages resulting to the property owners of a town from the removal of the county seat therefrom. *Wilkinson v. Cheatham*, 43 Ga. 258.

**5. For Construction of Highway.** — *People v. Flagg*, 46 N. Y. 401.

**6. Construction and Maintenance of Bridge.** — *Talbot County v. Queen Anne's County*, 50 Md. 245. In this case the bridge was located within the limits of another county, but the tax was sustained on the ground that its purpose was

limits,<sup>1</sup> or to pay municipal debts.<sup>2</sup> But a municipality cannot be compelled to incur debts exceeding in amount a limit imposed upon its taxing power by the constitution.<sup>3</sup>

**Purely Local Matters.** — As regards property rights and matters of exclusively local concern, it is generally deemed to be beyond the authority of the legislature to compel the exercise of the municipal taxing power.<sup>4</sup> Thus, it has been held that the legislature cannot compel a municipality to tax for private purposes,<sup>5</sup> or to incur a debt or issue its bonds for local, corporate purposes without its consent,<sup>6</sup> or to bear burdens in respect to matters not strictly municipal which other counties or towns are not required to bear.<sup>7</sup> But some cases recognize the right of the legislature to control municipalities even as to purely local affairs.<sup>8</sup>

**6. JUDICIAL COMPULSION.** — The authority of the courts to compel municipal corporations to exercise the taxing power has already been discussed under another title.<sup>9</sup>

**5. Submission to Popular Vote** — *a. POWER OF LEGISLATURE TO SUBMIT DECISION TO VOTERS.* — It was formerly held in some jurisdictions that a statute not to become effective until approved by the voters of the locality to be affected thereby was an unauthorized delegation of legislative functions, but according to the great weight of modern authority such statutes are valid if they contain a complete declaration of the legislative will and only require the approval of the voters to make them operative.<sup>10</sup> But the submission to the people of a mere plan or project of the law imposing a tax, for their adop-

not only public, but the object was at the same time local in its character and of special and peculiar interest to the people to be taxed.

**1. Improvement of River or Harbor.** — *Kimball v. Mobile County*, 3 Woods (U. S.) 555, wherein it was held that the fact that the county was vitally interested in the improvement was sufficient to justify the improvement, although other counties and the state at large would derive benefit therefrom.

**2. To Pay Municipal Debts.** — *Dunnovan v. Green*, 57 Ill. 63; *Decker v. Hughes*, 68 Ill. 33.

**Moral Obligation.** — The legislature can compel the municipality to pay a demand which in good conscience it ought to pay, though there be no legal liability to pay it. *Sinton v. Ashbury*, 41 Cal. 525; *Union Tp. v. Rader*, 39 N. J. L. 509.

**Question of Obligation a Judicial One.** — But the power to decide whether a municipality is under a legal obligation to pay a claim is a judicial one which must be exercised by the courts alone. *State v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622.

**3. But a municipality cannot be compelled to incur debts exceeding in amount the constitutional limit.** *People v. Chicago*, 51 Ill. 19, 2 Am. Rep. 278.

**4. Purely Local Matters.** — *People v. Detroit*, 28 Mich. 228. See also *State v. Haben*, 22 Wis. 660. And see the title MUNICIPAL CORPORATIONS, vol. 20, p. 1219.

**5. Cannot Compel Tax for Private Purposes.** — *State v. Foley*, 30 Minn. 350.

**6. Debt on Bond Issue for Local, Corporate Purposes.** — *People v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *Sleight v. People*, 74 Ill. 47; *Williams v. Roberts*, 88 Ill. 11; *Brunswick v. Litchfield*, Me. 28; *Bowdoinham v. Richmond*, 6 Me. 112; 19 Am. Dec. 197; *Hampshire County v. Franklin County*, 16 Mass. 76.

**Unconstitutional Act.** — A mandatory act requiring a town to issue bonds and exchange the same for, or invest the proceeds of a sale thereof in, the stock of a railroad, is unconstitutional. *People v. Batchellor*, 53 N. Y. 128, 13 Am. Rep. 480.

**7. Burdens Not Borne by Other Municipalities.** — *State v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622. And see *Callam v. Saginaw*, 50 Mich. 7.

**8. See the title MUNICIPAL CORPORATIONS**, vol. 20, p. 1220, note 2. See also *People v. Flagg*, 46 N. Y. 401, wherein it was said that wherever the legislature can authorize a town to incur a debt, it may direct this to be done.

**9. See the title MANDAMUS**, vol. 19, p. 864.

**10. Submission to Voters Not Delegation of Legislative Function.** — *People v. Burr*, 13 Cal. 343; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *Alcorn v. Hamer*, 38 Miss. 652; *Clarke v. Rochester*, 24 Barb. (N. Y.) 446; *Louisville, etc., R. Co. v. Davidson County Ct.*, 1 Sneed (Tenn.) 637; *Winston v. Tennessee, etc., R. Co.*, 1 Baxt. (Tenn.) 60; *Bull v. Read*, 13 Gratt. (Va.) 78. See the titles LOCAL OPTION, vol. 19, p. 489 *et seq.*; STATUTES, vol. 26, p. 567.

**May Not Submit Tax in Excess of Limit.** — No authority exists to submit to electors of a county, the question of voting taxes in excess of the limit fixed by law, and taxes levied under such proposition are illegal and may be enjoined. *Burlington, etc., R. Co. v. Clay County*, 13 Neb. 367.

**Minnesota — To Whom Submission Proper.** — In *Minnesota*, under the constitution, the legislature cannot authorize any person or class of persons other than the electors or officers chosen by the electors of the town, to determine what action the town will take in any particular case requiring local taxation. *Harrington v. Plainview*, 27 Minn. 224.

tion or regulation, is an unconstitutional delegation of power to tax.<sup>1</sup>

6. **NECESSITY FOR APPROVAL OF TAXPAYERS.**—In the absence of any constitutional restriction the legislature can authorize municipal corporations to incur obligations and raise revenue without the approval of the taxpayers and voters generally;<sup>2</sup> but a vote of the persons interested is frequently required as a condition precedent thereto,<sup>3</sup> and where this is the case, no valid tax can be levied without a submission of the proposition to the voters in conformity with the requirements of the statute.<sup>4</sup>

1. **Unconstitutional Delegation of Power.**—*Alcorn v. Hamer*, 38 Miss. 652. And for a full treatment see the title **LOCAL OPTION**, vol. 19, p. 486.

The True Distinction is between the delegation of power, to make the law which necessarily involves the discretion as to what it shall be, and conferring the authority or discretion as to its execution to be exercised under and in pursuance of law. *Lafayette, etc., R. Co. v. Geiger*, 34 Ind. 185.

Even Where the Majority Votes in Favor of a Tax, it cannot be sustained if the law authorizing it be unconstitutional, since the minority would thereby be deprived of their property without due process of law. *Anderson v. Hill*, 54 Mich. 477.

2. **Approval of Taxpayers Not Essential.**—*United States*.—*Roberts v. Bolles*, 101 U. S. 126; *Livingston County v. Darlington*, 101 U. S. 407.

*Illinois*.—*Keithsburg v. Frick*, 34 Ill. 405; *Misner v. Bullard*, 43 Ill. 470; *Marshall v. Silliman*, 61 Ill. 218; *People v. Brislin*, 80 Ill. 423; *Quincey, etc., R. Co. v. Morris*, 84 Ill. 416.

*Michigan*.—*Bay City v. State Treasurer*, 23 Mich. 503; *Callam v. Saginaw*, 50 Mich. 7.

*Missouri*.—*St. Louis v. Oeters*, 36 Mo. 456.

*New York*.—*People v. Flagg*, 46 N. Y. 401.

*North Carolina*.—*Manly v. Raleigh*, 4 Jones Eq. (57 N. Car.) 370; *Evans v. Cumberland County*, 89 N. Car. 154; *Halcombe v. Haywood County*, 89 N. Car. 346.

*Tennessee*.—*McCallie v. Chattanooga*, 3 Head (Tenn.) 317.

See also the titles **MUNICIPAL AID**, vol. 20, pp. 1089, 1107; **MUNICIPAL SECURITIES**, vol. 21, p. 47; **SPECIAL OR LOCAL ASSESSMENTS**, vol. 25, p. 1207.

The Legislature May Repeal a law authorizing a submission to the voters, although the vote has been taken. *Covington, etc., R. Co. v. Kenton County Ct.*, 12 B. Mon. (Ky.) 150.

**Effect of Adverse Vote under Former Statute.**—A statute imposing a tax upon a town is not invalid because, by a former statute, the question whether a tax should be levied for the same purpose had been submitted to electors of the town, and had been adversely determined by them. *Guilford v. Chenango County*, 13 N. Y. 143.

3. **Vote Frequently Required.**—*Venice v. Murdock*, 92 U. S. 494; *Burr v. Carbondale*, 76 Ill. 455; *Slack v. Maysville, etc., R. Co.*, 13 B. Mon. (Ky.) 1; *Bullock v. Curry*, 2 Met. (Ky.) 171; *Starin v. Genoa*, 23 N. Y. 439; *Duaneburgh v. Jenkins*, 57 N. Y. 177; *Cincinnati, etc., R. Co. v. Clinton County*, 1 Ohio St. 77; *Louisville, etc., R. Co. v. Davidson County, Ct.*, 1 Sneed (Tenn.) 637; *San Antonio v. Jones*, 28 Tex. 19. See also the title **MUNICIPAL AID**,

vol. 20, pp. 1089, 1107; **MUNICIPAL SECURITIES**, vol. 21, p. 46; **SPECIAL OR LOCAL ASSESSMENTS**, vol. 25, p. 1207. And see generally the title **LOCAL OPTION**, vol. 19, p. 486.

**Injunction to Restrain the Vote.**—An injunction will not issue at the instance of the taxpayers of a municipality, to prevent the officers thereof from holding an election under legislative authority, to enable the citizens to vote to levy or not to levy a certain tax on themselves. *Roudanez v. New Orleans*, 29 La. Ann. 271.

4. **Essential to Exercise of Taxing Power.**—*United States*.—*U. S. v. New Orleans*, 2 Woods (U. S.) 230.

*Alabama*.—*Stein v. Mobile*, 24 Ala. 591.

*Arkansas*.—*Cairo, etc., R. Co. v. Parks*, 32 Ark. 131; *Worthen v. Blodgett*, 32 Ark. 496; *Cole v. Blackwell*, 38 Ark. 271.

*California*.—*People v. Castro*, 39 Cal. 65.

*Georgia*.—*Spain v. Webster County*, 64 Ga. 498.

*Illinois*.—*School Directors v. Fogleman*, 76 Ill. 189; *Thatcher v. People*, 93 Ill. 240; *Watts v. McCleave*, 16 Ill. App. 272.

*Iowa*.—*Iowa R. Land Co. v. Woodbury County*, 39 Iowa 172; *Bartemeyer v. Rohlf*, 71 Iowa 582.

*Kentucky*.—*Bullock v. Curry*, 2 Met. (Ky.) 172; *Slack v. Maysville, etc., R. Co.*, 13 B. Mon. (Ky.) 1.

*Mississippi*.—*Hawkins v. Carroll County*, 50 Miss. 735.

*New Hampshire*.—*Lisbon v. Bath*, 21 N. H. 319.

*New York*.—*Starin v. Genoa*, 23 N. Y. 439; *People v. Ft. Edward*, 70 N. Y. 28.

*North Carolina*.—*Wilson v. Board of Aldermen*, 74 N. Car. 748; *Tucker v. Raleigh*, 75 N. Car. 267.

*Texas*.—*Ft. Worth v. Davis*, 57 Tex. 225.

*Vermont*.—*Henry v. Chester*, 15 Vt. 460; *Bowen v. King*, 34 Vt. 156; *Lamoille Valley R. Co. v. Fairfield*, 51 Vt. 257.

The Word "Assent," when used with reference to the levy of a tax with the assent of the electors, or of some board or body, must be given its usual and ordinary signification, that is, agreeing or consenting to; and this can be manifested only in an election by actual vote. *Hawkins v. Carroll County*, 50 Miss. 735.

**What Does Not Cure Omission.**—The erection of a schoolhouse, without a submission to a vote of the people, is not cured by a vote to defray the expenses, or by the acceptance and use of the building. *School Directors v. Fogleman*, 76 Ill. 180.

**Right to Increase Amount Voted.**—A township tax exceeding the amount voted by the township may be sustained on the presumption that the township board has exercised its statutory



The Propositions Most Frequently Submitted to popular vote are those in regard to municipal aid to public enterprises,<sup>1</sup> and for public school purposes.<sup>2</sup>

In Cases of Public Improvements the operation of the law is generally conditional on the petition of a specified proportion of the property owners to be affected thereby.<sup>3</sup>

c. NOTICE OF ELECTION — *Necessity for.* — When a vote for a tax for any purpose is to be taken, due notice or warning of the time, place, and purpose thereof must be given in the manner prescribed,<sup>4</sup> and notice of some kind is necessary even though the statute which authorizes the election contains no

right to increase the amount, if there is no showing to the contrary. *Silsbee v. Stockle*, 44 Mich. 561; *Stockle v. Silsbee*, 41 Mich. 615.

**Voting Taxes in Advance.** — Where electors at a town meeting have legal authority to vote taxes in advance, in order to meet the prompt payment of existing obligations, the question as to how far in advance they may be voted is to be determined by a vote of the electors of the town. *Wright v. People*, 87 Ill. 582.

**Power Not Affected by Subsequent Vote.** — Where an act, providing that a city could raise money for school purposes either by taxation or by issuing bonds, was adopted by popular vote, it was held that a subsequent vote against the issuance of the bonds did not take away the taxing power which had been conferred by the adoption of the act. *Ayers v. McCalla*, 95 Ga. 555. See also *Charlotte v. Shepard*, 122 N. Car. 602. But see *Hamlin v. Meadville*, 6 Neb. 227.

The North Carolina Constitution, art. 7, § 7, prohibits the levy of municipal taxes for other than "necessary expenses" except by a vote of the majority of the qualified voters. Under this the procuring of a water supply for the municipality is not a "necessary expense." *Charlotte v. Shepard*, 120 N. Car. 411; *Edgerton v. Goldsboro Water Co.*, 126 N. Car. 93. Nor is a school tax. *Rodman v. Washington*, 122 N. Car. 39.

But after an issue of bonds has been duly voted for a purpose which is not a "necessary expense," implied authority to levy taxes to pay the debt exists without any further vote being taken. *Charlotte v. Shepard*, 122 N. Car. 602.

A charter giving a town general powers of taxation is not repugnant to this section of the constitution, it being presumed that the town authorities will obey the constitutional requirements in levying taxes. *State v. Irvin*, 126 N. Car. 989.

**Iowa — Tax Authorized Before Vote Taken.** — Under Iowa Acts 26th Gen. Assem., c. 1, cities of the first class may levy the tax provided therein for the purchase and erection of water-works before the contract for the purchase or construction has been approved by the voters. *Youngerman v. Murphy*, 107 Iowa 686.

1. See the title MUNICIPAL AID, vol. 20, p. 1082.

2. **Public School Taxes.** — *Gray v. State*, 2 Harr. (Del.) 76; *Burr v. Carbondale*, 76 Ill. 456; *Richards v. Raymond*, 92 Ill. 612, 34 Am. Rep. 151; *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *Marshall v. Donovan*, 10 Bush (Ky.) 681; *Cardigan v. Page*, 6 N. H. 182; *Starin v. Genoa*, 23 N. Y. 439; *Goldsboro Graded School v. Broadhurst*, 109 N. Car. 228; *Mitchell v. Fox*, 5

*Lea* (Tenn.) 420; *Ft. Worth v. Davis*, 57 Tex. 225; *Bull v. Read*, 13 Gratt. (Va.) 78. And see the title SCHOOLS, vol. 25, p. 4.

**Constitutionality.** — That a law authorizing taxation for the purpose of establishing free schools, by the determination and vote of a majority of the voters of a school district, is constitutional, see *Steward v. Jefferson*, 3 Harr. (Del.) 335; *Burgess v. Pue*, 2 Gill (Md.) 11; *Matteson v. Rosendale*, 37 Wis. 254; *Plumer v. Marathon County*, 46 Wis. 163.

3. See the title SPECIAL OR LOCAL ASSESSMENTS, vol. 25, p. 1287.

4. **Prescribed Notice Must Be Given** — *Arkansas*. — *Union County Ct. v. Robinson*, 27 Ark. 116.

*California*. — *People v. Castro*, 39 Cal. 69; *People v. Seale*, 52 Cal. 71; *People v. Pratt*, 59 Cal. 77.

*Illinois*. — *Thatcher v. People*, 93 Ill. 240.

*Indiana*. — *Mustard v. Hoppess*, 69 Ind. 324; *Faris v. Reynolds*, 70 Ind. 359.

*Maine*. — *Jordan v. School Dist. No. 3*, 38 Me. 169.

*Massachusetts*. — *Perry v. Dover*, 12 Pick. (Mass.) 206; *Stone v. School Dist. No. Four*, 8 Cush. (Mass.) 592.

*Missouri*. — *McPike v. Pen*, 51 Mo. 63; *State v. St. Louis, etc.*, R. Co., 75 Mo. 526.

*New Jersey*. — *State v. Van Winkle*, 25 N. J. L. 73; *State v. Hardcastle*, 26 N. J. L. 143.

*New York*. — *People v. Ft. Edward*, 70 N. Y. 28.

*Vermont*. — *Sherwin v. Bugbee*, 17 Vt. 337; *Bowen v. King*, 34 Vt. 156.

And see the titles LOCAL OPTION, vol. 19, p. 561; MUNICIPAL AID, vol. 20, p. 1112; MUNICIPAL SECURITIES, vol. 21, p. 48. As to notice of elections generally, see the title ELECTIONS, vol. 10, p. 624.

"To Warn" Means nothing more than to notify a meeting appointed by other authority. *Stone v. School Dist. No. Four*, 8 Cush. (Mass.) 592.

**Notice of Special Meeting.** — As a general rule, no special notice is required of a regular annual meeting, the time of the annual meeting being fixed by law; but where the subject is to be considered at a special meeting, a special notice must be given. See *Smith v. Crittenden*, 16 Mich. 152; *Marchant v. Langworthy*, 6 Hill (N. Y.) 646; *Hodgkin v. Fry*, 33 Ark. 716.

**Posting Notices.** — A statute requiring an officer to post notices does not require him to do so in person. *Phillips v. Albany*, 28 Wis. 341. The posting of a warrant instead of a copy does not render the meeting illegal. *Brewster v. Hyde*, 7 N. H. 206. A requirement that notices of elections shall be posted in "three of the most public places in the town," means such

express provision for notice.<sup>1</sup> If a meeting held for an election be not legally called, the tax voted is void.<sup>2</sup>

**Necessity to Specify Purposes.** — No tax for any purpose other than that stated in the notice of the meeting can be legally voted.<sup>3</sup> Thus, for example, a notice stating the purpose to be the levying of a tax for the expenses of repairing a schoolhouse, will not warrant an additional tax to pay for the insurance of such house.<sup>4</sup> But it has been held sufficient if the notice of the meeting or election enables those interested to understand its purpose.<sup>5</sup>

public places in the judgment of the officer. *Sauerhering v. Iron Ridge, etc., R. Co., 25 Wis. 447.*

A jury may presume that a warrant for a town meeting, shown to have been properly posted, remained so during the time required by law, after the lapse of thirty years. *Schoff v. Gould, 52 N. H. 512.*

**Return of Warrant.** — It seems that it is not necessary that any return of the warrant by the officer to whom it is directed should state the manner of service; so a return that "he had warned the inhabitants of the town" is sufficient, *Houghton v. Davenport, 23 Pick. (Mass.) 237.* See also *Saxton v. Mimms, 14 Mass. 320.* "That he had warned the inhabitants by posting up copies," has also been held sufficient. *Thayer v. Stearns, 1 Pick. (Mass.) 109.* See also *Briggs v. Murdock, 13 Pick. (Mass.) 305.* But see *Perry v. Dover, 12 Pick. (Mass.) 206.* In *Nelson v. Pierce, 6 N. H. 194,* a certificate that a warrant for holding a meeting had been duly posted more than fifteen days, was held insufficient to show that the meeting was duly notified. See also *Tuttle v. Cary, 7 Me. 426.*

**1. Statute Making a Provision for Notice.** — *McPike v. Pen, 51 Mo. 63; State v. St. Louis, etc., R. Co., 75 Mo. 529.*

**2. Tax Void if Meeting Not Legally Called.** — *California.* — *People v. Castro, 39 Cal. 65.*

*Illinois.* — *Williams v. Roberts, 88 Ill. 11; Gaddis v. Richland County, 92 Ill. 119; People v. Jackson County, 92 Ill. 441.*

*Maine.* — *Lander v. School Dist., 33 Me. 239; Jordan v. School Dist. No. 3, 38 Me. 164; Haines v. School Dist. No. 6, 41 Me. 246.*

*Massachusetts.* — *Reynolds v. New Salem, 6 Met. (Mass.) 340; George v. Second School Dist., 6 Met. (Mass.) 497; Third School Dist. v. Atherton, 12 Met. (Mass.) 105; Rideout v. School Dist. No. 5, 1 Allen (Mass.) 232.*

*Michigan.* — *Township Board v. Hastings, 52 Mich. 528.*

*New Hampshire.* — *Cardigan v. Page, 6 N. H. 182; Nelson v. Pierce, 6 N. H. 194; Lisbon v. Bath, 21 N. H. 319.*

*New York.* — *People v. Ft. Edward, 70 N. Y. 28.*

*Pennsylvania.* — *Independent School Dist. No. 8, 33 Pa. 297.*

*Vermont.* — *Pratt v. Swanton, 15 Vt. 147; Greenbanks v. Boutwell, 43 Vt. 207.*

**Notice Too Long.** — In *Greenbanks v. Boutwell, 43 Vt. 207,* where the statute required the notice of the meeting to be given at least seven, and not exceeding twelve, days before the meeting, a tax voted at a meeting held under a warning giving more than twelve days' notice was held invalid.

**Request to Clerk to Warn Meeting Unnecessary.** It is not essential to the validity of the proceed-

ings of a school district to raise a tax at their annual meeting, that there should have been a request to the clerk to warn the meeting. *Chandler v. Bradish, 23 Vt. 416.*

**Change of Voting Place After Notice.** — In *Lafayette, etc., R. Co. v. Geiger, 34 Ind. 185,* it was held that an election was not rendered illegal by the fact that the place of voting was changed two days before such election, of which change no notice was given to the voter, there being no fraud and no evidence that any legal voter had been prevented from voting, and no illegal voter being thereby enabled to vote.

**Trustees Not Liable as Trespassers.** — Where a district clerk, in giving notice of a special district meeting regularly called, misrepresents the objects of the meeting to some of the taxable inhabitants, who, in consequence thereof, omit to attend, and a tax is voted, the trustees who caused the tax to be collected are not thereby to be rendered trespassers, unless they are parties to the fraud. *Randall v. Smith, 1 Den. (N. Y.) 214.*

**3. Only for Purposes Specified.** — *Thatcher v. People, 93 Ill. 240; Drisko v. Columbia, 75 Me. 73; Little v. Merrill, 10 Pick. (Mass.) 543; State v. Greenleaf, 34 N. J. L. 441; Wyley v. Wilson, 44 Vt. 404; Atwood v. Lincoln, 44 Vt. 332; Allen v. Burlington, 45 Vt. 202.* And see the title MUNICIPAL AID, vol. 20, p. 1112.

**Purposes Not Specified.** — A meeting warned to vote upon the question of raising money to meet the accruing expenses of the city government, and for school purposes for the ensuing year, cannot legally vote a tax for the purpose of erecting a high-school building. *Allen v. Burlington, 45 Vt. 202.*

**No Purpose to Levy Tax Specified.** — When a meeting was warned to see whether the town should appropriate money in the treasury for an object, it was held that the question of laying a tax for that purpose could not be considered. *Torrey v. Millbury, 21 Pick. (Mass.) 64.*

**Combining Taxes for Different Purposes.** — Two distinct taxes for two distinct village purposes, though both are authorized, cannot be combined in one notice and resolution, so as to compel voters to vote either for both or against both. *North Tonawanda v. Western Transp. Co., Sheld. (N. Y.) 371.*

**4. Holt's Appeal, 5 R. I. 603.**

**5. Sufficient if Notice Fairly Expresses Purpose.** — *South School Dist. v. Blakeslee, 13 Conn. 234; Bartlett v. Kinsley, 15 Conn. 327.*

**Sufficiency of Notice.** — A warning for a school meeting to decide whether the district shall have a school, and to provide for the expenses of the same, is sufficient to authorize a vote for a tax. *Chandler v. Bradish, 23 Vt. 416.*

A notice for a town meeting "to raise such sums of money as may be necessary to defray

**d. PROCEEDINGS — Method of Conducting Election.** — Where the statute provides no method for the conduct of the election, it must be conducted in the manner provided for general elections in the municipality where it is held.<sup>1</sup>

**Qualification and Registration of Voters.** — The statutory provisions control almost entirely questions relating to qualification<sup>2</sup> and registration of voters.<sup>3</sup>

**A Form of Ballot** so clear and explicit that no voter can be misled as to the effect of his vote is sufficient.<sup>4</sup>

**Majority Required.** — The question what constitutes the required majority under such statutes has been discussed elsewhere.<sup>5</sup>

**Fraud in the Election, or Undue Influence** brought to bear on the voters, invalidates the tax voted.<sup>6</sup>

**Mere Informalities or Irregularities** which cannot prejudice any substantial right will not affect the validity of the tax.<sup>7</sup>

town charges for the ensuing year," is sufficient to authorize a vote to raise money for specific general purposes. *Westhampton v. Searle*, 127 Mass. 502. A meeting held in pursuance of a notice signed by one of the selectmen only "by order of the selectmen," was held to be unauthorized. *Reynolds v. New Salem*, 6 Met. (Mass.) 340.

**Purpose Stated in Application for Meeting.** — An application for calling a meeting of a school district, containing the purpose of the meeting, annexed to the warrant for calling the meeting, addressed to a person directed to warn the inhabitants of the district to meet for the purpose of acting on the articles named in such application, is a part of the warrant as effectually as if it were embodied in it. *George v. Second School Dist.*, 6 Met. (Mass.) 497.

**A Notice Which Is Ambiguous** will be construed to intend a tax which would be valid, rather than one which the law does not permit; and when a valid tax is voted upon such a notice, it may be lawfully collected. *Bartemeyer v. Rohlf*, 71 Iowa 582.

**1. Method Provided for General Elections.** — *Oregon v. Jennings*, 119 U. S. 74; *People v. Dutcher*, 56 Ill. 144; *Prairie v. Lloyd*, 97 Ill. 179; *Phillips v. Albany*, 28 Wis. 340. See also *People v. Laenna*, 67 Ill. 65.

**Requirement Not Applicable to Town Meetings.** — A requirement that elections to authorize municipal subscriptions by towns shall be conducted as in case of annual elections, does not refer to town meetings, but to general elections. *Prairie v. Lloyd*, 97 Ill. 179.

**Necessity for Ordinance.** — Where the statute requires that an ordinance shall be passed authorizing the election, a mere resolution is not sufficient, and a vote taken thereunder is void. *Miller v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 522.

**2. Qualification of Voters.** — See the titles MUNICIPAL AID, vol. 20, p. 1111; MUNICIPAL SECURITIES, vol. 21, p. 49.

**Those Qualified to Vote at General Elections** are those entitled to vote on taxing propositions, in the absence of any provision to the contrary. *MacKenzie v. Wooley*, 39 La. Ann. 944.

**3. Registration.** — See the titles MUNICIPAL AID, vol. 20, p. 1111; MUNICIPAL SECURITIES, vol. 21, p. 49. And see generally the title ELECTIONS, vol. 10, p. 611.

**Where the Statute Requires Registration** it is a prerequisite to the right to vote. *Hawkins v. Carroll County*, 50 Miss. 735; *McDowell v.*

*Massachusetts, etc.*, Const. Co., 96 N. Car. 515.

**Opportunity to Register** must be given to all persons qualified to vote; failure to do so will vitiate the election, if the denial should materially affect the result. *McDowell v. Massachusetts, etc.*, Const. Co., 96 N. Car. 514.

**4. Form of Ballot.** — See the titles MUNICIPAL AID, vol. 20, p. 1112; MUNICIPAL SECURITIES, vol. 21, p. 49.

**The Ballot Must Show that the Specific Question** contemplated by the act, which authorizes a tax for a specific purpose, was passed upon. *People v. Woodhull Tp.*, 14 Mich. 27.

**5. Majority.** — See the title MAJORITY, vol. 19, p. 613. And see also the titles MUNICIPAL AID, vol. 20, p. 1112; LOCAL OPTION, vol. 19, p. 506, and the following additional cases: *Mobile Sav. Bank v. Oktibbeha County*, 22 Fed. Rep. 580; *Harrington v. Plainview*, 27 Minn. 224; *People v. Ft. Edward*, 70 N. Y. 28; *Ft. Worth v. Davis*, 57 Tex. 225.

**Proof of Vote.** — Where it is required that the vote should be proved by affidavit in writing, the affidavit is not conclusive, but only *prima facie* evidence of the facts contained, unless otherwise provided by statute. *Cagwin v. Hancock*, 84 N. Y. 532.

**Number Insufficient to Hold Election.** — In *Arkansas*, where a school meeting is not attended by a sufficient number of electors to hold an election, it is the duty of the trustees to lay their estimate before the county court for their action, upon which the county court is required to make the levy. *Union County Ct. v. Robinson*, 27 Ark. 116.

**6. Fraud or Undue Influence.** — *People v. San Francisco*, 27 Cal. 655; *Bish v. Stout*, 77 Ind. 255; *Truesdell v. Green*, 57 Iowa 215; *Chicago, etc., R. Co. v. Shea*, 67 Iowa 728; *State v. Lake City*, 25 Minn. 404. And see the title MUNICIPAL AID, vol. 20, p. 1113.

**The Burden Is upon the Taxpayer** who resists the collection of a tax voted, to show that the election was void. *School Dist. No. 88 v. Garvey*, 80 Ky. 159.

**As to Contesting the Election**, see the titles MUNICIPAL AID, vol. 20, p. 1113; MUNICIPAL SECURITIES, vol. 21, p. 49. See also *Dwyer v. Hackworth*, 57 Tex. 247; *Eddy v. Wilson*, 43 Vt. 362.

**Question for Jury.** — Whether a special tax has been directed by popular vote, is a question of fact for the jury. *Dent v. Bryce*, 16 S. Car. 1.

**7. Mere Irregularities Do Not Vitate.** — *Irwin v. Lowe*, 89 Ind. 540; *Rose v. Hindman*, 36

**Statement of Purpose in Vote.** — It is sufficient if the vote states in general terms the purpose and object for which the money is raised,<sup>1</sup> and if the warrant for holding the meeting states the purposes for which the tax is to be levied, the tax will not be invalidated by reason of the fact that the vote fails to specify such purposes.<sup>2</sup>

**Extent of Authority Conferred by Vote.** — A tax can be levied only in conformity with the terms of the power conferred by the election.<sup>3</sup>

**Certification of Vote.** — To constitute the basis of a legal tax, the vote must be certified by the proper officers to the board or persons authorized to act upon it,<sup>4</sup> and the certificate must conform to the law, else it will confer no authority to levy the tax.<sup>5</sup>

Iowa 160; Milwaukee, etc., R. Co. v. Kossuth County, 41 Iowa 57; Benjamin v. Malaka Dist. Tp., 50 Iowa 648; School Dist. No. 88 v. Garvey, 80 Ky. 159; Mowry v. Mowry, 20 R. I. 74; Marshall v. Kerns, 2 Swan (Tenn.) 68; Louisville, etc., R. Co. v. Davidson County Ct., 1 Sneed (Tenn.) 637; Texas, etc., R. Co. v. Harrison County, 54 Tex. 120; Henry v. Chester, 15 Vt. 460. See also titles MUNICIPAL AID, vol. 20, p. 1108; MUNICIPAL SECURITIES, vol. 21, p. 49.

**Insufficient Signatures to Petition.** — After the tax has been voted and levied, its validity cannot be attacked on the ground that a petition calling for the election was not signed by the required number of taxpayers. Ryan v. Varga, 37 Iowa 78.

**Time of Payment.** — In Bartlett v. Kinsley, 15 Conn. 327, an omission in a vote to fix the time for the payment of a tax was held not to render the tax invalid, as otherwise it was legally imposed and payable on demand within a reasonable time.

**Waiver of Objections.** — Where no objections are made to the person who acts as judge at an election, at the time it is held, it is too late to raise any question afterwards. School Dist. No. 88 v. Garvey, 80 Ky. 159.

**1. Vote Need Not State Specific Purpose.** — A vote to raise a certain sum is sufficiently definite to authorize the assessment of a tax. Taft v. Barrett, 58 N. H. 447.

In West School Dist. v. Merrills, 12 Conn. 437, where it appeared from the vote, that the tax was for "defraying the expenses of the district as reported by our committee and approved of by vote of the district," the tax was held to be lawful; it not being essential to its validity that the particular object be specified.

A vote to raise "all the law allows" is sufficient, as it can be rendered certain by reference to the law. State v. Sickles, 24 N. J. L. 125. The vote that a tax be raised to pay the expense of repairs is sufficient, without a limitation as to the amount of the tax or the rate. Adams v. Hyde, 27 Vt. 221. A vote "to raise fifty-five cents on the dollar of the grand list to pay the bounty offered to soldiers," is sufficiently definite. Blodgett v. Holbrook, 39 Vt. 336. And see Halleck v. Boylston, 117 Mass. 469.

**2. Purpose Stated in Warrant.** — Mowry v. Mowry, 20 R. I. 74.

**3. Authority Conferred by Election.** — See the title MUNICIPAL AID, vol. 20, p. 1114.

**Authorises Tax for Specified Purpose Only.** — A vote to raise money to defray town charges will not authorize a tax for the support of the ministry. Lisbon v. Bath, 21 N. H. 319.

A vote to levy a tax sufficient to keep schools open for a specified time will not authorize the levy of a tax for the succeeding year or any future year. Wells v. Board of Education, 20 W. Va. 157.

A vote to adopt an act regarding the establishment of public libraries does not authorize taxation by a library board created by an act passed after such vote is taken. State v. Des Moines, 103 Iowa 76, 64 Am. St. Rep. 157.

**Discretion of Municipal Authorities.** — When the voters empowered the municipal authorities to create a debt, issue bonds, and levy a special tax therefor, it was held that the authorities could, in their discretion, create the debt and levy the tax without issuing the bonds. Gray v. Bourgeois, 107 La. 671.

**4. Vote Must Be Certified.** — Cairo, etc., R. Co. v. Parks, 32 Ark. 131; Worthen v. Bodgett, 32 Ark. 496; Hodgkin v. Fry, 33 Ark. 716; School Directors v. Fogleman, 76 Ill. 189; Weber v. Ohio, etc., R. Co., 108 Ill. 451; State v. Van Winkle, 25 N. J. L. 73; Hardcastle v. State, 27 N. J. L. 551; State v. Duryea, 40 N. J. L. 266; Dent v. Bryce, 16 S. Car. 1; Matteson v. Rosendale, 37 Wis. 254; Plumer v. Marathon County, 46 Wis. 163.

**Failure to Return in Time.** — It is held that the failure to return the certificate of the vote, within the time required, will not invalidate the tax voted. Moore v. Fessenbeck, 88 Ill. 422; Smith v. Crittenden, 16 Mich. 152.

**5. Certificate Must Conform to Law.** — State v. Sullivan, 36 N. J. L. 89; State v. Duryea, 40 N. J. L. 266; School Dist. No. 8 v. Padden, 44 N. J. L. 151; McIntyre v. White Creek, 43 Wis. 620; Arnold v. Juneau County, 43 Wis. 627. But see Smyth v. Titcomb, 31 Me. 272.

**Must Show Action of Trustees.** — The action of the trustees in calling and holding the meeting at which a tax was voted according to law, should appear in the certificate of the clerk to the assessor. State v. Hurff, 38 N. J. L. 310.

**Sufficient Certificate.** — Where the clerk was required to certify the rate per centum of a tax voted, a certificate that the election was held upon the appropriate day, and that a majority of the votes cast were in favor of the tax, was held sufficient. Shontz v. Evans, 40 Iowa 139.

In New York, it was held that the certificate of town auditors allowing accounts, regular on its face, is a sufficient authority for the board of supervisors to proceed and cause the amount certified to be levied on the town, and such a certificate precludes the supervisors from inquiring as to the merits of particular items al-

**6. Purposes of Municipal Taxation — a. IN GENERAL — Must Be Municipal and Corporate.** — As has been shown hitherto the state has no power to tax except for purposes which are public,<sup>1</sup> and it follows that the legislature has no power to authorize a municipal corporation to levy taxes for private as distinguished from public purposes.<sup>2</sup> The exercise of the general grant of power to levy taxes must be for such purposes only as are municipal and corporate.<sup>3</sup>

**At to What Constitutes a Corporate Purpose** no exact rule which will cover all cases can be laid down. The question must necessarily be decided in view of the facts of each particular case.<sup>4</sup> The point has been quite fully elaborated under a previous title,<sup>5</sup> and it will be sufficient here to give a few additional illustrations of purposes which have been held to be municipal,<sup>6</sup> and of those

lowed. *People v. Queens County*, 1 Hill (N. Y.) 195.

1. See *supra*, this title, *Purpose of Taxation*.

2. See the title MUNICIPAL AID, vol. 20, p. 1084. See also the titles OCCUPATION, BUSINESS, AND PRIVILEGE TAXES, vol. 21, p. 770; SPECIAL OR LOCAL ASSESSMENTS, vol. 25, p. 1166.

3. **Must Be for Municipal and Corporate Purposes** — *United States*. — *Citizens' Sav., etc., Assoc. v. Topeka*, 20 Wall. (U. S.) 655; *Ottawa v. Carey*, 108 U. S. 110.

*Maine*. — *Bussey v. Gilmore*, 3 Me. 191.

*Massachusetts*. — *Cushing v. Newburyport*, 10 Met. (Mass.) 508; *Mead v. Action*, 139 Mass. 341.

*Michigan*. — *People v. Salem*, 20 Mich. 452, 4 Am. Rep. 400.

*New York*. — *People v. Works*, 7 Wend. (N. Y.) 486; *People v. Kelly*, 76 N. Y. 475; *Deady v. Lyons*, 39 N. Y. App. Div. 139; *Matter of Jensen*, 44 N. Y. App. Div. 509.

*Tennessee*. — *Taylor v. Chandler*, 9 Heisk. (Tenn.) 349, 24 Am. Rep. 308.

*Texas*. — *Nalle v. Austin*, (Tex. Civ. App. 1893) 21 S. W. Rep. 375.

*Wisconsin*. — *Soens v. Racine*, 10 Wis. 271; *State v. Tappan*, 29 Wis. 664, 9 Am. Rep. 622; *Wisconsin Industrial School v. Clark County*, 103 Wis. 651.

**Unlimited Grant of Power Void.** — An attempt by the legislature to confer on a municipality an unrestricted power to tax for any and all purposes is invalid. *Smith v. Fond du Lac*, 10 Biss. (U. S.) 418; *Foster v. Kenosha*, 12 Wis. 618; *Brodhead v. Milwaukee*, 19 Wis. 624.

**The Fact that a Tax May Incidentally Be Used for a Private Purpose** is not sufficient ground to defeat its collection where its main object is to accomplish a proper municipal purpose. In case the city diverts such tax to an unlawful purpose the taxpayer can then obtain appropriate relief. *Baltimore, etc., R. Co. v. People*, 200 Ill. 541. See also *Mayo v. Dover, etc., Village Fire Co.*, 96 Me. 539.

**A Tax Is Not Necessarily Void in Toto** where levied partly for a lawful purpose and partly for an unlawful one. *Nalle v. Austin*, 91 Tex. 424.

**A Statute Giving a Town Power to Raise Money for Necessary Charges** has been held to mean such sums as shall be necessary to meet the ordinary expenses of the year: such as the payment of municipal officers, the support and defense of actions to which it may be a party, and the expenses it incurs in performing duties imposed upon it by law. It does not extend to raising money to pay militia in time of war. *Stetson v. Kempton*, 13 Mass. 272, 7 Am. Dec. 145.

4. *McCallie v. Chattanooga*, 3 Head (Tenn.) 317.

In *People v. Kelly*, 76 N. Y. 475, Earl, J., discussing what are and what are not "municipal" purposes, said: "It is impossible to define in a general way with entire accuracy what a city purpose is, within the meaning of the constitution. Each case must largely depend upon its own facts, and the meaning of these words must be evolved by a process of exclusion and inclusion in judicial construction."

**Need Not Be Wholly Within City Limits.** — It is not essential to constitute a "city purpose," that the work shall be wholly within the city limits. A bridge connecting two cities is a city purpose for each. *People v. Kelly*, 76 N. Y. 480.

In *Illinois* the constitution, art. 9, §§ 9, 10, provides that the corporate authorities of the municipal governments may be invested with power to tax for corporate purposes. As to what constitutes a "corporate purpose" under this provision, see *Taylor v. Thompson*, 42 Ill. 9; *Johnson v. Campbell*, 49 Ill. 317; *People v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *People v. Salomon*, 51 Ill. 37; *Harward v. St. Clair, etc., Drainage Co.*, 51 Ill. 132; *Gage v. Graham*, 57 Ill. 144; *Chicago, etc., R. Co. v. Smith*, 62 Ill. 268, 14 Am. Rep. 99; *School Trustees v. People*, 63 Ill. 299; *People v. Dupuyt*, 71 Ill. 651; *Sleight v. People*, 74 Ill. 47; *People v. School Trustees*, 78 Ill. 136; *Middleport v. Aetna L. Ins. Co.*, 82 Ill. 562; *Law v. People*, 87 Ill. 385; *Will County v. People*, 110 Ill. 511; *Mather v. Ottawa*, 114 Ill. 659; *Wetherell v. Devine*, 116 Ill. 631.

In *Livingston County v. Darlington*, 101 U. S. 407, the court reviewed the Illinois decisions and held that *Livingston County v. Weider*, 64 Ill. 427, was out of line with the other cases.

*Taylor v. Thompson*, 42 Ill. 9, defined a corporate purpose to mean "a tax to be expended in a manner which shall promote the general prosperity and welfare of the municipality which levies it." See also *Middleport v. Aetna L. Ins. Co.*, 82 Ill. 562.

**Not to Be Too Strictly Construed.** — The term "corporate purposes" should not be so strictly construed as to render null a self-imposed tax, merely because it might be questionable whether it would promote the corporate welfare. *Taylor v. Thompson*, 42 Ill. 9.

5. See the title MUNICIPAL AID, vol. 20, p. 1084.

6. **Proper Purposes of Municipal Taxation — To Purchase Waterworks.** — *Mayo v. Dover, etc., Village Fire Co.*, 96 Me. 530.

**To Acquire Lighting Plant.** — *Baltimore, etc.,*

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which are not municipal.<sup>1</sup>

Whether a Tax Is Necessary for purposes embraced within the charter, is to be determined by the taxing power,<sup>2</sup> and the courts will not interfere unless the determination is clearly erroneous.<sup>3</sup>

b. SINKING-FUND TAXES. — Power may be conferred on municipalities to provide a sinking fund for the payment of public loans, principal or interest.<sup>4</sup>

R. Co. v. People, 200 Ill. 541; Mitchell v. Negaunee, 113 Mich. 359; 67 Am. St. Rep. 468  
To Pave City Street. — Maybin v. Biloxi, 77 Miss. 673.

To Pay Debts Incurred for City Purposes. — Shepard v. Kaysville, 16 Utah 340.

To Preserve Property Owned by City. — Van Sicklen v. Burlington, 27 Vt. 70.

To Aid Construction of Toll Bridge. — Pritchard v. Magoun, 109 Iowa 364.

To Defray Election Expenses. — Wetherell v. Devine, 116 Ill. 631.

1. Improper Purposes. — To Erect Hotels and Business Houses. — Mather v. Ottawa, 114 Ill. 659.

To Entertain Official Visitors. — Law v. People, 87 Ill. 385.

To Assist County in Repairing Its Buildings. — Deady v. Lyons, 39 N. Y. App. Div. 139.

To Improve Property Not Owned by City. — People v. Works, 7 Wend. (N. Y.) 486.

To Construct Water Power Dam. — Nalle v. Austin, (Tex. Civ. App. 1893) 21 S. W. Rep. 375. See also the title MUNICIPAL AID, vol. 20, p. 1085.

To Pay Debt Not Incurred by Authority Imposing Tax. — Sleight v. People, 74 Ill. 47.

To Pay Expense of Defending Unsuccessful Prosecutions against city or county officers. Matter of Jensen, 44 N. Y. App. Div. 509.

To Pay Expenses of Committee appointed by the town to effect the passage of an act which was declared unconstitutional when enacted. Mead v. Acton, 139 Mass. 341.

2. Necessity to Be Determined by Taxing Power. — Hawkins v. Jonesboro, 63 Ga. 527; Anderson v. Mayfield, 93 Ky. 234; Mayfield Woolen Mills v. Mayfield, 61 S. W. Rep. 43, 22 Ky. L. Rep. 1676; Wheeler v. Plattsmouth, 7 Neb. 270.

In Public School Com'rs v. Allegany County, 20 Md. 449, it was held that a power to levy all needful taxes, and discharge all claims authorized by law, confers authority to provide for any local object sanctioned by the legislature.

Presumption of Legality. — A tax levied to pay the expenses of officers not named in the general law will be presumed to be legal. Law v. People, 87 Ill. 385.

3. Courts Will Not Interfere. — Mayfield Woolen Mills v. Mayfield, 61 S. W. Rep. 43, 22 Ky. L. Rep. 1676; McInerney v. Huelfeld, (Ky. 1903) 75 S. W. Rep. 237; Mitchell v. Negaunee, 113 Mich. 359, 67 Am. St. Rep. 468; People v. Kelly, 76 N. Y. 475; Oconto City Water Supply Co. v. Oconto, 105 Wis. 76. And see McCallie v. Chattanooga, 3 Head (Tenn.) 317.

4. Sinking Fund Taxes. — Union Pac. R. Co. v. Buffalo County, 9 Neb. 449; Union Pac. R. Co. v. York County, 10 Neb. 612; Newark Aqueduct Board v. Newark, 50 N. J. L. 126; Wilkes Barre's Appeal, 116 Pa. St. 246; Bagby v. Bate-man, 50 Tex. 446; Houston v. Voorhies, 70 Tex. 356; Conklin v. El Paso, (Tex. Civ. App.

1897) 44 S. W. Rep. 879. See also Stilz v. Indianapolis, 81 Ind. 582; Sinking Fund Com'rs v. Grainger, 98 Ky. 319; Wright v. San Antonio, (Tex. Civ. App. 1899) 50 S. W. Rep. 406.

What Will Not Invalidate Tax. — The fact that a tax levied to pay interest on bonds and create a sinking fund will not provide a sufficient fund to meet the bonds at maturity, will not invalidate the levy. Nor is such tax invalidated by the fact that the city which issued the bonds purchased them as an investment for its sinking fund. Conklin v. El Paso, (Tex. Civ. App. 1897) 44 S. W. Rep. 879.

And where such a tax was made payable to a sinking fund commission which no longer existed, it was held that this did not invalidate it, since there was no substantial prejudice to the taxpayers. Wooley v. Louisville, 71 S. W. Rep. 893, 24 Ky. L. Rep. 1357.

Power to Tax Before Sale of Bonds. — Under a statute authorizing a city to tax for a sinking fund for its bonded indebtedness existing at the time of the levy, no tax can be levied before the bonds are sold. But after the sale of a bond issue with accrued interest thereon a tax may be imposed for the annual interest and sinking fund thereon, although such bonds have been sold less than a year before the levy. And if part of the bonds have been sold prior to the levy the tax may be sustained as to them, though not as to the unsold bonds. Nalle v. Austin, (Tex. Civ. App. 1897) 42 S. W. Rep. 780.

Commissioners' Report a Prerequisite. — Where an act providing for the creation of a sinking fund, also provided that the commissioners of the fund should report to the council the amount necessary to be raised, it was held that the council had no authority to levy the tax until the commissioners had made their report. St. Louis County v. Nettleton, 22 Minn. 356.

Reservation of Special Tax. — In New York, it is provided that taxes assessed upon any railroad in a town, city, or village, which has issued bonds in aid of the construction of the road, are to be set apart as a sinking fund to be applied in payment of such bonds. This statute is not unconstitutional. Clark v. Sheldon, 106 N. Y. 104.

In North Carolina, there is a similar provision which has been held to be constitutional. Brown v. Hertford County, 100 N. Car. 92.

Pennsylvania — Annual Taxes to Pay Public Debts. — The constitution of Pennsylvania requires cities to impose annual taxes, when necessary for the purpose of paying their public debt. They are in addition to the usual taxes for city purposes; and, although limited, they may be used to extinguish indebtedness arising subsequently to the adoption of the constitution, as well as those previously existing. Wilkes-Barre's Appeal, 116 Pa. St. 246.

And it has been held that authority to make a levy to pay interest on a debt and provide a sinking fund for its extinction authorizes a tax to pay the instalments of such debt which fall due from year to year.<sup>1</sup> Under the power to tax for such a fund, taxes may not be levied to pay a floating indebtedness.<sup>2</sup> The tax cannot be continued after the purpose for which it was authorized has been accomplished;<sup>3</sup> nor can the fund, when collected, be applied to any other purpose than that specified.<sup>4</sup>

**7. Subjects of Municipal Taxation — a. IN GENERAL.** — From the fact that a municipality has no taxing power at all except such as is granted to it by the state, it follows that only such property is liable to municipal taxation as is made so by the legislature.<sup>5</sup>

**Under a General Power to Levy Taxes,** a municipality may tax all property within its limits which is subject to taxation by the general laws of the state,<sup>6</sup> not

**1. May Tax to Pay Annual Instalments.** — *Mayfield Woolen Mills v. Mayfield*, 61 S. W. Rep. 43, 22 Ky. L. Rep. 1676.

**2. May Not Be Levied to Pay Floating Indebtedness.** — *Union Pac. R. Co. v. Buffalo County*, 9 Neb. 449; *Union Pac. R. Co. v. York County*, 10 Neb. 612; *Burlington, etc., R. Co. v. Clay County*, 13 Neb. 367. But see *Conklin v. El Paso*, (Tex. Civ. App. 1897) 44 S. W. Rep. 879.

**3. Cannot Be Continued After Accomplishment of Purpose.** — *Louisville v. Murphy*, 86 Ky. 53; *Union Pac. R. Co. v. Dawson County*, 12 Neb. 254.

**4. Applicable to Specified Purpose Only.** — *Clark v. Sheldon*, 106 N. Y. 104. And see *supra*, this title, *Distribution, etc., of Avails of Taxation*.

**5. As to What Property Is Taxable,** in general, see *supra*, this title, *Persons and Things Taxable*.

**The State May Reserve to Itself the Right to tax a certain class of property without delegating a similar power to municipal corporations.** See *Newark v. State Board of Taxation*, 67 N. J. L. 246, reversing 66 N. J. L. 466.

**Act Relating to Counties Not Applicable to Boroughs and Townships.** — An act enlarging the basis of county taxation so as to comprehend all objects liable to taxation for state purposes, does not render the additional subjects liable to taxation for borough and township purposes. *Blickensderfer v. School Directors*, 20 Pa. St. 38.

**Property Exempt under the General Laws of the State** cannot be taxed by a municipality under a grant in general terms of power to tax property within the municipal limits. *Johnson Home v. Seneca Falls*, 37 N. Y. App. Div. 147; *Columbia, etc., R. Co. v. Chilberg*, 6 Wash. 612. See generally the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 266.

**Property Not Enumerated by State Law.** — In *Baker v. Panola County*, 30 Tex. 87, it was held that under a statute authorizing counties to levy and collect taxes for county purposes upon all subjects of taxation on which a tax may be levied by the state, if the state law omits to enumerate any particular thing or pursuit in the subjects to be taxed, it is not a subject of taxation on which a tax may be levied by the state and, therefore, is not taxable by the county.

**The Good-will of a Business** is not subject to municipal taxation. *People v. Feitner*, 44 N. Y. App. Div. 278.

**6. All Property Taxable under General Laws — Georgia.** — *Frederick v. Augusta*, 5 Ga. 561; *Pearce v. Augusta*, 37 Ga. 597; *Augusta v. National Bank*, 47 Ga. 562.

**Indiana.** — *Toledo, etc., R. Co. v. Lafayette*, 22 Ind. 262; *Stilz v. Indianapolis*, 81 Ind. 582.

**Kentucky.** — *Anderson v. Mayfield*, 93 Ky. 230.

**Louisiana.** — *Maurin v. Smith*, 25 La. Ann. 445.

**Missouri.** — *St. Louis v. Russell*, 9 Mo. 507.

**Nebraska.** — *Turner v. Althaus*, 6 Neb. 54.

**Texas.** — *State v. Bremond*, 38 Tex. 116.

**What Included by "Taxable Property."** — The definition of the words "taxable property" when used in a grant of the power to tax, as "all property not excepted by law from taxation," was approved in *State v. Charleston*, 10 Rich. L. (S. Car.) 240; *St. Philip's Church v. Charleston, McMull. Eq. (S. Car.)* 140; *State v. Charleston*, 5 Rich. L. (S. Car.) 564.

**"Under the Revenue Laws of the State."** — A city authorized to levy a tax upon the "taxpayers of the city taxable under the revenue laws of the state," must levy upon the same persons and property as prescribed by the revenue laws of the state. "Taxpayers of the city, taxable under the revenue laws of the state," authorizing the levy of a tax, designates both the person and subject of taxation. *Barret v. Henderson*, 4 Bush (Ky.) 255.

**In Louisiana,** police juries are vested with power to tax all property and persons within the limits of incorporated towns, unless the power be withheld or withdrawn by express legislative provision. *Cook v. Dendinger*, 38 La. Ann. 261; *Benefield v. Hines*, 13 La. Ann. 420; *Maurin v. Smith*, 25 La. Ann. 445.

**Land of Nonresidents.** — In *Alexander v. Alexandria*, 5 Cranch (U. S.) 1, it was held that the city of Alexandria had power to tax the lands of nonresidents within its limits.

**Bridges.** — So much of a bridge as is within the corporate limits is taxable by the city. *St. Louis Bridge Co. v. East St. Louis*, 121 Ill. 238; *State v. Columbia*, 27 S. Car. 137. See also *Ft. Smith Bridge Co. v. Hawkins*, 54 Ark. 509; *Point Pleasant Bridge Co. v. Point Pleasant*, 32 W. Va. 328.

But it cannot tax a bridge outside its limits. *Sioux City Bridge Co. v. Dakota County*, 61 Neb. 75.

In *Kentucky* it was formerly held that a bridge within the corporate limits could not

only such as was taxable when the power was granted, but all made so by any general statute subsequently enacted.<sup>1</sup> Property which is taxable for one purpose must be held to be taxable for all purposes of general taxation;<sup>2</sup> and the fact that the state does not actually tax certain property will not prevent the municipality from taxing it, if it has not been exempted from taxation by the legislature.<sup>3</sup>

**Personal Property** which has its legal situs within the corporate limits is taxable by the municipality.<sup>4</sup>

**Choses in Action** are held to be embraced in some of the statutes authorizing municipal taxation,<sup>5</sup> but under others they are not deemed to be included.<sup>6</sup>

**Taxation of Corporations**, their capital stock, franchises, and shares of stock in the hands of shareholders, is treated under a separate title.<sup>7</sup>

**Relinquishment of Power Not Presumed.** — As in the exercise of the power by the general government, it is never to be presumed that the right is abandoned or surrendered by the municipality unless it clearly appears that such was the intention.<sup>8</sup>

be taxed, since it was not within the range of municipal benefits. *Louisville Bridge Co. v. Louisville*, 81 Ky. 189.

But under the present constitution such a bridge is taxable. *Louisville Bridge Co. v. Louisville*, 58 S. W. Rep. 598, 22 Ky. L. Rep. 703, 65 S. W. Rep. 814, 23 Ky. L. Rep. 1635; *Henderson Bridge Co. v. Henderson*, 90 Ky. 498, 105 Ky. 32, affirmed 173 U. S. 592.

**Designation by City Council.** — A charter made taxable whatever property "the city council may designate." It was held a sufficient designation, where the council ordered the taxation of "any property of any kind subject to taxation under the laws of this commonwealth." *Covington Gas-Light Co. v. Covington*, 84 Ky. 94.

1. **Property Made Taxable by Subsequent General Law.** — *Anderson v. Mayfield*, 93 Ky. 230; *Buffalo v. Le Couteux*, 15 N. Y. 451.

In *Tackaberry v. Keokuk*, 32 Iowa 155, it was held that any change in the general law in respect to the subject of taxation effects a corresponding change as regards the subject of taxation for municipal purposes where the power in the city refers to the general laws of the state for the subjects of taxation.

2. **Taxable for One Purpose, Taxable for All Purposes.** — *Hale v. Kenosha*, 29 Wis. 599.

3. **Property Not Taxed by State but Not Exempt.** — *Newport News*, etc., R., etc., Co. v. *Newport News*, 100 Va. 157; *Woodall v. Lynchburg*, 100 Va. 318. See also *Orange*, etc., R. Co. v. *Alexandria*, 17 Gratt. (Va.) 176.

4. **Personalty Taxable if Legal Situs Within Municipality.** — *Duluth v. Reynolds*, 53 Ill. 45; *Worth v. Fayetteville*, Winst. Eq. (60 N. Car.) 70. And see *infra*, this section, *Property Outside Corporate Limits*. As to the situs of personal property for purposes of taxation, see *supra*, VII. 3. *Personal Property*.

**Water Craft** are usually taxable at the place of registration which is ordinarily the home port. See *supra*, this title, *Place of Taxation*. See also the following cases relating especially to municipal taxation:

*United States.* — *St. Louis v. Wiggins Ferry Co.*, 11 Wall. (U. S.) 423; *Morgan v. Parham*, 16 Wall. (U. S.) 471; *Hays v. Pacific Mail Steam-Ship Co.*, 17 How. (U. S.) 596; *Wheeling*, etc., Transp. Co. v. *Wheeling*, 99 U. S. 273.

*Alabama.* — *Battle v. Mobile*, 9 Ala. 234, 44 Am. Dec. 438.

*Illinois.* — *Wilkey v. Pekin*, 19 Ill. 160; *Irving v. New Orleans*, etc., R. Co., 94 Ill. 105, 34 Am. Rep. 208; *Vogt v. Ayer*, 104 Ill. 583.

*Indiana.* — *New Albany v. Meekin*, 3 Ind. 481, 56 Am. Dec. 522.

*Kentucky.* — *Newport v. Berry*, (Ky. 1892) 19 S. W. Rep. 238.

*Massachusetts.* — *Peabody v. Essex County*, 10 Gray (Mass.) 97.

*Missouri.* — *St. Joseph v. Saville*, 39 Mo. 460.

*New Jersey.* — *State v. Haight*, 30 N. J. L. 428.

*New York.* — *People v. Tax Com'rs*, 58 N. Y. 242.

*Ohio.* — *Pelton v. Northern Transp. Co.*, 37 Ohio St. 450.

**The Products of Mines** are personal property and subject to taxation for municipal purposes as such. *Board of Aldermen v. Chollar-Potosi Gold*, etc., Min. Co., 2 Nev. 86.

5. **Choses in Action Embraced.** — *Boyd v. Selma*, 96 Ala. 144; *Newport v. Rings*, 87 Ky. 635; *Trimble v. Sterling*, (Ky. 1890) 12 S. W. Rep. 1066.

6. **Choses in Action Not Included.** — *Bridges v. Griffin*, 33 Ga. 113; *Johnson v. Lexington*, 14 B. Mon. (Ky.) 521.

7. **Taxation of Corporations.** — See the title **TAXATION (CORPORATE)**, *infra*. See also the following cases:

*Capital Stock.* — *Mason v. Macon Constr. Co.*, 94 Ga. 201.

*Corporate Franchise.* — *Covington Gaslight Co. v. Covington*, 92 Ky. 312; *Board of Councilmen v. Stone*, 108 Ky. 400, (Ky. 1900) 58 S. W. Rep. 373; *Middlesboro v. Coal*, etc., Bank, 108 Ky. 680; *Newark v. State Board of Taxation*, 67 N. J. L. 246, reversing 66 N. J. L. 466.

*Building Owned and Used by Bank.* — *Louisville Trust Co. v. Louisville*, (Ky. 1895) 30 S. W. Rep. 991, (Ky. 1897) 42 S. W. Rep. 340.

*Stock in Hands of Shareholder.* — *Union Bank v. Richmond*, 94 Va. 316.

*Nonresident Stockholder.* — *Corry v. Baltimore*, 96 Md. 310.

*Stock in Foreign Corporation.* — *Seward v. Rising Sun*, 79 Ind. 351.

8. **Surrender of Power Not Presumed.** — *Stein v. Mobile*, 17 Ala. 234; *Athens City Water Works Co. v. Athens*, 74 Ga. 413; *Wells v.*



**b. PUBLIC PROPERTY.** — The question of the liability of public property to taxation has been fully discussed elsewhere.<sup>1</sup>

**c. PROPERTY OUTSIDE CORPORATE LIMITS.** — As a general rule a municipal corporation has not, nor can the legislature give it, power to tax property the situs of which is outside the corporate limits.<sup>2</sup> Thus, where a city extended streets beyond its limits, and the owner of property situated outside such limits used the streets for certain purposes with the consent of the city, it was held that the city did not thereby acquire power to tax such property.<sup>3</sup> But the legislature can authorize a city to assess and levy benefits on adjacent property where the assessment is for the benefit of all the property taxed and not for city purposes only.<sup>4</sup> And a statute authorizing a city to collect water rents outside its limits has been upheld.<sup>5</sup>

**d. ANNEXED TERRITORY** — (1) *In General.* — In the absence of any provision by the legislature to the contrary, territory which is annexed to a municipality becomes at once liable to taxation for municipal purposes in the same manner as the territory lying within the original boundaries,<sup>6</sup> and this

Savannah, 107 Ga. 1; *Plaisted v. Lincoln*, 62 Me. 91. And see *Providence Bank v. Billings*, 4 Pet. (U. S.) 514; *Louisville, etc., Canal Co. v. Com.*, 7 B. Mon. (Ky.) 160; *Brewster v. Hough*, 10 N. H. 138. See generally *supra*, this title, *Power of Taxation — Waiver or Relinquishment*.

**1. Public Property.** — See the title *EXEMPTIONS (FROM TAXATION)*, vol. 12, p. 367 *et seq.*

**2. Cannot Tax Property Outside Corporate Limits** — *Florida.* — *Pensacola v. Louisville, etc., R. Co.*, 21 Fla. 492.

*Illinois.* — *Wilkey v. Pekin*, 19 Ill. 160.

*Kentucky.* — *Johnson v. Lexington*, 14 B. Mon. (Ky.) 521.

*Louisiana.* — *Blanc v. New Orleans*, 1 Mart. (La.) 119; *Lafferranderie v. New Orleans*, 3 La. 246.

*Missouri.* — *Wells v. Weston*, 22 Mo. 384, 66 Am. Dec. 627; *St. Charles v. Nolle*, 51 Mo. 122, 11 Am. Rep. 440; *Coon v. Cameron*, 19 Mo. App. 573; *Plattsburg v. Clay*, 67 Mo. App. 497.

*Nebraska.* — *Sioux City Bridge Co. v. Dakota County*, 61 Neb. 75. But see *Bradshaw v. Omaha*, 1 Neb. 16.

*New York.* — *Matter of Prospect Park*, 60 N. Y. 398.

*Washington.* — *Pacific Sheet Metal Works v. Roeder*, 26 Wash. 183.

**Coal under River Beyond Low-water Mark.** — Where the boundary of a corporation was the low-water mark in a river, it was held that the city had no power to tax coal under a river beyond that mark. *Gilchrist's Appeal*, 109 Pa. St. 600.

**Land Not Legally Annexed.** — Where an attempted extension of city limits is invalid, municipal taxes levied on the territory sought to be annexed are void. *Pensacola v. Louisville, etc., R. Co.*, 21 Fla. 492. And the fact that such territory is afterwards legally annexed will not validate previous taxes. *Atchison, etc., R. Co. v. Maquillin*, 12 Kan. 301.

**Land Partly Within and Partly Without.** — Where a municipality levies a tax on an entire tract which lies partly within and partly without the corporate limits, such tax is void as to the portion lying outside; and if the portions are not readily separable, the whole assessment is void. *Sioux City Bridge Co. v. Dakota County*, 61 Neb. 75.

**A Bridge outside the corporate limits is not taxable.** *Sioux City Bridge Co. v. Dakota County*, 61 Neb. 75.

**Personal Property**, whose situs assigned by the local law is outside the municipal limits, is not subject to municipal taxation. *Montgomery v. Lebanon*, 64 S. W. Rep. 509, 23 Ky. L. Rep. 891; *Stephens v. Booneville*, 34 Mo. 323; *Plattsburg v. Clay*, 67 Mo. App. 497. And see *Richmond County Academy v. Augusta*, 90 Ga. 634; *Lexington v. Fishback*, 109 Ky. 770. As to the situs of personal property for purposes of taxation, see *infra*, this title, VII. 3. *Personal Property*.

**Property Removed After Passage of Act.** — In *Board of Aldermen v. Chollar-Potosi Gold, etc., Min. Co.*, 2 Nev. 86, it was held that the removal of property from a city after the passage of an act authorizing the city to tax all property within its limits, but before the passage of an ordinance prescribing the amount and manner of assessing and collecting, did not take away the city's right to tax such property.

**Property Constructively Within City.** — In *Johnson v. Lexington*, 14 B. Mon. (Ky.) 521, it was held that the power of taxation conferred upon the city of Lexington extended only to property within the city, meaning visible property actually situated within the city, and not such property as had there merely a legal or constructive status.

**No Prescriptive Right to tax property outside the corporate limits** can be created by the exercise of municipal authority over it for twenty years. *Ham v. Sawyer*, 38 Me. 37.

**3. Use of Streets Outside Limits.** — *Pacific Sheet Metal Works v. Roeder*, 26 Wash. 183.

**4. Special Assessments on Adjacent Property.** — *Brooks v. Baltimore*, 48 Md. 265. For a full discussion of the question, see the title *SPECIAL OR LOCAL ASSESSMENTS*, vol. 25, p. 1190.

**5. May Authorize Collection of Water Rents Outside Limits.** — *Pittsburgh v. Brace*, 158 Pa. St. 174.

**6. As to change of municipal boundaries generally**, see the title *MUNICIPAL CORPORATIONS*, vol. 20, p. 1150 *et seq.*

**Land Within Limits When Tax Levied.** — Where land had been brought within the limits of a city before the levy of the annual taxes it was held to be subject to taxation for that

is true although the purpose of the taxation is to meet obligations incurred by the municipality previous to the annexation.<sup>1</sup>

On the Consolidation of Two or More Municipalities it is customary for the legislature to make provision as to how their respective liabilities shall be met.<sup>2</sup> Frequently each is required to discharge its own indebtedness, the existence of the original corporations being considered as continuing to the extent necessary to the payment of their debts.<sup>3</sup>

(2) *Agricultural Lands*—(a) *Majority Rule*.—It often happens that by the extension of municipal boundaries lands are included within the municipal limits which on account of their situation and unimproved condition remain available for agricultural purposes only. The question then arises whether such lands can be subjected to the payment of municipal taxes for purposes from which they derive no benefit, and on this point two conflicting doctrines obtain. According to the great weight of authority, if the annexation is legitimate and valid,<sup>4</sup> the matter is to be regarded as one within the control of the legislature and not to be interfered with by the courts, notwithstanding such taxation be unequal and unjust and confer no benefit on the lands taxed.<sup>5</sup>

year although the statute authorized the obtaining of an abstract of the county assessment, whereon the municipal levy was based, at a date previous to the annexation. There was no statutory requirement that the city should levy its taxes on any certain day. *Westport v. McGee*, 128 Mo. 153. See also *State v. Craig*, 11 Ohio Cir. Dec. 348, 21 Ohio Cir. Ct. 13, wherein it was held to be the county auditor's duty to enter upon the annexed land the municipal instead of the township levy where the annexation took place on April 24, and the township levy was certified to him on April 27, and the municipal levy on May 15.

*Land Annexed After Beginning of Year*.—In *Austin v. Butler*, (Tex. Civ. App. 1897) 40 S. W. Rep. 340, it was held that land annexed after the beginning of the year could not be taxed for that year, although the assessment was not made till after the annexation.

*Estoppel to Deny Liability*.—Owners of annexed territory who show acquiescence in the annexation by voting at municipal elections, and other acts, are estopped to deny the liability of their lands for municipal taxes. *Seward v. Rheiner*, 2 Kan. App. 95; *Lebanon v. Edmonds*, 101 Ky. 216; *Kuhn v. Port Townsend*, 12 Wash. 605, 50 Am. St. Rep. 911. And see *Sage v. Plattsmouth*, 48 Neb. 558 (following *South Platte Land Co. v. Buffalo County*, 15 Neb. 605) wherein it was held that the owner of annexed land could not, after the lapse of several years, restrain the collection of municipal taxes on the ground that the extension was unauthorized.

*Levy Based on Preceding Assessment*.—In *Iowa*, where a territory is incorporated as a city, the levy following the incorporation must be based upon the preceding assessment made before the incorporation. *Snell v. Ft. Dodge*, 45 Iowa 564.

If the Annexation is Illegal, taxes levied by the municipality on the lands attempted to be annexed are void. *Pensacola v. Louisville*, etc., R. Co., 21 Fla. 492; *Atchison*, etc., R. Co. v. *Maquiklin*, 12 Kan. 301.

1. *Annexed Territory Taxable for Pre-existing Debt*.—*Stilz v. Indianapolis*, 81 Ind. 582; *Lebanon v. Bevil*, (Ky. 1897) 38 S. W. Rep. 872. And see *Alexandria v. Wise*, 2 Cranch

(C. C.) 27. See also the title MUNICIPAL CORPORATIONS, vol. 20, p. 1152, note 4, and p. 1153, notes 1 and 2.

2. See the title MUNICIPAL CORPORATIONS, vol. 20, p. 1224 et seq.

3. *Apportionment Between Original Corporations*.—See *U. S. v. Memphis*, 97 U. S. 284; *Hartford Bridge Co. v. East-Hartford*, 16 Conn. 149; *Fender v. Neosho Falls Tp.*, 22 Kan. 305; *Marion County v. Harvey County*, 26 Kan. 181; *Layton v. New Orleans*, 12 La. Ann. 515; *Wallace v. Shelton*, 14 La. Ann. 503; *Midland Tp. v. Rosecommon Tp.*, 39 Mich. 424; *Cleveland v. Heisley*, 41 Ohio St. 670; *De Mattos v. New Whatcom*, 4 Wash. 127; *State v. Rice*, 35 Wis. 178.

*Cannot Impair Vested Rights*.—An act providing for the union of two or more districts or townships is wholly prospective in its operation; it furnishes a rule for the future only, and interferes with no vested rights, nor with the obligation of any contract. *U. S. v. Memphis*, 97 U. S. 284.

4. *Power of Legislature to Extend Municipal Limits*.—See the title MUNICIPAL CORPORATIONS, vol. 20, p. 1152.

*Land Not Contiguous or Adjoining*.—In *Smith v. Sherry*, 50 Wis. 210, it was held that the legislature could not authorize the inclusion in a village of land not contiguous to or joining it, and in which the existing corporation had no interest, the only purpose of such annexation being to increase the village revenues by taxing the annexed lands, therefore village taxes could not be imposed on such lands.

5. *United States*.—*Kelly v. Pittsburgh*, 104 U. S. 78; *Oliver v. Omaha*, 3 Dill. (U. S.) 368; *Kauntze v. Omaha*, 5 Dill. (U. S.) 443; *Gold Hill v. Caledonia Silver Min. Co.*, 5 Sawy. (U. S.) 575.

*California*.—*Santa Rosa v. Coulter*, 58 Cal. 537; *Dixon v. Mayes*, 72 Cal. 166.

*Georgia*.—*Linton v. Athens*, 53 Ga. 588.

*Illinois*.—*Cary v. Pekin*, 88 Ill. 154, 30 Am. Rep. 543.

*Indiana*.—*Conklin v. Cambridge City*, 58 Ind. 130; *Logansport v. Seybold*, 59 Ind. 235; *Cicero v. Sanders*, 62 Ind. 208.

*Kansas*.—*Mendenhall v. Burton*, 42 Kan.

(b) "Benefit" Rule. — But in a few jurisdictions the courts have decided that, while the legislature possesses full power to extend the boundaries of municipal corporations, yet it cannot authorize the imposition of municipal taxation on land which derives no benefit from its inclusion within the municipality, such taxation being deemed a taking of private property for public use without due compensation.<sup>1</sup> Where this doctrine prevails, however, it is held that land is taxable, although used for agricultural purposes, if it fall within the range of municipal benefits.<sup>2</sup>

570; *Hurla v. Kansas City*, 46 Kan. 738; *Seward v. Rheiner*, 2 Kan. App. 95.

*Louisiana*. — *Municipality No. Three v. Michoud*, 6 La. Ann. 605; *New Orleans v. Michoud*, 10 La. Ann. 763; *New Orleans v. Cazcar*, 27 La. Ann. 156; *Stoner v. Flournoy*, 28 La. Ann. 850.

*Maryland*. — *Groff v. Frederick*, 44 Md. 67. *Michigan*. — *Smith v. Saginaw*, 81 Mich. 123; *Mitchell v. Negaunee*, 113 Mich. 359, 67 Am. St. Rep. 468.

*Mississippi*. — *Martin v. Dix*, 52 Miss. 53, 24 Am. Rep. 661.

*Missouri*. — *St. Louis v. Russell*, 9 Mo. 507; *St. Louis v. Allen*, 13 Mo. 400; *Lee v. Thomas*, 49 Mo. 112; *Walden v. Dudley*, 49 Mo. 421; *Giboney v. Cape Girardeau Co.*, 58 Mo. 141; *State v. McReynolds*, 61 Mo. 203.

*Nebraska*. — *Turner v. Althaus*, 6 Neb. 54, overruling *Bradshaw v. Omaha*, 1 Neb. 16; *Lancaster County v. Rush*, 35 Neb. 119.

*New Jersey*. — *Bailey v. Brown*, 53 N. J. L. 162. And see *State v. Taylor*, 35 N. J. L. 184.

*Ohio*. — *Barker v. State*, 18 Ohio 514.

*Pennsylvania*. — *Kelly v. Pittsburgh*, 85 Pa. St. 170, 27 Am. Rep. 633; *Hewitts' Appeal*, 88 Pa. St. 55; *Hummelstown v. Brunner*, 17 Pa. Co. Ct. 140.

*Texas*. — *Norris v. Waco*, 57 Tex. 635; *Madry v. Cox*, 73 Tex. 538.

*Washington*. — *Ferguson v. Snohomish*, 8 Wash. 668; *Trace v. Tacoma*, 16 Wash. 69. And see *Kuhn v. Port Townsend*, 12 Wash. 605, 50 Am. St. Rep. 911.

*West Virginia*. — *Davis v. Port Pleasant*, 32 W. Va. 289.

*Wisconsin*. — *Weeks v. Milwaukee*, 10 Wis. 242; *Washburn v. Oshkosh*, 60 Wis. 453. Compare *Smith v. Sherry*, 50 Wis. 210.

Land Is Presumed to Be Liable for municipal taxes if lying within the corporate limits, and it is on the owner to show why it is not liable. *Hummelstown v. Brunner*, 2 Dauph. Co. Rep. (Pa.) 376.

As to special assessments on agricultural lands for local improvements, see the title SPECIAL OR LOCAL ASSESSMENTS, vol. 25, p. 1193.

1. In Iowa the doctrine has been firmly maintained that agricultural lands cannot be subjected to municipal taxes if receiving no benefit therefrom. *Morford v. Unger*, 8 Iowa 82; *Butler v. Muscatine*, 11 Iowa 433; *Langworthy v. Dubuque*, 13 Iowa 86; *Fulton v. Davenport*, 17 Iowa 404; *Buell v. Ball*, 20 Iowa 282; *Davis v. Dubuque*, 20 Iowa 458; *O'Hare v. Dubuque*, 22 Iowa 144; *Deeds v. Sanborn*, 26 Iowa 419; *Deiman v. Ft. Madison*, 30 Iowa 542; *Durant v. Kauffman*, 34 Iowa 194; *Brooks v. Polk County*, 52 Iowa 460; *Evans v. Council Bluffs*, 65 Iowa 238; *Tubbesing v. Burlington*, 68 Iowa 691; *Taylor v. Waverly*, 94 Iowa 661.

If the Land Is Included on the Original Incorporation the rule is the same as if it had been included by extension of the municipal limits. *Buell v. Ball*, 20 Iowa 282; *Deeds v. Sanborn*, 22 Iowa 214.

In Kentucky it was formerly held that land used exclusively for agriculture could not be taxed by the municipality where it received no benefit from such taxes. *Cheaney v. Hooser*, 9 B. Mon. (Ky.) 330; *Covington v. Southgate*, 15 B. Mon. (Ky.) 491; *Sharp v. Dunavan*, 17 B. Mon. (Ky.) 223; *Arbegust v. Louisville*, 2 Bush (Ky.) 271; *Swift v. Newport*, 7 Bush (Ky.) 37; *Henderson v. Lambert*, 8 Bush (Ky.) 607; *Courtney v. Louisville*, 12 Bush (Ky.) 419; *Parkland v. Gaines*, 88 Ky. 562; *Covington v. Arthur*, 14 S. W. Rep. 121, 12 Ky. L. Rep. 163; *Pineville v. Creech*, (Ky. 1894) 26 S. W. Rep. 1101. And the same principle was applied to a bridge within the city limits. *Louisville Bridge Co. v. Louisville*, 81 Ky. 189.

But under the Present Constitution the rule is different, and farm lands lying within the municipal limits are now-taxable without regard to benefits received. *Board of Councilmen v. Scott*, 101 Ky. 615; *Board of Council v. Rarick*, 102 Ky. 352; *Richmond v. Gibson*, (Ky. 1898) 46 S. W. Rep. 702; *Latonia v. Hopkins*, 104 Ky. 419; *Hughes v. Carl*, 106 Ky. 533; *Shuck v. Lebanon*, 107 Ky. 252; *Ryan v. Central City*, (Ky. 1899) 54 S. W. Rep. 2; *Specht v. Louisville*, 58 S. W. Rep. 607, 22 Ky. L. Rep. 699; *Bell County Coke, etc., Co. v. Pineville*, 64 S. W. Rep. 525, 23 Ky. L. Rep. 933. And the same rule applies to a bridge within the city limits. *Louisville Bridge Co. v. Louisville*, 58 S. W. Rep. 598, 22 Ky. L. Rep. 703, 65 S. W. Rep. 814, 23 Ky. L. Rep. 1655. And see *Henderson Bridge Co. v. Henderson*, 173 U. S. 592.

In Utah it has been held that municipal taxation should be limited to the range of municipal benefits, and therefore the territorial legislature had no power to authorize the taxation of lands which were located beyond the range of municipal benefits. *People v. Daniels*, 6 Utah 288; *Ellison v. Linford*, 7 Utah 166; *Kaysville v. Ellison*, 18 Utah 163, 72 Am. St. Rep. 772.

2. Taxable if Within Range of Municipal Benefits — *Iowa*. — *Butler v. Muscatine*, 11 Iowa 433; *Hershey v. Muscatine*, 22 Iowa 184; *Sears v. Iowa Midland R. Co.*, 39 Iowa 417; *Tubbesing v. Burlington*, 68 Iowa 691; *Perkins v. Burlington*, 77 Iowa 553; *Ford v. North Des Moines*, 80 Iowa 626; *Farwell v. Des Moines Brick Mfg. Co.*, 97 Iowa 286; *Allen v. Davenport*, 107 Iowa 90.

*Kentucky*. — *Maltus v. Shields*, 2 Met. (Ky.) 553; *Arbegust v. Louisville*, 2 Bush (Ky.) 271; *Swift v. Newport*, 7 Bush (Ky.) 37; *Torbitt v. Louisville*, (Ky. 1887) 4 S. W. Rep. 345; *Elfert*

(e) **Statutes Exempting or Fixing Lower Rate.**—In many of the states statutes exist which exempt rural lands from municipal taxation, or prescribe for them a rate lower than that imposed on other property in the city proper,<sup>1</sup> but such statutes are applicable only to such lands as fall fairly within their letter and spirit.<sup>2</sup>

**Constitutionality of Statutes.**—In some instances these statutes have been declared unconstitutional,<sup>3</sup> but under other constitutions the courts have upheld the power of the legislature to prescribe different rates of taxation for city pur-

*v. Central Covington*, 91 Ky. 194; *Elkton v. Gill*, 94 Ky. 138; *Beattyville v. Daniel*, 25 S. W. Rep. 746, 15 Ky. L. Rep. 793; *Briggs v. Russellville*, 99 Ky. 515; *Lebanon v. Beville*, (Ky. 1897) 38 S. W. Rep. 872; *Louisville, etc., R. Co. v. Com.*, 104 Ky. 35.

*Utah.*—Cook *v. Crandall*, 7 Utah 344.

**Land Held for Speculative Purposes** is taxable although used for agricultural purposes only. *Durant v. Kauffman*, 34 Iowa 194; *Farwell v. Des Moines Brick Mfg. Co.*, 97 Iowa 286.

**1. Statutes Exempting or Fixing Lower Rate**—*United States.*—U. S. *v. Memphis*, 97 U. S. 284.

*Connecticut.*—Gillette *v. Hartford*, 31 Conn. 351.

*Georgia.*—Smith *v. Americus*, 89 Ga. 810.

*Indiana.*—Blain *v. Bailey*, 25 Ind. 165; *Kalbrier v. Leonard*, 34 Ind. 497; *Hamilton v. Ft. Wayne*, 40 Ind. 491; *Conklin v. Cambridge City*, 58 Ind. 130; *Stilz v. Indianapolis*, 81 Ind. 582; *Leeper v. South Bend*, 106 Ind. 375; *Dickerson v. Franklin*, 112 Ind. 178; *South Bend v. Cushing*, 123 Ind. 290; *Indianapolis v. Ritzinger*, 24 Ind. App. 65.

*Iowa.*—Winzer *v. Burlington*, 68 Iowa 279; *Perkins v. Burlington*, 77 Iowa 553; *Farwell v. Des Moines Brick Mfg. Co.*, 97 Iowa 286; *Allen v. Davenport*, 107 Iowa 90; *Windsor v. Polk County*, 109 Iowa 156.

*Kentucky.*—Henderson *v. Lambert*, 8 Bush (Ky.) 607; *Simms v. Paris*, (Ky. 1886) 1 S. W. Rep. 543.

*Louisiana.*—Third Municipality *v. Ursuline Nuns*, 2 La. Ann. 611; *Municipality No. Three v. Michoud*, 6 La. Ann. 605; *New Orleans v. Michoud*, 10 La. Ann. 763.

*Maryland.*—Sindall *v. Baltimore*, 93 Md. 526; *Goebel v. Baltimore*, 93 Md. 749; *United R., etc., Co. v. Baltimore*, 93 Md. 630; *Joesting v. Baltimore*, (Md. 1903) 55 Atl. Rep. 456.

*Michigan.*—Baldwin *v. Hastings*, 83 Mich. 639.

*Missouri.*—St. Louis *v. Allen*, 13 Mo. 400; *Benoist v. St. Louis*, 15 Mo. 668.

*New Jersey.*—State *v. Vanhorne*, 39 N. J. L. 444; *Bailey v. Brown*, 53 N. J. L. 162.

*New York.*—People *v. Weaver*, 41 Hun (N. Y.) 133.

*Ohio.*—Barker *v. State*, 18 Ohio 514.

*Pennsylvania.*—Serrill *v. Philadelphia*, 38 Pa. St. 355.

*Tennessee.*—Carriger *v. Morristown*, 1 Lea (Tenn.) 116.

**The Fact that the Owner Erected Dwellings** and resided on such tract was held not to affect the exemption. *Winzer v. Burlington*, 68 Iowa 279.

**The Owner May Recover Against the City** taxes collected on such land above the rate

fixed by the statute. *Indianapolis v. Ritzinger*, 24 Ind. App. 65.

**In the Absence of Any Statutory Remedy**, the owner may obtain relief from illegal taxation by injunction. *Joesting v. Baltimore*, (Md. 1903) 55 Atl. Rep. 456.

**The Legislature May Repeal** such statutes at will. *Winzer v. Burlington*, 68 Iowa 279; *McCallie v. Chattanooga*, 3 Head (Tenn.) 317; *Probasco v. Moundsville*, 11 W. Va. 501; *Powell v. Parkersburg*, 28 W. Va. 698; *Washburn v. Oshkosh*, 60 Wis. 453.

**Charter Provisions Superseded by General Law.**

—Where a city, whose charter exempted from city taxation undivided parcels of land exceeding ten acres, was reorganized under a general act requiring uniform taxation upon all taxable property within the corporate limits, it was held that all lands in the city were taxable for city purposes whether or not they exceeded ten acres in extent. *Hayward v. People*, 145 Ill. 55.

**2. Lands Not Within Purview of Statute.**—

*Allen v. Davenport*, 107 Iowa 90; *Windsor v. Polk County*, 109 Iowa 156; *Simms v. Paris*, (Ky. 1886) 1 S. W. Rep. 543; *Sindall v. Baltimore*, 93 Md. 526; *Goebel v. Baltimore*, 93 Md. 749.

**Not Applicable to Extension Made Prior to Act.**—*Perkins v. Burlington*, 77 Iowa 553. Compare *Winzer v. Burlington*, 68 Iowa 279.

**Not Applicable to Special Assessments.**—*Dickerson v. Franklin*, 112 Ind. 178.

**Ceases to Apply When Land Laid Off in Blocks and Lots.**—State *v. Vanhorne*, 39 N. J. L. 444.

**Dwelling Houses and Their Appurtenances** are not included in an exemption of lands "used only for farming purposes." *Carriger v. Morristown*, 1 Lea (Tenn.) 116.

**The Right of Way and Tracks of a Street Railway** are not within the meaning of Md. Acts 1888, c. 98. *United R., etc., Co. v. Baltimore*, 93 Md. 630.

**3. Statutes Held Unconstitutional.**—*Smith v. Americus*, 89 Ga. 810; *Cary v. Pekin*, 88 Ill. 154, 30 Am. Rep. 543; *Hayward v. People*, 145 Ill. 55; *Zanesville v. Richards*, 5 Ohio St. 590; *Knowlton v. Rock County*, 9 Wis. 410.

**In Missouri** a statute of this kind was upheld in the earlier cases. *Benoist v. St. Louis*, 19 Mo. 179; *Lee v. Thomas*, 49 Mo. 112; *Kansas City v. Cook*, 69 Mo. 127.

But under a later constitution such statutes have been declared unconstitutional. *State v. O'Brien*, 89 Mo. 631; *Copeland v. St. Joseph*, 126 Mo. 417.

**The Present Kentucky Constitution**, when adopted, at once rendered inoperative provisions of a city charter exempting agricultural lands. *Shuck v. Lebanon*, 107 Ky. 252.

poses as between property which is within the range of municipal benefits and that which is not.<sup>1</sup>

*c. DETACHED TERRITORY.* — In the absence of any provision to the contrary by the legislature, where territory is detached from a municipality it is no longer liable to taxation for municipal obligations incurred either before or after such division or detachment took place.<sup>2</sup>

But the Legislature May Provide for an Equitable Apportionment between the respective portions of burdens existing at the time of the division so that they will still be borne by the whole of the original territory.<sup>3</sup>

*f. EXEMPTIONS.* — All questions relating to exemptions from taxation

1. *Statutes Upheld.* — U. S. *v. Memphis*, 97 U. S. 292; *Gillette v. Hartford*, 31 Conn. 351; *Hamilton v. Ft. Wayne*, 40 Ind. 491; *Leicht v. Burlington*, 73 Iowa 29; *Henderson v. Lambert*, 8 Bush (Ky.) 607; *Daly v. Morgan*, 69 Md. 460; *Baldwin v. Hastings*, 83 Mich. 639; *Serrill v. Philadelphia*, 38 Pa. St. 355.

2. *Detached Territory Not Liable for Municipal Debts.* — See the title MUNICIPAL CORPORATIONS, vol. 20, p. 1225. See also *Laramie County v. Albany County*, 92 U. S. 307; *Windham v. Portland*, 4 Mass. 384; *Cobb v. Kingman*, 15 Mass. 197; *Hampshire County v. Franklin County*, 16 Mass. 76.

*Illegal Division — Estoppel.* — Where an ordinance separating part of a village was void, but the village for seven years treated such territory as no longer within its limits, it was held to be estopped to claim the right to tax it for village purposes. *People v. Maxon*, 139 Ill. 306.

*Taxes Due Before the Separation* can be collected from the detached territory. *Devor v. McClinton*, 9 W. & S. (Pa.) 80.

*When Separation Complete.* — The organization of a township created by the division of the territory of another is not complete until its officers have been elected and have entered upon the discharge of their duties, and until that time, it remains a part of the original township, and is subject to the payment of taxes legally levied thereon. *Lamb v. Burlington*, etc., R. Co., 39 Iowa 333; *Comins Tp. v. Harrisville Tp.*, 45 Mich. 442.

*Separation After End of Tax Year.* — Where land was detached from a town after the end of the tax year but before the collection of the taxes, it was held liable to taxation for that year. *New Decatur v. Nelson*, 102 Ala. 556.

3. *Legislature May Apportion Burdens.* — See the title MUNICIPAL CORPORATIONS, vol. 20 p. 1226. See also the following cases:

*Connecticut.* — *Willimantic School Soc. v. First School Soc.*, 14 Conn. 457; *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149; *Granby v. Thurston*, 23 Conn. 416.

*Illinois.* — *Galesburg v. Hawkinson*, 75 Ill. 152.

*Iowa.* — *Milwaukee, etc., R. Co. v. Kossuth County*, 41 Iowa 57.

*Kansas.* — *Sedwick County v. Bunker*, 16 Kan. 498; *Chandler v. Reynolds*, 19 Kan. 249; *Ottawa County v. Nelson*, 19 Kan. 234, 27 Am. Rep. 101; *Marion County v. Harvey County*, 26 Kan. 181; *Morris County v. Hinchman*, 31 Kan. 729.

*Maine.* — *Bowdoinham v. Richmond*, 6 Me. 112, 19 Am. Dec. 197.

*Massachusetts.* — *Stone v. Charlestown*, 114 Mass. 214.

*Mississippi.* — *Portwood v. Montgomery County*, 52 Miss. 523.

*New Hampshire.* — *Bristol v. New Chester*, 3 N. H. 524; *Londonderry v. Derry*, 8 N. H. 320.

*Ohio.* — *Cleveland v. Heisley*, 41 Ohio St. 670.

*Vermont.* — *Montpelier v. East Montpelier*, 29 Vt. 12, 67 Am. Dec. 748.

*West Virginia.* — *Board of Education v. Board of Education*, 30 W. Va. 424.

*Wisconsin.* — *Milwaukee v. Milwaukee*, 12 Wis. 93.

*Pennsylvania — Statute Requiring Decree of Adjustment.* — *Wade v. Oakmont*, 165 Pa. St. 479.

*Kansas — Bonded Indebtedness.* — In Kansas, the taxation of detached territory to pay the bonded indebtedness of a county or township is authorized, where the bonds are both "authorized and issued" previous to the detachment. *Chandler v. Reynolds*, 19 Kan. 249; *Ottawa County v. Nelson*, 19 Kan. 234, 27 Am. Rep. 101; *Sedgwick County v. Bunker*, 16 Kan. 498; *Marion County v. Harvey County*, 26 Kan. 181; *Morris County v. Hinchman*, 31 Kan. 738; *Hurt v. Hamilton*, 25 Kan. 82. And see *Fender v. Neosho Falls Tp.*, 22 Kan. 305.

*Disputed Territory — Estoppel.* — Where there is a dispute between two districts respecting their boundaries, each claiming the territory in question, if one permits the other to levy, collect, and receive the taxes thereon from year to year, and expend them in meeting the annual wants of the district, it is estopped from maintaining an action therefor as for money had and received. *Rapids Dist. Tp. v. Clinton Dist. Tp.*, 27 Iowa 323.

*Conflict Between City and Parish.* — Where a city undertook to annex territory and claimed that the parish authorities had no right to tax it, but the parish considered the annexation illegal, it was held that the parish might proceed to levy its taxes on the disputed territory and thus present for judicial determination the conflicting pretensions of the city, the parish not being bound to refrain from levying such taxes until it has tested the validity of the annexation in direct proceedings. *Lake Charles v. Police Jury*, 50 La. Ann. 346.

*The Obligation of a Contract Is Violated* where the legislature, having apportioned the burdens at the time of the division, subsequently passes an act relieving the detached portion from such liability. *Bowdoinham v. Richmond*, 6 Me. 112, 19 Am. Dec. 197.

have already been fully treated under a previous title.<sup>1</sup>

**8. Assessment.**—In the main, the rules governing assessments by municipalities may be said to be the same as those governing assessments of state taxes.<sup>2</sup>

**By Whom Made.**—The question who is to make the assessment is usually dependent on the provisions of the local statutes.<sup>3</sup> No one other than the authorized person or board can make a valid assessment,<sup>4</sup> nor can the assessor's powers be delegated to another.<sup>5</sup>

**Basis of Valuation.**—Sometimes the municipality is by statute required to take the assessment for state, county, or town purposes as the basis of valuation for local purposes,<sup>6</sup> and, in such case, the assessment must follow as far as possible that of the state, county, or town, even though the property be so situated as to render an original valuation necessary.<sup>7</sup> But this is purely a matter of statutory regulation, and, of course, the municipality may be

**1. Exemptions.**—See the title **EXEMPTIONS (FROM TAXATION)**, vol. 12, p. p. 367 *et seq.*

**2.** See *supra*, this title, *Assessment*.

**3.** See the local statutes, and the following cases:

*California.*—*Reily v. Lancaster*, 39 Cal. 354; *People v. Sargent*, 44 Cal. 430; *Savings, etc., Soc. v. Austin*, 46 Cal. 416; *Williams v. Corcoran*, 46 Cal. 553; *People v. White*, 47 Cal. 616; *Houghton v. Austin*, 47 Cal. 646; *People v. Stockton, etc., R. Co.*, 49 Cal. 421; *Smith v. Farrelly*, 52 Cal. 77.

*Kentucky.*—*Murphy v. Louisville*, 71 S. W. Rep. 934, 24 Ky. L. Rep. 1574.

*Michigan.*—*Atty.-Gen. v. Cogshall*, 107 Mich. 181.

*Montana.*—*State v. Johnson*, 16 Mont. 570.

*New Jersey.*—*Benson v. Bloomfield*, 58 N. J. L. 491.

*Washington.*—*Port Townsend v. Sheehan*, 6 Wash. 220.

**Where No Assessors Are Elected**, the selectmen or trustees of a village are sometimes the proper persons to make the assessment. *Scammon v. Scammon*, 28 N. H. 419; *People v. Wood*, 71 N. Y. 371.

**Commissioners Cannot Appoint One of Their Number.**—Where the power to appoint assessors is conferred upon the commissioners of a municipality, they cannot appoint any of their number to fill the office. *Hawkins v. Jonesboro*, 63 Ga. 527.

**4. Where One of the Trustees of a Town**, without having been elected or qualified, made an assessment by permission of the other trustees, it was held to be void. *Springfield v. People's Deposit Bank*, 63 S. W. Rep. 271, 23 Ky. L. Rep. 519.

**Where the Municipality Had No Power to Elect** an assessor it was held that the assessment was invalid. *Kearney Tp. v. East Newark*, 59 N. J. L. 86.

**Georgia—Three Citizens Who Are Freeholders.**—In *Hawkins v. Jonesboro*, 63 Ga. 527, it was held that no tax upon property within the corporate limits of a municipality can be legally collected by the municipal authorities until after assessment by three citizens thereof who are freeholders. See also *Reily v. Lancaster*, 39 Cal. 354.

**A County Assessor Cannot Assess the Property of a Township** for a tax levied on township

property to raise a fund for township purposes. *People v. Sargent*, 44 Cal. 430. And see *Smith v. Farrelly*, 52 Cal. 77.

**City and County Assessor Cannot Assess City.**—It has been held that an assessor elected for the city and county cannot make assessments for the city, the city and county being a different district from the city. *People v. Hastings*, 29 Cal. 449.

**Assessor Cannot Act Outside His District.**—*People v. Placerville, etc., R. Co.*, 34 Cal. 656; *People v. Stockton, etc., R. Co.*, 49 Cal. 415.

**Where an Assessment Is Required to Be Made in Several Towns**, by the corporate authorities, an assessment made by the proper officers of each town acting together through all the towns, is invalid, as the corporate authorities of one town have no jurisdiction to make or participate in the assessment of the property in another town. The assessment in each town should be made by its own authorities. *Hundley v. Lincoln Park*, 67 Ill. 559.

**5. Assessor's Powers Cannot Be Delegated.**—*Tampa v. Kaunitz*, 39 Fla. 683, 63 Am. St. Rep. 202. But in *Tampa v. Mugge*, 40 Fla. 326, it was held that if the work is either done under the personal supervision of the assessor, or if he personally considers and adopts it, the assessment is valid although another person be employed in a clerical capacity to write up the assessment roll and put valuations of property thereon.

**6. State, County, or Town Assessment as Basis of Valuation.**—See *Perry County v. Selma, etc., R. Co.*, 58 Ala. 546; *Police Jury v. Harris*, 10 La. Ann. 676; *James Clark Distilling Co. v. Cumberland*, 95 Md. 468; *Westport v. McGee*, 128 Mo. 152; *Ridgefield v. Goodday*, 65 N. J. L. 153; *Covington v. Rockingham*, 93 N. Car. 134; *Germania Sav. Bank v. Darlington*, 50 S. Car. 337; *Wingate v. Ketner*, 8 Wash. 94.

**Time of Assessment.**—In *San Luis Obispo v. Petit*, 87 Cal. 499, a provision that a city council may adopt a system for the assessment, levy, and collection of taxes, which shall conform to the general laws of the state as nearly as circumstances will permit, "except as to the times for such assessment," was held not to forbid the council selecting the time fixed for other taxes, but to leave the selection of the time to their discretion.

**7. Original Valuation Necessitated.**—*People v. Adams*, 125 N. Y. 471.

authorized by the legislature to make an independent assessment.<sup>1</sup>

**9. Collection.** — Except in so far as specific statutory provisions control, the collection of taxes by municipal corporations is regulated by the same general principles that apply to state taxation.<sup>2</sup> It is a general rule that power to levy taxes carries with it authority to enforce their collection.<sup>3</sup> Questions relating to the manner of collecting municipal taxes depend almost entirely on statutory or charter provisions.<sup>4</sup>

**Right to Sue for Taxes.** — On the theory that a tax is not a debt in the ordinary sense,<sup>5</sup> it is generally held that no action can be maintained for its collection unless the legislature has granted power to do so,<sup>6</sup> but power to sue for taxes is generally conferred on municipal corporations either by the special provisions of their charters or by general statutes.<sup>7</sup> The conferring on a municipality of a

**1. Higher Assessment by City Valid.** — *State v. Talley*, 50 S. Car. 374.

**The Municipal Authorities May Elect to take the state and county assessment as the municipal assessment** although the charter authorizes them to make an independent assessment. *Lockey v. Walker*, 12 Mont. 577.

**New York — Village Assessment.** — In *Glover v. Edgewater*, 3 Thomp. & C. (N. Y.) 497, a charter provision requiring the assessment roll of the village to be prepared, as far as practicable, in the manner prescribed by law in respect to assessments made by town assessors, was held to relate only to taxes to be raised for municipal purposes.

**2. See *supra*, XIV. Collection.**

**As to Power to Collect by Sale, see *supra*, XV. Tax Sales.**

**3. Power to Tax Carries Power to Collect.** — See *supra*, XIV. 1. *Power to Collect*.

And see *Slack v. Ray*, 26 La. Ann. 674; *Aurora v. McGannon*, 138 Mo. 38.

**Right of City to Contract for Collection of Taxes.** — *Ft. Wayne v. Lehr*, 88 Ind. 62; *State v. Heath*, 20 La. Ann. 172, 96 Am. Dec. 390; *San Antonio v. Raley*, (Tex. Civ. App. 1895) 32 S. W. Rep. 180.

**4. See the local statutes.**

**City Taxes Made Collectible in Same Manner as State Taxes.** — *Wilmington v. Sprunt*, 114 N. Car. 310.

**Borough Given Same Power as Township.** — *Reilstab v. Belmar*, 58 N. J. L. 489.

**Charter Authorizing Provision by Ordinance.** — Under a charter authorizing a city to collect taxes in any manner that might be prescribed by ordinance, provided it were not repugnant to the Federal Constitution or the organic law of the territory, it was held that the city council had power to pursue the ordinary mode of collecting delinquent taxes. *Lockey v. Walker*, 12 Mont. 577.

**A City Cannot Be Vested with Discretionary Power to collect taxes as provided by either of two laws, which provide different officers and prescribe different methods for that purpose.** *People v. Cooper*, 83 Ill. 585.

**A Bounty Tax must be collected by the process and officer employed to collect the other taxes of the municipal division levying it.** *Hilbish v. Hower*, 58 Pa. St. 93.

**5. See *supra*, this title, *Definitions and General Principles*.**

**6. Action Not Maintainable unless Authorized by Legislature.** — *Louisville Bridge Co. v. Louisville*, 65 S. W. Rep. 814, 23 Ky. L. Rep. 1655; .

*St. Joseph v. Kansas City, etc.*, R. Co., 118 Mo. 671; *Rochester v. Gleichauf*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 446. And see generally *supra*, XIV. *Collection*.

**7. Power to Sue for Taxes.** — See the statutes, and the following cases:

**California.** — *San Luis Obispo County v. White*, 91 Cal. 432.

**Kentucky.** — *Somerset v. Somerset Banking Co.*, 109 Ky. 549; *Louisville Bridge Co. v. Louisville*, 65 S. W. Rep. 814, 23 Ky. L. Rep. 1655.

**Missouri.** — *St. Joseph v. Kansas City, etc.*, R. Co., 118 Mo. 671; *Aurora v. Lindsay*, 146 Mo. 509.

**New York.** — *New York v. Colgate*, 12 N. Y. 140.

**Texas.** — *Nalle v. Austin*, (Tex. Civ. App. 1897) 42 S. W. Rep. 780; *Link v. Houston*, (Tex. Civ. App. 1900) 59 S. W. Rep. 566; *Galveston, etc., R. Co. v. Galveston*, (Tex. 1903) 74 S. W. Rep. 537; *Dallas Title, etc., Co. v. Oak Cliff*, 8 Tex. Civ. App. 217; *McCrary v. Comanche*, (Tex. Civ. App. 1896) 34 S. W. Rep. 679.

**Wyoming.** — *Albany Mut. Bldg. Assoc. v. Laramie*, (Wyo. 1901) 65 Pac. Rep. 1011.

**Admissibility of Certified Delinquent Tax Bill in Evidence.** — *State v. Edwards*, 162 Mo. 660.

**Presumption in Favor of Regularity of Tax.** — *Fonda v. Louisville*, (Ky. 1899) 49 S. W. Rep. 785; *Powell v. Louisville*, (Ky. 1899) 52 S. W. Rep. 798; *Southern Warehouse, etc., Co. v. Mechanics' Trust Co.*, (Ky. 1900) 56 S. W. Rep. 162.

**Burden on Taxpayer to Show Nonliability for Tax.** — *Sherley v. Louisville*, (Ky. 1899) 53 S. W. Rep. 530.

**A Personal Judgment against the property owner may be obtained by the city under a charter provision giving it power to sue for taxes.** *Berry v. San Antonio*, (Tex. Civ. App. 1898) 46 S. W. Rep. 273, affirmed 92 Tex. 319.

**Where the Tax Was Unauthorized in Part, it was held that the city might recover the authorized portion in an action therefor.** *Wright v. San Antonio*, (Tex. Civ. App. 1899) 50 S. W. Rep. 406.

**After a Void Compromise of a city's claim for taxes the city may sue on such claim without first tendering the defendant the amount paid by him under the compromise. The latter, however, is of course entitled to credit for such amount.** *Louisville v. Louisville R. Co.*, 68 S. W. Rep. 840, 24 Ky. L. Rep. 528.

special remedy for the collection of taxes will not take away its authority to maintain an action at law therefor,<sup>1</sup> unless such special remedy be prescribed in the very law that confers the power to tax.<sup>2</sup>

**Penalties.** — The power to tax is usually deemed to include the power to prescribe penalties for nonpayment of the taxes assessed,<sup>3</sup> though in some cases it has been held that such power does not exist unless expressly granted by the legislature.<sup>4</sup> The penalty, when added, becomes part of the taxes due.<sup>5</sup>

**The Collector.** — Questions as to who is the proper person to collect municipal taxes depend almost entirely upon statutory provisions.<sup>6</sup>

1. **Special Remedy Does Not Exclude Collection by Action.** — See *U. S. v. Lyman*, 1 Mason (U. S.) 482; *Oakland v. Whipple*, 39 Cal. 113; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *Burlington v. Burlington, etc.*, R. Co., 41 Iowa 134; *State v. Southern Steamship Co.*, 13 La. Ann. 497; *Dugan v. Baltimore*, 1 Gill & J. (Md.) 499; *Camden v. Allen*, 26 N. J. L. 398; *Durant v. Albany County*, 26 Wend. (N. Y.) 66; *Howard v. Houston*, 59 Tex. 76.

In *San Antonio v. Berry*, 92 Tex. 319, it was held that a statute giving a municipal corporation authority to collect taxes in accordance with the provisions of such statute did not take away its power to collect by suit.

2. **Special Remedy Exclusive.** — *Rochester v. Gleichauf*, (Supm. Ct. Tr. T.) 40 Misc. (N. Y.) 446; *Howard v. Houston*, 59 Tex. 76.

3. **May Prescribe Penalties.** — *Denver City R. Co. v. Denver*, 21 Colo. 350; *Burlington v. Burlington, etc.*, R. Co., 41 Iowa 134; *Augustine v. Jennings*, 42 Iowa 198; *Slack v. Ray*, 26 La. Ann. 674; *State v. Consolidated Virginia Min. Co.*, 16 Nev. 445.

**Interest on Delinquent Taxes.** — The legislature may authorize a city to collect interest on delinquent taxes; and such a statute is not in conflict with a constitutional provision limiting the rate of interest under contracts. *Galveston, etc.*, R. Co. v. *Galveston*, (Tex. 1903) 74 S. W. Rep. 537.

**For Refusing Information to Assessor.** — The municipal authorities may add a penalty for refusal to give the assessor proper information to enable him to properly make the assessment. *Board of Alderman v. Chollar-Potosi Gold, etc.*, Min. Co., 2 Nev. 86.

**In the Case of Special Assessments,** however, only such penalties can be collected as are affixed by statute; the discretionary power of the municipality in regard to penalties extending to general taxes only. *Ankeny v. Henningesen*, 54 Iowa 29. And see *Bucknall v. Story*, 36 Cal. 67.

**Who Liable.** — A purchaser from the person who owned the land at the time the taxes were assessed is not liable to the penalty prescribed by ordinance against "the person owing such tax." *San Antonio v. Raley*, (Tex. Civ. App. 1805) 32 S. W. Rep. 180.

**When Penalty Not Incurred.** — Where, pending an appeal by a taxpayer from a tax assessment, the city makes no endeavor to collect the tax, and, immediately on the appeal being decided against him, the taxpayer tenders the amount of his taxes, the penalty for nonpayment cannot be enforced against him. *Ferguson v. Pittsburgh*, 159 Pa. St. 435.

**Exorbitant Penalty.** — In *Weber v. San Francisco*, 1 Cal. 455, it was held that a penalty of one per cent. a day was exorbitant, and that the common council had no authority under the charter of the city to impose it.

**May Impose Penalty of Ten Per Cent.** — Under a statute giving a city discretion as to the imposition of penalties, it may inflict a penalty of ten per cent. on the amount due. *Owensboro Waterworks Co. v. Owensboro*, (Ky. 1903) 75 S. W. Rep. 268.

4. **Express Grant of Power Required.** — *Augusta v. Dunbar*, 50 Ga. 387; *Jefferson v. Whipple*, 71 Mo. 519; *San Antonio v. Raley*, (Tex. Civ. App. 1895) 32 S. W. Rep. 180.

**Fine or Imprisonment.** — In *Missouri*, general words in a city charter are held not to be sufficient to give to the city the power to enforce a tax by fine or imprisonment, when the tax is levied not as a police regulation, but as a means of revenue, the municipality not having power to make the nonpayment of a purely revenue tax a misdemeanor punishable by fine and imprisonment. *St. Louis v. Green*, 6 Mo. App. 591; *St. Louis v. Heinrich*, 6 Mo. App. 591.

5. **Penalty Becomes Part of Taxes Due.** — *Burlington v. Burlington, etc.*, R. Co., 41 Iowa 134; *Kansas Pac. R. Co. v. Amrine*, 10 Kan. 318. And see *New Orleans v. Fisher*, 180 U. S. 185.

6. **By Whom Taxes Collected.** — See the statutes, and the following cases: *People v. Kelsey*, 34 Cal. 470; *Baird v. People*, 83 Ill. 387; *Springfield v. Edwards*, 84 Ill. 626; *Mix v. People*, 106 Ill. 425; *People v. Wilson*, 3 Ill. App. 368; *Britten v. Clinton*, 8 Ill. App. 164; *Suppiger v. People*, 9 Ill. App. 290; *White Sulphur Springs v. Pierce*, 21 Mont. 130; *Ferguson v. Pittsburgh*, 159 Pa. St. 435; *State v. Carson*, 6 Wash. 250. And see generally *supra*, this title, XIV. *Collection*.

**Cannot Collect for Adjoining Town.** — A municipal tax collector cannot collect the taxes for an adjoining town, and this even though it has, after his election and after the levy of the tax, been annexed to the city. *Mason v. Johnson*, 51 Cal. 612.

**No One but Authorized Collector Can Act.** — Where a city treasurer is alone empowered by law to enforce the collection of unpaid city taxes, any contract made by the city or its common council, with any person, for their collection, is *ultra vires*, and absolutely void. *Ft. Wayne v. Lehr*, 88 Ind. 62.

**Compensation of Collector.** — *Hagerstown v. Startzman*, 93 Md. 606.

**Right of Action on Collector's Bond.** — *House v. Dallas*, (Tex. 1903) 74 S. W. Rep. 901.



**10. Taxes in Particular Districts and Quasi-Municipalities — a. IN GENERAL.** — Districts for school, highway, levee, irrigation, drainage, and other similar purposes may be, and often are, invested by the state with a corporate character<sup>1</sup> and endowed with the taxing power.<sup>2</sup> They are *quasi* corporations — mere subdivisions of the state for political purposes — and not corporations within constitutional provisions prohibiting special acts conferring corporate powers;<sup>3</sup> and in levying taxes for the purposes of their creation, they are in a large sense mere agencies of the state in carrying into effect general laws which have been enacted for the common good.<sup>4</sup>

**b. SCHOOL DISTRICTS AND SCHOOL TAXES — (1) Delegation of Taxing Power.** — As has already been shown, the establishment and maintenance of public schools is deemed to be a legitimate purpose of taxation,<sup>5</sup> and, since the state has power to levy school taxes, it can delegate such power to its subordinate political divisions.<sup>6</sup> Usually the power is expressly conferred by

**1. Invested with Corporate Character.** — See *Dean v. Davis*, 51 Cal. 406; *Turlock Irrigation Dist. v. Williams*, 76 Cal. 360; *Taft v. Wood*, 14 Pick. (Mass.) 362; *Com. v. Beamish*, 81 Pa. St. 389. And see such titles as DRAINS AND SEWERS, vol. 10, p. 233; FIRE LIMITS, vol. 13, p. 402; IRRIGATION, vol. 17, p. 527; PARKS AND PUBLIC SQUARES, vol. 21, p. 1065; SCHOOLS, vol. 25, p. 31.

**Distinguished from Municipal Corporations.** — See the title MUNICIPAL CORPORATIONS, vol. 20, p. 1130.

**School Districts Are Not Strictly Municipal Corporations,** but territorial divisions for the purposes of common schools exercising, within a prescribed sphere, many of the faculties of a corporation. *Wharton v. School Directors*, 42 Pa. St. 358.

**City May Be a District.** — The word "district" signifies a part or portion of the state. A city therefore may be a district. *Keely v. Sanders*, 99 U. S. 441.

**Corporation Created by Implication.** — Powers or privileges may be conferred, or duties enjoined, of such a character that a corporation would be required, and from which the corporation must be implied. If such powers or privileges cannot be enjoined, or if such duties cannot be performed, without acting in a corporate capacity, a corporation, to that extent, is created by implication. *People v. Reclamation Dist. Number One Hundred and Eight*, 53 Cal. 346.

**2. Endowed with Taxing Power.** — See *People v. McAdams*, 82 Ill. 356; *Bowles v. State*, 37 Ohio St. 35; *Kinney v. Zimpleman*, 36 Tex. 564.

**As to the Right to Tax** for such purposes, see *supra*, this title, *Purpose of Taxation*.

**As to Special Assessments** for such purposes, see the title SPECIAL OR LOCAL ASSESSMENTS, vol. 25, p. 1166.

**Fire District.** — *Wood v. Quimby*, 20 R. I. 482.

**Park Commissioners.** — *South Park Com'rs v. Chicago First Nat. Bank*, 177 Ill. 234.

**3. Not Corporations Within Constitutional Provisions.** — *State v. Powers*, 38 Ohio St. 54; *Speight v. People*, 87 Ill. 595; *People v. Buffalo County*, 4 Neb. 150; *Sherman County v. Simons*, 109 U. S. 735. See *State v. Drainage, etc., Com'rs*, 41 N. J. L. 154.

**Effect of Statute Relating to General Taxation.** — An act authorizing assessments for reclamation purposes is an act in relation to local tax-

ation, and is not repealed by an act applicable to taxation for general purposes. *Reclamation Dist. No. 3 v. Goldman*, 61 Cal. 205.

**4. Mere Agencies of State.** — *Will County v. People*, 110 Ill. 511; *Dean v. Davis*, 51 Cal. 406; *People v. Flagg*, 46 N. Y. 401; *People v. Ulster County*, 93 N. Y. 397; *State v. Powers*, 38 Ohio St. 54.

**To Whom Legislature May Delegate Taxing Power.** — The legislature may delegate the power to impose a tax to commissioners, or such other agents as it may see fit to choose. *Kinney v. Zimpleman*, 36 Tex. 564; *Bull v. Read*, 13 Gratt. (Va.) 78. For a general discussion of this question, see *supra*, this title, *Power of Taxation — Delegation of Power*.

**Corporate Authorities.** — By the phrase "corporate authorities," as used in a constitutional limitation upon the power of the legislature to grant the right to tax to any other than "corporate authorities," are understood those officers who are directly elected by the people of the district sought to be taxed, or appointed in some mode to which they have assented. *Harwood v. St. Clair, etc., Drainage Co.*, 51 Ill. 130; *Lee v. Ruggles*, 62 Ill. 427; *Hessler v. Drainage Com'rs*, 53 Ill. 105; *Cornell v. People*, 107 Ill. 372; *People v. McAdams*, 82 Ill. 356; *People v. Chicago*, 51 Ill. 17, 2 Am. Rep. 278; *People v. Salomon*, 51 Ill. 37; *Lovington v. Wider*, 53 Ill. 302.

**5. See *supra*, this title, Purpose of Taxation.**

**As to school funds** created by taxation, see cases cited in the title SCHOOLS, vol. 25, p. 63, note 4.

That this power is not delegated by the constitution to Congress or prohibited to the states, see *Marshall v. Donovan*, 10 Bush (Ky.) 681; *Collins v. Henderson*, 11 Bush (Ky.) 74.

**6. Right of State to Delegate Taxing Power.** — See *supra*, this title, *Power of Taxation — Delegation of Power*.

**Validity of Statutes Granting Power.** — See *Southern R. Co. v. St. Clair County*, 124 Ala. 491; *People v. Lodi High School Dist.*, 124 Cal. 694; *Board of Education v. Board of Trustees*, 129 Cal. 599; *Board of Education v. Public Library*, 68 S. W. Rep. 10, 24 Ky. L. Rep. 98; *Hilburn v. St. Paul, etc., R. Co.*, 23 Mont. 229; *Allen v. Bidwell*, 68 N. H. 245; *Board of Education v. Brown*, 12 Utah 251; *Robertson v. Preston*, 97 Va. 296; *State v. Byrne*, (Wash. 1903) 73 Pac. Rep. 394.

the state on existing political divisions,<sup>1</sup> or on districts constituted as corporations for school purposes.<sup>2</sup> But these municipal and *quasi*-municipal corporations have no inherent authority to tax for school purposes, and can exercise the taxing power only when it is conferred upon them by constitutional provision,<sup>3</sup> or by legislative enactment in express terms,<sup>4</sup> or by necessary implication.<sup>5</sup> Questions relating to the nature and extent of the power delegated

**School Districts Cannot Be Vested with Taxing Power** in some states. *Schultes v. Eberly*, 82 Ala. 242; *Lipscomb v. Dean*, 1 Lea (Tenn.) 546.

In Illinois, There Is No Constitutional Limitation to "the power" of the legislature in the formation of school districts, or in prescribing who shall and who shall not be empowered with the levy and collection of school taxes. See *Speight v. People*, 87 Ill. 595.

**For What Schools Taxation May Be Authorized.**—See generally *supra*, this title, *Purpose of Taxation*. And see the title SCHOOLS, vol. 25, p. 64.

**Private School.**—In *People v. McAdams*, 82 Ill. 356, it was held that the legislature could not constitute a private schoolhouse, erected under the provisions of a will, a district school, and provide for the election of trustees therein and invest them with the taxing power for the support of the school.

**Agricultural College.**—The legislature may authorize the town to raise money for an agricultural college to be established therein by the state. *Merrick v. Amherst*, 12 Allen (Mass.) 500.

**Schools Not Required to Be Supported by General Laws.**—The general power to tax for the support of town schools is not restricted to such schools as are required to be supported by general laws. *Cushing v. Newburyport*, 10 Met. (Mass.) 508.

1. **Political Divisions.**—*Fuller v. Heath*, 89 Ill. 296; *Speight v. People*, 87 Ill. 595; *Richards v. Raymond*, 92 Ill. 612, 34 Am. Rep. 151; *Public Schools v. Alleghany County*, 20 Md. 449; *Texas, etc., R. Co. v. Harrison County*, 54 Tex. 120.

**Mandatory Act.**—An act providing that the county commissioners may levy a tax for school purposes is held to be mandatory. *Jones v. State*, 17 Fla. 411.

2. **School Districts.**—*Johnston v. Cathro*, 51 Mich. 80; *Ewing v. Board of Education*, 72 Mo. 439; *Pickering v. Coleman*, 53 N. H. 424; *Landis v. Ashworth*, 57 N. J. L. 309; *Wharton v. School Directors*, 42 Pa. St. 358; *Kuhn v. Board of Education*, 4 W. Va. 499.

**School District Must Have Legal Existence.**—*Green Mountain Stock-Ranching Co. v. Savage*, 15 Mont. 189. And see *Hamilton v. San Diego County*, 108 Cal. 273; *Benson v. Bloomfield Tp.*, 58 N. J. L. 491.

**Towns May Be Authorized to Determine the Limit of such districts.** *Taft v. Wood*, 14 Pick. (Mass.) 362; *Withington v. Eveleth*, 7 Pick. (Mass.) 106.

**Neglect or Refusal of District.**—In *New Hampshire*, power is given, in the first instance, to school districts, to raise money by vote, to build or repair schoolhouses for the use of the district, and to locate the same; but upon their unreasonable neglect or refusal, the jurisdiction devolves on the selectmen of the town, who

are bound to assess a sufficient tax on the district for that purpose. *Blake v. Sturtevant*, 12 N. H. 567.

**After a City Assumes Control of Its Free Schools**, its schoolhouses become public buildings, and the city can impose a tax of one-quarter of one per cent. for their erection. *Dwyer v. Hackworth*, 57 Tex. 246.

**Consolidation of Two Districts.**—A new school district created by vote of a town, uniting two old districts, has no authority to raise money by a tax to repay to one of the old districts the proportion of the value of a schoolhouse existing therein at the time of the union, for which the other old district would have been liable had it been built by the union district. *Bacon v. Thirteenth School-Dist.*, 97 Mass. 421.

3. **Constitutional Authority.**—*Ft. Worth v. Davis*, 57 Tex. 225; *Kinney v. Zimplermann*, 36 Tex. 554; *State v. Bremond*, 38 Tex. 116; *Willis v. Owen*, 43 Tex. 41.

4. **Necessity for Legislative Grant.**—*School Directors v. Fogleman*, 76 Ill. 189; *Fisher v. People*, 84 Ill. 491; *Marion, etc., R. Co. v. Alexander*, 63 Kan. 72; *Jenkins v. Andover*, 103 Mass. 94. And see *Estes v. School Dist. No. 19*, 33 Me. 170; *Norton v. Soule*, 75 Me. 385; *El Paso v. Conklin*, 91 Tex. 537.

**If There Be a Fair Doubt as to the Existence of the power**, it must be resolved in favor of the public. *Marion, etc., R. Co. v. Alexander*, 63 Kan. 72.

**Not a Municipal Purpose.**—In *Nelson v. Homer*, 48 La. Ann. 258, it was held that such a tax is not for a municipal purpose, and could not be levied under a general grant of power to tax for municipal purposes, or under the general welfare clause in a municipal charter. See also *Root v. Erdelmeyer*, 37 Ind. 225.

But see *Horton v. Mobile School Com'rs*, 43 Ala. 598, in which the power to tax for the maintenance of schools was deemed to be within a general grant of power to tax for municipal purposes.

In *Maine*, school districts are under no legal obligation to support schools and have no power to raise money for that object; the law imposes this duty on towns. *School Dist. No. 3 v. Brooks*, 23 Me. 543; *Dore v. Billings*, 26 Me. 56.

5. **The Power to Tax Is Implied** in a law providing for the establishment of schools, and that for the purpose of supporting schools and other necessary expenses the trustees shall have the power and discharge the duties of school directors, etc. *Fisher v. People*, 84 Ill. 491.

And see generally *supra*, this section, *Power to Tax*—*Power by Necessary Implication*.

**Power to Tax for Building Schoolhouses** is conferred by a law giving authority to establish schools and levy taxes to defray the expenses thereof. *Bull v. Read*, 13 Graff. (Va.) 78.

depend almost entirely on the terms of the statutes granting such power, which vary widely in the different states.<sup>1</sup>

(2) *Exercise of Power — By Whom Exercised.* — The power to impose taxes for school purposes must be exercised by the proper officials, else the tax will not be valid.<sup>2</sup>

*Mode of Exercise.* — The manner in which school taxes shall be levied is generally provided for by statutes, the provisions of which vary widely in the different jurisdictions, and questions relating to the sufficiency of a levy must, for the most part, be resolved by consulting them.<sup>3</sup> In order for the tax to be valid it is essential that all the mandatory provisions of the statutes be complied with,<sup>4</sup> and where the validity of such a tax is assailed, compliance with

1. See the statutes, and for decisions construing such statutes, see the following cases: *Board of Education v. Board of Trustees*, 129 Cal. 599; *Chicago, etc., R. Co. v. People*, 163 Ill. 616; *Baltimore, etc., R. Co. v. People*, 195 Ill. 423; *School Dist. No. 76 v. Ryker*, 64 Kan. 612; *Louisville, etc., R. Co. v. School Dist. No. 108*, (Ky. 1895) 29 S. W. Rep. 340; *Fremd v. Deposit Bank*, (Ky. 1897) 42 S. W. Rep. 102; *Board of Education v. Louisville, etc., R. Co.*, 110 Ky. 932; *Kirk v. Roberson*, 76 S. W. Rep. 183, 25 Ky. L. Rep. 633; *Stuart v. School Dist. No. 1*, 30 Mich. 69; *Benton v. Scott*, 168 Mo. 378; *State v. Omaha*, 7 Neb. 267; *Chicago, etc., R. Co. v. School Dist. No. 10*, 60 Neb. 164; *State v. Hunter*, (Wis. 1903) 96 N. W. Rep. 921.

The word "Town," as used in Wis. Rev. Stat. 1898, § 4971, relating to school taxes, means "taxing district," whether such district be a town, city, or village. *State v. Hunter*, (Wis. 1903) 96 N. W. Rep. 921.

2. *Must Be Exercised by Proper Officials.* — *Prowers County v. Pueblo, etc., R. Co.*, 3 Colo. App. 398; *Cedar Rapids, etc., R. Co. v. Carroll County*, 41 Iowa 153; *State v. Lakeside Land Co.*, 71 Minn. 283; *State v. Harper*, 11 Mo. App. 301; *Lamoreaux v. O'Rourke*, 3 Abb. App. Dec. (N. Y.) 15; *Johnson v. Sander-son*, 34 Vt. 94.

*By Whom Assessment Made.* — *Prowers County v. Pueblo, etc., R. Co.*, 3 Colo. App. 398; *School Dist. No. 76 v. Ryker*, 64 Kan. 612; *Cincinnati, etc., R. Co. v. Com.*, (Ky. 1890) 51 S. W. Rep. 568; *Collins v. Masden*, 25 Ky. L. Rep. 81, 74 S. W. Rep. 720; *Benson v. Bloomfield Tp.*, 58 N. J. L. 491; *Lamoreaux v. O'Rourke*, 3 Abb. App. Dec. (N. Y.) 15; *Board of Education v. Brown*, 12 Utah 251.

*By Whom Tax Extended.* — *People v. White*, 47 Cal. 616; *People v. Stockton, etc., R. Co.*, 49 Cal. 414; *Brown v. Harris*, 52 Mo. 306; *People v. Robinson*, 76 N. Y. 422; *Stephens v. School Dist. No. 21*, 6 Oregon 353; *Johnson v. Sanderson*, 34 Vt. 94.

3. See the statutes, and the following cases construing them:

*United States.* — *Commercial Bank v. Sandford*, 103 Fed. Rep. 98.

*Illinois.* — *Baltimore, etc., R. Co. v. People*, 195 Ill. 423; *Koelling v. People*, 196 Ill. 353; *Otis v. People*, 196 Ill. 542.

*Kansas.* — *Seward v. Rheiner*, 2 Kan. App. 95.

*Kentucky.* — *Louisville, etc., R. Co. v. School Dist. No. 108*, (Ky. 1895) 29 S. W. Rep. 340; *Hunter v. Louisville, etc., R. Co.*, (Ky. 1895)

30 S. W. Rep. 645; *Board of Education v. Nelson*, 109 Ky. 203, 59 S. W. Rep. 505, 22 Ky. L. Rep. 1377; *Lexington v. Board of Education*, 65 S. W. Rep. 827, 23 Ky. L. Rep. 1663.

*Michigan.* — *Union School-Dist. v. Parris*, 97 Mich. 593.

*Missouri.* — *State v. Hannibal, etc., R. Co.*, 135 Mo. 618; *Kansas City, etc., R. Co. v. Chapin*, 162 Mo. 409; *Benton v. Scott*, 168 Mo. 378; *State v. Phipps*, 148 Mo. 31.

*Nebraska.* — *State v. Omaha*, 39 Neb. 745.

*Oklahoma.* — *Board of Education v. King-fisher*, 5 Okla. 82.

*Pennsylvania.* — *Mathewson v. School Directors*, 23 Pa. Co. Ct. 121; *Lueder v. Caffrey*, 9 Kulp (Pa.) 144.

*Texas.* — *Oliver v. Carner*, 39 Tex. 396.

*Washington.* — *State v. Byrne*, (Wash. 1903) 73 Pac. Rep. 394.

*Wisconsin.* — *State v. Hunter*, (Wis. 1903) 96 N. W. Rep. 921.

*Mode of Assessment.* — *Waldron v. Lee*, 5 Pick. (Mass.) 323; *Williams v. School Dist. No. 1*, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; *Rawson v. School Dist.*, 100 Mass. 134; *Little v. Little*, 131 Mass. 367; *School Dist. No. 12 v. Cumberland*, 21 R. I. 576; *Sprague v. Abbott*, 58 Vt. 331.

*Notice of Assessment.* — *Randell v. Smith*, 1 Den. (N. Y.) 214; *Jewell v. Van Steenburgh*, 58 N. Y. 85; *Peckham v. Becknell*, 11 R. I. 506.

*Responsibility of Assessors.* — *Little v. Merrill*, 10 Pick. (Mass.) 543.

*Valuation.* — *Randall v. Smith*, 1 Den. (N. Y.) 214; *Easton v. Calendar*, 11 Wend. (N. Y.) 90; *Richardson v. Sheldon*, 1 Pin. (Wis.) 624.

*Equalization.* — *Board of Education v. Brown*, 12 Utah 251.

*Statement of Purpose.* — *State v. L'Engle*, 40 Fla. 392; *State v. West Duluth Land Co.*, 75 Minn. 456; *Stanton v. Board of Education*, 68 N. J. L. 496; *Locker v. Keiler*, 110 Iowa 707.

The General Principles applicable to the levy of such taxes are not different from those governing other taxes. *Glass v. Billings*, 59 Kan. 776, 53 Pac. Rep. 125.

4. *Failure to Comply Invalidates Tax* — *Illinois.* *Chicago, etc., R. Co. v. People*, 163 Ill. 616; *Chicago, etc., R. Co. v. People*, 171 Ill. 544; *Greenwood v. Gmelich*, 175 Ill. 526; *St. Louis, etc., R. Co. v. People*, 177 Ill. 78; *People v. Chicago, etc., R. Co.*, 183 Ill. 311; *Chicago, etc., R. Co. v. People*, 184 Ill. 240.

*Kentucky.* — *Tate v. Earlander School Dist. No. 32*, (Ky. 1899), 49 S. W. Rep. 337; *Perry v. Brown*, (Ky. 1899) 51 S. W. Rep. 457.

the statutory requirements must be affirmatively shown.<sup>1</sup> But a tax will not be invalidated by mere informalities or irregularities in the exercise of the power,<sup>2</sup> or by failure to obey directory provisions of the statutes.<sup>3</sup>

**Submission to Popular Vote.**—While the legislature may, if it sees fit, confer the power to levy school taxes without requiring a previous submission to the voters,<sup>4</sup> yet it is usually provided that the approval of the voters shall first be obtained.<sup>5</sup> Where this is the case no valid tax can be levied without a previous submission to the voters,<sup>6</sup> and the election must be conducted in compliance with the statutory requirements.<sup>7</sup>

*Massachusetts.*—Taft v. Wood, 14 Pick. (Mass.) 362.

*Missouri.*—State v. Hannibal, etc., R. Co., 135 Mo. 618; State v. Kansas City, etc., R. Co., 149 Mo. 635.

*New Jersey.*—Canda Mfg. Co. v. Woodbridge Tp., 58 N. J. L. 134; Sharp v. Froehlich, (N. J. 1897) 37 Atl. Rep. 1024.

*New York.*—Thomson v. Harris, 88 Hun (N. Y.) 478.

*Pennsylvania.*—Mitchell v. McCormick, 9 Kulp (Pa.) 286.

*Texas.*—El Paso v. Conklin, 91 Tex. 537.

*Virginia.*—New York, etc., R. Co. v. Northampton County, 92 Va. 661.

And see *supra*, this section, 3. *How Power Exercised.*

**Amendment.**—An omission to comply with a statutory requirement is usually not amendable. Chicago, etc., R. Co. v. People, 171 Ill. 544; People v. Chicago, etc., R. Co., 183 Ill. 311. But compare Indiana, etc., R. Co. v. People, 201 Ill. 351; St. Louis, etc., R. Co. v. People, 177 Ill. 78.

**Judicial Correction.**—Sometimes the courts have power to correct errors or omissions in the proceedings to levy a school tax. Vittum v. People, 183 Ill. 154; Chicago, etc., R. Co. v. People, 183 Ill. 247; Chicago, etc., R. Co. v. People, 184 Ill. 240; Locker v. Keiler, 110 Iowa 707. But see State v. Kansas City, etc., R. Co., 149 Mo. 635.

**When Order of County Court Not Prerequisite.**—St. Louis, etc., R. Co. v. Gracy, (Mo. 1894) 28 S. W. Rep. 736.

1. **Compliance Must Appear Affirmatively.**—Shaw v. Lockett, 14 Colo. App. 413.

2. **Irregularities Not Fatal.**—Chicago, etc., R. Co. v. People, 155 Ill. 276; Fordsville Graded School Dist. v. McCarty, 68 S. W. Rep. 147, 24 Ky. L. Rep. 164; St. Louis, etc., R. Co. v. Gracy, (Mo. 1894) 28 S. W. Rep. 736, *affirmed* 126 Mo. 472; State v. Hannibal, etc., R. Co., 135 Mo. 618; State v. Bremond, 38 Tex. 116; Texas, etc., R. Co. v. Harrison County, 54 Tex. 119; State v. Hunter, (Wis. 1903) 96 N. W. Rep. 921.

3. **Directory Provisions—Failure to Observe Not Fatal.**—State v. West Duluth Land Co., 75 Minn. 456; Smith v. Swain, 71 N. H. 277; Thomson v. Harris, 88 Hun (N. Y.) 478; Walker v. Edmonds, 197 Pa. St. 645.

4. **Submission to Voters Not Necessary.**—Schofield v. Watkins, 22 Ill. 66; Merritt v. Farriss, 22 Ill. 303; Munson v. Minor, 22 Ill. 595; Pennington v. Coe, 57 Ill. 118; Cleveland, etc., R. Co. v. Randle, 183 Ill. 364; Kansas City, etc., R. Co. v. Chapin, 162 Mo. 409. And see Benton v. Scott, 168 Mo. 378.

5. See *supra*, this section, 5. *Submission to Popular Vote.*

6. **Submission to Voters Essential to Validity.**—Greenwood v. Gmelich, 175 Ill. 526; Perry v. Brown, (Ky. 1899) 51 S. W. Rep. 457; El Paso v. Conklin, 91 Tex. 537.

**Sufficient Authorization by Voters.**—Chicago, etc., R. Co. v. People, 184 Ill. 240.

**Neglect or Refusal to Vote.**—Under a statute authorizing the board of education to determine the amount to be raised in case the electors refuse or neglect to vote thereon, the board cannot of its own volition levy a valid tax where there has been no such refusal or neglect on the part of the voters. Auditor Gen. v. Duluth, etc., R. Co., 116 Mich. 122.

7. **Statutory Requirements Must Be Observed.**—Tate v. Earlander School Dist. No. 32, (Ky. 1899) 49 S. W. Rep. 337; El Paso v. Conklin, 91 Tex. 537. And see *supra*, this section, 5. *Submission to Popular Vote.*

**Insufficient Notice of Meeting.**—Canda Mfg. Co. v. Woodbridge Tp., 58 N. J. L. 134.

**Who Qualified to Vote.**—Pickett v. Russell, 42 Fla. 116, 634; Hillsman v. Faison, 23 Tex. Civ. App. 398; Miller v. Crawford Independent School Dist., 26 Tex. Civ. App. 495.

**Registration—What Sufficient.**—Pickett v. Russell, 42 Fla. 116, 634.

**Motion for Vote—Sufficient Designation of Tax.**—Vaughn v. School Dist. No. Thirty-one, 27 Oregon 57.

**What Majority Required.**—Pickett v. Russell, 42 Fla. 116, 634.

**Affirmative Vote—Extent of Authority Conferred.**—State v. Phipps, 148 Mo. 31; Chamberlain v. Board of Education, 57 N. J. L. 605.

**Defeat of Proposition—Illegal Votes.**—Bennett v. Staples, (La. 1903) 34 So. Rep. 801.

**Previous Defeat No Bar to Adoption at Subsequent Meeting.**—Ewing v. Board of Education, 72 Mo. 436; Stanton v. Board of Education, 68 N. J. L. 496.

**Power of Electors to Rescind Vote.**—Hibbs v. District Tp., 110 Iowa 306.

**To Whom Returns to Be Made.**—Pickett v. Russell, 42 Fla. 116, 634.

**Sufficient Certificate by Commissioners Who Compared Vote.**—Fordsville Graded School Dist. v. McCarty, 68 S. W. Rep. 147, 24 Ky. L. Rep. 164.

**Sufficient Ballot.**—Pickett v. Russell, 42 Fla. 116, 634.

**A Statute Authorizing a Viva Voce Vote on the question of school taxes does not violate a constitutional provision requiring all elections to be by ballot.** Martin v. School Dist., 57 S. Car. 125.

**A Taxpayer Is Estopped to Deny the Regularity of the proceedings at a school meeting which he attended and at which he made a motion.** Martin v. School Dist., 57 S. Car. 125.

**Limitations on Rate.** — Limitations on the rate of taxation for school purposes may be, and frequently are, fixed by statute,<sup>1</sup> and, where such a limit is prescribed, no valid tax can be levied in excess thereof.<sup>2</sup> But a limitation will apply to such taxes only as are contemplated by the statute creating it,<sup>3</sup> and restrictions upon the rates of taxation for other purposes are held not to affect school district taxes.<sup>4</sup> Authority is sometimes given by statute to tax in excess of the limit under certain circumstances.<sup>5</sup>

**Judicial Control.** — In the absence of any manifest abuse of discretion the courts will usually refuse to interfere with the action of the constituted authorities in levying school taxes.<sup>6</sup>

(3) *Persons and Property Taxable.* — The statutes usually indicate the persons and property taxable for school purposes. Unless otherwise provided such taxes may be imposed upon all the property within the district subject to taxation generally.<sup>7</sup> But in the absence of express legislative authority a

1. **Limitation of Amount.** — See the statutes, and the following cases:

*Arkansas.* — *Vaughan v. Bowie*, 30 Ark. 278; *Worthen v. Badgett*, 32 Ark. 496.

*Illinois.* — *Thatcher v. People*, 93 Ill. 240; *Wabash R. Co. v. People*, 147 Ill. 196; *O'Day v. People*, 171 Ill. 293; *People v. Chicago, etc., R. Co.*, 186 Ill. 139; *Otis v. People*, 196 Ill. 542; *Wabash R. Co. v. People*, 202 Ill. 9.

*Iowa.* — *Milwaukee, etc., R. Co. v. Kossuth County*, 41 Iowa 57.

*Missouri.* — *St. Joseph Board of Public Schools v. Patten*, 62 Mo. 444; *State v. Holladay*, 66 Mo. 387; *State v. St. Louis, etc., R. Co.*, 74 Mo. 163; *State v. St. Louis, etc., R. Co.*, 75 Mo. 526.

*Nebraska.* — *Wheeler v. Plattsmouth*, 7 Neb. 270; *Burlington, etc., R. Co. v. York County*, 7 Neb. 487; *Union Pac. R. Co. v. Dawson County*, 12 Neb. 255.

*New Jersey.* — *Lee v. School Dist. No. 1*, 36 N. J. Eq. 581.

*Texas.* — *Oliver v. Carsner*, 39 Tex. 396.

*Wisconsin.* — *Kane v. School Dist.*, 52 Wis. 502.

In *Arkansas*, the electors of a school district have sole authority to fix the amount of a school tax, and the only limit upon them is that they shall not levy a less sum than is sufficient to carry on a school for three months in each scholastic year. *Union County Ct. v. Robinson*, 27 Ark. 116.

2. **Tax in Excess of Limit Invalid.** — *State v. L'Engle*, 40 Fla. 392; *Chicago, etc., R. Co. v. People*, 155 Ill. 276; *Wabash R. Co. v. People*, 187 Ill. 289; *Burlington, etc., R. Co. v. York County*, 7 Neb. 487; *Union Pac. R. Co. v. Dawson County*, 12 Neb. 254; *School Dist. v. Chicago, etc., R. Co.*, 60 Neb. 454; *Bright v. Halloman*, 7 Lea (Tenn.) 309. And see *Walker v. Edmonds*, 197 Pa. St. 645.

Where the Tax Already Levied Equals the Maximum Rate allowed by law, no additional tax can be levied to pay a judgment against the school district. *Iowa R. Land Co. v. Sac County*, 39 Iowa 124; *Sterling School Furniture Co. v. Harvey*, 45 Iowa 466; *Dawson County v. Clark*, 58 Neb. 756.

An Injunction Will Be Granted to restrain the collection of taxes in excess of the prescribed limit. *Marion, etc., R. Co. v. Alexander*, 63 Kan. 72; *Lueder v. Caffrey*, 9 Kulp (Pa.) 144.

How Excess Shown. — If a contestant of a

school tax desires to show that the levy was in excess of the amount authorized by law, he must show it by the levy itself. The record of the school board, merely showing an estimate, is not admissible to defeat an application for judgment for the school taxes levied. *English v. People*, 96 Ill. 566.

**Reduction of Amount by Court.** — *Spring Valley Coal Co. v. People*, 157 Ill. 543.

3. **Limit Not Applicable to Independent School Districts.** — *State v. Babcock*, 87 Minn. 234.

**Creation of New District — Limit Not Applicable.** — *School Dist. No. 1 v. McCormick*, (Neb. 1903) 93 N. W. Rep. 956.

**Charter Provision Controlled by General School Law.** — *Cleveland, etc., R. Co. v. Randle*, 183 Ill. 364.

4. **Limit on Rate for State and County Purposes Not Applicable.** — *Goodrich v. Lunenburg*, 9 Gray (Mass.) 38. See also *Nashville, etc., R. Co. v. Franklin County*, 5 Lea (Tenn.) 707.

A Provision Limiting the Rate of Taxation Applicable to Town Taxes does not apply to a school tax for building a schoolhouse. *Taft v. Wood*, 14 Pick. (Mass.) 362.

A School Tax Is Not Synonymous with a Borough and Township Tax. — *Blickensderfer v. School Directors*, 20 Pa. St. 38.

5. **Board of Education Authorized to Exceed Limit.** — *Lippincott v. Board of Education*, 186 Ill. 205; *Winifrede Coal Co. v. Board of Education*, 47 W. Va. 132.

**Submission of Question to Voters Necessary.** — *State v. St. Louis, etc., R. Co.*, 75 Mo. 526; *State v. Hannibal, etc., R. Co.*, 135 Mo. 618; *Kansas City, etc., R. Co. v. Chapin*, 162 Mo. 409.

6. **Judicial Control.** — *Board of Education v. Covington*, 103 Ky. 634; *Matter of Powers*, 52 Mo. 218; *Wharton v. School Directors*, 42 Pa. St. 358. See also *Clark v. Devereaux*, 8 Kan. App. 341; *Williams v. School Dist. No. 1*, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; *Eikenbary v. Porter*, 60 Neb. 77.

**Injunction Against Unlawful Exercise.** — *Holmes v. Baker*, 16 Gray (Mass.) 259.

**Reduction of Amount by Court.** — *Mitchell v. McCormick*, 9 Kulp (Pa.) 286.

7. **All Property Subject to Taxation Generally.** — *State v. Bremond*, 38 Tex. 116; *Stephens v. School Dist. No. 21*, 6 Oregon 354. See also *Rawson v. School Dist.*, 100 Mass. 134; *Little v. Little*, 131 Mass. 367.

school district has no power to levy taxes on lands not within its limits,<sup>1</sup> and when property is made subject to taxation in one district, it is withdrawn from all liability to taxation in others,<sup>2</sup> though a district cannot be deprived of its right to tax land within its limits by the fact that such land has already

**Banks Liable to School Taxes.**—*Fremd v. Deposit Bank*, (Ky. 1897) 42 S. W. Rep. 102.

**Personal Property.**—A requirement that every inhabitant of a district shall be taxed for all his personal estate must be understood as meaning all his personal property subject to taxation for municipal purposes by the town in which the district is situated. *Bates v. Eighth School Dist.*, 9 Gray (Mass.) 433.

**All Land Within the District** may be taxed for the erection of a graded school building, without regard to its distance from such building. *Keweenaw Assoc. v. School-Dist. No. 1*, 98 Mich. 437.

**Liability of Railroad Property.**—*Louisville, etc., R. Co. v. Elizabethtown Dist. Public School*, 64 S. W. Rep. 974, 23 Ky. L. Rep. 1169; *State v. Hannibal, etc., R. Co.*, 135 Mo. 618; *New York, etc., R. Co. v. Northampton County*, 92 Va. 661.

**School Tax a Lien on Decedent's Estate.**—*Decker's Estate*, 22 Pa. Co. Ct. 46.

**Exemptions.**—See the title EXEMPTIONS (FROM TAXATION), and the following cases: *South Bend v. Notre Dame du Lac University*, 69 Ind. 344; *Henderson v. Lambert*, 8 Bush (Ky.) 607; *Blickensderfer v. School Directors*, 20 Pa. St. 38; *Conyngham School Dist.'s Appeal*, 77 Pa. St. 265; *Robertson v. Preston*, 97 Va. 296.

**Restraining Removal of Property from Tax Roll.**—The county clerk may be restrained by a school district from removing from the tax roll property liable to school taxes in such district. *School Dist. No. 74 v. Long*, 2 Okla. 460.

**1. Land Outside District Not Taxable.**—*Chicago, etc., R. Co. v. Cass County*, 51 Neb. 369; *Ewing v. Board of Education*, 72 Mo. 436.

**Land Unlawfully Included** within a taxing district cannot be sold for taxes. *Simpkins v. Ward*, 45 Mich. 559.

**Land Was Considered Part of a District** where it had for thirty years been so treated, had been taxed for school purposes, and its inhabitants had enjoyed school facilities therein during that time, the records showing the actual limits of such district having been lost. *Independent Dist. v. Taylor*, 100 Iowa 617.

**A District Is Not Estopped** from claiming that certain land is within its limits for taxing purposes, by reason of persons who lived on such land being refused permission to vote at a school election on the ground that they resided outside the district. *Independent Dist. v. Taylor*, 100 Iowa 617.

**No Presumption Need Be Indulged** as to whether property taxed is or is not within the limits of the district, under Neb. Comp. Stat. c. 79, subd. 3, § 8. *Chicago, etc., R. Co. v. Cass County*, 51 Neb. 369.

**Statute Attaching Land for School Purposes.**—In *Kent v. Kentland*, 62 Ind. 291, 30 Am. Rep. 182, it was held that a statute authorizing a municipality to collect a tax for the payment of a debt contracted in the construction of a school building, upon the property of persons residing

and having property outside of the municipal limits, who have sent their children to a school within the municipality in such school building, is constitutional.

**A Tract Lying Partly Within a District** is usually taxable only as to the part therein. *Shaw v. Lockett*, 14 Colo. App. 413; *Jackson v. Brewer*, 66 S. W. Rep. 396, 23 Ky. L. Rep. 1871. And see *Paintsville Graded Free School Dist. v. Davis*, 64 S. W. Rep. 438, 23 Ky. L. Rep. 838. But the legislature may make the whole of such tract taxable in the district wherein the mansion house lies. *Arthur v. Polk Borough School Dist.*, 164 Pa. St. 410. And see *Jackson v. Brewer*, 66 S. W. Rep. 396, 23 Ky. L. Rep. 1871.

**Land Excluded by a Change of Boundaries** may still be subject to taxation to meet debts incurred while it was within the district. *Chambers v. Adair*, 110 Ky. 942. And see *Callaway v. Denver, etc., R. Co.*, 6 Colo. App. 284; *Paintsville Graded Free School Dist. v. Davis*, 64 S. W. Rep. 438, 23 Ky. L. Rep. 838.

**2. Not Liable to Taxation in Other Districts.**—*Roberts v. Rop*, (Ky. 1897) 38 S. W. Rep. 708; *Bates v. Eighth School Dist.*, 9 Gray (Mass.) 433; *State v. Holliday*, 9 Ohio Dec. 738. And see *State v. Burford*, 82 Mo. App. 343.

**Persons and Property Annexed to a School District of an Adjoining Town** are subject to school taxes in the district to which they are annexed, and not elsewhere. *Pickering v. Coleman*, 53 N. H. 424.

**Joint Free High School District.—Apportionment.**—*State v. Lamont*, 86 Wis. 563.

**Estate of Nonresidents—Massachusetts.**—A compliance with a requirement that the estates of nonresident owners shall be taxed in such districts as the assessors of the town determine, is a condition precedent to a valid assessment of a school tax, and if it is not complied with, any inhabitant of the district may avail himself of the defect. *Rawson v. School Dist.*, 100 Mass. 134; *Taft v. Wood*, 14 Pick. (Mass.) 362. But a school tax is not rendered void by the omission of the assessor, through misinformation or error of judgment, to assign the real estate of one or more resident owners to any school district. *George v. Second School Dist.*, 6 Met. (Mass.) 497.

The union of two school districts is such a redistricting of a town as makes it necessary for the assessors to make a new certificate, before the estate of a nonresident previously taxed in one of the old districts can be taxed in the new one, under the *Massachusetts* statute requiring such a certificate whenever a town is districted anew. *Bacon v. Thirteenth School Dist.*, 97 Mass. 421; *Gustin v. School Dist. No. 5*, 10 Gray (Mass.) 85.

**Right of Taxpayer to Divert Payment to Another District.**—Where a taxpayer has voluntarily paid the tax levied by a school district, he cannot compel the county treasurer to hold the amount for another district. *Fox v. Kountze*, 58 Neb. 439.

been unlawfully taxed by another district.<sup>1</sup>

(4) *Collection and Disposition of Fund.*—The principles governing the collection of school taxes are in the main the same as those applicable to general taxes.<sup>2</sup>

The Disposition of the School Fund is generally subject to the control of the legislature,<sup>3</sup> and questions relating thereto usually depend for their solution upon the terms of the statutes.<sup>4</sup> A school fund cannot be appropriated to any other purpose than that contemplated by the statute under which it was raised.<sup>5</sup>

c. HIGHWAY DISTRICTS AND STREET AND HIGHWAY TAXES—(1) *Delegation of Taxing Power.*—In the absence of any constitutional provision to the contrary,<sup>6</sup> the paramount and primary control, both of the highways in the state and of the streets in its cities, is vested in the legislature,<sup>7</sup> and it may itself

1. Unlawful Collection by Another District.—*Arthur v. Polk Borough School Dist.*, 164 Pa. St. 410.

2. See *supra*, XIV. Collection.

As to What Constitutes the School Fund, see the title SCHOOLS, vol. 25, p. 63. See also *Pingree v. Auditor Gen.*, 120 Mich. 95, as to what is not a "specific tax" so as to be applicable to the educational fund.

Who Authorized to Collect.—*Francis v. Peevey*, 132 Ala. 58; *McKay v. Batchellor*, 2 Colo. 591; *Smith v. Titcomb*, 31 Me. 272.

Compensation of Collector.—*Gorman v. Boise County*, 1 Idaho 647; *People v. Wiltshire*, 92 Ill. 260.

Collector Must Pay Over to District Treasurer Only.—*Hoover v. Reap*, 10 Kulp (Pa.) 59.

Settlement of Collector's Accounts.—*Swatara Tp. School Dist. v. Geesey*, 7 Pa. Dist. 173; *Mason v. Caffrey*, 9 Kulp (Pa.) 414.

School Directors Liable for Loss from Unlawful Settlement with Collector.—*Mason v. Caffrey*, 9 Kulp (Pa.) 414.

Collection by Action.—*People v. Castro*, 39 Cal. 65; *Collins v. Masden*, 25 Ky. L. Rep. 81, 74 S. W. Rep. 720; *Beck v. Kerr*, 87 N. Y. App. Div. 1; *Christrom v. McGregor*, 74 Hun (N. Y.) 343; *McCombs v. Rockport*, 14 Tex. Civ. App. 560.

In Whose Name Action Lies.—*Elizabethtown Dist. Public School v. Louisville, etc., R. Co.*, (Ky. 1895) 30 S. W. Rep. 620; *Board of Education v. Louisville, etc., R. Co.*, 110 Ky. 932.

Power to Sell Land.—*Ogden City v. Hamer*, 12 Utah 337; *Shaw v. Lockett*, 14 Colo. App. 413.

The Legality of the Levy May Be Questioned by objection raised in proceedings to recover judgment for delinquent taxes. *Baltimore, etc., R. Co. v. People*, 195 Ill. 423.

Injunction to Restrain Collection.—*Burnham v. Rogers*, 167 Mo. 17.

3. Legislative Control.—See the title SCHOOLS, vol. 25, p. 63. And see also *School Dist. No. 1 v. Weber*, 75 Mo. 558.

4. See the local statutes.

Expenditures Must Be Authorized by Voters.—The fund, when collected, is beyond the control of its officers, until its expenditure is authorized by a vote of the district. *School Dist. No. Two v. Stough*, 4 Neb. 357.

Liability of City to Account to School Fund for Taxes Collected.—*New Orleans v. Fisher*, 180 U. S. 185, modifying decree in 91 Fed. Rep. 574; *School Directors v. Sheveport*, 47 La. Ann. 21.

Interest of County in Fund—Not Liable for Moneys Illegally Collected.—*Elberg v. San Luis Obispo County*, 112 Cal. 316.

Duty of County Treasurer to Account to Town School District.—*State v. Nelson*, 105 Wis. 111.

Apportionment Between Districts.—*School Dist. No. 1 v. McCormick*, (Neb. 1903) 93 N. W. Rep. 956.

Apportionment Between Fiscal Years in Cities of Second Class.—*Board of Education v. Nelson*, 109 Ky. 203, 59 S. W. Rep. 505, 22 Ky. L. Rep. 1377.

Appropriation for Teachers' Salaries.—*Putnam v. St. Paul*, 75 Minn. 514.

Disposition of Surplus.—See *Banhagel v. School Dist. No. 1*, (Mich. 1903) 96 N. W. Rep. 506; *Bellows v. Weeks*, 41 Vt. 590.

As to School Warrants, see the title WARRANTS. See the title SCHOOLS, vol. 25, p. 64. See also MUNICIPAL SECURITIES, vol. 21, p. 13.

When Warrant May Be Drawn Against School Tax Levy.—*Zimmerman v. State*, 60 Neb. 633; *School Dist. v. Fiske*, 61 Neb. 3.

5. Cannot Be Appropriated to Other Purposes.—See the title SCHOOLS, vol. 25, p. 64. See also the following cases: *Pennington v. Coe*, 57 Ill. 118; *Benjamin v. District Tp.*, 50 Iowa 648; *Locker v. Keiler*, 110 Iowa 707; *State v. Cave*, 20 Mont. 468; *German Tp. School Dist. v. Sangston*, 74 Pa. St. 454; *Gilbert v. Tierney*, 14 Pa. Co. Ct. 472; *Mitchell v. Kearns*, 16 Pa. Super. Ct. 354; *Collier v. Peacock*, (Tex. Civ. App. 1900) 55 S. W. Rep. 756.

Erection of Schoolhouses.—Money raised to defray the expenses of carrying on a school cannot be applied by the trustees to the erection of schoolhouses. *Lee v. School Dist. No. 1*, 36 N. J. Eq. 581.

Taxpayers Have No Power to vote a sum in addition to the amount awarded against a school district by arbitrators. *Burnham v. Union Free School Dist. No. 1*, 24 N. Y. App. Div. 429, 165 N. Y. 661.

6. Constitutional Provisions sometimes govern the control of the highways. See *Logan v. Ouachita*, 105 La. 499; *Atty.-Gen. v. Bay County*, 34 Mich. 46, and jurisdiction thus conferred on designated officials cannot be taken away by the legislature. *Jefferson County v. Arrighi*, 54 Miss. 668. But the manner of its exercise is subject to legislative control. *Jefferson County v. Arrighi*, 54 Miss. 668; *Paxton v. Baum*, 59 Miss. 531.

7. Control Vested in Legislature.—*Hingham, etc., Bridge, etc., Corp. v. Norfolk County*, 6

exercise such power directly.<sup>1</sup> However, unless prohibited by the constitution, it may, and usually does, delegate such control, together with the power to tax for the construction and maintenance of streets and highways, to municipal or *quasi*-municipal corporations or districts created for that purpose.<sup>2</sup> In marking out highway districts the legislature need not follow existing lines,<sup>3</sup> and in order to equalize the burden it may unite several districts and municipalities into one taxing district.<sup>4</sup>

**Extent of Power.** — The power to levy highway taxes exists in municipalities and other subordinate political divisions only when expressly given by law,<sup>5</sup>

Allen (Mass.) 353; East Portland v. Multnomah County, 6 Oregon 63. And see generally the titles HIGHWAYS, vol. 15, p. 343; STREETS AND SIDEWALKS, *ante*, p. 99.

**May Compel Taxation for Highway Purposes.** — People v. Flagg, 46 N. Y. 401; State v. Haywood County, 122 N. Car. 812; Jensen v. Polk County, 47 Wis. 298.

**Legitimate Purpose of Taxation.** — It has already been shown that the construction and maintenance of highways is a legitimate purpose of taxation. See *supra*, this title, *Purpose of Taxation*. See also Lowe v. White County, 156 Ind. 163.

As to power to impose special assessments for highway purposes, see the title SPECIAL OR LOCAL ASSESSMENTS, vol. 25, p. 1183.

**Such Taxes Are for a "Corporate Purpose"** within a constitutional provision prohibiting taxation by municipalities for other than corporate purposes. O'Kane v. Treat, 25 Ill. 557.

1. **Legislature May Exercise Direct Control.** — People v. Ingham County, 20 Mich. 95.

2. **Delegation of Power** — *Illinois*. — Highway Com'rs v. Newell, 80 Ill. 587; People v. Finley, 97 Ill. App. 214.

*Indiana*. — Goodrich v. Winchester, etc., Turnpike Co., 26 Ind. 119.

*Maryland*. — Hall v. Anne Arundel County, 94 Md. 282.

*Michigan*. — People v. Ingham County, 20 Mich. 95.

*New York*. — People v. Flagg, 46 N. Y. 401; People v. Queens County, 48 Hun (N. Y.) 324.

*Ohio*. — State v. Franklin County, 35 Ohio St. 458.

*Oregon*. — East Portland v. Multnomah County, 6 Oregon 63.

*South Carolina*. — Southern R. Co. v. Kay, 62 S. Car. 28.

*Wisconsin*. — Jensen v. Polk County, 47 Wis. 298.

For cases construing local statutes see People v. Atchison, etc., R. Co., 201 Ill. 365; Murphy v. Beard, 138 Ind. 560; Monroe County v. Harrell, 147 Ind. 500; Sefton v. Howard County, (Ind. 1903) 66 N. E. Rep. 891; Hudson v. Police Jury, 107 La. 387; Longyear v. Aplin, 72 Mich. 415; Jones v. Tonawanda, 35 N. Y. App. Div. 151; State v. Davis, 129 N. Car. 570; Dawson v. Barron, 9 Ohio Dec. 706.

**Constitutional Provisions** must not be violated by the statute delegating the power, such as a provision fixing an equation between the tax on the poll and the tax on property. State v. Godwin, 123 N. Car. 697; and see Stone v. Bean, 15 Gray (Mass.) 42. Or one requiring uniformity of taxation. Fletcher v. Oliver, 25 Ark. 289. See also Gunnison County v. Owen,

7 Colo. 467; Middletown Road, 15 Pa. Super. Ct. 167.

**Nature of Highway District.** — Highway districts are merely divisions of highways made from year to year, for the sake of convenience and system in keeping the roads in repair. They do not possess any of the attributes or functions of corporations. Kimball v. Russell, 56 N. H. 488.

**Commissioners of Highways.** — In *Illinois*, commissioners of highways are corporate bodies whose power and jurisdiction are limited territorially to their respective towns, but they are a part of the machinery of the county and state governments, and as such, under certain contingencies, are required to act in concert with the county authorities. Will County v. People, 110 Ill. 511.

**Special Commissioners Not County Officers.** — Special commissioners named by statute to lay out state roads are not county officers, though required, for purposes of record, to render an account of their proceedings to the board of supervisors. Alcona County v. White, 54 Mich. 503.

**What Included in Road Taxes.** — Taxes levied for road purposes include all taxes collected for the payment of damages arising from opening and laying out roads, and the purchase of materials for constructing and repairing roads and bridges, etc., as well as a tax for making and repairing roads only. People v. Wilson, 3 Ill. App. 368. And see People v. Buffalo County, 4 Neb. 150.

**Road Tax a County Tax.** — In *State v. Hannibal, etc., R. Co.*, 101 Mo. 120, it was held that a road tax is a county tax, within the meaning of a corporate charter exempting a corporation from the payment of county taxes.

3. **Need Not Follow Existing Lines.** — Monroe County v. Harrell, 147 Ind. 500; People v. Lawrence, 41 N. Y. 141; Bowles v. State, 37 Ohio St. 35.

4. **May Unite Several Municipalities or Districts.** — Carter v. Cambridge, etc., Bridge Proprietors, 104 Mass. 236; Com. v. Newburyport, 103 Mass. 129.

A district may be made to consist of an entire city, or only one of its wards or precincts; an entire county, or only one or two of its towns. Cooper v. Ash, 76 Ill. 11; Atty-Gen. v. Cambridge, 16 Gray (Mass.) 247; Uhrig v. St. Louis, 44 Mo. 458; People v. Richmond County, 20 N. Y. 252.

5. **Power Exists Only When Expressly Given.** — Haisten v. Glover, 114 Ga. 992; Chicago, etc., R. Co. v. People, 184 Ill. 174; Johnson v. Boske, 66 S. W. Rep. 400, 23 Ky. L. Rep. 1845; Ryerson v. Laketon Tp., 52 Mich. 509;



and its extent is limited by the terms of the statute conferring it.<sup>1</sup>

(2) *Exercise of Power.* — In levying highway taxes the local authorities must comply with all the substantial requirements of the statute conferring the power, else the tax will be invalid,<sup>2</sup> but mere irregularities not affecting the substantial justice of the tax will generally not be allowed to defeat it.<sup>3</sup> The authorized officials are usually required to ascertain annually the sum necessary for roads and bridges for the ensuing year, and after levying a tax therefor<sup>4</sup> make a return of the levy to the county clerk, or other proper officer,

Michigan Land, etc., Co. v. Republic Tp., 65 Mich. 628.

1. *Extent of Power Limited by Statute.* — Ohio, etc., R. Co. v. People, 123 Ill. 648; Jones v. Tonawanda, 35 N. Y. App. Div. 151; People v. Clark, 45 N. Y. App. Div. 65; Ne-ha-sa-ne Park Assoc. v. Lloyd, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 207.

Leviable Only for Purposes Contemplated by Statute. — Libby v. State, 59 Neb. 264; Dixon County v. Chicago, etc., R. Co., (Neb. 1901) 25 N. W. Rep. 340.

For What Roads Taxes Leviable. — Taxes may be levied for highways which are contemplated, though not actually laid out. Sawyer-Goodman Co. v. Crystal Falls Tp., 56 Mich. 597; Peninsula Iron, etc., Co. v. Crystal Falls Tp., 60 Mich. 510. And see Mix v. People, 106 Ill. 425. And the same is true where the highways are actually used as such but the use of the land has never been legally acquired from the owners. Peninsula Iron, etc., Co. v. Crystal Falls Tp., 60 Mich. 510.

But such taxes cannot be levied where not laid for any existing highways or in contemplation of any intended to be opened. Michigan Land etc., Co. v. L'Anse Tp., 63 Mich. 700.

The Necessity for Laying Out a Highway is left to the discretion of the highway commissioners and supervisors by the Illinois statutes; and the fact that it will operate as a hardship on the taxpayers and is not required by the public interests cannot defeat the tax. Highway Com'rs v. Jackson, 165 Ill. 17.

2. *Compliance with Statute Necessary* — California. — Miller v. Kern County, 137 Cal. 516.

Illinois. — Ohio, etc., R. Co. v. People, 119 Ill. 207; People v. Chicago, etc., R. Co., 164 Ill. 506; Chicago, etc., R. Co. v. People, 184 Ill. 174; Chicago, etc., R. Co. v. People, 190 Ill. 20; Chicago, etc., R. Co. v. People, 193 Ill. 539; Chicago, etc., R. Co. v. People, 193 Ill. 594; Chicago, etc., R. Co. v. People, 197 Ill. 411; Chicago, etc., R. Co. v. People, 200 Ill. 141; Chicago, etc., R. Co. v. People, 200 Ill. 237.

Michigan. — Hogelskamp v. Weeks, 37 Mich. 422; Sage v. Stevens, 72 Mich. 638; Gamble v. Stevens, 78 Mich. 302; Newaygo County Mfg. Co. v. Echinaw, 81 Mich. 416; Hamilton, etc., Co. v. L'Anse Tp., 107 Mich. 419; Auditor Gen. v. Duluth, etc., R. Co., 116 Mich. 122; Thayer Lumber Co. v. Springfield Tp., (Mich. 1902) 90 N. W. Rep. 677.

Mississippi. — State v. Edwards, 81 Miss. 399.

New Jersey. — State v. Bergen County Circuit Ct., 64 N. J. L. 536.

New York. — Jones v. Tonawanda, 35 N. Y. App. Div. 151; Hampton v. Hamsher, 46 Hun (N. Y.) 144.

Ohio. — Gallia County v. State, 67 Ohio St. 412; Dawson v. Barron, 9 Ohio Dec. 706.

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Sufficient Compliance. — See Tunpin v. Eagle Creek, etc., Gravel Road Co., 48 Ind. 45; Chicago, etc., R. Co. v. People, 174 Ill. 80; Turnbull v. Alpena Tp., 74 Mich. 621; Longyear v. Aplin, 72 Mich. 415; Hoffman v. Lynburn, 104 Mich. 494.

No Presumption that Statute Not Complied with. — Wabash R. Co. v. People, 138 Ill. 303.

Under the California Statutes the board of supervisors have power to adopt any suitable mode of procedure in levying the tax. Comstock v. Yolo County, 71 Cal. 599.

3. *Irregularities Do Not Vitiate* — California. — Miller v. Kern County, 137 Cal. 516.

Illinois. — Thatcher v. People, 79 Ill. 597; Ohio, etc., R. Co. v. People, 119 Ill. 207; Chicago, etc., R. Co. v. People, 171 Ill. 249; Chicago, etc., R. Co. v. People, 174 Ill. 80; Indiana, etc., R. Co. v. People, 201 Ill. 351.

Iowa. — Cedar Rapids, etc., R. Co. v. Carroll County, 41 Iowa 153; Sioux City, etc., R. Co. v. Osceola County, 45 Iowa 168.

Kansas. — Kansas City, etc., R. Co. v. Tontz, 29 Kan. 460.

Maine. — Rogers v. Greenbush, 58 Me. 390, 4 Am. Rep. 292; Gilman v. Waterville, 59 Me. 491; Hayford v. Belfast, 69 Me. 63.

Massachusetts. — Cone v. Forest, 126 Mass. 97; Westhampton v. Searle, 127 Mass. 502.

Michigan. — Stockle v. Silsbee, 41 Mich. 615; Turnbull v. Alpena Tp., 74 Mich. 621; Hoffman v. Lynburn, 104 Mich. 494; Auditor Gen. v. Longyear, 110 Mich. 223.

New Hampshire. — Taft v. Barrett, 58 N. H. 447.

Ohio. — Lima v. McBride, 34 Ohio St. 338.

Wisconsin. — Arnold v. Juneau County, 43 Wis. 627.

4. *Ascertainment of Amount* — Levy. — See the statutes, and the following cases: Highway Com'rs v. Newell, 80 Ill. 587; Mee v. Paddock, 83 Ill. 494; Kansas City, etc., R. Co. v. Tontz, 29 Kan. 460.

Necessity for Tax held to be sufficiently shown, notwithstanding the fact that there was a considerable fund on hand. Thayer Lumber Co. v. Springfield Tp., (Mich. 1902) 90 N. W. Rep. 677.

Report by Board of Supervisors. — Where the county is required to contribute to a township one-half the expense of building a bridge, the township commissioners of highways do not levy the tax, but simply determine, in pursuance of the statute, when the contingencies have arisen requiring the county to contribute, and ascertain and report to the county authorities the cost of the structure, one-half of which the law requires them to pay; and in such case it is their duty to levy a tax to raise the required sum. Will County v. People, 110 Ill. 511. And

that he may extend it the same as other taxes for collection.<sup>1</sup> They must not levy taxes in excess of a limitation imposed by the legislature,<sup>2</sup> or violate constitutional provisions, such as those requiring taxation according to value,<sup>3</sup> or uniformity of taxation.<sup>4</sup>

(3) *Persons and Property Taxable.* — It is for the legislature to decide, subject to constitutional restrictions, on what persons and property the cost of constructing and maintaining highways shall fall,<sup>5</sup> and it may determine whether such cost shall be borne by the contiguous property, by the city, or county at large, or in part by each.<sup>6</sup> Where a highway runs through several

without such action by the board of supervisors, the tax cannot be extended. *Leachman v. Dougherty*, 81 Ill. 324.

**Illinois — Town Meetings May Direct Raising of Money.** — Under the Illinois township organization law, the town meeting is also authorized to direct the raising of money for the maintenance and construction of roads and bridges. *Thatcher v. People*, 79 Ill. 597.

1. **Return of Levy.** — *Highway Com'rs v. Newell*, 80 Ill. 587.

**What Does Not Vitate Tax.** — Though the law directs town taxes to be extended in a separate column, the failure of the clerk to extend the road tax in a separate column will not vitiate the tax; nor will the failure of the town clerk to certify the levy to the county clerk within the time required by law. *Thatcher v. People*, 79 Ill. 597. And see *Silsbee v. Stockle*, 44 Mich. 561.

**Authentication.** — If not authenticated by the officer whose duty it is to return it, according to law, subsequent proceedings are invalidated. *Hogelskamp v. Weeks*, 37 Mich. 422.

**Failure to Apportion the valuation and the amount of the tax among the various road districts in a town was held not to vitiate the tax.** *Chicago, etc., R. Co. v. People*, 174 Ill. 80.

2. **Must Not Exceed Limitation.** — *People v. Atchison, etc., R. Co.*, 201 Ill. 365; *Flint, etc., R. Co. v. Auditor Gen.*, 41 Mich. 635; *Peninsular Sav. Bank v. Ward*, 118 Mich. 87; *Dixon County v. Chicago, etc., R. Co.*, (Neb. 1901) 95 N. W. Rep. 340; *Taft v. Barrett*, 58 N. H. 447; *State v. Humphreys*, 25 Ohio St. 520; *State v. Strader*, 25 Ohio St. 527; *State v. Fulmore*, (Tex. Civ. App. 1902) 71 S. W. Rep. 418; *Mueller v. Cavour*, 107 Wis. 599. And see *supra*, this section, *Power to Tax — Limitations on Power*.

**Additional Amount by Vote of Taxpayers.** — Sometimes the statutes limiting the amount of road taxes provided for the levying of an additional amount on its being approved by the vote of the people. See *Highway Com'rs v. Newell*, 80 Ill. 587; *Mee v. Paddock*, 83 Ill. 494; *St. Louis Nat. Stock Yards v. People*, 127 Ill. 22; *St. Louis Bridge, etc., R. Co. v. People*, 127 Ill. 627; *Chicago, etc., R. Co. v. People*, 190 Ill. 20; *People v. Ulster County*, 93 N. Y. 397; *People v. Town Auditors*, 75 N. Y. 318; *People v. Town Auditors*, 74 N. Y. 310; *Barker v. Loomis*, 6 Hill (N. Y.) 463; *Jefferson Iron Co. v. Hart*, 18 Tex. Civ. App. 525.

**County Aid After Limit Reached.** — *Champaign County v. Condit*, 24 Ill. App. 560.

3. **Constitution Requiring Levy by Valuation.** — *Covell v. Young*, 11 Neb. 510; *McCann v. Merriam*, 11 Neb. 241; *Dundy v. Richardson County*, 8 Neb. 508. And see *supra*, this title,

*Power of Taxation — Constitutional Restrictions — Restrictions in State Constitutions — Taxation by Valuation.*

Though in the absence of such provisions, levies without regard to valuation have been upheld. *Burlington, etc., R. Co. v. York County*, 7 Neb. 487; *Burlington, etc., R. Co. v. Saunders County*, 9 Neb. 507.

**Basls of Valuation.** — *Wabash, etc., R. Co. v. Binkert*, 106 Ill. 298; *Mills v. Richland Tp.*, 72 Mich. 100; *Hebard v. Ashland County*, 55 Wis. 145; *Bigelow v. Washburn*, 98 Wis. 553.

4. **Uniformity.** — *Bright v. McCullough*, 27 Ind. 223; *Fields v. Highland County*, 36 Ohio St. 476. And see *supra*, this title, *Power of Taxation — Constitutional Restrictions — Restrictions in State Constitutions — Equality and Uniformity*.

5. **Question Governed by Legislative Intent.** — See *Ryerson v. Laketon Tp.*, 52 Mich. 509; *Erisman v. Chosen Freeholders*, 64 N. J. L. 516; *Nehasane Park Assoc. v. Lloyd*, 167 N. Y. 431; *Lloyd v. Thomson*, (Supm. Ct. Spec. T.) 60 N. Y. Supp. 72; *Cornell v. Franklin County*, 67 Ohio St. 335.

**Landls of Nonresidents Taxable.** — *Ensign v. Barse*, 107 N. Y. 329.

**Resident of Another District.** — See *Helle v. Deerfield Tp.*, 96 Ill. App. 642; *Deerfield Tp. v. Harper*, 115 Mich. 678.

**Owner of Land Held Not Personally Liable.** — *Dreake v. Beasley*, 26 Ohio St. 315.

**Taxation of Bicycles for Sidelpath Purposes.** — *Armitage v. Crawford County*, 24 Pa. Co. Ct. 207; *Westgate v. Spalding*, 8 Pa. Dist. 490.

**Township Board Cannot Exempt Property.** — *Auditor Gen. v. Duluth, etc., R. Co.*, 116 Mich. 122.

**Termination of Exemption.** — One exempted from payment of road taxes in consideration of his keeping a certain road in repair ceases to be exempt upon the termination of his liability to repair the road. *Heath v. Overseers of Poor*, [1894] 2 Q. B. 108.

6. *Sinton v. Ashbury*, 41 Cal. 525; *People v. Whyler*, 41 Cal. 354; *Uhrig v. St. Louis*, 44 Mo. 458; *Garrett v. St. Louis*, 25 Mo. 505, 69 Am. Dec. 475; *Hammett v. Philadelphia*, 65 Pa. St. 146, 3 Am. Rep. 615.

**Local Assessments for Benefits** are the means usually adopted to raise funds for the construction and maintenance of streets and other local improvements in cities, and the same principle has been sometimes applied to agricultural lands in defraying the expense of constructing roads. See the title *SPECIAL OR LOCAL ASSESSMENTS*, vol. 25, p. 1166.

**Apportionment of Expense Between Town and County.** — *Norwich v. Hampshire County*, 13 Pick. (Mass.) 60; *Boston Water Power Co. v.*

districts, or other subordinate political divisions, it may be made the duty of each to maintain its respective portion.<sup>1</sup>

**Persons and Property in Incorporated Cities and Towns.**—The legislature may, if it sees fit, include persons and property in incorporated cities and towns within the operation of road taxes.<sup>2</sup> But it may, and frequently does, exempt them from such taxes,<sup>3</sup> and such exemption is not unconstitutional if an equivalent burden be imposed on them for the maintenance of their streets,<sup>4</sup> but in the absence of such equivalent burden a constitutional provision requiring uniform taxation would be violated.<sup>5</sup>

(4) *Collection and Disposition of Fund.*—Questions concerning the collection of road taxes depend almost entirely upon the terms of the statutes.<sup>6</sup>

Boston, etc., R. Co., 23 Pick. (Mass.) 360; Hingham, etc., Bridge, etc., Corp. v. Norfolk County, 6 Allen (Mass.) 353.

**Whole Township Liable.**—In *Maine*, when a county road exists within the limits of an unincorporated township, the whole township is liable to be taxed to keep it in repair, notwithstanding the road is entirely within the western half of the township. *King v. Aroostook County*, 63 Me. 567.

**Exemption Not a Contract.**—A provision that certain towns shall never be compelled to support any part of certain roads or bridges without their consent, is not in the nature of a contract between the commonwealth and such towns that they shall be forever exempt from the burden of maintaining such roads and bridges. *Brighton v. Wilkinson*, 2 Allen (Mass.) 27.

1. **Apportionment Among Districts.**—*Shaw v. Dennis*, 10 Ill. 405; *Will County v. People*, 110 Ill. 511; *Cambridge v. Lexington*, 17 Pick. (Mass.) 222; *Hingham, etc., Bridge, etc., Corp. v. Norfolk County*, 6 Allen (Mass.) 353; *Salem Turnpike, etc., Bridge Corp. v. Essex County*, 100 Mass. 282; *Com. v. Newburyport*, 103 Mass. 129; *Wilcox v. Deer Lodge County*, 2 Mont. 574; *Pierson v. Newark*, 44 N. J. L. 424; *People v. Ulster County*, 93 N. Y. 397; *State v. Franklin County*, 35 Ohio St. 458; *Mahanoy Tp. v. Comry*, 103 Pa. St. 362. And see *Herring v. Dixon*, 122 N. Car. 420; *Seenor v. Whatcom County*, 13 Wash. 48.

In *Jensen v. Polk County*, 47 Wis. 298, it was held that the general rule and policy of the law of the state is to impose the burden of constructing and repairing highways upon the several towns through which they run, whether such roads are provided for by state, county, or town authorities; and an intent to the contrary must plainly appear in the act providing for the road.

**Apportionment Based on Judicial Investigation.**—Where the legislature finds that the apportionment of the burden of providing a thoroughfare among several counties and towns requires a more full and exact investigation than a committee of its own body could make, it may properly institute an investigation of a judicial character, giving parties interested an opportunity to be heard by evidence and argument. *Salem Turnpike, etc., Bridge Corp. v. Essex County*, 100 Mass. 282.

**Contribution to Maintenance of Highway in Another Town.**—Sometimes provision is made by statute for contribution by one town towards the maintenance of a highway in another town.

See *Campton v. Plymouth*, 64 N. H. 304; *Wardsboro v. Jamaica*, 59 Vt. 514; *Parker v. East Montpelier*, 59 Vt. 632; *Grand Isle v. Milton*, 68 Vt. 234.

**Bridge Between Two Towns.**—County commissioners may be authorized to lay out a highway across a river separating two towns, and apportion the expense of erecting and maintaining the bridge upon the towns in proportion to their valuation. *Waterville v. Kennebec County*, 59 Me. 80.

**Burden of Maintaining Bridge Put on County.**—Towns in which a bridge is situated may be relieved of the burden of maintaining it and the liability imposed upon the county. *People v. Dutchess County*, 1 Hill (N. Y.) 50.

2. **May Include Cities and Towns.**—*O'Kane v. Treat*, 25 Ill. 557; *Cooper v. Ash*, 76 Ill. 11; *Peoria, etc., R. Co. v. People*, 144 Ill. 458; *Byran v. Marion County*, 145 Ind. 240; *Chicago, etc., R. Co. v. Murphy*, 106 Iowa 43; *State v. Arnold*, 136 Mo. 446. And see *Bennehoff v. Mansfield*, 2 Ohio Dec. 404, 2 Ohio N. P. 225.

3. **Cities Exempted from Road Taxes.**—*Martin v. Aston*, 60 Cal. 63; *People v. La Salle County*, 111 Ill. 527; *People v. Chicago, etc., R. Co.*, 118 Ill. 520; *Butz v. Kerr*, 123 Ill. 659; *Marks v. Woodbury County*, 47 Iowa 452; *Shapter v. Carroll*, 18 N. Y. App. Div. 390. And see *Osborne v. Mecklenburg County*, 82 N. Car. 400.

**Land Taken into City.**—Where land subject to taxation to meet outstanding bonds, issued for the maintenance of a road, was taken into a city, it was held to be still subject to such taxes till the bonds were paid. *Boas v. Ft. Hunter Road Commission*, 20 Pa. Co. Ct. 482.

4. **Exemption Valid Where Equivalent Burden Imposed.**—*Miller v. Kern County*, 137 Cal. 516; *Gunnison County v. Owen*, 7 Colo. 467; *Fairplay v. Park County*, 29 Colo. 57; *Washington County v. Saltville Land Co.*, 99 Va. 640.

5. **Violation of Provision Requiring Uniformity.**—*Fletcher v. Oliver*, 25 Ark. 289. See generally *supra*, this title, *Power of Taxation—Constitutional Restrictions—Restrictions in State Constitutions—Equality and Uniformity*. And see the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 266.

6. **Collection of Road Taxes.**—See the statutes, and the following cases: *Kinney v. People*, 52 Ill. App. 359; *Morrow v. Shober*, 19 Ind. App. 127; *Wallace v. International Paper Co.*, 53 N. Y. App. Div. 41; *Creswell v. Montgomery*, 13 Pa. Super. Ct. 87; *Mason County v. Simpson*, 13 Wash. 250.

**By Whom Collected—Supervisors.**—*Magill v.*

Such taxes, when collected, become no part of the funds of the municipality collecting them,<sup>1</sup> but must be apportioned among the respective districts in accordance with the statute,<sup>2</sup> and cannot be applied to any other purpose than that for which they were levied.<sup>3</sup>

(5) *Work on Highways* — (a) *In General*. — In some states there are statutory provisions for keeping highways in repair by requiring the citizens to labor thereon for a specified number of days or pay a certain sum of money in lieu thereof.<sup>4</sup> But a road tax is not payable in labor unless the statutes so provide.<sup>5</sup>

**Power to Compel Work on Roads.** — The municipal authorities cannot compel citizens to work on the highways unless given power to do so by the legislature,<sup>6</sup>

Hellyer, 2 Pa. Dist. 644; *Creswell v. Montgomery*, 13 Pa. Super. Ct. 87.

**Payment to Wrong Person.** — *Baier v. Hosmer*, 107 Wis. 380.

1. See *Lima v. McBride*, 34 Ohio St. 338.

**Not County Moneys.** — Moneys raised by road tax as a special fund for the construction of state roads are not county moneys, though placed in the hands of the county treasurer for safe keeping. *Alcona County v. White*, 54 Mich. 503.

**Wrongful Collection — Remedies.** — See *Butler Fayette County*, 46 Iowa 326; *Des Moines, etc., R. Co. v. Lowry*, 51 Iowa 486; *Stone v. Woodbury County*, 51 Iowa 522; *Florer v. McAfee*, 135 Ind. 540; *Kimball v. Russell*, 56 N. H. 488; *Lewis v. Symmes*, 61 Ohio St. 471; *Judd v. Fox Lake*, 28 Wis. 583.

**2. Apportionment of Fund.** — *Fairplay v. Park County*, 29 Colo. 57; *Duval County v. Jacksonville*, 36 Fla. 196; *Genesee v. Latah County*, 4 Idaho 141; *Libbey v. State*, 59 Neb. 264; *Salem v. Marion County*, 25 Oregon 449; *Oregon City v. Moore*, 30 Oregon 221; *Oregon City v. Clackamas County*, 32 Oregon 491.

In *Illinois*, road taxes collected by the officers of a town within a village are required to be paid to the village treasurer, and that part of the tax which is derived from property outside the village is to be paid to commissioners of highways. *McFarland v. People*, 2 Ill. App. 615; *Clinton v. Clintonia*, 3 Ill. App. 36; *Baird v. People*, 83 Ill. 387; *People v. Suppiger*, 103 Ill. 434.

**3. Not Available for Other Purposes.** — *Highway Com'rs v. Newell*, 80 Ill. 587. And see *Clark v. Dayton*, 6 Neb. 192. See generally *supra*, this title, *Distribution and Disposition of Avails of Taxation*.

**A Wrongful Application of the Road Fund May Be Restrained** at the instance of a taxpayer. *Miller v. Bowers*, 30 Ind. App. 116.

**Appropriation Before Collection.** — The highway authorities cannot make expenditures on account of the road fund in anticipation of the ensuing annual levy. *Webster v. Douglas County*, 102 Wis. 181, 72 Am. St. Rep. 870.

But in *Barnard v. Argyle*, 20 Me. 296, it was held that, where the highway tax had been assessed and was in process of collection, orders might be drawn on such fund.

**4. Statutes Authorizing Labor on Highways.** — *Cooper v. Ash*, 76 Ill. 11; *Mee v. Paddock*, 83 Ill. 494; *Wahl v. Nauvoo*, 64 Ill. App. 17; *Matter of Dassler*, 35 Kan. 678; *Ryerson v. State*, 24 N. J. L. 622.

In *Maine*, where the citizen fails to appear and

labor on the roads after due notice, the amount is then charged against him as a cash tax. See *Treat v. Orono*, 26 Me. 217; *Patterson v. Creighton*, 42 Me. 367; *Ingalls v. Auburn*, 51 Me. 352; *Hayford v. Belfast*, 69 Me. 63; *Tufts v. Lexington*, 72 Me. 516.

In *Michigan* the tax may be provisionally placed on the assessment roll without a previous return showing delinquency, subject to be canceled on presentation of receipts showing payment in labor. *Lake Superior Ship Canal R., etc., Co. v. Thompson Tp.*, 56 Mich. 493.

**The Citizen Cannot Dictate the Time and Place** at which he will work out his road taxes. *Creswell v. Montgomery*, 13 Pa. Super. Ct. 87.

**If the Place Does Not Appear to Be Improper or Inconvenient** it is enough; such place need not be directly on a highway in the district. *Mason v. Thomas*, 36 N. H. 302.

**A Tender of Payment in Lieu of Work** must be made to the proper official. *Gross v. State*, 4 Tex. App. 249.

**Power to Employ Labor.** — The statutes authorizing the surveyor of highways to allow taxpayers to work out their highway taxes do not authorize him to employ labor on highways for pay. If the interests of the town require further expenditures, it is his duty to consult the selectmen, and they may authorize him to employ laborers to a certain amount. *Ingalls v. Auburn*, 51 Me. 352; *Haskell v. Knox*, 3 Me. 445; *Moor v. Cornville*, 13 Me. 293; *Morrell v. Dixfield*, 30 Me. 157; *Field v. Towle*, 34 Me. 405.

And where a town has duly authorized highway officers, the selectmen cannot bind it by a contract to pay for labor on highways, either in money or by an allowance upon the highway tax. *Tufts v. Lexington*, 72 Me. 516.

**5. Tax Not Payable in Labor.** — *People v. Suppiger*, 103 Ill. 434; *Van Dien v. Hopper*, 5 N. J. L. 880; *Ferguson v. Moore*, 5 Pa. Super. Ct. 349, 353. And see *Osborne v. Mecklenburg County*, 82 N. Car. 400.

**Submission of Proposition to Voters.** — See *Cleveland, etc., R. Co. v. Randle*, 183 Ill. 364, wherein the adoption of the labor system by the voters of a town was held not to be sufficiently shown.

**Sufficient Proof of Adoption of System.** — *Fenton v. Peters*, 50 Ill. App. 41.

**6. Legislative Authority Necessary.** — *Gallaway v. Tavares*, 37 Fla. 58.

**When General Laws Not Applicable to Cities.** — Where complete jurisdiction is given a city in regard to the improvement of its streets, the general laws of the state in regard to roads and

nor will a mere delegation of authority to control and regulate the highways confer such power.<sup>1</sup> And the municipal authorities, in order to compel the citizens to work on the roads under a statute giving them such power, must comply with all the statutory prerequisites.<sup>2</sup>

**Nature of Liability — Not a Poll Tax.** — The statutory liability of citizens to work on the highways is a duty required to be rendered the state without compensation, being analogous to military and jury service; and it is generally held that the money equivalent in which the labor is allowed to be commuted is not a poll tax,<sup>3</sup> and therefore not within constitutional and statutory provisions relating to capitation taxes.<sup>4</sup>

(b) **Notice.** — The statutes usually prescribe the notice to be given to persons called to work on the highways, and it is essential that notice shall be given in the manner and form prescribed.<sup>5</sup> But such notice may be waived, and the

road labor in counties cease to be applicable as soon as the city has exercised its powers. *Fox v. Rockford*, 38 Ill. 451; *East Portland v. Multnomah County*, 6 Oregon 63.

**1. Not Implied from General Authority to Control Highways.** — *Galloway v. Tavares*, 37 Fla. 58; *Ex p. Campbell*, (Tex. Crim. 1893) 22 S. W. Rep. 1020; *Ex p. Grace*, 9 Tex. App. 381.

But see *State v. Halifax*, 4 Dev. L. (15 N. Car.) 345, where an act authorizing commissioners to make such rules and ordinances as seemed proper to them for repairing the streets authorized them to compel citizens to labor on the streets, that being the method commonly in vogue throughout the state at the time the act was passed.

**2. Failure to Comply with Statute — No Power to Compel Labor.** — *Baader v. Cullman*, 115 Ala. 539; *Sumner v. Gardiner*, 88 Me. 584.

**An Apportionment of the Labor in the same proportion as the assessment of taxes is a prerequisite under some statutes.** *Wallace v. Bradshaw*, 55 N. J. L. 117, 56 N. J. L. 339; *Hampston v. Hamsher*, 124 N. Y. 634, *affirming* 46 Hun (N. Y.) 144.

**Ordinance or Order — Sufficient Compliance with Statute.** — *Wapella v. Davis*, 39 Ill. App. 592; *In re Hagan*, 65 Kan. 857, 68 Pac. Rep. 1104; *Tipton v. Norman*, 72 Mo. 380; *State v. Yoder*, 132 N. Car. 1111.

**Unreasonable Ordinance Void.** — *State v. Richards*, 74 Conn. 57.

**Assessment — Presumption as to Regularity.** — See *Hoffman v. Lynburn*, 104 Mich. 494.

**Where Sufficient Money for Road Purposes Is on Hand the citizens cannot be called out to work on the roads.** *Wallace v. Bradshaw*, 55 N. J. L. 117.

**3. Not a Poll Tax.** — *Galloway v. Tavares*, 37 Fla. 58; *Johnston v. Macon*, 62 Ga. 645; *Sawyer v. Alton*, 4 Ill. 127; *Pleasant v. Kost*, 29 Ill. 490; *Fox v. Rockford*, 38 Ill. 451; *Macomb v. Twaddle*, 4 Ill. App. 254; *Leedy v. Bourbon*, 12 Ind. App. 486; *State v. Halifax*, 4 Dev. L. (15 N. Car.) 345; *State v. Sharp*, 125 N. Car. 628, 74 Am. St. Rep. 663.

But see *Hassett v. Walls*, 9 Nev. 387, wherein a road tax of four dollars annually, or two days' labor, imposed by the *Nevada* statute, was held to be a capitation or poll tax, and under their constitution, prescribing specifically what poll tax could be levied, unconstitutional, the court disapproving the *Illinois* decisions and declining to follow them.

**4. Not Within Constitutional Provisions.** — *Johnston v. Macon*, 62 Ga. 645; *Fox v. Rockford*, 38 Ill. 451; *Macomb v. Twaddle*, 4 Ill. App. 254; *State v. Topeka*, 36 Kan. 76, 59 Am. Rep. 529; *State v. Sharp*, 125 N. Car. 628, 74 Am. St. Rep. 663.

**Performance of Labor Not Payment of Tax.** — The word "taxes" means a contribution in money, not labor or personal service, and the performance of labor on highways is not the payment of a tax so as to give a legal settlement within the meaning of an act for the settlement and relief of the poor. *Overseers of Poor v. Stanford*, 6 Johns. (N. Y.) 92; *Starksborough v. Hinesburgh*, 13 Vt. 215.

**5. Prescribed Notice Must Be Given.** — *Chicago, etc., R. Co. v. People*, 171 Ill. 525; *Patterson v. Creighton*, 42 Me. 367; *Coxe v. Sweeney*, 10 Pa. Co. Ct. 289; *Matteson v. Rosendale*, 37 Wis. 254; *Biss v. New Haven*, 42 Wis. 605.

**Must Be Given Prescribed Length of Time.** — *Jones v. State*, 42 Ark. 93; *Ford v. State*, 51 Ark. 103; *Moore v. State*, 52 Ark. 265; *Lowry v. State*, 52 Ark. 270.

**Must Be Served on Prescribed Person.** — *Lowry v. State*, 52 Ark. 270; *State v. Wainright*, 60 Ark. 280.

**Service by Publication on Nonresident Owners.** — *Miller v. Gorman*, 38 Pa. St. 309.

**When Notice to Railroad Company Unnecessary.** — *Chicago, etc., R. Co. v. People*, 183 Ill. 196.

**Road Overseer Need Not Serve in Person.** — *State v. Covington*, 125 N. Car. 641.

**Sufficiency of Verbal Notice.** — *Lowry v. State*, 52 Ark. 270; *State v. Telfair*, 130 N. Car. 645.

**Informal Notice Held Sufficient.** — *State v. Baker*, 108 N. Car. 799. And see *State v. Yoder*, 132 N. Car. 1111.

**Notice Need Not Specify Tools to Be Brought.** — *State v. Wainright*, 60 Ark. 280.

**Failure to Notify Does Not Invalidate Assessment.** — *Hayford v. Belfast*, 60 Me. 63.

**Failure to Notify Will Not Release Lien on Land.** — *Burlington, etc., R. Co. v. Lancaster County*, 4 Neb. 293.

**Failure to Notify Not Ground for Enjoining Collection.** — In *Iowa*, the fact that a taxpayer has not been notified to work out the part of his road tax allowed to be paid in labor, will not authorize the collection of the entire tax to be restrained. *Sioux City, etc., R. Co. v. Osceola County*, 45 Iowa 168.

**Where the Statute Requires Notice to Residents Only, failure to give notice will not invalidate**

waiver need not be in express words.<sup>1</sup>

(c) **Who Liable to Road Duty.** — The persons liable to perform road duty are to be determined from the statutes, and in the absence of any constitutional or statutory exemption no person within the terms of the statute can avoid such duty.<sup>2</sup> Thus, where there is no exemption, a person cannot excuse himself on the ground of age,<sup>3</sup> or of physical inability,<sup>4</sup> or that he has no occasion to use the road,<sup>5</sup> or is a member of a fire company,<sup>6</sup> or has been previously assigned to another highway,<sup>7</sup> or has answered a warning and done road work in another district,<sup>8</sup> or is employed in daily labor on the roadbed of a railroad company.<sup>9</sup> But usually the legislature makes certain exemptions,<sup>10</sup> such as persons above or below a specified age,<sup>11</sup> or physically unable to do the work,<sup>12</sup> or persons performing military duty,<sup>13</sup> or belonging to a fire company,<sup>14</sup> or the employees of certain corporations.<sup>15</sup>

(d) **Liability for Failure or Refusal to Work.** — The power to require citizens to work on the streets and highways carries with it the power to prescribe punishment for a failure or refusal to work by the imposition of penalties, or by making it a criminal offense.<sup>16</sup>

the tax assessed on the lands of nonresidents. *Burlington, etc., R. Co. v. Lancaster County*, 4 Neb. 293.

1. **Waiver of Notice.** — *McDonald v. Madison County*, 43 Ill. 22.

2. **Liable unless Exempted Expressly or by Implication.** — *Sanders v. Levi*, 42 La. Ann. 406; *McBoyle v. Hanks*, 1 Jones L. (46 N. Car.) 133.

3. **Mail Riders Not Exempt.** — *James v. State*, 41 Ark. 451.

**Nonresidents.** — Under a statute applicable only to residents of the district, nonresidents cannot be compelled to work on the roads although temporarily employed in the district. *On Yuen Hai Co. v. Ross*, 8 Sawy. (U. S.) 385; *State v. Hinton*, 131 N. Car. 770.

But under a statute including "all able-bodied male persons" it was held that a person in the employ of a local corporation for an indefinite period was liable to road duty notwithstanding he was a citizen of another state to which he intended to return on the conclusion of his employment. *State v. Johnston*, 118 N. Car. 1188.

A School Director exempted from road labor is not thereby exempted from road taxes assessed on personal property. *McDonald v. Madison County*, 43 Ill. 22.

4. **Age No Excuse.** — *Fox v. Rockford*, 38 Ill. 451.

5. **Physical Inability No Excuse.** — *Macomb v. Twaddle*, 4 Ill. App. 254.

6. **Absence of Occasion to Use Road.** — *State v. Gillikin*, 114 N. Car. 832.

7. **A Member of a Fire Company** is not exempted from road duty by a statute exempting him from military and jury service and from payment of a poll tax. *Leedy v. Bourbon*, 12 Ind. App. 486.

8. **Previous Assignment to Another Highway.** — *State v. Yoder*, 132 N. Car. 1111. Compare *Waters v. State*, 117 Ala. 189.

9. **Road Work in Another District No Excuse.** — *James v. State*, 41 Ark. 451.

10. **Other Employment No Excuse.** — *State v. Hathcock*, 20 S. Car. 419.

But see *Ward v. State*, 88 Ala. 202, wherein it was held that a person who, when notified to work on the highway, was under contract to perform service for his surety on a confession of

judgment for the fine and costs imposed on his conviction for a misdemeanor, was not within the statute.

11. **Inhabitants of Towns and Cities** may be exempted from road labor outside of their corporate limits. *Pleasant v. Kost*, 29 Ill. 490; *Fletcher v. Oliver*, 25 Ark. 289.

An Overseer of a Public road cannot be compelled to work on another road. *Dees v. State*, (Miss. 1890) 7 So. Rep. 326.

12. **Age Limit.** — *Ex p. Taylor*, (Tex. Crim. 1896) 37 S. W. Rep. 422 (persons under age of twenty-one or over age of forty-five exempt).

13. **Physical Disability.** — *Watkins v. State*, (Miss. 1892) 11 So. Rep. 532; *Moore v. Vaughan*, 127 Mo. 538.

A statute requiring "able-bodied" males to work on the roads does not apply to a person disabled by sickness. *State v. Covington*, 125 N. Car. 641.

14. **Military Service.** — *Jackson v. State*, 101 Tenn. 138.

15. **Member of Fire Company Exempt.** — *Porter v. State*, 141 Ind. 488.

16. **Employees of Corporations Exempted by Statute.** — *Hill v. Birmingham*, 73 Ala. 74; *Zimmer v. State*, 30 Ark. 677; *Ex p. Thompson*, 20 Fla. 887; *Hawkins v. Small*, 7 Baxt. (Tenn.) 193.

17. **Penalties.** — *Geneva County v. Hall*, 93 Ala. 488; *Baader v. Cullman*, 115 Ala. 539; *Moore v. Jonesboro*, 107 Ga. 704; *Reynolds v. Foster*, 89 Ill. 257; *Fenton v. Peters*, 50 Ill. App. 41; *Helle v. Deerfield Tp.*, 96 Ill. App. 642; *State v. Sikes*, 44 La. Ann. 949; *State v. Cox*, 52 La. Ann. 2049; *Tipton v. Norman*, 72 Mo. 380; *Bouton v. Neilson*, 3 Johns. (N. Y.) 474.

**Criminal Proceedings** — *Alabama*. — *Waters v. State*, 117 Ala. 189.

*Arkansas*. — *State v. Snyder*, 41 Ark. 226; *Ford v. State*, 51 Ark. 103.

*Georgia*. — *Cobb v. Dalton*, 53 Ga. 426.

*Minnesota*. — *State v. Tracy*, 82 Minn. 317.

*North Carolina*. — *State v. Smith*, 98 N. Car. 747, 103 N. Car. 403; *State v. Pool*, 106 N. Car. 698; *State v. Baker*, 108 N. Car. 799; *State v. Neal*, 109 N. Car. 859; *State v. Joyce*, 121 N. Car. 610; *State v. Sharp*, 125 N. Car. 628, 74 Am. St. Rep. 663; *State v. Covington*, 125 N.

d. **LEVEE DISTRICTS AND TAXES.** — The construction and maintenance of levees is, as has already been seen, a proper purpose of taxation,<sup>1</sup> and the power to tax for such purpose may be conferred by the state upon commissioners or other officers elected or appointed for that purpose.<sup>2</sup> These taxes are usually imposed in the form of special assessments upon the property deriving benefit from the levees.<sup>3</sup> They may be required to be levied and collected in the same manner and by the same officers as the ordinary taxes of the state, but when collected, like highway or drainage taxes, they should be set apart as a special fund which can be appropriated for no other purpose than that for which it was raised.<sup>4</sup>

Car. 641; *State v. Telfair*, 130 N. Car. 645; *State v. Yoder*, 132 N. Car. 1111.

*Texas.* — *Gross v. State*, 4 Tex. App. 249; *Bennett v. State*, 26 Tex. App. 671; *Ex p. Bowen*, 34 Tex. Crim. 107.

*In Whose Name Proceedings to Be Brought.* — *Bettis v. Nicholson*, 1 Stew. (Ala.) 349; *Barney v. Bush*, 9 Ala. 345; *Firebaugh v. Blount*, 52 Ill. App. 288.

*The Burden of Proving an Excuse* for failure to work on the highways is on the defendant. *Fenton v. Peters*, 50 Ill. App. 41.

*Defenses.* — See *supra*, this subdivision, *Who Liable to Road Duty*. See also *Morris v. Greenwood*, 73 Miss. 430; *State v. Yoder*, 129 N. Car. 544.

1. See *supra*, this title, *Purpose of Taxation*. See also *State v. Maginnis*, 26 La. Ann. 558; *Reelfoot Lake Levee Dist. v. Dawson*, 97 Tenn. 151.

2. *May Confer Taxing Power on Levee District.* — *McGehee v. Mathis*, 21 Ark. 40; *Carson v. St. Francis Levee Dist.*, 59 Ark. 513; *Nugent v. Mississippi Levee Com'rs*, 58 Miss. 197. See also *Goodloe v. Lanier*, 47 La. Ann. 568.

For other cases construing statutes relating to taxation for levee purposes, see *Memphis Land, etc., Co. v. St. Francis Levee Dist.*, 70 Ark. 409; *Missouri, etc., R. Co. v. Cambern*, 10 Kan. App. 581, 63 Pac. Rep. 605, 66 Kan. 365; *Williams v. Cammack*, 27 Miss. 209, 61 Am. Dec. 508; *Daily v. Swope*, 47 Miss. 367; *Woodruff v. State*, 77 Miss. 68; *Mullins v. Shaw*, 77 Miss. 900; *State v. Winkleman*, 96 Mo. App. 223.

*Not a Judicial Body.* — A grant of power to the levee inspectors to adjust the assessment and levy of the taxes, and to hear and decide all

questions in relation thereto, does not make them a court. In the performance of their duties, they act as ministerial and not as judicial officers. *McGehee v. Mathis*, 21 Ark. 40.

*Levee Commissioners' Authority Defined by Statute.* — *Nugent v. Mississippi Levee Com'rs*, 58 Miss. 197.

*Submission to Voters Required.* — *Udike v. Wright*, 81 Ill. 49.

3. See the title **SPECIAL OR LOCAL ASSESSMENTS**, vol. 25, p. 118a.

*Missouri — Constitutional Limitation Not Applicable.* — The money raised for levee purposes is in the nature of a special assessment levied according to benefits, and therefore the limitation imposed by the Missouri constitution on general taxation does not apply. *Morrison v. Morey*, 146 Mo. 543.

*As to What Property Is Liable* for levee taxes, see *Memphis Land, etc., Co. v. St. Francis Levee Dist.*, 64 Ark. 258; *Wilkinson v. Langridge*, 51 La. Ann. 189; *Buras Levee Dist. v. Mialeghvich*, 52 La. Ann. 1292; *Landry v. Henderson*, 109 La. 143; *Owens v. Yazoo, etc., Valley R. Co.*, 74 Miss. 821; *Smith v. Willis*, 78 Miss. 243; *Holder v. Bond*, (Miss. 1901) 29 So. Rep. 769; *Levee Com'rs v. Houston*, 81 Miss. 619.

*A Change in County Boundaries*, whereby land which formerly lay in a county not subject to levee taxes is transferred into a county so subject, renders the land transferred liable for such taxes. *Smith v. Willis*, 78 Miss. 243; *Holder v. Bond*, (Miss. 1901) 29 So. Rep. 769.

4. *Constitute Special Fund.* — *Louisiana Levee Co. v. State*, 31 La. Ann. 250; *State v. Maginnis*, 26 La. Ann. 558; *State v. Clinton*, 25 La. Ann. 401; *State v. Clinton*, 26 La. Ann. 561.

# TAXATION (CORPORATE).

BY XENOPHON PEARCE HUDDY.

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**I. INTRODUCTION.** — The principles of law concerning the taxation of natural persons and of property generally, which are applicable to and include corporations and corporate property, have been discussed in a prior title of this work.<sup>1</sup> The scope of this title will be confined to a treatment of the principles of law specially applicable to and governing the taxation of corporations and corporate interests which are taxable under legislation especially making corporations as a class and certain corporate interests subject to taxation. The principles of law governing the general taxation of persons and property will be considered only where such are particularly applicable to corporations.

**II. TAXABILITY OF CORPORATIONS — 1. Power of State to Tax — In General.** — The state's inherent power of taxation, which is incident to every sovereignty, embraces the authority to tax all subjects over which the sovereign power extends,<sup>2</sup> and includes the right to tax private corporations and corporate interests within its jurisdiction, which are not instruments of the federal government nor means employed by Congress to carry into effect the powers conferred in the Federal Constitution,<sup>3</sup> and which have come into existence by the state's authority or have been introduced into its borders by its permission, unless the state's right to tax them has been expressly relinquished or curtailed, or is barred by constitutional provisions.<sup>4</sup>

**2. Taxability of National Bank's Personality.** — The permission granted by Congress to the states to tax the real estate of national banks and the shares of the stockholders is held to be exclusive, and the personal assets of a national bank are not taxable by a state.<sup>5</sup>

1. See the title *TAXATION*, ante, p. 567.

2. *State May Tax Subjects over Which Sovereign Power Extends.* — See the title *TAXATION*, ante, p. 567.

3. *State Cannot Tax Instruments of Federal Government.* — *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316; *Linton v. Childs*, 105 Ga. 567. See also *infra*, this title, *Franchise Tax — Franchises of National Banks*.

4. *Power of State to Tax Corporations.* — *Savings Soc. v. Coite*, 6 Wall. (U. S.) 594; *Provident Inst. v. Massachusetts*, 6 Wall. (U. S.) 611; *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. (U. S.) 632; *Portland, etc., R. Co. v. Saco*, 60 Me. 196.

*The State May Impose Taxes upon the Corporation* as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. *Dela-ware Railroad Tax*, 18 Wall. (U. S.) 206.

*Corporations May Be Taxed*, like natural persons, upon their property and business. *Per Mr. Justice Field*, in *State Tax on Foreign-Held Bonds*, 15 Wall. (U. S.) 300.

*Since the Taxing Power Is an Incident and an Essential Part of Every Independent Government*,

extending to every thing and every person, the state may tax all persons, natural or artificial, within her borders, and compel them to contribute such part of their property and income as the legislature may think right, to defray the expenses and meet the engagements of the government. The wealth of men who are associated together is none the less subject to taxation than if it were owned by individuals. *State Bank v. Com.*, 19 Pa. St. 144.

5. *Personal Property of National Banks Not Taxable by States.* — *San Francisco v. Crocker-Woolworth Nat. Bank*, 92 Fed. Rep. 273; *National Bank v. Long*, (Ariz. 1899) 57 Pac. Rep. 639; *People v. National Bank*, 123 Cal. 53; *San Francisco First Nat. Bank v. San Francisco*, 129 Cal. 96; *Billings First Nat. Bank v. Province*, 20 Mont. 374. See also *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664.

"The Power to Tax the Tangible Property of a National Bank is \* \* \* confined by the United States statute to the real estate of the bank, its personal property not being taxable by the state." *Illinois Nat. Bank v. Kinsella*, 201 Ill. 31.

**3. Taxability of National Bank's Realty.** — The real estate of a national bank may be taxed by a state, the same as real estate owned by other corporations or individuals. Congress has expressly provided that nothing shall be construed in its acts to exempt the real property of such associations from either state, county, or municipal taxes to the same extent, according to its value, as other real property is taxed.<sup>1</sup>

**4. Taxability of Property of Gas Companies.** — Unless exempted, the property of gas companies is subject to taxation, including their lands, gas works and machinery, and their appurtenances; also their pipes used for conveying the gas to consumers.<sup>2</sup>

**III. METHODS OF TAXATION** — **1. Under General Taxation Laws.** — The method of taxing corporations, unless another method is provided, is the same as that of taxing natural persons, and corporations and corporate property may be taxed under the general laws governing the taxation of persons and property generally, without being expressly mentioned subjects of taxation in the statutes.<sup>3</sup> The words "persons" and "inhabitants" in the general tax laws have been held to include corporations.<sup>4</sup>

**2. Under Special Legislation** — **a. CLASSIFICATIONS FOR TAXATION.** — In some jurisdictions it is provided that the property of corporations shall be

**1. Real Estate of National Banks.** — U. S. Rev. Stat., § 5219. See also *Gray v. Logan County*, 7 Okla. 321.

**2. Taxability of Property Belonging to Gas Companies.** — *Capital City Gas Light Co. v. Charter Oak Ins. Co.*, 51 Iowa 31; *Memphis Gas-light Co. v. State*, 6 Coldw. (Tenn.) 310, 98 Am. Dec. 452; *Consumers Gas Co. v. Toronto*, 27 Can. Sup. Ct. 453.

In New York it has been held that the mains of a gas company under the streets of a city cannot be regarded as real estate for the purpose of taxation under a statute regulating the assessment of taxes, which declares that the term "land" as used in the statute shall be construed to include the land itself, all buildings and other articles erected upon or affixed to the same; and that the terms "real estate" and "real property" wherever they occur in the statute shall be construed as having the same meaning as the term "land" thus defined. *People v. Assessors*, 39 N. Y. 81.

Under the Laws of Tennessee it has been held that pipes laid by a gas company under the streets of a city for the purpose of conveying gas to consumers, are personal property and liable to taxation as such. *Memphis Gas-light Co. v. State*, 6 Coldw. (Tenn.) 310, 98 Am. Dec. 452.

**Taxability and Mode of Taxing Gas Companies in England.** — *Rex v. Birmingham Gas-Light, etc., Co.*, 1 B. & C. 506, 8 E. C. L. 215; *Reg. v. Lee*, L. R. 1 Q. B. 241.

A gas company which had erected works and laid pipes under an Act of Parliament was held to be ratable as an occupier of land by its works and pipes, under a statute subjecting every occupier of land, etc., to be rated. *Reg. v. Cambridge Gas Light Co.*, 8 Ad. & El. 73, 35 E. C. L. 333.

**3. Corporations May Be Taxed as Other Owners of Property.** — *New London Sav. Bank v. New London*, 20 Conn. 111; *Goodell Mfg. Co. v. Trask*, 11 Pick. (Mass.) 514; *Tremont Bank v. Boston*, 1 Cush. (Mass.) 142.

**The States Have Authority to Tax the Estate,**

**Real and Personal, of All Their Corporations,** including carrying companies, precisely as they may tax similar property when belonging to natural persons, and to the same extent. *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284.

**4. Word "Person" Includes Corporation.** — *Cortis v. Kent Water-Works Co.*, 7 B. & C. 314, 14 E. C. L. 52; *Pineville Public Graded Schools v. Bell County Coke, etc., Co.*, 96 Ky. 68; *Louisville, etc., R. Co. v. Com.*, 1 Bush (Ky.) 250, explained in *Louisville, etc., Mail Co. v. Barbour*, 88 Ky. 73; *Chicago, etc., R. Co. v. Ellson*, 113 Mich. 30; *British Commercial L. Ins. Co. v. Tax, etc., Com'rs*, 1 Keyes (N. Y.) 303; *Matter of Adler*, 76 N. Y. App. Div. 571. See the dissenting opinion in *Nashua Sav. Bank v. Nashua*, 46 N. H. 389; and see *Miller v. Com.*, 27 Gratt. (Va.) 110. See also *PERSON*, vol. 22, p. 742.

**Words "Persons and Associations" in Tax Law Include Corporations.** — *People v. McLean*, 80 N. Y. 254; *People v. Tax Com'rs*, 23 N. Y. 242.

**That the Word "Individuals" in a Tax Law May Include Corporations,** see *U. S. Bank v. State*, 12 Smed. & M. (Miss.) 456.

**Word "Inhabitant" Includes Corporation.** — *Rex v. Gardner*, 1 Cowp. 79; *Pineville Public Graded Schools v. Bell County Coke, etc., Co.*, 96 Ky. 68; *Baldwin v. Ministerial Fund*, 37 Me. 369; *Tripp v. Merchants' Mut. F. Ins. Co.*, 12 R. I. 435; *Ontario Bank v. Bunnell*, 10 Wend. (N. Y.) 186. See also *INHABITANT*, vol. 16, p. 333. But see *Hartford F. Ins. Co. v. Hartford*, 3 Conn. 15; *New London Sav. Bank v. New London*, 20 Conn. 111.

In *Cherokee Ins., etc., Co. v. Whitfield County*, 28 Ga. 121, it was held that although a corporation may be an inhabitant of a county for certain purposes, yet a bank as to its capital stock is not an inhabitant of a particular county for the purposes of taxation.

**Corporations Included Within Term "Freeholders."** — See *Ontario Bank v. Bunnell*, 10 Wend. (N. Y.) 186.

**The Words "Vendor" and "Dealer" in a statute imposing a mercantile tax were held to**

assessed and taxed the same as that of private persons,<sup>1</sup> but generally separate and different statutory provisions are made for the taxation of natural persons and of corporations, and there is a great diversity of legislation concerning the taxation of corporations in the different jurisdictions. As a rule various kinds of corporations are classified for the purposes of taxation, and various corporate interests are made the subject of specific legislation with particular directions concerning the mode of valuation, measurement, and assessment of the taxes thereon.<sup>2</sup>

**b. POWER OF LEGISLATURE TO MAKE CLASSIFICATIONS — EFFECT OF CONSTITUTIONAL PROVISIONS — FOURTEENTH AMENDMENT.** — The legislature of a state has the power to classify corporations and corporate interests for the purposes of taxation, and this may be done notwithstanding that corporations are "persons" within the meaning of the first section of the Fourteenth Amendment of the Constitution of the United States, declaring that no state shall deprive any person within its jurisdiction of the equal protection of the laws.<sup>3</sup>

The Constitutional Rules as to Uniformity do not prohibit the legislatures from placing certain specified corporations in one class, for which a uniform method of assessment is provided, and placing certain other specified corporations in another class, which latter class may either be exempted from the taxes imposed on the former or be taxed under a different method of assessment,<sup>4</sup> because diversity of taxation is not inconsistent with perfect uniformity and equality of taxation in the proper sense of those terms, both with respect to the amount imposed and the various species of property selected either for bearing its burdens or for being exempt from them. A system which imposes the same tax on every species of property, irrespective of its nature or condition or class, will be destructive of the principle of uniformity and equality in taxation and of a just adaptation of property to its burdens.<sup>5</sup> While state constitutions may contain provisions against unequal taxation, it has been held that there is no provision expressed or implied in the Constitution of the United States that taxation must be equal and uniform.<sup>6</sup>

include corporations. *Com. v. Bailey, etc., Co.*, 20 Pa. Super. Ct. 210.

**1. Property of Corporations Taxed Same as of Private Persons.** — See *State v. St. Paul Trust Co.*, 76 Minn. 423. See also the statutes of the various states.

**2. Special Legislation Governing Corporate Taxation.** — See the statutes of the different states concerning the taxation of corporations and corporate interests.

**Railroads, Banks, Partnerships, Manufacturing Associations, Telegraph Companies,** and each one of the numerous other agencies of business which the inventions of the age are constantly bringing into existence, require different machinery for the purpose of taxation. The object should be to place the burden so that it will bear as nearly as possible equally on all. For this purpose different systems, adjusted with reference to the valuation of different kinds of property, are adopted. The courts permit this. *Tappan v. Merchants' Nat. Bank*, 19 Wall. (U. S.) 490.

**3.** See the titles **CIVIL RIGHTS**, vol. 6, p. 78; **CONSTITUTIONAL LAW**, vol. 6, p. 969.

**"Classification Is Not Prohibited by the Federal Constitution,** so long as the law operates equally and uniformly upon all property of like kind." *St. Louis, etc., R. Co. v. Worthen*, 52 Ark. 529.

**"The Protection Afforded by the Fourteenth Amendment has never been carried to the extent of requiring that the same tax shall be imposed**

**in the same manner upon every class of property, irrespective of its nature or condition or class."** *Peacock v. Pratt*, (C. C. A.) 121 Fed. Rep. 772.

**4. Classification of Corporations for Purposes of Taxation.** — *Kidd v. Alabama*, 188 U. S. 730; *Florida Cent. R. Co. v. Reynolds*, 183 U. S. 471; *Adams Express Co. v. Ohio*, 165 U. S. 194; *Pacific Express Co. v. Seibert*, 142 U. S. 339; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232; *Home Ins. Co. v. New York*, 134 U. S. 594, 29 Am. & Eng. Corp. Cas. 575; *Wells, etc., Co.'s Express v. Crawford County*, 63 Ark. 576; *Middletown Nat. Bank v. Middletown*, 74 Conn. 449; *Com. v. Germania Brewing Co.*, 145 Pa. St. 83. See also the title **CONSTITUTIONAL LAW**, vol. 6, p. 970.

**"Classification for Purposes of Taxation, as a general rule, is a matter for the legislature; it is the uniformity of taxation, according to that classification, which is for the courts."** *Com. v. Delaware Div. Canal Co.*, 123 Pa. St. 594.

**Power of State to Exempt Certain Corporations from Taxation.** — See the title **EXEMPTIONS (FROM TAXATION)**, vol. 12, p. 266.

**5. Diversity of Legislation Not Inconsistent with Uniformity and Equality.** — *Pacific Express Co. v. Seibert*, 142 U. S. 339, approved *Adams Express Co. v. Ohio*, 165 U. S. 194.

**6. No Provision in United States Constitution that Taxation Must Be Equal and Uniform.** — *State v. Travelers' Ins. Co.*, 73 Conn. 255, affirmed 185 U. S. 364.

c. VALUATION AND ASSESSMENT BY DIFFERENT AGENCIES. — Different agencies may be employed by the state in the assessment and equalization of taxes imposed on different classes of corporations. Thus the manner of assessing the property of a railroad company by a different instrumentality from that employed to assess other property is authorized, because, from the peculiar nature of railroad property, its dissimilarity in use and value to the mass of other property, and its continuous extent through different localities, it can with difficulty be as fairly and uniformly valued by the local instrumentalities provided for assessing other property as by a state board created for that purpose.<sup>1</sup>

d. WHAT ARE CORPORATIONS WITHIN TAXING STATUTES. — Cases have arisen concerning what may be considered corporations within statutes expressly making such bodies by designation subject to taxation, and the liability for taxes under such statutes has turned on the construction given to the word "corporation." Thus it has been held that a joint-stock company is not a corporation within the meaning of a statute providing that all moneyed or stock corporations shall be liable to taxation on their capital,<sup>2</sup> and that the collective body known as "Adams Express Company" is not a corporation within the meaning of the same statute,<sup>3</sup> but it has been held that an association organized by contract substantially like that of the Adams Express Company was properly taxed under a New York statute subjecting to a franchise tax every corporation, joint-stock company or association whatever, now or hereafter incorporated or organized by or under the laws of any other state or country, and doing business in the state of New York.<sup>4</sup> In *New Jersey* it has been held that partnership associations, invested by the laws under

1. *Kentucky Railroad Tax Cases*, 115 U. S. 321; *St. Louis, etc., R. Co. v. Worthen*, 52 Ark. 529, 41 Am. & Eng. R. Cas. 589; *Missouri River, etc., R. Co. v. Morris*, 7 Kan. 210; *Cincinnati, etc., R. Co. v. Com.*, 81 Ky. 492, 13 Am. & Eng. R. Cas. 270; *Wagoner v. Loomis*, 37 Ohio St. 571; *Franklin County v. Nashville, etc., R. Co.*, 12 Lea (Tenn.) 521, 17 Am. & Eng. R. Cas. 445. See also *infra*, this title, *Taxation of Railroads* — *General Methods of Assessing* — *Assessment by State Board as Entirety*.

**Declared Limitation on Power to Make Classifications — Basis of Classification.** — The general rule that a state may classify different subjects, including corporations, for the purposes of taxation, notwithstanding the Fourteenth Amendment of the Federal Constitution, has a declared limitation which prohibits an arbitrary, unnatural, and unreasonable classification which is based on no real distinction. It is declared that clear hostile discrimination against particular subjects and classes, especially such as are of an unusual character, unknown to the practice of our government, might be obnoxious to the constitutional prohibition. It is stated, however, that it would be impracticable and unwise to attempt to lay down any general rule or definition on the subject, to include all cases. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232; *American Sugar Refining Co. v. Louisiana*, 179 U. S. 80.

In *Santa Clara Railway Tax Case*, 9 Sawy. (U. S.) 165, 13 Am. & Eng. R. Cas. 182, the court said: "Classification should have reference to the different character, situation, and circumstances of the property, making a different form or mode of taxation proper, if not absolutely necessary. It cannot be arbitrarily made, with mere reference to the na-

tionality, color, or character of the owners, whether natural or artificial persons, without any reference to a difference in the character, situation, or circumstances of the property."

**2. Joint-stock Companies Not Taxable as Corporations.** — *People v. Coleman*, 133 N. Y. 279, 37 Am. & Eng. Corp. Cas. 1, *affirming* (Supm. Ct. Gen. T.) 13 N. Y. Supp. 833, (Supm. Ct. Spec. T.) 5 N. Y. Supp. 394; *Gregg v. Sanford*, (C. C. A.) 65 Fed. Rep. 151. See also *Matter of Jones*, 172 N. Y. 575. Compare *State v. Adams Express Co.*, 3 Ohio Dec. 326; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566.

**Shares of Unincorporated Associations Cannot Be Taxed as Stocks in Moneyed Corporations.** — *Hoadley v. Essex County*, 105 Mass. 519.

**The Term "Corporation" Was Held Not to Include a State Owning a Railroad**, under an Act of Congress imposing a duty upon the gross receipts of railroads owned by corporations. *State v. Atkins*, 35 Ga. 315.

**3. Adams Express Company Not Taxable as Corporation.** — *Hoe v. Coleman*, 46 Fed. Rep. 221, 34 Am. & Eng. Corp. Cas. 283.

In *Gregg v. Sanford*, (C. C. A.) 65 Fed. Rep. 151, it was held that the Adams Express Company was not included within a statute imposing taxes on every "company incorporated," etc.

In *State v. Adams Express Co.*, 3 Ohio Dec. 326, involving a similar question, the court refused to follow *Gregg v. Sanford*, above cited, and decided that the Adams Express Company was a corporation within the Ohio statute.

**4. New York Statute.** — *People v. Wemple*, 117 N. Y. 136, 29 Am. & Eng. Corp. Cas. 610, [*distinguished in* *People v. Coleman*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 833, *affirmed* 133

which they came into being with the essential characteristics of corporations, are deemed corporations within the meaning of a corporation tax act, and this is not controlled by the fact that such associations are not deemed corporations within the state of their creation.<sup>1</sup>

**IV. PLACE OF TAXING CORPORATE INTERESTS — 1. Personal Property in General — a. PRINCIPAL OFFICE OR PLACE OF BUSINESS.** — Before stating any general rules or propositions of law concerning the situs or place of taxing personal property belonging to corporations, it should be mentioned that there are a great many conflicting expressions of opinion in the cases as to where the personal property belonging to a corporation, as well as to individuals, should be taxed. Preliminary to all inquiry concerning the proper place to tax personal property belonging to a corporation, it should be borne in mind that the law of taxation is purely statutory and that the place and subjects of taxation are dependent on the statutory provisions of the particular jurisdiction. In taxing personal property belonging to corporations, as well as to individuals, the courts have been guided in some cases by the fiction that personal property follows the domicile of the owner, and these courts have held that at that place such property is taxable.<sup>2</sup> Other courts have refused in certain cases to apply this old fiction of the law and have not allowed it to control their decisions, but have held, on the ground that personal property receives the protection of the laws where it is situated, that it is taxable there under the statute. Another difficulty which may cause some confusion is the fact that the courts in using the words "domicil" and "residence" have used them indiscriminately as meaning the same thing, failing to make any distinction between the two terms. But this misuse of words does not necessarily cause difficulty if it is apparent in any particular case what the court really means. The foregoing should be taken into consideration in laying down any general rule of law concerning the situs or place of taxing personal property, whether belonging to corporations or to individuals; and the broad propositions that are sometimes found stated in textbooks concerning this subject should be cautiously used with a reference to the statutory provisions and policy of the courts of the particular jurisdiction.<sup>3</sup> Since the method of taxing the property of corporations, unless otherwise provided, may be the same as that of taxing natural persons under the general tax

N. Y. 279, 37 Am. & Eng. Corp. Cas. 11. See also *Hoey v. Coleman*, 46 Fed. Rep. 221, 34 Am. & Eng. Corp. Cas. 283.

**1. Partnership Associations Taxable as Corporations.** — *Tide Water Pipe Co. v. Assessors*, 57 N. J. L. 516, affirmed 59 N. J. L. 269.

**2. Personalty Not Permanently Located in Foreign State Held Taxable at Domicil of Corporation.** — *Com. v. American Dredging Co.*, 122 Pa. St. 386, 9 Am. St. Rep. 116.

**Coal Belonging to Pennsylvania Corporation Located Temporarily in Another State Is Taxable in Pennsylvania.** — *Com. v. Pennsylvania Coal Co.*, 9 Pa. Dist. 486, affirmed 197 Pa. St. 551.

**Personal Property in Transit through State Held Not Taxable in It.** — *Standard Oil Co. v. Bachelor*, 89 Ind. 1; *Connecticut River Lumber Co. v. Columbia*, 62 N. H. 286.

**What Constitutes Property in Transit.** — *Brown County v. Standard Oil Co.*, 103 Ind. 302.

**Railroad Bonds Held Taxable at Domicil of Trustee.** — *Mackay v. San Francisco*, 128 Cal. 678.

**Vessel Belonging to Corporation Held Not Taxable Outside of Home Port.** — *Yost v. Lake Erie Transp. Co.*, 112 Fed. Rep. 746, 50 C. C. A. 511; *People v. Tax, etc., Com'rs*, 58 N. Y. 242.

**3. Personalty Taxable Where Found — Maxim Mobilia Sequuntur Personam Not Necessarily Controlling.** — *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; *Adams Express Co. v. Ohio*, 166 U. S. 185; *Assessors v. Comptoir Nat. d'Escompte*, 191 U. S. 388; *Hall v. American Refrigerator Transit Co.*, 24 Colo. 291, 65 Am. St. Rep. 223, affirmed 174 U. S. 70; *Union Refrigerator Transit Co. v. Lynch*, 18 Utah 378, affirmed 177 U. S. 149. See also *American Refrigerator Transit Co. v. Adams*, 28 Colo. 119.

**The Old Rule, Expressed in the Maxim Mobilia Sequuntur Personam**, by which personal property was regarded as subject to the law of the owner's domicile, grew up in the middle ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the *lex situs*, the law of the place where the property is kept and used. *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18.

laws,<sup>1</sup> the personalty is generally taxable in the town, county, or district of a state where the corporation's residence or principal office or place of business is located, and this is expressly controlled by statute in some jurisdictions.<sup>2</sup>

*b. PRINCIPAL OFFICE OR PLACE OF BUSINESS WHERE LOCATED.* — The principal office or place of business of a corporation for the purposes of taxation has been held under a statute to be where the governing power of the corporation is exercised,<sup>3</sup> but where it is required that a certificate of incorporation must designate the place where the principal office of the company is to be located, it has been held that this establishes the residence of the corporation for the purposes of taxation.<sup>4</sup> Where this is not required, however, it has been held that a statement in the articles of association of the place where the corporation's principal office is to be located is not conclusive.<sup>5</sup>

*c. TAXABILITY OF PERSONAL PROPERTY IN STATE WHERE LOCATED.* — Personal property belonging to a corporation may in certain cases and under certain circumstances be taxed by a state other than that in which the corporation is domiciled.<sup>6</sup> It is well settled that where a corporation of one

1. See *supra*, this title, *Methods of Taxation* — *Under General Taxation Laws*.

2. *Personalty Taxable at Principal Office or Place of Business.* — *Middletown Ferry Co. v. Middletown*, 40 Conn. 65; *Sangamon, etc., R. Co. v. Morgan County*, 14 Ill. 163, 56 Am. Dec. 497; *Portland, etc., R. Co. v. Saco*, 60 Me. 196; *Detroit v. Wayne Circuit Judge*, 127 Mich. 604; *People v. McLean*, 17 Hun (N. Y.) 204, *affirmed* 80 N. Y. 254; *Mohawk, etc., R. Co. v. Clute*, 4 Paige (N. Y.) 384; *Orange, etc., R. Co. v. Alexandria*, 17 Gratt. (Va.) 176; *People v. Barker*, 84 N. Y. App. Div. 469; *People v. Barker*, 91 Hun (N. Y.) 590; *Austen v. Hudson River Telephone Co.*, 73 Hun (N. Y.) 96.

In *Sangamon, etc., R. Co. v. Morgan County*, 14 Ill. 163, 56 Am. Dec. 497, the rule was laid down that, with certain qualifications, personal property follows the residence of the owner and is there taxable; that the rolling stock of a railroad company is personal property; and it was held that the residence of a railroad company must be taken to be in Sangamon county, where its principal office was, and that the rolling stock of the railroad could not be rightfully assessed for taxes in Morgan county. See also *Kennedy v. St. Louis, etc., R. Co.*, 62 Ill. 395.

*Franchise Assessable at Corporation's Principal Place of Business.* — *Spring Valley Water Works v. Barber*, 99 Cal. 36; *Frankfort v. Stone*, 108 Ky. 400.

In *Washington*, under a statute requiring the assessment of corporeal personal property where it is located, it was held that such property belonging to a corporation was not assessable otherwise at its principal place of business or residence. *North Western Lumber Co. v. Chehalis County*, 24 Wash. 626.

*Personal Property in the Possession of a Receiver* and belonging to a corporation was held taxable not at the residence of the receiver, but at the place where it was assessable before the receiver was appointed. *State v. Red River Valley Elevator Co.*, 69 Minn. 131.

*Residence of Corporation for Purposes of Taxation.* — A corporation's residence or domicile is deemed to be where its principal place of business is situated, when a statute under which a domestic corporation is organized does not fix its residence, or require that its place of

business or principal office shall be stated in its articles of association. *Frankfort v. Stone*, (Ky. 1900) 58 S. W. Rep. 373; *Austen v. Hudson River Telephone Co.*, 73 Hun (N. Y.) 96; *Austen v. Westchester Telephone Co.*, (N. Y. Super. Ct. Gen. T.) 8 Misc. (N. Y.) 11. See also *Conroe v. National Protection Ins. Co.*, (Supm. Ct. Spec. T.) 10 How. Pr. (N. Y.) 403; *Thorn v. Central R. Co.*, 26 N. J. L. 121.

*For Many Purposes, a Corporation Is Regarded as Having a Residence* — a certain and fixed domicile. In *Ohio*, where corporations are required to designate in their certificates of incorporation the place of the principal office, such office is the domicile or residence of the corporation. Several offices may be established at the place specified in the certificate, as it is sufficient, under the statute, to specify the "county or place." But where a single office is established in the county or township, or city, or other place designated, no further inquiry as to the identity of the principal office is admissible. *Pelton v. Northern Transp. Co.*, 37 Ohio St. 450.

3. *Middletown Ferry Co. v. Middletown*, 40 Conn. 65; *Grundy County v. Tennessee Coal, etc., Co.*, 94 Tenn. 295.

Where the company's principal place of business up to a certain time was conceded to be in a certain locality, and its safe was removed to the office of the secretary in the same town, in which office its officers were annually elected after that time, it was held that this constituted the principal office for the purpose of assessing the tax. *State v. Person*, 32 N. J. L. 134.

*An Office of a Corporation Was Held the Principal Office of Business* where rents were received, expenses and dividends were paid, and where were kept books and vouchers for disbursements. *People v. Oswego*, 6 Thomp. & C. 673.

4. *Place Established by Certificate of Incorporation.* — *Union Steamboat Co. v. Buffalo*, 82 N. Y. 351; *Western Transp. Co. v. Scheu*, 19 N. Y. 408; *Oswego Starch Factory v. Dolloway*, 21 N. Y. 449; *People v. Barker*, 91 Hun (N. Y.) 594; *People v. Barker*, 87 Hun (N. Y.) 341; *Pelton v. Northern Transp. Co.*, 37 Ohio St. 450.

5. *Austen v. Hudson River Telephone Co.*, 73 Hun (N. Y.) 96. See also *Austen v. Westchester Telephone Co.*, (N. Y. Super. Ct. Gen. T.) 8 Misc. (N. Y.) 11.

6. *Personalty Taxed at Situs.* — *Armour Pack-*

state brings into another state a portion of its movable personal property to use and employ therein, it is legitimate for the latter state to tax such property like similar property used in like way by its own citizens, and that such a tax may be properly assessed and collected, in the case of railway cars, where the specific and individual items of property so used and employed are not continuously the same, but are constantly changing according to the exigencies of the business, and that the tax may be fixed by an appraisal and valuation of the average amount of the property habitually used and employed. The fact that such cars are employed as vehicles of transportation in the business of interstate commerce does not render their taxation invalid.<sup>1</sup>

**2. Intangible Personality** — *a. IN GENERAL.* — The general rule that bills, notes, etc., have their situs at the domicile of the creditor for the purposes of taxation,<sup>2</sup> is applicable to choses in action belonging to corporations, as well as to those belonging to individuals.<sup>3</sup> A recognized exception to the rule that intangible property is taxable at the owner's domicile is when a corporation or person residing in one state has an agent in another, who conducts the business of his principal, and has notes in his hands for collection or renewal, with a view to keeping up a permanent business; in such case the actual situs of the notes will be the place of taxation.<sup>4</sup>

*b. CORPORATE BONDS AND SECURITIES.* — Concerning the situs of corporate bonds and securities for the purposes of taxation, it has been held in a case involving taxation on the interest on corporate bonds held out of the state, and the place of the property, that such bonds held out of the state could not be reached for the purposes of taxation.<sup>5</sup>

*c. SHARES OF STOCK* — (1) *In General* — **Taxation at Domicil of Owner.** — The principles of law which govern choses in action, fixing their situs for the purposes of taxation at the domicile of the owner, apply in the taxation of shares of stock in corporations. Such shares are personality, and, in the absence of any statute to the contrary, are taxable to the owner, as a general rule, like other personal estate, in the state of his domicile, whether the corporation is foreign or domestic;<sup>6</sup> and the shares may be so taxed, though the corporation

ing Co. v. Savannah, 115 Ga. 140; *People v. Tax, etc.*, Com'rs, (Supm. Ct. Gen. T.) 46 How. Pr. (N. Y.) 315; *People v. Barker*, 84 N. Y. App. Div. 469; *Norfolk, etc., R. Co. v. Board of Public Works*, 97 Va. 23; *North Western Lumber Co. v. Chehalis County*, 25 Wash. 95, 87 Am. St. Rep. 747.

**Ice Out and Stored in New Jersey** by a foreign corporation was held taxable in that state while remaining there. *John Hancock Ice Co. v. Rose*, 67 N. J. L. 86.

**Money in Possession of a Corporation** was held taxable under a Louisiana statute, where it was situated. *Liverpool, etc., Ins. Co. v. Assessors*, 44 La. Ann. 761.

**1. Movable Property Belonging to Foreign Corporation.** — *American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, affirming 24 Colo. 291, 65 Am. St. Rep. 223; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, affirming 18 Utah 378; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 46 Am. & Eng. R. Cas. 236. See also *American Refrigerator Transit Co. v. Adams*, 28 Colo. 119.

<sup>2</sup> See the title TAXATION, ante, p. 567.

**3. Place of Taxing Corporation's Intangible Personal Property.** — *State Board of Assessors v. Comptoir Nat. d'Escompte*, 191 U. S. 388; *In re Union Tank Line Co.*, 204 Ill. 347; *State v. Scottish-American Mortg. Co.*, 76 Minn. 155.

**4. Exception to Rule.** — *New Orleans v. Stempel*, 175 U. S. 309; *Assessors v. Comptoir Nat. d'Escompte*, 191 U. S. 388; *Matter of Fair*, 128 Cal. 607; *Mackay v. San Francisco*, 128 Cal. 678; *State v. London, etc., Mortg. Co.*, 80 Minn. 277; *Hubbard v. Brush*, 61 Ohio St. 252; *Jesse French Piano, etc., Co. v. Dallas*, (Tex. Civ. App. 1901) 61 S. W. Rep. 942.

But a balance in a bank account belonging to a foreign insurance company was held not taxable in the state where it was located, on the ground that the money was in transit from the policy holders to the insurers, and was merely collected into convenient amounts for the purpose of transit. *Metropolitan L. Ins. Co. v. Newark*, 62 N. J. L. 74.

**5. Place of Taxing Corporate Bonds and Securities.** — *State Tax on Foreign-held Bonds*, 15 Wall. (U. S.) 300, explained in *Blackstone v. Miller*, 188 U. S. 189; *New Orleans v. Stempel*, 175 U. S. 309; *Savings, etc., Soc. v. Multnomah County*, 160 U. S. 421.

"Bank Bills and Municipal Bonds are in such a concrete tangible form that they are subject to taxation where found, irrespective of the domicile of the owner." *New Orleans v. Stempel*, 175 U. S. 309.

**6. Place of Taxing Shares of Stock** — **General Rule** — *Alabama*. — *State v. Kidd*, 125 Ala. 413, affirmed 188 U. S. 730.



has paid a tax on its property or the capital stock, or both;<sup>1</sup> but some of the states exempt such shares from taxation when they are taxed in the state where the corporation is located.<sup>2</sup> By the preponderance of authority, also, the fact that the corporation's capital stock and property are exempt from taxation is held not to affect the application of this rule.<sup>3</sup> This is true because the capital stock and the shares are distinct properties.<sup>4</sup>

**Taxation of Shares Where Corporation Is Located.** — The general rule that personal property has no permanent situs of its own, but follows the person of the owner, is said to be one of convenience only, and there is no constitutional prohibition on the legislature to change the rule by providing for the taxing of shares of stock at the place where the corporation is located without regard to the residence of the owner of such shares.<sup>5</sup>

(2) *Shares in National Banks* — (a) *In General.* — Congress has placed national bank shares under the taxing power of the state wherein the bank is located, and the taxation of such shares elsewhere is prohibited. It is provided that each state may determine and direct the manner and place of taxing the shares of national banking associations located within the state, subject to two restrictions, one of which is that the shares of any national

*Illinois.* — *Greenleaf v. Board of Review*, 184 Ill. 226, 75 Am. St. Rep. 168.

*Indiana.* — *Evansville v. Hall*, 14 Ind. 27; *Conwell v. Connersville*, 15 Ind. 150, *distinguishing* *State v. Hamilton*, 5 Ind. 310; *Seward v. Rising Sun*, 79 Ind. 351. See also *Powell v. Madison*, 21 Ind. 335; *Madison v. Whitney*, 21 Ind. 261.

*Kansas.* — *Griffith v. Watson*, 19 Kan. 23.

*Maryland.* — *Appeal Tax Ct. v. Gill*, 50 Md. 377; *Baltimore v. Hussey*, 67 Md. 112. This case was concerning obligations of the city of Baltimore called city stock.

*Massachusetts.* — *Dwight v. Boston*, 12 Allen (Mass.) 316, 90 Am. Dec. 149; *Great Barrington v. Berkshire County*, 16 Pick. (Mass.) 572.

*Michigan.* — *Howell v. Cassopolis*, 35 Mich. 471; *Bacon v. State Tax Com'rs*, 126 Mich. 22, 86 Am. St. Rep. 524.

*Missouri.* — *Ogden v. St. Joseph*, 90 Mo. 522. *New Hampshire.* — See *Nashua Sav. Bank v. Nashua*, 46 N. H. 389.

*New Jersey.* — *State v. Branin*, 23 N. J. L. 484; *State v. Bentley*, 23 N. J. L. 532; *Newark City Bank v. Assessor*, 30 N. J. L. 13.

*North Carolina.* — *Worth v. Ashe County*, 82 N. Car. 420, 33 Am. Rep. 692, 90 N. Car. 409.

*Ohio.* — *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547; *Worthington v. Sebastian*, 25 Ohio St. 1; *Lander v. Burke*, 65 Ohio St. 532.

*Pennsylvania.* — *Whitesell v. Northampton County*, 49 Pa. St. 526; *McKeep v. Northampton County*, 49 Pa. St. 519, 88 Am. Dec. 515; *Strong v. O'Donnell*, 10 Phila. (Pa.) 575, 31 Leg. Int. (Pa.) 269.

*Rhode Island.* — *Dyer v. Osborne*, 11 R. I. 321, 23 Am. Rep. 460.

*Tennessee.* — *Union Bank v. State*, 9 Yerg. (Tenn.) 490; *Nashville v. Thomas*, 5 Coldw. (Tenn.) 600.

1. *Greenleaf v. Board of Review*, 184 Ill. 226, 75 Am. St. Rep. 168; *Seward v. Rising Sun*, 79 Ind. 351, 13 Am. & Eng. R. Cas. 315; *Cook v. Burlington*, 59 Iowa 251, 44 Am. Rep. 679; *Dwight v. Boston*, 12 Allen (Mass.) 316, 90 Am. Dec. 149; *Bacon v. State Tax Com'rs*, 126 Mich. 22, 86 Am. St. Rep. 524; *Ogden v. St. Joseph*, 90 Mo. 522; *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547; *Dyer v. Osborne*, 11 R. I. 321, 23 Am. Rep. 460; *Memphis v. Ensley*, 6 Baxt. (Tenn.) 553, 32 Am. Rep. 532. See *State Bank v. Richmond*, 79 Va. 113. See also *infra*, this title, *Double Taxation*.

2. *Lockwood v. Weston*, 61 Conn. 211; *Smith v. Exeter*, 37 N. H. 556; *De Baun v. Smith*, 55 N. J. L. 110; *Cuyahoga County v. Brush*, 9 Ohio Cir. Dec. 859; *Hubbard v. Brush*, 61 Ohio St. 252; *Lander v. Burke*, 65 Ohio St. 532.

3. *Immaterial Whether Capital Stock or Property Is Exempt.* — See the title *EXEMPTIONS (FROM TAXATION)*, vol. 12, pp. 356, 357.

4. *Capital Stock and Shares Are Distinct Properties.* — See *infra*, this title, *Taxation of Shares of Stock — In General; Double Taxation*.

*That the Capital Stock of a Corporation Is Subject to Taxation only in the state of the corporation's domicile*, see *Foster-Cherry Commission Co. v. Caskey*, 66 Kan. 600.

5. *Special Situs May Be Given to Shares of Stock for Purposes of Taxation.* — *Tappan v. Merchants' Nat. Bank*, 19 Wall. (U. S.) 490; *Mendota First Nat. Bank v. Smith*, 65 Ill. 44; *Danville Banking, etc., Co. v. Parks*, 88 Ill. 170; *Faxton v. McCosh*, 12 Iowa 527; *Baltimore v. Baltimore City Pass. R. Co.*, 57 Md. 31; *American Coal Co. v. Allegany County*, 59 Md. 185; *Corry v. Baltimore*, 96 Md. 310; *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547; *Wiley v. Salisbury*, 111 N. Car. 397; *Nashville v. Thomas*, 5 Coldw. (Tenn.) 600; *Union Bank v. Richmond*, 94 Va. 316; *Abingdon Bank v. Washington County*, 88 Va. 203.

*Distinction Between Foreign Shareholders and Bondholders.* — "The attitude of a holder of shares of capital stock is quite other than that of a holder of bonds, towards the corporation which issued them. While the bondholders are simply creditors, whose concern with the corporation is limited to the fulfilment of its particular obligation, the shareholders are persons who are interested in the operation of the corporate property and franchises, and their shares actually represent undivided interests in the corporate enterprise." *Matter of Bronson*, 150 N. Y. 1, 55 Am. St. Rep. 632.

banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Consequently shares of stock in a national banking association cannot be taxed by any state except that within which the bank is located.<sup>1</sup>

(b) *History of Congressional Legislation.* — Soon after the passage of the act permitting the states to tax national bank shares, a controversy arose as to the true meaning of the clause of the statute which permitted shares to be taxed under state authority "at the place where the bank is located and not elsewhere." In some of the states it was held that the restriction confined the exercise of the taxing power to the town or district in which the corporation conducted its business, while in others it was decided to apply to the state and not to any of its territorial divisions, and that such tax could be assessed upon a resident stockholder at the place of his residence wherever it might be within the state. The controversy was solved by an amendatory act declaring the word "place" to mean the state wherein the bank is located.<sup>2</sup>

(c) *Operation and Effect of Acts of Congress.* — The effect of the Acts of Congress, in the case of nonresidents, is to sever the stock as property from the person of the owner, for the purposes of taxation, and to impart to it a new legal situs, that of the bank itself. Unless the shares of nonresidents are taxed at the place where the corporation is located, they are beyond the reach of the taxing power of the state. By affixing to the property of the non-resident shareholder the situs of the bank itself, his interest is subjected to the exercise of the taxing power.<sup>3</sup>

(d) *Resident Owners.* — In regard to residents of a state owning shares in national banks located within its borders, it is held that the shares may be assessed under the Act of Congress, either at the place where such owners reside or at the place where the bank is located, as the legislature of the state may elect.<sup>4</sup>

(e) *Nonresident Owners.* — The requirement that shares in national banks must be taxed, if at all, in the city or town where the bank is located, restricts a state to the place designated only in regard to nonresident owners.<sup>5</sup>

1. *Place of Taxing National Bank Shares — United States.* — U. S. Rev. Stat., § 5219; *Tappan v. Merchants' Nat. Bank*, 19 Wall. (U. S.) 490.

*Alabama.* — *McIver v. Robinson*, 53 Ala. 456; *National Commercial Bank v. Mobile*, 62 Ala. 284, 34 Am. Rep. 15.

*Arizona.* — *National Bank v. Long*, (Ariz. 1899) 57 Pac. Rep. 639.

*Illinois.* — *Mendota First Nat. Bank v. Smith*, 65 Ill. 44; *Illinois Nat. Bank v. Kinsella*, 201 Ill. 31.

*Michigan.* — *Howell v. Cassopolis*, 35 Mich. 471.

*New Jersey.* — *State v. Newark*, 39 N. J. L. 380, 40 N. J. L. 558; *De Baun v. Smith*, 55 N. J. L. 110; *Orange Nat. Bank v. Williams*, 58 N. J. L. 45; *Crossley v. Township Committee*, 62 N. J. L. 583.

*New York.* — *Williams v. Weaver*, 75 N. Y. 30; *New York v. McLean*, 170 N. Y. 374.

*North Carolina.* — *Buie v. Fayetteville*, 79 N. Car. 267, *distinguishing* *Kyle v. Fayetteville*, 75 N. Car. 445. See also *Worth v. Ashe County*, 82 N. Car. 420, 33 Am. Rep. 692.

*Pennsylvania.* — *Strong v. O'Donnell*, 10 Phila. (Pa.) 575, 31 Leg. Int. (Pa.) 269.

*Tennessee.* — *Nashville v. Thomas*, 5 Coldw. (Tenn.) 600.

The Other Restriction is that the taxation of such shares shall not be at a greater rate than

is assessed on other moneyed capital in the hands of individual citizens of such state. Rev. Stat. U. S., § 5219; *Illinois Nat. Bank v. Kinsella*, 201 Ill. 31. See also *infra*, this title, *Taxation of Shares of Stock — Taxation of National Bank Shares.*

2. *History of Congressional Legislation.* — *Tappan v. Merchants' Nat. Bank*, 19 Wall. (U. S.) 490; *Buie v. Fayetteville*, 79 N. Car. 267; *Strong v. O'Donnell*, 10 Phila. (Pa.) 575, 31 Leg. Int. (Pa.) 269; *Mendota First Nat. Bank v. Smith*, 65 Ill. 44.

3. *Tappan v. Merchants' Nat. Bank*, 19 Wall. (U. S.) 490; *Buie v. Fayetteville*, 79 N. Car. 267; *Strong v. O'Donnell*, 10 Phila. (Pa.) 575, 31 Leg. Int. (Pa.) 269. See also *Mendota First Nat. Bank v. Smith*, 65 Ill. 44.

4. *Resident Shareholders.* — *Buie v. Fayetteville*, 79 N. Car. 267, *distinguishing* *Kyle v. Fayetteville*, 75 N. Car. 445. See also *Tappan v. Merchants' Nat. Bank*, 19 Wall. (U. S.) 490; *Mendota First Nat. Bank v. Smith*, 65 Ill. 44; *Strong v. O'Donnell*, 10 Phila. (Pa.) 575, 31 Leg. Int. (Pa.) 269.

5. *Place of Taxing Shares of Nonresidents.* — *Kyle v. Fayetteville*, 75 N. Car. 445, *distinguishing* *Buie v. Fayetteville*, 79 N. Car. 267. See also *Strong v. O'Donnell*, 10 Phila. (Pa.) 575, 31 Leg. Int. (Pa.) 269; *Howell v. Cassopolis*, 35 Mich. 471.

**3. Real Property.** — The realty of a corporation is generally taxable where it is situated. Express statutory provisions sometimes provide for this.<sup>1</sup>

**V. ELEMENTS OF TAXABLE VALUE — 1. Enumeration of.** — In corporations many elements of taxable value may be found, among which are franchises, capital stock in the hands of the corporation, shares of capital stock in the hands of the individual stockholders, and corporate property. Each of these may be, under certain circumstances, an appropriate subject of taxation.<sup>2</sup>

**2. Element Taxed Distinguished from Means Adopted to Measure Taxes.** — Taxes may be measured by reference to business done, income, indebtedness, dividends, and many other standards. From these standards or means of measuring taxes, the elements taxed are to be distinguished. Thus in questions arising under statutes imposing a tax on corporate franchises, it has been important to distinguish between the mode adopted for measuring the tax and the thing taxed, whether the tax is imposed on the corporate property or on the franchise. If the tax is on the corporate property as distinguished from the franchise, the particular statute imposing it may be subject to certain constitutional provisions, but if the tax is imposed on the franchise and measured by certain standards which may be in themselves property, the statute may not be subject to constitutional provisions relating to property taxation.<sup>3</sup>

**3. Corporation Not Taxable as Owner on Value of Indebtedness.** — Debts owing by corporations, like debts owing by individuals, are not the property of the debtors, and it would therefore follow that a corporation cannot be taxed on the value of the debts which it owes, as the owner.<sup>4</sup> But a corporation may be required to deduct a state tax on corporate bonds from interest paid to its bondholders, if the latter are within the state's jurisdiction.<sup>5</sup> It may be within the power of a state to impose a tax on a resident debt due a non-resident creditor. It has been declared that power over the person of the debtor confers jurisdiction. Consequently, it has been held that a state may rightfully impose a succession tax on debts owed by its citizens.<sup>6</sup>

**1. Real Estate of Corporation Assessed Where Situated.** — *Paris v. Norway Water Co.*, 85 Me. 330, 35 Am. St. Rep. 371; *Salem Iron Factory Co. v. Danvers*, 10 Mass. 514; *Nashua Sav. Bank v. Nashua*, 46 N. H. 389; *Mohawk, etc., R. Co. v. Clute*, 4 Paige (N. Y.) 384.

**Place of Taxing Real Property Generally.** — See the title *TAXATION*, *ante*, p. 567.

**2. Corporate Elements of Taxable Value.** — In *Tennessee v. Whitworth*, 117 U. S. 129, 29 Am. & Eng. R. Cas. 205, the corporate elements of taxable value enumerated in the text were stated by Chief Justice Waite, who has been quoted in the following cases: *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664; *Bank of Commerce v. Tennessee*, 161 U. S. 134; *New Orleans v. Houston*, 119 U. S. 265; *Louisville, etc., R. Co. v. Wright*, 116 Fed. Rep. 669; *Tennessee v. Bank of Commerce*, 53 Fed. Rep. 735; *State v. Travelers Ins. Co.*, 73 Conn. 255; also in the dissenting opinions in *Hancock v. Singer Mfg. Co.*, 62 N. J. L. 289; *Bacon v. State Tax Com'rs*, 126 Mich. 22, 86 Am. St. Rep. 524. See also *Farrington v. Tennessee*, 95 U. S. 679; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *Worth v. Wilmington, etc., R. Co.*, 89 N. Car. 291, 45 Am. Rep. 679; *Louisville, etc., R. Co. v. State*, 8 Heisk. (Tenn.) 663.

**3. Means of Measuring Tax Distinguished from Element Taxed.** — See *infra*, this title, *Franchise Tax* — *Distinguished from Property Tax*.

**Tax Held to Be on Franchise and Not on Coal Mined.** — In *Kittanning Coal Co. v. Com.*, 79 Pa. St. 100, a tax at the rate of three cents on each and every ton of twenty-two hundred and forty pounds of coal mined or purchased by coal companies was decided to be a tax, not on the coal mined, but on the franchise or right of the company to mine measured by the amount of its business.

**4. As Bearing on This Proposition**, see *State Tax on Foreign-held Bonds*, 15 Wall. (U. S.) 300. This case did not hold that a corporation could not be taxed on its debts, though the court, in effect, so stated in the opinion. See also *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561.

In *Blackstone v. Miller*, 188 U. S. 189, the court said, concerning *State Tax on Foreign-held Bonds*, above cited, speaking through Mr. Justice Holmes, that the decision "has been cut down to its precise point by later cases."

**5. Corporation Required to Pay State Tax by Deducting Same from Interest Due Domestic Bondholders.** — *Com. v. Delaware Div. Canal Co.*, 123 Pa. St. 594; *Com. v. Lehigh Valley R. Co.*, 129 Pa. St. 429; *Com. v. New York, etc., R. Co.*, 129 Pa. St. 463, 15 Am. St. Rep. 724; *Com. v. Pennsylvania Salt Mfg. Co.*, 145 Pa. St. 53.

**6. Power of State to Impose Succession Tax on Debts Owed by Its Citizens.** — *Blackstone v. Miller*, 188 U. S. 189. See generally the title *SUCCESSION TAXES*, *ante*, p. 337.

**VI. FRANCHISE TAX — 1. Taxability of Franchises — a. GENERALLY.** — Unless exempted in terms which amount to a contract, the privileges and franchises of a private corporation are as much a legitimate subject of taxation as other taxable subjects which are within the sovereign power of the state. The authority of the state to tax corporate franchises is independent of the federal government, and is unaffected by the fact that the corporation has or has not made investments in federal securities.<sup>1</sup> But corporate franchises granted by Congress are not taxable by state authority without the consent of Congress.<sup>2</sup>

**b. FRANCHISES OF NATIONAL BANKS.** — National banks, being instruments of the federal government, created for carrying into effect national powers granted by the Federal Constitution, are not subject to state taxation on their franchises or business.<sup>3</sup>

**2. Measurement of Franchise Taxes.** — <sup>4</sup>The amount of a franchise tax on a corporation may be graduated or measured by an appraisal of the whole or any portion of its property, or by the amount of its business.<sup>4</sup> For example, franchise taxes may be measured by dividends;<sup>5</sup> by the amount of the

**1. Taxability of Franchises — United States.** — *Savings Soc. v. Coite*, 6 Wall. (U. S.) 594; *Provident Inst. v. Massachusetts*, 6 Wall. (U. S.) 611; *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. (U. S.) 632; *Delaware Railroad Tax*, 18 Wall. (U. S.) 206; *North Missouri R. Co. v. Maguire*, 20 Wall. (U. S.) 46; *Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160.

*Kentucky.* — *Henderson Bridge Co. v. Negley*, (Ky. 1901) 63 S. W. Rep. 989; *South Covington, etc., St. R. Co. v. Bellevue*, 105 Ky. 283; *Latonía Agricultural, etc., Assoc. v. Donnelly*, 106 Ky. 325.

*Massachusetts.* — *Gleason v. McKay*, 134 Mass. 419.

*New Jersey.* — *State Board of Assessors v. Central R. Co.*, 48 N. J. L. 146.

*Ohio.* — *Southern Gum Co. v. Laylin*, 66 Ohio St. 578.

*Pennsylvania.* — *Philadelphia Contributionship, etc., v. Com.*, 98 Pa. St. 48.

*Texas.* — *Southwestern Tel., etc., Co. v. San Antonio*, (Tex. Civ. App. 1903) 73 S. W. Rep. 859.

*Washington.* — *Commercial Electric Light, etc., Co. v. Judson*, 21 Wash. 49; *Edison Electric Illuminating Co. v. Spokane County*, 22 Wash. 169; *Chehalis Boom Co. v. Chehalis County*, 24 Wash. 135.

**Franchises Deemed Property.** — See FRANCHISES, vol. 14, p. 6.

**Exemption of Corporations from Taxation.** — See the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 356.

**Legislative Discretion in Levying Franchise Tax.** — *California v. Central Pac. R. Co.*, 127 U. S. 1; *Home Ins. Co. v. New York*, 134 U. S. 594, 29 Am. & Eng. Corp. Cas. 575; *State v. Maine Cent. R. Co.*, 74 Me. 376; *Standard Underground Cable Co. v. Atty.-Gen.*, 46 N. J. Eq. 270, 19 Am. St. Rep. 394; *State v. Franklin County Sav. Bank, etc., Co.*, 74 Vt. 246.

**Franchise Taxable Even if Method of Assessment Is Not Prescribed.** — *Commercial Electric Light, etc., Co. v. Judson*, 21 Wash. 49; *State v. Anderson*, 90 Wis. 550.

**The Constitutional Provisions Requiring Equality in the taxation of property** "do not abridge

or apply to the legislative power of indirect taxation by taxes on franchises, privileges, trades, and occupations." *Standard Underground Cable Co. v. Atty.-Gen.*, 46 N. J. Eq. 270, 19 Am. St. Rep. 394.

**2. State Cannot Tax Franchise Granted by Congress Without Its Consent.** — *California v. Central Pac. R. Co.*, 127 U. S. 1, 33 Am. & Eng. R. Cas. 451. See *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150; *Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160. See also *infra*, this section, *Franchises of National Banks*, and the title OCCUPATION, BUSINESS, AND PRIVILEGE TAXES, vol. 21, p. 778.

"The Property of a Corporation of the United States might be taxed, though its franchises, as for instance its corporate capacity and its power to transact its appropriate business and charge therefor, could not be." *Central Pac. R. Co. v. California*, 162 U. S. 91.

**3. Franchises and Business of National Banks Not Subject to State Taxation.** — *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664; *Louisville Third Nat. Bank v. Stone*, 174 U. S. 432; *Louisville v. Third Nat. Bank*, 174 U. S. 435; *Louisville v. Citizens Nat. Bank*, 174 U. S. 436; *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 316; *Osborn v. U. S. Bank*, 9 Wheat. (U. S.) 738; *Stapylton v. Thaggard*, (C. C. A.) 91 Fed. Rep. 93; *Graves County v. Mayfield First Nat. Bank*, 108 Ky. 194; *Owen County Ct. v. Farmers' Nat. Bank*, (Ky. 1900) 59 S. W. Rep. 7. See also the title OCCUPATION, BUSINESS, AND PRIVILEGE TAXES, vol. 21, p. 778.

**State Tax on Presidents of National Banks Unauthorized.** — *Linton v. Childs*, 105 Ga. 567.

**4. Measurement of Franchise Tax.** — *State v. Maine Cent. R. Co.*, 74 Me. 376.

**Valuation of Franchise Apart from Property of Corporation.** — *Wilmington, etc., R. Co. v. Brunswick County*, 72 N. Car. 10; *Richmond, etc., R. Co. v. Brogden*, 74 N. Car. 707.

**Limitations in Ohio on Power of Legislature to Tax Franchises.** — *Southern Gum Co. v. Laylin*, 66 Ohio St. 578.

**5. Dividends.** — *People v. Albany Ins. Co.*, 92 N. Y. 458, 1 Am. & Eng. Corp. Cas. 466; *People v. Home Ins. Co.*, 92 N. Y. 328, 3 Am. & Eng. Corp. Cas. 363.

capital stock;<sup>1</sup> by the amount of the capital stock employed within the state;<sup>2</sup> by the paid-up capital stock;<sup>3</sup> by ascertaining the value of the capital stock and deducting the value of the tangible property assessed in the state;<sup>4</sup> by the extent of the business transacted;<sup>5</sup> by the net earnings;<sup>6</sup> by the earning capacity of the franchise;<sup>7</sup> by the gross receipts;<sup>8</sup> by the amount of deposits;<sup>9</sup> by the aggregate market value of the shares, less the value of real and personal property;<sup>10</sup> by a percentage on the excess of the market value of stock over the value of real estate and machinery;<sup>11</sup> by the value of life-insurance policies in force;<sup>12</sup> or by the number of tons of coal mined.<sup>13</sup>

**3. Distinguished from Property Tax.** — It is necessary to make the important distinction between those taxes which are franchise taxes, and those which are taxes on property, in respect to both the mode of levy and the basis prescribed for computing the amount.<sup>14</sup>

**VII. CAPITAL STOCK TAX — 1. In General.** — Since the capital stock of a corporation is a distinct property belonging to the corporation as a legal

**1. Amount of Capital Stock.** — *Com. v. Lancaster Sav. Bank*, 123 Mass. 493; *People's Invest. Co. v. State Board of Assessors*, 66 N. J. L. 175.

Under a statute providing that in taxing certain corporations the aggregate value of the shares of the capital stock should be taken as the basis of assessment, it was held that proposed but unissued new shares could not be included in estimating the value. *Boston, etc., R. Co. v. Com.*, 157 Mass. 68.

**2. Amount of Capital Stock Employed in State.** — *People v. Roberts*, 30 N. Y. App. Div. 150, affirmed 157 N. Y. 677; *People v. Knight*, 173 N. Y. 255.

**3. Paid-up Capital Stock.** — *Phoenix Carpet Co. v. State*, 118 Ala. 143, 72 Am. St. Rep. 143.

**4. Deducting Assessed Tangible Property from Value of Capital Stock.** — *State Railroad Tax Cases*, 92 U. S. 575; *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *Louisville R. Co. v. Com.*, 105 Ky. 710.

**5. Extent of Business Transacted.** — *Com. v. Lancaster Sav. Bank*, 123 Mass. 493.

**6. Net Earnings.** — *Philadelphia Contributionship, etc., v. Com.*, 98 Pa. St. 48.

**7. Earning Capacity of Franchise.** — *Rocheblave Market Co. v. New Orleans*, (La. 1903) 34 So. Rep. 665.

**Other Elements May Be Considered.** — *Crescent City R. Co. v. Assessors*, 51 La. Ann. 335; *St. Charles St. R. Co. v. Assessors*, 51 La. Ann. 459.

**8. Gross Receipts.** — *State Tax on Railway Gross Receipts*, 15 Wall. (U. S.) 284; *State v. Philadelphia, etc., R. Co.*, 45 Md. 361, 24 Am. Rep. 511; *Cumberland, etc., R. Co. v. Maryland*, 92 Md. 668; *State v. U. S. Fidelity, etc., Co.*, 93 Md. 314; *Paterson, etc., Gas, etc., Co. v. State Board of Assessors*, (N. J. 1903) 54 Atl. Rep. 246.

**9. Amount of Deposits.** — *Savings Soc. v. Coite*, 6 Wall. (U. S.) 594; *Provident Inst. v. Massachusetts*, 6 Wall. (U. S.) 611; *Com. v. People's Five Cents Sav. Bank*, 5 Allen (Mass.) 428; *Com. v. Lancaster Sav. Bank*, 123 Mass. 493; *State v. Bradford Sav. Bank, etc., Co.*, 71 Vt. 234.

**10. Value of Shares.** — *San Jose Gas Co. v.*

*January*, 57 Cal. 614; *Spring Valley Water Works v. Schottler*, 62 Cal. 69.

**11. Excess of Market Value of Stock over Value of Real Estate and Machinery.** — *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. (U. S.) 632, affirming 12 Allen (Mass.) 302; *Com. v. Lowell Gas Light Co.*, 12 Allen (Mass.) 75. See also *Worcester v. Board of Appeal*, (Mass. 1904) 69 N. E. Rep. 330.

**12. Value of Life-insurance Policies.** — *Connecticut Mut. L. Ins. Co. v. Com.*, 133 Mass. 161.

**13. Number of Tons of Coal Mined.** — *Kittanning Coal Co. v. Com.*, 79 Pa. St. 100.

**14. Franchise Taxes Distinguished from Property Taxes.** — *Provident Inst. v. Massachusetts*, 6 Wall. (U. S.) 611, distinguished in *State v. Stonewall Ins. Co.*, 89 Ala. 335. In this case it was held that a tax based upon the average amount of deposits was a franchise tax. See also *State v. Bradford Sav. Bank, etc., Co.*, 71 Vt. 234; *Home Ins. Co. v. New York*, 134 U. S. 594, 29 Am. & Eng. Corp. Cas. 575.

"Owing to the Difficulty of Distinguishing Between the Capital and the Property in Which It Is Invested, tests for determining whether a tax is on the property or the franchises may be regarded, generally, uncertain and unsatisfactory; yet its determination is often necessary, for, if a franchise tax, the property in which the capital is invested becomes immaterial. The usual and most certain test is, whether the tax is upon the capital stock, *eo nomine*, without regard to its value, or at its assessed valuation in whatever it may be invested; if the former, it is a franchise tax; if the latter, a tax upon the property." *State v. Stonewall Ins. Co.*, 89 Ala. 335. See also *Phoenix Carpet Co. v. State*, 118 Ala. 143, 72 Am. St. Rep. 143.

**Tax Held to Be on Franchise and Not Property.** — *Savings Soc. v. Coite*, 6 Wall. (U. S.) 594; *Provident Inst. v. Massachusetts*, 6 Wall. (U. S.) 611; *Hamilton Mfg. Co. v. Massachusetts*, 6 Wall. (U. S.) 632; *Home Ins. Co. v. New York*, 134 U. S. 594; *Phoenix Carpet Co. v. State*, 118 Ala. 143, 72 Am. St. Rep. 143; *State v. Maine Cent. R. Co.*, 74 Me. 376; *Standard Underground Cable Co. v. Atty.-Gen.*, 46 N. J. L. Eq. 270, 19 Am. St. Rep. 394; *Marsden Co. v. State Board of Assessors*, 61 N. J. L. 461; *People v. Home Ins. Co.*, 92 N. Y. 328, 3 Am. & Eng. Corp. Cas. 363.

entity,<sup>1</sup> this element of taxable value may be taxed to the corporation.<sup>2</sup> In some of the states certain corporations are relieved from paying a tax on their capital stock either in whole or in part.<sup>3</sup> In *New York*, under a statute subjecting certain corporations deriving an income or profit to taxation on their capital stock, it was held that a corporation was not relieved from taxation by showing that it was not in receipt of any net profits or income. Such corporations are subject to taxation when they are in receipt of any income or profits, without regard to losses.<sup>4</sup>

**2. Capital Stock of Corporations Chartered in Different States.**—A corporation chartered by two states may be taxable on its capital stock in each,<sup>5</sup> and where a corporation was formed under the laws of a state by the consolidation of other corporations, which were merged into the new corporation thus formed, and where one of the constituent companies was incorporated under the laws of the state, it was held that the new corporation thus formed was to be considered as one of the companies incorporated under the laws of the state within the revenue laws; and its capital stock located or used in the state is subject to be taxed as such. No distinction in principle was made between the status of such a corporation and that of a corporation operating its business in two adjoining states, having a charter for such purpose from each of such states.<sup>6</sup> A state may tax such proportion of the whole capital stock of a foreign sleeping-car company as the number of miles over which its cars are operated within the state bears to the whole number of miles over which its cars are operated, though such cars run into, through, and out of the state.<sup>7</sup> This principle of law and method of assessment have been applied in taxing property or the capital stock of railroad companies,<sup>8</sup> refrigerator car companies,<sup>9</sup> express companies,<sup>10</sup> and telegraph companies.<sup>11</sup>

1. See the title STOCK AND STOCKHOLDERS, vol. 26, p. 823.

2. **Capital Stock Subject of Taxation.**—*Tennessee v. Whitworth*, 117 U. S. 129, 29 Am. & Eng. R. Cas. 205; *State Railroad Tax Cases*, 92 U. S. 603; *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *Ottawa Gas Light, etc., Co. v. Downey*, 127 Ill. 201; *New Orleans City Gas Light Co. v. Assessors*, 31 La. Ann. 475; *Com. v. Erie R. Co.*, 98 Pa. St. 127.

**Capital Stock Taxable as Personality.**—*Quincy R. Bridge Co. v. Adams County*, 88 Ill. 615; *Belle-ville Nail Co. v. People*, 98 Ill. 399; *Saup v. Morgan*, 108 Ill. 326; *Cooper v. Corbin*, 105 Ill. 224; *Mohawk, etc., R. Co. v. Clute*, 4 Paige (N. Y.) 384.

3. **Corporations Relieved from Paying Taxes on Corporate Stock.**—*Union, etc., Bank v. Memphis*, 101 Tenn. 154; *State v. Butler*, 86 Tenn. 614.

4. *People v. Niagara County*, 4 Hill (N. Y.) 20, affirmed 7 Hill (N. Y.) 504. See also *People v. New York*, 18 Wend. (N. Y.) 605.

Under the laws of *Pennsylvania* relieving from taxation so much of the capital stock of manufacturing corporations as is invested and used in the manufacturing enterprise in the state, it is held that a manufacturing corporation is not relieved from paying taxes on its capital stock invested in certain bonds of other companies, even if issued free from taxes. *Com. v. Jarecki Mfg. Co.*, 204 Pa. St. 36. See *Com. v. Keystone Laundry Co.*, 203 Pa. St. 289. And see generally the title EXEMPTIONS (FROM TAXATION), vol. 12, pp. 345-352.

5. **Corporation Chartered by Two States.**—*Quincy R. Bridge Co. v. Adams County*, 88 Ill.

615. See also *Ohio, etc., R. Co. v. Weber*, 96 Ill. 443; *Keokuk, etc., Bridge Co. v. People*, 161 Ill. 132.

6. **Taxation of Capital Stock of Consolidated Corporation.**—*Ohio, etc., R. Co. v. Weber*, 96 Ill. 443.

**Whether the Whole Capital Stock** of such a corporation is taxable by a state, see *Keokuk, etc., Bridge Co. v. People*, 161 Ill. 132, wherein the court declared that all the capital stock was taxable. Compare *State Treasurer v. Auditor Gen.*, 46 Mich. 224.

7. **Taxation of Capital Stock of Foreign Sleeping-car Company—Mileage Basis of Assessment.**—*Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 46 Am. & Eng. R. Cas. 236, affirming 107 Pa. St. 156.

8. **Railroad Companies.**—*Pittsburgh, etc., R. Co. v. Backus*, 154 U. S. 421; *Com. v. Delaware, etc., R. Co.*, 145 Pa. St. 96. See also *infra*, this title, *Taxation of Railroads*.

9. **Refrigerator Car Companies.**—*American Refrigerator Transit Co. v. Hall*, 174 U. S. 70, affirming 24 Colo. 291, 65 Am. St. Rep. 223; *Union Refrigerator Transit Co. v. Lynch*, 177 U. S. 149, affirming 18 Utah 378. See also *American Refrigerator Transit Co. v. Adams*, 28 Colo. 119.

10. **Express Companies.**—*Adams Express Co. v. Ohio*, 165 U. S. 194; *Wells, etc., Co.'s Express v. Crawford County*, 63 Ark. 576.

11. **Telegraph Companies.**—*Postal Tel. Cable Co. v. Adams*, 155 U. S. 688; *Western Union Tel. Co. v. Taggart*, 163 U. S. 1.

**For a General Discussion of the Taxation of Interstate Corporations** in relation to interstate commerce, see the title INTERSTATE COMMERCE, vol. 17, p. 34.

**3. Capital Stock of National Banks.** — The capital stock of a national bank is not taxable as such against the bank by state authority, and if the bank gives in its capital for taxation, it is not estopped from refusing to pay taxes on the same.<sup>1</sup> So also a tax assessed on all the shares issued by the association *in solido* against the association has been held unauthorized.<sup>2</sup> But a statute requiring a national bank to pay the tax on the shares of the stockholders, as the agent of each of its shareholders, is held not to be in conflict with the laws of the United States as a tax upon the capital of the bank.<sup>3</sup>

**4. Valuation of Capital Stock.** — It has been held that an assessment for taxation by a board of equalization of the capital stock of a corporation by first ascertaining the market or fair cash value of the shares of capital stock of the corporation and the market or fair cash value of its debts, exclusive of those for current expenses, and adding these together, and taking from the sum the equalized valuation of all its tangible property, was proper, as showing the balance of the capital stock over and above the assessed value of the tangible property.<sup>4</sup> The market value of the shares of stock may not alone furnish a proper basis for the valuation of the capital stock,<sup>5</sup> but such may be considered in certain cases, as may the indebtedness and general condition of the corporation.<sup>6</sup> In *New York* certain corporations deriving an income or profit were made liable to taxation on their capital, to be levied on the amount of the capital stock of the corporation paid in, and secured to be paid in, after deducting the amount expended for its real estate, which was taxed separately, and the amount of stock owned by the state and incorporated literary and charitable institutions. No respect was paid either to accumulations or losses of capital in the course of the business of the company; but the amount paid and secured to be paid as capital was taken as the true sum to be inserted in the assessment roll.<sup>7</sup>

**VIII. TAXATION OF SHARES OF STOCK — 1. In General.** — In nearly all the states shares of stock in corporations are by statute expressly declared to be taxable as personal property.<sup>8</sup>

**2. Taxation of Shares through Corporation.** — In some states the taxation of shares of stock in corporations is effected by requiring the corporations to

1. **Capital Stock of National Bank Not Taxable by States.** — *Brown v. French*, 80 Fed. Rep. 166.

2. *National Bank v. Richmond*, 42 Fed. Rep. 877.

3. **Payment by Bank as Agent of Stockholders.** — *Aberdeen Bank v. Chehalis County*, 166 U. S. 410.

4. **Valuation of Capital Stock by Deducting Assessed Valuation of Tangible Property.** — *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *Distilling, etc., Co. v. People*, 161 Ill. 101. See also *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561; *State Railroad Tax Cases*, 92 U. S. 575.

5. **Market Value of Shares Held Improper Basis of Assessing Capital Stock.** — *People v. Coleman*, 126 N. Y. 433.

6. **Value of Shares May Be Considered, Also Indebtedness and General Condition of Company.** — As bearing on what may be considered in valuing the capital stock of a corporation for purposes of taxation, see *State Railroad Tax Cases*, 92 U. S. 575; *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561; *New Orleans, etc., R. Co. v. Assessors*, 32 La. Ann. 19; *St. Charles St. R. Co. v. Assessors*, 31 La. Ann. 852; *People v. Coleman*, 126 N. Y. 433; *People v. Tax, etc., Com'rs*, (Supm. Ct. Gen. T.) 46 How. Pr. (N. Y.) 227.

7. **A Law Making the Market Value the Basis of Assessment is constitutional.** *St. Charles St. R. Co. v. Assessors*, 31 La. Ann. 852.

**Assessed Value of Real Estate Deducted.** — *People v. Tax, etc., Com'rs*, (Supm. Ct. Gen. T.) 46 How. Pr. (N. Y.) 227; *People v. Tax Com'rs*, 104 N. Y. 240.

**Deduction of Foreign Realty.** — *People v. Tax Com'rs*, 95 N. Y. 554; *People v. Tax Com'rs*, 104 N. Y. 240; *People v. Coleman*, 115 N. Y. 178.

7. **Valuation of Capital Stock under New York Statute.** — *People v. Niagara County*, 4 Hill (N. Y.) 20.

8. **Shares of Stock Made Taxable by Statute.** — See the various statutes of the different states.

**Shares of Stock in Incorporated Exchange.** — *Schreiber v. Assessors*, 37 La. Ann. 908, 55 Am. Rep. 528.

**Scrip Certificates Held Not Taxable Within Statutory Definition of Taxable Property.** — *Adams v. Shields*, 9 Ohio Cir. Dec. 558.

**Membership in Associated Press Company Held Not Taxable.** — *Arapahoe County v. Rocky Mountain News Printing Co.*, 15 Colo. App. 189. Compare *Hart v. Smith*, 159 Ind. 182, 95 Am. St. Rep. 280.

**Seat in Stock Exchange Held Not Taxable.** — See the title STOCK AND PRODUCE EXCHANGES, vol. 26, p. 794.

**Meaning of Word "Stocks" in Taxing Statute.** — *Lockwood v. Western*, 61 Conn. 211. And see the title STOCK AND STOCKHOLDERS, vol. 26, p. 823.

pay out of the shareholders' dividends the amount of the tax levied on the shares, instead of making the levy directly against and requiring payment by the shareholders.<sup>1</sup> Unless statutory provision is made for collecting taxes on the shareholders from the corporation, it has been held that such a procedure is unwarranted.<sup>2</sup> It has also been held that a statute providing for this method of taxing shares of stock does not apply to corporations such as exchanges which issue shares, but pay no dividends and are not organized for money-making purposes.<sup>3</sup>

**3. Method of Taxing Shares through Corporation Applied to Corporate Bonds.**—The method of taxing shares of stock through the corporation has been adopted in taxing corporate bonds held by residents of a state. Such a tax is not a tax on the corporation or its property, but on the individual citizen who holds the bonds. The corporation is chargeable with it only as a collector, and by reason of default in the duty to collect. It has been held that such a tax is not only not on the corporation, but it is not on the bondholders generally. It is only on such as are within the taxing power of the state. This limitation is the result of the lack of jurisdiction of the state to tax property of nonresidents which has no actual situs within the state.<sup>4</sup>

**4. Taxation of National Bank Shares**—*a. IN GENERAL.*—Congress has provided that the shares in national banking associations may be included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; and that the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere.<sup>5</sup>

**1. Taxing Shareholders through Corporation**—*United States.*—*Louisville First Nat. Bank v. Com.*, 9 Wall. (U. S.) 353; *Omaha First Nat. Bank v. Douglas County*, 3 Dill. (U. S.) 330, 9 Fed. Cas. No. 4,799; *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461.

*Arizona.*—*Western Invest. Banking Co. v. Murray*, (Ariz. 1899) 56 Pac. Rep. 728.

*Indiana.*—*Whitney v. Madison*, 23 Ind. 331.

*Iowa.*—*State Exch. Bank v. Parkersburg*, 112 Iowa 104.

*Louisiana.*—*New Orleans Cotton Exch. v. Assessors*, 35 La. Ann. 1154.

*Maryland.*—*American Coal Co. v. Allegany County*, 59 Md. 185; *American Casualty Ins. Co.'s Case*, 82 Md. 535; *Hull v. Southern Development Co.*, 89 Md. 8; *James Clark Distilling Co. v. Cumberland*, 95 Md. 468.

*New Mexico.*—*Lowenthal v. Baca*, 10 N. Mex. 337.

*North Carolina.*—*Buie v. Fayetteville*, 79 N. Car. 267; *Charlotte Bldg., etc., Assoc. v. Mecklenburg County*, 115 N. Car. 410.

*Virginia.*—*Union Bank v. Richmond*, 94 Va. 316.

*Washington.*—*Baker v. King County*, 17 Wash. 622; *Citizens' Nat. Bank v. Columbia County*, 23 Wash. 441.

"That the State Has the Right to Make the Bank Its Agent to collect the tax from the individual stockholders was settled in *Louisville First Nat. Bank v. Com.*, 9 Wall. (U. S.) 353." *Merchants', etc., Bank v. Pennsylvania*, 167 U. S. 461. See also *Omaha First Nat. Bank v.*

*Douglas County*, 3 Dill. (U. S.) 330, 9 Fed. Cas. No. 4,799; *Maguire v. Board of Revenue*, 71 Ala. 401; *New Orleans Cotton Exch. v. Assessors*, 35 La. Ann. 1154.

**2. Statutory Provision Necessary for Collecting Taxes on Shares from Bank.**—*Waco Nat. Bank v. Rogers*, 51 Tex. 606.

**3. Non-dividend-paying Shares.**—*New Orleans Cotton Exch. v. Assessors*, 35 La. Ann. 1154. See also *Schreiber v. Assessors*, 37 La. Ann. 908, 55 Am. Rep. 528.

**4. Taxation of Corporate Bonds through Corporation.**—*Com. v. Lehigh Valley R. Co.*, 104 Pa. St. 89, 129 Pa. St. 429, 186 Pa. St. 235; *Com. v. Delaware Div. Canal Co.*, 123 Pa. St. 594.

**Duty of Corporation to Ascertain Residence of Bondholders.**—*Com. v. Lehigh Valley R. Co.*, 186 Pa. St. 235.

**Corporation Which Paid No Interest Held Not Liable for Failure to Retain and Pay Over Tax.**—*Com. v. Philadelphia, etc., R. Co.*, 2 Pa. Dist. 731.

**5. Act of Congress Permitting State Taxation of National Bank Shares.**—U. S. Rev. Stat., § 5219.

**History of Acts of Congress Permitting State Taxation of National Bank Shares.**—*Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664; *Mercantile Bank v. New York*, 121 U. S. 138.

The Original Provision was that state taxation of national bank shares should not exceed the rate imposed on shares in state banks; but in 1868 the present form of the restriction was adopted, that is, that the taxation should not be



The Intent of the Statute is to prevent an unjust discrimination against moneyed capital invested in shares of national banks.<sup>1</sup>

The Term "Moneyed Capital" does not include capital which does not come into competition with the business of national banks. It must be satisfactorily made to appear by the proof that the moneyed capital claimed to be given an unjust advantage is of the character above stated.<sup>2</sup> Therefore exemptions from taxation, however large, such as deposits in savings banks or moneys belonging to charitable institutions, which are exempted for reasons of public policy and not as an unfriendly discrimination as against investments in national bank shares, cannot be regarded as forbidden by the federal statute.<sup>3</sup> Money invested by corporations or individuals in railroads, mines, manufacturing, insurance, or other kindred enterprises is not within the meaning of the act.<sup>4</sup>

**b. EXTENT OF STATE'S AUTHORITY TO TAX SHARES.** — The section of the Revised Statutes of the United States which permits the states to tax national bank shares is the measure of the power of a state to tax national banks, their property or franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of shareholders and to an assessment of the real estate of the bank. A state tax therefore which is in excess of and not in conformity to these requirements is void.<sup>5</sup>

**c. VALUATION.** — It has been held to be competent for a state to value, for taxation, shares of stock in a national bank at their actual value, even if in excess of their par value, provided they were not taxed at a greater rate than was assessed on other moneyed capital in the hands of individual citizens of the state.<sup>6</sup>

at a greater rate than is assessed on "other moneyed capital" in the hands of individual citizens of the state. *Van Allen v. Assessors*, 3 Wall. (U. S.) 573. See also *Mercantile Bank v. New York*, 121 U. S. 138; *McHenry v. Downer*, 116 Cal. 20.

In *Lionberger v. Rouse*, 9 Wall. (U. S.) 468, it was held that the proviso originally contained in the Act of 1864, and omitted from the Act of 1868, expressly referring to state banks, was limited to state banks of issue.

**1. Intent of Statute.** — *Garnett First Nat. Bank v. Ayres*, 160 U. S. 660; *Mercantile Bank v. New York*, 121 U. S. 138; *Jenkins v. Neff*, 186 U. S. 230. See also *Consolidated Nat. Bank v. Pima County*, (Ariz. 1897) 48 Pac. Rep. 291.

The Act of Congress Was Not Intended to Curtail the States' Power on the Subject of Taxation. — It simply requires that capital invested in national banks should not be taxed at a greater rate than like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property if the legislature chose to do so. The plain intention of the statute is to protect the corporations formed under its authority from unfriendly discrimination by the states in the exercise of their taxing power. *Adams v. Nashville*, 95 U. S. 19.

**Exemptions Held Not to Make Taxation of National Bank Shares Unequal.** — *Hepburn v. School Directors*, 23 Wall. (U. S.) 480; *Deposit Bank v. Daveiss County*, 102 Ky. 174.

**2. Meaning of Term "Moneyed Capital."** — *Commercial Bank v. Chambers*, 182 U. S. 556; *Wellington First Nat. Bank v. Chapman*, 173 U. S. 205; *National Bank v. Baltimore*, (C. C. A.) 100 Fed. Rep. 24; *Aberdeen Bank v. Chehalis County*, 166 U. S. 440; *Illinois Nat. Bank v. Kinsella*, 201 Ill. 31; *Mechanics Nat. Bank v.*

*Baker*, 65 N. J. L. 549; *Ankeny v. Blakley*, (Oregon 1903) 74 Pac. Rep. 485; *Primm v. Fort*, 23 Tex. Civ. App. 605; *Newport v. Mudgett*, 18 Wash. 271.

**3. Exemptions from Taxation Not Forbidden by Federal Statute.** — *Wellington First Nat. Bank v. Chapman*, 173 U. S. 205.

**Statutes of New York in Reference to Taxation of Trust Companies Held Not to Discriminate Unlawfully.** — *Jenkins v. Neff*, 186 U. S. 230, affirming 163 N. Y. 320. See also *Mercantile Bank v. New York*, 121 U. S. 138.

**4. Money Invested in Railroads, Mines, etc.** — *Aberdeen Bank v. Chehalis County*, 166 U. S. 440.

**5. Extent of State's Authority to Tax National Bank Shares.** — *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664.

"It Is Only by Permission of Congress that these shares are taxable by the state." *Newport v. Mudgett*, 18 Wash. 271. See also *San Francisco First Nat. Bank v. San Francisco*, 129 Cal. 96.

**6. Valuation of National Bank Shares.** — *Hepburn v. School Directors*, 23 Wall. (U. S.) 480.

**Deduction of Debts.** — The prohibition against the taxation of national bank shares at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens cannot be evaded by the assessment of equal rates of taxation on unequal valuations, and consequently where a state authorized individuals to deduct the amount of debts owing by them from the assessed value of their personal property and moneyed capital subject to taxation, the owners of shares of national banks were entitled to the same deduction. *People v. Weaver*, 100 U. S. 539. See also *Albany County v. Stand-*

*d.* TAXATION OF SHARES THROUGH BANK. — The shares of stock in a national bank may be taxed through the bank as the agent of the stockholders, the bank paying the tax and charging the same to the individual owner of the shares. State legislation authorizing this procedure is constitutional. Such is not a tax on the bank, but a tax on the individual shareholders.<sup>1</sup>

**IX. INCOME TAX — NET INCOME — GROSS RECEIPTS — 1. General Principles.** — In discussing the principles of law concerning the taxation of corporate franchises, it was seen that a corporation may be taxed in proportion to its income or gross receipts.<sup>2</sup> The corporations created by a state may undoubtedly be taxed on their income, as well as on their corporate franchises, property, and business, but in imposing such taxes care should be taken not to interfere with or hamper interstate or foreign commerce, or any other matter exclusively within the jurisdiction of the federal government.<sup>3</sup> A tax imposed upon the earnings, income, or gross receipts of a corporation is in many cases not a property tax, but a tax on the corporate privilege or franchise measured by the earnings, income, or gross receipts.<sup>4</sup>

**2. Net Income.** — Taxes on corporations may be proportioned to their net income, and this method has been adopted in some of the states as a means of measuring the amount of taxes on corporate franchises.<sup>5</sup>

ley, 105 U. S. 305; Hills v. Exchange Bank, 105 U. S. 319; Evansville Bank v. Britton, 105 U. S. 322; Newport v. Mudgett, 18 Wash. 271.

But where the constitution or laws of a state distinguish between stock and credits and authorize only a deduction of debts from credits, it has been held that shares of national bank stock are not credits, and consequently the owners thereof are not entitled to deduct *bona fide* indebtedness from the value of their shares of stock. Commercial Nat. Bank v. Chambers, 182 U. S. 556, affirming 21 Utah 324. See also Richmond First Nat. Bank v. Turner, 154 Ind. 456; Chapman v. Wellington First Nat. Bank, 56 Ohio St. 310; Burrows v. Smith, 95 Va. 694.

**1. Taxation of National Bank Shares through Bank as Agent of Stockholders.** — Merchants', etc., Bank v. Pennsylvania, 167 U. S. 461; Walla Walla First Nat. Bank v. Hungate, 62 Fed. Rep. 548; Mechanics' Nat. Bank v. Baker, 65 N. J. L. 113; Baker v. King County, 17 Wash. 622.

**Requirement that National Bank Shall Pay Taxes Assessed upon Shares as Agent of Stockholders Is Not Forbidden as Tax on Capital.** — Aberdeen Bank v. Chehalis County, 166 U. S. 440.

**Receiver of Insolvent National Bank Held Not Liable to Pay Taxes Assessed Against Shares.** — Baker v. King County, 17 Wash. 622.

**2. Corporation Taxed in Proportion to Income or Gross Receipts.** — See *supra*, this title, *Franchise Tax — Measurement of Franchise Taxes*.

**3. Tax on Income or Earnings.** — Philadelphia Contributionship, etc., v. Com., 98 Pa. St. 48; Philadelphia, etc., Steamship Co. v. Pennsylvania, 122 U. S. 326; Com. v. New York, etc., R. Co., 150 Pa. St. 234. See also Knisely v. Cotterel, 196 Pa. St. 614. And see the title INTERSTATE COMMERCE, vol. 17, p. 34.

"A Tax upon a Corporation may be proportioned to the income received as well as to the value of the franchise granted or the property possessed." Delaware Railroad Tax, 18 Wall. (U. S.) 206.

In Alabama certain corporations were required

to return for assessment their gains and income after deducting expenses. Board of Revenue v. Montgomery Gas-Light Co., 64 Ala. 269.

**Income and Profits Defined.** — People v. Niagara County, 4 Hill (N. Y.) 20.

**Income Distinguished from Property.** — Waring v. Savannah, 60 Ga. 93.

**4. Tax on Earnings or Income Held to Be Tax on Franchise and Not Property.** — In Philadelphia Contributionship, etc., v. Com., 98 Pa. St. 48, a tax was imposed upon the annual net earnings or income of certain corporations, and it was decided to be a tax not on the money and receipts of such companies, but on their franchises, the amount of the net earnings or income being used simply as a measure of the amount of the tax.

In Com. v. New York, etc., R. Co., 150 Pa. St. 234, it was decided that a tax on the net earnings or income of trust companies was a tax not on the property but on the franchises of the companies.

**Tax on Gross Receipts Held to Be Tax on Franchise and Not Property.** — State v. U. S. Fidelity, etc., Co., 93 Md. 314; Cumberland, etc., R. Co. v. State, 92 Md. 668; State v. Philadelphia, etc., R. Co., 45 Md. 361, 24 Am. Rep. 511. See also Paterson, etc., Gas, etc., Co. v. Assessors, (N. J. 1903) 54 Atl. Rep. 246.

**5. Net Income Tax.** — Philadelphia Contributionship, etc., v. Com., 98 Pa. St. 48; Com. v. New York, etc., R. Co., 150 Pa. St. 234.

Under the Laws of Pennsylvania it was held that the net income of the corporation included the amount of its gross earnings less the current expenses only, and that the net income could not be reduced by deducting the sum expended in enlarging the corporation's works. Com. v. Minersville Water Co., 2 Pa. Dist. 738.

"The Net Earnings or Income are the product of the business deducting the expenses only." Com. v. Penn Gas Coal Co., 62 Pa. St. 241.

**The Surplus Profits of a Gas Company are taxable,** although certificates representing such surplus have been distributed among the stockholders. People v. Assessors, 76 N. Y. 202.

**3. Gross Receipts.** — Gross receipts furnish a much more generally adopted basis for the assessment of taxes against corporations and one which has frequently been approved.<sup>1</sup> It is well settled that a franchise tax on the gross receipts of a corporation is not an invalid exercise of the taxing power of the state; it being a tax imposed on the corporation because of the value of its franchise, as distinguished from its ownership of property.<sup>2</sup>

**4. Gross Receipts from Interstate Commerce.** — The imposition of a tax on gross receipts derived from the transportation of persons or property between the different states has been held unconstitutional, because it is a regulation of interstate commerce, which the states are prohibited from making.<sup>3</sup> The authority of the states to tax corporations and corporate interests, as limited by the powers vested in the federal government over interstate commerce, has been fully discussed in a prior title of this work.<sup>4</sup>

**X. DIVIDEND TAX.** — A tax on dividends is not an uncommon method of taxing corporations.<sup>5</sup> A tax on the franchise of a corporation is sometimes measured by the dividends as a basis for computing the tax. A tax on dividends has been held quite generally to be a tax on the franchise of the corporation, computed on the basis of dividends.<sup>6</sup> Consequently such a tax is not void if a portion of the dividends is derived from the capital invested in non-taxable securities. From the very nature of the tax it cannot be affected

**1. Tax on Gross Receipts — United States.** — State Tax on Railway Gross Receipts, 15 Wall. (U. S.) 284.

**Alabama.** — Western Union Tel. Co. v. State Board of Assessment, 80 Ala. 273, 60 Am. Rep. 99.

**Maryland.** — State v. Northern Cent. R. Co., 44 Md. 131; State v. Philadelphia, etc., R. Co., 45 Md. 361, 24 Am. Rep. 511; State v. Baltimore, etc., R. Co., 48 Md. 49; Baltimore Union Pass. R. Co. v. Baltimore, 71 Md. 405, 41 Am. & Eng. R. Cas. 646; U. S. Electric Power, etc., Co. v. State, 79 Md. 63; Cumberland, etc., R. Co. v. State, 92 Md. 668; State v. U. S. Fidelity, etc., Co., 93 Md. 314.

**Michigan.** — Fargo v. Auditor Gen., 57 Mich. 598, 22 Am. & Eng. R. Cas. 216; Detroit v. Detroit City R. Co., 76 Mich. 421, 39 Am. & Eng. R. Cas. 538.

**Minnesota.** — State v. St. Paul, etc., R. Co., 30 Minn. 311; State v. St. Paul Union Depot Co., 42 Minn. 142, 41 Am. & Eng. R. Cas. 636; State v. District Ct., 54 Minn. 34; Minneapolis, etc., R. Co. v. Koerner, 85 Minn. 149; State v. Northwestern Telephone Exch. Co., 84 Minn. 459.

**Missouri.** — American Union Express Co. v. St. Joseph, 66 Mo. 675, 27 Am. Rep. 382.

**North Carolina.** — Wilmington Underwriters Ins. Co. v. Stedman, 130 N. Car. 221.

**North Dakota.** — Fargo, etc., R. Co. v. Brewer, 3 N. Dak. 34.

**Pennsylvania.** — Buffalo, etc., R. Co. v. Com., 3 Brews. (Pa.) 386; Philadelphia, etc., R. Co. v. Com., 4 Brews. (Pa.) 222; Com. v. Buffalo, etc., R. Co., 2 Pearson (Pa.) 376; Philadelphia, etc., Mail Steamship Co. v. Com., 104 Pa. St. 109; Com. v. Brush Electric Light Co., 204 Pa. St. 249.

**South Carolina.** — Southern Express Co. v. Hood, 15 Rich. L. (S. Car.) 66, 94 Am. Dec. 141.

**Wisconsin.** — State v. McFetridge, 56 Wis. 256, 64 Wis. 130; State v. Harshaw, 76 Wis. 230.

**Tax on Gross Earnings of Corporation Situated Partly Without State Held Unauthorized.** — State Treasurer v. Auditor Gen., 46 Mich. 224.

**Gross Earnings Law Held Void in North Dakota.** — Northern Pac. R. Co. v. McGinnis, 4 N. Dak. 494.

**Tax on Gross Receipts for Tolls and Transportation** — Com. v. New York, etc., R. Co., (Pa. 1891) 48 Am. & Eng. R. Cas. 633.

**2. Power of State to Levy Franchise Tax on Gross Receipts.** — State v. U. S. Fidelity, etc., Co., 93 Md. 314. And see Maine v. Grand Trunk R. Co., 142 U. S. 217.

**3. Tax on Gross Receipts Held Unconstitutional as Interfering with Interstate Commerce.** — Philadelphia, etc., Steamship Co. v. Pennsylvania, 122 U. S. 326.

**4. Power of State to Tax Interstate Corporations and their Interests.** — See the title INTERSTATE COMMERCE, vol. 17, p. 34.

**5. Dividend Tax on Corporations.** — Board of Review v. Montgomery Gas-Light Co., 64 Ala. 269; State v. Comptroller, 54 N. J. L. 135; People v. Albany Ins. Co., 92 N. Y. 458, 1 Am. & Eng. Corp. Cas. 466; State v. Farmer's Bank, 11 Ohio 94; Pennsylvania Bank Assignees' Account, 39 Pa. St. 103; Second, etc., St. Pass. R. Co. v. Philadelphia, 51 Pa. St. 465; Philadelphia v. Philadelphia, etc., Pass. R. Co., 52 Pa. St. 177; Com. v. Pittsburg, etc., R. Co., 74 Pa. St. 83.

"The Tax on Dividends is a well-known mode of raising revenue for the state upon corporations, and was in its origin chiefly confined to banks." Phoenix Iron Co. v. Com., 59 Pa. St. 104.

**6. Franchise Tax Measured by Dividends.** — See *supra*, this title, *Franchise Tax — Measurement of Franchise Taxes*.

**Dividend Tax Is Tax on Franchise.** — People v. Albany Ins. Co., 92 N. Y. 458, 1 Am. & Eng. Corp. Cas. 466; People v. Home Ins. Co., 92 N. Y. 328, *affirmed* Home Ins. Co. v. New York, 134 U. S. 594. See also State v. Comptroller, 54 N. J. L. 135.

in any way by the character of the property in which the corporation's capital stock is invested.<sup>1</sup> Like a tax on the franchise, a tax on capital stock may be graduated by dividends.<sup>2</sup> It has been held that in assessing the tax no difference can be made between dividends actually paid to the stockholders, and stock dividends, which are profits added to the stock of each corporator.<sup>3</sup> Dividends declared and credited to stockholders become obligations of the company to the stockholders and are their property. They are not the property of the corporation. Where, however, a corporation merely formally declares dividends without any intention to pay them over to the stockholders and without any change in the status of the funds of the corporation, such dividends are taxable as capital and assets of the company.<sup>4</sup> Because a corporation or its capital stock is exempt from taxation, it does not necessarily follow that the dividends or profits of the individual stockholders are exempt.<sup>5</sup>

**XI. TAXATION OF FOREIGN CORPORATIONS — 1. General Principles —** *a. TAXES ON PROPERTY.* — Many of the principles of law concerning the taxation of foreign corporations, especially those in regard to the taxation of the personal property, both tangible and intangible, belonging to such associations, also concerning the taxation of shares of stock in foreign corporations, have already been discussed under the subject pertaining to the place of taxing corporate interests.<sup>6</sup>

*b. PRIVILEGE TAX ON FOREIGN CORPORATIONS.* — As a condition of exercising corporate functions or doing business within a state by a foreign corporation, such state may impose a privilege or license tax on the corporation. Such a tax against foreign corporations is not unconstitutional because of lacking equality or uniformity under state constitutions, or because of a denial of privileges and immunities of citizens of the several states, nor is it a denial of the equal protection of the laws; and it is settled that, subject to certain limitations respecting interstate and foreign commerce, a state may impose such conditions upon permitting a foreign corporation to do business within its limits as it may judge expedient, and that it may make the grant or privilege dependent upon the payment of a specific license tax, or sum proportioned to the amount of its capital used within the state.<sup>7</sup> It has been held competent for the legislature of a state to impose as a condition upon

In New Jersey an annual franchise tax was imposed on certain corporations calculated upon two factors, viz., "(1) gross receipts within a specified period, and (2) 'dividends earned or declared' during the same period." Under this statute it was held that earnings fairly used for the betterment of the plant were not "dividends earned or declared." *State v. Comptroller*, 54 N. J. L. 135.

In New York a tax upon a foreign corporation based on the dividends of the corporation was upheld, even where the dividends were earned in business transacted out of the state. *People v. Roberts*, (Ct. App.) 5 N. Y. Annot. Cas. 201.

1. *Home Ins. Co. v. New York*, 134 U. S. 594, affirming *People v. Home Ins. Co.*, 92 N. Y. 328, 3 Am. & Eng. Corp. Cas. 363.

2. **Tax on Capital Stock Graduated by Dividends.** — *Phoenix Iron Co. v. Com.*, 59 Pa. St. 104; *Leigh Crane Iron Co. v. Com.*, 55 Pa. St. 448.

3. **Dividends Paid and Stock Dividends Liable to Assessment.** — *Com. v. Cleveland, etc., R. Co.*, 29 Pa. St. 370. See also *Com. v. Pittsburg, etc., R. Co.*, 74 Pa. St. 83; *Leigh Crane Iron Co. v. Com.*, 55 Pa. St. 448.

**Stock Certificates Held Not Liable to Dividend Tax.** — *Chicago, etc., R. Co. v. Page*, 1 Biss. (U. S.) 461.

4. **Dividends Held Taxable as Property of Corporation.** — *People v. Barker*, 23 N. Y. App. Div. 532.

5. **Tax on Dividends of Individual Stockholders Held Valid.** — *State v. Petway*, 2 Jones Eq. (55 N. Car.) 396. See also *Atty.-Gen. v. Charlotte Bank*, 4 Jones Eq. (57 N. Car.) 287.

**Statute Imposing Tax on Dividends of National Bank Stock Held Valid.** — *State v. Tax Collector*, 2 Bailey L. (S. Car.) 654.

6. See *supra*, this title, *Place of Taxing Corporate Interests*.

7. **Authority of States to Tax Foreign Corporations.** — *United States.* — *Ducat v. Chicago*, 10 Wall. (U. S.) 410, applying *Paul v. Virginia*, 8 Wall. (U. S.) 168; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566; *Philadelphia Fire Assoc. v. New York*, 119 U. S. 110; *Pembina Consol. Silver Min., etc., Co. v. Pennsylvania*, 125 U. S. 187; *Maine v. Grand Trunk R. Co.*, 142 U. S. 217; *Horn Silver Min. Co. v. New York*, 143 U. S. 305; *New York v. Roberts*, 171 U. S. 658; *Manchester F. Ins. Co. v. Herriott*, 91 Fed. Rep. 711.

*Georgia.* — *Goldsmith v. Home Ins. Co.*, 62 Ga. 379.

*Illinois.* — *Ducat v. Chicago*, 48 Ill. 172, 95 Am. Dec. 529; *Western Union Tel. Co. v. Lieb*, 76 Ill. 172.

foreign corporations doing business in the state that they shall assess and collect a tax upon that portion of their loans in the hands of individual residents within the state.<sup>1</sup> In *New York* foreign corporations doing business within the state are taxable on the amount of capital employed in the business in the state.<sup>2</sup> The jurisdiction of the state to tax foreign corporations under the statute depends on the existence of two concurring conditions, namely, that the corporation sought to be taxed shall be "doing business" in the state, and, second, that its capital or some portion thereof shall have been "employed within the state."<sup>3</sup>

**c. MODE OF FIXING AMOUNT OF PRIVILEGE TAX.** — The tax may be in the nature of a specific sum required to be paid each year, or the state may apportion the amount exacted according to the value of the business permitted, as disclosed by the gains or receipts of the corporation. The character of the tax or its validity is not determined by the mode adopted in fixing its amount.<sup>4</sup>

**2. Taxation of Foreign Corporations as Included within Certain Legislation.** — A statute which provides that all persons and associations doing business in the state and not residents of the state shall be assessed and taxed on all sums invested in such business, the same as if they were residents, is held to include foreign corporations.<sup>5</sup> However, a foreign corporation has been held not to be an inhabitant within a statute of a state in which it carried on business.<sup>6</sup>

**3. Taxation of Foreign Corporations in Relation to Interstate Commerce.** — A limitation on the power of the state to tax a foreign corporation arises where the corporation is in the employ of the federal government, or where its business is strictly commerce, interstate or foreign. A state cannot exclude from its limits a corporation engaged in interstate or foreign commerce.<sup>7</sup>

*Indiana.* — *State v. Insurance Co. of North America*, 115 Ind. 257; *Blackmer v. Royal Ins. Co.*, 115 Ind. 291.

*Iowa.* — *Scottish Union, etc., Ins. Co. v. Herriott*, 109 Iowa 606, 77 Am. St. Rep. 548.

*Kansas.* — *Leavenworth v. Booth*, 15 Kan. 627.

*Kentucky.* — *Phoenix Ins. Co. v. Com.*, 5 Bush (Ky.) 68, 96 Am. Dec. 331; *Com. v. Milton*, 12 B. Mon. (Ky.) 212, 54 Am. Dec. 522; *Southern Bldg., etc., Assoc. v. Norman*, 98 Ky. 294, 56 Am. St. Rep. 367.

*Louisiana.* — *State v. Lathrop*, 10 La. Ann. 398; *State v. Fosdick*, 21 La. Ann. 434; *State v. Hammond Packing Co.*, (La. 1903) 34 So. Rep. 368.

*Maine.* — *State v. Western Union Tel. Co.*, 73 Me. 518.

*Massachusetts.* — *Atty.-Gen. v. Bay State Min. Co.*, 99 Mass. 148, 96 Am. Dec. 717.

*Montana.* — *Northwestern Mut. L. Ins. Co. v. Lewis County*, (Mont. 1903) 72 Pac. Rep. 982.

*Nevada.* — *Ex p. Cohn*, 13 Nev. 424.

*New Jersey.* — *Tatem v. Wright*, 23 N. J. L. 429.

*New York.* — *Fire Dept. v. Noble*, 3 E. D. Smith (N. Y.) 440; *People v. Roberts*, 91 Hun (N. Y.) 158, *affirmed* 149 N. Y. 608; *People v. Philadelphia Fire Assoc.*, 92 N. Y. 311, 44 Am. Rep. 380, 1 Am. & Eng. Corp. Cas. 1.

*Ohio.* — *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521; *Southern Gum Co. v. Laylin*, 66 Ohio St. 578.

*Virginia.* — *Slaughter v. Com.*, 13 Gratt. (Va.) 767.

*Wisconsin.* — *Milwaukee Fire Dept. v. Helfenstein*, 16 Wis. 137.

See also the titles FOREIGN CORPORATIONS, vol. 13, p. 860; OCCUPATION, BUSINESS, AND PRIVILEGE TAXES, vol. 21, p. 277.

1. *Com. v. New York, etc.*, R. Co. 129 Pa. St. 463, 15 Am. St. Rep. 724.

2. **Tax on Amount of Capital Employed in State.** — *People v. Wemple*, 78 Hun (N. Y.) 63, 150 N. Y. 46; *People v. Roberts*, 91 Hun (N. Y.) 158, *affirmed* 149 N. Y. 608; *People v. Equitable Trust Co.*, 96 N. Y. 387; *People v. Wemple*, 129 N. Y. 558; *People v. Wemple*, 133 N. Y. 323; *People v. Wemple*, 138 N. Y. 582; *People v. Roberts*, 154 N. Y. 1; *People v. Roberts*, 4 N. Y. App. Div. 288, *affirmed* 151 N. Y. 621.

3. **Jurisdiction to Tax Foreign Corporations under New York Statute.** — *People v. Campbell*, 130 N. Y. 68; *People v. Roberts*, 154 N. Y. 1.

4. **Mode of Estimating Tax.** — *Maine v. Grand Trunk R. Co.*, 142 U. S. 219.

5. **Foreign Corporations Held Taxable as Non-residents in New York.** — *People v. McLean*, 80 N. Y. 254; *People v. Barker*, 141 N. Y. 118; *British Commercial L. Ins. Co. v. Tax, etc., Com'rs*, 1 Keyes (N. Y.) 303.

6. **Foreign Corporation Held Not Taxable as Inhabitant.** — *Boston Invest. Co. v. Boston*, 158 Mass. 461.

7. **Taxation of Foreign Corporations — Interstate Commerce.** — See the titles FOREIGN CORPORATIONS, vol. 13, p. 861; INTERSTATE COMMERCE, vol. 17, p. 34; OCCUPATION, BUSINESS, AND PRIVILEGE TAXES, vol. 21, p. 793.

Although no state can compel a corporation to pay for the privilege of engaging in interstate commerce, this immunity does not prevent a state from imposing ordinary property taxes on property having a situs within its territory and employed in interstate commerce.<sup>1</sup>

4. **Definition of "Doing Business."** — Occasional and isolated transactions do not render concerns liable to taxes laid on foreign corporations "doing business" within the state. This subject has been fully treated in a prior title of this work.<sup>2</sup>

5. **Retaliatory Legislation.** — In some of the states statutes have been enacted imposing on foreign corporations seeking to do business therein, similar taxes, license fees, and conditions exacted by the home state of such corporations from the corporations of the former seeking to do business in the latter. The constitutionality of this legislation has been attacked on various grounds, but in the main it has been upheld. This subject has been fully treated under other titles in this work, to which reference is made.<sup>3</sup>

**XII. TAXATION OF RAILROADS — 1. Power of State to Tax — General Principles.** — The general principles of law governing the power of the state to tax corporations generally, apply to the taxation of railroad corporations, the interests therein and their properties.<sup>4</sup> However, since railroads are generally not confined to a particular locality within a state, and ordinarily extend through and out of many of the states of the Union, the state's power of taxing such corporations and certain of their interests may be limited under certain circumstances, especially by the exclusive authority of the federal government over interstate commerce.<sup>5</sup>

2. **General Methods of Assessing — a. ASSESSMENT BY LOCAL AUTHORITIES.** — One of the methods of assessing railroads is by assessing so much of the road by local authorities, as is situated within the jurisdiction, the same as other property is assessed which is located within the limits of the county or town.<sup>6</sup>

*b. ASSESSMENT BY STATE BOARD AS ENTIRETY.* — From the peculiar nature of railroad property, its dissimilarity in use and value to the mass of other property, and its continuous extent through different localities, it is commonly regarded by the states that it cannot, in justice to the owners, be as fairly and uniformly valued by the numerous local instrumentalities provided for assessing other property, as by a state board created for the purpose.<sup>7</sup> It has been held to be neither in conflict with the constitution of a state nor inequitable, that taxable property of a railroad company should be ascertained by a state board of equalization, and that the state, county, and city taxes should be collected within each municipality on the assessment, in the proportion which the length of the road within such municipality bore to

1. **Property of Corporation Carrying on Interstate Commerce May Be Taxed in State Where It Has Situs.** — *Atlantic, etc., Tel. Co. v. Philadelphia*, 190 U. S. 160. See also the title *INTERSTATE COMMERCE*, vol. 17, pp. 106, 111.

2. See the titles *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*, vol. 21, p. 811; *FOREIGN CORPORATIONS*, vol. 13, p. 869.

3. See the titles *FOREIGN CORPORATIONS*, vol. 13, pp. 863-866; *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*, vol. 21, p. 780.

4. **Power of State to Tax Corporations Generally.** — See *supra*, this title, *Taxability of Corporations — Power of State to Tax*.

5. **State Cannot Interfere with Interstate Commerce.** — See generally the title *INTERSTATE COMMERCE*, vol. 17, p. 34.

6. **Assessment by Local Authorities.** — As illustrative of the method of assessing railroads in

each county through which they run, see *Huntington v. Central Pac. R. Co.*, 2 Sawy. (U. S.) 503; *People v. Placerville, etc.*, R. Co., 34 Cal. 656; *Sangamon, etc., R. Co. v. Morgan County*, 14 Ill. 163, 56 Am. Dec. 497; *Albany, etc., R. Co. v. Osborn*, 12 Barb. (N. Y.) 223; *Albany, etc., R. Co. v. Canaan*, 16 Barb. (N. Y.) 244; *Mohawk, etc., R. Co. v. Clute*, 4 Paige (N. Y.) 384; *Providence, etc., R. Co. v. Wright*, 2 R. I. 459; *Orange, etc., R. Co. v. Alexandria*, 17 Gratt. (Va.) 176.

7. *St. Louis, etc., R. Co. v. Worthen*, 52 Ark. 529, 41 Am. & Eng. R. Cas. 589; *Cincinnati, etc., R. Co. v. Com.*, 81 Ky. 492, 13 Am. & Eng. R. Cas. 270.

**Short Line Railroad Located in County and Belonging to Manufacturing Corporation Held Not Assessable by State Board.** — *Dayton v. Dayton Coal, etc., Co.*, 99 Tenn. 578.

the whole length of the road within the state. Methods similar to the one thus approved have been very generally adopted by statute in many of the states, and this method of assessing and taxing railroads is upheld.<sup>1</sup>

**c. PROPERTY ESSENTIAL TO OPERATION OF ROAD — REALTY — RIGHT OF WAY — RAILROAD TRACK.** — The property included in the foregoing terms, belonging to a railroad company, exclusive of that unnecessary to the operation of the road, is assessed for taxation, in many of the states, after the method given in the next preceding section. The statutes in some of the states declare what properties shall be assessed by the state board and what shall be assessed by local authorities.<sup>2</sup> In order to secure a just valuation for taxation of this class of property, all of it that is used for the convenient and proper operation of the railway may be assessed as a unit, and the valuation thus ascertained may be apportioned to the various taxing districts on a mileage basis.<sup>3</sup> In *Illinois* it is held, that land held and used as right of way by a railroad company, including the superstructures thereon, is railroad track, and not subject to assessment by the local assessor; and that land so held by

**1. Assessment of Railroad as Entirety — Taxes Apportioned Among Subdivisions of State.** — State Railroad Tax Cases, 92 U. S. 575. See also the following cases wherein the principal case is cited and approved: *Pittsburgh, etc., R. Co. v. Backus*, 154 U. S. 421; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; *Kentucky Railroad Tax Cases*, 115 U. S. 321; *St. Louis, etc., R. Co. v. Worthen*, 52 Ark. 529, 41 Am. & Eng. R. Cas. 589; *Carlisle v. Pullman Palace Car Co.*, 8 Colo. 320, 54 Am. Rep. 553; *Pittsburgh, etc., R. Co. v. Backus*, 133 Ind. 625; *Cleveland, etc., R. Co. v. Backus*, 133 Ind. 513; *Franklin County v. Nashville, etc., R. Co.*, 12 Lea (Tenn.) 521.

In *Kentucky* it is said: "The principal object of the legislature in having this board of commissioners to assess and supervise the taxing of such corporations was, that no injustice might be done the companies by subjecting their property to fragmentary assessments." *Cincinnati, etc., R. Co. v. Com.*, 81 Ky. 492, 13 Am. & Eng. R. Cas. 270.

**Taxes Imposed on Earnings in Lieu of Other Taxes.** — In some of the states taxes are imposed on the earnings, income, or receipts of railroad companies, which are in lieu of all or certain other taxes for which the company might be otherwise liable. *Pere Marquette R. Co. v. Ludington*, (Mich. 1903) 95 N. W. Rep. 417. See also *State v. St. Paul Union Depot Co.*, 42 Minn. 142, 41 Am. & Eng. R. Cas. 636.

**A Farm Purchased for a Supply of Gravel**, by a railroad company, and a branch built from the main line leading to it, are, like other property, subject to taxation, though the charter may provide that such company shall pay into the treasury of the state yearly a tax on its capital stock, and that no other tax shall be imposed on said company. *State v. Hancock*, 33 N. J. L. 315.

**2. Property Essential to Operation of Road.** — *Nashville, etc., R. Co. v. State*, 129 Ala. 142; *St. Louis, etc., R. Co. v. Miller County*, 67 Ark. 498; *Oregon Short Line R. Co. v. Gooding*, 6 Idaho 773; *Chicago, etc., R. Co. v. People*, 195 Ill. 184; *Chicago, etc., R. Co. v. Grant*, 167 Ill. 489; *State v. Hannibal, etc., R. Co.*, 135 Mo. 618; *State v. Chicago, etc., R. Co.*, 162 Mo. 391; *United New Jersey R., etc., Co. v. Jersey City*, 53 N. J. L. 547; *Hoboken R., etc., Connecting Co. v. State Board of Assessors*, 64

N. J. L. 172. See also *Burlington, etc., R. Co. v. Lancaster County*, 7 Neb. 33, 15 Neb. 251, 13 Am. & Eng. R. Cas. 664.

**Railroad Bridge Held Assessable by State Board and Not by Local Authorities.** — *Chicago, etc., R. Co. v. Richardson County*, 61 Neb. 519.

**Elevated Railroads Held to Be Railroads in Illinois.** — *Knopf v. Lake St. El. R. Co.*, 197 Ill. 212.

**Use for Trolley Road Not a Railroad Use.** — *Matter of Jersey City, etc., R. Co.*, 66 N. J. L. 501.

**Railroad Held Not Taxable by State Board of Assessors under New Jersey Act.** — *Monmouth Park Assoc. v. State Board of Assessors*, 60 N. J. L. 372.

**Definitions of Roadbed, Roadway, Right of Way, Railroad Track, and What Are Included Therein.** — *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 24 Am. & Eng. R. Cas. 523; *San Francisco, etc., R. Co. v. State Board of Equalization*, 60 Cal. 12, 13 Am. & Eng. R. Cas. 248; *San Francisco v. Central Pac. R. Co.*, 63 Cal. 467, 49 Am. Rep. 98; *Chicago, etc., R. Co. v. Cass County*, 8 N. Dak. 18.

**The Track of a Street Railway Consisting of Stringers, Ties, and Rails Affixed to the Land**, is "land" within the meaning of a statute imposing a tax, and declaring that the term "land" shall be construed to "include the land itself, and all buildings, and all other articles erected upon or affixed to the same." *People v. Cassity*, 46 N. Y. 46.

**Foundation, Columns, and Superstructure of Elevated Railroad Held Taxable as Real Estate.** — *People v. Tax, etc., Com'rs*, 82 N. Y. 459, 2 Am. & Eng. R. Cas. 343, affirming 19 Hun (N. Y.) 460. See also *People v. Tax, etc., Com'rs*, 101 N. Y. 322, reversing 23 Hun (N. Y.) 687.

**Town Lots, over Which a Railroad Company Has the Right of Way**, may be taxed as railroad track, but this precludes them from being also taxed as town or city lots. *Chicago, etc., R. Co. v. Miller*, 72 Ill. 144.

**Lots Belonging to Railroad Held Not Part of Railroad Track under Illinois Statute.** — *Chicago, etc., R. Co. v. People*, 136 Ill. 660.

**Sufficiency of Description of Railroad Property under Illinois Statute.** — *Wabash, etc., R. Co. v. People*, 137 Ill. 181.

**3. Ames v. People**, 26 Colo. 83.

a railroad company as right of way is required by law to be assessed for taxation by the state board of equalization; and that an assessment of such property by the local assessor is void.<sup>1</sup> In *California* it has been held that the franchises, rails, and rolling stock of a street railroad operated in more than one county are not assessable by the state board of equalization, but are assessable by the assessors of the several counties through which the railroad passes.<sup>2</sup>

*d. UNESSENTIAL PROPERTY.* — So much of a railroad company's realty as is unessential to the operation of the railroad is generally assessed for taxation in the same manner as the realty of natural persons. Statutes, in some jurisdictions, expressly stipulate what property is locally assessable.<sup>3</sup>

**3. Rolling Stock** — *a. GENERALLY.* — A railroad company's rolling stock may be taxable as personalty.<sup>4</sup> But the legislature may provide that the rolling stock shall be considered real estate and assessed with the road as a whole,<sup>5</sup> or that it shall be distributed for taxation among the counties, cities,

1. *Chicago, etc., R. Co. v. Miller*, 73 Ill. 144; *Ohio, etc., R. Co. v. Weber*, 96 Ill. 443; *Chicago, etc., R. Co. v. People*, 98 Ill. 350; *Peoria, etc., R. Co. v. Goar*, 118 Ill. 134; *Chicago, etc., R. Co. v. People*, 129 Ill. 571; *Chicago, etc., R. Co. v. Grant*, 167 Ill. 489.

2. *Street Railroad Not Assessable by State Board of Equalization in California.* — *San Francisco, etc., Electric R. Co. v. Scott*, (Cal. 1903) 75 Pac. Rep. 575.

3. *Realty Not Essential to Operation of Road* — *Arkansas.* — *St. Louis, etc., R. Co. v. Miller County*, 67 Ark. 498.

*Connecticut.* — *Osborn v. Hartford, etc., R. Co.*, 40 Conn. 498.

*Idaho.* — *Oregon Short Line R. Co. v. Gooding*, 6 Idaho 773.

*Illinois.* — *Chicago, etc., R. Co. v. Paddock*, 75 Ill. 616; *Chicago, etc., R. Co. v. People*, 195 Ill. 184.

*Indiana.* — *Toledo, etc., R. Co. v. Lafayette*, 22 Ind. 262.

*Iowa.* — *Herter v. Chicago, etc., R. Co.*, 114 Iowa 330.

*Missouri.* — *State v. Hannibal, etc., R. Co.*, 135 Mo. 618; *State v. Chicago, etc., R. Co.*, 162 Mo. 391.

*New Jersey.* — *United New Jersey R., etc., Co. v. Jersey City*, 53 N. J. L. 547; *Delaware, etc., R. Co. v. Newark*, 60 N. J. L. 60; *Matter of Erie R. Co.*, 64 N. J. L. 123; *National Docks R. Co. v. Assessors*, 64 N. J. L. 486; *Matter of Erie R. Co.*, 65 N. J. L. 608; *Matter of Jersey City, etc., R. Co.*, 66 N. J. L. 501. See also *Hoboken R., etc., Connecting Co. v. Assessors*, 64 N. J. L. 172.

*Tennessee.* — *Franklin County v. Nashville, etc., R. Co.*, 12 Lea (Tenn.) 521, 17 Am. & Eng. R. Cas. 445.

**Repair Shops Not Subject to Local Taxation in Pennsylvania.** — *Western New York, etc., R. Co. v. Venango County*, 183 Pa. St. 618, affirming 5 Pa. Super. Ct. 304. See also *Lehigh Valley R. Co. v. Bradford County*, 24 Pa. Co. Ct. 537.

**As to What Property Used by Railroads Is Locally Assessable or Otherwise,** see the following cases bearing on this subject:

*United States.* — *Santa Clara County v. Southern Pac. R. Co.*, 118 U. S. 394, 24 Am. & Eng. R. Cas. 523; *California v. Central Pac. R. Co.*, 127 U. S. 1, 33 Am. & Eng. R. Cas. 451;

*Chicago, etc., R. Co. v. Sabula*, 19 Fed. Rep. 177, 13 Am. & Eng. R. Cas. 443.

*Arkansas.* — *St. Louis, etc., R. Co. v. Williams*, 53 Ark. 58, 45 Am. & Eng. R. Cas. 20.

*California.* — *San Francisco v. Central Pac. R. Co.*, 63 Cal. 467, 49 Am. Rep. 98.

*Idaho.* — *Oregon Short Line R. Co. v. Yeates*, 2 Idaho 397, 33 Am. & Eng. R. Cas. 481.

*Illinois.* — *People v. Chicago, etc., R. Co.*, 116 Ill. 181, 24 Am. & Eng. R. Cas. 612; *Anderson v. Chicago, etc., R. Co.*, 117 Ill. 26, 25 Am. & Eng. R. Cas. 522; *Peoria, etc., R. Co. v. Goar*, 118 Ill. 134, 29 Am. & Eng. R. Cas. 189; *Chicago, etc., R. Co. v. People*, 129 Ill. 571, 41 Am. & Eng. R. Cas. 629.

*Indiana.* — *Pfaff v. Terre Haute, etc., R. Co.*, 108 Ind. 144, 29 Am. & Eng. R. Cas. 181.

*Kentucky.* — *Com. v. Louisville, etc., R. Co.*, 89 Ky. 134, 37 Am. & Eng. R. Cas. 418.

*Nebraska.* — *Red Willow County v. Chicago, etc., R. Co.*, 26 Neb. 660, 39 Am. & Eng. R. Cas. 556.

**4. Rolling Stock Taxable as Personalty.** — *Baltimore, etc., R. Co. v. Allen*, 22 Fed. Rep. 376, 17 Am. & Eng. R. Cas. 461; *Sangamon, etc., R. Co. v. Morgan County*, 14 Ill. 163, 56 Am. Dec. 497; *Kennedy v. St. Louis, etc., R. Co.*, 62 Ill. 395; *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 56; *Appeal Tax Ct. v. Northern Cent. R. Co.*, 50 Md. 417; *Appeal Tax Ct. v. Pullman Palace Car Co.*, 50 Md. 452; *Pacific R. Co. v. Cass County*, 53 Mo. 17; *Orange, etc., R. Co. v. Alexandria*, 17 Gratt. (Va.) 176. See also *Philadelphia, etc., R. Co. v. Appeal Tax Ct.*, 50 Md. 397; *Appeal Tax Ct. v. Western Maryland R. Co.*, 50 Md. 274.

**Rolling Stock Is Personalty and, as such, is liable to be seized and sold for the collection of a tax against the company.** *Randall v. Elwell*, 52 N. Y. 521, 11 Am. Rep. 747.

**Nature of Rolling Stock Generally,** see the title RAILROADS, vol. 23, p. 774. In regard to railroad mortgages, see the title RAILROAD SECURITIES, vol. 23, p. 807. As a subject of chattel mortgage, see the title CHATTEL MORTGAGES, vol. 5, p. 075.

**5. Rolling Stock May Be Considered Real Estate for Purposes of Taxation.** — *Louisville, etc., R. Co. v. State*, 25 Ind. 177, 87 Am. Dec. 358; *State v. Severance*, 55 Mo. 378.

In *Illinois* it was provided by statute that "the rolling stock of railroad companies shall



and towns through which the road runs, proportionally to the length of the road.<sup>1</sup>

**b. ROLLING STOCK USED IN INTERSTATE COMMERCE.** — Rolling stock engaged in interstate commerce may be taxed by the states in which it is found. This subject has been fully treated elsewhere in this work.<sup>2</sup>

**c. SLEEPING CARS.** — Under the usual contract between railroad companies and sleeping-car companies, the possession, control, and community of interest which the former have and exercise, give to the sleeping cars hired by them from foreign corporations having no place of business in the taxing state, the same situs as ordinary cars operated by the same railroad companies.<sup>3</sup> It has been held that the community of interest in the sleeping cars is such that they are to be deemed as belonging to the railroad companies for the purposes of taxation.<sup>4</sup>

**4. Railroads Taxable as Units.** — Under the generally adopted method of taxing railroads, it is held that each, from one end to the other, is an entirety, and as a whole only may be subject to taxation or coercive sale.<sup>5</sup>

As to Railroad and Sleeping-car Companies Engaged in Interstate Commerce, it has often been held that their property, in the several states through which their lines or business extended, might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular state without violating any federal restriction.<sup>6</sup>

**5. Residence of Railroads for Taxation.** — For the purposes of taxation, the corporation may be deemed a resident of each town and county through which its road passes; and for the purpose of distributing for taxation the unlocated personalty of the corporation among the several counties through which the railway runs, so as to subject this personalty to county taxation in proper proportions, the corporation may be treated as residing *sub modo* in all the counties along its line of road, and therefore in one as much as in

be listed and taxed in the several counties, towns, and cities *pro rata*, in proportion as the length of the main track in each county, town, or city bears to the whole length of the road." Under such a statute, it was held that a company was not taxable in a county wherein it ran its cars over a leased track. *Cook County v. Chicago, etc., R. Co.*, 35 Ill. 460.

**Rolling Stock Which Is Declared by Statute to Be Real Estate** may be nevertheless personal property for the purpose of sale to collect delinquent taxes. *Chicago, etc., R. Co. v. Ft. Howard*, 21 Wis. 44, 91 Am. Dec. 458.

**1. Distribution of Rolling Stock Among Counties, Etc.** — *Nashville, etc., R. Co. v. State*, 129 Ala. 142; *Cook County v. Chicago, etc., R. Co.*, 35 Ill. 460; *State v. Severance*, 55 Mo. 378; *Richmond, etc., R. Co. v. Alamance*, 84 N. Car. 504, 7 Am. & Eng. R. Cas. 339. See also *supra*, this section, *General Methods of Assessing—Assessment by State Board as Entirety*.

**2. Taxation of Rolling Stock Used in Interstate Commerce.** — See the title *INTERSTATE COMMERCE*, vol. 17, pp. 117, 118. See also *supra*, this title, *Place of Taxing Corporate Interests—Taxability of Personal Property in State Where Located*.

**3. Place of Taxing Sleeping Cars Hired by Railroad.** — *Carlisle v. Pullman Palace Car Co.*, 8 Colo. 320, 54 Am. Rep. 553, explained in *Denver, etc., R. Co. v. Church*, 17 Colo. 1, 31 Am. St. Rep. 252.

**4. Kennedy v. St. Louis, etc., R. Co.**, 62 Ill.

395. See also *Denver, etc., R. Co. v. Church*, 17 Colo. 1, 31 Am. St. Rep. 252.

**Under a Missouri Statute**, it was held that cars belonging to the Pullman Palace Car Company were not owned by a railroad within the meaning of the statute and were not to be assessed against it. *State v. St. Louis County*, 84 Mo. 234, 29 Am. & Eng. R. Cas. 192.

**Tax on Gross Earnings of Palace Car Companies—Wisconsin.** — *State v. Pullman's Palace Car Co.*, 64 Wis. 89.

**Privilege Tax on Sleeping Cars Run Within State May Be Imposed.** — *Gibson County v. Pullman South. Car Co.*, 42 Fed. Rep. 572.

**Crown Held Entitled to Duty on Sum Charged to Sleeping-car Passengers.** — *Atty.-Gen. v. London, etc., R. Co.*, 6 Q. B. D. 216, 1 Am. & Eng. R. Cas. 578, affirming 5 Ex. D. 247.

**5. Railroads Taxable in Entirety and as Units.** — *Applegate v. Ernst*, 3 Bush (Ky.) 648, 96 Am. Dec. 272; *Graham v. Mt. Sterling Coalroad Co.*, 14 Bush (Ky.) 425, 29 Am. Rep. 412; *Franklin County v. Nashville, etc., R. Co.*, 12 Lea (Tenn.) 521, 17 Am. & Eng. R. Cas. 445; *Matter of Railroad School Tax*, 78 Mo. 596, 17 Am. & Eng. R. Cas. 491. See also *supra*, this section, *General Methods of Assessing—Assessment by State Board as Entirety*.

**6. Railroad and Sleeping-car Companies Engaged in Interstate Commerce.** — *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18; *Cleveland, etc., R. Co. v. Backus*, 154 U. S. 439; *Pittsburgh, etc., R. Co. v. Backus*, 154 U. S.

another; and also it is equally proper to treat the corporation, in so far as its track and roadbed are located within the limits of incorporated cities and towns, as residing *sub modo* in them.<sup>1</sup> It has been held that the lands of a railroad are not assessable as nonresident lands.<sup>2</sup>

**6. Valuation of Railroads.** — In the absence of prescribed methods of valuation, any may be adopted which tend to the ascertainment of the value of the property for the purposes for which it is used. Personal inspection, inquiry of experts, testimony of witnesses, consideration of income, competition, earning capacity, situation with reference to markets, in short, all the elements which constitute railroad value, may be looked to as proper methods of arriving at a valuation for assessment. In many of the states there are express statutory directions concerning the methods to be pursued in estimating the value of railroads for the purpose of taxation.<sup>3</sup> It has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular state is, in the case of a railroad, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole,<sup>4</sup> or to take as the basis of assessment such proportion of the capital stock of a sleeping-car company as the number of miles of railroad over which its cars are run in a particular state bears to the whole number of miles traversed by them in that and other states.<sup>5</sup>

**7. Taxation of Lands Granted in Aid of Railroads**—*a. IN GENERAL.* — It has been held that the lands granted by Congress to aid the construction of a railroad cannot be taxed by the state until the company, having complied with the conditions of the grant, is entitled to a patent. Such lands are taxable when the railroad company has complete title to the same.<sup>6</sup>

*b. SURVEYED BUT UNPATENTED LANDS.* — As to surveyed but unpatented lands, on which the costs of survey have not been paid, it has been held that, although lands sold by the United States may be taxed before the government has parted with the legal title by issuing the patent, this

421; *Adams' Express Co. v. Ohio*, 165 U. S. 194.

**1. Railroad Deemed Resident of Each County through Which Road Passes.** — *Columbus Southern R. Co. v. Wright*, 89 Ga. 574; *Sparks v. Macon*, 98 Ga. 301; *People v. Fredericks*, 48 Barb. (N. Y.) 173, *affirmed* 48 N. Y. 70; *Buffalo, etc., R. Co. v. Erie County*, 48 N. Y. 93. See generally the title RAILROADS, vol. 23, pp. 679, 680.

**2. Lands of Railroad Held Not Assessable as Nonresident.** — *People v. Cassity*, 46 N. Y. 46; *Buffalo, etc., R. Co. v. Erie County*, 48 N. Y. 93; *People v. Fredericks*, 48 Barb. (N. Y.) 173, *affirmed* 48 N. Y. 70.

**3. Valuation of Railroads in General**—*Illinois.* — *Sangamon, etc., R. Co. v. Morgan County*, 14 Ill. 163, 56 Am. Dec. 497; *State v. Illinois Cent. R. Co.*, 27 Ill. 64, 79 Am. Dec. 396; *Chicago, etc., R. Co. v. Lee County*, 44 Ill. 248; *St. Louis, etc., R. Co. v. Surrrell*, 88 Ill. 535; *Illinois, etc., R., etc., Co. v. Stookey*, 122 Ill. 358, 31 Am. & Eng. R. Cas. 479.

*Indiana.* — *Louisville, etc., R. Co. v. State*, 25 Ind. 177, 87 Am. Dec. 358.

*Missouri.* — *State v. St. Louis, etc., R. Co.*, 8 Mo. App. 582, 1 Am. & Eng. R. Cas. 631.

*Nebraska.* — *State v. Savage*, (Neb. 1902) 91 N. W. Rep. 716.

*Nevada.* — *State v. Virginia, etc., R. Co.*, 23 Nev. 283.

*New York.* — *People v. Hicks*, 105 N. Y. 198;

*People v. Clapp*, 152 N. Y. 490; *People v. Fredericks*, 48 Barb. (N. Y.) 173, *affirmed* 48 N. Y. 70.

*Oregon.* — *Oregon, etc., R. Co. v. Jackson County*, 38 Oregon 589.

*Tennessee.* — *Louisille, etc., R. Co. v. State*, 8 Heisk. (Tenn.) 663; *Chattanooga v. Nashville, etc., R. Co.*, 7 Lea (Tenn.) 561.

**Valuation Placed upon Railroad Property by Corporation Authorities Not Conclusive.** — *Chicago, etc., R. Co. v. Paddock*, 75 Ill. 616.

**Assessment of Branch Roads.** — *Louisville, etc., R. Co. v. Bate*, 12 Lea (Tenn.) 573, 17 Am. & Eng. R. Cas. 494.

**4. Pittsburgh, etc., R. Co. v. Backus**, 154 U. S. 421. See also *Adams Express Co. v. Ohio*, 165 U. S. 194.

**5. Pullman's Palace Car Co. v. Pennsylvania**, 141 U. S. 18. See also *Adams Express Co. v. Ohio*, 165 U. S. 194.

**6. Taxability of Lands Granted in Aid of Railroads.** — *Kansas Pac. R. Co. v. Prescott*, 16 Wall. (U. S.) 603; *Tucker v. Ferguson*, 22 Wall. (U. S.) 527; *Union Pac. R. Co. v. McShane*, 22 Wall. (U. S.) 444; *Central Pac. R. Co. v. Howard*, 51 Cal. 229; *Cass County v. Morrison*, 28 Minn. 257, 5 Am. & Eng. R. Cas. 404.

**Lands Granted by State in Aid of Railroad Held Not Exempt from Taxation.** — *Memphis, etc., R. Co. v. Loftin*, 105 U. S. 258, 13 Am. & Eng. R. Cas. 377.

principle was to be understood as applicable only to cases where the right to the patent was complete, and the equitable title fully vested, without anything more to be paid, or any act done going to the foundation of the right; and hence, where there had been a large grant to a railroad company, if prepayment by the grantee of the cost of surveying the lands granted was required by the statute making the grant, before any of the lands should be conveyed, no title vested in the grantee, and the state could not levy taxes on the land, and under such levy sell and make a title which might defeat the lien of the United States.<sup>1</sup>

c. CONGRESSIONAL LEGISLATION. — Congress, in 1886, passed an act to provide for the taxation of railroad grant lands, which provided that no lands granted to any railroad corporation by any act of Congress shall be exempt from taxation by states, territories, and municipal corporations on account of the lien of the United States upon such lands for costs of surveying, selecting, and conveying the same, or because no patent has been issued therefor; but this shall not apply to lands unsurveyed; provided, that any such land sold for taxes shall be taken by the purchaser subject to the lien for costs of surveying, selecting, and conveying, to be paid in such manner by the purchaser as the secretary of the interior may by rule provide, and subject to all liens, mortgages, and rights of the United States in respect to such lands. The act was made applicable only to lands situated opposite to and coterminous with completed portions of said roads, and in organized counties; and it was provided that at any sale of lands under the provisions of the act, the United States may become a preferred purchaser, and in such case the lands sold shall be restored to the public domain and disposed of as provided by the laws relating thereto.<sup>2</sup>

8. **Taxation of Interstate Roads.** — The usual method of valuing for taxation the portion within a given state of an interstate road, is by a consideration of the proportion between mileage within and mileage without the state and of the value of the whole.<sup>3</sup>

9. **Taxation of Consolidated Roads.** — In *Illinois* it has been held that where a railroad corporation is formed under the laws of that state by the consolidation of other railroad corporations, which are merged into the new corporation thus formed, and where one of the constituent companies was incorporated under the laws of that state, the new corporation thus formed is to be considered as one of the companies incorporated under the laws of *Illinois*, within the terms and meaning of the revenue law, and the capital stock (located or used in the state) of such corporation is subject to be assessed and taxed.<sup>4</sup> Where several railroad companies have consolidated, questions concerning the operation of certain exemptions from taxation have frequently been made the subject of judicial determination. This subject is fully discussed in a prior title in this work, to which reference is made.<sup>5</sup>

1. **Taxation of Surveyed but Unpatented Lands.** — *Kansas Pac. R. Co. v. Prescott*, 16 Wall. (U. S.) 603; *Union Pac. R. Co. v. McShane*, 22 Wall. (U. S.) 444; *Northern Pac. R. Co. v. Traill County*, 115 U. S. 600. See also *Central Pac. R. Co. v. Nevada*, 162 U. S. 512; *Northern Pac. R. Co. v. Myers*, 172 U. S. 589.

2. **Congressional Legislation Providing for Taxation of Railroad Grant Lands.** — 24 U. S. Stat. at L. 143. See also *Central Pac. R. Co. v. Nevada*, 162 U. S. 512; *Northern Pac. R. Co. v. Myers*, 172 U. S. 589.

3. **Taxation of Interstate Roads.** — See *supra*, this section, *Valuation of Railroads*. See also the title INTERSTATE COMMERCE, vol. 17, p. 120.

4. **Taxation of Capital Stock of Consolidated Railroad Company.** — *Ohio, etc., R. Co. v. Weber*,

96 Ill. 443. See also *Quincy R. Bridge Co. v. Adams County*, 88 Ill. 615.

Whether consolidated railroad companies may be deemed corporations formed under laws of a particular state for purposes of taxation, see *State Treasurer v. Auditor Gen.*, 46 Mich. 224; *People v. New York, etc., R. Co.*, 129 N. Y. 474, reversing 61 Hun (N. Y.) 66; *Ohio, etc., R. Co. v. Weber*, 96 Ill. 443. See also *Quincy R. Bridge Co. v. Adams County*, 88 Ill. 615.

As to the General Effect of the Consolidation of Corporations, see the title CONSOLIDATION OF CORPORATIONS, vol. 6, p. 800.

5. **Effect of Consolidation of Railroad Companies on Exemptions from Taxation.** — See the title EXEMPTIONS (FROM TAXATION), vol. 12, pp. 361, 362. See also the title CONSOLIDATION OF CORPORATIONS, vol. 6, pp. 817, 818.

**10. Taxation of Leased Roads.** — It has been held that a state statute is not unconstitutional as impairing the obligation of a contract which is prohibited by the Federal Constitution, because the statute requires the lessee of a railroad to pay taxes assessed against the road and to deduct the same from the stipulated rent. The state has the power thus to make a lessee of a railroad a collector of taxes assessed against the lessor, the same as banks and other corporations may be constituted the means for collecting a tax assessed against shares of stock belonging to the individual stockholders.<sup>1</sup> Because a railroad company has leased its road, and the lessee has agreed to pay all taxes thereon, the company is not relieved from taxation.<sup>2</sup>

**11. Taxation of Union Depots.** — A union depot company which is an independent corporation may be taxed according to its track mileage or in such other way as may be provided by law.<sup>3</sup> But if such company is only a nominal corporation created merely for the convenience of the railroad companies in holding and managing the depot property, all the depot stock being owned by such railroad companies, a tax on the gross earnings of the railroad companies constitutes a tax on the depot stock, and it is not separately taxable as an independent corporation.<sup>4</sup>

**12. County Aid.** — Where a county subscribed stock to a railroad and imposed an *ad valorem* tax on all taxable property in the county for the purpose of raising the amount so subscribed, it was held that even if a part of the road were subject to taxation for local purposes, it could not, to any extent, be liable for the county subscription to itself for the purpose of completing its construction.<sup>5</sup>

**XIII. DOUBLE TAXATION** — **1. Power of State to Impose.** — While the double taxation of corporations and corporate interests may unjustly work a hardship, nevertheless the power of the state to subject corporations and corporate interests to double taxation under certain circumstances is ample, unless restricted by constitutional provisions.<sup>6</sup>

**2. Construction of Statutes.** — Statutes will be so construed as to prevent double taxation, if possible. Double taxation is never to be presumed. Justice requires that the burdens of government shall, as far as is practicable, be laid equally on all, and if property is taxed once in one way it would ordinarily be wrong to tax it again in another way, when the burden of both taxes falls on the same person. Sometimes tax laws have that effect, but if they do it is because the legislature has unmistakably so enacted. All presumptions are against such an imposition.<sup>7</sup>

1. Vermont, etc., R. Co. v. Vermont Cent. R. Co., 63 Vt. 1, 46 Am. & Eng. R. Cas. 646.

In New York, it has been held that it was improper to assess and tax the lessee of a railroad as if it were the owner of the property. People v. Feitner, 61 N. Y. App. Div. 129, affirmed 171 N. Y. 641.

2. Effect of Lease. — Yazoo, etc., Valley R. Co. v. Adams, 76 Miss. 545.

3. Taxation of Union Depot Companies in General. — Fort St. Union Depot Co. v. Railroad Com'rs, 118 Mich. 340.

4. Union Depot Company Whose Stock Is Owned by Railroads. — State v. St. Paul Union Depot Co., 42 Minn. 142, 41 Am. & Eng. R. Cas. 636.

5. Applegate v. Ernst, 3 Bush (Ky.) 648, 96 Am. Dec. 272; Elizabethtown, etc., R. Co. v. Carter County, (Ky. 1892) 18 S. W. Rep. 370.

6. Power of State to Subject Corporations and Corporate Interests to Double Taxation. — As bearing on the power of the state to subject corporations and corporate interests to double taxation, see Toll-Bridge Co. v. Osborn, 35 Conn. 7; U. S. Express Co. v. Ellyson, 28 Iowa

370; State v. Branin, 23 N. J. L. 484; State v. Collector, 25 N. J. L. 315; Rudderow v. State, 31 N. J. L. 512; Prairie Cattle Co. v. Williamson, 5 Okla. 488; Com. v. Fall Brook Coal Co., 156 Pa. St. 488. And see generally the title TAXATION, ante.

7. Statutes Construed to Avoid Taxation — United States. — Tennessee v. Whitworth, 117 U. S. 129, 29 Am. & Eng. R. Cas. 205.

Alabama. — Board of Revenue v. Montgomery Gas-Light Co., 64 Ala. 269.

Connecticut. — Toll Bridge Co. v. Osborn, 35 Conn. 7; Osborn v. New York, etc., R. Co., 40 Conn. 491.

Massachusetts. — Salem Iron Factory Co. v. Danvers, 10 Mass. 514.

Minnesota. — Rice County v. Citizens' Nat. Bank, 23 Minn. 280.

Missouri. — Hannibal, etc., R. Co. v. Shacklett, 30 Mo. 350; State v. Hannibal, etc., R. Co., 37 Mo. 265; State v. St. Louis, etc., R. Co., 77 Mo. 202, 13 Am. & Eng. R. Cas. 426; Valle v. Ziegler, 84 Mo. 214.

New Hampshire. — Smith v. Burley, 9 N.

**3. Separate Taxation of Shares and Capital Stock or Property.** — Since the shares of stock in a corporation constitute a distinct property from the capital stock and property belonging to the corporation, it is very generally held that the taxation of the shares and also the capital stock or property of the corporation does not constitute double taxation prohibited by law.<sup>1</sup> But this rule has not been followed without exception, as it has been held otherwise under the laws of some jurisdictions which perhaps pursue a more equitable and just policy.<sup>2</sup>

**4. Shares Held in Foreign Corporations.** — It is established that a tax may be lawfully levied on the shares in the capital stock of a foreign corporation held and owned by residents of a state which imposes the tax, though the corporation has paid taxes on its capital stock or property under the laws of the state under which the corporation was created.<sup>3</sup>

**5. Simultaneous Tax on Franchise, Capital Stock, Property, and Shares.** — It has been held that it is within the legislative power, in respect to corporations, to levy any two or more of the following taxes simultaneously: on the franchise (including dividends); on the capital stock; on the tangible property of the corporation; and on the shares of the capital stock in the hands of the stockholders.<sup>4</sup> In discussing the principles of law relating to the taxation of

*H.* 423; *Nashua Sav. Bank v. Nashua*, 46 N. H. 389; *Cheshire County Telephone Co. v. State*, 63 N. H. 167.

*New Jersey.* — *Jersey City Gaslight Co. v. Jersey City*, 46 N. J. L. 194.

*New York.* — *People v. Roberts*, 32 N. Y. App. Div. 113, affirmed 157 N. Y. 677.

*Pennsylvania.* — *Pennsylvania L., etc., Ins. Co. v. Com.*, 22 W. N. C. (Pa.) 340; *Com. v. Fall Brook Coal Co.*, 156 Pa. St. 488.

*Rhode Island.* — *Providence Sav. Inst. v. Gardiner*, 4 R. I. 484; *American Bank v. Mumford*, 4 R. I. 478.

*Texas.* — *Rosenberg v. Weeks*, 67 Tex. 578.

In *New Hampshire* it is provided by statute that no statutory provisions shall be so construed as to subject any stock to double taxation. See *Kimball v. Milford*, 54 N. H. 406. See also *Robinson v. Dover*, 59 N. H. 521.

**1. Taxation of Shares and Capital Stock or Property of Corporation Not Double Taxation — United States.** — *Van Allen v. Assessors*, 3 Wall. (U. S.) 573; *Farrington v. Tennessee*, 95 U. S. 679; *New Orleans v. Houston*, 119 U. S. 265.

*Alabama.* — *Sumter County v. National Bank*, 62 Ala. 464, 34 Am. Rep. 30; *Jefferson County Sav. Bank v. Hewitt*, 112 Ala. 546.

*Illinois.* — *Greenleaf v. Board of Review*, 184 Ill. 226, 75 Am. St. Rep. 168; *Porter v. Rockford, etc., R. Co.*, 76 Ill. 561; *Danville Banking, etc., Co. v. Parks*, 88 Ill. 170; *Illinois Nat. Bank v. Kinsella*, 201 Ill. 31.

*Iowa.* — *Cook v. Burlington*, 59 Iowa 251, 44 Am. Rep. 679; *Henkle v. Keota*, 68 Iowa 334. *New Jersey.* — *State v. Branin*, 23 N. J. L. 484.

*North Carolina.* — *Belo v. Forsyth County*, 82 N. Car. 415, 33 Am. Rep. 688; *Durham County v. Blackwell Durham Tobacco Co.*, 116 N. Car. 441; *Beaufort County v. Old Dominion Steamship Co.*, 128 N. Car. 558.

*Ohio.* — *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547; *Lee v. Sturges*, 46 Ohio St. 153.

*Pennsylvania.* — *Lycoming County v. Gamble*, 47 Pa. St. 106.

*Rhode Island.* — *Providence, etc., R. Co. v. Wright*, 2 R. I. 459.

*Tennessee.* — *Memphis v. Ensley*, 6 Baxt. (Tenn.) 553, 32 Am. Rep. 532; *Nashville Gas Light Co. v. Nashville*, 8 Lea (Tenn.) 406; *Union Bank v. State*, 9 Yerg. (Tenn.) 490; *South Nashville St. R. Co. v. Morrow*, 87 Tenn. 406, 39 Am. & Eng. R. Cas. 518; *Memphis v. Union, etc., Bank*, 91 Tenn. 546; *Memphis v. Home Ins. Co.*, 91 Tenn. 558; *State v. Bank of Commerce*, 95 Tenn. 221.

*Virginia.* — *State Bank v. Richmond*, 79 Va. 113; *Com. v. Charlottesville Perpetual Bldg., etc., Co.*, 90 Va. 790, 44 Am. St. Rep. 950; *Allen v. Com.*, 98 Va. 80.

*Wisconsin.* — *Second Ward Sav. Bank v. Milwaukee*, 94 Wis. 587.

**2. Tax on Capital Stock or Property and Shares Held Double Taxation.** — *Burke v. Badlam*, 57 Cal. 594; *Rice County v. Citizens' Nat. Bank*, 23 Minn. 280; *Cheshire County Telephone Co. v. State*, 63 N. H. 167; *Gillespie v. Gaston*, 67 Tex. 599. See also *San Francisco v. Fry*, 63 Cal. 470, 49 Am. Rep. 98; *Frederick County v. Farmers', etc., Nat. Bank*, 48 Md. 117; *Gordon v. Baltimore*, 5 Gill (Md.) 231; *Tax Cases*, 12 Gill & J. (Md.) 117; *Stroh v. Detroit*, (Mich. 1902) 90 N. W. Rep. 1029; *Com. v. Fall Brook Coal Co.*, 156 Pa. St. 488.

**Taxation of Stock Exchange Seat Invalid as Double Taxation Where Property of Association Is Taxed.** — *San Francisco v. Anderson*, 103 Cal. 69, 42 Am. St. Rep. 98.

**3. Shares of Stock in Foreign Corporation.** — *Greenleaf v. Board of Review*, 184 Ill. 226, 75 Am. St. Rep. 168; *San Francisco v. Fry*, 63 Cal. 470, 49 Am. Rep. 98; *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547.

**4. Franchise, Capital Stock, Tangible Property, and Shares of Stock Taxed Simultaneously.** — *Durham County v. Blackwell Durham Tobacco Co.*, 116 N. Car. 441; *Beaufort County v. Old Dominion Steamship Co.*, 128 N. Car. 558.

The Franchise of a Corporation "is capable of a valuation apart from the property which the corporation may happen to own, and a valuation of the franchise does not necessarily

corporate franchises, it was pointed out that if a tax is levied on the franchise of a corporation as distinguished from a tax on property, no complaint can be made that the corporation is already taxed on its property.<sup>1</sup> Thus it has been held that a franchise tax on the net earnings or income of certain corporations, and a tax on bonds owned by them, is not prohibited double taxation, as the income tax is on the franchise measured by the net earnings or income.<sup>2</sup>

**6. Statutory Provisions to Avoid Double Taxation.** — Some of the states have provided against double taxation by enacting statutes exempting certain corporate interests where other interests are taxed, and exempting shares of stock from taxation when the corporation itself is taxed on its property or capital stock.<sup>3</sup> It has been held that an assessment, by a board of equalization, of the capital stock of a corporation for taxation by first ascertaining the market or fair cash value of the shares of the capital stock and the market or fair cash value of its debts, exclusive of those for current expenses, and adding them together, and taking from the sum the equalized valuation of all its tangible property, was proper, as showing the balance of the capital stock over and above the assessed value of the tangible property. The assessed valuation of the personal property is deducted to avoid double taxation.<sup>4</sup>

**XIV. CORPORATION REQUIRED TO FURNISH LIST OF TAXABLE PROPERTIES.** — In many of the states corporations, like other taxable subjects, are required by statute to make and furnish to the proper authorities a list of their taxable properties, and in some states certain penalties are imposed for a failure or refusal of a corporation to comply with the statutory requirements.<sup>5</sup> Thus corporations in some jurisdictions are required to furnish a list of their stockholders,<sup>6</sup> the number and market value of their shares of stock,<sup>7</sup> the capital stock and property,<sup>8</sup> a report of the amount of their business,<sup>9</sup> and their indebtedness.<sup>10</sup> Under the generally adopted system of taxing railroads, it is usually required that certain officers of railroad companies shall make out and return to the proper authorities a list of the railroad properties subject to taxation.<sup>11</sup>

or properly include a valuation of the corporate property." *Wilmington, etc., R. Co. v. Brunswick County*, 72 N. Car. 10.

"The Powers and Privileges Which Constitute the Franchises of a Corporation are in a just sense property, and quite distinct and separate from the property which, by the use of such franchises, the corporation may acquire." *Monroe County Sav. Bank v. Rochester*, 37 N. Y. 365, holding that a tax on the franchise of a bank is not invalid because the bank has invested in nontaxable bonds of the United States.

Under the Laws of Texas it has been held that to tax the franchise of a corporation after all its property has been taxed at its full value is prohibited double taxation. *Southwestern Tel., etc., Co. v. Meerscheidt*, (Tex. Civ. App. 1901) 65 S. W. Rep. 381.

1. See *supra*, this title, *Franchise Tax — Distinguished from Property Tax*.

2. *Franchise Tax on Income and Tax on Bonds Not Invalid as Double Taxation.* — *Com. v. New York, etc., R. Co.*, 150 Pa. St. 234.

3. See the statutes of the various states. See also the title *TAXATION, ante*, p. 567.

4. *Distilling, etc., Co. v. People*, 161 Ill. 101. See also *Indianapolis, etc., R. Co., v. Vance*, 96 U. S. 450; *Pacific Hotel Co. v. Lieb*, 83 Ill. 602.

5. *Corporations Required to Furnish List of Taxable Properties.* — See the statutes of the various states.

6. *List of Stockholders Required to Be Furnished* — *Donovan v. Firemen's Ins. Co.*, 30 Md. 155; *Boston, etc., R. Co. v. Com.*, 157 Mass. 68; *Newman v. Wait*, 46 Vt. 689.

In Tennessee a statute made it the duty of the officers of the corporation to keep a list of the stockholders always on hand subject to the free inspection of the assessor. See *Memphis v. Home Ins. Co.*, 91 Tenn. 558.

7. *Number and Market Value of Shares.* — *State v. New York, etc., R. Co.*, 60 Conn. 326.

8. *List of Capital Stock and Property Required.* — *Lake County v. Sulphur Bank Quicksilver Min. Co.*, 68 Cal. 14; *People v. Ward*, 105 Ill. 620; *State v. Hannibal, etc., R. Co.*, 60 Mo. 143; *State v. Washoe County*, 5 Nev. 317; *People v. Tax, etc., Com'rs*, 99 N. Y. 254; *Bramwell Bank v. Mercer County Ct.*, 36 W. Va. 341.

9. *Report of Amount of Business Required.* — *Board of Revenue v. Montgomery Gas Light Co.*, 64 Ala. 269; *State v. Louisiana Mut. Ins. Co.*, 19 La. Ann. 474; *State v. McFetridge*, 64 Wis. 130; *State v. Harshaw*, 76 Wis. 230.

10. *Report of Indebtedness Required.* — See *Pacific Hotel Co. v. Lieb*, 83 Ill. 602; *Com. v. Pennsylvania Salt Mfg. Co.*, 145 Pa. St. 53.

11. *Railroads Required to Return Lists of Taxable Property.* — *Cowen v. Aldridge*, 114 Fed. Rep. 44, 51 C. C. A. 670; *Chicago, etc., R. Co. v. People*, 195 Ill. 184; *Chicago, etc., R. Co. v. People*, 99 Ill. 464; *Chicago, etc., R. Co. v. Peo-*

**XV. EXEMPTIONS.** — The exemption of corporations and their elements of taxable value from taxation, also the construction of statutes imposing exemptions from taxation, and the operation of exemptions of certain corporate interests upon other corporate properties, have been fully treated elsewhere in this work.<sup>1</sup>

**TAX LIENS.** — See the title TAXATION, *ante*, p. 567.

**TAX SALES.** — See the title TAXATION, *ante*, p. 567.

ple, 98 Ill. 350; Porter v. Rockford, etc., R. Co., 76 Ill. 561; State v. Central Pac. R. Co., 17 Nev. 259; State v. Board of Equalization, 7 Nev. 83; State v. Austin, etc., R. Co., 94 Tex.

530. See also the statutes of the various states.

1. **Exemption of Corporations and Corporate Interests from Taxation.** — See generally the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 266.

# TAX TITLES.

BY JOHN LEHMAN.

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## CROSS-REFERENCES.

For matters of *PROCEDURE*, see the title *TAXATION*, 21 *ENCYCLOPÆDIA OF PLEADING AND PRACTICE* 480 *et seq.*

For specific applications of the rules herein stated, see the titles *ABSTRACT OF TITLE*, vol. 1, p. 219; *ACKNOWLEDGMENTS*, vol. 1, p. 568; *ADVERSE POSSESSION*, vol. 1, pp. 804, 846 *et seq.*; *COUNTIES*, vol. 7, p. 933; *DE FACTO OFFICERS*, vol. 8, p. 819.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the titles *CLOUD ON TITLE*, vol. 6, p. 149; *DEEDS*, vol. 9, p. 90; *JUDICIAL SALES*, vol. 17, p. 948; *LIMITATION OF ACTIONS*, vol. 19, p. 136; *REAL PROPERTY*, vol. 23, p. 933; *RECORDING ACTS*, vol. 24, p. 73; *STATES*, vol. 26, p. 463; *TAXATION*, *ante*, p. 567, and references there given.

**I. DEFINITION.** — A tax title is the title by which one holds land purchased at a tax sale.<sup>1</sup>

**II. WHO MAY ACQUIRE TITLE** — 1. **Persons under Duty to Pay Taxes** —

a. **GENERAL RULE.** — A purchase at a tax sale by one upon whom rests the duty of paying the taxes operates merely as a payment of such taxes, leaving the title to stand as if the payment had been made before sale.<sup>2</sup> But one who is under no duty, legal or moral, to pay the taxes for which property is sold may purchase at the sale and acquire title under such purchase,<sup>3</sup> even though he was in possession at the time of the assessment.<sup>4</sup>

Thus, an **Owner** cannot acquire a different title by neglecting to pay the taxes and purchasing at the tax sale;<sup>5</sup> and the same rule applies to a purchase

1. Black's L. Dict.

For the Requisite Steps up to the Deed for the acquisition of a valid tax title, as the assessment, levy, sale, etc., see the title *TAXATION*, *ante*, p. 567.

2. **Person under Duty to Pay Taxes Acquires No Title.** — *Gates v. Lindley*, 104 Cal. 451; *Middletown Sav. Bank v. Bacharach*, 46 Conn. 513; *Doud v. Blood*, 89 Iowa 237; *Chambers v. Wilson*, 2 Watts (Pa.) 495; *Perkins v. Wilkinson*, 86 Wis. 538.

**Purchase by Grantor with General Warranty.** — *Frank v. Carruthers*, 108 Mo. 569.

3. **Purchaser under No Duty May Acquire Title** — *Colorado*. — *Bennet v. North Colorado Springs Land, etc., Co.*, 23 Colo. 470, 58 Am. St. Rep. 281.

*Georgia*. — *University Bank v. Athens Sav. Bank*, 107 Ga. 246.

*Illinois*. — *Oswald v. Wolf*, 129 Ill. 200.

*Kansas*. — *Smith v. Newman*, 62 Kan. 318.

*Michigan*. — *Blackwood v. Van Vleit*, 30 Mich. 118.

*Pennsylvania*. — *Powell v. Lantzy*, 173 Pa. St. 543.

*Wisconsin*. — *Miller v. Donahue*, 96 Wis. 498.

**When Title Is in Controversy.** — *Jeffery v. Hursh*, 45 Mich. 59.

But where, in an action for the recovery of a lot, the defendant relies upon the tax title, acquired during the pendency of the suit, under a tax sale from which the plaintiff had sought to redeem prior to the expiration of the time of redemption from the person who then held the certificate of sale, the plaintiff in the suit is entitled to redeem. *Butterfield v. Walsh*, 36 Iowa 534.

4. **Purchaser in Possession.** — *Bowman v. Cockrill*, 6 Kan. 311.

5. **Owner** — *Alabama*. — *Thorington v. Montgomery*, 88 Ala. 548.

of lands of another sold jointly with land belonging to the purchaser upon which the taxes are delinquent.<sup>1</sup>

A Vendee under an Executory Contract who is in possession and under the duty to pay the taxes cannot acquire title by purchasing at a tax sale<sup>2</sup> though the title bond is silent as to such duty;<sup>3</sup> and the assignee of such vendee is under the same disability.<sup>4</sup>

One Who Receives the Rents and Profits and whose duty it is to pay the taxes is likewise debarred from acquiring title at a tax sale.<sup>5</sup>

One in Possession, Claiming Title, when the assessment is made is subject to the same rule.<sup>6</sup>

*Arkansas.*—*Pleasants v. Scott*, 21 Ark. 370, 76 Am. Dec. 403.

*Connecticut.*—*Middletown Sav. Bank v. Bacharach*, 46 Conn. 513.

*Florida.*—*Paul v. Fries*, 18 Fla. 573.

*Illinois.*—*McAlpine v. Zitzer*, 119 Ill. 273.

*Iowa.*—*Blumenthal v. Culver*, 116 Iowa 326; *Griffin v. Turner*, 75 Iowa 250.

*Louisiana.*—*Montgomery v. Whitfield*, 41 La. Ann. 649.

*Missouri.*—*Smith v. Phelps*, 63 Mo. 585.

*Wisconsin.*—*Perkins v. Wilkinson*, 86 Wis. 538; *Swift v. Agnes*, 33 Wis. 228.

But see *Branhan v. Bezanson*, 33 Minn. 49.

1. **Lands of Purchaser and Lands of Another Sold Together.**—*Lewis v. Ward*, 99 Ill. 525; *Cooley v. Waterman*, 16 Mich. 366; *State v. Williston*, 20 Wis. 228. But see *Towle v. Shelly*, 19 Neb. 636.

**Mortgagee.**—The inhibitions of the rule apply as strongly to a mortgagee as to an owner. *Cone v. Wood*, 108 Iowa 260, 75 Am. St. Rep. 223.

**Procuring Improper Assessment.**—One cannot have property in which he has no interest listed for assessment and taxation in his own name, make default in payment, and acquire title thereto by purchasing at the sale. *Pope v. Wilder*, 41 S. Car. 540.

And the same is true where the party improperly procures the assessment of land not his own together with land which he owns, and purchases the whole at the sale. *Griffith v. Silver*, 125 N. Car. 368.

But it is otherwise as to one in whose name land is assessed without any agency of his own and when he was under no duty to pay the taxes. *Pleasants v. Scott*, 21 Ark. 370, 76 Am. Dec. 403.

**Land in Which Several Have Easement.**—*Towne v. Salentine*, 92 Wis. 404.

**The Claimant under a Prior Void Tax Title may acquire title under a subsequent sale for taxes.** *Staley v. Leomans*, 53 Ark. 428, 22 Am. St. Rep. 231; *Neal v. Frazier*, 63 Iowa 451; *Mallory v. French*, 44 Iowa 133; *Coxe v. Gibson*, 27 Pa. St. 160, 67 Am. Dec. 454; *Eaton v. North*, 29 Wis. 75.

2. **Vendee in Executory Contract.**—*Oliver v. Croswell*, 42 Ill. 41; *Baily v. Doolittle*, 24 Ill. 577; *Stinson v. Richardson*, 48 Iowa 541; *Haskell v. Putnam*, 42 Me. 244; *Quinn v. Quinn*, 27 Wis. 168. See also *Jones v. Wells*, 31 Mich. 170.

3. **Title Bond Silent as to Duty.**—*Johnston v. Smith*, 70 Ala. 108; *Fitzgerald v. Spain*, 30 Ark. 95; *Hunt v. Rowland*, 22 Iowa 54; *Miller v. Corey*, 15 Iowa 166; *Connecticut Mut. L. Ins. Co. v. Bulte*, 49 Mich. 113; *Harkreader v.*

*Clayton*, 56 Miss. 383, 31 Am. Rep. 369. See also *Seaver v. Cobb*, 98 Ill. 200.

4. **Assignee of Vendee.**—*Bertram v. Cook*, 32 Mich. 518.

5. **One Receiving Rents and Profits.**—*Sanders v. Ellis*, 42 Ark. 215; *Hunt v. Gaines*, 33 Ark. 267; *Duffitt v. Tuhau*, 28 Kan. 292; *Rowley v. Wilkinson*, 8 Kan. App. 435. But as to taxes already accrued, see *Uhl v. Small*, 54 Kan. 651.

6. **One in Possession under Claim of Title.**—*Arkansas.*—*Rodman v. Sanders*, 44 Ark. 504; *Guynn v. McCauley*, 32 Ark. 97; *Jacks v. Dyer*, 31 Ark. 334.

*California.*—*Christy v. Fisher*, 58 Cal. 256; *Reily v. Lancaster*, 39 Cal. 354; *Garwood v. Hastings*, 38 Cal. 216; *Barrett v. Amerein*, 36 Cal. 322; *Bernal v. Lynch*, 36 Cal. 135; *Copping v. Rice*, 33 Cal. 408; *McMinn v. Whelan*, 27 Cal. 300; *Kelsey v. Abbott*, 13 Cal. 609.

*Dakota.*—*Wambole v. Foote*, 2 Dak. 1.

*Illinois.*—*Stubblefield v. Borders*, 92 Ill. 279; *Glancy v. Elliott*, 14 Ill. 456; *Varis v. Thomas*, 12 Ill. 442; *Choteau v. Jones*, 11 Ill. 301, 50 Am. Dec. 460.

*Iowa.*—*Stears v. Hollenbeck*, 38 Iowa 550; *Anson v. Anson*, 20 Iowa 55, 89 Am. Dec. 514; *Thomas v. Stickle*, 32 Iowa 71.

*Kansas.*—*Miller v. Ziegler*, 31 Kan. 417.

*Michigan.*—*Dubois v. Campau*, 24 Mich. 360.

*Mississippi.*—*Pool v. Ellis*, 64 Miss. 555; *Rule v. Broach*, 58 Miss. 552.

*Ohio.*—*Douglas v. Dangerfield*, 14 Ohio 522.

*Wisconsin.*—*Link v. Doerfer*, 42 Wis. 391, 24 Am. Rep. 417; *Whitney v. Gunderson*, 31 Wis. 359; *Fallass v. Pierce*, 30 Wis. 443; *Lybrand v. Haney*, 31 Wis. 230; *Jones v. Davis*, 24 Wis. 229; *Bassett v. Welch*, 22 Wis. 175; *Smith v. Lewis*, 20 Wis. 350.

See also *Ballance v. Forsyth*, 13 How. (U. S.) 18.

**Possession Without Claim of Title does not prevent the acquisition of title at a sale for taxes.** *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94; *Seaver v. Cobb*, 98 Ill. 200; *Stubblefield v. Borders*, 92 Ill. 279; *Blakeley v. Bestor*, 13 Ill. 709; *Buckley v. Taggart*, 62 Ind. 236; *Curtis v. Smith*, 42 Iowa 665; *Weichselbaum v. Curlett*, 20 Kan. 709, 27 Am. Rep. 204; *Bowman v. Cockrill*, 6 Kan. 311; *Sands v. Davis*, 40 Mich. 14.

**Where Taxes Were a Lien when Possession Was Taken** it was held that the possessor could not acquire title at a subsequent sale for such taxes. *Lacey v. Davis*, 4 Mich. 140, 66 Am. Dec. 524, criticised in *Blackwood v. Van Vleit*, 30 Mich. 118.

**A Purchaser in Possession under a Prior Sale may purchase at a subsequent sale before title**

A Tenant in Common or His Grantee cannot generally obtain title by purchase at a sale for taxes.<sup>1</sup> It is otherwise, however, where the interests of the tenants were not acquired by the same instrument or at the same time and no relation of trust existed between them,<sup>2</sup> or where the tax title is not founded upon any default of the cotenant acquiring it, for example, where the taxes were levied, the land was sold, and the time of redemption had expired before such tenant had acquired any interest in the land,<sup>3</sup> or after the cotenant's interest had ceased or the tenancy had been destroyed.<sup>4</sup>

A Tenant for Life cannot purchase as against the remainderman or reversioner.<sup>5</sup>

under the first sale has become absolute. *Tweed v. Metcalf*, 4 Mich. 579.

1. **Tenant in Common or Grantee — Alabama.** — *Johns v. Johns*, 93 Ala. 239; *Donnor v. Quartermas*, 90 Ala. 164, 24 Am. St. Rep. 778.

**Arkansas.** — *Cocks v. Simmons*, 55 Ark. 104, 29 Am. St. Rep. 28.

**California.** — *Emeric v. Alvarado*, 90 Cal. 444.

**Illinois.** — *McChesney v. White*, 140 Ill. 330; *Burgett v. Taliaferro*, 118 Ill. 503; *Bracken v. Cooper*, 80 Ill. 221; *Chickering v. Faile*, 38 Ill. 342; *Brown v. Hogle*, 30 Ill. 119.

**Indiana.** — *Bender v. Stewart*, 75 Ind. 88.

**Iowa.** — *Funson v. Bradt*, 105 Iowa 471; *Clark v. Brown*, 70 Iowa 139; *Smith v. Smith*, 68 Iowa 608; *Sheean v. Shaw*, 47 Iowa 411; *Conn v. Conn*, 58 Iowa 747; *Shell v. Walker*, 54 Iowa 386; *Fallon v. Chidester*, 46 Iowa 588, 26 Am. Rep. 164; *Austin v. Barrett*, 44 Iowa 488; *Weare v. Van Meter*, 42 Iowa 128, 20 Am. Rep. 616.

**Kansas.** — *Phipps v. Phipps*, 39 Kan. 495; *Delashmuth v. Parrent*, 39 Kan. 548; *Muthersbaugh v. Burke*, 33 Kan. 260.

**Louisiana.** — *Hake v. Lee*, 106 La. 482.

**Maine.** — *Williams v. Gray*, 3 Me. 207, 14 Am. Dec. 234.

**Michigan.** — *Richards v. Richards*, 75 Mich. 408; *Dubois v. Campau*, 24 Mich. 360; *Butler v. Porter*, 13 Mich. 292; *Page v. Webster*, 8 Mich. 263, 77 Am. Dec. 446.

**Minnesota.** — *Easton v. Scofield*, 66 Minn. 425; *Holterhoff v. Mead*, 36 Minn. 42.

**Mississippi.** — *Clark v. Rainey*, 72 Miss. 151; *Falkner v. Thurmond*, (Miss. 1898) 23 So. Rep. 584; *Fox v. Coon*, 64 Miss. 465; *Wise v. Hyatt*, 68 Miss. 714; *Harrison v. Harrison*, 56 Miss. 174; *Allen v. Poole*, 54 Miss. 323.

**New Hampshire.** — *Barker v. Jones*, 62 N. H. 497, 13 Am. St. Rep. 586.

**Ohio.** — *Clark v. Lindsey*, 47 Ohio St. 437; *Piatt v. St. Clair*, 6 Ohio 227.

**Pennsylvania.** — *Davis v. King*, 87 Pa. St. 261; *Maul v. Rider*, 51 Pa. St. 377; *Lloyd v. Lynch*, 28 Pa. St. 419, 70 Am. Dec. 137.

**Vermont.** — *Downer v. Smith*, 38 Vt. 464; *Willard v. Strong*, 14 Vt. 532, 39 Am. Dec. 240.

**West Virginia.** — *Cecil v. Clark*, 44 W. Va. 659; *Parker v. Brast*, 45 W. Va. 399.

**Becoming Cotenant After Acquisition of Tax Certificate.** — *Tice v. Derby*, 59 Iowa 312; *Flinn v. McKinley*, 44 Iowa 68.

**Husband of Tenant in Common.** — *Busch v. Huston*, 75 Ill. 343; *Burns v. Byrne*, 45 Iowa 285; *Chace v. Durfee*, 16 R. I. 248. *Compare Broquet v. Warner*, 43 Kan. 48, 19 Am. St. Rep. 124, as to the effect of a purchase by the husband as against a mortgagee under a mortgage from an ancestor of the coheirs.

**Trustee of Tenant in Common.** — *Sorenson v. Davis*, 83 Iowa 405.

**As Against Strangers** the title acquired by a cotenant will be good. *Burgett v. Williford*, 56 Ark. 187, 35 Am. St. Rep. 96.

**Adverse Possession** for the requisite period may operate as an ouster, however, and perfect the title of a cotenant holding under a tax deed. *English v. Powell*, 119 Ind. 93. See also *Richards v. Carter*, 201 Ill. 165, where an heir to an undivided interest purchased a tax title from the purchaser at the tax sale and continued to occupy the claim of title under his deed from such tax purchaser for the statutory period; *Wright v. Sperry*, 21 Wis. 331, where the purchaser at a foreclosure sale acquired an undivided interest with the mortgagor and purchased thereafter an outstanding tax title to the entire premises. But see *Davis v. Chapman*, 24 Fed. Rep. 674.

2. **Interest Not Acquired at Same Time or by Same Instruments.** — *Boynton v. Veldman*, (Mich. 1902) 91 N. W. Rep. 1022.

3. **Title Not Founded on Tenant's Default.** — *Boynton v. Veldman*, (Mich. 1902) 91 N. W. Rep. 1022. See also *Wright v. Sperry*, 21 Wis. 331.

4. **After Cotenant's Interest Has Ceased.** — *Jonas v. Flanniken*, 69 Miss. 577.

**Partition Before Assessment.** — *Maul v. Rider*, 51 Pa. St. 377.

**Taxes Assessed Separately.** — *Bennet v. North Colorado Springs Land, etc., Co.*, 23 Colo. 470, 58 Am. St. Rep. 281.

**Acquisition of Title from Purchaser at Tax Sale.** — The rule against the acquisition of an outstanding title by the tenant in common against his cotenants is held in some cases not to apply where a tenant in common purchases from a stranger the title acquired by him at the tax sale after expiration of the time to redeem. *Kirkpatrick v. Mathiot*, 4 W. & S. (Pa.) 251; *Reinboth v. Zerbe-Run Imp. Co.*, 29 Pa. St. 139; *Lewis v. Robinson*, 10 Watts (Pa.) 355. See also *Alexander v. Sully*, 50 Iowa 192; *Coleman v. Coleman*, 3 Dana (Ky.) 398, 28 Am. Dec. 86; *Keele v. Cunningham*, 2 Heisk. (Tenn.) 288; *Frentz v. Klotsch*, 28 Wis. 312. *Contra*, *Dubois v. Campau*, 24 Mich. 360; *Parker v. Brast*, 45 W. Va. 399; *Battin v. Woods*, 27 W. Va. 58, in which cases it was held that whether the defendant purchases at the sale directly or from a stranger who purchases at the sale, his purchase inures to the benefit of the cotenants.

5. **Tenant for Life — United States.** — *Patrick v. Sherwood*, 4 Blatchf. (U. S.) 112; *Chaplin v. U. S.*, 29 Ct. Cl. 231.

**Iowa.** — *Olleman v. Kelgore*, 52 Iowa 38.

**Kansas.** — *Menger v. Carruthers*, 3 Kan. App.

75.

**A Tenant in Possession** under an agreement to pay taxes is subject to the rule.<sup>1</sup>

**A Licensee** has likewise been held to be under disability.<sup>2</sup>

**A Mortgagee** is held to come under the general rule prohibiting acquisition of title,<sup>3</sup> especially when he is in possession,<sup>4</sup> though it is held in some cases that a mortgagee out of possession may acquire an independent title under the tax sale.<sup>5</sup>

*Maine.*—*Dunn v. Snell*, 74 Me. 22; *Varney v. Stevens*, 22 Me. 331.

*Mississippi.*—*Jones v. Merrill*, 69 Miss. 747; *Stewart v. Matheny*, 66 Miss. 21, 14 Am. St. Rep. 538.

*New Jersey.*—*Foley v. Kirk*, 33 N. J. Eq. 170.

*New York.*—*Burhans v. Van Zandt*, 7 N. Y. 524.

*Wisconsin.*—*Phelan v. Boylan*, 25 Wis. 679.

**Color of Title to Vended of Life Tenant.**—In *Lewis v. Pleasants*, 143 Ill. 271, it was held that where a life tenant procures a tax deed, his warranty deed thereafter, under which his grantee takes possession, gives color of title under which the possession may be adverse to the remaindermen.

**1. Tenant under Agreement to Pay Taxes.**—*Alabama.*—*Donnor v. Quartermas*, 90 Ala. 170, 24 Am. St. Rep. 778.

*Illinois.*—*Burgett v. Talliaferro*, 118 Ill. 503; *Busch v. Huston*, 75 Ill. 343.

*Kansas.*—*Carithers v. Weaver*, 7 Kan. 110; *Rowley v. Wilkinson*, 8 Kan. App. 435.

*Maine.*—*Haskell v. Putnam*, 42 Me. 244.

*Maryland.*—*Oppenheimer v. Levi*, 96 Md. 296.

*Michigan.*—*Connecticut Mut. L. Ins. Co. v. Bulte*, 45 Mich. 113.

*Vermont.*—*Blake v. Howe*, 1 Aik. (Vt.) 306, 15 Am. Dec. 681.

*West Virginia.*—*Williamson v. Russell*, 18 W. Va. 612.

*Wisconsin.*—*Shepardson v. Elmore*, 19 Wis. 421.

**When There Is No Agreement to Pay Taxes**, the tenant may, according to the doctrine in some jurisdictions, acquire a valid title against the landlord. *Ferguson v. Etter*, 21 Ark. 160, 76 Am. Dec. 361; *Bettison v. Budd*, 17 Ark. 546, 65 Am. Dec. 442; *Weichselbaum v. Curlett*, 20 Kan. 709, 27 Am. Rep. 204.

Other cases, however, hold the contrary, *Jackson v. King*, 82 Ala. 432; *Bailey v. Campbell*, 82 Ala. 342; *Gaskins v. Blake*, 27 Miss. 675; *Williamson v. Russell*, 18 W. Va. 612, especially where the taxes are assessed upon improvements made by the tenant as a part of the property, *Williams v. Towl*, 65 Mich. 204.

**Taxes Accrued Before Tenancy.**—A tenant under no obligation to pay taxes, as in the case of taxes accrued before the tenancy, and where there is no covenant to pay taxes, may acquire title under a sale for such taxes. *Uhl v. Small*, 54 Kan. 651; *Smith v. Newman*, 62 Kan. 318.

**2. Licensee.**—*Keokuk, etc., R. Co. v. Lindley*, 48 Iowa 11; *Saunders v. Farmer*, 62 N. H. 572.

**3. Mortgagee.**—*California.*—*Ward v. Matthews*, 80 Cal. 343.

*Connecticut.*—*Middletown Sav. Bank v. Bacharach*, 46 Conn. 525.

*Illinois.*—*Moore v. Titman*, 44 Ill. 367; *Chickering v. Failes*, 26 Ill. 507.

*Michigan.*—*Porter v. Corbin*, 124 Mich. 201; *Maxfield v. Willey*, 46 Mich. 252; *Taylor v. Snyder, Walk.* (Mich.) 490.

*Mississippi.*—*Martin v. Swofford*, 59 Miss. 328; *McLaughlin v. Green*, 48 Miss. 175.

*Rhode Island.*—*Hall v. Westcott*, 15 R. I. 373.

*Wisconsin.*—*Burchard v. Roberts*, 70 Wis. 111, 5 Am. St. Rep. 148; *Fisk v. Brunette*, 30 Wis. 102.

**As Between Different Mortgagees or Lienholders** one cannot purchase at a tax sale to the prejudice of the other. *Fair v. Brown*, 40 Iowa 209; *Norton v. Metropolitan L. Ins. Co.*, 74 Minn. 484. See also *Anson v. Anson*, 20 Iowa 55, 89 Am. Dec. 514.

**Purchase by a Junior Mortgagee** confers no title to defeat a senior mortgagee. *Goodrich v. Kimberly*, 48 Conn. 395; *Eck v. Swennumson*, 73 Iowa 423, 5 Am. St. Rep. 690; *Frank v. Arnold*, 73 Iowa 370; *Garrettson v. Scofield*, 44 Iowa 35; *Chrisman v. Hough*, 146 Mo. 102; *Woodbury v. Swan*, 59 N. H. 22; *Smith v. Lewis*, 20 Wis. 350. Compare *Connecticut Mut. L. Ins. Co. v. Bulte*, 45 Mich. 113.

If the holder of a third mortgage buys a tax-sale certificate on the property mortgaged, then, on the foreclosure of the second mortgage, buys the legal title to the lands subject to the lien of the first mortgage, all tax liens merge in his superior title, and he acquires by payment of taxes no lien superior to the title under such sale. *Gibson v. Greene*, 6 Kan. App. 196.

**Owner of Judgment Lien.**—The right of a judgment lienor to pay taxes does not preclude him from acquiring title to the property at a tax sale, since the right to pay the taxes imposes no duty to do so. *Morrison v. Bank of Commerce*, 81 Ind. 335. See also *Wilson v. Jamison*, 36 Minn. 59, 1 Am. St. Rep. 635, as to the right of a judgment creditor to purchase a tax title as against the superior lien of a mortgage.

**A Mortgagee Acting as Agent of Another** in purchasing may acquire a good title for his principal. *Jury v. Day*, 54 Iowa 573.

**4. Mortgagee in Possession.**—*Stinson v. Connecticut Mut. L. Ins. Co.*, 174 Ill. 125, 66 Am. St. Rep. 262, affirming 62 Ill. App. 319; *Schenck v. Kelley*, 88 Ind. 444; *Brown v. Simons*, 44 N. H. 475; *Shoemaker v. Bank*, 15 Phila. (Pa.) 297, 39 Leg. Int. Pa.) 81.

**5. Mortgagee Out of Possession Held to Acquire Title.**—*Spratt v. Price*, 18 Fla. 289; *Waterson v. Devoe*, 18 Kan. 223; *Williams v. Townsend*, 31 N. Y. 415; *Allen v. Dayton Hotel Co.*, 95 Tenn. 480; *Summers v. Kanawha County*, 26 W. Va. 159. See also *Reimer v. Newel*, 47 Minn. 237, where the mortgagor had covenanted to pay the taxes; *Sturdevant v. Mather*, 20 Wis. 576.

A mortgagor in possession and those claiming under him,<sup>1</sup> or one who purchases for the mortgagor,<sup>2</sup> cannot take title at a tax sale; and even after sale under the mortgage and purchase by the mortgage debtor, where the taxes accrued during the mortgagor's ownership, the title is held to remain undisturbed.<sup>3</sup>

One whose title has been extinguished may, however, purchase at a tax sale, and the purchase of such title will not amount to a mere payment of the taxes, since the purchaser owes to the person holding adversely no duty in respect of the payment of the taxes for which the land was sold.<sup>4</sup>

**Adverse Possession.** — So one who, though owing the duty to pay taxes, acquires an outstanding tax title and goes into possession may hold the land adversely under such title until it ripens under the statute of limitations.<sup>5</sup>

**b. AGENT.** — Tax deeds taken by one as agent or on behalf of another to protect the latter operate as a mere redemption,<sup>6</sup> and one whose agency relates to the property cannot buy for himself and acquire the title,<sup>7</sup> where there has been no explicit renunciation or revocation of the agency.<sup>8</sup> But a purchase by an agent is voidable, and not void.<sup>9</sup>

**c. ATTORNEY.** — Where an attorney whose relation to his client's property imposes the duty to pay taxes purchases a tax title, the purchase amounts to a redemption only;<sup>10</sup> and an attorney is forbidden to purchase for himself where he has a duty to perform which is inconsistent with the character of the purchase.<sup>11</sup>

1. **Mortgagor in Possession** — *Illinois*. — *Ralston v. Hughes*, 13 Ill. 469; *Frye v. State Bank*, 11 Ill. 367.

*Indiana*. — *Cooper v. Jackson*, 99 Ind. 566; *Travellers Ins. Co. v. Patten*, 98 Ind. 209.

*Iowa*. — *Cowdry v. Cuthbert*, 71 Iowa 733; *Dayton v. Rice*, 47 Iowa 429; *Fair v. Brown*, 40 Iowa 209; *Porter v. Lafferty*, 33 Iowa 254; *Stears v. Hollenbeck*, 38 Iowa 550.

*Kansas*. — *Leppo v. Gilbert*, 26 Kan. 138.

*Louisiana*. — *Austin v. Citizens' Bank*, 30 La. Ann. 691; *Beltram v. Villeré*, (La. 1888) 4 So. Rep. 506.

*Maine*. — *Phinney v. Day*, 76 Me. 83; *Fuller v. Hodgdon*, 25 Me. 243; *Gardiner v. Gerrish*, 23 Me. 46.

*Michigan*. — *Fells v. Barbour*, 58 Mich. 49; *Maxfield v. Willey*, 46 Mich. 252; *Connecticut Mut. L. Ins. Co. v. Bulte*, 45 Mich. 113.

*Minnesota*. — *Washington L. & T. Co. v. McKenzie*, 64 Minn. 273 (where the mortgagor had covenanted to pay taxes); *Allison v. Armstrong*, 28 Minn. 276, 41 Am. Rep. 281.

*Mississippi*. — *North American Trust Co. v. Lanier*, 78 Miss. 418, 84 Am. St. Rep. 635.

*New Hampshire*. — *Kezer v. Clifford*, 59 N. H. 208; *Woodbury v. Swan*, 59 N. H. 22.

*Wisconsin*. — *Newton v. Marshall*, 62 Wis. 8; *Avery v. Judd*, 21 Wis. 262; *Fallass v. Pierce*, 30 Wis. 443; *Edgerton v. Schneider*, 26 Wis. 385.

**The Owner of Part of the Equity of Redemption**, no matter how small his interest, cannot purchase the tax title. *Middletown Sav. Bank v. Bacharach*, 46 Conn. 513.

**A Purchase from the Mortgagor Before Perfecting the Tax Title** confers no additional rights as against the mortgagee. *Washington L. & T. Co. v. McKenzie*, 64 Minn. 273.

2. **One Purchasing for Mortgagor.** — *McAlpine v. Zitzer*, 119 Ill. 273; *Drew v. Morrill*, 62 N. H. 565.

3. **After Sale under Mortgage.** — *Magner v. Hibernia Ins. Co.*, 30 La. Ann. 1357.

4. **One Whose Title Has Been Extinguished.** — *Seymour v. Harrison*, 85 Iowa 130. See also *Atkison v. Dixon*, 89 Mo. 464.

5. **Adverse Possession.** — *Richards v. Carter*, 201 Ill. 165; *English v. Powell*, 119 Ind. 93.

6. **Deed to Agent Is Redemption.** — *Beacham v. Gurney*, 91 Iowa 621; *Fox v. Zimmermann*, 77 Wis. 414. See also *Jenks v. Brewster*, 96 Fed. Rep. 625; *Lamb v. Davis*, 74 Iowa 719, where the facts were held not to show the purchase to have been by agency.

7. **Agent Cannot Acquire Title.** — See the title *AGENCY*, vol. 1, pp. 1085, 1086, and see *Baker v. Whiting*, 3 Sumn. (U. S.) 475; *Coxe v. Wolcott*, 27 Pa. St. 154; *Grindo v. McGee*, 111 Wis. 531.

**Agent to Pay Taxes or Bid in Property Cannot Take Title.** — *Young v. Iowa Toolers Protective Assoc.*, 106 Iowa 447; *Matthews v. Light*, 32 Me. 305; *Day v. Davey*, (Mich. 1903) 93 N. W. Rep. 256; *Curtis v. Borland*, 35 W. Va. 124. See also *Shay v. McNamara*, 54 Cal. 169; *Linsley v. Sinclair*, 24 Mich. 380; *Huzzard v. Trego*, 35 Pa. St. 9.

8. **After the Agency Has Ceased** the person who was agent may acquire title. *Bemis v. Plato*, (Iowa 1903) 93 N. W. Rep. 83.

9. **Purchase Voidable Only.** — *Ellsworth v. Cordrey*, 63 Iowa 675.

10. **Purchase by Attorney Is Redemption.** — *Boardman v. Boozewinkel*, 121 Mich. 320.

11. **Attorney Cannot Purchase for Himself.** — See the title *ATTORNEY AND CLIENT*, vol. 3, p. 341.

**Where Attorney Is under No Duty to Pay Taxes.** — The mere fact that the purchaser had been the owner's attorney at some time prior to the sale does not preclude him from purchasing and acquiring title. *Pack v. Crawford*, 29 Ark. 489; *Wilson v. Cantrell*, 40 S. Car. 114.

**So Where the Attorney Justifiably Severs His Relation** with his client he may then act for the protection of his own interest and thereafter may become a purchaser. *Eckrote v. Myers*, 41 Iowa 324.

*d.* PARENT. — In the absence of any fiduciary relation, a father is not precluded from obtaining a valid tax title to land as against his son.<sup>1</sup>

*e.* GUARDIAN. — A guardian cannot acquire title, adverse to his ward, under a tax deed of the ward's land.<sup>2</sup>

*f.* HUSBAND OR WIFE. — A husband cannot obtain a tax title upon the estate of his wife,<sup>3</sup> but the same rule has not been applied uniformly as against the wife's acquisition of title to the husband's land.<sup>4</sup>

**2. Tax Officers.** — An officer conducting or connected with a tax sale cannot purchase the property himself or through an agent.<sup>5</sup> A statute which prevents such purchase has been held to preclude the officer from taking a certificate which was issued before he came into office,<sup>6</sup> but an officer of a county out of which a new county is carved may purchase the certificates of the old county which have been assigned to the new,<sup>7</sup> and a clerk or mere ministerial officer having no control or influence over the sale may purchase.<sup>8</sup>

**3. State, County, and Municipality — In General.** — Under the various statutes, if a sale must fail for want of bidders or because the bids made are not sufficient to cover the taxes due, etc., the property may be bid in for the state, county, or municipality; the contingency contemplated by the particular statute must arise, and the conditions of the statute must be complied with.<sup>9</sup>

**1. Father May Purchase.** — *Langley v. Batchelder*, 69 N. H. 566.

**2. Guardian.** — *Dohms v. Mann*, 76 Iowa 723. And see the title GUARDIAN AND WARD, vol. 15, pp. 75, 76.

**3. Husband Cannot Purchase.** — *Willard v. Ames*, 130 Ind. 351; *Burns v. Byrne*, 45 Iowa 285; *Warner v. Broquet*, 54 Kan. 649, *overruling* 43 Kan. 48, 19 Am. St. Rep. 124; *Laton v. Balcom*, 64 N. H. 92, 10 Am. St. Rep. 381.

**4. Wife Cannot Acquire Title.** — The cases from *Kansas* and *New Hampshire* cited in the last preceding note indicate that the rule is the same as to both husband and wife. See also *Swift v. Agnes*, 33 Wis. 229.

**Wife Can Acquire Title.** — *Willard v. Ames*, 130 Ind. 351; *Carter v. Bustamente*, 59 Miss. 559.

**After the Husband's Death** and while the widow is residing on the premises and is entitled to dower she cannot be heard to say that she had no interest, and could buy another and independent title through tax sales. *Virginia L. Ins. Co. v. Day*, 127 N. Car. 133.

**After Destruction of the Wife's Interest** in the husband's land by a sale under the direct-tax act, it was held that the wife might acquire title after the husband's death by purchase from the government. *Murray v. U. S.*, 29 Ct. Cl. 366.

**5. Officer Cannot Purchase.** — *Ely v. Brown*, 183 Ill. 575; *Sponable v. Woodhouse*, 48 Kan. 173; *Haxton v. Harris*, 19 Kan. 511; *Clute v. Barron*, 2 Mich. 192; *McLeod v. Burkhalter*, 57 Miss. 65; *Cuttle v. Brockway*, 24 Pa. St. 145 (as to right of county commissioner to purchase for more than taxes and costs); *Chandler v. Moulton*, 33 Vt. 245.

**Cannot Purchase as Agent for Another.** — *Everett v. Beebe*, 37 Iowa 452; *Corbin v. Beebe*, 36 Iowa 336; *Payson v. Hall*, 30 Me. 319.

**Purchase by Deputy.** — Under statutory inhibition, see *Ellis v. Peck*, 45 Iowa 112; *Kirk v. St. Thomas' Church*, 70 Iowa 287; *Galbraith v. Drought*, 24 Kan. 591 (holding that an auctioneer was a deputy of the sheriff so as to be precluded from purchasing); *Taylor v. Stringer*, 1 Gratt. (Va.) 158. *Contra*, *O'Reilly v. Holt*, 4

*Woods* (U. S.) 645; *Hare v. Carnall*, 39 Ark. 196, in which cases it was held that a deputy taking no part in the sale may purchase thereat.

**Void or Voidable.** — In some jurisdictions a sale to an officer under disability is absolutely void. *Ely v. Brown*, 183 Ill. 575; *Spicer v. Rowland*, 39 Kan. 740; *Taylor v. Stringer*, 1 Gratt. (Va.) 158. In others, however, it is voidable merely. *Lawrence v. Hornick*, 81 Iowa 193; *Ellis v. Peck*, 45 Iowa 112. See also *Martin v. Parsons*, 50 Cal. 498.

**6. Certificate Issued Before Term of Office.** — *truit*, 91 Wis. 661.

**7. Certificate of Old County.** — *Gilbert v. De-truit*, 91 Wis. 661.

**8. Officer Not Connected with Sale May Purchase.** — *O'Reilly v. Holt*, 4 *Woods* (U. S.) 645; *Lorain v. Smith*, 37 Iowa 67; *Wells v. Jackson Iron Mfg. Co.*, 47 N. H. 235, 90 Am. Dec. 575; *Fox v. Cash*, 11 Pa. St. 207. But see *Cole v. Moore*, 34 Ark. 582, where a clerk of a County Court was held to be under disability on account of certain duties required of him; *Morton v. Waring*, 18 B. Mon. (Ky.) 72, wherein it was held that a purchase by a deputy register of the land office required the showing of fairness and full consideration.

**A Clerk May Take an Assignment of a Certificate** though he is the officer who is to make the deed to himself. *Barr v. Randall*, 35 Kan. 126.

**The Officer Who Procures the Tax Judgment** is not precluded from purchasing, he having no control of the process under which the sale is made. *Walcott v. Hand*, 122 Mo. 621; *Turner v. Gregory*, 151 Mo. 100.

**9. State, County, or Municipality — Alabama.** — *State v. Brewer*, 64 Ala. 287.

*Kansas.* — *Mack v. Price*, 35 Kan. 134; *Larkin v. Wilson*, 28 Kan. 513; *Babbitt v. Johnson*, 15 Kan. 252; *Norton v. Friend*, 13 Kan. 532; *Magill v. Martin*, 14 Kan. 67; *Guit-tard Tp. v. Marshall County*, 4 Kan. 388; *How-ard v. Hulbert*, 10 Kan. App. 314.

*Louisiana.* — *Breaux v. Negrotto*, 43 La. Ann. 426; *Martinez v. State Tax Collectors*, 42 La. Ann. 677.

But in the absence of express power conferred by statute, a municipal corporation is not authorized to become a purchaser at a sale for taxes due to it.<sup>1</sup>

**III. DEED — 1. Right to Deed and Authority to Execute — a. RIGHT TO DEED — (1) In General.** — The statutes often prescribe a period within which a deed may be procured, or before the expiration of which the right to a deed does not mature. Such provisions must be strictly observed,<sup>2</sup> and the deed must be demanded or issued or an action begun to foreclose the tax certificate within the period prescribed.<sup>3</sup>

*Minnesota.* — *Mulvey v. Tozer*, 40 Minn. 384; *Gillfillan v. Chatterton*, 38 Minn. 335.

*Mississippi.* — *National Bank of Republic v. Louisville, etc.*, R. Co., 72 Miss. 447.

*Nebraska.* — *State v. Cain*, 18 Neb. 635; *Otoe County v. Mathews*, 18 Neb. 466; *Otoe County v. Brown*, 16 Neb. 394; *Shelley v. Towle*, 16 Neb. 194.

*New Jersey.* — *Ludington v. Elizabeth*, 34 N. J. Eq. 357; *Schatt v. Grosch*, 31 N. J. Eq. 199; *Morgan v. Comptroller*, 44 N. J. L. 571. See also *In re Elizabeth*, 49 N. J. L. 488.

*North Carolina.* — *Doe v. Bryan, 2 Hawks* (9 N. Car.) 17; *Love v. Wilbourn*, 5 Ired. L. (27 N. Car.) 344; *Avery v. Rose*, 4 Dev. L. (15 N. Car.) 554.

*Oklahoma.* — *Hannenkratt v. Hamil*, 10 Okla. 219.

*Tennessee.* — *State v. Dugan*, 105 Tenn. 245.

*Virginia.* — *Turner v. Smith*, 18 Gratt. (Va.) 830 (as to a sale to the United States under Act Cong. Feb. 6, 1863).

*West Virginia.* — *McGee v. Sampselle*, 47 W. Va. 352.

*Wisconsin.* — *Sprague v. Coenen*, 30 Wis. 209.

**Forfeiture to State for Want of Bidders.** — *Biggins v. People*, 106 Ill. 270; *Scott v. People*, 2 Ill. App. 642; *Magruder v. Esmay*, 35 Ohio St. 221; *Woodward v. Sloan*, 27 Ohio St. 592; *Owens v. Owens*, 25 S. Car. 155; *State v. Thompson*, 18 S. Car. 538.

**Deed.** — In *Colorado* county bidding in land at a tax sale is entitled to a deed substantially in the form of a deed to a cash purchaser. *Dyke v. Whyte*, 17 Colo. 296.

In other jurisdictions, where lands are struck off to the state for want of bidders, a deed is not necessary. *Neal v. Andrews*, 53 Ark. 445; *Doyle v. Martin*, 55 Ark. 37; *Baldwin v. Ely*, 66 Wis. 171; *Lombard v. White*, 76 Wis. 445.

In *Kansas* it was held under a statute providing that where lands were bid off by the county treasurer for the county, a certificate of sale to the county should be issued and that such certificate should be assignable and subject to purchase, that a deed could not be taken by the county so as to preclude an assignment of the certificate of sale by the treasurer. *State v. Magill*, 4 Kan. 415; *Guittard Tp. v. Marshall County*, 4 Kan. 389.

**A Certified List of the Lands struck off by the officer stands in the place of and operates like a conveyance *inter partes*.** *Mayson v. Banks*, 59 Miss. 447; *Ferrill v. Dickerson*, 63 Miss. 210; *State v. Dugan*, 105 Tenn. 245.

**1. Municipality Express Authority Necessary.** — *Logansport v. Humphrey*, 84 Ind. 467; *Bruck v. Broesigks*, 18 Iowa 393; *Knox v. Peterson*, 21 Wis. 247. See also *Champaign v. Harmon*, 98 Ill. 491; *Miller v. Gregg*, 26 Iowa 75.

**Execution Sales.** — In *Illinois* it has been held

that a statute authorizing suit to be brought in the name of the county was broad enough to authorize the county to purchase under the judgment. *Douthett v. Kettle*, 104 Ill. 357.

And in *Jefferson v. Curry*, 71 Mo. 85, a city was held to have authority under its charter to purchase under an execution.

In *Kentucky* it was held that under a municipal charter authorizing the purchase of property for governmental purposes, the municipality might purchase at a sale for its taxes, whether under a levy by its collecting officer or under a decretal sale for a like purpose. *Keller v. Wilson*, 90 Ky. 350.

In *Wisconsin* it was held that under an act permitting counties to purchase and hold land for public use, etc., a county treasurer might take an assignment of a tax certificate for the use of the county even if the county could not sell. *Parish v. Eager*, 15 Wis. 532.

**2. Time for Issuance of Deed Prescribed by Statute.** — *Williams v. Hedrick*, (C. C. A.) 101 Fed. Rep. 876, (C. C. A.) 96 Fed. Rep. 657; *Bowman v. Wettig*, 39 Ill. 416; *Farrar v. Eastman*, 10 Me. 191; *Taft v. McCulloch*, 135 Mo. 588; *McGavock v. Pollack*, 13 Neb. 535; *Annan v. Baker*, 49 N. H. 161; *Ward v. Phillips*, 89 N. Car. 215; *Hotson v. Wetherby*, 88 Wis. 324; *Safford v. Conan*, 88 Wis. 354.

**Right to Redeem Preserved.** — In some cases, however, the deed may be executed before the expiration of the period of redemption, leaving unaffected the right to redeem. *Ives v. Lynn*, 7 Conn. 505; *Baker v. Kelley*, 11 Minn. 480.

**3. Limitations.** — *Wheeler v. Jackson*, 137 U. S. 245; *Tuttle v. Block*, 104 Cal. 443; *Fuller v. Shedd*, 161 Ill. 462, 52 Am. St. Rep. 380; *Doud v. Blood*, 89 Iowa 237; *Innes v. Drexel*, 78 Iowa 253; *La Rue v. King*, 74 Iowa 288; *Thode v. Spofford*, 65 Iowa 294; *Fuller v. Colfax County*, 33 Neb. 716; *Alexander v. Wilcox*, 30 Neb. 793.

**Statute After Sale Prescribing Reasonable Time.** — *Tuttle v. Block*, 104 Cal. 443.

**Statute as to Right to Recover Possession Not Applicable.** — *Hotson v. Wetherby*, 88 Wis. 324.

**Time Pending Existence of Injunction Excluded.** — *Gage v. Reid*, 118 Ill. 35.

**Application of Statute to State or County.** — Such a statute of limitations does not apply to or bind the state unless it is made to do so by express words or necessary implication. *Russ v. Crichton*, 117 Cal. 695.

**As Against an Assignee of a certificate held by the county, the statute runs from the date of the assignment.** *Hiles v. Cate*, 75 Wis. 91.

**Limitation of Action to Foreclose.** — In *Wisconsin* the action to foreclose the tax certificate must be commenced while the owner of the certificate has a right to demand a deed. *Goffe v. Bond*, 69 Wis. 366.



Where Laches or Abandonment Is Relied On to bar the issuance of a deed, evidence thereof must be clear and decisive, aside from any presumption of payment or redemption that might arise from the lapse of twenty years or from long-continued adverse possession.<sup>1</sup>

(2) *When Right Matures.* — After the statutory period for redemption has expired a purchaser is entitled to a deed upon complying with all the conditions imposed by law.<sup>2</sup> But a deed cannot issue until after performance of the statutory conditions, such as payment of the legal fees,<sup>3</sup> the filing of an affidavit of nonoccupancy prior to the application for the deed,<sup>4</sup> notice of purchase,<sup>5</sup> notice of expiration of the time to redeem or of application for a deed and the filing of an affidavit of such notice,<sup>6</sup> presentment and surrender of the certificate of purchase to the proper officer,<sup>7</sup> payment of all taxes in arrears or which were a lien at the time of the completion of the purchase,<sup>8</sup> and procuring a report by the county surveyor specifying the metes and bounds of the land sold.<sup>9</sup>

(3) *Mandamus to Enforce Right.* — Where the right to a deed is perfected its execution may be enforced by mandamus.<sup>10</sup> So the officer<sup>11</sup> or his successor in office<sup>12</sup> may be thus required to execute a second and corrected deed when the first is imperfect. Mandamus will not issue, however, unless all the

In *Nebraska* the right of action accrues when the period of redemption expires. *Parker v. Matheson*, 21 Neb. 546. See also *Helprey v. Redick*, 21 Neb. 80; *D'Gette v. Sheldon*, 27 Neb. 829.

*Before redemption.* — Where the statute makes provision for redemption at any time before the deed is executed, the deed must of course be executed before redemption, and thereafter the officer is justified in refusing it. *State v. Cranney*, 30 Wash. 594.

1. *Laches or Abandonment.* — *Hotson v. Wetherby*, 88 Wis. 324.

But in *Oskendon v. Barnes*, 43 Iowa 615, it was held that even in the absence of a statutory limitation upon the right to demand a deed, there is a presumption of abandonment in favor of a *bona fide* grantee of the tax debtor when the purchaser delays for more than eleven years to apply for a deed. *Compare Eaton v. North*, 32 Wis. 303.

2. *When Right Matures.* — *State v. Jordan*, 36 Fla. 1; *Forqueran v. Donnolly*, 7 W. Va. 114.

That the Property Is in the Hands of a Receiver is no ground for refusing to issue the deed. *Whitehead v. Farmers' L. & T. Co.*, 98 Fed. Rep. 10, 39 C. C. A. 34; *Rice v. Jerome*, 97 Fed. Rep. 719, 38 C. C. A. 388.

One Deed for Several Parcels. — *State v. Jordan*, 36 Fla. 1. See also *Watkins v. Inge*, 24 Kan. 612 (under statute).

Owner under Disability. — The right to a deed may be perfect though the owner was under disability and may redeem after the execution of the deed. *Wright v. Wing*, 18 Wis. 45. So also, it seems, as to the right to foreclose the lien of a tax certificate. *Leavitt v. Bell*, 55 Neb. 57.

Second Sale — Postponement of Right to Deed. — In *Illinois*, where a purchaser permits lands to be again sold for taxes or forfeited within two years, the purchaser is not entitled to a deed until the expiration of a like term from the date of the sale or forfeiture. *Denike v. Rourke*, 3 Biss. (U. S.) 39; *Ely v. Brown*, 183 Ill. 575; *Netterstrom v. Kemeys*, 187 Ill. 617.

3. *Payment of Legal Fees.* — *State v. Strahl*, 17 Wis. 146.

*Improper Fee.* — A county treasurer cannot require as a condition to the execution of a deed the payment of a fee allowed to the register of deeds for recording, as the recording of such deed is within the discretion of the purchaser. *Burnham v. Farmers' L. & T. Co.*, 44 Neb. 438.

4. *Affidavit of Nonoccupancy.* — *Howe v. Genin*, 57 Wis. 268, holding that the number of days prescribed in the statute meant consecutive days and that the affidavit need not be made by the owner or holder of the certificate. See also as to sufficiency of the affidavit *Dreutzer v. Smith*, 56 Wis. 292.

5. *Notice of Purchase.* — *King v. Cooper*, 128 N. Car. 347.

6. *Notice to Redeem.* — See the title TAXATION, ante, p. 860.

7. *Presentment of Certificate.* — *Silliman v. Frye*, 6 Ill. 664; *Reed v. Merriam*, 15 Neb. 323.

8. *Payment of Taxes in Arrears.* — *U. S. v. MacFarland*, 18 App. Cas. (D. C.) 120; *Hubbard v. Auditor Gen.*, 120 Mich. 505; *Cockburn v. Auditor Gen.*, 120 Mich. 643; *Hughes v. Jordan*, 118 Mich. 27.

Deed Void if Taxes Unpaid. — *Citizens' Sav. Bank v. Auditor Gen.*, 123 Mich. 511.

9. *Procuring Report of Surveyor.* — *Orr v. Wiley*, 19 W. Va. 150.

10. *Mandamus to Enforce Right.* — *Jones v. Welsing*, 52 Iowa 220; *State v. Lancaster*, 46 S. Car. 282; *State v. Cranney*, 30 Wash. 594.

One Deed for Several Parcels. — *State v. Jordan*, 36 Fla. 1.

11. *Grimm v. O'Connell*, 54 Cal. 522; *Maxey v. Clabaugh*, 6 Ill. 26; *Klokke v. Stanley*, 109 Ill. 192; *Bryson v. Spaulding*, 20 Kan. 427; *Douglass v. Nuzum*, 16 Kan. 515; *Corbin v. Bronson*, 28 Kan. 532.

Corrected Deed to Assignee of Certificate. — *Clippinger v. Tuller*, 10 Kan. 377; *State v. Winn*, 10 Wis. 304, 88 Am. Dec. 689.

12. *Maxey v. Clabaugh*, 6 Ill. 26.

conditions exist which entitle the applicant to a deed.<sup>1</sup>

**b. AUTHORITY TO EXECUTE**—(1) *In General*.—The authority to issue a tax deed must be found in the statute, and a deed executed without such authority conveys no title.<sup>2</sup> The power to sell, it has been held, does not by implication embrace the power to convey.<sup>3</sup>

(2) *Particular Officer*—(a) *In General*.—No other officer than the one designated in the particular statute may execute the authority to convey land sold for taxes.<sup>4</sup>

(b) *Deputy*.—A regular deputy of the principal officer authorized to execute a tax deed may himself execute such conveyance<sup>5</sup> for and in the name of his principal.<sup>6</sup>

**Officer Not Authorized to Appoint Deputy**.—Where, however, sheriffs as tax collectors are not authorized to appoint deputies in the capacity of tax collectors, a deed cannot be executed by any under-sheriff.<sup>7</sup>

**Deputy's Authority Not Derived from Principal**.—Where the deputy is clothed with the powers of the principal and derives his authority from the law rather than from the principal, under particular circumstances, it seems that he may execute the deed in the name of the principal by the deputy or in his own name as deputy.<sup>8</sup>

(c) *After Expiration of Official Term*.—Since the power to convey exists by virtue of official status alone, the deed should be executed by the incumbent of the office at the time of conveyance, and not by the officer who made the sale if he is no longer the incumbent.<sup>9</sup>

**1. Conditions Showing Right Must Exist**.—*Bosworth v. Webster*, 64 Cal. 1; *U. S. v. MacFarland*, 18 App. Cas. (D. C.) 120; *Aitcheson v. Huebner*, 90 Mich. 643; *State v. Gayhart*, 34 Neb. 192; *People v. New York*, 10 Wend. (N. Y.) 395; *State v. Cranney*, 30 Wash. 594; *State v. Williston*, 20 Wis. 228.

**Not Available to Correct Applicant's Own Mistakes**.—*Klokke v. Stanley*, 109 Ill. 192.

**Not Available to Compel Contradiction of Official Return**.—*Hewell v. Lane*, 53 Cal. 213.

**2. Authority Dependent upon Statute**.—*Doe v. Chunn*, 1 Blackf. (Ind.) 336; *Sibley v. Smith*, 2 Mich. 486; *Powell v. Jenkins*, (Supm. Ct. Spec. T.) 14 Mich. (N. Y.) 83; *Smith v. Todd*, 55 Wis. 459; *Knox v. Peterson*, 21 Wis. 247.

**3. Not Conferred by Implication**.—*Doe v. Chunn*, 1 Blackf. (Ind.) 336; *Sibley v. Smith*, 2 Mich. 486. But see *Bruce v. Schuyler*, 9 Ill. 221, 46 Am. Dec. 447.

**4. Only Officer Designated by Statute**.—*Lathrop v. Brittain*, 30 Cal. 680; *Callahan v. Davis*, 125 Mo. 27; *Spurlock v. Dougherty*, 81 Mo. 171; *Ward v. Huggins*, 7 Wash. 617; *Baxter v. Wade*, 39 W. Va. 281. See also *Farrar v. Eastman*, 5 Me. 345, and the cases cited in the last two preceding notes.

**Office Not in Existence**.—A deed executed by one as the incumbent of an office which is not in existence is void. *Felch v. Travis*, 92 Fed. Rep. 210.

**Officer Ex Officio Tax Collector**.—Where after a sale and issuance of a certificate by a city treasurer in his *ex officio* capacity as collector the municipal charter provision was changed so that it became the duty of the treasurer as such, without any official designation as the collector, to execute tax deeds, a deed executed to the purchaser by the officer as treasurer was held to be valid. *Chrisman v. Hough*, 146 Mo. 102. Compare *Callahan v. Davis*, 125 Mo. 27, holding

that where a county treasurer was *ex officio* county collector a deed executed by him as collector only was not sufficient. But where the sheriff is also the tax collector a deed by him describing himself as both sheriff and tax collector is not for that reason bad. *Bell v. Gordon*, 55 Miss. 45.

**Continuance of Authority**.—Where a county board under lawful authority directs the proper officer of the county to issue tax deeds, the authority of the officer continues until it is withdrawn. *Mead v. Nelson*, 52 Wis. 402.

**5. Deputy May Execute Conveyance**.—*Whitford v. Lynch*, 10 Kan. 180; *Chapman v. Bennett*, 2 Leigh (Va.) 329; *Gilkey v. Cook*, 60 Wis. 133; *Scheiber v. Kaehler*, 49 Wis. 291; *Huey v. Van Wie*, 23 Wis. 613. Compare *Wilson v. Doe*, 7 Leigh (Va.) 22, holding that the officer who makes the sale should execute the conveyance, and that where the sale was made by the sheriff himself a deed by a deputy conveyed no title.

**Deputy de Facto**.—*McRee v. Swalm*, 81 Miss. 679.

**6. Deputy in Name of Principal**.—*Marx v. Hanthorn*, 30 Fed. Rep. 579; *Ward v. Walters*, 63 Wis. 39; *Scheiber v. Kaehler*, 49 Wis. 291; *Huey v. Van Wie*, 23 Wis. 613.

**7. Appointment of Deputy Unauthorized**.—*Lathrop v. Brittain*, 30 Cal. 680.

**8. Authority Derived from Law**.—*Westbrook v. Miller*, 56 Mich. 148; *Drennan v. Herzog*, 56 Mich. 467; *McRee v. Syalm*, 81 Miss. 679; *Davis v. Living*, 32 W. Va. 174; *Gilkey v. Cook*, 60 Wis. 133.

**Presumption in Favor of Official Action**.—*Westbrook v. Miller*, 56 Mich. 148.

**9. By Incumbent at Time of Conveyance**.—*Taylor v. Allen*, 67 N. Car. 346; *Hoffman v. Bell*, 61 Pa. St. 444; *Donnel v. Bellas*, 34 Pa. St. 157; *Cuttle v. Brockway*, 32 Pa. St. 45; *Hightower v. Freedle*, 5 Sneed (Tenn.) 312.

(3) *Corrected Deed.* — The officer may execute a second deed in order to incorporate a sufficient description of the property,<sup>1</sup> or to conform the recitals to the facts or cure mere irregularities.<sup>2</sup> But the authority cannot be exercised to overthrow by false recitals in a deed the records upon which it is based,<sup>3</sup> and where a good and valid deed is once executed the power of the officer is exhausted, and he cannot divest the title by the execution of another deed.<sup>4</sup>

c. EXECUTION — (1) *In General.* — The formalities with which the power of executing the deed is circumscribed must be strictly observed.<sup>5</sup>

(2) *Signature.* — A tax deed should be signed officially with the proper designation of the title of the officer authorized by law to execute it,<sup>6</sup> but the signature is sufficient even though not technically correct in the official designation if substantial certainty as to the identity of the officer is preserved.<sup>7</sup>

(3) *Attestation.* — Statutory requirements as to attestation by witnesses must be complied with,<sup>8</sup> but in the absence of statute attesting witnesses are not necessary.<sup>9</sup>

(4) *Seal.* — Under statutes requiring conveyances of estates in land to be under seal,<sup>10</sup> as well as under statutes specifically governing tax proceedings<sup>11</sup> and under the common law,<sup>12</sup> a tax deed to be valid as a deed must be under seal, though the legislature has power to prescribe a form of deed dispensing with a seal.<sup>13</sup>

*Omission Not Curable.* — The omission of the seal is not a mere irregularity or curable defect, but is fatal to the deed.<sup>14</sup>

*Contra, Cummings v. Cummings*, 91 Fed. Rep. 602, under a *North Carolina* statute of 1891 requiring conveyance by the officer who made the sale, except in the exceptional case provided; *Bestor v. Powell*, 7 Ill. 119, holding that either the officer making the sale or his successor may make the sale; *Graves v. Hayden*, 2 Litt. (Ky.) 61; *Taylor v. Forrest*, 96 Md. 529, under a statute requiring conveyance by the officer who makes the sale. See also *Herron v. Murphy*, (Pa. 1888) 13 Atl. Rep. 958; *Kennedy v. Daily*, 6 Watts (Pa.) 269; *Sheafer v. Mitchell*, 109 Tenn. 181; *Miller v. Williams*, 15 Gratt. (Va.) 213.

1. *Officer May Execute Second Deed.* — *Duggan v. McCullough*, 27 Colo. 43.

2. *Duggan v. McCullough*, 27 Colo. 43; *Genther v. Fuller*, 36 Iowa 604; *Parker v. Sexton*, 29 Iowa 421; *McCready v. Sexton*, 29 Iowa 356, 4 Am. Rep. 214; *Hurley v. Street*, 29 Iowa 429; *Johnson v. Chase*, 30 Iowa 308; *Gray v. Coan*, 30 Iowa 536; *Finley v. Brown*, 22 Iowa 538; *Douglass v. Nuzum*, 16 Kan. 515; *Woodman v. Clapp*, 21 Wis. 350.

*After Cancellation of Certificate.* — In *Nebraska*, where a certificate is surrendered, upon the execution of the first deed, and is canceled and filed in the county clerk's office by the treasurer, as required by statute, the treasurer has no authority to issue a second deed. *Baldwin v. Merriam*, 16 Neb. 199; *Reed v. Merriam*, 15 Neb. 323; *Thompson v. Merriam*, 15 Neb. 498.

But in *Colorado* it is held that where the certificate is still in the hands of the treasurer, he may make a second deed. *Duggan v. McCullough*, 27 Colo. 43.

3. *No Authority to Pervert Truth.* — *Gould v. Thompson*, 45 Iowa 450; *Hewitt v. Storch*, 31 Kan. 488; *Corbin v. Bronson*, 28 Kan. 532; *Bowman v. Cockrill*, 6 Kan. 311.

4. *Bulkley v. Callanan*, 32 Iowa 464.

5. *Strict Observance of Formalities Necessary.* — *Avery v. Rose*, 4 Dev. L. (15 N. Car.) 549.

6. *Should Be Signed Officially.* — *Callahan v. Davis*, 125 Mo. 27.

7. *Substantial Certainty Sufficient.* — *Bulger v. Moore*, 67 Wis. 430; *Scheiber v. Kachler*, 49 Wis. 291; *Knox v. Huidekoper*, 21 Wis. 527. See also *Bell v. Gordon*, 55 Miss. 45.

8. *Attestation — Compliance with Statute.* — *Watson v. Atwood*, 25 Conn. 313; *Keech v. Enriquez*, 28 Fla. 597; *Paul v. Fries*, 18 Fla. 573; *Jackson v. Neal*, 136 Ind. 173; *Armstrong v. Hufty*, (Ind. 1899) 55 N. E. Rep. 443; *Bowen v. Striker*, 100 Ind. 45; *Gabe v. Root*, 93 Ind. 256; *Essex v. Meyers*, 27 Ind. App. 639.

9. *Not Necessary in Absence of Statute.* — *McCauslin v. McGuire*, 14 Kan. 234; *Stebbins v. Guthrie*, 4 Kan. 353. See also *Dillingham v. Brown*, 38 Ala. 311.

10. *Under General Statutes.* — *Doty v. Beasley*, 2 Bibb (Ky.) 14; *Shortridge v. Catlett*, 1 A. K. Marsh. (Ky.) 587.

11. *Under Special Statutes.* — *King v. Hyatt*, 51 Kan. 504, 37 Am. St. Rep. 304; *Reed v. Morse*, 51 Kan. 141; *Sutton v. Stone*, 4 Neb. 319.

12. *At Common Law.* — *Patterson v. Galliher*, 122 N. Car. 511.

13. *Legislature May Dispense with Seal.* — *Patterson v. Galliher*, 122 N. Car. 511.

A *Statutory Form Without Seal* dispenses with the necessity of a seal. *Bowers v. Chambers*, 53 Miss. 259. *Compare Day v. Day*, 59 Miss. 318, holding that a conveyance by an officer not embraced in the statutory exception must be under his official seal.

14. *Omission Not Curable.* — *Altes v. Hinckler*, 36 Ill. 265, 85 Am. Dec. 406, holding that a court of chancery will not correct the error. *Reed v. Morse*, 51 Kan. 141; *Patterson v. Galliher*, 122 N. Car. 511. See also the title SEALS, vol. 25, p. 80.

**Official Seal.** — When the official seal is required by statute the deed must be so authenticated<sup>1</sup> even though private seals are abolished,<sup>2</sup> and it has been held that if no provision has been made for an official seal of the particular officer he cannot execute a valid deed.<sup>3</sup> But the private seal of the officer executing the deed, and not the public seal of the county, is the proper seal under a statute requiring a particular officer to execute the deed under his seal.<sup>4</sup>

(5) **Acknowledgment** — (a) **In General.** — As in the case of other deeds,<sup>5</sup> a tax deed must be acknowledged in compliance with the statute<sup>6</sup> before recording, unless the deed is again recorded after acknowledgment.<sup>7</sup> In some states an acknowledgment is not necessary.<sup>8</sup>

(b) **Sufficiency of Acknowledgment and Certificate Thereof.** — The acknowledgment should, of course, be taken by the officer lawfully authorized to act in that regard.<sup>9</sup>

- **The Certificate of acknowledgment must be in the statutory form.**<sup>10</sup>

**Where the Deed Is Executed by a Deputy,** a certificate of acknowledgment that the deputy, by name, personally came, etc.,<sup>11</sup> or that the principal, naming him,

1. **Official Seal.** — *Reed v. Morse*, 51 Kan. 141; *King v. Hyatt*, 51 Kan. 504, 37 Am. St. Rep. 304; *Day v. Day*, 59 Miss. 318; *Sutton v. Stone*, 4 Neb. 319; *Knox v. Huidekoper*, 21 Wis. 527.

**Sufficient Sealing.** — See *Brown v. Cohn*, 85 Wis. 1, holding that the particular seal used sufficiently appeared to be the official seal of the county.

In *Daniel v. Taylor*, 33 Fla. 636, it was held that the use of the seal of the Circuit Court by mistake for that of the County Court was immaterial where the same person was clerk of both courts and the instrument referred to the seal as that of the County Court.

**Where a Board Has No Common Seal,** a conveyance purporting to be under its common seal is void. *McCoy v. Dickenson College*, 5 S. & R. (Pa.) 254; *Watt v. Gilgore*, 2 Yeates (Pa.) 330.

**Recital of Seal by Wrong Name Immaterial.** — See *Bulger v. Moore*, 67 Wis. 430.

2. *Deputron v. Young*, 134 U. S. 241; *Ben-dexen v. Fenton*, 21 Neb. 184; *Seaman v. Thompson*, 16 Neb. 546; *Baldwin v. Merriam*, 16 Neb. 199; *Sullivan v. Merriam*, 16 Neb. 157; *Shelley v. Towle*, 16 Neb. 194; *Hendrix v. Boggs*, 15 Neb. 469.

3. **Where Provision Not Made for Official Seal.** — *McCauley v. Ohenstein*, 44 Neb. 89; *Dickey v. Paterson*, 45 Neb. 848; *Thomsen v. Dickey*, 42 Neb. 314; *Larson v. Dickey*, 39 Neb. 471, 42 Am. St. Rep. 595; *Frank v. Scoville*, 48 Neb. 169.

4. **Private Seal of Officer.** — *Eaton v. North*, 20 Wis. 449; *Sturdevant v. Mather*, 20 Wis. 576. See also *Herron v. Murphy*, (Pa. 1888) 13 Atl. Rep. 958; *Huston v. Foster*, 1 Watts (Pa.) 477.

5. See the title **ACKNOWLEDGMENTS**, vol. 1, p. 483.

6. **Acknowledgment as in Case of Other Deeds** — *United States*. — *Bird v. McClelland*, etc., *Brick Mfg. Co.*, 45 Fed. Rep. 458.

*Alabama.* — *Reddick v. Long*, 124 Ala. 260; *Smith v. Watson*, 124 Ala. 339.

*Indiana.* — *Bowen v. Striker*, 100 Ind. 45.

*Kansas.* — *Douglass v. Bishop*, 45 Kan. 200.

*Massachusetts.* — *Tilson v. Thompson*, 10 Pick. (Mass.) 359.

*Missouri.* — *Dunlap v. Henry*, 76 Mo. 106; *Ryan v. Carr*, 46 Mo. 483; *Dalton v. Fenn*, 40 Mo. 109; *Sterlin v. Daley*, 37 Mo. 483; *Williams v. McLanahan*, 67 Mo. 499.

*Virginia.* — *Leftwich v. Richmond*, 100 Va. 164.

7. **Before Recording.** — *Flowers v. Jernigan*, 116 Ala. 516; *Lee v. Newland*, 164 Pa. St. 360. See generally the title **RECORDING ACTS**, vol. 24, p. 101.

**Acknowledgment Is for the Purpose of Registration,** and a statute requiring that a deed be filed in the office of the clerk of the probate court and remain there for two years unless sooner redeemed does not require that the deed be acknowledged before being so deposited in the office of said clerk. *Edmondson v. Granberry*, 73 Miss. 723.

8. **Acknowledgment Unnecessary.** — *Ellis v. Clark*, 39 Fla. 714; *Thompson v. Schuyler*, 7 Ill. 271; *Graves v. Bruen*, 6 Ill. 167.

**As Against a Previously Acquired Title** an acknowledgment of a collector's deed is not necessary. *Langley v. Batchelder*, 69 N. H. 566.

9. **Who May Take Acknowledgment.** — See the title **ACKNOWLEDGMENTS**, vol. 1, p. 493 *et seq.* **Deputy Clerk.** — *Waddingham v. Dickson*, 17 Colo. 223.

**Presumption of Regularity from Caption.** — *Douglass v. Bishop*, 45 Kan. 200.

10. **Certificate in Statutory Form.** — *Smith v. Watson*, 124 Ala. 339; *Parker v. Boutwell*, 119 Ala. 297; *Jackson v. Kirskey*, 110 Ala. 547; *Schleicher v. Gatlin*, 85 Tex. 270. And see generally the title **ACKNOWLEDGMENTS**, vol. 1, p. 526 *et seq.*

**Record of Acknowledgment in Court.** — *Lee v. Newland*, 164 Pa. St. 366; *Foust v. Ross*, 1 W. & S. (Pa.) 501.

**The Date of Delivery** need not be fixed by the certificate. *Caruthers v. McLaran*, 56 Miss. 371.

**Formal Inaccuracies Disregarded.** — *Ward v. Walters*, 63 Wis. 39; *Yorty v. Paine*, 62 Wis. 154.

**Acknowledgment as in Other Cases.** — *Hogins v. Brashears*, 13 Ark. 242.

11. **Certificate that Deputy Appeared, Etc.** — *Osterman v. Baldwin*, 6 Wall. (U. S.) 116;

appeared by his deputy, naming him, and showing that the acknowledgment was by the deputy who executed the deed,<sup>1</sup> is sufficient.

(6) *Revenue Stamp*. — Since Congress possesses no power to tax the means or instruments devised by the states for the purpose of collecting their own revenues,<sup>2</sup> it cannot require that stamps be affixed to tax deeds issued under the state authority.<sup>3</sup>

(7) *Delivery and Acceptance*. — Where the tax title depends upon a deed, delivery is necessary in order to perfect the conveyance, and the delivery and the acceptance must be mutual and concurrent acts.<sup>4</sup> Delivery is not always necessary, however, under statutory provisions, as where the land is bid in for the county<sup>5</sup> or upon the purchase from the state of lands which had been previously bid in by the state.<sup>6</sup>

2. *Recording — Not Essential to Execution*. — In the absence of statute the recording of a tax deed is not essential to the vesting of the title, though, as in the case of other deeds, important advantages may result from its registration or disadvantages from a failure to record,<sup>7</sup> as, for example, where the question of constructive notice to subsequent purchasers is involved.<sup>8</sup> So recording sometimes becomes important where under the statute the period of limitation against informalities and irregularities,<sup>9</sup> or against redemption,<sup>10</sup> begins to run from a valid recording of the deed; and an unrecorded tax deed does not carry constructive possession of the land.<sup>11</sup>

*Essential to Validity of Deed*. — Under other statutes recording is essential to the validity of the deed or to the vesting of the legal title in the grantee.<sup>12</sup>

*Deed Must Be Witnessed or Acknowledged*. — As in the case of other deeds, unless a tax deed is properly witnessed or acknowledged it is not entitled to regis-

McRee v. Swalm, 81 Miss. 679; Ward v. Walters, 63 Wis. 39; Scheiber v. Kachler, 49 Wis. 291.

1. *Certificate that Principal Appeared by Deputy*. — Huey v. Van Wie, 23 Wis. 613.

2. *Revenue Stamp*. — See the title REVENUE LAWS, vol. 24, p. 934.

3. *Delorme v. Ferk*, 24 Wis. 201; *Sayles v. Davis*, 22 Wis. 217. See also *Knox v. Huidekoper*, 21 Wis. 527, holding that a deed may be stamped, so as to make it admissible in evidence, after the commencement of an action.

4. *Delivery and Acceptance*. — *Hulick v. Scovil*, 9 Ill. 159; *Caruthers v. McLaran*, 56 Miss. 371; *McVey v. Carr*, 159 Mo. 648; *Hilton v. Smith*, 134 Mo. 499; *Michael v. Carlyle*, 53 Wis. 504. And see generally the title DEEDS, vol. 9, pp. 150, 161.

*Possession Evidence of Delivery*. — *Games v. Stiles*, 14 Pet. (U. S.) 322. See also *Whitmore v. Learned*, 70 Me. 276.

5. *Land Bid in for County*. — *Powell v. Jenkins*, (Supm. Ct. Spec. T.) 14 Misc. (N. Y.) 83, wherein it was held that in such cases the title vests in the board of supervisors notwithstanding the deed is held in the treasurer's office.

6. *Purchase of Tax Lands from State*. — *Youngs v. Povey*, 127 Mich. 297; *Eldridge v. Richmond*, 120 Mich. 586, in which cases it was held that the application for the deed and payment of the amount complete the purchase, the execution of the deed being merely ministerial and necessary only to evidence the title.

7. *Not Essential to Execution*. — *Burnham v. Farmers' L. & T. Co.*, 44 Neb. 438; *Bracka v. Fish*, 23 Wash. 646; *Hotson v. Wetherby*, 88 Wis. 324. See also *Rhinehart v. Schuyler*, 7

Ill. 473; *Thompson v. Schuyler*, 7 Ill. 271; *Graves v. Bruen*, 6 Ill. 167.

For a Full Discussion of the recording of instruments, see the title RECORDING ACTS, vol. 24, p. 73.

8. *Notice*. — *Carter v. Woolfork*, 71 Md. 283; *Tilson v. Thompson*, 10 Pick. (Mass.) 359; *Dalton v. Fenn*, 40 Mo. 109; *Stierlin v. Daley*, 37 Mo. 483. And see generally the title RECORDING ACTS, vol. 24, p. 141 *et seq.*

*Notice of Curable Defects*. — *In re Elizabeth*, 49 N. J. L. 488.

*Sufficiency of Registration*. — *Oconto Co. v. Jerrard*, 46 Wis. 317; *International L. Ins. Co. v. Scales*, 27 Wis. 640.

*Sufficiency of Index*. — *Bardon v. Land, etc., Imp. Co.*, 157 U. S. 327; *Peirce v. Wear*, 41 Iowa 378; *Hall v. Baker*, 74 Wis. 118.

*Filing with Clerk Pending Period of Redemption*. — See *Sintes v. Barber*, 78 Miss. 585.

*Record Only for Preservation of Deed*. — *Goodman v. Sanger*, 91 Pa. St. 71.

9. See *infra*, this title, *Limitations*.

10. *Starting Limitations Against Redemption*. — *Hiles v. Atlee*, 90 Wis. 72 (as to omission of the seal from the record); *Lander v. Bromley*, 79 Wis. 372. And see the title TAXATION, *ante*, p. 854.

*Registration Pending the Period of Redemption is good without reregistration after the expiration of such period*. *Davis v. Hurst*, (Tex. 1890) 14 S. W. Rep. 610.

11. *Constructive Possession*. — *Grindo v. McGee*, 111 Wis. 531. See also *Hewitt v. Week*, 59 Wis. 444.

12. *Essential to Validity of Deed*. — *Parker v. Butwell*, 119 Ala. 297; *Ely v. Brown*, 183 Ill. 575; *Gage v. Reid*, 118 Ill. 35; *Humphrey v.*

tration in most jurisdictions, and if recorded the recording will not have its ordinary effect.<sup>1</sup>

**3. Parties — a. GRANTOR.** — As a general rule, a tax deed should be in the name of the grantor for whose taxes the land is sold — the state or the particular municipal division thereof.<sup>2</sup>

**b. GRANTEE — Purchaser or His Assignee.** — The deed should be executed to the purchaser at the sale or to his assignee,<sup>3</sup> since the assignee under a proper assignment succeeds to all the rights of the purchaser;<sup>4</sup> but the assignment must be made in the manner required by the statute<sup>5</sup> and must be recited in the deed.<sup>6</sup>

Yost, 10 Kan. App. 324; *Leftwich v. Richmond*, 100 Va. 164.

**1. Deed Must Be Witnessed or Acknowledged.** — *Hill v. Gordon*, 45 Fed. Rep. 276; *Keech v. Enriquez*, 28 Fla. 597; *Stierlin v. Daley*, 37 Mo. 483; *Dunlap v. Henry*, 76 Mo. 106; *Leftwich v. Richmond*, 100 Va. 164. See also *supra*, this section, *Right to Deed and Authority to Execute — Execution — Acknowledgment*, and see the title *RECORDING ACTS*, vol. 24, p. 101.

**2. Grantor — Body for Whose Taxes Land Was Sold.** — *Stieff v. Hartwell*, 35 Fla. 606; *Florida Sav. Bank v. Brittain*, 20 Fla. 507; *Sama v. King*, 18 Fla. 557; *Treat v. Smith*, 68 Me. 394; *Woodman v. Clapp*, 21 Wis. 355.

**Both State and County.** — In *Wisconsin* a tax deed to a county is invalid if it fails to name both the state and the county as grantors. *Woodman v. Clapp*, 21 Wis. 355; *Wilson v. Henry*, 40 Wis. 594; *Easley v. Whipple*, 57 Wis. 485; *Haseltine v. Hewitt*, 61 Wis. 121. See also *Wine v. Woods*, 158 Ind. 388.

**Execution May Be Sufficient** though not technically in the name of state or county as required, when the deed appears to be executed in pursuance of the proper authority. *McNamara v. Estes*, 22 Iowa 246; *Leggett v. Rogers*, 9 Barb. (N. Y.) 406; *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 48 Am. Dec. 189; *Wilson v. Henry*, 40 Wis. 594.

**In Name of Officer — Warranty.** — Where the deed is in the name of the officer, as under some early statutes, covenants of warranty therein are not personal, but official. *Stephenson v. Weeks*, 22 N. H. 257; *Wilson v. Cochran*, 14 N. H. 397; *Gibson v. Mussey*, 11 Vt. 212.

**Several Collectors Cannot Join** in one deed for lands sold by them severally. *Humphry v. Boge*, 2 Root (Conn.) 437.

**3. Grantee — Purchaser or Assignee.** — *Ogden v. Bemis*, 125 Ill. 105; *Swan v. Whaley*, 75 Iowa 623; *Keene v. Houghton*, 19 Me. 368; *Walton v. Hale*, 9 Gratt. (Va.) 194.

**Sufficient Designation.** — See *Garwood v. Hastings*, 38 Cal. 216; *Sherry v. Gilmore*, 58 Wis. 324.

**Several Purchasers.** — Where the deed includes several parcels of land, some purchased by one and some by another person, naming the two purchasers with words indicating the circumstances of the sale, but not with sufficient particularity to show who purchased each particular tract, is sufficient under the *Wisconsin* statute. *Hunt v. Stinson*, 101 Wis. 556.

**A Deed Running to a Grantee Not in Existence** is a nullity. *Paine v. Boynton*, 124 Mich. 194.

**Assignee of County or Town.** — In *North Carolina*, under the Act of 1895, the interest of a

county purchasing at a tax sale is that of a mortgagee, and the assignee of the county acquires no right but that of foreclosure. *Huss v. Craig*, 124 N. Car. 743; *Collins v. Bryan*, 124 N. Car. 738; *Wilcox v. Leach*, 123 N. Car. 74. But if the assignee takes a deed it will be valid as a mortgage. *Kerner v. Boston Cottage Co.*, 126 N. Car. 356.

So in *Wisconsin* a tax deed to the purchaser of a certificate from a town is void, the town having no authority to receive or make an assignment of a certificate of sale. *Irvin v. Smith*, 60 Wis. 175; *Jackson v. Jacksonport*, 56 Wis. 310; *Dreutzer v. Smith*, 56 Wis. 292; *Eaton v. Manitowoc County*, 44 Wis. 488. See also, under the statute then controlling in *Kansas*, where the assignment of a certificate by a county was invalid, *Entreken v. Howard*, 16 Kan. 553; *Sapp v. Morrill*, 8 Kan. 677; *Judd v. Driver*, 1 Kan. 455.

**4.** See generally the title *ASSIGNMENTS*, vol. 2, p. 1007. See also the title *TAXATION*, *ante*, p. 846.

**5. Assignment as Required by Statute.** — *Capehart v. McGahey*, 132 Ala. 384; *Prizer v. Taylor*, 3 Kan. App. 690; *Territory v. Perea*, 6 N. Mex. 531; *Wilson v. Wood*, 10 Okla. 279; *Smith v. Todd*, 55 Wis. 459.

**For the Sufficiency of the Assignment** under various statutes, see *Shoat v. Walker*, 6 Kan. 66; *State v. Haughey*, 5 Kan. 639; *Jordan v. Kyle*, 27 Kan. 190; *Board of Regents v. Linscott*, 30 Kan. 240; *Chrisman v. Hough*, 146 Mo. 102, 47 S. W. Rep. 941; *Territory v. Perea*, 6 N. Mex. 531; *Dreutzer v. Smith*, 56 Wis. 292; *Horn v. Garry*, 49 Wis. 464.

**Quitclaim Deed Sufficient.** — *Clippinger v. Tuller*, 10 Kan. 377; *Lain v. Shepardson*, 23 Wis. 224; *State v. Winn*, 19 Wis. 304, 88 Am. Dec. 689.

**6. Recital in Deed.** — *Ropes v. Kemps*, 38 Fla. 233; *Sanders v. Ransom*, 37 Fla. 457; *Florida Sav. Bank v. Brittain*, 20 Fla. 507; *Atkinson v. Butler Imp. Co.*, 125 Mo. 565; *Pitkin v. Shacklett*, 106 Mo. 571; *Pitkin v. Reibel*, 104 Mo. 505; *North v. Wendell*, 22 Wis. 431; *Krueger v. Knab*, 22 Wis. 429.

**Presumption of Proper Assignment from Recital.** — *Stephenson v. Thompson*, 13 Ill. 186; *Doe v. Bean*, 6 Ill. 302; *American Exch. Nat. Bank v. Crooks*, 97 Iowa 244; *Gardenhire v. Mitchell*, 21 Kan. 83. See also *Neenan v. White*, 50 Kan. 639; *Cousins v. Allen*, 28 Wis. 232.

**Sufficient Showing of Assignment.** — See *Knox v. Huidekoper*, 21 Wis. 527.

**Parol Evidence Admissible to Show Different Date.** — *Shelton v. Dunn*, 6 Kan. 128.

**Recording Not Essential.** — *Swan v. Whaley*, 75 Iowa 623.

**Authority of Officer Limited by Statute.** — The authority of the officer in this regard as in others is strictly limited by the particular statutory provisions prevailing.<sup>1</sup>

**The Equitable Owner of the Tax Certificate may foreclose it by action.**<sup>2</sup>

**4. Requisites and Sufficiency of Deed** — *a. IN GENERAL* — In the absence of a Special Statutory Form, the deed should be adjusted to the facts of the case, and must purport to convey the title in such manner as to operate as a valid common-law conveyance.<sup>3</sup>

**Statutes fixing the Form of the deed are mandatory,**<sup>4</sup> and according to some cases must be strictly followed,<sup>5</sup> though it is generally held that while a material deviation from the statute will vitiate,<sup>6</sup> a substantial compliance is sufficient.<sup>7</sup>

*A fortiori*, a deed which follows the statutory form will be sufficient if there is no necessity to deviate therefrom in order to make the instrument speak the truth.<sup>8</sup>

**Statutory Form Inapplicable.** — The statutory form, however, will not control a case to which it does not apply,<sup>9</sup> and need not be followed to the extent of making recitals inapplicable to a particular case,<sup>10</sup> or which are not true and show an illegal sale.<sup>11</sup>

**Deed Void on Its Face.** — A deed showing on its face a failure to comply with the law is void.<sup>12</sup>

**1. Authority of Officer Limited.** — *Alexander v. Savage*, 90 Ala. 383, holding that a conveyance to administrators "for the use of the heirs" of the original purchaser is void for want of authority to execute it.

**2. Equitable Owner of Certificate.** — *Leavitt v. Bell*, 55 Neb. 57.

**3. In Absence of Statutory Form.** — *State v. Mantz*, 62 Mo. 258; *Einstein v. Gay*, 45 Mo. 62; *Guffey v. O'Reiley*, 88 Mo. 418, 57 Am. Rep. 424.

**A Quitclaim by the State is sufficient to convey lands** which had been bid in by the state. *Mann v. Carson*, 120 Mich. 631; *Dawson v. Peter*, 119 Mich. 274.

**A Deed "in the Usual Form" under the statute in Arkansas** providing that such a deed shall be taken as sufficient evidence of certain matters, though no form is prescribed, means a deed which substantially recites the material steps to constitute a valid tax sale, etc. *Bonnell v. Roane*, 20 Ark. 114.

**4. Statutory Form Mandatory.** — *Atkison v. Butler Imp. Co.*, 125 Mo. 565; *Pitkin v. Reibel*, 104 Mo. 505.

**5. Strict Observance of Statutory Form Necessary.** — *Simmons v. McCarthy*, 118 Cal. 622; *Hubbell v. Campbell*, 56 Cal. 527; *Grimm v. O'Connell*, 54 Cal. 522; *Russell v. Mann*, 22 Cal. 131; *Hopkins v. Scott*, 86 Mo. 140; *Williams v. McLanahan*, 67 Mo. 499.

**6. Substantial Deviation Fatal.** — *Jacks v. Dyer*, 31 Ark. 334; *Ropes v. Kemps*, 38 Fla. 233; *Knowlton v. Moore*, 136 Mass. 32; *Sullivan v. Donnell*, 90 Mo. 278; *Rector, etc., Co. v. Maloney*, 15 S. Dak. 271.

**7. Substantial Compliance Sufficient.** — *Gabe v. Root*, 93 Ind. 256; *Doe v. Hileman*, 2 Ill. 323; *Martin v. Garrett*, 49 Kan. 131; *Mack v. Price*, 35 Kan. 134; *McCauslin v. McGuire*, 14 Kan. 248; *McQuesten v. Swope*, 12 Kan. 32; *Haynes v. Heller*, 12 Kan. 381; *Bowman v. Cockrill*, 6 Kan. 311; *Haller v. Blaco*, 10 Neb. 38; *Sutton v. Stone*, 4 Neb. 319; *Kinney v. Beverley*, 2 Hen. & M. (Va.) 318.

**Wisconsin Statute.** — As to what is a sufficient compliance with the Wisconsin statute requiring the deed to be in "substantially" the form given or "in other equivalent form," see *Lybrand v. Haney*, 31 Wis. 230; *Marshall v. Benson*, 48 Wis. 558; *Austin v. Holt*, 32 Wis. 478; *Krueger v. Knab*, 22 Wis. 429; *Lain v. Cook*, 15 Wis. 446; *Cutler v. Hurlbut*, 29 Wis. 152; *Cousins v. Allen*, 28 Wis. 232. See also *Geekie v. Kirby Carpenter Co.*, 106 U. S. 379; *Condit v. Blackwell*, 22 N. J. Eq. 481.

**The Literal Language of the Statute need not be adopted.** *Pearce v. Pittsworth*, 87 Mo. 639.

**Omission of Date Not Fatal.** — *Clark v. Holton*, 94 Ga. 542; *Thompson v. Schuyler*, 7 Ill. 271; *McMichael v. Carlyle*, 53 Wis. 504.

**Statutory Form Applicable to Sale Before Statute Passed.** — *Gardenhire v. Mitchell*, 21 Kan. 83; *Lain v. Shepardson*, 18 Wis. 60. See also *Robinson v. Howe*, 13 Wis. 347.

**8. Sufficient to Follow Statutory Form.** — *Davis v. Harrington*, 35 Kan. 196; *Bell v. Gordon*, 55 Miss. 45; *Marshall v. Benson*, 48 Wis. 558. See also *Cruzen v. Stephens*, 123 Mo. 337, 45 Am. St. Rep. 549.

**9. Statutory Form Inapplicable.** — *Atkinson v. Butler Imp. Co.*, 125 Mo. 565.

**10. Recitals Inapplicable to Particular Case.** — *Barnett v. Jaynes*, 26 Colo. 279.

**11. Recitals Not True in Particular Case.** — *Magill v. Martin*, 14 Kan. 67; *McCauslin v. McGuire*, 14 Kan. 234; *Sullivan v. Donnell*, 90 Mo. 278; *Skinner v. Williams*, 85 Mo. 489; *Hanenkratt v. Hamil*, 10 Okla. 219.

**Change Necessary to Meet Later Statute.** — *Reckitt v. Knight*, (S. Dak. 1902) 92 N. W. Rep. 1077; *Thompson v. Roberts*, (S. Dak. 1902) 92 N. W. Rep. 1079.

**12. Deed Void on Its Face** — *United States v. Moore v. Brown*, 4 McLean (U. S.) 211.

**Arkansas.** — *Pack v. Crawford*, 29 Ark. 489.

**California.** — *Landregan v. Peppin*, 86 Cal. 122; *Brady v. Dowden*, 59 Cal. 51.

**Colorado.** — *Bennet v. North Colorado Springs Land, etc., Co.*, 23 Colo. 470, 58 Am. St. Rep.

**Special Authority.** — It is not necessary that the deed should show on its face that it was executed under the special statutory power.<sup>1</sup>

**b. RECITALS — In General.** — A tax deed should show by its recitals a compliance with the provisions of the law,<sup>2</sup> and it is invalid if it recites facts which show a failure to comply with the law<sup>3</sup> or if it omits or misrecites facts which the statute requires to be recited to show a valid sale.<sup>4</sup> It has frequently been held, however, that it is not necessary for the deed to show affirmatively and in detail that every prerequisite step in the tax proceeding has been taken,<sup>5</sup> nor need it state other matters than those which the statute requires it to recite,<sup>6</sup> but in any event it must recite so much of the previous

281; *Emerson v. Shannon*, 23 Colo. 274, 58 Am. St. Rep. 232; *Crisman v. Johnson*, 23 Colo. 264, 58 Am. St. Rep. 224.

*Iowa.* — *Hintrager v. McElhinny*, 112 Iowa 325; *Boardman v. Bourne*, 20 Iowa 134.

*Kansas.* — *Larkin v. Wilson*, 28 Kan. 513; *Babbitt v. Johnson*, 15 Kan. 252; *Magill v. Martin*, 14 Kan. 67.

*Missouri.* — *Atkison v. Butler Imp. Co.*, 125 Mo. 565.

*Oklahoma.* — *Hanenkratt v. Hamil*, 10 Okla. 219.

*South Dakota.* — *Thompson v. Roberts*, (S. Dak. 1902) 92 N. W. Rep. 1079; *Salmer v. Lathrop*, 10 S. Dak. 216.

*West Virginia.* — *Baxter v. Wade*, 39 W. Va. 281.

*Wisconsin.* — *Sprague v. Coenen*, 30 Wis. 209.

1. **Special Authority.** — *Hobson v. Dutton*, 9 Kan. 477; *Garner v. Wallace*, 118 Mich. 387; *Bowers v. Chambers*, 53 Miss. 259; *Falkner v. Dorman*, 7 Wis. 388.

**Misrecital of Statute Will Not Vitalize.** — *Boyle v. West*, 107 La. 347; *Sims v. Walshe*, 49 La. Ann. 781.

2. **Compliance with Law.** — *For the Construction of Recitals Held to Be Sufficient*, see *Waddingham v. Dickson*, 17 Colo. 223; *Pixley v. Pixley*, 164 Mass. 335; *Hunt v. Stinson*, 101 Wis. 556; *Hotson v. Wetherby*, 88 Wis. 324.

*For the Construction of Recitals Held to Be Insufficient*, see *Green v. Alden*, 92 Me. 177; *Ladd v. Dickey*, 84 Me. 190.

3. See *supra*, the next preceding subdivision of this subsection.

4. **Omission or Misrecital — United States.** — *Daniels v. Case*, 45 Fed. Rep. 843.

*Arkansas.* — *Lawrence v. Zimpleman*, 37 Ark. 643; *McDermott v. Scully*, 27 Ark. 226.

*California.* — *Simmons v. McCarthy*, 118 Cal. 622; *Russ v. Crichton*, 117 Cal. 695.

*Dakota.* — *Wambole v. Foote*, 2 Dak. 1.

*Florida.* — *Ropes v. Kemps*, 38 Fla. 233; *Sanders v. Ransom*, 37 Fla. 457.

*Illinois.* — *Doe v. Hileman*, 2 Ill. 323.

*Indiana.* — *McEntire v. Brown*, 28 Ind. 347.

*Kansas.* — *York v. Barnes*, 58 Kan. 478; *Howard v. Hulbert*, 10 Kan. App. 314.

*Louisiana.* — *Dufour v. Camfranc*, 11 Mart. (La.) 607, 13 Am. Dec. 360.

*Maine.* — *Skowhegan Sav. Bank v. Parsons*, 86 Me. 514.

*Massachusetts.* — *Knowlton v. Moore*, 136 Mass. 32; *Harrington v. Worcester*, 6 Allen (Mass.) 576.

*Missouri.* — *Dameron v. Jamison*, 143 Mo. 483; *Loring v. Groomer*, 142 Mo. 1; *Atkison v. Butler Imp. Co.*, 125 Mo. 565; *Burden v. Tay-*

*lor*, 124 Mo. 12; *Burden v. Cook*, 124 Mo. 23; *Western v. Flanagan*, 120 Mo. 61; *Bender v. Dungan*, 99 Mo. 126; *Moore v. Harris*, 91 Mo. 621; *Duff v. Neilson*, 90 Mo. 93; *Spurlock v. Allen*, 49 Mo. 178.

*South Dakota.* — *Horswill v. Farnham*, (S. Dak. 1902) 92 N. W. Rep. 1082.

*Tennessee.* — *Blankenship v. French*, (Tenn. Ch. 1900) 60 S. W. Rep. 512.

*Wisconsin.* — *Wakeley v. Mohr*, 18 Wis. 321.

**Lost Deed.** — Where the statute requires that a second deed should recite the loss or destruction of the first deed and its date, if possible, a second deed not complying with these requirements is no evidence of title. *Burroughs v. Goff*, 64 Mich. 464.

**The Facts Themselves**, and not conclusions therefrom, should be recited. *Duncan v. Gillette*, 37 Kan. 156; *Jones v. Miracle*, 93 Ky. 639; *Ladd v. Dickey*, 84 Me. 190; *Yankee v. Thompson*, 51 Mo. 234; *Spurlock v. Allen*, 49 Mo. 178; *Large v. Fisher*, 49 Mo. 307; *May v. Wright*, 17 Vt. 97, 42 Am. Dec. 481. But see *O'Grady v. Barnhisel*, 23 Cal. 287.

**The Recital of a Conclusion Will Be Overthrown** by the further statement of the facts from which the conclusion was drawn if the two are not consistent. *Landregan v. Peppin*, 86 Cal. 122.

**Material Variance Between the Deed and the Record** will invalidate the deed. *Sheafer v. Mitchell*, 109 Tenn. 181.

5. **Recital of Every Step Unnecessary.** — *Pleasants v. Scott*, 21 Ark. 370, 76 Am. Dec. 403; *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94; *Cane v. Herndon*, 107 La. 591; *State v. Mantz*, 62 Mo. 258; *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 538, 48 Am. Dec. 189; *Brien v. O'Shaughnessy*, 3 Lea (Tenn.) 724; *Flanagan v. Grimmet*, 10 Gratt. (Va.) 421.

**Presumption of Regularity from Recitals Contained.** — *Griffin v. Tuttle*, 74 Iowa 219; *Smith v. Easton*, 37 Iowa 584; *M'Coy v. Michew*, 7 W. & S. (Pa.) 386; *Frentz v. Klotsch*, 28 Wis. 312.

6. **Recitals Not Required by Statute.** — *Davis v. Pacific Imp. Co.*, 137 Cal. 245.

**The Manner of Offering the Land for Sale** need not be recited. *Hayes v. Ducasse*, 119 Cal. 682; *Cane v. Herndon*, 107 La. 591; *Sheafer v. Mitchell*, 109 Tenn. 181.

Thus, it has been held that the fact that several tracts are embraced in one deed will not raise the inference that the parcels were not separately sold. *Bennett v. Darling*, 15 S. Dak. 1; *Hotson v. Wetherby*, 88 Wis. 324. Compare the cases cited *infra*, this subsection, the note headed *Separate Sale of Lands*.



proceedings as will show authority to sell the land and make the deed.<sup>1</sup> Where the truth or falsity of the fact recited does not vitiate the sale,<sup>2</sup> the deed will not be invalidated by the misrecital of facts not necessary to be recited.<sup>3</sup>

**Particular Recitals.** — The particular recitals which are necessary depend upon the statutes themselves which prescribe the conditions of a valid sale and the requisite recitals in that regard.<sup>4</sup> Thus, under various statutes, the deed must show that the parcels of land were sold separately,<sup>5</sup> that the statutory notice was given by advertisement or otherwise,<sup>6</sup> that the assessment was for a particular year,<sup>7</sup> that authority to make the sale existed by reason of delinquency, etc.,<sup>8</sup> that the certificate was assigned, if such be the case, and that the assignment was valid.<sup>9</sup> So the time and place of sale and the<sup>10</sup>

1. **Recital of Enough to Show Authority.** — *Coulter v. Stafford*, 56 Fed. Rep. 564, 15 U. S. App. 118; *Jones v. Miracle*, 93 Ky. 639; *Sibley v. Smith*, 2 Mich. 486; *O'Mulcahy v. Florer*, 27 Minn. 449; *Madland v. Benland*, 24 Minn. 372; *State v. Mantz*, 62 Mo. 258; *Ludden v. Hansen*, 17 Neb. 354; *Woodward v. Sloan*, 27 Ohio St. 592; *Turney v. Yeomen*, 14 Ohio 208; *Hobbs v. Shumate*, 11 Gratt. (Va.) 516; *Buchanan v. Reynolds*, 4 W. Va. 681. See also *Hanenkratt v. Hamil*, 10 Okla. 219 (deed to county). But see as to a deed of forfeited state lands *Walker v. Taylor*, 43 Ark. 543.

2. *Hickman v. Kempner*, 35 Ark. 505, holding that a false recital that the land was assessed in the name of unknown owners was immaterial.

3. **Misrecital of Immaterial Facts.** — *Harper v. Rowe*, 55 Cal. 132.

4. **Particular Recitals.** — See generally the local statutes.

5. **Separate Sale of Lands.** — *Howard v. Hulbert*, 10 Kan. App. 314; *Allen v. Buckley*, 94 Mo. 158.

A deed reciting that the several pieces were separately disposed of at a public sale, and that the purchaser separately offered to pay the sum due on each, etc., is sufficient though it does not recite that the parcels were stricken off separately to the purchaser. *Barnett v. Jaynes*, 26 Colo. 279. But see *Hotson v. Wetherby*, 88 Wis. 324.

6. **Notice or Advertisement.** — *Skowhegan Sav. Bank v. Parsons*, 86 Me. 514; *Ladd v. Dickey*, 84 Me. 190; *Wiggin v. Temple*, 73 Me. 382; *Moore v. Harris*, 91 Mo. 616; *Abbott v. Doling*, 49 Mo. 302; *Lagroue v. Rains*, 48 Mo. 536; *Yankee v. Thompson*, 51 Mo. 234. But see *Flanagan v. Grimmet*, 10 Gratt. (Va.) 421.

7. **Assessment.** — *Jacks v. Dyer*, 31 Ark. 334; *Spain v. Johnson*, 31 Ark. 314; *Simmons v. McCarthy*, 118 Cal. 622; *Wetherbee v. Dunn*, 32 Cal. 106; *Maxey v. Clabaugh*, 6 Ill. 26; *Skowhegan Sav. Bank v. Parsons*, 86 Me. 514; *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 48 Am. Dec. 189; *Horswill v. Farnham*, (S. Dak. 1902) 92 N. W. Rep. 1082; *Buchanan v. Reynolds*, 4 W. Va. 681.

8. **Authority for Sale — Delinquency, Etc.** — *Arkansas.* — *McDermott v. Scully*, 27 Ark. 226, as to order required.

*Indiana.* — *Ward v. Montgomery*, 57 Ind. 276.

*Kansas.* — *Hubbard v. Johnson*, 9 Kan. 632.

*Maine.* — *Brookings v. Woodin*, 74 Me. 222; *Allen v. Morse*, 72 Me. 502; *Briggs v. Johnson*, 71 Me. 236; *Whitmore v. Learned*, 70 Me. 276;

*French v. Patterson*, 61 Me. 203; *Lovejoy v. Lunt*, 48 Me. 377; *Loomis v. Pingree*, 43 Me. 311.

*Massachusetts.* — *Downey v. Lancy*, 178 Mass. 465; *Langdon v. Stewart*, 142 Mass. 576; *Lunenburg v. Walter Heywood Chair Co.*, 118 Mass. 540; *Adams v. Mills*, 126 Mass. 278; *Harrington v. Worcester*, 6 Allen (Mass.) 576; *Reed v. Crapo*, 127 Mass. 39. See also *Pixley v. Pixley*, 164 Mass. 335, wherein the recital was held to be sufficient.

*Minnesota.* — *Sherburne v. Rippe*, 35 Minn. 540; *Gilfillan v. Chatterton*, 38 Minn. 335; *Sheehy v. Hinds*, 27 Minn. 259.

*Missouri.* — *Williams v. McLanahan*, 67 Mo. 499 (as to reciting the date of the execution or order authorizing the sale); *Hopkins v. Scott*, 86 Mo. 144.

*Tennessee.* — *Blankenship v. French*, (Tenn. Ch. 1900) 60 S. W. Rep. 512; *Marley v. Foster*, 102 Tenn. 241.

*Wisconsin.* — *Call v. Dearborn*, 21 Wis. 504.

9. **Assignment of Certificate.** — See *supra*, this section, *Parties — Grantee*.

10. **Time and Place of Sale.** — *Haynes v. Heller*, 12 Kan. 381; *Mason v. Crowder*, 85 Mo. 526; *Shelley v. Towle*, 16 Neb. 194; *Baldwin v. Merriam*, 16 Neb. 199; *Thompson v. Merriam*, 15 Neb. 498; *Towle v. Holt*, 14 Neb. 221; *Howard v. Lamaster*, 11 Neb. 582; *Haller v. Blaco*, 10 Neb. 36; *Thompson v. Lawrence*, 2 Baxt. (Tenn.) 415. See also *Frentz v. Klotsch*, 28 Wis. 312, holding a recital of sale at the county-seat to be sufficient; *Hoge v. Magnes*, (C. C. A.) 85 Fed. Rep. 355.

**More Misrecital of the Actual Date of Sale** has been held not to invalidate the deed. *Callanan v. Hurley*, 93 U. S. 387; *Hurlburt v. Dyer*, 36 Iowa 474; *Harris v. Curran*, 32 Kan. 580; *Brigins v. Chandler*, 60 Miss. 862; *Shell v. Duncan*, 31 S. Car. 547.

**Adjourned or Deferred Sales.** — The statute not requiring a recital of adjournment from day to day, the recital of the particular day on which the land was offered for sale is sufficient. *Hill v. Atterbury*, 88 Mo. 114.

And where sales were continued over several days, a recital in the deed of a sale on the first day will not render the deed invalid though the sale was actually made on a later day. *Callanan v. Hurley*, 93 U. S. 387; *Phelps v. Meade*, 41 Iowa 470.

So where the statute permits a sale on a subsequent date when it cannot be made on the first date provided, the recital of a sale on the subsequent date without showing the contingen-

consideration paid<sup>1</sup> should be stated, and in *California* the provisions of the certificate must be recited in the deed.<sup>2</sup>

*c. AS TO LAND CONVEYED* — (1) *In General — Several Parcels.* — In the absence of statutory inhibition, there is no reason why more than one parcel of land may not be conveyed in one and the same deed to a purchaser at a tax sale.<sup>3</sup>

(2) *Description* — (a) *Rights Attach Only to Property Described.* — Rights under a tax deed can be asserted to that property alone which is described in such deed.<sup>4</sup>

(b) *Sufficiency* — *aa. REASONABLE CERTAINTY.* — A tax deed must describe the land conveyed with such reasonable certainty as to identify it without the aid of extrinsic facts.<sup>5</sup>

*Conformity with Description in Antecedent Proceedings.* — The description in the deed

cies excusing sale on the first date does not show an unauthorized sale. *Easton v. Savery*, 44 Iowa 654; *Love v. Welch*, 33 Iowa 192; *Sully v. Kuehl*, 30 Iowa 275; *Eldridge v. Kuehl*, 27 Iowa 160; *Stafford v. Lauver*, 49 Kan. 690; *Hobson v. Dutton*, 9 Kan. 477.

But where the statute permits adjournments only for two weeks at a time, a deed which discloses on its face that the sale was made at an adjourned day three months after the regular sale commenced is void without recitals affirmatively showing that the adjournments did not exceed two weeks. *Gregg v. Jesberg*, 113 Mo. 34.

1. *Consideration Paid.* — *Simmons v. McCarthy*, 118 Cal. 622; *Hubbell v. Campbell*, 56 Cal. 527; *Clark v. Holton*, 94 Ga. 542.

An Erroneous Statement of the Consideration will not invalidate the deed and is not prejudicial where the giving of the deed ended the right of redemption. *Langley v. Batchelder*, 69 N. H. 566.

2. *Provisions of Certificate.* — *Simmons v. McCarthy*, 118 Cal. 622; *Russ v. Crichton*, 117 Cal. 695; *De Frieze v. Quint*, 94 Cal. 653, 28 Am. St. Rep. 151; *Hughes v. Cannedy*, 92 Cal. 382; *Anderson v. Hancock*, 64 Cal. 455; *Grimm v. O'Connell*, 54 Cal. 522.

Variance as to the Amount of Taxes and Costs as recited in the two instruments has been held not to be sufficient to invalidate the deed. *Doland v. Mooney*, 79 Cal. 137.

3. *More than One Parcel.* — *Barnett v. Jaynes*, 26 Colo. 279; *Waddingham v. Dickson*, 17 Colo. 223; *Stieff v. Hartwell*, 35 Fla. 606; *State v. Jordan*, 36 Fla. 1. See also *Watkins v. Inge*, 24 Kan. 612 (under statute); *Bennett v. Darling*, 15 S. Dak. 1; *Hotson v. Wetherby*, 88 Wis. 324.

4. *Rights Attach Only to Property Described.* — *Claiborne v. Elkins*, 79 Tex. 380; *Berrendo Stock Co. v. Kaiser*, 66 Tex. 352; *Ozee v. Henrietta*, 90 Tex. 334.

Correction in Equity of Deed Made under Decree in Tax Suit. — *Kneeland v. Hull*, 116 Mich. 55. But see *Keepfer v. Force*, 86 Ind. 81.

5. *Description with Reasonable Certainty* — *Sufficient Descriptions.* — In the following cases the descriptions were held to be sufficient:

*United States.* — *Newby v. Browlee*, 23 Fed. Rep. 320 (under statute).

*Alabama.* — *Doe v. Clayton*, 81 Ala. 391.

*Arkansas.* — *Schattler v. Cassinelli*, 56 Ark. 172.

*California.* — *Garwood v. Hastings*, 38 Cal.

216; *Brynn v. Murphy*, 29 Cal. 326; *Bosworth v. Danzien*, 25 Cal. 296.

*Indiana.* — *Keepfer v. Force*, 86 Ind. 81.

*Iowa.* — *Roberts v. Deeds*, 57 Iowa 323.

*Kansas.* — *Martz v. Newton*, 29 Kan. 331; *Haynes v. Heller*, 12 Kan. 381.

*Louisiana.* — *Thibodaux v. Keller*, 29 La. Ann. 508.

*Michigan.* — *Sleight v. Roe*, 125 Mich. 585.

*Minnesota.* — *Bell v. McLaren*, (Minn. 1903) 93 N. W. Rep. 515.

*Mississippi.* — *Mixon v. Clevenger*, 74 Miss. 67; *McCready v. Lansdale*, 58 Miss. 877; *Selden v. Coffee*, 55 Miss. 41.

*New Hampshire.* — *Annan v. Baker*, 49 N. H. 161.

*Texas.* — *Earle v. Henrietta*, (Tex. Civ. App. 1897) 41 S. W. Rep. 727; *Homes v. Henrietta*, (Tex. Civ. App. 1897) 41 S. W. Rep. 728; *Kilpatrick v. Sisneros*, 23 Tex. 113.

*Wisconsin.* — *Schelber v. Kaehler*, 49 Wis. 291; *Delorme v. Ferk*, 24 Wis. 201; *Mecklem v. Blake*, 19 Wis. 397.

See also *State v. Morrison*, 44 S. Car. 470.

*Part of Land Excepted from Grant.* — *Wetherbee v. Dunn*, 32 Cal. 106; *Marsh v. Ne-ha-sa-ne Park Assoc.*, 25 N. Y. App. Div. 34; *Ne-ha-sa-ne Park Assoc. v. Lloyd*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 207. See also *Dolan v. Trelevan*, 31 Wis. 147.

*Omission of County in Which Land Is Situated.* — The failure to state the county in which the land is situated does not invalidate the deed where in another part of the deed the land is properly and accurately described. *Roth v. Gabbert*, 123 Mo. 21; *Haynes v. Heller*, 12 Kan. 381. And the omission of the county is immaterial where the section, township, and range are given. *Keepfer v. Force*, 86 Ind. 81.

*Insufficient Descriptions* — *Alabama.* — *Reddick v. Long*, 124 Ala. 260.

*Arkansas.* — *Rhodes v. Covington*, 69 Ark. 357.

*Iowa.* — *Tucker v. Carlson*, 113 Iowa 449.

*Kansas.* — *McDonough v. Merten*, 53 Kan. 120; *Hale v. Sweet*, 7 Kan. App. 409.

*Maine.* — *Libby v. Mayberry*, 80 Me. 137.

*Massachusetts.* — *Hill v. Mowry*, 6 Gray (Mass.) 551.

*New York.* — *Underhill v. Keirns*, 54 N. Y. App. Div. 214, affirmed 170 N. Y. 587.

*Texas.* — *Brokel v. McKechnie*, 69 Tex. 32; *Ammons v. Dwyer*, 78 Tex. 639; *Berrendo Stock Co. v. Kaiser*, 66 Tex. 352; *Waters v. Spofford*, 58 Tex. 115; *Wofford v. McKinna*, 23

must correspond substantially with that employed in the antecedent proceedings, as in the assessment, advertisement, decree, order of sale, etc.,<sup>1</sup> and if the description in the antecedent proceedings is insufficient the deed is bad though the description therein is sufficient.<sup>2</sup>

**Sufficiently Certain to Permit Location.** — The description must be sufficiently certain to permit a location of the land by a surveyor.<sup>3</sup>

**Error as to One of Two Lots.** — An error in the description of one tract of land cannot be held to invalidate the deed as to another tract properly described.<sup>4</sup>

**Where No Boundaries Are Given,** or merely the amount of land is specified, without more to fix its limits, the description is not sufficient.<sup>5</sup>

**bb. DESIGNATION AS PART OF LARGER TRACT.** — A description designating the land merely as a part of a larger tract, without any greater certainty as to the identity of the particular part conveyed, is not sufficient.<sup>6</sup>

**An Undivided Interest** in land is sufficiently designated as the undivided interest in the particular tract specifically described.<sup>7</sup>

**cc. COMMON NAME OR ABBREVIATIONS.** — The property may be described by the name by which it is commonly known, identifying it generally, as by its location without giving metes and bounds,<sup>8</sup> or by the use of familiar abbreviations.<sup>9</sup>

Tex. 36, 76 Am. Dec. 53; Harber v. Dyches, (Tex. 1890) 14 S. W. Rep. 580; Crumbley v. Busse, 11 Tex. Civ. App. 319.

**Failure to Designate the Town** has been held to invalidate the deed though the property was described as lying in a particular county. Campbell v. Packard, 61 Wis. 88.

**Part of Tract Excepted.** — Johnson v. Ashland Lumber Co., 52 Wis. 458.

**Name of Owner Required by Statute.** — Sutton v. Calhoun, 14 La. Ann. 205.

**1. Conformity with Antecedent Proceedings Necessary.** — Levy v. Ladd, 35 Fla. 391; Blair Town Lot, etc., Co. v. Scott, 44 Iowa 143; Carlisle v. Cassidy, (Ky. 1898) 46 S. W. Rep. 490; Lowe v. Ekey, 82 Mo. 286; Abbott v. Coates, 62 Neb. 247; Jones v. Dils, 18 W. Va. 759 (as to deed for part where entire tract was sold). See also Vetterly v. McNeal, 129 Mich. 507, holding descriptions to be identical; Boon v. Simmons, 88 Va. 259.

**2. Insufficient Description in Antecedent Proceedings.** — Stout v. Mastin, 139 U. S. 151; Hewitt v. Storch, 31 Kan. 488; Wilkins v. Tourtellott, 28 Kan. 825; Bruce v. McBee, 23 Kan. 379; Olsen v. Bagley, 10 Utah 492.

**Defect Not Curable by Execution of Subsequent Deed.** — Hewitt v. Storch, 31 Kan. 488.

**3. Sufficient to Permit Location.** — Roberts v. Deeds, 57 Iowa 323.

**4. Error as to One of Two Lots.** — Watkins v. Inge, 24 Kan. 612.

**5. Boundaries.** — Cooper v. Falk, 109 La. 474; Wilson v. Marshall, 10 La. Ann. 327; Green v. Alden, 92 Me. 177.

**Omission of Part of the Boundaries,** leaving the extent of the land conveyed unascertainable, is fatal. Zink v. McManus, 121 N. Y. 259.

**6. Designation as Part of Larger Tract — United States.** — Hintrager v. Nightingale, 36 Fed. Rep. 847; Ronkendorff v. Taylor, 4 Pet. (U. S.) 349.

**Arkansas.** — Jacks v. Chaffin, 34 Ark. 534.

**Illinois.** — Brickey v. English, 129 Ill. 646; Shackleford v. Bailey, 35 Ill. 387.

**Indiana.** — Armstrong v. Hufty, (Ind. 1899) 55 N. E. Rep. 443.

**Iowa.** — Cornoy v. Wetmore, 92 Iowa 100; Ellsworth v. Nelson, 81 Iowa 57; Griffith v. Utley, 76 Iowa 292; Poindexter v. Doolittle, 54 Iowa 52; Bosworth v. Farenholz, 3 Iowa 84.

**Maine.** — Greene v. Lunt, 58 Me. 519; Larabee v. Hodgkins, 58 Me. 412.

**Mississippi.** — Hughes v. Thomas, (Miss. 1900) 29 So. Rep. 74; Yandell v. Pugh, 53 Miss. 295. See also Nelson v. Abernathy, 74 Miss. 164.

**Missouri.** — Western v. Flanagan, 120 Mo. 61. See also Roth v. Gabbert, 123 Mo. 21.

**New York.** — Peck v. Mallans, 10 N. Y. 509.

**Ohio.** — Humphries v. Huffman, 33 Ohio St. 395; Winkler v. Higgins, 9 Ohio St. 599; Lafferty v. Byers, 5 Ohio 458.

**Wisconsin.** — Head v. James, 13 Wis. 641.

**Aider of Description.** — In *Mississippi* a description of land as a specified number of acres of the north, east, or west part of a particular legal subdivision is good, and where the assessment roll furnishes a clue which, when followed by the aid of other testimony, conducts certainly to the land intended, such testimony is admissible. See *Illinois Cent. R. Co. v. Le Blanc*, 74 Miss. 650; *Herring v. Moses*, 71 Miss. 620; *Dodds v. Marx*, 63 Miss. 443; *Bowers v. Chambers*, 53 Miss. 259; *McCready v. Lansdale*, 58 Miss. 877; *Enochs v. Miller*, 60 Miss. 19; *Tierney v. Brown*, 65 Miss. 563, 7 Am. St. Rep. 679. See also *Taylor v. Wright*, 121 Ill. 455.

**Location by the Purchaser** has been permitted in *Pennsylvania* where the treasurer's deed found the quantity, but not the location, of a part of the tract. *Coxe v. Blanden*, 1 Watts (Pa.) 533, 26 Am. Dec. 83; *McCord v. Bergautz*, 7 Watts (Pa.) 490.

**7. Undivided Interest.** — *Anderson v. Hancock*, 61 Cal. 88.

**8. Name by Which Land Commonly Known.** — *Vaughan v. Swayzie*, 56 Miss. 704; *Flanagan v. Boggess*, 46 Tex. 330. See also *People v. Crockett*, 33 Cal. 153; *High v. Shoemaker*, 22 Cal. 363.

**9. Abbreviations.** — *McCready v. Lansdale*, 58 Miss. 877; *Lowe v. Ekey*, 82 Mo. 286, wherein

*dd. PAROL EVIDENCE.* — Parol evidence is not admissible to make good a fatally defective description.<sup>1</sup>

**Latent Ambiguities.** — On the other hand, it is held that latent ambiguities may be corrected by evidence.<sup>2</sup> But the principle, it has been said, should be confined to parties to the instrument and those claiming in privity.<sup>3</sup>

**Description Inherently Insufficient.** — And even where evidence of extrinsic facts is admissible to identify the premises, a description which is inherently insufficient cannot be made sufficient by proof of facts to show what was intended to be conveyed.<sup>4</sup>

**5. What Law Governs.** — Tax deeds and the validity thereof must be governed by the law in force at the time of the sale.<sup>5</sup>

**6. Effect — a. AS COLOR OF TITLE** — (1) *In General.* — A tax deed is color of title, and will support a claim by adverse possession under the various statutes of limitations, even though the tax proceedings themselves are defective;<sup>6</sup> but in such case it is only color of title, and will not support

certain abbreviations were considered to be sufficient under the statute and others insufficient.

**Parol Evidence Admissible to Explain.** — *Barton v. Anderson*, 104 Ind. 578.

**1. Parol Evidence Inadmissible.** — *People v. Mahoney*, 55 Cal. 286; *Keane v. Cannovan*, 21 Cal. 302, 82 Am. Dec. 738; *Roberts v. Deeds*, 57 Iowa 320; *Orono v. Veazie*, 61 Me. 431; *Bowers v. Andrews*, 52 Miss. 596; *McGuire v. Stevens*, 42 Miss. 724, 2 Am. Rep. 649; *Curtis v. Brown County*, 22 Wis. 167.

**The Admissibility of the Description in the Assessment Roll** to identify the property does not authorize parol testimony to fix an uncertain description upon a parcel of land not described in the assessment roll or otherwise indicated by any fact or circumstance which may lead to its identification. *Hughes v. Thomas*, (Miss. 1900) 29 So. Rep. 74.

**Statute Making Recital Conclusive.** — *Roberts v. Fargo First Nat. Bank*, 8 N. Dak. 504.

**2. Latent Ambiguities Corrected by Evidence.** — *Stewart v. Colter*, 31 Minn. 385; *Selden v. Coffee*, 55 Miss. 41; *Brown v. Walker*, 11 Mo. App. 226; *Marsh v. Nelson*, 101 Pa. St. 51; *Jenkins v. Sharpf*, 27 Wis. 472; *Macklem v. Blake*, 19 Wis. 397. See also *Roberts v. Deeds*, 57 Iowa 323.

**Deeds Between Individuals Have Been Distinguished** from tax deeds in that in the case of a sale for taxes no question of intention on the part of the owner can arise. Hence a more accurate description is required in conveyances under sales for taxes, which cannot be aided by intentment. *Tallman v. White*, 2 N. Y. 66. See also *Dike v. Lewis*, 4 Den. (N. Y.) 237; *Griffin v. Creppin*, 60 Me. 270; *Greene v. Lunt*, 58 Me. 519; *Nelson v. Brodhack*, 44 Mo. 596, 100 Am. Dec. 328; *Harber v. Dyches*, (Tex. 1890) 14 S. W. Rep. 580. But see *Bosworth v. Danzien*, 25 Cal. 296; *Thompson v. Ela*, 60 N. H. 562.

In other cases, however, the distinction is disregarded to the extent that a description which can be made to identify the land by proper extrinsic evidence is alike admissible in either case. See *Cornelius v. Dunn*, 17 Pa. Co. Ct. 566; *Lochte v. Austin*, 69 Miss. 271; *Murphy v. Williams*, (Tex. Civ. App. 1900) 56 S. W. Rep. 695.

And under statute in *Wisconsin* the question

of uncertainty in the description is to be determined by the same rules as are applicable to ordinary conveyances between grantor and grantee. *Mendota Club v. Anderson*, 101 Wis. 479; *Mecklem v. Blake*, 19 Wis. 397. And evidence *aliunde* is admissible. *Meade v. Gilfoyle*, 64 Wis. 18.

**3. Confined to Parties and Privies.** — *Brokel v. McKechnie*, 69 Tex. 32.

**4. Bell v. McLaren**, (Minn. 1903) 93 N. W. Rep. 515. See also *Ozee v. Henrietta*, 90 Tex. 334.

**5. What Law Governs.** — *State v. Mantz*, 62 Mo. 258; *McCann v. Merriman*, 11 Neb. 241; *Dever v. Cornwall*, 10 N. Dak. 123; *Shearer v. Mitchell*, 109 Tenn. 181; *Ford v. Durie*, 8 Wash. 87; *Nelson v. Rountree*, 23 Wis. 367; *Smith v. Cleveland*, 17 Wis. 556; *Woodman v. Clapp*, 21 Wis. 355.

**6. Color of Title in General** — *United States v. Lewis v. Barnhart*, 145 U. S. 56; *Hall v. Law*, 102 U. S. 461; *Wright v. Mattison*, 18 How. (U. S.) 50; *Bartlett v. Ambrose*, (C. C. A.) 78 Fed. Rep. 839; *Van Gunden v. Virginia Coal, etc., Co.*, (C. C. A.) 52 Fed. Rep. 838; *Williams v. Williams J. Athens Lumber Co.*, 62 Fed. Rep. 558.

*Alabama.* — *Fleming v. Moore*, 122 Ala. 399; *National Bank v. Baker Hill Iron Co.*, 108 Ala. 635; *Ladd v. Dubroca*, 61 Ala. 25; *Rivers v. Thompson*, 43 Ala. 633.

*District of Columbia.* — *Mackall v. Mitchell*, 18 App. Cas. (D. C.) 58.

*Georgia.* — *Kile v. Fleming*, 78 Ga. 1.

*Illinois.* — *Taylor v. Hamilton*, 173 Ill. 392; *Richards v. Carter*, 201 Ill. 165; *Chicago v. Middlebrook*, 143 Ill. 265; *Lewis v. Pleasants*, 143 Ill. 271; *Gage v. Hampton*, 127 Ill. 87; *Scott v. Delaney*, 87 Ill. 146; *Stubblefield v. Borders*, 92 Ill. 280; *Coleman v. Billings*, 89 Ill. 190; *Whitney v. Stevens*, 77 Ill. 585; *Russell v. Mandell*, 73 Ill. 136; *Rawson v. Fox*, 65 Ill. 200; *Winstanley v. Meacham*, 58 Ill. 97; *Hassett v. Ridgely*, 49 Ill. 202; *Morrison v. Norman*, 47 Ill. 477; *McCagg v. Heacock*, 42 Ill. 157; *Brooks v. Bruyn*, 35 Ill. 392; *Hardin v. Crate*, 78 Ill. 533; *Dickenson v. Breeden*, 30 Ill. 279; *Holloway v. Clark*, 27 Ill. 483; *Watts v. Parker*, 27 Ill. 224; *Dawley v. Van Court*, 21 Ill. 460; *McClellan v. Kellogg*, 17 Ill. 498; *Woodward v. Blanchard*, 16 Ill. 424; *Irving v. Brownell*, 11 Ill. 402.

ejectment even against a trespasser where the action is not one merely to try the right of possession.<sup>1</sup>

**Time from Which Operative.** — The deed operates as color of title only from its date or actual execution, and not from the date of the sale.<sup>2</sup>

**A Mere Sale** of land for nonpayment of taxes has been held not to constitute color of title.<sup>3</sup>

**A Tax Certificate** does not constitute color of title, since to have that effect the instrument must purport on its face to convey title.<sup>4</sup>

**A Quitclaim Deed** from the grantee in a tax deed<sup>5</sup> or tax lease,<sup>6</sup> or from a purchaser at a sale under a judgment for taxes,<sup>7</sup> is color of title.

(2) **Void Deed.** — According to the weight of authority a tax deed may constitute color of title though void on its face,<sup>8</sup> though upon this point the authorities are not uniform and in some jurisdictions it is held otherwise.<sup>9</sup>

*Indiana.* — *Watkins v. Winings*, 102 Ind. 330; *Hearick v. Doe*, 4 Ind. 164.

*Iowa.* — *Hunt v. Gray*, 76 Iowa 268.

*Louisiana.* — *Wykoff v. Miller*, 48 La. Ann. 475; *Giddens v. Mobley*, 37 La. Ann. 417.

*Maryland.* — *Baker v. Swan*, 32 Md. 358.

*Michigan.* — *Harrison v. Spencer*, 90 Mich. 586; *Hoffman v. Harrington*, 28 Mich. 90.

*Minnesota.* — *Ricker v. Butler*, 45 Minn. 545; *Washburn v. Cutter*, 17 Minn. 361.

*New Hampshire.* — *Waldron v. Tuttle*, 4 N. H. 371.

*New York.* — *Finlay v. Cook*, 54 Barb. (N. Y.) 9.

*North Dakota.* — *Power v. Kitching*, 10 N. Dak. 254, 88 Am. St. Rep. 691.

*Ohio.* — *Dresback v. M'Arthur*, 7 Ohio (pt. i.) 146.

*Texas.* — *Kobs v. New York, etc., Land Co.*, (Tex. Civ. App. 1901) 63 S. W. Rep. 1087; *Charlie v. Saffold*, 13 Tex. 94.

*Virginia.* — *Lennig v. White*, (Va. 1894) 20 S. E. Rep. 831; *Reusens v. Lawson*, 91 Va. 226; *Flanagan v. Grimmer*, 10 Gratt. (Va.) 421.

*Washington.* — *Ward v. Huggins*, 7 Wash. 617.

**As to Adverse Possession under Color of Title Generally**, see the title ADVERSE POSSESSION, vol. 1, p. 846 *et seq.*

**A Claim under a Tax Lease** is not adverse to the owner in fee. *Sanders v. Riedinger*, 30 N. Y. App. Div. 277; *Doherty v. Matsell*, 119 N. Y. 646; *Bedell v. Shaw*, 59 N. Y. 46.

1. **Only Color of Title.** — *Hubbard v. Godfrey*, 100 Tenn. 150.

2. **Operative from Date.** — *Harrell v. Enterprise Sav. Bank*, 183 Ill. 538; *De Graw v. Taylor*, 37 Mo. 311.

**From Time of Delivery to Recorder.** — *Nye v. Alfter*, 127 Mo. 529.

3. **Mere Sale Not Color.** — *Annan v. Baker*, 49 N. H. 161.

4. **Certificate Not Color.** — *Davis v. Chapman*, 24 Fed. Rep. 674; *Harrell v. Enterprise Sav. Bank*, 183 Ill. 538; *Dunlap v. Dougherty*, 20 Ill. 404; *Barton v. McWhinney*, 85 Ind. 481; *O'Mulcahy v. Florer*, 27 Minn. 449. See also *McLellan v. Omodt*, 37 Minn. 157, and see the title ADVERSE POSSESSION, vol. 1, p. 860. *Contra*, *Worthen v. Fletcher*, 64 Ark. 662.

5. **Quitclaim Deed.** — *Cowly v. Monson*, 10 Biss. (U. S.) 182; *Wheeler v. Merriman*, 30 Minn. 372; *Minot v. Brooks*, 16 N. H. 374.

6. *Sanders v. Riedinger*, 30 N. Y. App. Div. 277.

7. *McVey v. Carr*, 159 Mo. 648.

**And as to Quitclaim Deeds Generally** as constituting color of title, see the title ADVERSE POSSESSION, vol. 1, p. 860.

8. **Deed Void on Face** — *United States*. — *Deputron v. Young*, 134 U. S. 241 (as to the rule in *Nebraska*); *Pillow v. Roberts*, 13 How. (U. S.) 472 (as to the rule in *Arkansas*); *Leffingwell v. Warren*, 2 Black (U. S.) 599 (as to the rule in *Wisconsin*); *Hoge v. Magnes*, 85 Fed. Rep. 355, 56 U. S. App. 500; *Peck v. Comstock*, 6 Fed. Rep. 22.

*Alabama.* — *Reddick v. Long*, 124 Ala. 260; *Doe v. Clayton*, 81 Ala. 391; *Doe v. Anderson*, 79 Ala. 209; *Stovall v. Fowler*, 72 Ala. 77; *Pugh v. Youngblood*, 69 Ala. 296; *Dillingham v. Brown*, 38 Ala. 311.

*Arkansas.* — *Woolfork v. Buckner*, 60 Ark. 163; *Pleasants v. Scott*, 21 Ark. 371, 76 Am. Dec. 403; *Elliott v. Pearce*, 20 Ark. 508; *Cofe v. Brooks*, 20 Ark. 546.

*California.* — *Wilson v. Atkinson*, 77 Cal. 485; 11 Am. St. Rep. 299.

*Colorado.* — *De Foresta v. Gast*, 20 Colo. 307; *Bennet v. North Colorado Springs Land, etc., Co.*, 23 Colo. 470, 58 Am. St. Rep. 281; *Brinker v. Union Pac., etc., R. Co.*, 11 Colo. App. 166.

*Iowa.* — *Chicago, etc., R. Co. v. Allfree*, 64 Iowa 500; *Colvin v. McCune*, 39 Iowa 502; *Douglass v. Tullock*, 34 Iowa 262; *Childs v. Shower*, 18 Iowa 266.

*Missouri.* — *Pharis v. Bayless*, 122 Mo. 116.

*Nebraska.* — *Gatling v. Lane*, 17 Neb. 80.

*North Dakota.* — *Power v. Kitching*, 10 N. Dak. 254, 88 Am. St. Rep. 691.

*Oregon.* — *Smith v. Shattuck*, 12 Oregon 362.

*South Dakota.* — *Stokes v. Allen*, 15 S. Dak. 421; *Parker v. Vinson*, 11 S. Dak. 381.

*Texas.* — *Wofford v. McKinna*, 23 Tex. 36, 76 Am. Dec. 53.

*Wisconsin.* — *Zwietusch v. Watkins*, 61 Wis. 615; *McMillan v. Wehle*, 55 Wis. 685; *Lindsay v. Fay*, 25 Wis. 460; *Knox v. Cleveland*, 13 Wis. 245; *Sprecher v. Wakeley*, 11 Wis. 432; *Hill v. Kricke*, 11 Wis. 443; *Edgerton v. Bird*, 6 Wis. 527, 70 Am. Dec. 473.

See further the title ADVERSE POSSESSION, vol. 1, p. 850 *et seq.*

9. **Deed Void on Face Not Color.** — *Moore v. Brown*, 11 How. (U. S.) 414; *Arrowsmith v. Burlingim*, 4 McLean (U. S.) 489 (as to the

(3) *Under Curative Statutes.*—Some statutes limiting the period within which a tax conveyance may be assailed on account of irregularities in the proceedings are in the nature of statutes of limitation, and not merely curative.<sup>1</sup> But on the other hand it is held that where the special statute is invoked against an attack upon a tax title the possession must be under such a deed and proceedings as the special statute contemplates, and that a void deed will not operate as color of title so as to make the statute available.<sup>2</sup>

(4) *Good Faith.*—One claiming under a tax deed as color of title must have acquired his title in good faith,<sup>3</sup> which means only that the property should not have been acquired *mala fide*.<sup>4</sup> But good faith may be evidenced by the payment of taxes for the statutory period,<sup>5</sup> and will be presumed in the absence of evidence to the contrary; and such presumption is not overcome by the mere fact that the title was originally bad by reason of some defect in the proceedings.<sup>6</sup>

b. AS EVIDENCE—(1) *In General.*—In the absence of statute a tax deed is not evidence, even *prima facie*, of a compliance with the law in respect of the antecedent steps necessary to be taken in the tax proceedings, and one claiming under such a deed has the burden of showing by evidence the legality of the sale and the regularity of the proceedings.<sup>7</sup> So the recitals of a tax deed are not conclusive evidence of the facts therein stated, as, for example, that

rule in *Illinois*); *Keefe v. Bramhall*, 3 Mackey (D. C.) 551; *Irving v. Brownell*, 11 Ill. 402; *Sapp v. Morrill*, 8 Kan. 677; *Carithers v. Weaver*, 7 Kan. 110; *Shoat v. Walker*, 6 Kan. 65; *Taylor v. Miles*, 5 Kan. 498, 7 Am. Rep. 558. \*See also *Waterson v. Devoe*, 18 Kan. 223.

1. *Curative Statute in Nature of Limitation.*—*Meigs v. Roberts*, 162 N. Y. 371, 76 Am. St. Rep. 322.

2. *Void Deed Not Color under Special Statutes.*—*Sutton v. Stone*, 4 Neb. 319. See also *Power v. Kitching*, 10 N. Dak. 254, 88 Am. St. Rep. 691; *Kilpatrick v. Sisneros*, 23 Tex. 113; *Smith v. Power*, 23 Tex. 29; *Wofford v. McKinna*, 23 Tex. 36, 76 Am. Dec. 53; *Schleicher v. Gatlin*, 85 Tex. 270; *Gillaspie v. Murray*, 27 Tex. Civ. App. 580; *Allen v. Courtney*, 24 Tex. Civ. App. 86. And see *infra*, this title, *Limitations*.

3. *Good Faith.*—*Bowman v. Wettig*, 39 Ill. 416; *Dalton v. Lucas*, 63 Ill. 337; *Marmion v. McPeak*, 51 La. Ann. 1631.

4. *Williams v. William J. Athens Lumber Co.*, 62 Fed. Rep. 558; *Muller v. Mazerat*, 109 La. 116; *Giddens v. Mobley*, 37 La. Ann. 417.

5. *Evidenced by Payment of Taxes.*—*De Foresta v. Gast*, 20 Colo. 307.

6. *Presumption.*—*Taylor v. Hamilton*, 173 Ill. 392; *Bowman v. Wettig*, 39 Ill. 416; *Coleman v. Billings*, 89 Ill. 183; *Dalton v. Lucas*, 63 Ill. 337; *Brooks v. Bruyn*, 35 Ill. 392; *Dickenson v. Breeden*, 30 Ill. 279; *Jopling v. Chachere*, 107 La. 522.

*Question of Fact.*—*Wright v. Mattison*, 18 How. (U. S.) 50; *Woodward v. Blanchard*, 16 Ill. 424.

*Presumption of Bad Faith Where Deed Shows Its Own Illegality.*—*Bowman v. Wettig*, 39 Ill. 416.

7. *Absence of Statute—Burden of Proving Regularity—United States.*—*Gage v. Kaufman*, 133 U. S. 471; *Moore v. Brown*, 11 How. (U. S.) 414; *Early v. Doe*, 16 How. (U. S.) 610; *Williams v. Peyton*, 4 Wheat. (U. S.) 77; *Mayhew v. Davis*, 4 McLean (U. S.) 213; *Dunn*

*v. Games*, 1 McLean (U. S.) 321; *Bradford v. Hall*, 36 Fed. Rep. 801.

*Alabama.*—*Collins v. Doe*, 33 Ala. 91.

*California.*—*Emeric v. Alvarado*, 90 Cal. 444.

*Georgia.*—*Johnson v. Phillips*, 89 Ga. 286. But see *Livingston v. Hudson*, 85 Ga. 835.

*Illinois.*—*Skinner v. Fulton*, 39 Ill. 484; *Goewey v. Urig*, 18 Ill. 238; *Hinman v. Pope*, 6 Ill. 131.

*Indiana.*—*Bowen v. Swander*, 121 Ind. 164; *Gavin v. Shuman*, 23 Ind. 32.

*Iowa.*—*Rayburn v. Kuhl*, 10 Iowa 92.

*Kentucky.*—*Griffin v. Sparks*, 70 S. W. Rep. 30, 24 Ky. L. Rep. 849; *Carlisle v. Cassidy*, (Ky. 1898) 46 S. W. Rep. 490; *Whipple v. Earlick*, 93 Ky. 121; *Pryor v. Hardwick*, (Ky. 1893) 22 S. W. Rep. 546; *Jones v. Miracle*, 93 Ky. 639; *Taylor v. Whiting*, 2 B. Mon. (Ky.) 268. But see *Allen v. Robinson*, 3 Bibb (Ky.) 326.

*Louisiana.*—*Rapp v. Lowry*, 30 La. Ann. 1272; *State v. Herron*, 29 La. Ann. 848; *Reeves v. Towles*, 10 La. 276; *Nancarrow v. Weathersbee*, 6 Mart. N. S. (La.) 347; *Smith v. Corcoran*, 7 La. 46.

*Maine.*—*Ladd v. Dickey*, 84 Me. 190; *Libby v. Mayberry*, 80 Me. 137; *Rackliff v. Look*, 69 Me. 516; *Phillips v. Sherman*, 61 Me. 548; *Smith v. Bodfish*, 27 Me. 289; *Phillips v. Phillips*, 40 Me. 160; *Worthing v. Webster*, 45 Me. 270, 71 Am. Dec. 543; *Wescott v. McDonald*, 22 Me. 402; *Howe v. Russell*, 36 Me. 115.

*Maryland.*—*Polk v. Rose*, 25 Md. 153, 89 Am. Dec. 773; *Alexander v. Walter*, 8 Gill (Md.) 240.

*Massachusetts.*—*Burke v. Burke*, 170 Mass. 499; *Alvord v. Collin*, 20 Pick. (Mass.) 418.

*Michigan.*—*Norris v. Hall*, 124 Mich. 170; *Farmers', etc., Bank v. Bronson*, 14 Mich. 361; *Scott v. Detroit Young Men's Soc.*, 1 Dougl. (Mich.) 119; *Latimer v. Lovett*, 2 Dougl. (Mich.) 204; *Ives v. Kimball*, 1 Mich. 308.

*Mississippi.*—*Ferrill v. Dickerson*, 63 Miss.

the sale was in fact made at the time and place appointed,<sup>1</sup> and the deed itself is not admissible in evidence when not accompanied with evidence of the essentials of its validity or when not shown to have been made in pursuance of lawful authority.<sup>2</sup> Thus, notice, judgment, and precept must be shown,<sup>3</sup> and the judgment recited in the deed must correspond to that read in evidence.<sup>4</sup>

**Recital by Officer of His Own Acts.** — Though the general rule is applied without reference to the question to whose acts the recitals in the deed refer, there appears to be an implication in several cases that such recitals are *prima facie*

210; *French v. Ladd*, 57 Miss. 678; *Clymer v. Cameron*, 55 Miss. 593; *Dejarnett v. Haynes*, 23 Miss. 600.

**Missouri.** — *Moreau v. Detchemendy*, 41 Mo. 431; *Bosworth v. Bryan*, 14 Mo. 575.

**New Hampshire.** — *Wells v. Jackson Iron Mfg. Co.*, 48 N. H. 491; *Harvey v. Mitchell*, 31 N. H. 575.

**New Jersey.** — *Hopper v. Malleeson*, 16 N. J. Eq. 382.

**New York.** — *Brown v. Goodwin*, 75 N. Y. 409; *Beekman v. Bigham*, 5 N. Y. 366; *Jackson v. Roberts*, 11 Wend. (N. Y.) 422; *Jackson v. Shepard*, 7 Cow. (N. Y.) 88, 17 Am. Dec. 502; *Hoyt v. Dillon*, 19 Barb. (N. Y.) 644; *Leggett v. Rogers*, 9 Barb. (N. Y.) 406; *Varick v. Tallman*, 2 Barb. (N. Y.) 113; *Jackson v. Esty*, 7 Wend. (N. Y.) 148; *Sharp v. Speir*, 4 Hill (N. Y.) 76. See also *Hill v. Draper*, 10 Barb. (N. Y.) 454.

**North Carolina.** — *Eastern Land Lumber etc., Co. v. State Board of Education*, 101 N. Car. 35; *Fox v. Stafford*, 90 N. Car. 296; *Worth v. Simmons*, 121 N. Car. 357; *Jordan v. Rouse*, 1 Jones L. (46 N. Car.) 119; *Love v. Gates*, 4 Dev. & B. L. (20 N. Car.) 363; *Pentland v. Stewart*, 4 Dev. & B. L. (20 N. Car.) 386.

**Ohio.** — *Thompson v. Gotham*, 9 Ohio 170; *Holt v. Hemphill*, 3 Ohio 232.

**Oregon.** — *Bays v. Trulson*, 25 Oregon 109.

**Pennsylvania.** — *Rockland, etc., Coal, etc., Co. v. McCalmont*, 72 Pa. St. 221; *Johnston v. Jackson*, 70 Pa. St. 164; *Emery v. Harrison*, 13 Pa. St. 317; *Wheeler v. Winn*, 53 Pa. St. 122, 91 Am. Dec. 186; *Troutman v. May*, 33 Pa. St. 455; *Crum v. Burke*, 25 Pa. St. 377; *Foust v. Ross*, 1 W. & S. (Pa.) 501; *Huston v. Foster*, 1 Watts (Pa.) 477; *Foster v. McDivit*, 9 Watts (Pa.) 341; *Shearer v. Woodburn*, 10 Pa. St. 511; *Dikeman v. Parrish*, 6 Pa. St. 210, 47 Am. Dec. 455; *Blair v. Caldwell*, 3 Yeates (Pa.) 284.

**South Carolina.** — *State v. Thompson*, 18 S. Car. 538.

**Texas.** — *Bartley v. Harris*, 70 Tex. 181; *Calder v. Ramsey*, 66 Tex. 218; *Boyd v. Miller*, 22 Tex. Civ. App. 165.

**Utah.** — *Asper v. Moon*, 24 Utah 241; *Olsen v. Bagley*, 10 Utah 492.

**Vermont.** — *Downer v. Tarbell*, 61 Vt. 530; *Townsend v. Downer*, 32 Vt. 183; *May v. Wright*, 17 Vt. 97, 42 Am. Dec. 481; *Reed v. Field*, 15 Vt. 672; *Bellows v. Elliot*, 12 Vt. 569; *Hall v. Collins*, 4 Vt. 316.

**Virginia.** — *Robinett v. Preston*, 4 Gratt. (Va.) 141; *Nalle v. Fenwick*, 4 Rand. (Va.) 585; *Christy v. Minor*, 4 Munf. (Va.) 431; *Chapman v. Doe*, 2 Leigh (Va.) 329.

**But as Against a Mere Treasurer a tax deed**

is *prima facie* evidence. *Stille v. Shull*, 41 La. Ann. 816; *Smith v. Bodfish*, 27 Me. 289; *Dejarnett v. Haynes*, 23 Miss. 600; *Thompson v. Burhans*, 61 Barb. (N. Y.) 260; *Troutman v. May*, 33 Pa. St. 455; *Foust v. Ross*, 1 W. & S. (Pa.) 501; *Foster v. McDivit*, 9 Watts (Pa.) 344; *Dikeman v. Parrish*, 6 Pa. St. 210, 47 Am. Dec. 455.

**1. Deed Not Conclusive.** — *Longfellow v. Quimby*, 33 Me. 457.

**2. Inadmissible Without Evidence of Authority.** — *Shearer v. Corbin*, 1 McCrary (U. S.) 307; *Dukes v. Rowley*, 24 Ill. 221; *Madland v. Benland*, 24 Minn. 372; *Houston v. Washington*, 16 Tex. Civ. App. 504; *Earle v. Henrietta*, 91 Tex. 301; *Hobbs v. Shumates*, 11 Gratt. (Va.) 516; *Flanagan v. Grimmer*, 10 Gratt. (Va.) 421; *Rockbold v. Barnes*, 3 Rand. (Va.) 473. See also *Carlisle v. Longworth*, 5 Ohio 369; *Jones v. Devore*, 8 Ohio St. 430, construing a statutory provision making the deed evidence for certain purposes; *Delaroderie v. Hillen*, 28 La. Ann. 537.

**3. United States.** — *Little v. Herndon*, 10 Wall. (U. S.) 26.

**Arkansas.** — *Bettison v. Budd*, 17 Ark. 546, 65 Am. Dec. 442.

**California.** — *People v. Doe*, 31 Cal. 220.

**Georgia.** — *Shackleford v. Hooper*, 65 Ga. 366.

**Illinois.** — *Gilbreath v. Dilday*, 152 Ill. 207; *Perry v. Burton*, 126 Ill. 599; *Eagan v. Connelly*, 107 Ill. 458; *Gage v. Caraher*, 125 Ill. 447; *Gage v. Lightburn*, 93 Ill. 248; *Cottingham v. Springer*, 88 Ill. 90; *Williams v. Underhill*, 58 Ill. 137; *Buck v. Delafield*, 55 Ill. 31; *Wilding v. Horner*, 50 Ill. 50; *Elston v. Kenicott*, 46 Ill. 187; *Holbrook v. Dickinson*, 46 Ill. 285; *Dukes v. Rowley*, 24 Ill. 210; *Baily v. Doolittle*, 24 Ill. 577; *Spellman v. Curtenius*, 12 Ill. 409; *Atkins v. Hinman*, 7 Ill. 437; *Hinman v. Pope*, 6 Ill. 131. But see *Ransom v. Henderson*, 114 Ill. 528, as to the *prima facie* effect of a deed without showing a precept under the *Illinois* Act of 1870.

**Indiana.** — *Burt v. Hasselman*, 139 Ind. 196; *Parker v. Smith*, 4 Blackf. (Ind.) 70.

**Kentucky.** — *Terry v. Bleight*, 3 T. B. Mon. (Ky.) 270, 16 Am. Dec. 101.

**Nevada.** — *Bolan v. Bolan*, 4 Nev. 150.

**Texas.** — *Houssels v. Taylor*, 24 Tex. Civ. App. 72, holding that the statute making the tax deed to vest a good and perfect title, etc., subject to be impeached only for actual fraud did not relieve the defendant in an action of trespass to try title of the necessity of showing order of sale.

**Virginia.** — *Miller v. Williams*, 15 Gratt. (Va.) 213.

**4. Pitkin v. Yaw**, 13 Ill. 251.

evidence as to the acts of the officers making them,<sup>1</sup> and it has been in effect expressly so held.<sup>2</sup>

**Jurisdictional Defects** may be shown by the owner,<sup>3</sup> even under statutes making the deed conclusive evidence in other respects.<sup>4</sup>

**Unconstitutional Statute Declaring Deed to Be Conclusive Evidence.** — If a statute declaring a deed to be conclusive evidence in certain particulars is unconstitutional and void the deed is not even *prima facie* evidence, and those things as to which the statute attempted to make the deed conclusive evidence must then be proved.<sup>5</sup>

**After a Long Lapse of Time**, and especially where the owner has acquiesced during such period, the courts will indulge a presumption in favor of the validity of the tax proceedings.<sup>6</sup>

(2) **Under Statutory Provisions** — (a) **Prima Facie Evidence** — *aa.* IN GENERAL. — By statutes in most jurisdictions the common-law rule has been modified to the extent that a tax deed regular on its face<sup>7</sup> is *prima facie* evidence of the recitals therein contained or of the regularity of antecedent proceedings, imposing upon the party claiming against it the burden of showing any irregularity to defeat it;<sup>8</sup> and it has been held that under such a statutory

1. **Recital by Officer of His Own Acts.** — Smith v. Corcoran, 7 La. 46; Hall v. Collins, 4 Vt. 316. But see Powell v. Brown, 1 Tyler (Vt.) 285, distinguishing between a deed by a collector of taxes assessed by the state and a deed by the collector of a proprietor's tax; Parker v. Bixby, 2 Tyler (Vt.) 466.

2. Shackleford v. Hooper, 65 Ga. 366; Morton v. Waring, 18 B. Mon. (Ky.) 72.

3. **Owner May Show Jurisdictional Defects.** — Simpson v. Meyers, 197 Pa. St. 522.

4. See *infra*, this subsection, **Under Statutory Provisions** — **Conclusive Evidence** — **Irregularities and Jurisdictional Defects.**

5. **Void Statute Making Deed Evidence.** — Doe v. Minge, 56 Ala. 123; Stoudenmire v. Brown, 48 Ala. 699; McCready v. Sexton, 29 Iowa 356, 4 Am. Rep. 214.

6. **Presumption from Lapse of Time.** — Lasher v. McCreery, 66 Fed. Rep. 834; Sheaffer v. Mitchell, 109 Tenn. 181; Lennig v. White, (Va. 1894) 20 S. E. Rep. 831.

**Ancient Deed Accompanied with Possession.** — McAllister v. Shaw, 69 Me. 348; Worthing v. Webster, 45 Me. 270, 71 Am. Dec. 543.

7. **Deed Regular on Its Face.** — Taylor v. Winona, etc., R. Co., 45 Minn. 66; Cogel v. Raph, 24 Minn. 194. See also Madland v. Benland, 24 Minn. 372.

**Due Execution and Acknowledgment Necessary.** — Munde v. Freeman, 23 Fla. 529; Winstanley v. Meacham, 58 Ill. 97; Gabe v. Root, 93 Ind. 256; Sprague v. Pitt, McCahon (Kan.) 212; Dunn v. Snell, 74 Me. 22; Sheehy v. Hinds, 27 Minn. 259; Day v. Day, 59 Miss. 318; Dalton v. Fenn, 40 Mo. 109; Stierlin v. Daley, 37 Mo. 483; Sutton v. Stone, 4 Neb. 319; Richardson v. Dorr, 5 Vt. 9; Putney v. Cutler, 54 Wis. 66.

**Judicial Notice** will be taken of the fact that the person executing the deed was tax collector at the time of execution. Wetherbee v. Dunn, 32 Cal. 106. And see generally the title JUDICIAL NOTICE, vol. 17, p. 916 *et seq.*

8. **Prima Facie Evidence of Recitals and Antecedent Proceedings** — **United States.** — Gage v. Kaufman, 133 U. S. 471; Thomas v. Lawson, 21 Haw. (U. S.) 331; Webb v. Den, 17 How.

(U. S.) 576; Pillow v. Roberts, 13 How. (U. S.) 472; Ogden v. Saunders, 12 Wheat. (U. S.) 213; Williams v. Kirtland, 13 Wall. (U. S.) 310; Lamb v. Gillett, 6 McLean (U. S.) 365; Overman v. Parker, Hempst. (U. S.) 692; Tilton v. Oregon Cent. Military Road Co., 3 Sawy. (U. S.) 22; Huntington v. Central Pac. R. Co., 2 Sawy. (U. S.) 513.

**Alabama.** — Lassitter v. Lee, 68 Ala. 287; Stoudenmire v. Brown, 57 Ala. 481; Riddle v. Messer, 84 Ala. 236.

**Arkansas.** — Alexander v. Bridgford, 59 Ark. 195; Scott v. Mills, 49 Ark. 266; Thornton v. Smith, 36 Ark. 508; Merrick v. Hutt, 15 Ark. 331; Biscoe v. Coulter, 18 Ark. 423; Bonnell v. Roane, 20 Ark. 114; Hunt v. McFadgen, 20 Ark. 277; Twombly v. Kimbrough, 24 Ark. 459; Thweatt v. Black, 30 Ark. 732; Cairo, etc., R. Co. v. Parks, 32 Ark. 147; Steadman v. Planters' Bank, 7 Ark. 426.

**California.** — Klumpke v. Baker, 131 Cal. 80; Rollins v. Wright, 93 Cal. 395; Wetherbee v. Dunn, 32 Cal. 106; O'Grady v. Barnhisel, 23 Cal. 287; Norris v. Russell, 5 Cal. 249.

**Colorado.** — Duggan v. McCullough, 27 Colo. 43; U. S. Security, etc., Co. v. Wolfe, 27 Colo. 218; Waddingham v. Dickson, 17 Colo. 223.

**Florida.** — Stieff v. Hartwell, 35 Fla. 606; Munde v. Freeman, 23 Fla. 529; Paul v. Fries, 18 Fla. 573.

**Idaho.** — Co-operative Sav., etc., Assoc. v. Green, 5 Idaho 660.

**Illinois.** — Taylor v. Wright, 121 Ill. 455; Burbank v. People, 90 Ill. 555; Roby v. Chicago, 64 Ill. 447; Townsend v. Radcliffe, 63 Ill. 11; Sullivan v. Oneida, 61 Ill. 247; Illinois Cent. R. Co. v. Phillips, 55 Ill. 194; Irving v. Brownell, 11 Ill. 402; Graves v. Bruen, 11 Ill. 431; Job v. Tebbetts, 10 Ill. 376; Rhinehart v. Schuyler, 7 Ill. 473; Vance v. Schuyler, 6 Ill. 160; Messinger v. Germain, 6 Ill. 631.

**Indiana.** — Richard v. Carrie, 145 Ind. 49; Wilson v. Carrico, 155 Ind. 570; Doren v. Lupton, 154 Ind. 396; Scarry v. Lewis, 133 Ind. 96; Wines v. Woods, 109 Ind. 291; Doe v. Himelick, 4 Blackf. (Ind.) 494; Hearick v. Doe, 4 Ind. 164.

**Iowa.** — Chicago, etc., R. Co. v. Hemenway,



provision tax deeds carry a presumption in their favor which must be accepted and to which full effect must be given in the absence of evidence to the contrary.<sup>1</sup>

**Applied to Construction of Language.** — This presumption in the case of a tax deed which is open to construction is applied to the language used, to give

117 Iowa 598; Chicago, etc., R. Co. v. Kelley, 105 Iowa 106; Soukup v. Union Invest. Co., 84 Iowa 448, 35 Am. St. Rep. 317; Fuller v. Armstrong, 53 Iowa 683; Genther v. Fuller, 36 Iowa 604; Clark v. Connor, 28 Iowa 311; Fitch v. Casey, 2 Greene (Iowa) 300.

**Kansas.** — Smith v. Hobbs, 49 Kan. 800; City R. Co. v. Chesney, 30 Kan. 199; Ide v. Finneran, 29 Kan. 569; Young v. Rheinecher, 25 Kan. 366; Gardenhire v. Mitchell, 21 Kan. 87; McCauslin v. McGuire, 14 Kan. 234; Hobson v. Dutton, 9 Kan. 477; Bowman v. Cockrill, 6 Kan. 311; Sprague v. Pitt, McCahon (Kan.) 212.

**Kentucky.** — Griffin v. Sparks, 70 S. W. Rep. 30, 24 Ky. L. Rep. 849; Metcalfe v. Commonwealth Land, etc., Co., 68 S. W. Rep. 100, 24 Ky. L. Rep. 527; Oldhams v. Jones, 5 B. Mon. (Ky.) 458; Terry v. Bleight, 3 T. B. Mon. (Ky.) 271, 16 Am. Dec. 101; Graves v. Hayden, 2 Litt. (Ky.) 61.

**Louisiana.** — Muller v. Mazerat, 109 La. 116; Tensas Delta Land Co. v. Sholars, 105 La. 357; State v. Herron, 29 La. Ann. 849; Winter v. Atkinson, 28 La. Ann. 650; Coco v. Thienman, 25 La. Ann. 236.

**Maine.** — Orono v. Veazie, 57 Me. 517; Freeman v. Thayer, 33 Me. 76; Falle v. Wadsworth, 23 Me. 553.

**Maryland.** — Young v. Ward, 88 Md. 413.

**Massachusetts.** — Holmes v. Hunt, 122 Mass. 505, 23 Am. Rep. 381; Kendall v. Kingston, 5 Mass. 524; Com. v. Thurlow, 24 Pick. (Mass.) 374.

**Michigan.** — Anderson v. Besser, (Mich. 1902) 91 N. W. Rep. 737 (evidence of good faith, in trover by owner for timber cut); Beard v. Sharrick, 67 Mich. 321; Stockle v. Silsbee, 41 Mich. 615; Groesbeck v. Seeley, 13 Mich. 329; Wright v. Dunham, 13 Mich. 414; Palmer v. Rich, 12 Mich. 414.

**Minnesota.** — Taylor v. Winona, etc., R. Co., 45 Minn. 66; Madland v. Benland, 24 Minn. 372; Broughton v. Sherman, 21 Minn. 431; Baker v. Kelley, 11 Minn. 480.

**Mississippi.** — Herndon v. Mayfield, 79 Miss. 533; Lochte v. Austin, 69 Miss. 271; Hardie v. Chrisman, 60 Miss. 671; Greene v. Williams, 58 Miss. 752; Beirne v. Burdett, 52 Miss. 795; Ray v. Murdock, 36 Miss. 692; Meeks v. Whately, 48 Miss. 337; Virden v. Bowers, 55 Miss. 1; Minor v. Natchez, 4 Smed. & M. (Miss.) 602, 43 Am. Dec. 488; Burroughs v. Vance, 75 Miss. 696; Mixon v. Clevenger, 74 Miss. 67.

**Missouri.** — State v. Richardson, 21 Mo. 420; Morton v. Reeds, 6 Mo. 74.

**New Jersey.** — Doremus v. Cameron, 49 N. J. Eq. 1; Woodbridge Tp. v. Allen, 43 N. J. L. 262.

**New York.** — Colman v. Shattuck, 62 N. Y. 348; Rathbone v. Hooney, 58 N. Y. 463; Forbes v. Halsey, 26 N. Y. 53; Brown v. Allen, 57 Hun (N. Y.) 219; Curtiss v. Follett, 15 Barb. (N. Y.) 337; Jackson v. Shepard, 7 Cow. (N. Y.) 88, 17 Am. Dec. 502.

**North Carolina.** — Doe v. Lucey, 1 Murph. (5 N. Car.) 311.

**North Dakota.** — Lee v. Crawford, 10 N. Dak. 482.

**Ohio.** — Rhodes v. Gunn, 35 Ohio St. 387; Woodward v. Sloan, 27 Ohio St. 592; Stanbery v. Sillon, 13 Ohio St. 571; Jones v. Devore, 8 Ohio St. 430; Carlisle v. Longworth, 5 Ohio 369; Turney v. Yeoman, 14 Ohio 217.

**Oregon.** — Brentano v. Brentano, 41 Oregon 15; Strode v. Washer, 17 Oregon 50.

**Pennsylvania.** — Cox v. Deringer, 78 Pa. St. 271, 82 Pa. St. 236; Lee v. Jeddo Coal Co., 84 Pa. St. 74; Deringer v. Cox, (Pa.) 1887) 10 Atl. Rep. 412.

**South Carolina.** — Wilson v. Cantrell, 40 S. Car. 114; Bull v. Kirk, 37 S. Car. 395; State v. Thompson, 18 S. Car. 538.

**Tennessee.** — Sheaffer v. Mitchell, 109 Tenn. 181; Randolph v. Metcalf, 6 Coldw. (Tenn.) 400; Thompson v. Lawrence, 2 Baxt. (Tenn.) 415. Compare Allen v. Dayton Hotel Co., 95 Tenn. 480.

**Texas.** — Earle v. Henrietta, (Tex. Civ. App. 1897) 41 S. W. Rep. 727.

**Virginia.** — Flanagan v. Grimmet, 10 Gratt. (Va.) 421.

**Washington.** — Ward v. Huggins, 7 Wash. 617.

**West Virginia.** — Dequasie v. Harris, 16 W. Va. 354.

**Wisconsin.** — Hotson v. Wetherby, 88 Wis. 324; Hiles v. Cate, 75 Wis. 91; Bemis v. Weege, 67 Wis. 435; Marshall v. Benson, 48 Wis. 558; Hart v. Smith, 44 Wis. 223; Stewart v. McSweeney, 14 Wis. 468.

**Subsequent Special Authority to Convey.** — Where the deed is to the county it is not evidence in pursuance of a special authority to convey the title acquired by the county. Bemis v. Weege, 67 Wis. 435.

**Sufficient Evidence Means Prima Facie Evidence.** — Martin v. Barbour, 140 U. S. 634; Thomas v. Lawson, 21 How. (U. S.) 331; Parker v. Overman, 18 How. (U. S.) 137; Pillow v. Roberts, 13 How. (U. S.) 472; Scott v. Mills, 49 Ark. 266; Bonnell v. Roane, 20 Ark. 114; Merrick v. Hutt, 15 Ark. 331.

**Deed Admissible Notwithstanding Facts Set up to Defeat It.** — Crane v. Reeder, 25 Mich. 303; Gilman v. Riopelle, 18 Mich. 145.

**Where Both Parties in Ejectment Claim under Tax Deeds,** the later deed, if not impeached, will prevail. Brown v. Castellaw, 33 Fla. 204.

**Deed Evidence to Support Plea of Limitation.** — Schleicher v. Gatlin, 85 Tex. 270; Gillaspie v. Murray, 27 Tex. Civ. App. 580; Villareal v. McLaughlin, (Tex. Civ. App. 1901) 62 S. W. Rep. 98. See also *supra*, this subsection, *As Color of Title*.

**A Deed Which Has Been Set Aside** has no further evidential force. O'Neil v. Tyler, 3 N. Dak. 47. See also Nowlen v. Hall, 128 Mich. 274.

1. Stroebel v. Seeger, 49 La. Ann. 16.

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to it the meaning which will uphold rather than avoid the sale.<sup>1</sup>

**Statutes Constitutional.** — Statutes making the tax deed *prima facie* evidence have been uniformly upheld as constitutional.<sup>2</sup>

**Quitclaim Deed from Grantee in Tax Deed.** — The tax deed being *prima facie* evidence of a good title, a quitclaim deed from the grantee therein vests the same kind of a title.<sup>3</sup>

**66. EFFECT OVERCOME BY EVIDENCE.** — It is, of course, entirely competent to introduce evidence to rebut the *prima facie* character of the deed, and when evidence, sufficient for this purpose, is introduced the burden is thrown upon the party claiming under it to sustain it by proof as at common law.<sup>4</sup>

**(b) Conclusive Evidence — 66. IN GENERAL.** — Some of the statutes go even further than those making the tax deeds *prima facie* evidence, and provide that such a deed shall be conclusive evidence of its recitals<sup>5</sup> or of the regularity of the sale and certain of the proceedings leading thereto.<sup>6</sup>

**1. Construction of Language.** — *Cane v. Herndon*, 107 La. 591.

**2. Statutes Constitutional — United States.** — *Marx v. Hanthorn*, 148 U. S. 172; *Phlow v. Roberts*, 13 How. (U. S.) 476.

**Alabama.** — *Stoudenmire v. Brown*, 48 Ala. 699.

**California.** — *Clarke v. Nead*, 102 Cal. 516.

**Iowa.** — *Allen v. Armstrong*, 16 Iowa 508.

**Michigan.** — *Groesbeck v. Seeley*, 13 Mich. 329.

**Mississippi.** — *Belcher v. Mhoon*, 47 Miss. 613.

**Missouri.** — *Cook v. Hackemann*, 45 Mo. 317; *Abbott v. Lindenbower*, 42 Mo. 162.

**New York.** — *Hand v. Ballou*, 12 N. Y. 541; *Oswego County v. Betts*, 53 Hun (N. Y.) 638, 6 N. Y. Supp. 934; *White v. Wheeler*, 51 Hunt (N. Y.) 573; *Hickox v. Tallman*, 38 Barb. (N. Y.) 608.

**North Carolina.** — *Kelly v. Craig*, 5 Ired. L. (27 N. Car.) 129.

**Pennsylvania.** — *McCall v. Lorimer*, 4 Watts (Pa.) 351.

**Virginia.** — *Nalle v. Fenwick*, 4 Rand. (Va.) 591.

**Washington.** — *State v. Whittlesey*, 17 Wash. 447.

**Wisconsin.** — *Delaplaine v. Cook*, 7 Wis. 44; *Smith v. Cleveland*, 17 Wis. 556; *Lumsden v. Cross*, 10 Wis. 282.

**3. Quitclaim from Grantee.** — *Wilson v. Carrico*, 155 Ind. 570.

**4. Overcome by Evidence — United States.** — *West v. Duncan*, 42 Fed. Rep. 430.

**Arkansas.** — *Hickman v. Kempner*, 35 Ark. 505; *Cairo, etc., R. Co. v. Parks*, 32 Ark. 131.

**California.** — *Daly v. Ah Goon*, 64 Cal. 512; *Hall v. Theisen*, 61 Cal. 524; *Roberts v. Chan Tin Pen*, 23 Cal. 259.

**Iowa.** — *Lathrop v. Howley*, 50 Iowa 39; *Rayburn v. Kuhl*, 10 Iowa 92; *Laraby v. Reid*, 3 Greene (Iowa) 419.

**Louisiana.** — *Tensas Delta Land Co. v. Sholars*, 105 La. 357; *Hickman v. Dawson*, 33 La. Ann. 438.

**Mississippi.** — *National Bank of Republic v. Louisville, etc., R. Co.*, 72 Miss. 447.

**Missouri.** — *Abbott v. Doling*, 49 Mo. 302; *Large v. Fisher*, 49 Mo. 307.

**New York.** — *Johnson v. Elwood*, 53 N. Y. 431.

**Tennessee.** — *Randolph v. Metcalf*, 6 Coldw. (Tenn.) 400.

**Wisconsin.** — *Jarvis v. Silliman*, 21 Wis. 599.

**Evidence Insufficient to Overcome.** — *Mundee v. Freeman*, 23 Fla. 529; *Barrett v. Kevane*, 100 Iowa 653; *Early v. Whittingham*, 43 Iowa 162; *Mixon v. Clevenger*, 74 Miss. 67; *Lee v. Newland*, 164 Pa. St. 360. See also *Lathrop v. Irwin*, 96 Iowa 713.

**Prima Facie Presumption Overcome.** — *Patrick v. Davis*, 15 Ark. 363; *Easton v. Savery*, 44 Iowa 655; *Fenton v. Way*, 40 Iowa 196; *Long v. Burnett*, 13 Iowa 28, 81 Am. Dec. 420; *Parsons v. Parker*, 80 Hun (N. Y.) 281 (as to tax lease); *Peebles v. Taylor*, 121 N. Car. 38; *Lee v. Crawford*, 10 N. Dak. 482; *Harris v. Harsch*, 29 Oregon 562; *Brentano v. Brentano*, 41 Oregon 15; *Baer v. Choir*, 7 Wash. 631; *Orton v. Noonan*, 25 Wis. 672.

**5. Conclusive Evidence of Recitals.** — *Jenkins v. McTigue*, 22 Fed. Rep. 148; *Klumpke v. Baker*, 131 Cal. 80; *Bell v. Coats*, 54 Miss. 538; *Doremus v. Cameron*, 49 N. J. Eq. 1; *Wells v. Johnston*, 55 N. Y. App. Div. 484, affirmed 171 N. Y. 324; *Bennett v. Kovarick*, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 73, affirmed 44 N. Y. App. Div. 629; *Eastis v. Henrietta*, 91 Tex. 325; *Cousins v. Allen*, 28 Wis. 232.

**Rule Applicable Where Title Is in Issue.** — *Woodbridge Tp. v. Allen*, 43 N. J. L. 262.

**A Second Deed After Application to Redeem,** curing defects in the original deed which rendered it unavailable under the statute, cannot be given in evidence. *Vestal v. Morris*, 11 Wash. 451.

**Government Lands.** — As government lands cannot be taxed by the state, one holding a government title may set it up against any tax sale which took place while the title was in the government, notwithstanding a statutory provision that a tax deed shall be conclusive evidence of title except against fraud, etc. *Wright v. Cradlebaugh*, 3 Nev. 341.

**Waiver by Stipulation.** — *Tracy v. Reed*, 38 Fed. Rep. 69.

**6. Conclusive as to Regularity of Proceedings — United States.** — *Callanan v. Hurley*, 93 U. S. 387.

**California.** — *Haaren v. High*, 97 Cal. 445; *Brady v. Dowden*, 59 Cal. 51.

**Iowa.** — *Bullis v. Marsh*, 56 Iowa 747; *Chandler v. Keiler*, 44 Iowa 371; *Phelps v. Meade*, 41 Iowa 470; *Sibley v. Bullis*, 40 Iowa 429; *Martin v. Cole*, 38 Iowa 141; *Madson v. Sexton*, 37 Iowa 562; *Clark v. Thompson*, 37 Iowa 536; *Smith v. Easton*, 37 Iowa 584;

**66. HOW FAR ENFORCED** — (aa) *Irregularities and Jurisdictional Defects.* — Such statutes are enforced as constitutional in so far as they cure mere irregularities,<sup>1</sup> but as to matters which are jurisdictional and go to the want of power a tax deed cannot be made to preclude the owner.<sup>2</sup>

**Deed Vesting Perfect Title.** — And so though the statute provide that the tax deed shall vest a perfect or unassailable title, it is held that defects which are jurisdictional and vital may be shown.<sup>3</sup>

(bb) *Curative or Limitation Statutes.* — Such statutes are also sustained where the conclusive effect is given to the deed after the expiration of a certain period for redemption, whether the statute be considered as a statute of limitations or in the nature of a rule of property.<sup>4</sup> And in this connection it is held that the legislature is competent to declare what part of the tax pro-

Ware v. Little, 35 Iowa 234; Bulkley v. Callanan, 32 Iowa 461; Gould v. Thompson, 45 Iowa 450; Rima v. Cowan, 31 Iowa 125; Stewart v. Corbin, 25 Iowa 144.

Louisiana. — Matter of Lake, 40 La. Ann. 142; Dibble v. Leppert, 47 La. Ann. 792.

New Jersey. — Woodbridge Tp. v. Allen, 43 N. J. L. 262.

New York. — Beekman v. Bigham, 5 N. Y. 366; People v. Turner, 49 Hun (N. Y.) 466.

Tennessee. — Randolph v. Metcalf, 6 Coldw. (Tenn.) 400.

Wisconsin. — Huey v. Van Wie, 23 Wis. 613.

1. Enforced as to Irregularities — United States. — Kelly v. Herrall, 20 Fed. Rep. 364.

California. — Rollins v. Wright, 93 Cal. 395.

Iowa. — Shawler v. Johnson, 52 Iowa 472; Phelps v. Meade, 41 Iowa 470; Hurley v. Powell, 31 Iowa 64; Parker v. Sexton, 29 Iowa 421; Allen v. Armstrong, 16 Iowa 508; Robinson v. Cedar Rapids First Nat. Bank, 48 Iowa 354; Jeffrey v. Brokaw, 35 Iowa 505; McCready v. Sexton, 29 Iowa 356, 4 Am. Rep. 214.

Missouri. — Raley v. Guinn, 76 Mo. 263.

New York. — Oswego County v. Betts, 53 Hun (N. Y.) 638, 6 N. Y. Supp. 934.

North Dakota. — Roberts v. Fargo First Nat. Bank, 8 N. Dak. 504.

But see White v. Flynn, 23 Ind. 46.

2. Not Conclusive as to Jurisdictional Defects — United States. — Marx v. Hanthorn, 148 U. S. 172; Bannon v. Burnes, 39 Fed. Rep. 892; Kelly v. Herrall, 20 Fed. Rep. 364.

Alabama. — Doe v. Minge, 56 Ala. 123; Stoudenmire v. Brown, 48 Ala. 699.

Iowa. — Gardner v. Early, 69 Iowa 42; Martin v. Cole, 38 Iowa 141; Immebart v. Gorgas, 41 Iowa 439; Powers v. Fuller, 30 Iowa 476; McCready v. Sexton, 29 Iowa 356, 4 Am. Rep. 214; Allen v. Armstrong, 16 Iowa 508.

Louisiana. — Matter of Lake, 40 La. Ann. 142.

Michigan. — Taylor v. Deveaux, 100 Mich. 581; McKinnon v. Meston, 104 Mich. 642; Dawson v. Peter, 119 Mich. 274, which cases construe the statute to mean that the deed shall be conclusive evidence of title after the right to give it is shown by proof of a valid decree.

Mississippi. — Dingey v. Paxton, 60 Miss. 1038; Powers v. Penny, 59 Miss. 5; Davis v. Vanarsdale, 59 Miss. 367; Stovall v. Connor, 58 Miss. 138; Smith v. Nelson, 57 Miss. 138; McLeod v. Burkhalter, 57 Miss. 65; Harkreader v. Clayton, 56 Miss. 383, 31 Am. Rep.

369; Vaughan v. Swayzie, 56 Miss. 705; Mead v. Day, 54 Miss. 58; McGehee v. Martin, 53 Miss. 519.

Missouri. — Roth v. Gabbert, 123 Mo. 21; Abbott v. Lindenbower, 42 Mo. 162, 46 Mo. 291.

New York. — Joslyn v. Rockwell, 128 N. Y. 334. See also Wallace v. International Paper Co., 53 N. Y. App. Div. 41; Hagner v. Hall, 10 N. Y. App. Div. 581.

North Dakota. — Roberts v. Fargo First Nat. Bank, 8 N. Dak. 504.

Ohio. — Magruder v. Esmay, 35 Ohio St. 221.

Oklahoma. — Wilson v. Wood, 10 Okla. 279.

Oregon. — Harris v. Harsch, 29 Oregon 562;

Strode v. Washer, 17 Oregon 50.

Texas. — Eustis v. Henrietta, 91 Tex. 325;

Luffkin v. Galveston, 73 Tex. 342.

See also State v. Dugan, 105 Tenn. 245.

Fraud in Conducting Sale May Be Shown. — Butler v. Delano, 42 Iowa 350.

Payment Before Sale Provable. — Curry v. Hinman, 11 Ill. 420; Rowland v. Doty, Harr. (Mich.) 3; Jackson v. Morse, 18 Johns. (N. Y.) 441, 9 Am. Dec. 225.

Redemption May Be Shown. — Cooper v. Shephardson, 51 Cal. 298.

Total Departure from Law May Be Shown. — Griffin v. Ellis, 63 Miss. 351.

3. Deed Vesting Perfect Title. — Silsbee v. Stockle, 44 Mich. 561; Greene v. Williams, 58 Miss. 752.

4. Curative or Limitation Statutes. — Virginia Coal Co. v. Thomas, 97 Va. 527. See also Saranac Land, etc., Co. v. New York, 177 U. S. 318 (as to statutes of limitations); People v. Francisco, 76 N. Y. App. Div. 262; Marsh v. Ne-ha-sa-ne Park Assoc., 25 N. Y. App. Div. 34; Bennett v. Kovarik, (Supm. Ct. Tr. T.) 23 Misc. (N. Y.) 73, affirmed 44 N. Y. App. Div. 629; People v. Turner, 145 N. Y. 451, 168 U. S. 90; Thomas v. Jones, 94 Va. 758. But see Wallace v. International Paper Co., 53 N. Y. App. Div. 41; Hagner v. Hall, 10 N. Y. App. Div. 581; Ne-ha-sa-ne Park Assoc. v. Lloyd, 7 N. Y. App. Div. 359; Turner v. Boyce, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 502; Andrus v. Wheeler, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 412; Wallace v. Curtis, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 415.

When Whole Statute Fails. — Where a clause providing a means of testing the validity of the title prior to the time when the deed should become conclusive was unconstitutional and void, it was held that the whole statute must fall. Quinlon v. Rogers, 12 Mich. 168.

ceedings shall or shall not be essential to the validity of the sale or deed, and therefore may provide that after the execution of the deed it shall not be invalidated for any defect or irregularities in such proceedings in case the land was subject to the taxes levied upon it and they were not paid.<sup>1</sup>

(cc) *As Against Purchaser.* — As against the purchaser it is competent for the legislature to make the deed conclusive proof of the facts therein stated; and independently of such a statute the purchaser would be concluded by such recitals by way of estoppel.<sup>2</sup>

**Deed Void on Its Face.** — So where the statute makes a tax deed conclusive as to its recitals, if the deed shows a sale not authorized by law, it is void on its face, and the party claiming under it is concluded and can acquire no rights thereunder.<sup>3</sup>

(e) **Construction and Application of Statutes** — *aa. STRICT CONSTRUCTION.* — Statutes making tax deeds evidence of title or of particular facts or recitals are strictly construed,<sup>4</sup> and the evidential character will not attach to deeds for taxes or assessments under special laws or under municipal charters without proof of authority to sell or of the validity of the proceedings.<sup>5</sup>

**Statutes Characterizing Estate.** — A statute providing that a tax deed shall vest a title in fee simple merely characterizes the estate, and does not make the deed evidence of the validity of the sale.<sup>6</sup>

*bb. CONFINED TO PARTICULAR PROCEEDINGS AND RECITALS.* — **Proof of Other Facts Necessary.** — A statute designating those things as to which a tax deed shall be taken as evidence, either *prima facie* or conclusive, cannot be extended so as to obviate the necessity of proving other and essential facts.<sup>7</sup>

**Recitals Not Made Evidence.** — The recital of facts of which the deed is not made evidence by the statute will not make the deed evidence of such facts.<sup>8</sup>

**Proceedings Antecedent to Sale.** — In some states the statutory *prima facie* validity of tax deeds relates to the conduct of the sale itself, and not to the antecedent proceedings.<sup>9</sup>

1. **Competency of Legislation.** — *Virginia Coal Co. v. Thomas*, 97 Va. 527.

2. **As Against Purchaser.** — *French v. Edwards*, 13 Wall. (U. S.) 506; *Pack v. Crawford*, 29 Ark. 489; *Brady v. Dowden*, 59 Cal. 51; *Grimm v. O'Connell*, 54 Cal. 522; *Hanenkratt v. Hamil*, 10 Okla. 219; *Reckitt v. Knight*, (S. Dak. 1902) 92 N. W. Rep. 1077; *Eustis v. Henrietta*, 91 Tex. 325.

3. **Deed Void on Its Face.** — *Salmer v. Lathrop*, 10 S. Dak. 216.

4. **Strict Construction.** — *Townsend v. Martin*, 55 Ark. 192; *Parr v. Matthews*, 50 Ark. 390; *Bucknall v. Story*, 36 Cal. 67; *Garrett v. Doe*, 2 Ill. 335, 30 Am. Dec. 653; *Gavin v. Shuman*, 23 Ind. 32; *Parker v. Smith*, 4 Blackf. (Ind.) 70; *Stierlin v. Daley*, 37 Mo. 483; *Hannel v. Smith*, 15 Ohio 134; *Carlisle v. Longworth*, 5 Ohio 369; *Shoalwater v. Armstrong*, 9 Humph. (Tenn.) 217; *Dequasie v. Harris*, 16 W. Va. 345; *McCallister v. Cottrille*, 24 W. Va. 173; *Bemis v. Weege*, 67 Wis. 435.

**Uncertain Statute.** — A statute providing that a tax deed shall be good and effectual both in law and in equity is not sufficient to make such deed without more evidence of the title. *Hadley v. Tankersley*, 8 Tex. 12.

5. **Special Authority.** — *Carpenter v. Shinnars*, 108 Cal. 359; *Bucknall v. Story*, 36 Cal. 67; *Holbrook v. Dickinson*, 46 Ill. 285; *Shoalwater v. Armstrong*, 9 Humph. (Tenn.) 217; *Kelly v. Medlin*, 26 Tex. 48. See also *Johnson v. Phillips*, 89 Ga. 286; *Ansley v. Wilson*, 50 Ga. 418; *Wright v. U. S. Mortgage Co.*, (Tex. Civ.

App. 1899) 54 S. W. Rep. 368; *Earle v. Henrietta*, 91 Tex. 301.

**Special Authority of Particular Officer.** — *Spurlock v. Dougherty*, 81 Mo. 171.

6. **Statute Characterizing Estate.** — *Keepfer v. Force*, 86 Ind. 81; *Steeple v. Downing*, 60 Ind. 478; *Tallman v. White*, 2 N. Y. 66; *Jackson v. Morse*, 18 Johns. (N. Y.) 441, 9 Am. Dec. 225; *Varick v. Tallman*, 2 Barb. (N. Y.) 113.

7. **Confined to Particular Proceedings or Recitals.** — *White v. Flynn*, 23 Ind. 46; *King v. Cooper*, 128 N. Car. 347; *Earle v. Henrietta*, 91 Tex. 301.

**Evidence Only of Collector's Acts.** — *Parker v. Smith*, 4 Blackf. (Ind.) 70.

8. **Recitals Not Made Evidence.** — *Pierce v. Low*, 51 Cal. 580; *Millikan v. Patterson*, 91 Ind. 517; *Worthing v. Webster*, 45 Me. 270, 71 Am. Dec. 543; *Taylor v. Winona*, etc., R. Co., 45 Minn. 66; *State v. Mantz*, 62 Mo. 258; *Brown v. Goodwin*, 75 N. Y. 409; *Marsh v. Brooklyn*, 59 N. Y. 280; *Randolph v. Metcalf*, 6 Coldw. (Tenn.) 400.

9. **Proceedings Antecedent to Sale** — *Illinois*. — *Doe v. Leonard*, 5 Ill. 140.

*Indiana*. — *Keepfer v. Force*, 86 Ind. 81; *Wilson v. Lemon*, 23 Ind. 433, 85 Am. Dec. 471.

*Louisiana*. — *Cucullu v. Brakenridge Lumber Co.*, 49 La. Ann. 1445.

*Michigan*. — *Ives v. Kimball*, 1 Mich. 308; *Latimer v. Lovett*, 2 Dougl. (Mich.) 204; *Rowland v. Doty*, Harr. (Mich.) 3; *Scott v. Detroit Young Men's Soc.*, 1 Dougl. (Mich.) 121.

**Proceedings Subsequent to Sale.** — The statutory force of a tax deed as *prima facie* evidence of the regularity of a sale does not extend to the steps required to be taken subsequently to complete the title,<sup>1</sup> as the giving of notice by the purchaser of the expiration of the period of redemption, etc.;<sup>2</sup> and a later statute requiring such acts does not come within the purview of an earlier statute which made the deed evidence of the regularity of the tax proceedings.<sup>3</sup>

**cc. OMISSION OF RECITAL AND MISRECITAL — PAROL EVIDENCE.** — **Void Deed.** — A statute which gives to a tax deed some character as evidence does not obviate the necessity of following the requirements of the law, and if recitals to show authority are omitted or for any other cause the deed is void on its face it is not admissible as evidence;<sup>4</sup> and parol evidence will not be admitted to give life to it.<sup>5</sup>

**Deed Not Absolutely Void.** — On the other hand, if the defect renders the deed voidable merely, and not absolutely void, it is not for that reason inadmissible.<sup>6</sup>

**Proof of Omitted Recital.** — If a tax deed does not contain the proper recitals of the necessary facts it is not *prima facie* evidence without supplemental evidence of the facts omitted,<sup>7</sup> and if there are sufficient recitals to admit the

**New York.** — *Marsh v. Brooklyn*, 59 N. Y. 280; *Rathbone v. Hoonney*, 58 N. Y. 463; *Beekman v. Bigham*, 5 N. Y. 366; *Tallman v. White*, 2 N. Y. 66; *Striker v. Kelly*, 2 Den. (N. Y.) 323, 7 Hill (N. Y.) 9; *Leggett v. Rogers*, 9 Barb. (N. Y.) 406; *Bunner v. Eastman*, 50 Barb. (N. Y.) 639; *Jackson v. Morse*, 18 Johns. (N. Y.) 441, 9 Am. Dec. 225.

**Texas.** — *Lufkin v. Galveston*, 73 Tex. 340; *Devine v. McCulloch*, 15 Tex. 490; *Robson v. Osborn*, 13 Tex. 298; *Yenda v. Wheeler*, 9 Tex. 408.

**Wisconsin.** — *Bridge v. Bracken*, 3 Pin. (Wis.) 75.

See also *O'Brien v. Cogswell*, 17 Can. Sup. Ct. 420.

**1. Proceedings Subsequent to Sale.** — *Williams v. Kirtland*, 13 Wall. (U. S.) 306; *Sanborn v. Mueller*, 38 Minn. 27; *Sheehy v. Hinds*, 27 Minn. 259; *Greve v. Coffin*, 14 Minn. 345, 100 Am. Dec. 229; *Bunner v. Eastman*, 50 Barb. (N. Y.) 639.

**Failure to Redeem Must Be Shown.** — *Miller v. Miller*, 96 Cal. 376, 31 Am. St. Rep. 229; *Reed v. Lyon*, 96 Cal. 501; *Greve v. Coffin*, 14 Minn. 345, 100 Am. Dec. 229; *Sheehy v. Hinds*, 27 Minn. 259; *Westbrook v. Willey*, 47 N. Y. 457; *Beekman v. Bigham*, 5 N. Y. 366; *Doughty v. Hope*, 3 Den. (N. Y.) 594; *Jackson v. Esty*, 7 Wend. (N. Y.) 148.

**2. Acts of Purchaser — Notice.** — *Miller v. Miller*, 96 Cal. 376, 31 Am. St. Rep. 229; *Reed v. Thompson*, 56 Iowa 455; *Wilson v. Crafts*, 56 Iowa 450.

**3. Miller v. Miller**, 96 Cal. 376, 31 Am. St. Rep. 229; *Herrick v. Niesz*, 16 Wash. 74.

**4. Void Deed — United States.** — *Johnston v. Sutton*, 45 Fed. Rep. 296.

**Alabama.** — *Reddick v. Long*, 124 Ala. 260.

**Arkansas.** — *Hogins v. Brashears*, 13 Ark. 242; *Twombly v. Kimbrough*, 24 Ark. 459; *Merrick v. Hutt*, 15 Ark. 331.

**California.** — *Hubbell v. Campbell*, 56 Cal. 527; *O'Grady v. Barnhisel*, 23 Cal. 287; *Kelsey v. Abbott*, 13 Cal. 609; *Ferris v. Coover*, 10 Cal. 589.

**Florida.** — *Mundee v. Freeman*, 23 Fla. 529.

**Georgia.** — *Bedgood v. McLain*, 89 Ga. 793.

**Louisiana.** — *Reeves v. Towles*, 10 La. 276.

**Maine.** — *Wiggin v. Temple*, 73 Me. 380; *Allen v. Morse*, 72 Me. 502; *Orono v. Veazie*, 57 Me. 517.

**Michigan.** — *Ball v. Busch*, 64 Mich. 336.

**Minnesota.** — *Taylor v. Winona, etc., R. Co.*, 45 Minn. 66; *Farnham v. Jones*, 32 Minn. 7; *Sherburne v. Rippe*, 35 Minn. 540; *Sheehy v. Hinds*, 27 Minn. 259; *Cogel v. Raph*, 24 Minn. 194.

**Missouri.** — *Loring v. Groomer*, 142 Mo. 1; *Burden v. Taylor*, 124 Mo. 12; *Duff v. Neilson*, 90 Mo. 93; *State v. Mantz*, 62 Mo. 258.

**Nebraska.** — *Merriam v. Dovey*, 25 Nev. 618; *Haller v. Blaco*, 10 Neb. 36.

**Ohio.** — *Woodward v. Sloan*, 27 Ohio St. 592.

**Tennessee.** — *Hightower v. Freedle*, 5 Sneed (Tenn.) 312.

**Texas.** — *Kelly v. Medlin*, 26 Tex. 48; *Kilpatrick v. Sisneros*, 23 Tex. 113.

**5. Parol Evidence Inadmissible.** — *Burden v. Taylor*, 124 Mo. 12. *Compare Ward v. Montgomery*, 57 Ind. 276.

**A Quitclaim Deed** from one who has no interest other than that acquired by the tax deed is likewise inadmissible on behalf of the party claiming under such deeds. *Loring v. Groomer*, 142 Mo. 1.

**6. Deed Not Void.** — *Clark v. Ellithorp*, 9 Kan. App. 503.

**7. Supplemental Proof.** — **Alabama.** — *Riddle v. Messer*, 84 Ala. 236.

**Arizona.** — *Hereford v. O'Connor*, (Ariz. 1898) 52 Pac. Rep. 471.

**Arkansas.** — *Lawrence v. Zimpleman*, 37 Ark. 643; *Jacks v. Chaffin*, 34 Ark. 534; *Bonnell v. Roane*, 20 Ark. 114; *Gossett v. Kent*, 19 Ark. 602; *Bettison v. Budd*, 17 Ark. 546, 65 Am. Dec. 442.

**California.** — *Pierce v. Low*, 51 Cal. 580; *Wetherbee v. Dunn*, 32 Cal. 106; *Moss v. Shear*, 25 Cal. 38, 85 Am. Dec. 94.

**Indiana.** — *Keeper v. Force*, 86 Ind. 81; *Farrar v. Clark*, 85 Ind. 449; *Woolen v. Rockafeller*, 81 Ind. 213; *Langohr v. Smith*, 81 Ind. 495; *Bender v. Stewart*, 75 Ind. 88; *Smith v. Kyler*, 74 Ind. 575; *Reid v. State*, 74 Ind. 252; *Steeple v. Downing*, 60 Ind. 478; *Ward v. Montgomery*, 57 Ind. 276.

deed in evidence an omission of other recitals may be supplied.<sup>1</sup>

*ad. DEED FROM STATE.* — Under the *Mississippi* statute making an auditor's deed *prima facie* evidence of paramount title, the deed is made such evidence only in aid of a particular title made by the state, and one claiming under such deed must point out the title which the state claimed to own and to transfer to him,<sup>2</sup> and must show a sale for taxes to the state.<sup>3</sup> And in *Florida* it is held that such a statute does not apply to a sale to the state and a deed thereafter by the state to a purchaser from it.<sup>4</sup>

*ee. APPLICATION OF STATUTE TO DEED EXECUTED.* — A statute changing the effect of a deed as evidence is held to be a rule of evidence, and therefore to apply to a deed made before its passage.<sup>5</sup>

**IV. NATURE OF TITLE ACQUIRED — 1. In General — Until Execution of Deed.** — The general rule is that until the expiration of the time for redemption and the execution and delivery of a deed the title to land sold for taxes remains with the original owner, and the purchaser acquires only a lien for the amount of his bid, with interest, penalties, etc.;<sup>6</sup> and if the sale is void the purchaser thereat, or one who procures an assignment from the state, takes a certificate of purchase or assignment subject to the right of the state under the statute to proceed again, upon refundment, to enforce the collection of a prior tax.<sup>7</sup>

**Right to Possession, Rents, Etc.** — The purchaser is not entitled to possession<sup>8</sup>

*Maine.* — *Nason v. Ricker*, 63 Me. 381.

*Minnesota.* — *Taylor v. Winona, etc.*, R. Co., 45 Minn. 66.

*Missouri.* — *State v. Mantz*, 62 Mo. 258.

*New Jersey.* — *Woodridge Tp. v. Allen*, 43 N. J. L. 262.

**1. Sufficient Recital to Admit Deed.** — *Budd v. Bettison*, 21 Ark. 582; *Gossett v. Kent*, 19 Ark. 602.

**More Errors in Recitals.** — *Harvey v. Gulf States Land, etc., Co.*, 108 La. 550; *Brigins v. Chandler*, 60 Miss. 862.

**Correction by Official Return.** — *Harvey v. Gulf States Land, etc., Co.*, 108 La. 550.

**Misrecital of Facts Not Necessary to Be Recited.** — *Longfellow v. Quimby*, 33 Me. 457; *Brigins v. Chandler*, 60 Miss. 862.

**2. Deed from State.** — *National Bank of Republic v. Louisville, etc.*, R. Co., 72 Miss. 447, holding that one claiming under an auditor's deed cannot, by mere averment that a sale was made in one year or another, put his adversary to prove that in fact the asserted sale was never made; *Sunflower Land, etc., Co. v. Watts*, 77 Miss. 56; *Chamberlain v. Lawrence County*, 71 Miss. 949; *Chambers v. Myrick*, 61 Miss. 459; *Dingey v. Paxton*, 60 Miss. 1038.

**3. Bennett v. Chaffe**, 69 Miss. 279; *Ferrill v. Dickerson*, 63 Miss. 210; *French v. Ladd*, 57 Miss. 679; *Weathersby v. Thoma*, 57 Miss. 296; *Vaughan v. Swayzie*, 56 Miss. 704; *Clymer v. Cameron*, 55 Miss. 593; *Yazoo, etc., R. Co. v. McLarty*, 71 Miss. 755. See also *Clay v. Moore*, 65 Miss. 81.

**4. Ayer v. Dillard**, (Fla. 1903) 33 So. Rep. 714.

**5. Rule of Evidence.** — *Emeric v. Alvarado*, 90 Cal. 444; *Strode v. Washer*, 17 Oregon 50. But see *Tracy v. Reed*, 38 Fed. Rep. 69; *Marx v. Hanthorn*, 30 Fed. Rep. 579, *affirmed* 148 U. S. 172; *Smith v. Cleveland*, 17 Wis. 556.

**New Remedy May Be Provided.** — Even if the legislature may not make such a provision imperative as to a prior deed, it may provide

a new remedy giving the owner of such deed new rights and privileges upon condition that he subject his deed to certain new defenses to which it would not otherwise have been subject. *Burrows v. Bashford*, 22 Wis. 103.

**6. Before Deed — Purchaser Has Lien Only.** — *Betts v. Dick*, 1 Penn. (Del.) 268; *Douglass v. Dickson*, 31 Kan. 310 [*criticising Stebbins v. Guthrie*, 4 Kan. 353]; *Ives v. Beeler*, 9 Kan. App. 892, 59 Pac. Rep. 726; *Hilton v. Smith*, 134 Mo. 499; *Burgin v. Rutherford*, 56 N. J. Eq. 666, *affirmed Kaighn v. Burgin*, 56 N. J. Eq. 852; *State v. Godfrey*, 62 Ohio St. 18. See also the title *TAXATION, ante*, p. 858.

**Title Analogous to that of Mortgagees.** — *Harrington v. Valley Sav. Bank*, 119 Iowa 312; *Tredway v. McDonald*, 51 Iowa 663; *Dennison v. Keokuk*, 45 Iowa 270; *Crosthwait v. Byington*, 11 Iowa 532; *Byington v. Buckwalter*, 7 Iowa 512; *Watkins v. Eaton*, 30 Me. 535, 50 Am. Dec. 637. See also *supra*, this title, *Deed — Parties — Grantee*.

**The Assignee of a Certificate by Quitclaim Deed** acquires no greater rights than those of the original holder of the certificate. *Boardman v. Boozewinkel*, 121 Mich. 320.

**7. Void Sale — Subject to Refundment.** — *State v. Kipp*, 80 Minn. 119. See also *infra*, this title, *Rights of Purchasers of Defective Titles*.

**If the State as Purchaser Acquires No Title** a certificate transferring its right and title gives no better title than the state acquired. *Fleming v. McGee*, 81 Ala. 409. See also *Boykin v. Smith*, 65 Ala. 294.

**8. Not Entitled to Possession — Alabama.** — *Hibbard v. Brown*, 51 Ala. 469.

*Iowa.* — *Tredway v. McDonald*, 51 Iowa 663; *Dennison v. Keokuk*, 45 Iowa 270; *Crosthwait v. Byington*, 11 Iowa 532.

*Kansas.* — *Ives v. Beeler*, 9 Kan. App. 892, 59 Pac. Rep. 726.

*Michigan.* — *Busch v. Nester*, 62 Mich. 381; *People v. Hammond*, 1 Dougl. (Mich.) 276.

*Missouri.* — *Parsons v. Viets*, 96 Mo. 408.

or to rents and profits,<sup>1</sup> and while he may prevent the removal of buildings or other acts which tend to depreciate the value of the property,<sup>2</sup> he is not protected by his certificate in the commission of waste himself.<sup>3</sup>

**2. After Execution of Deed or Perfection of Title — a. IN GENERAL.** — Since the tax deed is generally held to attach to the land itself, and it devolves upon all persons in any way interested to see that the taxes are paid, the grantee is vested, under the statutes in most jurisdictions, with an interest in fee to the exclusion of all prior interests and incumbrances.<sup>4</sup>

**Payment of Other Taxes than Those for Which Land Sold.** — But when certain other taxes than those for which a purchaser buys are required to be paid, it is held that without such payment the purchaser cannot assert title.<sup>5</sup>

**No Relation Back in Time.** — Where no title passes until the execution of a deed, the deed will not relate back to the sale;<sup>6</sup> and where the title of the

*Pennsylvania.* — *Shalemiller v. McCarty*, 55 Pa. St. 186.

*Texas.* — *Masterson v. State*, 17 Tex. Civ. App. 91.

*Vermont.* — *Wing v. Hall*, 47 Vt. 182.

*Wisconsin.* — *Lacy v. Johnson*, 58 Wis. 414.

But under Other Statutory Provisions, see *Ethel v. Batchelder*, 90 Ind. 520; *Dalton v. Fenn*, 40 Mo. 109; *Brewer v. Ireland*, 67 N. J. L. 31; *Hack v. Heffern*, 10 Ohio Cir. Dec. 461, 19 Ohio Cir. Ct. 233.

**No Allowance for Improvements.** — *McLellan v. Omodt*, 37 Minn. 157.

**1. Not Entitled to Rents and Profits.** — *People v. Hammond*, 1 Dougl. (Mich.) 276; *Woodland Oil Co. v. Lawrence*, 1 Penny. (Pa.) 480. And see the title *TAXATION*, *ante*, p. 860.

**2. May Prevent Depreciation of Value.** — *Phillips v. Myers*, 55 Iowa 265; *Woodland Oil Co. v. Shoup*, 107 Pa. St. 293.

**3. Not Protected in Commission of Waste.** — *Douglass v. Dickson*, 31 Kan. 310; *Dalton v. Fenn*, 40 Mo. 109; *Brewer v. Ireland*, 67 N. J. L. 31; *Woodland Oil Co. v. Shoup*, 107 Pa. St. 293; *Shalemiller v. McCarty*, 55 Pa. St. 186.

**4. Interest in Fee to Exclusion of Other Liens — United States.** — *Pike v. Wassell*, 94 U. S. 714; *De Roux v. Girard*, 112 Fed. Rep. 89, 50 C. C. A. 136; *Cummings v. Cummings*, 91 Fed. Rep. 602; *Newby v. Brownlee*, 23 Fed. Rep. 322; *Clarke v. Strickland*, 2 Curt. (U. S.) 439; *Sharpleigh v. Surdam*, 1 Flipp. (U. S.) 472.

*Alabama.* — *Thorington v. Montgomery*, 88 Ala. 548; *Jones v. Randle*, 68 Ala. 265.

*Arkansas.* — *Scott v. Mills*, 49 Ark. 266; *Biscoe v. Coulter*, 18 Ark. 423.

*Florida.* — *Billings v. Stark*, 15 Fla. 297.

*Georgia.* — *Verdery v. Dotterer*, 69 Ga. 194; *Doe v. Deavors*, 8 Ga. 479.

*Illinois.* — *Dunlap v. Gallatin County*, 15 Ill. 7; *Atkins v. Hinman*, 7 Ill. 437.

*Indiana.* — *Wines v. Woods*, 109 Ind. 291; *Peckham v. Millikan*, 99 Ind. 352; *Keepfer v. Force*, 86 Ind. 81; *Steeple v. Downing*, 60 Ind. 478; *Doe v. Hearick*, 14 Ind. 242.

*Kansas.* — *Douglass v. Lowell*, 64 Kan. 533; *McFadden v. Goff*, 32 Kan. 418; *Regents v. Linscott*, 30 Kan. 240.

*Kentucky.* — *Vincent v. Eaves*, 1 Met. (Ky.) 247.

*Louisiana.* — *In re Douglas*, 41 La. Ann. 765; *Maumus v. Beynet*, 31 La. Ann. 462; *Marin v. Sheriff*, 30 La. Ann. 293.

*Massachusetts.* — *Langley v. Chapin*, 134 Mass. 82; *Parker v. Baxter*, 2 Gray (Mass.) 185.

*Michigan.* — *Sinclair v. Learned*, 51 Mich. 344; *Robbins v. Barron*, 32 Mich. 36; *Lacey v. Davis*, 4 Mich. 140, 66 Am. Dec. 524; *People v. Hammond*, 1 Dougl. (Mich.) 276.

*Mississippi.* — *Hazlip v. Nunnery*, (Miss. 1901) 29 So. Rep. 821; *Greene v. Williams*, 58 Miss. 752.

*Missouri.* — *Williams v. Hudson*, 93 Mo. 524; *Allen v. McCabe*, 93 Mo. 138; *Myers v. Bassett*, 84 Mo. 479; *Gitchell v. Kreidler*, 84 Mo. 472; *Abbott v. Lindenbower*, 42 Mo. 162.

*New Hampshire.* — *Eastman v. Thayer*, 60 N. H. 408; *Smith v. Messer*, 17 N. H. 420.

*New York.* — *Becker v. Howard*, 66 N. Y. 5; *Tallman v. White*, 2 N. Y. 66; *Jackson v. Morse*, 18 Johns. (N. Y.) 441, 9 Am. Dec. 225; *Dale v. M'Evers*, 2 Cow. (N. Y.) 118.

*North Carolina.* — *Powell v. Sikes*, 119 N. Car. 231; *Lyman v. Hunter*, 123 N. Car. 508.

*Ohio.* — *Gwynne v. Neiswanger*, 18 Ohio 408; *Jones v. Devore*, 8 Ohio St. 430; *Tullis v. Pierano*, 9 Ohio Cir. Dec. 103; *State v. Godfrey*, 10 Ohio Cir. Dec. 316.

*Pennsylvania.* — *Kelso v. Kelly*, 14 Pa. St. 204; *Bigler v. Karns*, 4 W. & S. (Pa.) 137; *Strauch v. Shoemaker*, 1 W. & S. (Pa.) 166; *M'Coy v. Michew*, 7 W. & S. (Pa.) 386; *Parker's Appeal*, 8 W. & S. (Pa.) 449; *Fager v. Campbell*, 5 Watts (Pa.) 287.

*South Carolina.* — *Interstate Bldg., etc., Assoc. v. Waters*, 50 S. Car. 459; *Wilson v. Cantrell*, 40 S. Car. 114; *Shell v. Duncan*, 31 S. Car. 547; *Butler v. Bailey*, 2 Bay (S. Car.) 244.

*Vermont.* — *Brown v. Austin*, 41 Vt. 262.

*Wisconsin.* — *Sayles v. Davis*, 22 Wis. 225; *Smith v. Lewis*, 20 Wis. 350; *Jarvis v. Peck*, 19 Wis. 74.

*Contra*, as to the lien of previous taxes which are not included in the sale, *Adams v. Osgood*, 42 Neb. 450.

**Notice of Sale.** — In so far as the rule is affected by the right of various parties to notice of sale, see the title *TAXATION*, *ante*, p. 820.

**5. Payment of Other Taxes.** — *Remick v. Lang*, 47 La. Ann. 914; *Martinez v. State Tax Collectors*, 42 La. Ann. 677.

**Statute in Michigan Not Applicable to Public Sale.** — *Berkey v. Burchard*, 119 Mich. 101; *Munroe v. Winegar*, 128 Mich. 309.

**6. Deed Does Not Relate Back to Sale.** — *Hess v. Griggs*, 43 Mich. 397; *Donohoe v. Veal*, 19

purchaser is inceptive only, the title of the owner not being fully divested until the expiration of a statutory period after the sale, notwithstanding the execution of a deed, the title in the purchaser is not retroactive.<sup>1</sup>

**b. EFFECT AS TO PRIOR TAXES.** — If the state sells for the taxes of a particular year it cannot proceed for the taxes of a previous year after the title is perfected under the first sale.<sup>2</sup>

**c. INTEREST OF OWNER AT TIME OF ASSESSMENT OR SALE.** — Under some statutory provisions the purchaser takes merely such interest in the land as was vested in the delinquent at the time of the sale,<sup>3</sup> or at the commencement or at any time during the year for which the taxes were assessed.<sup>4</sup> But it has been held that such a provision refers to the character of the title merely, as whether it be a fee simple or a lesser estate, and not to liens, and does not mean that the land is purchased subject to liens thereon at the time of the assessment.<sup>5</sup>

**d. SEPARATE INTERESTS TAXED SEPARATELY.** — Where different interests or estates are made separate and distinct subjects of taxation, the collection or mode of collecting a tax assessed upon the one has no effect upon the other, and the owner of one interest is not divested thereof by the sale of the other interest for the nonpayment of taxes thereon.<sup>6</sup>

**e. SUBJECT TO REDEMPTION.** — In some jurisdictions, in the case of infancy of the owner or other disability, the estate of the purchaser is subject to be defeated by redemption notwithstanding the execution of a deed.<sup>7</sup>

**f. DEEDS TO DIFFERENT PERSONS FOR TAXES OF DIFFERENT YEARS.** — Where deeds to the same land are executed to different persons for the taxes of different years, the deed last executed for the taxes of the latest year

Mo. 331. See also *Eaton v. Lyman*, 28 Wis. 324.

**Does Not Relate to Time Before Deed Was Due.** — *Palmer v. Frank*, 169 Ill. 90. See also *Spratt v. Price*, 18 Fla. 289.

**1. Inceptive Title.** — *Woodland Oil Co. v. Shoup*, 107 Pa. St. 293. See also *Paul v. Fries*, 18 Fla. 573. But see *Connecticut Mut. L. Ins. Co. v. Bulte*, 45 Mich. 113, holding that while the title will relate back to the sale for the purpose of effecting substantial justice, the doctrine of relation will not be allowed to effect wrong.

**Title of Plaintiff in Ejectment Does Not Relate Back.** — *Paul v. Fries*, 18 Fla. 573; *Pitkin v. Yaw*, 13 Ill. 251.

**2. Effect as to Prior Taxes.** — *District of Columbia v. Huffy*, 13 App. Cas. (D. C.) 175; *Brewer v. District of Columbia*, 5 Mackey (D. C.) 274; *Gulf States Land, etc., Co. v. Wade*, 51 La. Ann. 251; *State v. Camp*, 79 Minn. 343. See also *Houston v. Bartlett*, (Tex. Civ. App. 1902) 68 S. W. Rep. 730. And see the title *TAXATION*, *ante*, p. 745.

**Abandonment of Previous Purchase by County.** — A sale for taxes by a county after its purchase is an abandonment of its own purchase. *Murphy v. Packer*, 152 U. S. 398; *Emmons County v. Bennett*, 9 N. Dak. 131; *Schreiber v. Moynihan*, 197 Pa. St. 578; *Feltz v. Natalie Anthracite Coal Co.*, 203 Pa. St. 166; *Cobb v. Barclay*, 9 Pa. Super. Ct. 573. See also *State v. Collins*, 48 W. Va. 64. But see *People v. Buffalo*, 63 N. Y. App. Div. 563.

**3. Title at Time of Sale.** — *Matter of Macay*, 84 N. Car. 63.

**4. Interest During Year of Assessment.** — *United States.* — *McDonald v. Hannah*, 51 Fed. Rep. 73, 59 Fed. Rep. 977, 15 U. S. App. 348 (under statute in *Washington*).

*Alabama.* — *Dyer v. Branch Bank*, 14 Ala. 622.

*Illinois.* — *Hulick v. Scovil*, 9 Ill. 159.

*Mississippi.* — *Dunn v. Winston*, 31 Miss. 135.

*New Jersey.* — *Morrow v. Dows*, 28 N. J. Eq. 459; *Hopper v. Malleon*, 16 N. J. Eq. 382.

*Tennessee.* — *Bleidorn v. Oakdale Iron, etc., Co.*, (Tenn. Ch. 1896) 43 S. W. Rep. 360; *Anderson v. Post*, (Tenn. Ch. 1896) 38 S. W. Rep. 283; *Cardwell v. Crumley*, (Tenn. Ch. 1895) 35 S. W. Rep. 767; *Nashville v. Cowan*, 10 Lea (Tenn.) 215.

*Texas.* — *Wheeler v. Yenda*, 11 Tex. 562.

*Virginia.* — *Gates v. Lawson*, 32 Gratt. (Va.) 12.

**Lands Mortgaged to a School Fund** remain subject to such lien in the hands of the purchaser. *State v. Shaw*, 28 Iowa 67; *Crum v. Cotting*, 22 Iowa 423; *Helphrey v. Ross*, 19 Iowa 40; *Jasper County v. Rogers*, 17 Iowa 254.

**No Privilege Between Holder of Fee and Claimant under Tax Title.** — *Hussman v. Durham*, 165 U. S. 144 (under the tax law in *Iowa*); *Crum v. Cotting*, 22 Iowa 423.

**5. Statute Refers to Title, Not to Liens.** — *Stevenson v. Henkle*, 100 Va. 591.

**6. Separate Interests Taxed Separately.** — *Cadmus v. Jackson*, 52 Pa. St. 295; *Alleghany City's Appeal*, 41 Pa. St. 60; *Pittsburgh's Appeal*, 40 Pa. St. 455; *Irwin v. U. S. Bank*, 1 Pa. St. 349; *McGee v. Sampselle*, 47 W. Va. 352; *Summers v. Kanawha County*, 26 W. Va. 159; *Smith v. Lewis*, 2 W. Va. 39.

**7. Subject to Redemption.** — *Douglass v. Dickson*, 31 Kan. 310; *Wright v. Wing*, 18 Wis. 45. See also the title *TAXATION*, *ante*, p. 855, and see *supra*, this title, *Deed — Right to Deed — When Right Matures*.



is paramount to any previously executed for the taxes of previous years.<sup>1</sup>

**3. Under Foreclosure of Purchaser's Lien.** — Under a statute authorizing the foreclosure of the lien of a purchaser under an invalid tax deed, such foreclosure may be taken against one or more who have, or claim, or appear of record to have, an interest in or lien upon the lot covered by the tax lien; if by virtue of the decree the land is sold for the full amount of the decree, the purchaser acquires only the title or interest of the one against whom the decree was taken, and all other interests are discharged of the tax lien.<sup>2</sup>

**V. LIMITATIONS — 1. In General.** — The Owner in Possession Is Not Barred by Lapse of Time from instituting proceedings to set aside a tax sale as invalid,<sup>3</sup> and laches is not imputable to the landowner where there is no actual possession under the tax title.<sup>4</sup>

**2. Special Statutes — a. IN GENERAL.** — In many jurisdictions special statutes have been enacted fixing a shorter period of limitations than that controlling other cases for attacking tax proceedings and curing irregularities therein which might have invalidated the title within the prescribed time,<sup>5</sup> and barring an action for a recovery by the owner when the purchaser was in possession for the statutory period;<sup>6</sup> also limiting the time within which the

**1. Deed Last Executed.** — *Chandler v. Dunn*, 50 Cal. 15; *Johns v. Griffin*, 76 Iowa 419; *Bowman v. Thompson*, 36 Iowa 505; *Douglass v. Lowell*, 64 Kan. 533; *Campbell v. Staggs*, 37 Kan. 419; *Harris v. Curran*, 32 Kan. 580; *McFadden v. Goff*, 32 Kan. 418; *Belz v. Bird*, 31 Kan. 141; *Regents v. Linscott*, 30 Kan. 240; *Case v. Frazier*, 30 Kan. 343; *Townsend v. Prowattain*, 81\* Pa. St. 139; *John v. Rush*, 14 Pa. St. 339; *Montgomery v. Meredith*, 17 Pa. St. 42; *McCoy v. Michew*, 7 W. & S. (Pa.) 386; *Wadleigh v. Marathon County Bank*, 58 Wis. 546; *Knox v. Leidgen*, 23 Wis. 292.

**2. Under Foreclosure of Lien.** — *Williams v. Hedrick*, 101 Fed. Rep. 876, 42 C. C. A. 75. See generally *infra*, this title, *Rights of Purchasers of Defective Titles — Reimbursement — Under Statutory Authority*.

**3. Limitations — In General** — *Brooks v. Union Tp.*, 68 N. J. L. 133; *State v. Jersey City*, 36 N. J. L. 188; *State v. Jersey City*, 35 N. J. L. 381.

**4. State v. Sponaugle**, 45 W. Va. 415. See also *Cook v. Lasher*, 73 Fed. Rep. 701, 42 U. S. App. 42; *Sommers v. Ward*, 41 W. Va. 78.

**5. Special Statutes — In General** — *United States v. Saranac Land, etc., Co. v. New York*, 177 U. S. 318 (*New York* statute); *Coulter v. Stafford*, 48 Fed. Rep. 266.

**Colorado.** — *Crisman v. Johnson*, 23 Colo. 264, 58 Am. St. Rep. 224.

**Iowa.** — *Collins v. Valteau*, 79 Iowa 626; *Griffin v. Bruce*, 73 Iowa 126; *Peirce v. Weare*, 41 Iowa 378; *Monk v. Corbin*, 58 Iowa 503; *Bullis v. Marsh*, 56 Iowa 747; *Douglass v. Tullock*, 34 Iowa 262; *Thomas v. Stickle*, 32 Iowa 71.

**Kansas.** — *Dodge v. Emmons*, 34 Kan. 732; *Harris v. Curran*, 32 Kan. 580; *Maxson v. Huston*, 22 Kan. 643.

**Louisiana.** — *In re Lockhart*, 109 La. 740 (under constitutional provision); *Canter v. Williams*, 107 La. 77; *Cane v. Herndon*, 107 La. 591; *Boyle v. West*, 107 La. 347; *Breaux v. Negrotto*, 43 La. Ann. 426; *Russell v. Lang*, 50 La. Ann. 36. See also *Jopling v. Chachere*, 107 La. 522.

**Michigan.** — *State Land Office Com'r v. Auditor-Gen.*, (Mich. 1902) 91 N. W. Rep. 153.

**Mississippi.** — *Brougher v. Stone*, 72 Miss. 647; *Nevin v. Bailey*, 62 Miss. 433.

**Missouri.** — *Francis v. Grote*, 14 Mo. App. 324.

**New York.** — Under a curative statute in the nature of a statute of limitations, *Meigs v. Roberts*, 162 N. Y. 371; *Ensign v. Barse*, 107 N. Y. 329; *Ostrander v. Darling*, 127 N. Y. 70; *Loomis v. Semper*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 567; *Morgan v. Turner*, (Supm. Ct. Tr. T.) 35 Misc. (N. Y.) 399.

**North Carolina.** — *Lyman v. Hunter*, 123 N. Car. 508.

**North Dakota.** — *Meldahl v. Dobbin*, 8 N. Dak. 115.

**Pennsylvania.** — *Rogers v. Johnson*, 67 Pa. St. 43; *Burd v. Patterson*, 22 Pa. St. 219; *Iddings v. Cairns*, 2 Grant Cas. (Pa.) 88.

**South Carolina.** — *Bull v. Kirk*, 37 S. Car. 395.

**Wisconsin.** — *Kennan v. Smith*, 115 Wis. 463; *Pratt v. Milwaukee*, 93 Wis. 658; *Milledge v. Coleman*, 47 Wis. 184; *Morris v. Carmichael*, 68 Wis. 133; *Urquhart v. Westcott*, 65 Wis. 135; *Sprague v. Coenen*, 30 Wis. 209.

See also *supra*, this title, *Deed — Effect — As Evidence — Curative or Limitation Statutes*.

**Municipal Corporation Barred.** — *Helena v. Hornor*, 58 Ark. 151.

**Suit Dismissed Without Prejudice — Extension of Time.** — *Myers v. Coonratt*, 28 Kan. 211.

The statutory extension operates in favor of the transferee of the tax-title purchaser. *Thornburgh v. Cole*, 27 Kan. 490; *Shively v. Beeson*, 24 Kan. 352.

**Claimant under Purchaser Must Show Title from Him.** — *Kruger v. Walker*, (Iowa 1894) 59 N. W. Rep. 65.

In *Minnesota* the limitation previously existing was abrogated by statute in 1887, at least in so far as the limitation applied to an action to set aside a tax sale or to test the validity of such sale and the tax judgment, and thereafter such an action could be brought at any time. *Security Invest. Co. v. Buckler*, 72 Minn. 251.

**6. Statutes in Favor of Purchaser in Possession.** — *Cooper v. Lee*, 59 Ark. 460; *Scott v. Parry*, 108 La. 11.

tax-title claimant must enforce the rights under his purchase by proceeding to recover the land <sup>1</sup> or by foreclosing his tax lien.<sup>2</sup>

**When Statute Begins to Run.** — These statutes begin to run variously from the execution of the deed or from the time when the claimant is entitled to a deed,<sup>3</sup> from the sale,<sup>4</sup> from the time when the deed is recorded,<sup>5</sup> or from the time when the claimant takes possession, as by providing a period of adverse possession.<sup>6</sup>

**b. WHEN STATUTE DOES NOT OPERATE** — (1) *In General.* — The special limitation which the statute makes to cover particular sales will apply to none other.<sup>7</sup>

(2) *Suits to Quiet Title.* — Provisions limiting the time for bringing actions to recover the land have been held to be inapplicable to equitable suits to quiet title.<sup>8</sup> Thus, prescription of a particular time to sue for the land will not preclude the tax-title claimant from suing to quiet his title and thus

**Statute Does Not Run Against Owner in Possession.** — *Carey v. Cagney*, 109 La. 77; *Hansen v. Mauberrert*, 52 La. Ann. 1565.

**1. Limitation Against Recovery of Land by Tax Purchaser.** — See *Gallaher v. Head*, 108 Iowa 588; *Roth v. Munzenmaier*, (Iowa 1902) 91 N. W. Rep. 1072; *Taft v. McCullock*, 135 Mo. 588.

**Equitable Relief — Action Prevented by Unfounded Litigation.** — *Union Mut. L. Ins. Co. v. Dice*, 14 Fed. Rep. 523.

**Statute Available Only to Owner at Time of Sale.** — *Gill v. Candler*, 114 Iowa 332; *Baird v. Law*, 93 Iowa 742; *Varnum v. Shuler*, 69 Iowa 92; *Lockridge v. Daggett*, 54 Iowa 332, 47 Iowa 679; *Knight v. Campbell*, 76 Iowa 730.

**2. Limitation Against Foreclosure of Lien.** — *Osgood v. Westover*, (Neb. 1902) 89 N. W. Rep. 746; *Hathaway v. Nelson*, 52 Neb. 109; *Alexander v. Thacker*, 43 Neb. 494.

**Bar of Action to Foreclose Lien Destroys Lien.** — *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691; *McCague v. Douglas County*, (Neb. 1902) 91 N. W. Rep. 412; *Alexander v. Shaffer*, 38 Neb. 812.

**3. From Execution or from Time When Purchaser Entitled to Deed** — *Alabama.* — *Pugh v. Youngblood*, 69 Ala. 296; *Lassitter v. Lee*, 68 Ala. 287; *Jones v. Randle*, 68 Ala. 258.

*Florida.* — *Spaulding v. Ellsworth*, 39 Fla. 76. *Iowa.* — *Gallaher v. Head*, 108 Iowa 588; *Roth v. Munzenmaier*, (Iowa 1902) 91 N. W. Rep. 1072; *Innes v. Drexel*, 78 Iowa 253; *Doud v. Blood*, 89 Iowa 237; *La Rue v. King*, 74 Iowa 288; *Eldridge v. Kuehl*, 27 Iowa 160; *Henderson v. Oliver*, 28 Iowa 20; *McCreedy v. Sexton*, 29 Iowa 356, 4 Am. Rep. 214; *Hurley v. Street*, 29 Iowa 429; *Thomas v. Stickle*, 32 Iowa 71; *Douglass v. Tullock*, 34 Iowa 262; *Jeffrey v. Brokaw*, 35 Iowa 505; *Barrett v. Love*, 48 Iowa 103.

*Missouri.* — *Taft v. McCullock*, 135 Mo. 588. *North Carolina.* — *Lyman v. Hunter*, 123 N. Car. 508.

**4. From Sale.** — *Mitchell v. Etter*, 22 Ark. 178; *Gomer v. Chaffee*, 6 Colo. 314; *McDougall v. Monlezun*, 39 La. Ann. 1005.

**5. From Recording of Deed** — *United States.* — *Barrett v. Holmes*, 102 U. S. 651.

*Alabama.* — *Flowers v. Jernigan*, 116 Ala. 516; *Smith v. Cox*, 115 Ala. 503.

*Colorado.* — *Crisman v. Johnson*, 23 Colo. 264, 58 Am. St. Rep. 224.

*Florida.* — *Keech v. Enriquez*, 28 Fla. 597.

*Kansas.* — *Douglass v. Lowell*, 55 Kan. 574; *Edwards v. Sims*, 40 Kan. 235; *West v. Cameron*, 39 Kan. 736; *Austin v. Jones*, 37 Kan. 327; *Campbell v. Stagg*, 37 Kan. 420; *Beebe v. Doster*, 36 Kan. 666; *Harris v. Curran*, 32 Kan. 580; *Estes v. Stebbins*, 25 Kan. 315; *Bowman v. Cockrill*, 6 Kan. 311.

*Kentucky.* — *Washington v. McCombs*, (Ky. 1895) 32 S. W. Rep. 398.

*Louisiana.* — *Cane v. Herndon*, 107 La. 591.

*Minnesota.* — *Hill v. Lund*, 13 Minn. 451; *Baker v. Kelley*, 11 Minn. 480.

*Missouri.* — *Skinner v. Williams*, 85 Mo. 489.

*New York.* — *Meigs v. Roberts*, 162 N. Y. 371.

*North Dakota.* — *Meldahl v. Dobbin*, 8 N. Dak. 115.

*Wisconsin.* — *Kennan v. Smith*, 115 Wis. 463; *Webster v. Schwears*, 69 Wis. 89; *Gunnison v. Hoehne*, 18 Wis. 268; *Lawrence v. Kenney*, 32 Wis. 281.

**6. From Possession Taken.** — *Land Trust v. Hoffman*, 57 Fed. Rep. 333, 13 U. S. App. 399 (*Louisiana* statute); *Hoakins v. Illinois Cent. R. Co.*, 78 Miss. 768, 84 Am. St. Rep. 644; *Brougher v. Stone*, 72 Miss. 647; *Baldwin v. Merriam*, 16 Neb. 199; *Gardner v. Reedy*, 62 S. Car. 503; *State v. Morrison*, 44 S. Car. 470. See also *State v. Sponangle*, 45 W. Va. 415.

**Entry under Tax Deed Required.** — *Gilman v. Riopelle*, 18 Mich. 145.

**Entry as Trespasser.** — *Parsons v. Viets*, 96 Mo. 408.

**Suit on Subsequent Tax Title.** — It is not an assault upon the defendant's tax title, within the meaning of such a statute, that the plaintiff seeks to recover upon a claim of a title acquired in subsequent tax proceedings. *Lewis v. Seibles*, 65 Miss. 251, 7 Am. St. Rep. 649.

**7. Applicable to Particular Sales.** — *Clay v. Moore*, 65 Miss. 81.

**Limitation of Owner's Action Not Applicable to Purchaser.** — *Sullivan v. Collins*, 20 Colo. 528. See also *Lee v. Crawford*, 10 N. Dak. 482.

**8. Statutes Inapplicable to Suits to Quiet Title.** — *Kraus v. Montgomery*, 114 Ind. 103; *Earle v. Simons*, 94 Ind. 573; *Bowen v. Striker*, 87 Ind. 317; *Gabe v. Root*, 93 Ind. 256; *Farrar v. Clark*, 85 Ind. 449.

**Limitation of Right to Test Amendment Inapplicable to Action to Remove Cloud.** — *Brennan v. Buffalo*, 13 N. Y. App. Div. 453.

cutting off the owner's right to sue for the land before the statute has run;<sup>1</sup> and the tax-title claimant in possession may sue to quiet his title after the expiration of the statutory period has barred the original owner, in which suit the owner is precluded by the statutory bar as effectually as if he were plaintiff in an action to recover the land.<sup>2</sup>

(3) *Void or Vitally Defective Proceedings* — (a) *In General*. — As a rule, these statutes reach only those defects which do not go to the absence of authority to sell or convey. They do not operate to cure jurisdictional defects or to validate titles which are void for want of power to sell the property, as where there was no assessment, levy, or sale, where the land was not subject to taxation, or where the taxes had been paid before the sale;<sup>3</sup> and defects which go to the fraud of the parties are not within their operation.<sup>4</sup> In a few jurisdictions, however, the statutes cure even fundamental objections<sup>5</sup> and seem to stop short of nothing less than the entire want of authority *ab initio* of the taxing officers to put the taxing power into motion.<sup>6</sup>

1. *Stevenson v. Bonesteel*, 30 Iowa 286. See also *Walker v. Boh*, 32 Kan. 354.

Conversely it is held that the owner may pursue his statutory remedy to test the tax purchaser's claim within the two-year period of redemption. *Loomis v. Sempser*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 567.

2. *Shawler v. Johnson*, 52 Iowa 472.

3. *Vital Defect Not Within Statutes* — *United States*. — *Swope v. Purdy*, 1 Dill. (U. S.) 349. *Colorado*. — *Crisman v. Johnson*, 23 Colo.

264, 58 Am. St. Rep. 224.

*Florida*. — *McKeown v. Collins*, 38 Fla. 276; *Townsend v. Edwards*, 25 Fla. 582; *Florida Sav. Bank v. Brittain*, 20 Fla. 507.

*Illinois*. — *Torrence v. Shedd*, 156 Ill. 194.

*Iowa*. — *Chicago, etc., R. Co. v. Kelley*, 105 Iowa 106; *Rath v. Martin*, 93 Iowa 499; *Wilson v. Russell*, 73 Iowa 395; *Patton v. Luther*, 47 Iowa 236; *Nichols v. McGlathery*, 43 Iowa 189; *Early v. Whittingham*, 43 Iowa 162; *Case v. Albee*, 28 Iowa 277; *McNamara v. Estes*, 22 Iowa 246.

*Kansas*. — *Wilson v. Reasoner*, 37 Kan. 663; *Paine v. Spratley*, 5 Kan. 550; *Taylor v. Miles*, 5 Kan. 498, 7 Am. Dec. 558.

*Kentucky*. — See *Packard v. Beaver Valley Land, etc., Co.*, 96 Ky. 249.

*Louisiana*. — *Marmion v. McPeak*, 51 La. Ann. 1631; *Breaux v. Negrotto*, 43 La. Ann. 441 (in which cases the rule in *Barrow v. Wilson*, 39 La. Ann. 403, was modified); *Foreman v. Hinchcliffe*, 106 La. 225; *Scott v. Parry*, 108 La. 11; *Pennington v. Jones*, 52 La. Ann. 2025; *Welsch v. Augusti*, 52 La. Ann. 1949; *Hansen v. Mauberret*, 52 La. Ann. 1565; *Le Seigneur v. Bessan*, 52 La. Ann. 187; *Dibble v. Leppert*, 47 La. Ann. 792; *Montgomery v. Marydale Land, etc., Co.*, 46 La. Ann. 403; *Concordia v. Bertron*, 46 La. Ann. 356; *Johnson v. Martinez*, 48 La. Ann. 52; *Surget v. Newman*, 42 La. Ann. 777; *Wederstrandt v. Freyhan*, 34 La. Ann. 705; *Davenport v. Knox*, 34 La. Ann. 407; *Lague v. Boagni*, 32 La. Ann. 914; *Person v. O'Neal*, 32 La. Ann. 228.

*Minnesota*. — *Burdick v. Bingham*, 38 Minn. 482; *Feller v. Clark*, 36 Minn. 338; *Sanborn v. Cooper*, 31 Minn. 307.

*Mississippi*. — *Hoskins v. Illinois Cent. R. Co.*, 78 Miss. 768, 84 Am. St. Rep. 644 (land exempt from taxation); *Metcalfe v. Perry*, 66 Miss. 68.

*New York*. — See *Hagner v. Hall*, 10 N. Y.

App. Div. 381; *Sanders v. Saxton*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 574; *Wallace v. International Paper Co.*, 53 N. Y. App. Div. 41; *Turner v. Boyce*, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 502; *Andrus v. Wheeler*, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 412.

*North Dakota*. — *Eaton v. Bennett*, 10 N. Dak. 346; *Roberts v. Fargo First Nat. Bank*, 8 N. Dak. 504; *Sweigle v. Gates*, 9 N. Dak. 538. See also *Lee v. Crawford*, 10 N. Dak. 482.

*Oregon*. — *Nickum v. Gaston*, 28 Oregon 322. *Pennsylvania*. — *Simpson v. Meyers*, 197 Pa. St. 522.

*West Virginia*. — *Bradley v. Ewart*, 18 W. Va. 598.

*Wisconsin*. — *Chicago, etc., R. Co. v. Bayfield County*, 87 Wis. 188; *Dupen v. Wetherby*, 79 Wis. 203; *Wadleigh v. Marathon County Bank*, 58 Wis. 546; *Smith v. Sherry*, 54 Wis. 114. See also *Oconto Co. v. Jerrard*, 46 Wis. 317; *Marsh v. Clark County*, 42 Wis. 502.

And see *supra*, this title, *Deed — Effect — As Evidence — How Far Enforced*.

*Assessment in Name of Dead Man*. — *Mil-laudon v. Gallagher*, 104 La. 713; *Kohlman v. Glaudi*, 52 La. Ann. 700.

*Irregular Proof of Notice*. — The statute is not prevented from running by the fact that the notice of expiration of the period of redemption, as decided in the deed, was made by affidavit of the publisher instead of by that of the holder of the certificate. *Bolin v. Francis*, 72 Iowa 619; *Trulock v. Bentley*, 67 Iowa 602.

*Previous Tender* has been held to prevent the bar of the statute. *Douglass v. Lowell*, 55 Kan. 574. See also *Noble v. Douglass*, 56 Kan. 92.

4. *Fraud of Parties*. — *Crisman v. Johnson*, 23 Colo. 264, 58 Am. St. Rep. 224.

*Innocent Purchaser Protected*. — *Nickum v. Gaston*, 24 Oregon 380.

5. *Fundamental Objections Cured*. — *Hill v. Atterbury*, 88 Mo. 114.

*The Deed Is Color of Title*, and therefore possession under the special statute will ripen into an indefeasible title. *Lassiter v. Lee*, 68 Ala. 287, holding that the statute runs even if the sale is void by reason of the fact that the taxes had been paid; *Pugh v. Youngblood*, 69 Ala. 296.

6. *Pratt v. Milwaukee*, 93 Wis. 658; *Knox v. Cleveland*, 13 Wis. 245.

(b) **Deed Void on Its Face.** — In many jurisdictions the statute will not run in favor of the grantee though he is in the actual possession of the premises, if the deed is void on its face.<sup>1</sup>

(c) **Purchase by One Not Authorized to Purchase.** — The statutes do not run against the original owner in favor of one who by reason of his relation to the owner was precluded from acquiring the tax title,<sup>2</sup> at least until the discovery of the fraud in the purchase.<sup>3</sup>

c. **STATUTES OPERATING AGAINST EITHER PARTY OUT OF POSSESSION** — (1) **In General.** — The limitation provided often operates upon the remedy of both parties, as well to cut off that of the grantee in the tax deed as that of the original owner, it devolving on the party out of possession to bring his action within the time prescribed by the statute.<sup>4</sup>

(2) **Sufficient Occupancy** — (a) **In General.** — The occupancy which will set the statute in motion and keep it running in favor of the party in possession need not be a continued possession by the same person.<sup>5</sup>

(b) **Constructive Possession.** — Where the premises are not in actual possession of either party a valid tax deed gives to the grantee constructive possession

**Exceptions Fixed by Statute.** — See *Canter v. Williams*, 107 La. 77, holding that the statutory exceptions are exclusive; *Kennan v. Smith*, 115 Wis. 463; *Chicago, etc., R. Co. v. Arnold*, 114 Wis. 434.

1. **Statute Does Not Run if Deed Void on Face** — *United States*. — *Redfield v. Parks*, 132 U. S. 239; *Moore v. Brown*, 11 How. (U. S.) 414; *Daniels v. Case*, 45 Fed. Rep. 843; *Coulter v. Stafford*, 56 Fed. Rep. 564, 15 U. S. App. 118.

*Colorado*. — *Crisman v. Johnson*, 23 Colo. 264, 58 Am. St. Rep. 224; *Gomer v. Chaffee*, 6 Colo. 314; *Brinker v. Union Pac., etc., R. Co.*, 11 Colo. App. 166.

*Kansas*. — *Richards v. Thompson*, 43 Kan. 209; *Larkin v. Wilson*, 28 Kan. 513; *Waterson v. Devoe*, 18 Kan. 223; *Hall v. Dodge*, 18 Kan. 280; *Entrekin v. Chambers*, 11 Kan. 368; *Hubbard v. Johnson*, 9 Kan. 634; *Sapp v. Morrill*, 8 Kan. 677; *Shoat v. Walker*, 6 Kan. 65.

*Louisiana*. — *Beltram v. Villere*, (La. 1888) 4 So. Rep. 506.

*Minnesota*. — *Sheehy v. Hinds*, 27 Minn. 259.

*Mississippi*. — *Clay v. Moore*, 65 Miss. 81.

*Missouri*. — *Callahan v. Davis*, 90 Mo. 78; *Duff v. Neilson*, 90 Mo. 93; *Pearce v. Tittsworth*, 87 Mo. 635; *Hopkins v. Scott*, 86 Mo. 140; *Mason v. Crowder*, 85 Mo. 526.

*Nebraska*. — *Bendexen v. Fenton*, 21 Neb. 184; *Housel v. Boggs*, 17 Neb. 94; *Towle v. Holt*, 14 Neb. 221; *McGavock v. Pollack*, 13 Neb. 535.

*North Dakota*. — *Hegar v. De Groat*, 3 N. Dak. 354.

*Oregon*. — *Lewis v. Blackburn*, 42 Oregon 114.

*South Dakota*. — *Horswill v. Farnham*, (S. Dak. 1902) 92 N. W. Rep. 1082.

*Texas*. — *Berrendo Stock Co. v. Kaiser*, 66 Tex. 352; *Kilpatrick v. Sisneros*, 23 Tex. 113; *Wofford v. McKinna*, 23 Tex. 36, 76 Am. Dec. 53.

*Washington*. — *Hurd v. Brisner*, 3 Wash. 1, 28 Am. St. Rep. 17.

See also *supra*, this title, *Deed — Effect — As Color of Title*.

2. **Unauthorized Purchase.** — *Sorenson v. Davis*, 83 Iowa 405; *Jordan v. Brown*, 56 Iowa 281;

*Austin v. Barrett*, 44 Iowa 488; *Krutz v. Fisher*, 8 Kan. 90; *Carithers v. Weaver*, 7 Kan. 110; *McGee v. Holmes*, 63 Miss. 50; *McMahon v. McGraw*, 26 Wis. 614. See also *Battin v. Woods*, 27 W. Va. 58. But see *Bemis v. Plato*, 110 Iowa 127; *Waggoner v. Mann*, 83 Iowa 110 Iowa 127; *Waggoner v. Mann*, 83 Iowa 17.

3. **Statute Does Not Run until Discovery of Fraud.** — *Doyle v. Doyle*, 33 Kan. 721; *Duffitt v. Tuhan*, 28 Kan. 292.

4. **Either Party Out of Possession Barred** — *United States*. — *Barrett v. Holmes*, 102 U. S. 651.

*Alabama*. — *Capehart v. Guffey*, 130 Ala. 425.

*Arkansas*. — *Parr v. Matthews*, 50 Ark. 390.

*Iowa*. — *Dorweiler v. Callanan*, 91 Iowa 299; *La Rue v. King*, 74 Iowa 288; *Brett v. Farr*, 66 Iowa 684; *Griffith v. Carter*, 64 Iowa 193; *Ellsworth v. Low*, 62 Iowa 178; *McCaughan v. Tatman*, 53 Iowa 508; *Tabler v. Callanan*, 49 Iowa 362; *Patton v. Luther*, 47 Iowa 236; *Hintrager v. Hennessy*, 46 Iowa 600; *Wallace v. Sexton*, 44 Iowa 257; *Lavery v. Sexton*, 41 Iowa 435; *Peck v. Sexton*, 41 Iowa 566; *Brown v. Painter*, 38 Iowa 456.

*Kansas*. — *Coale v. Campbell*, 58 Kan. 480; *Smith v. Jones*, 37 Kan. 292; *Corbin v. Brownson*, 28 Kan. 532; *Thornburg v. Cole*, 27 Kan. 490; *Hubbard v. Johnson*, 9 Kan. 632; *Bowman v. Cockrill*, 6 Kan. 311.

*Louisiana*. — *Russell v. Lang*, 50 La. Ann. 36; *Waddill v. Walton*, 42 La. Ann. 763.

*Michigan*. — *Case v. Dean*, 16 Mich. 12; *Groesbeck v. Seeley*, 13 Mich. 329.

*Missouri*. — *Spurlock v. Dougherty*, 81 Mo. 171.

*Pennsylvania*. — *Hole v. Rittenhouse*, 19 Pa. St. 305.

*Wisconsin*. — *Stephenson v. Wilson*, 50 Wis. 95; *Smith v. Ford*, 48 Wis. 117; *Coleman v. Eldred*, 44 Wis. 210; *Pepper v. O'Dowd*, 39 Wis. 538; *Wilson v. Henry*, 40 Wis. 594; *Lewis v. Disher*, 32 Wis. 504; *Lybrand v. Haney*, 31 Wis. 230; *Swain v. Comstock*, 18 Wis. 463; *Parish v. Eager*, 15 Wis. 532; *Knox v. Cleveland*, 13 Wis. 245; *Falkner v. Dorman*, 7 Wis. 388.

5. *Gallaher v. Head*, 108 Iowa 588.

and starts the statute to run against the owner,<sup>1</sup> or prevents it from running against an action by the tax-title claimant.<sup>2</sup>

Where the Deed Is Void on Its Face and the grantee is not in actual possession the deed will not give to him constructive possession, and the statute of limitations runs against him and not against the original owner.<sup>3</sup>

d. RETROSPECTIVE STATUTES. — A statute of the character under discussion may be retrospective and operate upon sales prior to its passage,<sup>4</sup> but as to existing causes of action a reasonable time must be allowed for instituting suit,<sup>5</sup> and if the whole time allowed by the statute had expired before its passage the statute does not apply until the time allowed by it has run.<sup>6</sup> On the other hand, where an absolute title becomes vested in the tax purchaser by reason of the expiration of the statutory period of limitation, such right cannot be subsequently impaired.<sup>7</sup>

e. PARTIES UNDER DISABILITY. — While the rights of owners who are under disability at the time of sale are frequently protected by saving clauses,<sup>8</sup>

1. Constructive Possession of Unoccupied Land — *United States*. — *Bardon v. Land, etc., Imp. Co.*, 157 U. S. 327 (*Wisconsin* statute); *Coleman v. Peshtigo Lumber Co.*, 30 Fed. Rep. 317. See also *Vail v. Richards*, 62 Fed. Rep. 720, 23 U. S. App. 570.

*Iowa*. — *Rice v. Haddock*, 70 Iowa 318; *Monk v. Corbin*, 58 Iowa 503; *Bullis v. Marsh*, 56 Iowa 747; *McCaughan v. Tatman*, 53 Iowa 508; *Moingona Coal Co. v. Blair*, 51 Iowa 447; *Goslee v. Tearney*, 52 Iowa 455.

*Kansas*. — *Doyle v. Doyle*, 33 Kan. 725; *Harris v. Curran*, 32 Kan. 580; *McFadden v. Goff*, 32 Kan. 415; *Case v. Frazier*, 30 Kan. 345; *Myers v. Coonrad*, 28 Kan. 215.

*Louisiana*. — *Ashley Co. v. Bradford*, 109 La. 641.

*Minnesota*. — *Bronson v. St. Croix Lumber Co.*, 44 Minn. 348.

*Missouri*. — *Hill v. Atterbury*, 88 Mo. 114.

*Wisconsin*. — *Warren v. Putnam*, 63 Wis. 414; *Austin v. Holt*, 32 Wis. 478; *Lawrence v. Kenney*, 32 Wis. 281; *Cutler v. Hurlbut*, 29 Wis. 152; *Gunnison v. Hoehne*, 18 Wis. 268; *Whitney v. Marshall*, 17 Wis. 174; *Parish v. Eager*, 15 Wis. 532; *Dean v. Earley*, 15 Wis. 100; *Knox v. Cleveland*, 13 Wis. 245; *Hill v. Kricke*, 11 Wis. 442.

See also *Sullivan v. Collins*, 20 Colo. 528.

Where Actual Possession Is Disputed the rule seems to be otherwise. See *Taylor v. Rountree*, 28 Wis. 391; *Jones v. Collins*, 16 Wis. 594.

Constructive Possession of All by Actual Possession of Part. — *Sparks v. Farris*, (Ark. 1903) 71 S. W. Rep. 945.

Under Statutory Right to Maintain Ejectment for Unoccupied Lands. — See *Simpson v. Meyers*, 197 Pa. St. 522; *Johnston v. Jackson*, 70 Pa. St. 164; *Stewart v. Trevor*, 56 Pa. St. 374; *Burd v. Patterson*, 22 Pa. St. 219; *Sheik v. McElroy*, 20 Pa. St. 31; *Robb v. Bowen*, 9 Pa. St. 71; *Dull v. Ahls*, 14 Pa. Co. Ct. 350. But see *Waln v. Shearman*, 8 S. & R. (Pa.) 357, 11 Am. Dec. 624, and *Cranmer v. Hall*, 4 W. & S. (Pa.) 37, which held otherwise though opposed to the earlier decision in *Parish v. Stevens*, 3 S. & R. (Pa.) 298. But the statute applies only to unseated lands. *Simpson v. Meyers*, 197 Pa. St. 522; *Stewart v. Trevor*, 56 Pa. St. 374.

2. Prevents Running of Statute Against Purchaser. — *Dorweiler v. Callanan*, 91 Iowa 299; *Francis v. Griffin*, 72 Iowa 23.

3. Deed Void on Face. — *Jackson v. Neal*, 136 Ind. 173; *Cutler v. Hurlbut*, 29 Wis. 152; *Lain v. Shepardson*, 18 Wis. 59. See also *supra*, this section, *When Statute Does Not Operate — Deed Void on Its Face*.

4. Retrospective Operation. — *Barrow v. Wilson*, 39 La. Ann. 403; *In re Lockhart*, 109 La. 740 (constitutional provision). See also generally the title LIMITATION OF ACTIONS, vol. 19, p. 174.

Statute Shortening Existing Period Valid. — *Mecklem v. Blake*, 22 Wis. 495, 99 Am. Dec. 68; *Howell v. Howell*, 15 Wis. 55; *Smith v. Packard*, 12 Wis. 371; *Parker v. Kane*, 4 Wis. 1, 65 Am. Dec. 283.

Statute Extending Existing Period Valid. — *Martz v. Newton*, 29 Kan. 331; *Jordan v. Kyle*, 27 Kan. 193; *Keith v. Keith*, 26 Kan. 26; *Long v. Wolf*, 25 Kan. 522; *Maxson v. Huston*, 22 Kan. 643.

Saving Clause in Statute. — *Ward v. Huggins*, 7 Wash. 617.

5. Reasonable Time Must Be Allowed. — *Smith v. Bryan*, 74 Ind. 515; *Dale v. Frisbie*, 59 Ind. 530; *Osborn v. Jaines*, 17 Wis. 573. And see the title LIMITATION OF ACTIONS, vol. 19, p. 169.

6. Where Time Allowed Has Run. — *Smith v. Bryan*, 74 Ind. 515. And see the title LIMITATION OF ACTIONS, vol. 19, p. 176.

7. Vested Title Cannot Be Impaired. — *Sigman v. Lundy*, 66 Miss. 522; *Gibson v. Berry*, 66 Miss. 515; *Cutler v. Hurlbut*, 29 Wis. 152; *Lindsay v. Fay*, 28 Wis. 177; *Pleasants v. Rohrer*, 17 Wis. 577; *Smith v. Cleveland*, 17 Wis. 556; *Parish v. Eager*, 15 Wis. 532; *Knox v. Cleveland*, 13 Wis. 245; *Sprecher v. Wakeley*, 11 Wis. 432; *Hill v. Kricke*, 11 Wis. 442. See also *Vail v. Richards*, 62 Fed. Rep. 720, 23 U. S. App. 570. And see the title LIMITATION OF ACTIONS, vol. 19, p. 172. *Contra*, *Kipp v. Johnson*, 31 Minn. 360, holding that the statute merely took away or suspended the remedy, and had no reference to the right.

8. Parties under Disability — Time Extended. — *Sullivan v. Collins*, 20 Colo. 528; *McConnel v. Konepel*, 46 Ill. 519; *Smith v. Bryan*, 74 Ind. 515; *Bemis v. Plato*, 119 Iowa 127; *Kearns v. Collins*, 40 La. Ann. 453; *Barrow v.*

such a clause will not protect the grantee of such person<sup>1</sup> or extend the time within which the tax-title claimant must act;<sup>2</sup> and where the tax law makes no exception of persons under disability such a person is not saved from the operation of the statute limiting the time within which to bring an action for land sold for taxes, and a general statute permitting a person under disability to sue within a certain time after the disability is removed does not apply.<sup>3</sup>

**VI. RIGHTS OF PURCHASERS OF DEFECTIVE TITLES — 1. Avoiding Liability for Future Taxes.** — One who fails to acquire title under a tax deed may deny his ownership of the land as a defense to an action to recover taxes from him; he is not estopped by his previous acceptance and recording of the deed.<sup>4</sup>

**2. Reimbursement — a. IN ABSENCE OF STATUTE.** — In the absence of a statute changing the rule, the doctrine of *caveat emptor* applies to tax sales, and if the title fails the purchaser is remediless to recover the amount paid by him.<sup>5</sup>

**b. UNDER STATUTORY AUTHORITY — (i) Purchase Price, Subsequent Taxes, Etc. — (a) In General.** — In many jurisdictions a purchaser of an invalid tax title is protected by statutes providing for repayment to him of the amount of the purchase money, or of the purchase money and all subsequent taxes, with interest, etc., and making such charges a lien or subrogating the purchaser to the lien of the taxing power.<sup>6</sup> The right of an individual to recover and the extent of his recovery will, of course, depend upon the par-

Wilson, 39 La. Ann. 403; Lyman v. Hunter, 123 N. Car. 508.

**Redemption Essential.** — Redemption within the statutory time after majority is absolutely essential to a minor's right to sue in ejectment for the land. Woodbury v. Shackleford, 19 Wis. 59.

**1. Grantee of Person under Disability Not Protected.** — McCaughan v. Tatman, 53 Iowa 508. See also Lyman v. Hunter, 123 N. Car. 508.

**2. Tax-title Claimant Not Within Statute.** — McCaughan v. Tatman, 53 Iowa 508.

**3. Exception Exists Only by Express Provision.** — Goodman v. Wilson, 54 Kan. 709; Douglass v. Lowell, 55 Kan. 574; Cartwright v. Korman, 45 Kan. 515. And see generally the title LIMITATION OF ACTIONS, vol. 19, p. 212.

**4. Defense Against Future Taxes.** — Coombs v. People, 198 Ill. 586.

**5. No Relief in Absence of Statute — Arkansas.** — Nevada County v. Dickey, 68 Ark. 160; St. Louis, etc., R. Co. v. Alexander, 49 Ark. 190.

**California.** — Loomis v. Los Angeles County, 59 Cal. 456; Harper v. Rowe, 53 Cal. 233.

**Colorado.** — Larimer County v. National State Bank, 11 Colo. 564.

**Florida.** — Graham v. Florida Land, etc., Co., 33 Fla. 356.

**Indiana.** — Worley v. Cicero, 110 Ind. 208; State v. Casteel, 110 Ind. 174; Churchman v. Indianapolis, 110 Ind. 259; McWhinney v. Indianapolis, 98 Ind. 182; Logansport v. Humphrey, 84 Ind. 467; Indianapolis v. Langsdale, 29 Ind. 486.

**Kansas.** — Coe v. Farwell, 24 Kan. 566; Lyon County v. Goddard, 22 Kan. 389.

**Maine.** — Packard v. New Limerick, 34 Me. 266; Treat v. Orono, 26 Me. 217; Emerson v. Washington County, 9 Me. 88.

**Maryland.** — Hamilton v. Valiant, 30 Md. 139.

**Massachusetts.** — Lynde v. Melrose, 10 Allen (Mass.) 49.

**Michigan.** — Croskery v. Busch, 116 Mich. 288; Rice v. Auditor-Gen., 30 Mich. 12.

**Minnesota.** — Burdick v. Bingham, 38 Minn. 482; Barber v. Evans, 27 Minn. 92.

**Nebraska.** — Martin v. Kearney County, 62 Neb. 538; McCague v. Omaha, 58 Neb. 37; Norris v. Burt County, 56 Neb. 295; Pennock v. Douglas County, 39 Neb. 293, 42 Am. St. Rep. 579; Merrill v. Omaha, 39 Neb. 304.

**New Jersey.** — Casselbury v. Piscataway, 43 N. J. L. 353; Hampton v. Nicholson, 23 N. J. Eq. 423; Tooker v. Roe, 44 N. J. L. 591. But see Phillips v. Hudson, 31 N. J. L. 143.

**New Mexico.** — Blackwell v. Albuquerque First Nat. Bank, 10 N. Mex. 555.

**New York.** — Coffin v. Brooklyn, 116 N. Y. 159.

**Pennsylvania.** — Bredin v. Cranberry Tp., 87 Pa. St. 441; Jenks v. Wright, 61 Pa. St. 410.

**South Carolina.** — Harth v. Gibbs, 3 Rich. L. (S. Car.) 316.

**South Dakota.** — American Invest. Co. v. Beadle County, 5 S. Dak. 410.

**Tennessee.** — Ross v. Mabry, 1 Lea (Tenn.) 226.

**Texas.** — McCormick v. Edwards, 69 Tex. 106.

**West Virginia.** — Simpson v. Edmiston, 23 W. Va. 675.

**Contra.** — Norton v. Rock County, 13 Wis. 611 (obiter).

**Statutory Modification of Common-law Rule.** — In Pennsylvania it was provided by statute in 1856 that where the assessment was double or the land was not in the county the doctrine of *caveat emptor* should not apply. Bredin v. Cranberry Tp., 87 Pa. St. 441.

**6. Recovery under Statutory Authority — In General.** — United States. — Smith v. Gage, 11 Biss. (U. S.) 217.

**Arizona.** — Hereford v. O'Connor, (Ariz. 1898) 52 Pac. Rep. 471.

ticular statute. Thus, under the various enactments, reimbursement for taxes paid subsequent to the tax sale is restricted to *bona fide* occupants;<sup>1</sup> the rate of interest recoverable is provided;<sup>2</sup> the liability is confined to one under duty to pay at the time of the sale;<sup>3</sup> and the purchaser must show his purchase<sup>4</sup> and what taxes are properly chargeable.<sup>5</sup>

As to Personal Liability the statutory provisions vary; but where the purchaser is subrogated to the lien of the taxing power the reimbursement is enforced by foreclosing the lien, and the legal owner is not personally liable.<sup>6</sup>

(b) *Refundment by Taxing Power.* — Some of the statutes provide for reimburse-

*Arkansas.* — *Anderson v. Williams*, 59 Ark. 144; *Wright v. Graham*, 42 Ark. 140; *Coats v. Hill*, 41 Ark. 149; *St. Louis, etc., R. Co. v. Alexander*, 49 Ark. 190; *Hare v. Carnall*, 39 Ark. 196.

*Colorado.* — *Charlton v. Kelly*, 24 Colo. 273; *Crisman v. Johnson*, 23 Colo. 264, 58 Am. St. Rep. 224.

*Florida.* — *Graham v. Florida Land, etc., Co.*, 83 Fla. 356.

*Illinois.* — *Gage v. Du Puy*, 134 Ill. 132; *Smith v. Prall*, 133 Ill. 308; *Gage v. Waterman*, 121 Ill. 115.

*Indiana.* — *Cole v. Gray*, 139 Ind. 396; *Stalcup v. Dixon*, 136 Ind. 9; *Harlan v. Jones*, 104 Ind. 167; *Parker v. Goddard*, 81 Ind. 294; *McKeen v. Haskell*, 108 Ind. 97; *Culbertson v. Munson*, 104 Ind. 451; *Scott v. Millikan*, 104 Ind. 75; *Ludlow v. Ludlow*, 109 Ind. 199; *Sloan v. Sewell*, 81 Ind. 180; *Crecelius v. Mann*, 84 Ind. 147; *Locke v. Catlett*, 96 Ind. 291; *Duke v. Brown*, 65 Ind. 25; *Hosbrook v. Schooley*, 74 Ind. 51; *Dixon v. Eikenberry*, (Ind. App. 1903) 65 N. E. Rep. 938. See also *Armstrong v. Hufty*, (Ind. 1899) 55 N. E. Rep. 443.

*Iowa.* — *Buckley v. Early*, 72 Iowa 289; *Goodnow v. Burrows*, 74 Iowa 758; *Goodnow v. Litchfield*, 67 Iowa 691; *Goodnow v. Wells*, 67 Iowa 654; *Hunter v. Early*, 75 Iowa 769; *Buck v. Holt*, 74 Iowa 294; *Bradley v. Cole*, 67 Iowa 650; *Orr v. Travacrier*, 21 Iowa 68; *Guisse v. Early*, 72 Iowa 283; *Light v. West*, 42 Iowa 138; *Thompson v. Savage*, 47 Iowa 522; *Sexton v. Henderson*, 45 Iowa 160; *Besore v. Dosh*, 43 Iowa 211; *Springer v. Bartle*, 46 Iowa 688; *Everett v. Beebe*, 37 Iowa 452; *Claussen v. Rayburn*, 14 Iowa 136.

*Kansas.* — *Polenqueen v. McAllaster*, 64 Kan. 263; *Harding v. Greene*, 59 Kan. 202; *Arn v. Hoppin*, 25 Kan. 707; *Geer v. Thrasher*, 37 Kan. 657; *Auld v. McAllaster*, 43 Kan. 163; *Jackson v. Challiss*, 41 Kan. 247; *Hoffman v. Groll*, 35 Kan. 652; *Standard Invest. Co. v. Freeman*, 64 Kan. 885, 67 Pac. Rep. 859; *Fairbanks v. Williams*, 24 Kan. 16; *Stetson v. Freeman*, 36 Kan. 608; *Shaw v. Kirkwood*, 24 Kan. 476; *Corbin v. Young*, 24 Kan. 198; *Smith v. Smith*, 15 Kan. 292; *Barker v. McCartney*, 10 Kan. App. 130; *Park v. Hetherington*, 9 Kan. App. 309, *affirmed* 62 Kan. 868, 64 Pac. Rep. 1115; *Canine v. Finnup*, 5 Kan. App. 798; *Powell v. Finn*, 5 Kan. App. 495; *Booge v. Ritchie*, 2 Kan. App. 714.

*Kentucky.* — *Fish v. Genett*, (Ky. 1900) 56 S. W. Rep. 813.

*Louisiana.* — *Foreman v. Hinchcliffe*, 106 La. 225; *West v. Negrotto*, 52 La. Ann. 381.

*Michigan.* — *Nester v. Busch*, 64 Mich. 657.

*Mississippi.* — *McLaran v. Moore*, 60 Miss. 376; *Peterson v. Kittredge*, 65 Miss. 33; *Cog-*

*burn v. Hunt*, 56 Miss. 718, *distinguishing* *Yandell v. Pugh*, 53 Miss. 302.

*Missouri.* — *Allen v. Buckley*, 94 Mo. 158; *White v. Shell*, 84 Mo. 560.

*Nebraska.* — *Green v. Hellman*, 61 Neb. 875; *John v. Connell*, 61 Neb. 267; *Carman v. Harris*, 61 Neb. 635; *Adams v. Osgood*, 60 Neb. 779; *Merrill v. Ijams*, 58 Neb. 706; *Sanford v. Moore*, 58 Neb. 654; *Grant v. Bartholomew*, 57 Neb. 673; *Leavitt v. Bartholomew*, (Neb. 1901) 93 N. W. Rep. 856; *Merriam v. Rauert*, 23 Neb. 217; *Stegeman v. Faulkner*, 42 Neb. 53; *Dillon v. Merriam*, 22 Neb. 151; *Pettit v. Black*, 8 Neb. 52; *Wilhelm v. Russell*, 8 Neb. 120; *Lynam v. Anderson*, 9 Neb. 368; *Miller v. Hurford*, 11 Neb. 377; *Reed v. Merriam*, 15 Neb. 323; *Merriam v. Hemple*, 17 Neb. 345; *Wise v. Newatney*, 26 Neb. 88; *Johnson v. Finley*, 54 Neb. 733; *Medland v. Connell*, 57 Neb. 10; *Frank v. Scoville*, 48 Neb. 169; *Weston v. Meyers*, 45 Neb. 95.

*Ohio.* — *Heffern v. Hack*, 65 Ohio St. 164; *Allen v. Russell*, 59 Ohio St. 137; *Steel v. Pogue*, 8 Ohio Dec. 255, 15 Ohio Cir. Ct. 149; *Chapman v. Sollars*, 38 Ohio St. 378. See also *Johnson v. Stewart*, 29 Ohio St. 498.

*Washington.* — *Gove v. Tacoma*, 26 Wash. 474.

*Wisconsin.* — *Towne v. Salentine*, 92 Wis. 404; *Wisconsin Cent. R. Co. v. Comstock*, 71 Wis. 88.

**Taxes Subsequently Paid by Purchaser Recoverable.** — *Millikan v. Ham*, 104 Ind. 498; *Genella v. Vincent*, 50 La. Ann. 956; *Walsh v. Harang*, 48 La. Ann. 984; *Pfefferle v. Wieland*, 55 Minn. 202; *Reid v. Yazoo, etc., R. Co.*, 74 Miss. 769; *Green v. Hellman*, 61 Neb. 875.

**Not Applicable to Successful Claimant under Later Tax Deed.** — *Douglas v. Lowell*, 64 Kan. 533; *Robbins v. Barron*, 32 Mich. 36.

1. **Right Extended to Occupant Only.** — *Pfefferle v. Wieland*, 60 Minn. 328.

2. **Rate of Interest.** — *Peck v. Truesdell*, 7 Kan. App. 189, *affirmed* 59 Kan. 779, 54 Pac. Rep. 1131; *Medland v. Linton*, 60 Neb. 249; *Merrill v. Ijams*, 58 Neb. 706; *Grant v. Bartholomew*, 57 Neb. 673; *Adams v. Osgood*, 42 Neb. 450; *Cornelius v. Ferguson*, (S. Dak. 1902) 91 N. W. Rep. 460 (where only the legal rate was allowed).

3. **Liability Restricted.** — *La Rue v. King*, 74 Iowa 288. See also *Hunt v. Curry*, 37 Ark. 100.

4. **Purchaser Must Show Purchase.** — *Sohn v. Wood*, 75 Ind. 17.

5. **Purchaser Must Show What Taxes Chargeable.** — *Faris v. Simpson*, 30 Tex. Civ. App. 103.

6. **No Personal Liability.** — *Carman v. Harris*, 61 Neb. 635. See also *Barker v. McCartney*, 10 Kan. App. 130.

ment by way of refundment by the state, county, or municipality when the title fails because the land was not subject to taxation or because the taxes had been paid, etc., the liability, however, being confined to such cases as are covered by the statute;<sup>1</sup> and under such enactments the purchaser may himself have the validity of the sale determined, the certificate canceled, and the purchase money refunded.<sup>2</sup>

**Procuring Refundment by Mistake** in a case in which refundment was not authorized will not prevent a subsequent return of the money by the purchaser, and his title is not invalidated thereby.<sup>3</sup>

(2) *Application and Construction of Statutes* — (a) **Rights Confined by Terms of Statute.** — As any recovery must depend upon the statutory authority, it is only in such cases as the statute expressly prescribes that reimbursement may be enforced,<sup>4</sup> or that an application to cancel the sale and to refund may be granted.<sup>5</sup> And if the tax is illegal, creating no obligation for its payment

**1. Refundment by Taxing Power** — *Colorado.* — *Hurd v. Hamill*, 10 Colo. 174.

*Indiana.* — *Ball v. Barnes*, 123 Ind. 394; *State v. Casteel*, 110 Ind. 174; *Millikan v. Lafayette*, 118 Ind. 323.

*Iowa.* — *Corbin v. Davenport*, 9 Iowa 239.

*Kansas.* — *Topeka Commercial Security Co. v. Harper County*, 63 Kan. 351; *School Dist. No. 15 v. Allen County*, 22 Kan. 568.

*Massachusetts.* — *Lynde v. Malden*, 166 Mass. 244.

*Michigan.* — *Gurd v. Auditor-Gen.*, 122 Mich. 151.

*Nebraska.* — *Fuller v. Colfax*, 33 Neb. 716; *Wilson v. Butler County*, 26 Neb. 776; *Roberts v. Adams County*, 20 Neb. 409; *Roberts v. Adams County*, 18 Neb. 471; *Merriam v. Otoe County*, 15 Neb. 408; *Richardson County v. Hull*, 28 Neb. 810, 24 Neb. 536.

*New Mexico.* — *Stewart v. Bernalillo County*, (N. Mex. 1902) 70 Pac. Rep. 574.

*New York.* — *Matter of Chadwick*, 59 N. Y. App. Div. 334; *People v. Campbell*, 35 N. Y. App. Div. 103.

*North Dakota.* — *Paine v. Dickey County*, 8 N. Dak. 581; *Tyler v. Cass County*, 1 N. Dak. 369; *Roberts v. Fargo First Nat. Bank*, 8 N. Dak. 504.

*South Dakota.* — *Boynton v. Faulk County*, 7 S. Dak. 423.

*Texas.* — *Mumme v. McCloskey*, 28 Tex. Civ. App. 83.

*Wisconsin.* — *Pier v. Oneida County*, 102 Wis. 338; *Pier v. Oneida County*, 93 Wis. 463; *Warner v. Outagamie County*, 19 Wis. 611.

**Special Contract to Refund Is in Excess of Authority.** — *Hyde v. Kenosha County*, 43 Wis. 129.

**Duty of Officer Not Judicial.** — *State v. Dressel*, 38 Minn. 90.

**Sufficient Adjudication of Invalidity.** — *German-American Bank v. White*, 38 Minn. 471; *Easton v. Hayes*, 38 Minn. 463.

**Refundment Not Cancellation of Tax** — *Subsequent Collection.* — *Auditor-Gen. v. Patterson*, 122 Mich. 39; *State v. Murphy*, 81 Minn. 354; *State v. Kipp*, 70 Minn. 286.

**Bad Faith Defeats Right.** — *Easton v. Scofield*, 66 Minn. 425.

**Refundment After Separation of Land from County.** — *Pier v. Oneida County*, 102 Wis. 338.

**When Interest Not Recoverable.** — *Stewart v.*

*Bernalillo County*, (N. Mex. 1902) 70 Pac. Rep. 574.

**2. Purchaser May Procure Cancellation and Refundment.** — *Lynde v. Malden*, 166 Mass. 244; *State v. Dunn*, 88 Minn. 444; *People v. Roberts*, 144 N. Y. 234. See also *O'Connor v. Auditor-Gen.*, 127 Mich. 553.

**Mandamus to Compel Hearing or Refundment.** — *Gurd v. Auditor-Gen.*, 122 Mich. 151; *Olson v. Cook*, 57 Minn. 552; *People v. Chapin*, 105 N. Y. 309.

**Application Must Show Right under Statute.** — *Lynde v. Malden*, 166 Mass. 244; *Olson v. Cook*, 57 Minn. 552.

**Grantee of State of Land Bid in by State Not Within Statute.** — *People v. Woodruff*, 57 N. Y. App. Div. 342; *Matter of Olmstead*, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 700.

**3. Return of Money Refunded by Mistake.** — *Edwards v. Upham*, 93 Wis. 455.

**4. Confined by Terms of Statute** — *Colorado.* — *Larimer County v. National State Bank*, 11 Colo. 564.

*Indiana.* — *Morrison v. Jacoby*, 114 Ind. 84; *Hilgenberg v. Marion County*, 107 Ind. 494.

*Iowa.* — *Lonsdale v. Carroll County*, 105 Iowa 452; *Lindsey v. Boone County*, 92 Iowa 86.

*Michigan.* — *Corrigan v. Hinkley*, 125 Mich. 125.

*Minnesota.* — *Pfefferle v. Wteland*, 55 Minn. 202.

*Missouri.* — *Bingham v. Delougherty*, (Mo. 1890) 13 S. W. Rep. 208.

*Nebraska.* — *Martin v. Kearney County*, 62 Neb. 538.

*New Jersey.* — *Brooks v. Union Tp.*, 68 N. J. L. 133.

*North Dakota.* — *Iowa, etc., Land Co. v. Barnes County*, 6 N. Dak. 601.

**Lien for Subsequent Taxes Confined to Original Purchaser.** — *Toy v. McHugh*, 62 Neb. 820.

**Taxes Not Legally Assessed.** — *Polenqueen v. McAllaster*, 64 Kan. 263; *Barber v. Evans*, 27 Minn. 92. But see *Capital State Bank v. Lewis*, 64 Miss. 727; *Kaiser v. Harris*, 63 Miss. 590.

**Burden of Proof on Party Resisting Lien.** — *Cole v. Gray*, 139 Ind. 396.

**5. Cancellation and Refunding.** — *Ball v. Barnes*, 123 Ind. 394; *State v. Casteel*, 110 Ind. 174; *Rice v. Auditor-Gen.*, 30 Mich. 12; *People v. Roberts*, 144 N. Y. 234; *People v. Woodruff*, 57 N. Y. App. Div. 342; *Matter of Olmstead*, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 700.



in the first instance, reimbursement may be refused.<sup>1</sup>

Where the Purchase Operates Merely as a Payment or Redemption, reimbursement is not necessary, and the statute does not apply.<sup>2</sup>

**Failure to Procure or Record Deed.** — If the deed becomes inoperative by reason of the purchaser's failure to have it recorded he retains no lien.<sup>3</sup> But where the taxes are made a lien until paid, failure to perfect title by taking out a deed will not destroy the purchaser's lien.<sup>4</sup>

**Judgment of Invalidity Condition Precedent.** — In some jurisdictions the right depends upon the prior adjudication of the invalidity of the tax title,<sup>5</sup> made at the instance of the owner.<sup>6</sup>

(b) **To Whom Applicable.** — The statutory right to reimbursement extends not only to the purchaser at a tax sale, but to one who purchases tax lands previously forfeited to or bid in by the state.<sup>7</sup> And the assignee of the original purchaser is entitled to restitution.<sup>8</sup>

(c) **Retrospective Statutes.** — A statute providing for reimbursement applies in general to sales made after its passage,<sup>9</sup> though it may be retrospective, operating upon sales made before its passage.<sup>10</sup> As to sales already made, however, the right cannot be taken away or impaired.<sup>11</sup>

(d) **Limitations.** — The right to reimbursement must be enforced within the time prescribed by the particular statute,<sup>12</sup> though the period, as a general

1. **No Liability on Part of Owner.** — *Wilmerton v. Phillips*, 103 Ill. 78; *Mayer v. Peebles*, 58 Miss. 628; *Burke v. Brown*, 148 Mo. 309; *John v. Connell*, 61 Neb. 267; *Ledwich v. Connell*, 48 Neb. 172; *Eaton v. Bennett*, 10 N. Dak. 346; *McHenry v. Brett*, 9 N. Dak. 68. See also *Jory v. Palace Dry Goods, etc., Co.*, 30 Oregon 196.

**Statute Invalid as to Void Taxes or Sale.** — *Eustis v. Henrietta*, 91 Tex. 325; *Tierney v. Union Lumbering Co.*, 47 Wis. 248; *Philleo v. Hiles*, 42 Wis. 527; *Smith v. Smith*, 19 Wis. 615, 38 Am. Dec. 707; *Wilson v. Jarvis*, 19 Wis. 597.

**No Lien for Subsequent Taxes.** — *Hintrager v. Nightingale*, 36 Fed. Rep. 847; *Barke v. Early*, 72 Iowa 273; *Roberts v. Deeds*, 57 Iowa 320; *Croskery v. Busch*, 116 Mich. 288; *McHenry v. Brett*, 9 N. Dak. 68; *Phelps v. Tacoma*, 15 Wash. 367. *Contra*, *Strother v. Reilly*, 105 Tenn. 48.

2. **Purchase Operating as Redemption.** — *Blumenthal v. Culver*, 116 Iowa 326; *Easton v. Scofield*, 66 Minn. 425. See also *Whiton v. Rock County*, 16 Wis. 44.

**Purchase by Mortgagee After Buying at Foreclosure Sale.** — *Home Sav. Bank v. Boston*, 131 Mass. 277.

3. **Failure to Record Deed.** — *Humphrey v. Yost*, 10 Kan. App. 324.

4. **Failure to Procure Deed.** — *Denman v. Steinbach*, 29 Wash. 179.

5. **Judgment of Invalidity Condition Precedent.** — *Tillotson v. Gage*, 97 Mich. 585; *Van Nest v. Sargent County*, 7 N. Dak. 139.

6. *Gage v. Eddy*, 186 Ill. 432; *North v. Lehman*, 97 Ill. App. 399; *Van Nest v. Sargent County*, 7 N. Dak. 139.

**Foreclosure of Lien by Purchaser.** — It is otherwise where, as in *Nebraska*, the purchaser may bring an action to foreclose his lien. *Alling v. Nelson*, 55 Neb. 161; *McClure v. Warner*, 16 Neb. 447; *Shelley v. Towle*, 16 Neb. 194; *Miller v. Hurford*, 13 Neb. 20.

**Evidence.** — In such action the certificate and receipt of the proper officer are *prima facie*

evidence of the validity of the taxes which they represent. *Starr v. Voss*, (Neb. 1902) 89 N. W. Rep. 750; *Ure v. Reichenberg*, 63 Neb. 899; *Concordia L. & T. Co. v. Van Camp*, (Neb. 1902) 89 N. W. Rep. 744; *Adams v. Osgood*, 60 Neb. 779. But neither the levy nor the assessment are shown by the receipt for taxes or a certificate of purchase, when the levy and assessment are put in issue by the pleadings. *Merrill v. Wright*, 41 Neb. 351.

7. **Purchaser of Lands Previously Forfeited to State.** — *Tillotson v. Gage*, 97 Mich. 585; *Fleming v. Roverud*, 30 Minn. 273; *Wilkinson County v. Fitts*, 63 Miss. 600.

8. **Assignee of Purchaser.** — *Rio Grande County v. Whelen*, 28 Colo. 435; *Otis v. Carpenter*, 10 Kan. App. 147; *Easton v. Hayes*, 35 Minn. 418; *McGehee v. Fitts*, 65 Miss. 357; *Pitkin v. Reibel*, 104 Mo. 506; *Green v. Hellman*, 61 Neb. 875; *People v. Chapin*, 109 N. Y. 179; *Norton v. Rock County*, 13 Wis. 611.

**Owner Redeeming Is Not Assignee.** — *Morris v. Sioux County*, 42 Iowa 416.

9. **Sales After Enactment of Statute.** — *Norris v. Burt County*, 56 Neb. 295.

**Mistake of Assessor Before Passage of Statute.** — *Hurd v. Hamill*, 10 Colo. 174.

**Legislative Intent Controls.** — *Shaw v. Morley*, 89 Mich. 313.

10. **Statute May Be Retrospective.** — *Flinn v. Parsons*, 60 Ind. 573; *Schoonover v. Galarnault*, 45 Minn. 174; *State v. Cronkhite*, 28 Minn. 197; *Blackwell v. Albuquerque First Nat. Bank*, 10 N. Mex. 555.

**Change in Rate of Interest.** — *Hentig v. Thomas*, 7 Kan. App. 115.

11. **After Sale Right Cannot Be Impaired.** — *Corbin v. Washington County*, 3 Fed. Rep. 356; *St. Louis, etc., R. Co. v. Alexander*, 49 Ark. 190; *Morgan v. Miami County*, 27 Kan. 89; *Fleming v. Roverud*, 30 Minn. 273; *State v. Foley*, 30 Minn. 350. See also *Capital State Bank v. Lewis*, 64 Miss. 727; *Pier v. Oneida County*, 102 Wis. 338.

12. **Enforcement Within Statutory Period.** — *Indiana*. — *Scott v. Millikan*, 104 Ind. 75;

rule, does not begin to run until the invalidity of the title is established by the judgment of a court of competent jurisdiction.<sup>1</sup> Where the purchaser may require a return of the purchase price from the collector he should do so before that officer has made his regular settlement with the state. Thereafter the collector personally cannot be pursued.<sup>2</sup>

**c. PAYMENT OR TENDER CONDITION PRECEDENT TO RELIEF.** — In some jurisdictions the legal owner is not permitted to attack the tax deed without having tendered the taxes due upon the property,<sup>3</sup> and reimbursement of the purchaser is a condition precedent to the right of the owner to have the deed<sup>4</sup>

*Brown v. Fodder*, 81 Ind. 491; *Montgomery v. Aydelotte*, 95 Ind. 144.

*Iowa*. — *Hooper v. Sac County Bank*, 72 Iowa 280; *Barke v. Early*, 72 Iowa 273; *LaRue v. King*, 74 Iowa 288; *Sexton v. Peck*, 48 Iowa 250.

*Kansas*. — *Rork v. Douglas County*, 46 Kan. 175; *Douglass v. Boyle*, 42 Kan. 392; *Mitchell v. Lines*, 36 Kan. 378.

*Nebraska*. — *Alexander v. Thacker*, 43 Neb. 494.

*New York*. — *Reid v. Albany County*, 128 N. Y. 364; *People v. Morgan*, 45 N. Y. App. Div. 19.

*Wisconsin*. — *Capron v. Adams County*, 43 Wis. 613; *Eaton v. Manitowoc County*, 40 Wis. 668; *Baker v. Columbia County*, 39 Wis. 444 [disapproving dictum in *State v. Sheboygan County*, 29 Wis. 791]; *Tarbox v. Adams County*, 34 Wis. 558.

**Where No Special Limitation Is Prescribed** the general statute of limitations will control. *Olson v. Cook*, 57 Minn. 552.

**Limitation as to Action to Recover Land Applied.** — *State v. Norton*, 59 Minn. 424.

**Taxes Paid Subsequent to Purchase.** — *Sheffield City Co. v. Tradesmans Nat. Bank*, 131 Ala. 185.

**Estoppel to Set up Bar.** — *Harber v. Sexton*, 66 Iowa 211, distinguishing *Thode v. Spofford*, 65 Iowa 294.

**1. Time Runs from Adjudication of Invalidity.** — *St. Louis, etc., R. Co. v. Alexander*, 49 Ark. 190; *Tillotson v. Gage*, 97 Mich. 585; *Corbin v. Morrow*, 46 Minn. 522; *McClure v. Warner*, 16 Neb. 447; *Bryant v. Estabrook*, 16 Neb. 217; *Otoe County v. Brown*, 16 Neb. 394; *Merriam v. Otoe County*, 15 Neb. 408; *Schoenheit v. Nelson*, 16 Neb. 235; *Peet v. O'Brien*, 5 Neb. 360. But see under a later statute in *Minnesota*, as to refundment upon application of the purchaser, *Olson v. Cook*, 57 Minn. 552.

**Time Runs from Time of Obtaining Deed.** — *Montgomery v. Aydelotte*, 95 Ind. 144; *Reed v. Earhart*, 88 Ind. 159; *Sharpe v. Dillman*, 77 Ind. 280.

**Statute Runs on Discovery of Proof of Invalidity.** — *Hutchinson v. Sheboygan County*, 26 Wis. 402.

**Foreclosure.** — In *Nebraska* an action to foreclose a tax lien is barred if not brought within five years after the expiration of the time to redeem. *Carson v. Broady*, 56 Neb. 648, 71 Am. St. Rep. 691; *Shepherd v. Burr*, 27 Neb. 432; *Parker v. Matheson*, 21 Neb. 546; *Helphrey v. Redick*, 21 Neb. 80; *Alexander v. Thacker*, 43 Neb. 494, in which last case the court cited *D'Gette v. Sheldon*, 27

*Neb.* 829; *Alexander v. Wilcox*, 30 Neb. 793; *Warren v. Demary*, 33 Neb. 327; *Fuller v. Colfax*, 33 Neb. 716; *Black v. Leonard*, 33 Neb. 745; *Alexander v. Shaffer*, 38 Neb. 812, and *Foree v. Stubbs*, 41 Neb. 271, which were said to overrule in effect the earlier decisions supporting the doctrine that the limitation begins to run from the time when the title acquired by the tax deed fails.

**2. Before Collecting Officer Makes His Settlement.** — *Brown v. Pontchartrain Land Co.*, 49 La. Ann. 1779.

**3. Tender Condition Precedent to Attacking Title.** — *Rice v. Jerome*, 97 Fed. Rep. 719, 38 C. C. A. 388; *Browne v. Finley*, 51 Neb. 465; *McMillan v. Hogan*, 129 N. Car. 314; *Eustis v. Henrietta*, (Tex. Civ. App. 1896) 37 S. W. Rep. 632; *Henrietta v. Eustis*, 87 Tex. 14; *Denman v. Steinbach*, 29 Wash. 179; *Merritt v. Corey*, 22 Wash. 444; *Ward v. Huggins*, 16 Wash. 530; *McClain v. Batton*, 50 W. Va. 121; *Blackman v. Arnold*, 113 Wis. 487. See also *Trigg v. Ray*, 64 Ark. 150.

**The Affidavit of Tender** required by statute in *Arkansas* is not necessary where the owner does not base his action on the invalidity of the tax sale, but upon a title acquired subsequent to sale and expiration of the redemption period. *McCrary v. Joyner*, 64 Ark. 547.

**When Tender Is Unnecessary.** — *Mendenhall v. Hall*, 134 U. S. 559; *Title Trust Co. v. Aylsworth*, 40 Oregon 20; *Mather v. Darst*, 13 S. Dak. 75; *Collins v. Sherwood*, 50 W. Va. 133 (where no taxes or purchase price paid); *Anderson v. Douglas County*, 98 Wis. 393.

**4. Reimbursement Condition Precedent to Settling Aside.** — *Colorado*. — *Rustin v. Merchants', etc., Tunnel Co.*, 23 Colo. 351.

*District of Columbia*. — *Knox v. Gaddis*, 1 App. Cas. (D. C.) 336.

*Illinois*. — *Glos v. Brown*, 194 Ill. 307; *Gage v. Pirtle*, 124 Ill. 502; *Gage v. Consumers' Electric Light Co.*, 194 Ill. 30.

*Michigan*. — *Jenkinson v. Auditor-Gen.*, 104 Mich. 34.

*Mississippi*. — *O'Flinn v. McInnis*, 80 Miss. 125; *Tierney v. Brown*, 67 Miss. 109.

*South Dakota*. — *Clark v. Darlington*, 11 S. Dak. 418.

*West Virginia*. — *Winning v. Eakin*, 44 W. Va. 19.

*Wisconsin*. — *Blackman v. Arnold*, 113 Wis. 487.

**Deposit in Court as Condition to Defending.** — *Orono v. Veazie*, 57 Me. 517; *Powell v. St. Croix County*, 46 Wis. 211; *Jarvis v. McBride*, 18 Wis. 316; *Smith v. Smith*, 19 Wis. 615, 88 Am. Dec. 707; *Knight v. Barnes*, 25 Wis. 352; *Wakeley v. Nicholas*, 16 Wis. 588; *Wakeley v.*

or the judgment<sup>1</sup> set aside or to have the execution of the deed restrained.<sup>2</sup>

**Removal of Cloud.** — So when the legal owner sues to set aside the tax deed and remove from his title the cloud created by it, he will be required to reimburse the purchaser for the purchase price, subsequent taxes paid, etc., as a condition to relief.<sup>3</sup> As to the sufficiency of tender without payment into court the cases are not in accord.<sup>4</sup> But there is no obligation to refund or tender taxes or assessments which were void *ab initio*,<sup>5</sup> or taxes paid prior to those for which the land was sold.<sup>6</sup>

**3. Recovery for Improvements.** — Under the statutes in many jurisdictions, upon failure of a tax title the purchaser may recover for permanent and beneficial improvements made in good faith on the premises<sup>7</sup> where such pur-

Mohr, 15 Wis. 609. See also Title Trust Co. v. Aylsworth, 40 Oregon 20.

**Condition to Relief, Not to Beginning Suit.** — Longworth v. Johnson, 66 Kan. 193 (*distinguishing* the different rule at an earlier date by the statute then controlling); Dibble v. Leppert, 47 La. Ann. 792; State v. Judges, 49 La. Ann. 303.

**Sale en Masse—Sufficient Tender for Part.** — See Heffern v. Hack, 65 Ohio St. 164; Brentano v. Brentano, 41 Oregon 15.

**1. Condition to Setting Aside Judgment.** — Aztec Copper Co. v. Auditor-Gen., 128 Mich. 615. See also Robert P. Lewis Co. v. Knowlton, 84 Minn. 53.

**2. Condition to Restraining Execution of Deed.** — Whitehead v. Farmers' L. & T. Co., 98 Fed. Rep. 10, 39 C. C. A. 34; Glos v. Dawson, 83 Ill. App. 197.

**3. Condition to Removal of Cloud—United States.** — Smith v. Gage, 11 Biss. (U. S.) 217. **Arkansas.** — Hickman v. Kempner, 35 Ark. 505.

**Colorado.** — Charlton v. Kelly, 24 Colo. 273. **Connecticut.** — Adams v. Castle, 30 Conn. 404.

**Illinois.** — Glos v. Cratty, 196 Ill. 193; Smith v. Prall, 133 Ill. 308; Gage v. Arndt, 121 Ill. 491; Gage v. Caraher, 125 Ill. 447; Peacock v. Carnes, 110 Ill. 99.

**Indiana.** — Montgomery v. Trumbo, 126 Ind. 331; Peckham v. Millikan, 99 Ind. 352; Lancaster v. Du Hadway, 97 Ind. 565.

**Iowa.** — Corbin v. Woodbine, 33 Iowa 297, wherein allegations of readiness and willingness and an offer to pay were held to be insufficient.

**Kansas.** — Black v. Johnson, 63 Kan. 47; Franz v. Krebs, 41 Kan. 223; Pritchard v. Madren, 24 Kan. 489; Knox v. Dunn, 22 Kan. 684; Hagaman v. Cloud County, 19 Kan. 395; Challiss v. Atchison County, 15 Kan. 53; Lawrence v. Killam, 11 Kan. 499; Miller v. Ziegler, 31 Kan. 417; Challiss v. Hekelnkaemper, 14 Kan. 474.

**Louisiana.** — Blanton v. Ludeling, 30 La. Ann. 1232.

**Mississippi.** — Ragsdale v. Alabama G. S. R. Co., 67 Miss. 106.

**Nebraska.** — Dillon v. Merriam, 22 Neb. 151; Wood v. Helmer, 10 Neb. 65; Boeck v. Merriam, 10 Neb. 199.

**South Dakota.** — Thompson v. Roberts, (S. Dak. 1902) 92 N. W. Rep. 1079.

**Necessity of Proof of Amount Paid.** — Hughey v. Winborne, (Fla. 1902) 33 So. Rep. 249; Hebard v. Ashland County, 55 Wis. 145.

**Rate of Interest.** — Glos v. Gerrity, 190 Ill. 545.

**4. Tender — Offer Sufficient Without Payment into Court.** — Glos v. Goodrich, 175 Ill. 20; Yeaman v. Lepp, 167 Mo. 61.

**Payment into Court Required.** — McClain v. Batton, 50 W. Va. 121.

**5. Void Taxes or Assessments.** — Morrill v. Lovett, 95 Me. 165; Title Trust Co. v. Aylsworth, 40 Oregon 20.

**Offer of Legal Taxes Necessary.** — Casey v. Wright, 14 Mont. 315.

**6. Prior Taxes.** — Lauer v. Weber, 177 Ill. 115.

**7. Recovery for Improvements—Arkansas.** — McCann v. Smith, 65 Ark. 305; Haney v. Cole, 28 Ark. 299.

**Illinois.** — Gilbreath v. Dilday, 152 Ill. 207. **Indiana.** — Cain v. Hunt, 41 Ind. 466.

**Kansas.** — Mercer v. Justice, 63 Kan. 225; Regents v. Linscott, 30 Kan. 240; Park v. Hetherington, 9 Kan. App. 309, *affirmed* 62 Kan. 868, 64 Pac. Rep. 1115.

**Louisiana.** — Foreman v. Hinchcliffe, 106 La. 225; West v. Negrotto, 52 La. Ann. 381; Walsh v. Harang, 48 La. Ann. 984; Payne v. Anderson, 35 La. Ann. 977; Gernon v. Handlin, 19 La. Ann. 25.

**Michigan.** — Croskery v. Busch, 116 Mich. 288; Burkle v. Circuit Judge, 42 Mich. 513.

**Minnesota.** — Jewell v. Truhn, 38 Minn. 433.

**Missouri.** — Boatmen's Sav. Bank v. Grewe, 101 Mo. 625.

**Nebraska.** — Page v. Davis, 26 Neb. 670; Towle v. Holt, 14 Neb. 221.

**Ohio.** — Allen v. Russell, 59 Ohio St. 137 (where, however, under peculiar circumstances, recovery for improvements was not allowed); Neiswanger v. Gwynne, 13 Ohio 75.

**Pennsylvania.** — Lynch v. Brudie, 63 Pa. St. 206; Miller v. Keene, 5 Watts (Pa.) 348; Hockenbury v. Snyder, 2 W. & S. (Pa.) 240; Creigh v. Wilson, 1 S. & R. (Pa.) 38; Steele v. Spruance, 22 Pa. St. 256; Coney v. Owen, 6 Watts (Pa.) 435; Cranmer v. Hall, 4 W. & S. (Pa.) 36; McKee v. Lamberton, 2 W. & S. (Pa.) 107; Gilmore v. Thompson, 3 Watts (Pa.) 106.

**Tennessee.** — Strother v. Reilly, 105 Tenn. 48.

**Wisconsin.** — Zwietsch v. Watkins, 61 Wis. 615; Oberich v. Gilman, 31 Wis. 495; Huebschmann v. McHenry, 29 Wis. 655.

See also Murphy v. Williams, (Tex. Civ. App. 1900) 56 S. W. Rep. 695.

**Allowance Only to Extent of Increased Value of Property.** — Childs v. Shower, 18 Iowa 261. See also Strother v. Reilly, 105 Tenn. 48.

chaser is in possession under color of title.<sup>1</sup> Under the *Kansas* statutes it has been held that there may be a recovery even though the tax deed is void on its face.<sup>2</sup> In other jurisdictions, however, a deed which is void on its face carries no right to recover for improvements.<sup>3</sup>

**Time of Improvements.** — The right is usually confined to the recovery of such improvements as were made after the party acquired his color of title or after accrual of title or execution of a deed,<sup>4</sup> and, it has been held, before suit brought.<sup>5</sup>

**Possession Required.** — The purchaser must have had full and actual possession at the time when the improvements were made; he may not enter upon land in possession of another and make improvements and claim compensation therefor;<sup>6</sup> and his entry must have been attended with the formalities prescribed by the statute.<sup>7</sup>

**4. Liability for Rents and Profits.** — The tax-title claimant is chargeable with rents and profits<sup>8</sup> accruing pending his action to quiet his title,<sup>9</sup> but not with such as accrue after a judgment awarding the repayment of taxes to him and giving possession to him until such payment is made.<sup>10</sup>

**TEACH — TEACHER.** (See also the titles PARENT AND CHILD, vol. 21, p. 1034; SCHOOLS, vol. 25, p. 8.) — A teacher is not an officer in the ordinary sense of the word. He is not usually elected or appointed, but is employed — contracted with. He has duties to perform incident to his employment, but they are not official duties and he is not under oath.<sup>11</sup>

**TEAM.** (See also the title EXEMPTIONS (FROM EXECUTION), vol. 12, pp. 121, 125 *et seq.*) — A team, according to the definition of a standard lexicographer, is "two or more horses, oxen, or other beasts harnessed together

**Interest on Improvements Not Recoverable.** — *Madland v. Benland*, 24 Minn. 372.

**Grantee Is Assignee under Statute Giving Right to Assignee.** — *Childs v. Shower*, 18 Iowa 261.

**1. Possession under Color of Title.** — *Parker v. Vinson*, 11 S. Dak. 381. See also *Hickman v. Dawson*, 35 La. Ann. 1086; *Wederstrandt v. Freyhan*, 34 La. Ann. 705; *Hopkins v. Daunoy*, 33 La. Ann. 1423; *Stafford v. Twitchell*, 33 La. Ann. 520; *Miller v. Montagne*, 32 La. Ann. 1203; *Guidry v. Broussard*, 32 La. Ann. 924; *Eldridge v. Tibbitts*, 5 La. Ann. 380; *Liggett v. Long*, 19 Pa. St. 499; *House v. Stone*, 64 Tex. 677 [*questioning Robson v. Osborn*, 13 Tex. 2981]; *French v. Grenet*, 57 Tex. 273; *Wofford v. McKinna*, 23 Tex. 36, 76 Am. Dec. 53.

**Possession Must Be under Tax Title.** — *Sands v. Davis*, 40 Mich. 14; *King v. Harrington*, 18 Mich. 213.

**2. Deed Void on Its Face.** — *Larkin v. Wilson*, 28 Kan. 516; *Wilder v. Cockshutt*, 25 Kan. 504; *Millbank v. Ostertag*, 24 Kan. 471; *Smith v. Smith*, 15 Kan. 290.

**3. Hershey v. Thompson**, 50 Ark. 485; *House v. Stone*, 64 Tex. 677; *Hatchett v. Conner*, 30 Tex. 104.

**4. After Accrual of Title or Color.** — *Anderson v. Williams*, 59 Ark. 144; *McCann v. Smith*, 65 Ark. 305; *Jacks v. Dyer*, 31 Ark. 335; *Wheeler v. Merriman*, 30 Minn. 372. *Contra*, *Davis v. Powell*, 13 Ohio 308; *Shaler v. Magin*, 2 Ohio 236.

**Improvements Made Prior to the Passage of the Act** have been held not to be included under the *Minnesota* statute. *Wilson v. Red Wing School Dist.*, 22 Minn. 488.

**5. Before Suit Brought.** — *Hilgenberg v. Rhodes*, 111 Ind. 167. But see *Zwietusch v. Watkins*, 61 Wis. 615.

**6. Possession Required.** — *Coonrad v. Myers*, 31 Kan. 30; *Neil v. Case*, 25 Kan. 510, 37 Am. Rep. 259; *Millbank v. Ostertag*, 24 Kan. 471; *Smith v. Smith*, 15 Kan. 290; *Waterson v. Devoe*, 18 Kan. 231; *Larkin v. Wilson*, 28 Kan. 516; *Mumme v. McCloskey*, 28 Tex. Civ. App. 83.

**Possession by Tenant Sufficient.** — *Parsons v. Moses*, 16 Iowa 440.

**7. Entry under Statute.** — *Corrigan v. Hinkley*, 125 Mich. 125.

**8. Chargeable with Rents and Profits.** — *Heffern v. Hack*, 65 Ohio St. 164.

**9. Longworth v. Johnson**, 66 Kan. 193; *Will v. Ritchie*, 61 Kan. 715.

**10. Not Chargeable After Judgment Awarding Repayment.** — *Hoffmire v. Rice*, 22 Kan. 749.

**11. Teacher.** — *Seymour v. Over-River School Dist.*, 53 Conn. 509.

**Contract of Apprenticeship.** — In the case of an outdoor apprenticeship, there is an implication that the master is to perform his covenant to *teach* at the place where he and his apprentice and the latter's parent resided at the date of the deed; but there would seem to be no such implication in an indoor apprenticeship. *Eaton v. Western*, 9 Q. B. D. 636. *overruling Royce v. Charlton*, 8 Q. B. D. 1. See also the title APPRENTICES, vol. 2, p. 488.

**Principal.** — The term *teacher* is held to include a principal. *People v. Board of Education*, 69 Hun (N. Y.) 212, *affirmed* 142 N. Y. 627.

to the same vehicle for drawing."<sup>1</sup> But the courts give the word a broader and more extensive meaning than that given in the dictionaries.<sup>2</sup>

**TEAMSTER.** — A teamster is one who drives horses and a wagon for the purpose of carrying goods for hire;<sup>3</sup> also, one who drives a team.<sup>4</sup>

**TEAM WORK.** See note 5.

**TECHNICAL.** See note 6.

**TEG.** See note 7.

1. **Team.** — Webst. Dict., followed in *Inman v. Chicago, etc., R. Co.*, 60 Iowa 462.

2. *Finnin v. Malloy*, 33 N. Y. Super. Ct. 382, quoted in the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 129.

**Unharnessed and Loose.** — In a statute allowing damages for injury happening, by reason of an insufficient highway, to any person, *team*, or carriage, the term *team* has been held to include a horse driven with other horses unharnessed and loose along the road. *Elliott v. Lisbon*, 57 N. H. 27.

And construing the same statute it was said in *Conway v. Jefferson*, 46 N. H. 523: "We have no doubt that the legislature intended to include in the term *team*, in the first section, the animal or animals that drew or carried the load, whether one or many, or that were driven over the highway, whether in harness or otherwise."

**Conveyance for Carriage of Goods or of Persons.** — A *Connecticut* statute provided that when "any vehicle of the above description [that is, any vehicle for the conveyance of persons] shall meet or overtake a *team* in the public highway and shall have occasion to pass the same, the teamster shall," etc. It was contended for the plaintiff that the term *team*, as used in the statute, included and described a vehicle driven by the plaintiff and not designed for nor carrying any load. The court, while admitting that ordinarily a *team* would include such a vehicle, held that in the statute in question the term meant a vehicle, with the animals drawing it, used for carrying loads, as distinguished from one used for carrying persons. *Hotchkiss v. Hay*, 41 Conn. 568.

In *Rowell v. Crothers*, 75 Conn. 126, it was said: "The substituted complaint describes the vehicle driven by the defendant, and that in which the plaintiff was driving, as 'a wagon.' They are also referred to in the complaint as *teams*. Since either of these words may as properly be used to designate a vehicle for the carriage of goods as one for the conveyance of persons, neither of them nor both of them constitute a sufficiently specific description of the vehicle named in the statute to entitle the plaintiff to a judgment for treble damages." The statute under construction in that case was one enacting the law of the road for vehicles for conveyance of persons.

**Driver No Part of Team.** — *Dexter v. Canton Toll-Bridge Co.*, 79 Me. 563, citing Webst. Dict. That case was upon a statute providing that a person should not be entitled to recover damages for the injuries sustained by the breaking down of a tollbridge if the weight he was transporting "exceeded forty-five hundred pounds, exclusive of the *team* and carriage." It was held that the driver formed no part of the *team*.

**Exemption of "Team" from Execution.** — See

the title EXEMPTIONS (FROM EXECUTION), vol. 12, pp. 128, 129.

**Machinery.** — In an action for negligence under an allegation that defective machinery was used, the plaintiff attempted to show that a *team* used by the defendant was unable to perform the work for which it was used. The court said: "The respondent's counsel contended that if this *team* was unable to lift the bent by hauling at the rope, the allegation of the use of defective machinery was made out. We are unable to concur in this view. A *team* is in no sense machinery, any more than a man would be hauling at the same rope." *McPherson v. Pacific Bridge Co.*, 20 Oregon 490.

**Team Embraces Idea of Live Stock.** — In *Inman v. Chicago, etc., R. Co.*, 60 Iowa 461, the court said: "Whilst it may be admitted that the term 'stock' does not embrace the idea of a *team*, it cannot, nevertheless, be denied that the term *team* embraces the idea of live stock. The word *team* means two or more horses, oxen, or other beasts, harnessed together to the same vehicle for driving. A *team*, therefore, is composed of live stock, and cannot exist without it. It would be exceedingly technical to hold that two horses, when harnessed and hitched together to a wagon, cease to fall under the designation of live stock."

**Team Embracing Horses, Mules, and Oxen.** — See *McLester v. Somerville*, 54 Ala. 675.

**Two-horse or Four-horse Team.** — See *Ganson v. Madigan*, 9 Wis. 146.

3. **Carrier.** — A *teamster* is liable as a common carrier. Story on Bailments, § 496. See also the title COMMON CARRIERS, vol. 6, p. 251.

4. **Exemption.** — See the title EXEMPTIONS (FROM EXECUTION), vol. 12, pp. 103, 106.

**Laborer.** — See LABOR — LABORER, vol. 18, pp. 74, 78, and see *McElwaine v. Hosey*, 135 Ind. 481, holding that a *teamster* is a laborer.

**Livery-stable Keeper.** — A livery-stable keeper has been held not to be a *teamster*. *Edgecomb v. His Creditors*, 19 Nev. 156.

5. **Team Work.** — A lessee's covenant in an agricultural lease to provide *team work* extends to other than agricultural work — *e. g.*, hauling coals; but it does not oblige him to find a cart, plough, or other machine that may be necessary for performance of the work. *Marlborough v. Osborn*, 5 B. & S. 67, 117 E. C. L. 67.

**Exemption.** — See *Mundell v. Hammond*, 40 Vt. 647; *Sullivan v. Davis*, 50 Vt. 648; *Rowell v. Powell*, 53 Vt. 304. And see the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 130.

6. **Technical Import of Words.** — The *technical* import of words is that which is suggested by their use in reference to a science or a profession. *People v. Hallett*, 1 Colo. 359. See also the title STATUTES, vol. 26, p. 606.

7. **Teg — Lamb.** — See *Reg. v. Jewett*, 2 Cox C. C. 227.

# TELEGRAPHS AND TELEPHONES.

BY H. DENT MINOR.

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### CROSS-REFERENCES.

For matters of *PROCEDURE*, see 21 *ENCYCLOPEDIA OF PLEADING AND PRACTICE* 499.

For other matters of *SUBSTANTIVE LAW AND EVIDENCE* related to this subject, see the following titles in this work: *ABUTTING OWNERS*, vol. 1, p. 224; *ADMISSIONS*, vol. 1, p. 670; *CHECKS*, vol. 5, p. 1051; *COMMON CARRIERS*, vol. 6, p. 236; *CONTRACTS*, vol. 7, p. 88; *CONTRIBUTORY NEGLIGENCE*, vol. 7, p. 368; *CORPORATIONS (PRIVATE)*, vol. 7, p. 620; *DAMAGES*, vol. 8, p. 537; *DOCUMENTARY EVIDENCE*, vol. 9, p. 877; *DOMINION OF CANADA*, vol. 10, p. 105; *ELECTRIC-LIGHT COMPANIES*, vol. 10, p. 861; *ELECTRIC RAILROADS*, vol. 10, p. 877; *EMINENT DOMAIN*, vol. 10, p. 1043; *EXEMPTIONS (FROM TAXATION)*, vol. 12, p. 374; *FELLOW SERVANTS*, vol. 12, p. 893; *FIXTURES*, vol. 13, p. 594; *FOREIGN CORPORATIONS*, vol. 13, p. 834; *FORGERY*, vol. 13, p. 1099; *GAMBLING CONTRACTS*, vol. 14, p. 644; *INTERSTATE COMMERCE*, vol. 17, p. 34; *MANDAMUS*, vol. 19, p. 709; *NEGLIGENCE*, vol. 21, p. 455; *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*, vol. 21, p. 770; *POLICE POWER*, vol. 22, p. 914; *PRIVATE INTERNATIONAL LAW*, vol. 22, p. 1314; *SALES*, vol. 24, p. 1031; *STREETS AND SIDEWALKS*, *ante*, p. 99; *TAXATION*, *ante*, p. 226; *TAXATION (CORPORATE)*, *ante*, p. 920; *VERBAL AGREEMENTS (STATUTE OF FRAUDS)*. And see *COMMERCE*, vol. 6, p. 220.

**I. DEFINITIONS.** — A **Telegraph** is an apparatus or machine used to transmit intelligence to a distant point by means of electricity.<sup>1</sup> The word, as now

1. **Telegraph Defined.** — *Chesapeake*, etc., Cas. 213. See also *Atty.-Gen. v. Edison Telephone Co. v. Baltimore*, etc., Tel. Co., 66 phone Co., 6 Q. B. D. 248.  
Md. 399, 59 Am. Rep. 167, 16 Am. & Eng. Corp. "An instrument or apparatus which by

generally understood, refers to the entire system of appliances used for transmitting messages by electric ticking machines.<sup>1</sup>

A **Telegram** is a message or dispatch transmitted by the telegraph,<sup>2</sup> but the term may, under some circumstances, embrace a telephone message.<sup>3</sup>

The **Term Telephone**, in a general sense, applies to any instrument or apparatus which transmits sound beyond the limits of ordinary audibility. Technically it is restricted to an instrument or device which transmits the voice of the speaker by means of electric appliances.<sup>4</sup>

"**Telegraph**" Includes "**Telephone**." — As a rule, statutes or ordinances concerning telegraphs will be construed as embracing telephones as well, unless there is something in the context to indicate a contrary legislative intent.<sup>5</sup> This may be true even though the telephone was not known when the statute in question was passed.<sup>6</sup> The rule has been applied to statutes forbidding discrimination,<sup>7</sup> to statutes fixing the locality of suits against telegraph

means of iron wires, conducting the electric fluid, conveys intelligence to any given distance with the velocity of lightning." Webster's Dict.

**Telegraph Line or System**, as used in ordinary statutes, will not embrace a distinct telegraph system. See *Toledo v. Western Union Tel. Co.*, (C. C. A.) 107 Fed. Rep. 10.

1. **Term Includes System of Appliances.** — The system consists of: "1st, a battery or other source of electric power; 2d, a line wire or conductor for conveying the electric current from one station to another; 3d, the apparatus for transmitting, interrupting, and, if necessary, reversing, the electric current at pleasure; and 4th, the indicator or signalling instrument. See Imperial Dict." *Hockett v. State*, 105 Ind. 250, 55 Am. Rep. 210, 11 Am. & Eng. Corp. Cas. 577.

2. Cent. Dict.

3. **Telephone Message Considered a "Telegram."** — *Atty.-Gen. v. Edison Telephone Co.*, 6 Q. B. D. 244, 29 Moak 602.

4. **Telephone Defined.** — *Hockett v. State*, 105 Ind. 250, 55 Am. Rep. 210, 11 Am. & Eng. Corp. Cas. 577.

**What the Term Includes.** — In *Western Union Tel. Co. v. American Bell Telephone Co.*, 105 Fed. Rep. 696, it was said that, according to the course of business, the term "telephone" refers only to the instrument itself "apart from wires, batteries, call bells, switch boards, and other apparatus and appliances with which it is connected in its practical and commercial use."

But as used in a statute limiting the rate which may be charged for a telephone, the term was held to include not merely the single instrument technically known as a "telephone," but also the organized apparatus, or combination, of instruments, usually in use in transmitting, as well as in receiving, telephonic messages. *Hockett v. State*, 105 Ind. 250, 55 Am. Rep. 210, 11 Am. & Eng. Corp. Cas. 577; *Central Union Telephone Co. v. Bradbury*, 106 Ind. 1; *Central Union Telephone Co. v. State*, 118 Ind. 206, 10 Am. St. Rep. 114. But compare *Chesapeake, etc., Telephone Co. v. Manning*, 186 U. S. 218.

**Telephone Exchange.** — See TELEPHONE EXCHANGE. *post*.

5. "**Telegraph**" Includes "**Telephone**." — *United States*. — *Cumberland Telephone, etc.,*

*Co. v. United Electric Co.*, 42 Fed. Rep. 273, 43 Am. & Eng. R. Cas. 194.

*California.* — *Davis v. Pacific Telephone, etc., Co.*, 127 Cal. 312.

*Maryland.* — *Chesapeake, etc., Telephone Co. v. Baltimore, etc., Tel. Co.*, 66 Md. 399, 59 Am. Rep. 167, 16 Am. & Eng. Corp. Cas. 213.

*Missouri.* — *St. Louis v. Bell Telephone Co.*, 96 Mo. 623, 9 Am. St. Rep. 370, 25 Am. & Eng. Corp. Cas. 476 (statute giving city power to regulate).

*New Jersey.* — *Roake v. American Telephone, etc., Co.*, 41 N. J. Eq. 35, 12 Am. & Eng. Corp. Cas. 342; *Duke v. Central New Jersey Telephone Co.*, 53 N. J. L. 341; *New York, etc., Telephone Co. v. Bound Brook*, 66 N. J. L. 168.

*Pennsylvania.* — *Bell Telephone Co. v. Com.*, (Pa. 1886) 3 Atl. Rep. 825; *Taggart v. Interstate Telephone, etc., Co.*, 16 Montg. Co. Rep. (Pa.) 155.

*Wisconsin.* — *Roberts v. Wisconsin Telephone Co.*, 77 Wis. 589, 20 Am. St. Rep. 143.

**Statutes Authorizing Telegraph Companies to Exercise the Right of Eminent Domain** apply to telephone companies. *San Antonio, etc., R. Co. v. Southwestern Tel., etc., Co.*, 93 Tex. 313, 77 Am. St. Rep. 884, (Tex. Civ. App. 1900) 56 S. W. Rep. 201; *Southwestern Tel., etc., Co. v. Gulf, etc., R. Co.*, (Tex. Civ. App. 1899) 52 S. W. Rep. 106; *Gulf, etc., R. Co. v. Southwestern Tel., etc., Co.*, 18 Tex. Civ. App. 500.

So also of a statute authorizing telegraph companies to occupy highways. See *People's Telephone, etc., Co. v. Berks, etc., Turnpike Road*, 199 Pa. St. 411; *Northwestern Telephone Exch. Co. v. Chicago, etc., R. Co.*, 76 Minn. 334.

"**An Improved Telegraph.**" — "In these days there ought to be no one to question the statement that a telephone is simply an improved telegraph." *Northwestern Telephone Exch. Co. v. Chicago, etc., R. Co.*, 76 Minn. 334.

6. **Statute Antedating Introduction of Telephone.** — *New Orleans, etc., R. Co. v. Southern, etc., Tel. Co.*, 53 Ala. 211; *St. Louis v. Bell Telephone Co.*, 96 Mo. 623, 9 Am. St. Rep. 370, 25 Am. & Eng. Corp. Cas. 476; *Atty.-Gen. v. Edison Telephone Co.*, 6 O. B. D. 244, 29 Moak 602. Compare *Richmond v. Southern Bell Telephone, etc., Co.*, 174 U. S. 761.

7. **Statutes Forbidding Discrimination.** — *State*

companies,<sup>1</sup> to statutes relating to taxation,<sup>2</sup> and to those providing for the incorporation of such companies.<sup>3</sup> A different rule obtains, however, when, from the circumstances or character of the legislation, it is clear that the intention was otherwise, as in the case of the Act of Congress giving telegraph companies a right to occupy post roads; that act does not embrace telephone companies.<sup>4</sup>

**II. LEGAL STATUS — 1. As Public Use.** — The telegraph is such a public use as to justify the exercise of the right of eminent domain in its behalf; the same is true of the telephone, where it is not wholly a private affair, the use of which is denied to the public.<sup>5</sup>

The Business Is One Affected with a "Public Interest" within the meaning of the rule authorizing the regulation, by the state, of the conduct of the business.<sup>6</sup>

An Individual May Own and Operate a telephone line; statutes conferring the right upon corporations are not exclusive.<sup>7</sup>

**2. As Common Carriers.** — Various theories have been propounded as to the extent to which telegraph and telephone companies are analogous to common carriers. Like common carriers, they are bound to serve the public without discrimination<sup>8</sup> and cannot evade liability for the consequences of their negligence by any contract.<sup>9</sup> But the analogy goes no further. They are not, like common carriers, insurers.<sup>10</sup>

**3. Franchise Is Public and May Not Be Transferred.** — Any agreement by such a company to alienate or transfer the privileges granted it by the government is *ultra vires* and void.<sup>11</sup>

*v. Bell Telephone Co.*, 36 Ohio St. 296, 38 Am. Rep. 583. See *infra*, this title, VII. *Duty to Furnish Equal Facilities to All*.

**1. Statutes Fixing Locality of Suits.** — *Franklin v. Northwestern Telephone Co.*, 69 Iowa 97.

**2. Statutes Relating to Taxation.** — *Iowa Union Telephone Co. v. Board of Equalization*, 67 Iowa 250; *Com. v. Western Union Tel. Co.*, 2 Dauphin Co. Rep. (Pa.) 30.

**3. Statutes Providing for Incorporation.** — *Duke v. Central New Jersey Telephone Co.*, 53 N. J. L. 341, 35 Am. & Eng. Corp. Cas. 1; *York Telephone Co. v. Kessey*, 5 Pa. Dist. 366; *Wisconsin Telephone Co. v. Oshkosh*, 62 Wis. 32, 8 Am. & Eng. Corp. Cas. 538.

**4. Contrary Legislative Intent Manifest.** — *Richmond v. Southern Bell Telephone, etc., Co.*, 174 U. S. 761.

**5.** See the title *EMINENT DOMAIN*, vol. 10, p. 1079.

**6.** See *infra*, this title, *Regulation and Control*. See also *Munn v. Illinois*, 94 U. S. 113, *affirming* 69 Ill. 80; *Hockett v. State*, 105 Ind. 259, 55 Am. Rep. 201, 11 Am. & Eng. Corp. Cas. 577.

**7. Individual May Operate Telephone Line.** — *Magee v. Overshiner*, 150 Ind. 127, 65 Am. St. Rep. 358. See also the title *EMINENT DOMAIN*, vol. 10, p. 1059.

The Maine statute of 1895, c. 103, prohibiting any telegraph or telephone company organized thereunder from establishing a line to compete with an existing or authorized line does not preclude an individual from establishing and maintaining such a line. *Haines v. Crosby*, 94 Me. 212.

**8.** See *infra*, this title, *Duty to Furnish Equal Facilities to All*.

**9.** See *infra*, this title, *Company's Duty and Liability as Affected by Regulations; Stipulations in Contract of Sending*.

**10.** See *infra*, this title, *Transmission and Delivery of Messages*.

**Are Like Carriers of Passengers.** — "Although there may be no analogy between the business of telegraph companies and that of public carriers of passengers for hire, yet we regard their legal status as practically the same. Both are engaged in a business of a public nature. Both must serve all who come. Neither are insurers nor liable as such, but both are liable for negligence." *Gillis v. Western Union Tel. Co.*, 61 Vt. 465, 15 Am. St. Rep. 917, 25 Am. & Eng. Corp. Cas. 568. See also *Fowler v. Western Union Tel. Co.*, 80 Me. 381, 6 Am. St. Rep. 211.

**Mechanics' Liens.** — A telegraph company is an important public agency and an instrument of commerce, and is within the rule of the United States courts giving a lien, superior to the mortgage lien, to those who furnish labor or materials to operate a railroad or similar public utility. *Keelyn v. Carolina Mut. Telephone, etc., Co.*, 90 Fed. Rep. 29. See generally the title *MECHANICS' LIENS*, vol. 20, p. 255.

**11. Franchise Not Transferable.** — *U. S. v. Western Union Tel. Co.*, 50 Fed. Rep. 28; *U. S. v. Union Pac. R. Co.*, 160 U. S. 1; *U. S. v. Northern Pac. R. Co.*, 120 Fed. Rep. 546. See the titles *CORPORATIONS*, vol. 7, p. 750; *ELECTRIC-LIGHT COMPANIES*, vol. 10, p. 868. *Compare Hatch v. American Union Tel. Co.*, (Supm. Ct. Spec. T.) 9 Abb. N. Cas. (N. Y.) 223; *Reiff v. Western Union Tel. Co.*, 49 N. Y. Super. Ct. 441. See also *Benedict v. Western Union Tel. Co.*, (Supm. Ct. Spec. T.) 9 Abb. N. Cas. (N. Y.) 214, holding that an agreement entered into by a telegraph company with a similar company to divide earnings and expenses is neither *ultra vires* nor against public policy.

**U. S. Rev. Stat., § 5266, Prohibits the Transfer** of any of the privileges granted by the federal statute authorizing the occupation of post roads by telegraph companies.

**4. Character of Telegraph Property.** — Telegraph property is usually regarded as real estate,<sup>1</sup> but the wires and instruments may retain their character as personality, although made a part of the company's plant, as between mortgagor and mortgagee where there is a contractual provision to that effect.<sup>2</sup>

**III. RIGHT OF WAY.** 1. **Federal Grants of Right of Way** — *a.* **ACT OF 1866.** — By an early Act of Congress, and supplementary legislation, a right of way over the public lands and all military and post roads of the United States was granted to all telegraph companies complying with the conditions therein prescribed.<sup>3</sup> Similar statutes define what shall be post roads, and within the term are included all railroads over which mails are carried,<sup>4</sup> and all letter-carrier or free-delivery routes.<sup>5</sup> This legislation was enacted under the congressional power to establish post offices and post roads and to regulate interstate commerce, and no doubts have ever been entertained as to its constitutionality. Within the scope embraced by its provisions it supersedes all state legislation on the same subject.<sup>6</sup>

**Conditions Must Be Complied With.** — No company acquires any rights under the statute until it has filed with the postmaster-general its written acceptance of all the conditions therein imposed.<sup>7</sup>

**Lease of Franchise.** — The rule of the text prevents such companies from leasing their franchises, though it has been held that the company may lease its lines and equipments for a reasonable length of time. See *Philadelphia v. Western Union Tel. Co.*, 11 Phila. (Pa.) 327, 33 Leg. Int. (Pa.) 129. See also *Western Tel. Co. v. Baltimore, etc., R. Co.*, 69 Md. 211.

**Sale and Transfer of Franchise Held Valid.** — See *Michigan Telephone Co. v. St. Joseph*, 121 Mich. 502, 80 Am. St. Rep. 520, wherein the court pointed out that if the right to sell a transfer does not exist, mortgages and bonds executed by the company are valueless; *Badger Telephone Co. v. Wolf River Telephone Co.*, (Wis. 1904) 97 N. W. Rep. 907 (under statute).

**Transferee Takes Property Subject to All Duties of Vendor.** — An ordinance granting to a telephone company the right to occupy the city streets stipulated that in the event of a sale by the company of its properties, its vendee should be bound by all the obligations imposed on the original company. Such a sale took place afterwards, and for some time after the sale the purchasing company gave the subscribers of the purchased company connections with its own subscribers. It was held that the purchasing company, having bought with notice, was bound to assume and carry out all the obligations of the old company; and that its action in furnishing the old company's subscribers with connections to its own lines operated as an acknowledgment by it of the character of its assumed obligations and that it could not thereafter discontinue such connections. *Mahan v. Michigan Telephone Co.*, (Mich. 1903) 93 N. W. Rep. 629.

1. **Regarded as Real Estate.** — See *Keating Implement, etc., Co. v. Marshall Electric Light, etc., Co.*, 74 Tex. 605. Compare *St. Paul, etc., R. Co. v. Western Union Tel. Co.*, (C. C. A.) 118 Fed. Rep. 497.

2. **Retaining Character as Personality.** — *Boston Safe-Deposit, etc., Co. v. Bankers', etc., Tel. Co.*, 36 Fed. Rep. 288. See also *Western Union Tel. Co. v. Pennsylvania Co.*, 125 Fed. Rep. 67, and *infra*, III. 6. *On Railroad Right of Way.*

"**Lines of Telegraph.**" — Receiver's certi-

icates issued by the receiver of a telegraph company by an order of the court, and made a lien upon all the company's "lines of telegraph," are a lien upon wires strung by a workman but grounded by him so as not to be usable as telegraph lines, and such lien is superior to that of the workman. *Postal Tel. Cable Co. v. Vane*, (C. C. A.) 80 Fed. Rep. 961.

3. **United States Statutes Authorizing Occupation of Post Roads by Telegraph Lines.** — U. S. Rev. Stat., §§ 5263-5268; 14 U. S. Stat. at L. 221; Act of July 24, 1866.

**In Indian Territory.** — The Act of March 3, 1901, c. 832, providing for grants to telegraph companies of franchises in the Indian Territory necessarily annulled all previous conflicting grants made by any of the Indian nations. *Muskogee Nat. Telephone Co. v. Hall*, (C. C. A.) 118 Fed. Rep. 382, *disapproving* *Muskogee Nat. Telephone Co. v. Hall*, (Indian Ter. 1901) 64 S. W. Rep. 600.

By Act of Congress of March 3, 1901 (31 U. S. Stat. L. 1084) the secretary of the interior is given full authority to grant rights of way to telegraph lines in the territory, and no lines may be constructed there without authority from him. *Muskogee Nat. Telephone Co. v. Hall*, (Indian Ter. 1901) 64 S. W. Rep. 600.

4. **What Constitute Post Roads.** — See the title *POSTAL LAWS*, vol. 22, p. 1058.

**Railroads.** — U. S. Rev. Stat., § 3964; *Mercantile Trust Co. v. Atlantic, etc., R. Co.*, 63 Fed. Rep. 513.

**The Streets of the District of Columbia** are "post roads" within the meaning of the statute. *Hewett v. Western Union Tel. Co.*, 4 Mackey (D. C.) 424, 16 Am. & Eng. Corp. Cas. 276.

5. **Letter-carrier and Free-delivery Routes.** — Act of Cong., June 18, 1872; U. S. Rev. Stat., § 3964. See *Toledo v. Western Union Tel. Co.*, 107 Fed. Rep. 10, 46 C. C. A. 111.

6. **Supersedes State Legislation.** — See *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, *affirming* 2 Woods (U. S.) 643; *Western Union Tel. Co. v. Atlantic, etc., State Tel. Co.*, 5 Nev. 102. Compare *Western Union Tel. Co. v. New York*, 38 Fed. Rep. 552.

7. **Acceptance of Conditions.** — U. S. Rev.

**b. SCOPE AND EFFECT OF ACT.** — The statute is permissive only.<sup>1</sup> While it may operate to prevent the state or any of its municipalities from an arbitrary or absolute exclusion of a telegraph company which had complied with its provisions from any post road,<sup>2</sup> it does not affect the right of the state or its agencies to regulate the use of streets and highways by such companies.<sup>3</sup>

**Does Not Interfere with the Right to Compensation.** — The right of an owner of abutting property to compensation for the occupation of the highway in front of his premises by a telegraph company, either because the telegraph line is an additional burden upon the fee or because it materially interferes with his easement of access or his enjoyment of the highway, is not affected in any way by the Act of Congress.<sup>4</sup> Nor does the act affect the right of a railroad company to compensation where part of its right of way is taken for a telegraph line; the act is permissive merely, and leaves the question of compensation in such cases to be determined by the law of the state where the property taken lies.<sup>5</sup> Where, however, the railroad company's right of way is one acquired by congressional grants subsequent to the act, the grants must be considered as made and accepted subject to the provisions of the act giving telegraph companies the right to occupy and use such right of way without compensation, and this right on the part of the telegraph company may be enforced in equity.<sup>6</sup>

**The Act Does Not Undertake to Provide for Compulsory Proceedings** to secure a right of way for telegraph companies over private property either of individuals or of railroad companies, and resort must be had entirely to the laws of the state where the property lies for such proceedings.<sup>7</sup> Nor can a federal court of equity, under that statute and its general equity powers, use its injunction process so as to effect an equitable condemnation of an easement of right of way over a railroad along which it had constructed its line under a contract with a prior owner of the railroad whose ownership had been terminated by the foreclosure of a mortgage existing prior to the contract.<sup>8</sup>

**The Act Does Not Affect the Liability of the Telegraph Company for Damages** resulting from its negligence in the transmission or delivery of messages.<sup>9</sup>

**The Act Embraces Telegraph Companies Only** and not telephone companies,<sup>10</sup> nor

Stat., § 5268. Therefore a telegraph company has no right to carry its line over a bridge across a navigable stream until it has filed its acceptance. *Chicago, etc., Bridge Co. v. Pacific Mut. Tel. Co.*, 36 Kan. 113, 16 Am. & Eng. Corp. Cas. 271.

1. **Construction of Statute.** — *St. Louis v. Western Union Tel. Co.*, 148 U. S. 102; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Western Union Tel. Co. v. Atty.-Gen.*, 125 U. S. 548; *Richmond v. Southern Bell Telephone, etc., Co.*, 174 U. S. 761.

2. *Western Union Tel. Co. v. Atty.-Gen.*, 125 U. S. 530, *quoted in St. Louis v. Western Union Tel. Co.*, 148 U. S. 102.

3. *People v. Squire*, 145 U. S. 175, *affirming* 107 N. Y. 593, 1 Am. St. Rep. 894; *Michigan Telephone Co. v. Charlotte*, 93 Fed. Rep. 11; *Toledo v. Western Union Tel. Co.*, (C. C. A.) 107 Fed. Rep. 10. See *infra*, this title, VI. 3. **Municipal Regulation.**

4. *Kester v. Western Union Tel. Co.*, 108 Fed. Rep. 926; *Phillips v. Postal Tel. Cable Co.*, 130 N. Car. 513. See *infra*, this section, 4. b. **As Additional Servitude.**

5. *Atlantic, etc., Tel. Co. v. Chicago, etc., R. Co.*, 6 Biss. (U. S.) 150; *Western Union Tel. Co. v. American Union Tel. Co.*, 9 Biss. (U. S.) 72; *Western Union Tel. Co. v. Ann Arbor R.*

*Co.*, 90 Fed. Rep. 379, 178 U. S. 243; *Southwestern R. Co. v. Southern, etc., Tel. Co.*, 46 Ga. 43, 12 Am. Rep. 585; *American Telephone, etc., Co. v. Pearce*, 71 Md. 535; *Northwestern Telephone Exch. Co. v. Chicago, etc., R. Co.*, 76 Minn. 334.

6. *Mercantile Trust Co. v. Atlantic, etc., R. Co.*, 63 Fed. Rep. 519.

7. *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1; *Postal Tel. Cable Co. v. Cleveland, etc., R. Co.*, 94 Fed. Rep. 234; *Postal Tel. Cable Co. v. Southern R. Co.*, 89 Fed. Rep. 190; *Western Union Tel. Co. v. Pennsylvania R. Co.*, (C. C. A.) 123 Fed. Rep. 33, *reversing* 120 Fed. Rep. 981, and *affirming* 120 Fed. Rep. 362; *Postal Tel. Cable Co. v. Morgan's Louisiana, etc., R., etc., Co.*, 49 La. Ann. 58; *Nicoll v. New York, etc., Telephone Co.*, 62 N. J. L. 733, 72 Am. St. Rep. 666, *affirming* 62 N. J. L. 156. See also *Western Union Tel. Co. v. Ann Arbor R. Co.*, 178 U. S. 243, *reversing* 90 Fed. Rep. 379.

8. *Western Union Tel. Co. v. Ann Arbor R. Co.*, (C. C. A.) 90 Fed. Rep. 379.

9. *Western Union Tel. Co. v. Mellon*, 100 Tenn. 420.

10. *Richmond v. Southern Bell Telephone, etc., Co.*, 174 U. S. 761, *affirming* 103 Fed. Rep. 31.

does it extend to the installation, by a regularly organized telegraph company, of a district telegraph system for the collection and distribution of telegraph messages and for the operation of call boxes, watchman and police signals, and the like.<sup>1</sup>

c. TO SUBSIDIZED RAILROADS OPERATING TELEGRAPH LINES. — By early Acts of Congress, supplemented by later legislation, the various subsidized railroad companies, known generally as the Pacific railroads, were granted rights of way over the public domain<sup>2</sup> and were required to construct and operate telegraph lines along their various routes under special provisions with regard to the telegraphic service to be furnished to the government and the public.<sup>3</sup>

2. State Grants. — By statute, in most of the states, telegraph and telephone companies are given the right to construct their lines over the public highways,<sup>4</sup> and in a number of states provision is made for their using the right of way of railroad companies. Statutes of the latter class, while they are subordinate to the Act of Congress<sup>5</sup> on the same subject, may nevertheless be resorted to for the condemnation of a right of way along railroads when necessary.<sup>6</sup>

The Term "Highways" Embraces City Streets, within the meaning of statutes conferring upon telegraph or telephone companies the right to occupy the public highways of the state unless a different intent is clearly indicated.<sup>7</sup> The term will also embrace a turnpike,<sup>8</sup> but not a railroad or its right of way.<sup>9</sup>

3. Municipal Grants — a. IN GENERAL. — The extent of a municipality's power to grant or to refuse to a telegraph or telephone company the right to occupy the streets and highways within its limits must depend upon the provisions of its charter and of the legislation in force in the state. As a general rule, such companies are given by statute the right to occupy all streets and highways, but it is made the right and duty of each municipality to fix the terms and conditions upon which its own streets may be used.<sup>10</sup> Where this

1. Toledo v. Western Union Tel. Co., (C. C. A.) 107 Fed. Rep. 10, 121 Fed. Rep. 734.

2. See STATE AND PUBLIC LANDS, vol. 26, p. 324.

3. See this legislation reviewed in U. S. v. Union Pac. R. Co., 160 U. S. 1, 163 U. S. 710; U. S. v. Northern Pac. R. Co., 120 Fed. Rep. 546.

4. State Statutes. — See Code of Ala., 1896, §§ 1244, 2490; Code of Tenn., 1896, § 1830; Code of Va., 1887, §§ 1287-1290, construed in Southern Bell Telephone, etc., Co. v. Richmond, 103 Fed. Rep. 31, 174 U. S. 761. See also Meridian v. Western Union Tel. Co., 72 Miss. 910, construing Laws of Miss., 1886, p. 93; Hudson Telephone Co. v. Jersey City, 49 N. J. L. 303, 60 Am. Rep. 619, construing New Jersey statute; Marshfield v. Wisconsin Telephone Co. 102 Wis. 604, construing Wis. Rev. Stat. 1898, § 1778.

Louisiana — Telegraph Using Lands Granted for Canal Purposes. — State v. Cumberland Telephone, etc., Co., 52 La. Ann. 1411.

Missouri Statute — Telephone in Streets — Municipal Control. — See State v. Flad, 23 Mo. App. 185.

Washington — Constitutional Grant Not Self-Executing. — State v. Spokane, 24 Wash. 53.

5. U. S. Rev. Stat., § 5263 et seq.

6. Postal Tel. Cable Co. v. Morgan's Louisiana, etc., R., etc., Co., 49 La. Ann. 58. See supra, this section, Federal Grants of Right of Way.

7. "Highways" in Statutes. — Abbott v. Du-

luth, 104 Fed. Rep. 833; Chamberlain v. Iowa Telephone Co., 119 Iowa 619 (city's consent unnecessary); East Tennessee Telephone Co. v. Russellville, 106 Ky. 667; Duluth v. Duluth Telephone Co., 84 Minn. 486; Northwestern Telephone Exch. Co. v. Minneapolis, 81 Minn. 140; Michigan Telephone Co. v. Benton Harbor, 121 Mich. 512; State v. Sheboygan, 111 Wis. 23. See also generally the title HIGHWAYS, vol. 15, p. 350.

"Public Roads" in a statute on this subject has been held not to include streets. Nebraska Telephone Co. v. Western Independent Long Distance Telephone Co., (Neb. 1903) 95 N. W. Rep. 18.

8. Turnpike. — People's Telephone, etc., Co. v. Berks, etc., Turnpike Road, 199 Pa. St. 411.

9. Railroad. — Western Union Tel. Co. v. Pennsylvania R. Co., (C. C. A.) 123 Fed. Rep. 33, reversing 120 Fed. Rep. 981. See also PUBLIC ROADS, vol. 23, p. 458.

10. Municipal Control of Streets. — See Sheffield v. Central Union Telephone Co., 36 Fed. Rep. 164; Domestic Tel., etc., Co. v. Newark, 49 N. J. L. 344, 16 Am. & Eng. Corp. Cas. 293; Broome v. New York, etc., Telephone Co., 49 N. J. L. 624; Domestic Tel., etc., Co. v. Newark, 49 N. J. L. 344; State v. Hoboken, 35 N. J. L. 205. See also London Mills v. Fairview London Telephone Circuit, 105 Ill. App. 146 (ordinance not the exclusive mode of granting right to occupy streets).

Grant "Over and Through" Streets — Right to Place Wires Underground Not Included. — Com. v.

is true, the municipality cannot, either by refusing to name the conditions or by imposing unreasonable restrictions or conditions, defeat the grant of the right given by statute.<sup>1</sup> If the statutory grant is unconditional, the municipality is without power to impose any conditions, and its officers cannot interfere with the company in its proper exercise of the privilege granted.<sup>2</sup> But even though the municipality may be without power to impose conditions, having merely the power to consent to or refuse consent, if it annexes conditions to its assent and these are acquiesced in by the company and the streets are occupied by it under that arrangement, it cannot afterwards repudiate the conditions.<sup>3</sup>

A Provision that the Consent of the Municipality Shall Be First Obtained is mandatory, and a company can acquire no right to occupy the streets until such consent has been obtained.<sup>4</sup> And the same rule obtains when the city grants the right of occupancy upon condition that a permit be first obtained from the commissioner of public works.<sup>5</sup>

**b. RIGHT OF MUNICIPALITY TO EXACT COMPENSATION.** — When the charter of the municipality or the laws of the state vest the entire control over streets in the municipality where they lie,<sup>6</sup> the municipal authorities may compel a telegraph or telephone company to pay a reasonable compensation, in the nature of rent, for the use of the streets.<sup>7</sup> While the passage

Warwick, 185 Pa. St. 623, holding further, however, that where this had been done pursuant to an ordinance, the city could not urge this to limit to particular streets a grant embracing all streets.

**Authority to "License, Tax, and Regulate"** telephone companies and "all their branches of business," given to a city by its charter, carries with it power to grant to such companies the right to erect poles and wires within the city. *Hersfield v. Rocky Mountain Bell Telephone Co.*, 12 Mont. 102.

**A Grant to a Company Whose Organization Is Not Completed** is not void if the organization of the company, though not technically complete, is practically so. *Chicago Telephone Co. v. Northwestern Telephone Co.*, 199 Ill. 324, affirming 100 Ill. App. 57.

**1. Refusing to Name Conditions — Unreasonable Conditions.** — *Chamberlain v. Iowa Telephone Co.*, 119 Iowa 619; *Michigan Telephone Co. v. Benton Harbor*, 121 Mich. 512; *Northwestern Telephone Exch. Co. v. Minneapolis*, 81 Minn. 140; *State v. Flad*, 23 Mo. App. 185; *Summit Tp. v. New York, etc., Telephone Co.*, 57 N. J. Eq. 123; *Com. v. Warwick*, 6 Pa. Dist. 473 (mandamus for a permit refused); *State v. Sheboygan*, 111 Wis. 23.

The wrongful and arbitrary refusal of a permit by a municipal officer will not protect the company for excavating in the streets without permission. *St. Paul v. Freedy*, 86 Minn. 350.

**For Cases Involving the Construction of Particular Statutes, see Michigan.** — *Michigan Telephone Co. v. Benton Harbor*, 121 Mich. 512, construing Acts Mich. 1883, p. 131, § 4, and Acts Mich. 1895, N. 215.

**New Jersey.** — *Bayonne v. Lord*, 61 N. J. L. 136, applying 3 Gen. Stat. N. J., p. 3459, pl. 21.

**Ohio.** — *Zanesville v. Zanesville Tel., etc., Co.*, 64 Ohio St. 67, 83 Am. St. Rep. 725, construing Rev. Stat. Ohio, 3461; *State v. Central Union Telephone Co.*, 7 Ohio Cir. Dec. 536, 14 Ohio Cir. Ct. 273; *In re Co-operative Telephone Co.*, 9 Ohio Dec. 831; *Macklin v.*

*Home Telephone Co.*, 24 Ohio Cir. Ct. 446; *Mantell v. Bucyrus Telephone Co.*, 11 Ohio Cir. Dec. 274, 20 Ohio Cir. Ct. 345.

**Washington.** — *State v. Spokane*, 24 Wash. 53, construing Ball. Annot. Codes, etc., Wash., § 4369.

**Wisconsin.** — *State v. Sheboygan*, 111 Wis. 23, construing Rev. Stat. Wis. 1898, § 1778; *Marshfield v. Wisconsin Telephone Co.*, 102 Wis. 604.

**2. State v. Flad**, 23 Mo. App. 185.

**3. Southern Bell Telephone, etc., Co. v. Richmond**, (C. C. A.) 103 Fed. Rep. 31.

**4. Southern Bell Telephone, etc., Co. v. Richmond**, (C. C. A.) 103 Fed. Rep. 31; *East Tennessee Telephone Co. v. Anderson County Telephone Co.*, 74 S. W. Rep. 218, 24 Ky. L. Rep. 2358; *State v. Spokane*, 24 Wash. 53; *Marshfield v. Wisconsin Telephone Co.*, 102 Wis. 604.

**5. St. Paul v. Freedy**, 86 Minn. 350.

**6. Lack of Charter Power in City to Demand Compensation.** — *Meridian v. Western Union Tel. Co.*, 72 Miss. 910, applying Acts Miss. 1886, p. 93, and criticizing *Donnaher v. State*, 8 Smed. & M. (Miss.) 649.

**Missouri — Charter Powers of St. Louis Authorize Exactng Rental from Telephone Companies.** — *St. Louis v. Western Union Tel. Co.*, 149 U. S. 465.

**7. Charge in Nature of Rent.** — *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92; *Postal Tel. Cable Co. v. Baltimore*, 79 Md. 502, affirmed 156 U. S. 210; *Harrisburg v. Pennsylvania Telephone Co.*, 15 Pa. Co. Ct. 518, 3 Pa. Dist. 815.

Such a charge is in no sense a tax. *St. Louis v. Western Union Tel. Co.*, 148 U. S. 92; *Meridian v. Western Union Tel. Co.*, 72 Miss. 910.

The Ohio statute forbids any municipality to demand or receive any compensation for the use of the streets beyond the actual cost of restoring pavements. *Macklin v. Home Telephone Co.*, 24 Ohio Cir. Ct. 446. See also *In re Co-operative Telephone Co.*, 9 Ohio Dec. 831,

of an ordinance fixing the charge per annum for each pole at a specified amount creates a presumption that such an amount is a reasonable charge, it is not conclusive, and the company may show that the amount is unreasonable when compared with the average rentals of adjoining property.<sup>1</sup>

**Termination of Franchise to Occupy Streets.** — There is no power in a municipality, by indirection or otherwise, arbitrarily to declare a forfeiture of the company's right to occupy its streets,<sup>2</sup> nor, upon the expiration of the right by lapse of the stipulated period, to remove the company's lines arbitrarily and without notice.<sup>3</sup> But it may enjoin the company from replacing its lines in the streets after the expiration of the franchise to occupy them,<sup>4</sup> or it may revoke, for just cause, a franchise not expired.<sup>5</sup> And it has been held that where the company's right to occupy streets is, as a matter of law, unsettled, the company cannot have a preliminary injunction to restrain the removal of the poles by the city.<sup>6</sup>

**4. In Streets and Highways — a. IN GENERAL.** — The right to construct a telegraph or telephone line along and upon a street or highway must be derived from an express grant of authority. It cannot exist by implication merely.<sup>7</sup> The power to grant such authority rests in Congress as to such highways as are post roads;<sup>8</sup> as to all other highways, including city streets, the power rests ultimately in the legislature of the state by virtue of its inherent right of control over all streets and highways.<sup>9</sup> The power of the legislature, however, may be and frequently is delegated to municipalities as to streets within their territorial limits.<sup>10</sup>

**The Necessity of the Abutting Owner's Consent to such a use of the street, when not regulated by statute, depends generally upon the nature of the municipality's title to the street, and the view of the jurisdiction as to whether this use amounts to an additional servitude.<sup>11</sup>**

**b. AS ADDITIONAL SERVITUDE.** — A telegraph or telephone line consisting of wires strung upon poles, constructed along and over a street or highway, constitutes a new use thereof and an additional servitude, entitling the owner of the fee to compensation.<sup>12</sup> If such a line materially interferes with

1. **Amount Not Conclusive.** — *St. Louis v. Western Union Tel. Co.*, 63 Fed. Rep. 68.

2. **Termination by City.** — *Abbott v. Duluth*, 104 Fed. Rep. 833; *Old Colony Trust Co. v. Wichita*, 123 Fed. Rep. 762. See *infra*, this section, *Vested Rights*, and *ante*, the title *STREETS AND SIDEWALKS*, p. 154.

3. *Mutual Union Tel. Co. v. Chicago*, 16 Fed. Rep. 309.

4. *Mutual Union Tel. Co. v. Chicago*, 16 Fed. Rep. 309.

5. *Western Union Tel. Co. v. Toledo*, 103 Fed. Rep. 746. See also *Seaboard Tel., etc., Co. v. Kearny*, 68 N. Y. App. Div. 283.

6. *New York, etc., Telephone Co. v. East Orange Tp.*, 42 N. J. Eq. 490.

7. **Lines in Streets and Highways.** — *Atty.-Gen. v. United Kingdom Electric Tel. Co.*, 30 Beav. 287; *Reg. v. United Kingdom Electric Tel. Co.*, 9 Cox C. C. 174; *New York, etc., Telephone Co. v. East Orange Tp.*, 42 N. J. Eq. 490.

8. See *supra*, this section, 1. *Federal Grants of Right of Way*.

9. *Abbott v. Duluth*, 104 Fed. Rep. 833 (*constructing Laws Minn. 1860, c. 12, § 1*); *Irwin v. Great Southern Telephone Co.*, 37 La. Ann. 63; *Hudson Telephone Co. v. Jersey City*, 49 N. J. L. 303, 60 Am. Rep. 619, 16 Am. & Eng. Corp. Cas. 289; *Barhite v. Home Telephone Co.*, 50 N. Y. App. Div. 25.

Prior to Ky. Const. 1890, municipalities were without power to grant the use of their streets to such companies. See *East Tennessee Telephone Co. v. Russellville*, 106 Ky. 667.

10. See *supra*, this section, 3. *Municipal Grants*, and *ante*, the title *STREETS AND SIDEWALKS*, pp. 148, 151.

11. See the titles *ABUTTING OWNERS*, vol. 1, p. 228; *STREETS AND SIDEWALKS*, *ante*, p. 153, and references, and the next paragraph of the text, *infra*.

**The Public Easement in the Street May Include Its Use for telephone and telegraph purposes, and the right may be exercised without consent.** *Johnson v. New York, etc., Telephone, etc., Co.*, 76 N. Y. App. Div. 564. See also *Marshall v. Bayonne*, 59 N. J. L. 101.

12. **Compensation to Abutting Owners — United States.** — *Pacific Postal Tel. Cable Co. v. Irvine*, 49 Fed. Rep. 113; *Kester v. Western Union Tel. Co.*, 108 Fed. Rep. 926.

*Illinois.* — *Goddard v. Chicago, etc., R. Co.*, 202 Ill. 362, *affirming* 104 Ill. App. 536; *American Telephone, etc., Co. v. Jones*, 78 Ill. App. 372; *Union Electric Telephone, etc., Co. v. Applequist*, 104 Ill. App. 517; *Postal Tel. Cable Co. v. Eaton*, 170 Ill. 513, 62 Am. St. Rep. 390.

*Nebraska.* — *Bronson v. Albion Telephone Co.*, (Neb. 1903) 93 N. W. Rep. 201, 60 L. R. A. 426.

*New Jersey.* — *Winter v. New York, etc.,*



an abutting owner's easement of access to his property or of passage over the street, he is entitled to damages therefor without regard to the ownership of the fee.<sup>1</sup> Statutes granting such companies a right of way over streets and highways are not to be construed as authorizing an occupation of the streets by the telegraph company without compensation to the owners of abutting property.<sup>2</sup> They operate merely to protect the company from indictment for maintaining a public nuisance.<sup>3</sup>

**The Ownership of the Fee Is Material**, and an abutting owner cannot complain when the fee is in the public unless he can show some specific material injury to his easement of access and passage.<sup>4</sup>

**The Measure of Damages** recoverable by an abutting owner who retains the fee is the extent to which the rental and salable value of his property has been diminished, or the difference in the value of the property before and after the construction of the line.<sup>5</sup>

Telephone Co., 51 N. J. L. 83, 25 Am. & Eng. Corp. Cas. 497; *Nicoll v. New York, etc., Telephone Co.*, 62 N. J. L. 733, 72 Am. St. Rep. 666; *Halsey v. Rapid Transit St. R. Co.*, 47 N. J. Eq. 380.

**New York.**—*Metropolitan Telephone, etc., Co. v. Colwell Lead Co.*, 50 N. Y. Super. Ct. 488; *Tiffany v. U. S. Illuminating Co.*, 51 N. Y. Super. Ct. 280, 67 How. Pr. (N. Y.) 73; *Andrews v. Delhi, etc., Telephone Co.*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 23; *Gray v. New York State Telephone Co.*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 108.

**North Carolina.**—*Hodges v. Western Union Tel. Co.*, 133 N. Car. 225.

**North Dakota.**—*Donovan v. Allert*, 11 N. Dak. 289.

**Ohio.**—*Daily v. State*, 51 Ohio St. 348, 46 Am. St. Rep. 578; *Callen v. Columbus Edison Electric Light Co.*, 66 Ohio St. 166; *Schaaf v. Cleveland, etc., R. Co.*, 66 Ohio St. 215; *Denver v. U. S. Telephone Co.*, 10 Ohio Dec. 273. *Compare Auerbach v. Cuyahoga Telephone Co.*, 9 Ohio Dec. 389, 7 Ohio N. P. 633.

**Pennsylvania.**—*Lancaster, etc., Turnpike Road Co. v. Columbia Telephone Co.*, 18 Lanc. L. Rev. 161.

**Texas.**—*Erie Tel., etc., Co. v. Kennedy*, 80 Tex. 71.

**Virginia.**—*Western Union Tel. Co. v. Williams*, 86 Va. 696, 19 Am. St. Rep. 908, 30 Am. & Eng. Corp. Cas. 564.

**Washington.**—*Spokane v. Colby*, 16 Wash. 610.

**Wisconsin.**—*Krueger v. Wisconsin Telephone Co.*, 106 Wis. 96.

See also for additional cases the title **ABUTTING OWNERS**, vol. 1, p. 228.

**A Contrary View** has been vigorously asserted in some jurisdictions. *Hewett v. Western Union Tel. Co.*, 4 Mackey (D. C.) 424, 16 Am. & Eng. Corp. Cas. 276; *Magee v. Overshiner*, 150 Ind. 127, 65 Am. St. Rep. 358; *Irwin v. Great Southern Telephone Co.*, 37 La. Ann. 63; *Boston v. Richardson*, 13 Allen (Mass.) 160; *People v. Eaton*, 100 Mich. 208; *Cater v. Northwestern Telephone Exch. Co.*, 60 Minn. 539, 51 Am. St. Rep. 543. *Compare Willis v. Erie Tel., etc., Co.*, 37 Minn. 347; *Gay v. Mutual Union Tel. Co.*, 12 Mo. App. 491; *State v. St. Louis, etc., R. Co.*, 86 Mo. 288; *Hershfield v. Rocky Mountain Bell Telephone Co.*, 12 Mont. 102; *Kirby v. Citizens' Telephone Co.*,

(S. Dak. 1903) 97 N. W. Rep. 3. See also *Patton v. Chattanooga*, 108 Tenn. 197, and the title **ABUTTING OWNERS**, vol. 1, p. 228.

**A Conduit for Wires, Laid under the Sidewalk** is not an additional servitude. *Coburn v. New Telephone Co.*, 156 Ind. 90.

**1. Injury to Easement of Access.**—*Cleveland Burial Case Co. v. Erie R. Co.*, 24 Ohio Cir. Ct. 107; *Krueger v. Wisconsin Telephone Co.*, 106 Wis. 96.

**The Easement of Access Embraces** the use of an outer upper story door for receiving merchandise. *Hays v. Columbiana County Telephone Co.*, 12 Ohio Cir. Dec. 167, 21 Ohio Cir. Ct. 480.

**When the Interference Is Unnecessary or Results from Improper Construction** it is a continuing trespass which may be abated. *Krueger v. Wisconsin Telephone Co.*, 106 Wis. 96.

**Merely Stringing Wires Before One's Property** is not an injury entitling him to a preliminary injunction. *Roake v. American Telephone, etc., Co.*, 41 N. J. Eq. 35, 12 Am. & Eng. Corp. Cas. 342.

**2. Effect of Statutes Authorizing Use of Streets.**—*Kester v. Western Union Tel. Co.*, 108 Fed. Rep. 926; *Western Union Tel. Co. v. Williams*, 86 Va. 696, 19 Am. St. Rep. 908, 30 Am. & Eng. Corp. Cas. 564 (*construing* Va. Code, 1887, §§ 1287-90). See also *Postal Tel. Cable Co. v. Norfolk, etc., R. Co.*, 88 Va. 920, 39 Am. & Eng. Corp. Cas. 533.

**3. Eels v. American Telephone, etc., Co.**, 63 Hun (N. Y.) 516, *affirmed* 143 N. Y. 133.

**4. Ownership of Fee.**—*Hewett v. Western Union Tel. Co.*, 4 Mackey (D. C.) 424, 16 Am. & Eng. Corp. Cas. 276; *Post v. Hudson River Telephone Co.*, 76 N. Y. App. Div. 621; *Halleran v. Bell Telephone Co.*, 64 N. Y. App. Div. 41. *Compare Bronson v. Albion Telephone Co.*, (Neb. 1903) 93 N. W. Rep. 201, 60 L. R. A. 426; *Eels v. American Telephone, etc., Co.*, 143 N. Y. 133; *Theobald v. Louisville, etc., R. Co.*, 66 Miss. 279; *McQuaid v. Portland, etc., R. Co.*, 18 Oregon 237.

**5. Measure of Damages.**—*Chesapeake, etc., Telephone Co. v. Mackenzie*, 74 Md. 36, 28 Am. St. Rep. 227; *Erie Tel., etc., Co. v. Kennedy*, 80 Tex. 71. See also *Postal Tel. Cable Co. v. Bruen*, (Supm. Ct. Spec. T.) 39 N. Y. Supp. 220, where the erection of poles one hundred and fifty feet apart was held to give a right to nominal damages only.

**Remedy of Abutting Owner.** — When the occupation of the highway by a telegraph or telephone company is by authority of law, the line is not a nuisance,<sup>1</sup> and the remedy of an abutting owner who retains the fee of the highway is in an action to recover compensation for the added servitude, or, when his easement of access is interfered with, in an action for damages. In the former case he may maintain ejectment,<sup>2</sup> but, as in case of other quasi-public utilities, the company will be allowed an opportunity to perfect its right of occupancy by instituting condemnation proceedings. In the latter case he may have an injunction against the continued impairment of his easement where it is due to the improper construction of the line and is unnecessary to its proper operation.<sup>3</sup>

**c. UNAUTHORIZED USE OF STREETS MAY BE ENJOINED.** — Where the use of the streets of a city by a telegraph or telephone company is without authority, either because of the particular mode of use adopted by the company or because of an utter lack of authority to occupy the streets, injunction will lie to restrain such further use. The injunction may issue at the suit of the city<sup>4</sup> or of the owner of abutting property who is affected by the unauthorized use,<sup>5</sup> but not at the suit of a rival company.<sup>6</sup> The rule prevails whether the occupation of the streets was never authorized or has ceased to be lawful because of the valid withdrawal of an original authority.<sup>7</sup>

**5. Over Private Lands — a. BY AGREEMENT WITH OWNER.** — The right of way over private property may be acquired by agreement of the owner. If an agreement with the landowner cannot be obtained, resort must be had to the local statutes authorizing the right of condemnation.<sup>8</sup>

**1. Not a Nuisance When Constructed under Authority.** — *Com. v. Boston*, 97 Mass. 555; *Irwin v. Great Southern Telephone Co.*, 37 La. Ann. 63; *York Telephone Co. v. Keesey*, 5 Pa. Dist. 366; *Heinitsh v. Pennsylvania Tel. Co.*, 5 Lack. Leg. N. (Pa.) 324, 16 Lanc. L. Rev. 206; *Brown v. Southwestern Tel. Co.*, 17 Tex. Civ. App. 433; *Maxwell v. Central Dist., etc., Tel. Co.*, 51 W. Va. 121. See also the title STATUTES, vol. 26, p. 654, and references.

**2. Ejectment.** — *Postal Tel. Cable Co. v. Eaton*, 170 Ill. 513, 62 Am. St. Rep. 390; *Board of Trade Tel. Co. v. Barnett*, 107 Ill. 507, 47 Am. Rep. 453, 8 Am. & Eng. Corp. Cas. 81; *Western Union Tel. Co. v. Williams*, 86 Va. 696, 19 Am. St. Rep. 908. See also the titles EJECTMENT, vol. 10 p. 473; STREETS AND SIDEWALKS, *ante*, p. 163.

**Purchaser Succeeds to Right of Vendor.** — *Postal Tel. Cable Co. v. Eaton*, 170 Ill. 513, 62 Am. St. Rep. 390.

**Injunction Has Been Held to Be the Proper Remedy** in such a case. *Gray v. New York State Telephone Co.*, (Supm. Ct. Tr. T.) 41 Misc. (N. Y.) 108. See *Donovan v. Allert*, 11 N. Dak. 289; *Denver v. U. S. Telephone Co.*, 10 Ohio Dec. 273.

**The Abutting Owner Is Estopped** to ask for an injunction where he has, without objection, permitted the company to spend large sums of money in the construction of its lines. *Daffinger v. Pittsburg, etc., Tel. Co.*, 31 Pittsb. Leg. J. N. S. (Pa.) 37, 14 York Leg. Rec. (Pa.) 46.

**The Only Remedy** of an abutting owner, according to the better rule, is an action for damages, except where the easement of access is materially impaired. See *Bronson v. Albion Telephone Co.*, (Neb. 1903), 93 N. W. Rep. 201, 60 L. R. A. 429; *Maxwell v. Central*

*Dist., etc., Tel. Co.*, 51 W. Va. 121; *Omaha v. Flood*, 57 Neb. 124.

**3. Improper or Unnecessary Construction.** — See *Hays v. Columbiana County Telephone Co.*, 12 Ohio Cir. Dec. 167, 21 Ohio Cir. Ct. 480; *Broome v. New York, etc., Telephone Co.*, 42 N. J. Eq. 141; *Russ v. Pennsylvania Telephone Co.*, 15 Pa. Co. Ct. 226, 3 Pa. Dist. 654.

**4. Injunction Against Unauthorized Use.** — *Mutual Union Tel. Co. v. Chicago*, 16 Fed. Rep. 309; *People v. Metropolitan Telephone, etc., Co.*, 31 Hun (N. Y.) 596; *Utica v. Utica Telephone Co.*, 24 N. Y. App. Div. 361; *Marshfield v. Wisconsin Telephone Co.*, 102 Wis. 604. See also *Reg. v. United Kingdom Electric Tel. Co.*, 2 B. & S. 648, note, 110 E. C. L. 648, note, 31 L. J. M. C. 166. *Compare* *Wardsworth Dist. v. United Telephone Co.*, 13 Q. B. D. 904.

If the company, being authorized to use poles of such size and height as is reasonably necessary, uses poles of greater size or height, the authority granted to it is no protection. *People v. Metropolitan Telephone, etc., Co.*, 31 Hun (N. Y.) 596.

**5. Irwin v. Great Southern Telephone Co.**, 37 La. Ann. 63; *Maxwell v. Central Dist., etc., Tel. Co.*, 51 W. Va. 121. See also *Donovan v. Allert*, 11 N. Dak. 289.

**6. Chicago Telephone Co. v. Northwestern Telephone Co.**, 199 Ill. 324, *affirming* 100 Ill. App. 57.

**7. Mutual Union Tel. Co. v. Chicago**, 16 Fed. Rep. 309; *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 21 Am. St. Rep. 764.

**8. See generally** the title EMINENT DOMAIN, vol. 10, p. 1043, especially p. 1054.

**A Mere Parol License** is revocable at will, and a transfer of the land is an implied revocation. *Andrews v. Delhi, etc., Tel. Co.*, (Supm. Ct. App. Div.) 73 N. Y. Supp. 1129.

**b. BY CONDEMNATION.** — In practically all of the states statutes exist providing for the acquisition by the power of eminent domain of private property for public uses, and these statutes embrace, either expressly or by implication, the purposes of telegraph and telephone companies.<sup>1</sup> The general rules applicable in this connection with respect to the conditions precedent to the right to condemn, the nature of the right and the procedure to be adopted, are those governing condemnations generally, subject only to the modifications which the inherent character of the structures under consideration demand.<sup>2</sup>

**The Interest Acquired** in such cases is a mere easement of right of way, and the original owner of the land is not deprived of the use of it except in so far as such use is inconsistent with the rights of the company.<sup>3</sup>

**6. On Railroad Right of Way — a. BY CONTRACT WITH RAILROAD COMPANY.** — A telegraph company may acquire, by contract with a railroad company, a right to occupy part of the latter's right of way, though it cannot acquire any exclusive rights.<sup>4</sup> The principal questions arising in this connection are as to the construction and effect of such agreements in particular cases.<sup>5</sup>

**Contract for Joint Operation — Effect — Termination.** — A contract between a railroad and a telegraph company for the joint construction of a telegraph line along the railroad right of way, the line to be used by the railroad in its business and by the telegraph company for public service, makes the telegraph company a joint owner of the personalty merely,<sup>6</sup> and the agreement may be terminated at any time by either party on reasonable notice.<sup>7</sup>

**Telegraph Line an Additional Servitude.** — A telegraph or telephone line upon the right of way of a railroad company is, generally, an additional burden, for

**Poles and Wires Erected under an Agreement** with a land owner are subject to the lien of a prior mortgage which included after-acquired property. *Monmouth County Electric Co. v. Central R. Co.* (N. J. 1903) 54 Atl. Rep. 140.

1. See *supra*, this title, *Definitions*, and the title *EMINENT DOMAIN*, vol. 10, p. 1079.

2. **Condemnation — Conditions Precedent.** — See generally the title *EMINENT DOMAIN*, vol. 10, p. 1053 *et seq.*

For the application of these rules to this particular class of cases, see *Postal Tel. Cable Co. v. Oregon Short Line R. Co.*, 104 Fed. Rep. 623 (condemnation under Rev. Stat. Idaho, §§ 5210-12); *Lockie v. Mutual Union Tel. Co.*, 103 Ill. 401; *Postal Tel. Cable Co. v. Morgan's Louisiana, etc., R., etc., Co.*, 49 La. Ann. 58; *Louisville, etc., R. Co. v. Postal Tel. Cable Co.*, 68 Miss. 806; *Broome v. New York, etc., Telephone Co.*, 49 N. J. L. 624; *Winter v. New York, etc., Telephone Co.*, 51 N. J. L. 83, 25 Am. & Eng. Corp. Cas. 497; *Duke v. Central New Jersey Telephone Co.*, 53 N. J. L. 341, 35 Am. & Eng. Corp. Cas. 1; *Coles v. Midland Telephone, etc., Co.*, 67 N. J. L. 490; *Nicholl v. New York, etc., Telephone Co.*, 62 N. J. L. 733, 72 Am. St. Rep. 666; *Postal Tel. Cable Co. v. Norfolk, etc., R. Co.*, 87 Va. 349.

3. **More Right of Way Acquired.** — *Union Pac. R. Co. v. Colorado Postal Tel. Cable Co.*, 30 Colo. 133; *St. Louis, etc., R. Co. v. Postal Tel. Co.*, 173 Ill. 508; *Mobile, etc., R. Co. v. Postal Tel. Cable Co.*, 76 Miss. 731. See also *Lockie v. Mutual Union Tel. Co.*, 103 Ill. 401, where it was further held that a strip of land half a rod in width was not too much, and that the land owner was not bound to fence his land from this strip.

4. See *infra*, this section, 7. *Exclusive Rights*; and *infra*, this title VI. 1. *b. Telegraph Lines over Subsidized Railroads.*

5. See *St. Paul, etc., R. Co. v. Western Union Tel. Co.*, 106 Fed. Rep. 243; *U. S. v. Northern Pac. R. Co.*, 120 Fed. Rep. 546; *U. S. v. Union Pac. R. Co.*, 160 U. S. 1.

**Expiration of Right to Occupancy.** — Where a license by a railroad company to a telegraph company to use its right of way expires with the expiration of the charter of the telegraph company, the reincorporation of the telegraph company under a subsequent statute before the expiration of its charter does not affect the case. *Western Union Tel. Co. v. Baltimore, etc., R. Co.*, 20 Fed. Rep. 572; *Western Tel. Co. v. Baltimore, etc., R. Co.*, 69 Md. 211; *Latrobe v. Western Tel. Co.*, 74 Md. 232.

**Lease by Railroad to Telegraph Company — Right to Re-occupancy at Expiration.** — *Western Union Tel. Co. v. Pennsylvania R. Co.*, (C. C. A.) 123 Fed. Rep. 33.

**Contract for Use of Wire as Distinguished from Sale.** — *Western Union Tel. Co. v. Western, etc., R. Co.*, 91 U. S. 283.

6. **Effect of Contract for Joint Construction and Operation.** — *Western Union Tel. Co. v. Pennsylvania Co.*, 125 Fed. Rep. 67, 120 Fed. Rep. 362. See also *Aspdin v. Austin*, 5 Q. B. 671, 48 E. C. L. 671; *St. Paul, etc., R. Co. v. Western Union Tel. Co.*, (C. C. A.) 118 Fed. Rep. 511; *Western Union Tel. Co. v. Burlington, etc., R. Co.*, 11 Fed. Rep. 1; *Atlantic, etc., Tel. Co. v. Union Pac. R. Co.*, 1 Fed. Rep. 745.

7. **Terminable on Notice at Will.** — *Western Union Tel. Co. v. Pennsylvania Co.*, 125 Fed. Rep. 67. See also *Jones v. Newport News*,

which the original owner of the land, if he retains the fee, is entitled to compensation;<sup>1</sup> but where the line is constructed by the railroad company, in good faith, for its own use, and is reasonably necessary for its operation,<sup>2</sup> there is no additional servitude, but merely a legitimate development of the easement originally acquired.<sup>3</sup> A telegraph line is also regarded as subjecting the easement of a railroad company to an additional servitude, and the company is entitled to compensation therefor under the constitutional provisions against the taking of private property without compensation.<sup>4</sup>

b. BY CONDEMNATION. — The rule has long been recognized that property already devoted to a public use may be condemned for another and different public use under authority from the state.<sup>5</sup> And this rule is applied to condemnation, for the purposes of a telegraph line, of a railroad's right of way, either under general eminent domain statutes (it being considered that the construction and use of a telegraph line do not interfere materially with use of a right of way for railroad purposes) or under special acts providing for such condemnation.<sup>6</sup> Such a condemnation cannot be defeated by showing

etc., Co., (C. C. A.) 65 Fed. Rep. 736; Texas, etc., R. Co. v. Marshall, 136 U. S. 393; Echols v. New Orleans, etc., R. Co., 52 Miss. 610; Coffin v. Landis, 46 Pa. St. 432. Compare Llanelly R., etc., Co. v. London, etc., R. Co., L. R. 7 H. L. 550; Mississippi River Logging Co. v. Robson, (C. C. A.) 69 Fed. Rep. 775.

1. **Generally Additional Servitude as to Owner of Fee.** — Western Union Tel. Co. v. American Union Tel. Co., 9 Biss. (U. S.) 72; American Telephone, etc., Co. v. Pearce, 71 Md. 535; Phillips v. Postal Tel. Cable Co., 130 N. Car. 513. See also New Orleans, etc., R. Co. v. Southern, etc., Tel. Co., 53 Ala. 211.

**Purchaser from Original Owner May Maintain Action for Damages.** — Phillips v. Postal Tel. Cable Co., 130 N. Car. 513, 89 Am. St. Rep. 868.

**Accounting.** — The owner in such a case has no right to an accounting as to the rents and profits received from the telegraph company under its contract with the railroad. Chicago, etc., R. Co. v. Snyder, (Iowa 1903) 95 N. W. Rep. 183.

2. **Telegraph Line Operated by Railroad Company for Its Own Use.** — Western Union Tel. Co. v. Rich, 19 Kan. 517, 27 Am. Rep. 159; American Telephone, etc., Co. v. Pearce, 71 Md. 535. See also Adams v. Louisville, etc., R. Co., (Miss. 1893) 13 So. Rep. 932.

3. Taggart v. Newport St. R. Co., 16 R. I. 688, 43 Am. & Eng. R. Cas. 214. See also Hodges v. Western Union Tel. Co., 133 N. Car. 225.

**Upon a Transfer** of such a line by the railroad company to a telegraph company, the owner of the fee may claim compensation. Hodges v. Western Union Tel. Co., 133 N. Car. 225.

4. **Additional Burden as to Railroad Company.** — Atlantic, etc., Tel. Co. v. Chicago, etc., R. Co., 6 Biss. (U. S.) 158; Western Union Tel. Co. v. Atlantic, etc., Tel. Co., 7 Biss. (U. S.) 367; Western Union Tel. Co. v. American Union Tel. Co., 9 Biss. (U. S.) 72; Kester v. Western Union Tel. Co., 108 Fed. Rep. 926; Southwestern R. Co. v. Southern, etc., Tel. Co., 46 Ga. 43, 12 Am. Rep. 585; American Telephone, etc., Co. v. Pearce, 71 Md. 535; Northwestern Telephone Exch. Co. v. Chicago, etc.,

R. Co., 76 Minn. 334; Louisville, etc., R. Co. v. Postal Tel. Cable Co., 68 Miss. 806. See also Baltimore, etc., Tel. Co. v. Morgan's Louisiana, etc., R., etc., Co., 37 La. Ann. 883; South Eastern R. Co. v. European, etc., Electric Printing Tel. Co., 9 Exch. 363.

5. See the title EMINENT DOMAIN, vol. 10, p. 193 et seq.

6. **Condemnation of Railroad Right of Way for Telegraph Company — United States.** — Oregon Short Line R. Co. v. Postal Tel. Cable Co., (C. C. A.) 111 Fed. Rep. 842, affirming 104 Fed. Rep. 623; Postal Tel. Cable Co. v. Oregon Short Line R. Co., 114 Fed. Rep. 787.

Alabama. — Mobile, etc., R. Co. v. Postal Tel. Cable Co., 120 Ala. 21. See also New Orleans, etc., R. Co. v. Southern, etc., Tel. Co., 53 Ala. 211.

Arkansas. — St. Louis, etc., R. Co. v. Southwestern Telephone, etc., Co., (C. C. A.) 121 Fed. Rep. 278.

Colorado. — Union Pac. R. Co. v. Colorado Postal Tel. Cable Co., 30 Colo. 133.

Georgia. — Savannah, etc., R. Co. v. Postal Tel. Cable Co., 112 Ga. 941, 115 Ga. 554; Western Union Tel. Co. v. American Union Tel. Co., 65 Ga. 160, 38 Am. Rep. 781.

Illinois. — St. Louis, etc., R. Co. v. Postal Tel. Co., 173 Ill. 508.

Indiana. — Postal Tel. Cable Co. v. Chicago, etc., R. Co., 30 Ind. App. 654.

Louisiana. — Postal Tel. Cable Co. v. Morgan's Louisiana, etc., R., etc., Co., 49 La. Ann. 58; Postal Tel. Cable Co. v. Louisiana Western R. Co., 49 La. Ann. 1270; Southwestern Telephone Co. v. Kansas City, etc., R. Co., 109 La. 892.

New Mexico. — Union Trust Co. v. Atchison, etc., R. Co., 8 N. Mex. 327.

Mississippi. — Mobile, etc., R. Co. v. Postal Tel. Cable Co., 76 Miss. 731.

North Carolina. — Postal Tel. Cable Co. v. Southern R. Co., 90 Fed. Rep. 31.

Ohio. — See Postal Tel. Cable Co. v. Cleveland, etc., R. Co., 94 Fed. Rep. 234.

South Carolina. — South Carolina, etc., R. Co. v. American Telephone, etc., Co., 65 S. Car. 459.

Tennessee. — Mobile, etc., R. Co. v. Postal Tel. Cable Co., 101 Tenn. 62.

that a right of way for the telegraph line may be secured over a public highway near or adjacent to the railroad or over other property in other ways.<sup>1</sup>

A Foreign Corporation cannot, in general, exercise the right of eminent domain;<sup>2</sup> but a local corporation may do so, although it is a branch of a company incorporated in another state, and is subordinate and auxiliary thereto.<sup>3</sup>

**What Portion of Right of Way May Be Taken.** — Where the right to condemn is conferred upon the telegraph company, the power to select so much of the right of way as may be necessary for its telephone lines is conferred by implication, subject to the limitation that its selection must not essentially interfere with the operation of the railroad.<sup>4</sup>

**The Measure of Damages** allowed in such cases is merely the decrease in the value of the right of way for railroad purposes, and this, in the absence of special circumstances, is so slight as to justify the allowance of nothing more than practically nominal damages.<sup>5</sup>

**7. Exclusive Rights.** — The Act of Congress giving telegraph companies the right to occupy all post roads<sup>6</sup> prevents the acquisition by any such company of an exclusive right on any such road, either by contract with a railroad company<sup>7</sup>

*Texas.* — Ft. Worth, etc., R. Co. v. Southwestern Tel., etc., Co., (Tex. 1903) 71 S. W. Rep. 270, 60 L. R. A. 145; Houston, etc., R. Co. v. Postal Tel. Cable Co., 18 Tex. Civ. App. 502; Gulf, etc., R. Co. v. Southwestern Tel., etc., Co., 18 Tex. Civ. App. 500. See also cases cited *infra*, this title, *Measure of Damages*.

*Utah.* — Postal Tel. Cable Co. v. Oregon Short-Line R. Co., 23 Utah 476, 90 Am. St. Rep. 705.

*Virginia.* — Postal Tel. Cable Co. v. Farmville, etc., R. Co., 96 Va. 661.

A Somewhat Different View seems to have been entertained in Western Union Tel. Co. v. Pennsylvania R. Co., (C. C. A.) 123 Fed. Rep. 33, 120 Fed. Rep. 362, where it is emphasized that the possible future needs of the railroad company must be given full consideration in determining whether any portion of its right of way may be taken from it for a telegraph line. See also St. Louis, etc., R. Co. v. Southwestern Telephone, etc., Co., (C. C. A.) 121 Fed. Rep. 278.

1. Union Pac. R. Co. v. Colorado Postal Tel. Cable Co., 30 Colo. 133; Savannah, etc., R. Co. v. Postal Tel. Cable Co., 115 Ga. 554; Ft. Worth, etc., R. Co. v. Southwestern Tel. etc., Co., (Tex. 1903) 71 S. W. Rep. 270, 60 L. R. A. 145. See also St. Louis, etc., R. Co. v. Southwestern Telephone, etc., Co., (C. C. A.) 121 Fed. Rep. 278.

2. See the title FOREIGN CORPORATIONS, vol. 13, p. 858. See also Postal Tel. Cable Co. v. Cleveland, etc., R. Co., 94 Fed. Rep. 234 (*applying the Ohio statute*); St. Louis, etc., R. Co. v. Co. v. Southwestern Telephone, etc., Co., (C. C. A.) 121 Fed. Rep. 278 (Indian Territory).

3. Postal Tel. Cable Co. v. Oregon Short Line R. Co., 104 Fed. Rep. 623, *affirmed* (C. C. A.) 111 Fed. Rep. 842; Union Pac. R. Co. v. Colorado Postal Tel. Cable Co., 30 Colo. 133; Postal Tel. Cable Co. v. Oregon Short Line R. Co., 23 Utah 474, 90 Am. St. Rep. 705. See also Day v. Postal Tel. Co., 66 Md. 354.

4. Portion Selected. — Savannah, etc., R. Co. v.

Postal Tel. Cable Co., 112 Ga. 941; Savannah, etc., R. Co. v. Postal Tel. Cable Co., 115 Ga. 554. See also St. Louis, etc., R. Co. v. Southwestern Telephone, etc., Co., (C. C. A.) 121 Fed. Rep. 278.

5. Damages Practically Nominal — *United States.* — Postal Tel. Cable Co. v. Oregon Short Line R. Co., 104 Fed. Rep. 623, *affirmed* (C. C. A.) 111 Fed. Rep. 842 (\$500 for a distance of 200 miles); Chicago, etc., R. Co. v. Chicago, 166 U. S. 248.

*Illinois.* — St. Louis, etc., R. Co. v. Postal Tel. Co., 173 Ill. 508.

*Tennessee.* — Mobile, etc., R. Co. v. Postal Tel. Cable Co., 101 Tenn. 62.

*Texas.* — Gulf, etc., R. Co. v. Southwestern Tel. etc., Co., (Tex. Civ. App. 1899) 52 S. W. Rep. 87; Southwestern Tel., etc., Co. v. Gulf, etc., R. Co., (Tex. Civ. App. 1899) 52 S. W. Rep. 107; Texas, etc., R. Co. v. Postal Tel. Cable Co., (Tex. Civ. App. 1899) 52 S. W. Rep. 108; San Antonio, etc., R. Co. v. Southwestern Tel., etc., Co., (Tex. Civ. App. 1900) 56 S. W. Rep. 201; Texas Midland R. Co. v. Southwestern Tel., etc., Co., (Tex. Civ. App. 1900) 57 S. W. Rep. 313.

In Louisiana, the amount allowed the railroad company has been fixed at the sum which it originally cost to clear eight feet (that being the width of the cross-arms on the telegraph line) of the right of way, plus the sum which would yield an annual interest sufficient to keep that portion of the right of way clear. Postal Tel. Cable Co. v. Louisiana Western R. Co., 49 La. Ann. 1270. See also Postal Tel. Cable Co. v. Morgan's Louisiana, etc., R. etc., Co., 49 La. Ann. 58; Southwestern Telephone Co. v. Kansas City, etc., R. Co., 109 La. 892.

6. See *supra*, this section, *Federal Grants of Right of Way*.

7. No Exclusive Rights in Post Roads — *United States.* — Western Union Tel. Co. v. Baltimore, etc., Tel. Co., 19 Fed. Rep. 660, 22 Fed. Rep. 133, 8 Am. & Eng. Corp. Cas. 99, 23 Fed. Rep. 12; Western Union Tel. Co. v. American Union Tel. Co., 9 Biss. (U. S.) 72. Compare West-

or by state legislation.<sup>1</sup> This is true whether the post road is over a part of the public domain or over private property acquired by condemnation.<sup>2</sup>

**When Not Prohibited by Statute** such an agreement for exclusive privileges has been held not contrary to public policy nor to be in restraint of trade, and it may be enforced.<sup>3</sup>

**Even in the United States** a contract by a railroad company with a telegraph company for exclusive rights is not void, in so far as it merely excludes competitors from the line of poles erected and used by the telegraph company.<sup>4</sup>

**In Construing Municipal Grants** to one telephone or telegraph company, the courts lean to that construction which will tend to prevent the exclusion of new companies.<sup>5</sup>

**Contests Between Rival Companies.** — The courts will not readily interfere, at the instigation of one company occupying streets, to prevent their use by another company.<sup>6</sup> A company which itself occupies the streets of a city under a void ordinance or without right cannot enjoin a rival company from erecting its line within the city.<sup>7</sup>

**8. Vested Rights.** — When an ordinance of a city which it had power to enact has designated the streets which a telegraph or telephone company may use, and fixed the conditions of such use, the company's acceptance of its terms and conditions by acting upon them and expending money in the construction of its lines in conformity with them constitutes a contract the obligation of which the city cannot impair by adding new conditions unless the right to do so was expressly reserved.<sup>8</sup> But a municipality may, under its

ern Union Tel. Co. v. Atlantic, etc., Tel. Co., 7 Biss. (U. S.) 367.

*New Mexico.* — Union Trust Co. v. Atchison, etc., R. Co., 8 N. Mex. 327.

*Ohio.* — Marietta, etc., R. Co. v. Western Union Tel. Co., 38 Ohio St. 24, 10 Am. & Eng. R. Cas. 387.

See also the title RESTRAINT OF TRADE, vol. 24, p. 855.

**This Rule Cannot Be Evaded by Indirection.** — Mercantile Trust Co. v. Atlantic, etc., R. Co., 63 Fed. Rep. 910 (railroad agreeing not to furnish facilities for rival telegraph lines).

**Contract Held Not to Create Exclusive Privileges.** — Marietta, etc., R. Co. v. Western Union Tel. Co., 38 Ohio St. 24, 10 Am. & Eng. R. Cas. 387 (railroad grant of certain privileges to telegraph company, but reserving to itself "all local telegraph business," and defining the telegraph company's rights).

**1. No Exclusive Grant by State Legislature.** — "The statute amounts to a prohibition of all state monopolies in this particular." Pensacola Tel. Co. v. Western Union Tel. Co., 96 U. S. 1, affirming 2 Woods (U. S.) 643. It is immaterial whether the company sought to be excluded by state legislation is to operate an interstate or a merely local line. Muskogee Nat. Telephone Co. v. Hall, (C. C. A.) 118 Fed. Rep. 382.

**Municipality Cannot Grant Exclusive Privilege to Telegraph Company in Streets.** — Chicago Telephone Co. v. Northwestern Telephone Co., 199 Ill. 324, affirming 100 Ill. App. 57; Michigan Telephone Co. v. St. Joseph, 121 Mich. 502, 80 Am. St. Rep. 520.

**Telephone Companies** are within the policy of the law forbidding exclusive grants. Muskogee Nat. Telephone Co. v. Hall, (C. C. A.) 118 Fed. Rep. 382. See State v. Spokane, 24 Wash. 53.

**2. Union Trust Co. v. Atchison, etc., R. Co., 8 N. Mex. 327.**

**3. Contract for Exclusive Privileges Upheld.** — Canadian Pac. R. Co. v. Western Union Tel. Co., 17 Can. Sup. Ct. 151, 33 Am. & Eng. Corp. Cas. 1. See also California State Tel. Co. v. Alta Tel. Co., 22 Cal. 398.

**4. Competitors May Be Excluded from Company's Poles.** — Western Union Tel. Co. v. Chicago, etc., R. Co., 86 Ill. 246, 29 Am. Rep. 28. See Marietta, etc., R. Co. v. Western Union Tel. Co., 38 Ohio St. 24, 10 Am. & Eng. R. Cas. 387.

**5. Construction of Agreement.** — Chicago Telephone Co. v. Northwestern Telephone Co., 199 Ill. 324, affirming 100 Ill. App. 57.

**6. But Unreasonable and Unnecessary Interference** with the rights of a company already occupying the streets by a later rival may be enjoined. Chicago Telephone Co. v. Northwestern Telephone Co., 199 Ill. 324, affirming 100 Ill. App. 57; Northwestern Telephone Exch. Co. v. Twin City Telephone Co., (Minn. 1903) 95 N. W. Rep. 460.

So a new company may enjoin a company already occupying the streets from unreasonably raising the height of its poles so as to interfere with the construction of a new line. Cumberland Telephone, etc., Co. v. Louisville Home Telephone Co., 72 S. W. Rep. 4, 24 Ky. L. Rep. 1676.

**7. Company Occupying Streets under Void Authority or None.** — East Tennessee Telephone Co. v. Anderson County Telephone Co., (Ky. 1900) 57 S. W. Rep. 457, (Ky. 1903) 74 S. W. Rep. 218; Nebraska Telephone Co. v. Western Independent Long Distance Telephone Co., (Neb. 1903) 95 N. W. Rep. 18.

**8. Municipal Grant to Telephone or Telegraph Company a Contract.** — Morristown v. East Tennessee Telephone Co., (C. C. A.) 115 Fed. Rep. 304; Sunset Telephone, etc., Co. v. Medford, 115 Fed. Rep. 202; Abbott v. Duluth, 104 Fed. Rep. 833; New Orleans v. Great Southern Telephone, etc., Co., 40 La. Ann. 41, 8 Am. St.

police power, make such changes in the original requirements as the welfare of the public may demand.<sup>1</sup>

**The Company's Right to Extend Its Lines**, but within the city limits, is a part of the right acquired by its acceptance of the ordinance, and the city cannot by mere inaction or by indirection defeat such right.<sup>2</sup>

**Interference with Such Vested Rights May Be Enjoined** at the instance of the company or of the trustees in a trust deed executed by it to secure its bonds.<sup>3</sup>

**IV. LIABILITY FOR INJURIES CAUSED BY IMPROPER LOCATION OR CONSTRUCTION** — 1. **Injuries to Persons Using Highway.** — A telegraph or telephone company must exercise reasonable care not only in the original location and construction of its lines, but in their maintenance and in its general use of the highway, to prevent injuries to persons using the highway, and it is responsible for all injuries which result from a breach of this duty.<sup>4</sup>

Rep. 502, 21 Am. & Eng. Corp. Cas. 35; Michigan Telephone Co. v. St. Joseph, 121 Mich. 502, 80 Am. St. Rep. 520; Mahan v. Michigan Telephone Co., (Mich. 1903) 93 N. W. Rep. 629; Northwestern Telephone Exch. Co. v. Minneapolis, 81 Minn. 140; Bayonne v. Lord, 61 N. J. L. 136; Hudson Telephone Co. v. Jersey City, 49 N. J. L. 303, 60 Am. Rep. 619, 16 Am. & Eng. Corp. Cas. 291; American Union Tel. Co. v. Harrison, 31 N. J. Eq. 627; People's Pass. R. Co. v. Baldwin, 14 Phila. (Pa.) 231, 37 Leg. Int. (Pa.) 424; Com. v. Warwick, 185 Pa. St. 623; State v. Sheboygan, 114 Wis. 505. See also Richmond v. Southern Bell Telephone, etc., Co., (C. C. A.) 85 Fed. Rep. 19; Com. v. Boston, 97 Mass. 555; Suburban Light, etc., Co. v. Board of Aldermen, 153 Mass. 200. Compare St. Louis v. Western Union Tel. Co., 148 U. S. 92.

**City Estopped to Deny Company's Incorporation.** — Old Colony Trust Co. v. Wichita, 123 Fed. Rep. 762.

1. **May Make Changes under Police Power.** — Michigan Telephone Co. v. Charlotte, 93 Fed. Rep. 11; People v. Squire, 145 U. S. 175, affirming 107 N. Y. 593, 1 Am. St. Rep. 894; Norristown v. Keystone Tel., etc., Co., 15 Montg. Co. Rep. (Pa.) 9, 12 York Leg. Rec. (Pa.) 183; American Tel. Co. v. Millcreek Tp., 195 Pa. St. 643. Compare State v. Sheboygan, 114 Wis. 505.

**A Change of Location in the Highway** may be required under the Maine statute, 1885, c. 378. Readfield Telephone, etc., Co. v. Cyr, 95 Me. 287.

**Where a Municipality's Consent** to the use of its streets by a telephone company was granted before the provision of the Kentucky constitution requiring it, it has been held simply void and not binding. East Tennessee Telephone Co. v. Russellville, 106 Ky. 667.

2. **Right to Extend Lines.** — Michigan Telephone Co. v. St. Joseph, 121 Mich. 502, 80 Am. St. Rep. 520. See also Old Colony Trust Co. v. Wichita, 123 Fed. Rep. 762.

3. **Old Colony Trust Co. v. Wichita**, 123 Fed. Rep. 762.

4. **Care in Use of Highway** — England. — Houniday v. National Telephone Co., (1899) 2 Q. B. 392.

**United States.** — Sheffield v. Central Union Telephone Co., 36 Fed. Rep. 164; Wolfe v. Erie Tel. Co., 33 Fed. Rep. 320; Henning v. Western Union Tel. Co., 43 Fed. Rep. 131; Southwestern Tel., etc., Co. v. Robinson,

50 Fed. Rep. 810, 39 Am. & Eng. Corp. Cas. 520.

**Alabama.** — Postal Tel. Cable Co. v. Jones, 133 Ala. 217.

**Colorado.** — Western Union Tel. Co. v. Eyster, 2 Colo. 141.

**District of Columbia.** — District of Columbia v. Dempsey, 13 App. Cas. (D. C.) 533.

**Illinois.** — See Cumberland Telephone, etc., Co. v. Coats, 100 Ill. App. 519 (no negligence shown).

**Indiana.** — Western Union Tel. Co. v. Levi, 47 Ind. 552; Brush Electric Lighting Co. v. Kelley, 126 Ind. 220.

**Louisiana.** — Wilson v. Great Southern Telephone, etc., Co., 41 La. Ann. 1041.

**Maine.** — Dickey v. Maine Tel. Co., 46 Me. 483.

**Maryland.** — Lee v. Maryland Telephone, etc., Co., (Md. 1903) 55 Atl. Rep. 680.

**Massachusetts.** — Thomas v. Western Union Tel. Co., 100 Mass. 156; Sias v. Lowell, etc., St. R. Co., 179 Mass. 343.

**Michigan.** — Hovey v. Michigan Telephone Co., 124 Mich. 607; Kyes v. Valley Telephone Co., (Mich. 1903) 93 N. W. Rep. 623; Friesenhan v. Michigan Telephone Co., (Mich. 1903) 96 N. W. Rep. 501; Chaffee v. Telephone, etc., Constr. Co., 77 Mich. 625, 18 Am. St. Rep. 424.

**Missouri.** — Larkin v. Western Union Tel. Co., 82 Mo. App. 155.

**New Jersey.** — New York, etc., Telephone Co. v. Bennett, 62 N. J. L. 742; Chalmers v. Paterson, etc., Telephone Co., 66 N. J. L. 41 (injury caused from gas leaking into conduit).

**New York.** — Flood v. Western Union Tel. Co., (Supm. Ct. Gen. T.) 15 N. Y. Supp. 400; Gordon v. Ashley, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 743; Leeds v. New York Telephone Co., 64 N. Y. App. Div. 484; Sheldon v. Western Union Tel. Co., 51 Hun (N. Y.) 591. See also Ward v. Atlantic, etc., Tel. Co., 71 N. Y. 81, 27 Am. Rep. 10; Leeds v. New York Telephone Co., (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 671, 79 N. Y. App. Div. 121.

**Oregon.** — Chaperon v. Portland Gen. Electric Co., 41 Oregon 39.

**Pennsylvania.** — Pennsylvania Tel. Co. v. Varnau, (Pa. 1888) 15 Atl. Rep. 624; Central Pennsylvania Telephone, etc., Co. v. Wilkesbarre, etc., R. Co., 11 Pa. Co. Ct. 417.

**Rhode Island.** — McDonald v. Postal Tel. Co., 22 R. I. 131.

**South Carolina.** — Miles v. Postal Tel. Cable Co., 55 S. Car. 403.

**Negligence on the Part of the Company Is the Basis of Such Actions,** and there can be no recovery in the absence of proof of it.<sup>1</sup> But the fact that one of the company's wires crossing a highway was allowed to swing so low as to obstruct ordinary travel is sufficient evidence of negligence, if unexplained, to warrant a recovery by a traveler who is injured through coming in contact with it.<sup>2</sup>

**The Contributory Negligence of the Plaintiff** is, as in other cases of negligence, a defense.<sup>3</sup>

**Improper Location Authorized by Municipality.** — The fact that the company's poles were located in the highway under the supervision of the municipal authorities does not relieve it from liability to one who, while using the highway, is injured in consequence of a pole being so located as to be dangerous to such persons.<sup>4</sup>

**2. Injuries to Servants.** — The general rules governing the liability of a

*Tennessee.* — *Postal Tel. Cable Co. v. Zopfi*, 93 Tenn. 369; *Cumberland Telephone, etc., Co. v. Cook*, 103 Tenn. 730; *Cumberland Telephone, etc., Co. v. Hunt*, 108 Tenn. 699; *United Electric R. Co. v. Shelton*, 89 Tenn. 423, 24 Am. St. Rep. 614.

*Texas.* — See *Postal Tel. Cable Co. v. Coote*, (Tex. Civ. App. 1900) 57 S. W. Rep. 912; *Wehner v. Lagerfelt*, 27 Tex. Civ. App. 520; *Southwestern Tel., etc., Co. v. Ingrand*, 27 Tex. Civ. App. 400.

*Virginia.* — *Watts v. Southern Bell Telephone, etc., Co.*, 100 Va. 45, 3 Vt. Sup. Ct. 577.

*West Virginia.* — *Hannum v. Hill*, 52 W. Va. 166.

*Wisconsin.* — *Roberts v. Wisconsin Telephone Co.*, 77 Wis. 589, 20 Am. St. Rep. 143.

**Abandonment No Defense.** — Where a person was injured by pieces of cut wire left in the street, the fact that the company have abandoned the property is no defense. *Nichols v. Minneapolis*, 33 Minn. 430, 53 Am. Rep. 56.

**The Location of Poles** must be such as not to discommode the public unnecessarily. *Sheffield v. Central Union Telephone Co.*, 36 Fed. Rep. 164.

**Strength and Stability of Poles.** — *Riker v. New York, etc., R. Co.*, 64 N. Y. App. Div. 357; *Ward v. Atlantic, etc., Tel. Co.*, 71 N. Y. 81, 27 Am. Rep. 10; *Southwestern Tel., etc., Co. v. Ingrand*, 27 Tex. Civ. App. 400.

**Liability for Failure to Restore Line After Violent Storm.** — *Southwestern Tel., etc., Co. v. Robinson*, 50 Fed. Rep. 810; *Cumberland Telephone, etc., Co. v. Hunt*, 108 Tenn. 697. But see *Fitch v. Central New York Telephone, etc., Co.*, 42 N. Y. App. Div. 321.

**Liability for Injury to Railroad Employee from Telegraph Wire Crossing Railway.** — *American Telephone, etc., Co. v. Kersh*, 27 Tex. Civ. App. 127.

**Duty to Persons Invited to Use Company's Property — Reasonable Care Only.** — *New York, etc., Telephone Co. v. Speicher*, 59 N. J. L. 23, affirmed 60 N. J. L. 242 (city lineman injured on company's poles). See title NEGLIGENCE, vol. 21, p. 471.

**Though Cross Bar Is Maintained on a Company's Poles by Another,** it is nevertheless liable for injury occasioned by the falling of an insulator therefrom, since injury from such cause might reasonably be contemplated. *Quill v. Empire State Telephone Co.*, (Supm. Ct.) 13 Misc. (N.

Y.) 435. See also the title NEGLIGENCE, vol. 21, p. 486.

**1. Negligence of Company Must Be Shown.** — *Cumberland Telephone, etc., Co. v. Coats*, 100 Ill. App. 519; *Allen v. Atlantic, etc., Tel. Co.*, 21 Hun (N. Y.) 22; *Monahan v. Miami Telephone Co.*, 9 Ohio Dec. 532, 7 Ohio N. P. 95; *Barrett v. Independent Telephone Co.*, (Tex. Civ. App. 1902) 65 S. W. Rep. 1128; *Roberts v. Wisconsin Telephone Co.*, 77 Wis. 589, 20 Am. St. Rep. 143. See also *Lee v. Maryland Telephone, etc., Co.*, (Md. 1903) 55 Atl. Rep. 680, where company was held not liable because there was no sufficient proof of its ownership of the wire causing the injury.

**2. Thomas v. Western Union Tel. Co.**, 100 Mass. 156; *Southwestern Tel., etc., Co. v. Robinson*, 50 Fed. Rep. 810, 39 Am. & Eng. Corp. Cas. 520.

**Evidence of Negligence — Soundness of Poles.** — *Western Union Tel. Co. v. Levi*, 47 Ind. 552 (condition of neighboring poles inadmissible).

**Height of Wires Over Street.** — *Pennsylvania Tel. Co. v. Varnau*, (Pa. 1888) 15 Atl. Rep. 624 (other persons with similarly loaded wagons had passed; defendant elevating wires after accident); *Hannum v. Hill*, 52 W. Va. 166 (condition of wires at intervals before and after accident).

**A Massachusetts Statute** (Rev. Laws Mass., c. 122, § 15) renders the company liable, irrespective of negligence, for injuries occasioned by its poles, wires, etc. *Riley v. New England Tel., etc., Co.*, (Mass. 1903) 68 N. E. Rep. 17.

**3. Contributory Negligence.** — *Kyes v. Valley Telephone Co.*, (Mich. 1903) 93 N. W. Rep. 623; *Hovey v. Michigan Tel. Co.*, 124 Mich. 607 (violation of ordinance is not *per se*).

See also the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368.

**Question of Fact for Jury.** — *Kyes v. Valley Telephone Co.*, (Mich. 1903) 93 N. W. Rep. 623.

**4. Improper Location.** — *Wolfe v. Erie Tel., etc., Co.*, 33 Fed. Rep. 320; *Bonn v. Bell Telephone Co.*, 30 Ont. 696; *Nebraska Telephone Co. v. Jones*, 60 Neb. 396; *Kowalski v. Newark Passenger R. Co.*, 15 N. J. L. J. 50; *Western Union Tel. Co. v. Eyser*, 2 Colo. 141.

**By Authorizing Improper Construction, a Municipality** renders itself jointly liable. *Atkinson v. Chatham*, 26 Ont. App. 521; *Geneva v. Brush Electric Co.*, 50 Hun (N. Y.) 581. See also *Nichols v. Minneapolis*, 33 Minn. 430, 53 Am. Rep. 56.



master for injuries to a servant apply in this connection.<sup>1</sup>

**3. Interference of Other Electrical Appliances.** — The general subject of the interference of electric light and street railway systems with the telephone through conduction and induction is considered elsewhere.<sup>2</sup>

**4. Injuries Caused by Wire Conducting Electricity into Building.** — In placing wires for conducting electricity into a house, a telephone company owes the persons living there the exercise of reasonable care, proportioned to the known dangers of the conditions, to prevent the wires acting as conductors of lightning into the building, and it is liable for damage resulting from neglect to provide against this danger; especially is it liable where damage from lightning occurs through its failure to remove its wires when the person living in the house has ceased to subscribe for a telephone.<sup>3</sup>

**5. Injuries to Trees of Abutting Owner.** — The liability of a telegraph or telephone company for injury to the trees of an abutting owner is discussed elsewhere.<sup>4</sup>

**For a Trespass on the Land of an Abutting Owner** for the purpose of cutting trees which interfere with the company's plan of construction, the company is responsible in damages without regard to its right to occupy the street.<sup>5</sup>

**V. STATUTORY PROTECTION OF TELEGRAPH AND TELEPHONE LINES.** — Injury to the poles and wires of telegraph and telephone lines has been made the subject of penal legislation in a number of the states.<sup>6</sup> Independently of these statutes, any person or corporation wilfully interfering with or destroying such lines may be held liable for trespass, as in other cases of destruction of private property.<sup>7</sup>

**VI. REGULATION AND CONTROL — 1. By Federal Government — a. IN GENERAL.** — The fact that a telegraph company whose lines extend into several states is an instrument of interstate commerce, subjects it to regulation by

**1. Servants Injured.** — See the title *MASTER AND SERVANT*, vol. 20, p. 54. See also as applying those rules to this class of cases, *Western Union Tel. Co. v. Tracy*, (C. C. A.) 114 Fed. Rep. 282; *Bergin v. Southern New England Telephone Co.*, 70 Conn. 54; *McGorty v. Southern New England Telephone Co.*, 69 Conn. 635, 61 Am. St. Rep. 62; *Jenney Electric Light, etc., Co. v. Murphy*, 115 Ind. 566; *Clairain v. Western Union Tel. Co.*, 40 La. Ann. 178 (breaking of cross-arm); *Maryland Telephone, etc., Co. v. Cloman*, (Md. 1903) 55 Atl. Rep. 681; *Flood v. Western Union Tel. Co.*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 400; *Chalmers v. Paterson, etc., Telephone Co.*, 66 N. J. L. 41; *Postal Tel. Cable Co. v. Coote*, (Tex. Civ. App. 1900) 57 S. W. Rep. 912; *General Electric Co. v. Murray*, (Tex. Civ. App. 1903) 74 S. W. Rep. 50.

**May Require Employee to Test for Himself** guy wires and circuit breakers of an electric street railway using the same poles, where it furnishes suitable appliances to him. *Bergin v. Southern New England Telephone Co.*, 70 Conn. 54. See also *McGorty v. Southern New England Telephone Co.*, 69 Conn. 635, 61 Am. St. Rep. 62; *Western Union Tel. Co. v. Tracy*, (C. C. A.) 114 Fed. Rep. 282.

**2.** See *ELECTRIC LIGHT COMPANIES*, vol. 10, p. 867; *ELECTRIC RAILROADS*, vol. 10, p. 885. See also *Birmingham Traction Co. v. Southern Bell Telephone, etc., Co.*, 119 Ala. 144.

**Over Post Roads.** a telegraph company, as a result of the Act of Congress, has a right superior to that of an electric light and power company. *Western Union Tel. Co. v. Los Angeles Electric Co.*, 76 Fed. Rep. 178.

**3.** *Southern Bell Telephone, etc., Co. v. Mc-Tyer*, 137 Ala. 601.

**4.** See the title *TREES*.

**5. Trespass and Cutting Trees.** — *Tissot v. Great Southern Tel., etc., Co.*, 39 La. Ann. 996, 4 Am. St. Rep. 248, 21 Am. & Eng. Corp. Cas. 53; *Clay v. Postal Tel. Cable Co.*, 70 Miss. 406; *Memphis Bell Telephone Co. v. Hunt*, 16 Lea (Tenn.) 456, 57 Am. Rep. 237; *Southwestern Tel., etc., Co. v. Branham*, (Tex. Civ. App. 1903) 74 S. W. Rep. 949.

**Punitive Damages Allowed.** — *Cumberland Tel., etc., Co. v. Poston*, 94 Tenn. 696; *Cumberland Telephone, etc., Co. v. Shaw*, 102 Tenn. 317.

**6. Penal Statutes.** — *Davis v. Pacific Telephone, etc., Co.*, 127 Cal. 312, *construing* Pen. Code Cal., § 591; Code Miss. 1892, § 1300; *Shannon's Anno. Code Tenn.* 1896, § 1839; *Southwestern Tel., etc., Co. v. Priest*, (Tex. Civ. App. 1903) 72 S. W. Rep. 241, *construing* Pen. Code Tex., art. 784; *Western Union Tel. Co. v. Bullard*, 65 Vt. 634, *construing* Stat. Vt. 1894, § 4249.

**7.** See *Sub-marine Tel. Co. v. Dickson*, 15 C. B. N. S. 759, 109 E. C. L. 759; *The Clara Killam*, L. R. 3 A. & E. 161, 19 W. R. 25, 39 L. J. Adm. 50. These were cases of interference by masters of vessels with submarine cables.

**Damages for Cutting Telegraph Wires.** — *Farnsworth v. Western Union Tel. Co.*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 735.

**Injunction Against Cutting Wires Granted Against Municipal Authorities.** — *American Union Tel. Co. v. Harrison*, 31 N. J. Eq. 627.

Congress, so far as regards matters connected with commerce among the states or with foreign countries.<sup>1</sup>

*b. TELEGRAPH LINES OVER SUBSIDIZED RAILROADS.* — By virtue of the express provisions in the various statutes of the United States granting rights of way and subsidies to the Pacific railroads, and especially the reservation in such statutes of the right to "repeal, alter, or amend," Congress has power to regulate the exercise by such companies of the telegraph franchises granted them; and since those franchises are expressly declared to be "inalienable" by the grantees, this power of regulation extends to any telegraph company exercising those franchises under an agreement with the railroad company.<sup>2</sup>

*The Railroad Company Cannot Evade the Requirements of the Statutes* by any arrangement with a telegraph company.<sup>3</sup>

*The Government May Compel the Railroads* so to operate their respective lines as to afford equal facilities to all, without discrimination in favor of any person or corporation, and to receive and exchange business with connecting lines.<sup>4</sup>

**2. By State** — *a. EXTENT OF POWER.* — Under its inherent police power a state may, for public safety and convenience, regulate the management of the property of a telegraph or telephone company and provide for the proper conduct of the company's business.<sup>5</sup>

*Instances of Its Exercise.* — The state may regulate the manner in which the company's lines shall be constructed and maintained over highways,<sup>6</sup> and, where reasonably necessary, require them to be placed underground;<sup>7</sup> it may provide that an office once established shall not be discontinued without the consent of the state, and in such a case the fact that the office has ceased to become a paying one and can be kept open only at a loss will be no defense to the company for a violation of the statute;<sup>8</sup> it may prescribe the rate to be charged for all messages sent from one point in the state to another, pro-

Here the wires were too high to interfere with traffic and the poles were on private property.

*The Right of Highway Commissioners to Enforce Ordinances* as to putting wires in a subway by removing poles and wires is declared in *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 21 Am. St. Rep. 764. See also *People v. Metropolitan Telephone Co.*, 31 Hun (N. Y.) 596.

1. See the title *INTERSTATE COMMERCE*, vol. 17, p. 89.

*In the District of Columbia* the power to regulate the use of the city streets rests in Congress. *Callum v. District of Columbia*, 15 App. Cas. (D. C.) 529.

**2. Subsidized Railroads.** — See *U. S. v. Western Union Tel. Co.*, 50 Fed. Rep. 28. See also *U. S. v. Union Pac. R. Co.*, 160 U. S. 1; *U. S. v. Northern Pac. R. Co.*, 120 Fed. Rep. 546.

**3. Attempting Evasion of Statute by Contract.** — *U. S. v. Union Pac. R. Co.*, 160 U. S. 1. See also *U. S. v. Union Pac. R. Co.*, 163 U. S. 710; *U. S. v. Western Union Tel. Co.*, 160 U. S. 53. In the case first cited it was held that the agreement between the railroad and the telegraph company amounted to a transfer of the former's franchise to carry on a telegraph business and was prohibited by the statute. But see *U. S. v. Northern Pac. R. Co.*, 120 Fed. Rep. 546, where this case is distinguished.

**4. U. S. v. Northern Pac. R. Co.**, 120 Fed. Rep. 546.

**5. State Regulation — Police Power.** — *People*

*v. Squire*, 145 U. S. 175, affirming 107 N. Y. 593, 1 Am. St. Rep. 894; *American Union Tel. Co. v. Western Union Tel. Co.*, 67 Ala. 32, 42 Am. Rep. 90; *Western Union Tel. Co. v. Way*, 83 Ala. 542; *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226; *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 21 Am. St. Rep. 764, 39 Am. & Eng. Corp. Cas. 526, affirming 58 Hun (N. Y.) 610. See also the titles *INTERSTATE COMMERCE*, vol. 17, pp. 74, 89; *POLICE POWER*, vol. 22, p. 914, and especially p. 928.

**6. Construction of Lines over Highways.** — *People v. Squire*, 107 N. Y. 593, 1 Am. St. Rep. 894, affirmed 145 U. S. 175; *Mutual Union Tel. Co. v. Chicago*, 16 Fed. Rep. 309; *Forsythe v. Baltimore, etc., Tel. Co.*, 12 Mo. App. 494; *Allentown v. Western Union Tel. Co.*, 148 Pa. St. 117, 33 Am. St. Rep. 820; *Western Union Tel. Co. v. Philadelphia*, (Pa. 1888) 12 Atl. Rep. 144, 21 Am. & Eng. Corp. Cas. 40.

**7. See infra**, this section, 3. *Municipal Regulation.*

**8. State May Forbid Abandonment of Established Office.** — *Western Union Tel. Co. v. Mississippi R. Commission*, 74 Miss. 80; *Code of Miss.* 1892, § 4328. See also the title *STATIONS*, vol. 26, p. 495.

*Laws of North Carolina*, 1891, c. 320, empowering the railroad commissioners to regulate telegraph rates, confers no power on them to compel the company to open a particular office for commercial business. *Railroad Com'rs v. Western Union Tel. Co.*, 113 N. Car. 213. See also *Mayo v. Western Union Tel. Co.*, 112 N. Car. 343.

vided the rate fixed is not so low as to amount to a taking of the company's property;<sup>1</sup> may provide against discrimination;<sup>2</sup> and may exercise such other general control and supervision as the public interests may require.<sup>3</sup> A telegraph company is no exception to the rule that the state may require all foreign corporations to comply with certain conditions with respect to the filing of charters or providing an agent upon whom process may be served, as a condition precedent to their doing business in the state.<sup>4</sup>

**The State May Restrict the Company's Power to Limit Its Liability** by declaring invalid stipulations in the contract of sending in so far as such stipulations operate to relieve the company from liability for negligence.<sup>5</sup>

**b. DELEGATION OF POWER.** — **The State May Delegate to Municipalities** the general power to regulate the construction and maintenance of telegraph or telephone lines within their corporate limits, and this power is embraced in the delegation of a general power of police control over streets.<sup>6</sup>

**Power of Regulation Delegated to Board of Commissioners.** — It is within the power of the state to create a board of commissioners which shall be vested with the right to exercise for the state its power of regulation, and such an arrangement exists in a number of the states.<sup>7</sup>

**c. REGULATION OF CHARGES.** — Both telegraph and telephone companies are engaged in a "business affected with a public interest" within the meaning of the rule laid down in a leading case,<sup>8</sup> and the state, in the exercise of its police power, may therefore regulate the charges of such companies and provide a maximum rate which their charges shall not exceed.<sup>9</sup>

1. See *infra*, this section, 2. *c. Regulation of Charges.*

2. See *infra*, this title, VII. *Duty to Furnish Equal Facilities to All*, and XIII. *Statutory Penalties.*

3. **Limitation on State Regulation.** — "The subjects upon which the state may act are almost infinite, yet in its regulations with respect to all of them there is this necessary limitation — that the state does not thereby encroach upon the free exercise of the power vested in Congress by the Constitution. Within that limitation it may undoubtedly make all necessary provisions with respect to the buildings, poles, and wires of telegraph companies in its jurisdiction which the comfort and convenience of the community may require." *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, 18 Am. & Eng. Corp. Cas. 18.

4. **Foreign Corporations.** — *American Union Tel. Co. v. Western Union Tel. Co.*, 67 Ala. 26, 42 Am. Rep. 90; *Western Union Tel. Co. v. Way*, 83 Ala. 542; *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226. See also *Debnam v. Southern Bell Telephone Co.*, 126 N. Car. 831; *Taggart v. Interstate Telephone, etc., Co.*, 16 Montg. Co. Rep. (Pa.) 155, and generally the title *FOREIGN CORPORATIONS*, vol. 13, p. 834.

5. *Kemp v. Western Union Tel. Co.*, 28 Neb. 661, 26 Am. St. Rep. 363, 30 Am. & Eng. Corp. Cas. 607. See also, for analogous subject, the title *CARRIERS OF GOODS*, vol. 5, p. 292.

6. *Allentown v. Western Union Tel. Co.*, 148 Pa. St. 117, 33 Am. St. Rep. 820; *Western Union Tel. Co. v. Philadelphia, (Pa. 1888)* 12 Atl. Rep. 144, 21 Am. & Eng. Corp. Cas. 40. See *infra*, this section, 3. *Municipal Regulation.*

7. See *Western Union Tel. Co. v. Mississippi R. Commission*, 74 Miss. 80; *Zanesville v. Zanesville Tel., etc., Co.*, 64 Ohio St. 67, 83 Am. St. Rep. 725.

**Failure to Keep Departments of Government**

**Separated** may render such a statute void. *Western Union Tel. Co. v. Austin*, (Kan. 1903) 72 Pac. Rep. 850 (executive, judicial, and legislative functions conferred). For a statute conferring legislative or executive duties on courts, see *Michigan Telephone Co. v. St. Joseph*, 121 Mich. 502, 80 Am. St. Rep. 520. Compare *Zanesville v. Zanesville Tel., etc., Co.*, 64 Ohio St. 67, 83 Am. St. Rep. 725.

8. *Munn v. Illinois*, 94 U. S. 113, affirming 69 Ill. 80.

9. **State Regulation of Charges.** — *Chesapeake, etc., Telephone Co. v. Manning*, 186 U. S. 238 (congressional regulation in District of Columbia); *Hockett v. State*, 105 Ind. 259, 55 Am. Rep. 207, 11 Am. & Eng. Corp. Cas. 577; *Central Union Telephone Co. v. Bradbury*, 106 Ind. 1; *Johnson v. State*, 113 Ind. 143, 21 Am. & Eng. Corp. Cas. 65; *Central Union Telephone Co. v. State*, 118 Ind. 194, 10 Am. St. Rep. 114, 25 Am. & Eng. Corp. Cas. 481; *Railroad Com'rs v. Western Union Tel. Co.*, 113 N. Car. 213 (regulation of local telegraph rates). See also *St. Louis v. Bell Telephone Co.*, 96 Mo. 623, 9 Am. St. Rep. 370, 25 Am. & Eng. Corp. Cas. 476; *Nebraska Telephone Co. v. State*, 55 Neb. 627; *Mayo v. Western Union Tel. Co.*, 112 N. Car. 343. See also *infra*, this section, *Municipal Regulation.*

**Power to Regulate Local Telegraph Rates** includes the power to determine the ownership or control of a particular line. *Railroad Com'rs v. Western Union Tel. Co.*, 113 N. Car. 213.

**Nebraska — Act Includes Telegraph and Telephone Lines.** — *Nebraska Telephone Co. v. Cornell*, 59 Neb. 737.

**A Violation of Rates Lawfully Established** is not excused by showing that the message was sent partly over the line of another company, a part of the defendant's line being occupied with work for a railroad company; for the telegraph company cannot prefer one customer

The Fact that Telephone Lines Are Operated under Patents granted by the general government in no way affects the power of the state in this regard.<sup>1</sup>

The Company Cannot, by Indirection, Evade the statute fixing or regulating its charges.<sup>2</sup>

As to Interstate Messages, the state is without power to regulate charges. Such messages are interstate commerce, and the charges therefor are subject to regulation by Congress alone.<sup>3</sup>

The Rate Fixed by Law Must Not Be Unreasonable. — If it appears that the maximum rate allowed is less than the actual cost of service, the regulation is unconstitutional as denying to the company the equal protection of the law.<sup>4</sup>

**3. Municipal Regulation.** — When the municipality has been vested with authority to regulate and control the use of its streets by telegraph or telephone companies, it may make and enforce all such reasonable regulations as will tend to protect the public in the free enjoyment of the streets.<sup>5</sup> It may prescribe the exact location of the poles,<sup>6</sup> may require that they shall be of such size and character as not to endanger persons using the streets, and that they shall not be unsightly.<sup>7</sup> Where conditions are such as reasonably to warrant their removal entirely, the city may compel the company to dispense with their use and to place its wires underground.<sup>8</sup> But power to regulate the 'mode of use' of streets by such companies does not empower a municipality to regulate the rentals or charges to the company's patrons;<sup>9</sup> nor does it authorize the municipal authorities to impose unreasonable restrictions or conditions as to the manner in which streets shall be used.<sup>10</sup>

The Municipality Cannot Regulate the Charges of telegraph or telephone companies in the absence of express legislative authority. Such a power is not embraced within the general police powers of a city.<sup>11</sup>

to another. *Leavell v. Western Union Tel. Co.*, 116 N. Car. 211, 47 Am. St. Rep. 798.

1. *Hockett v. State*, 105 Ind. 250, 55 Am. Rep. 201. See also PATENTS, vol. 22, p. 446.

2. **Evasion of Rates.** — *Johnson v. State*, 113 Ind. 143 (telephone company dividing charge into two portions; rental of instrument and charge for use by nonsubscribers); *Central Union Telephone Co. v. State*, 118 Ind. 194, 598, 10 Am. St. Rep. 114 (charge for certain sum for each conversation); *Hockett v. State*, 105 Ind. 259, 55 Am. Rep. 209 (separate charges for use of the various parts of instrument). But see *Chesapeake, etc., Telephone Co. v. Manning*, 186 U. S. 238, holding a law fixing a maximum rate for a "telephone on a separate wire" not violated by additional charges for equipments, such as auxiliary bells, etc.

3. See the title INTERSTATE COMMERCE, vol. 17, pp. 89, 91.

4. **Unreasonable Rate.** — *Western Union Tel. Co. v. Wyatt*, 98 Fed. Rep. 335. See also *Chesapeake, etc., Telephone Co. v. Manning*, 186 U. S. 238.

5. **Municipal Regulation.** — *Western Union Tel. Co. v. Philadelphia*, 22 W. N. C. (Pa.) 39; *Cluster v. Philadelphia, etc., Tel. Co.*, 148 Pa. St. 120; *State v. Janesville St. R. Co.*, 87 Wis. 72, 41 Am. St. Rep. 23. See also the titles POLICE POWER, vol. 22, p. 928; STREETS AND SIDEWALKS, *ante*, pp. 148, 152.

**Removal of Line from Particular Streets May Be Required.** — *Michigan Telephone Co. v. Charlotte*, 93 Fed. Rep. 111.

**Power to "Regulate" Telephone and Telegraph Company's Use of Streets.** — *Com. v. Warwick*, 185 Pa. St. 623.

6. **Location of Poles.** — *Auerbach v. Cuyahoga Telephone Co.*, 9 Ohio Dec. 389, 7 Ohio N. P. 633.

7. **Size and Character and Appearance of Poles.** — *Forsythe v. Baltimore, etc., Tel. Co.*, 12 Mo. App. 494; *Hardwick v. Vermont Telephone, etc., Co.*, 70 Vt. 180, *construing Stat. Vt.*, § 4229.

8. **May Require Wires to Be Placed in Conduits under Ground.** — *United States.* — *People v. Squire*, 145 U. S. 175, *affirming* 107 N. Y. 593, 1 Am. St. Rep. 894; *Mutual Union Tel. Co. v. Chicago*, 16 Fed. Rep. 309.

*Maryland.* — *Baltimore v. Chesapeake, etc., Telephone Co.*, 92 Md. 692.

*New York.* — *American Rapid Tel. Co. v. Hess*, 125 N. Y. 641, 21 Am. St. Rep. 764, 29 Am. & Eng. Corp. Cas. 526, *affirming* 58 Hun (N. Y.) 610.

*Ohio.* — *Auerbach v. Cuyahoga Telephone Co.*, 9 Ohio Dec. 389, 7 Ohio N. P. 633.

See also the titles INTERSTATE COMMERCE, vol. 17, p. 34; POLICE POWER, vol. 22 p. 928; STREETS AND SIDEWALKS, *ante*, p. 152.

**May Require Use of City Conduits.** — *Geneva v. Geneva Telephone Co.*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 336.

9. **Regulating "Mode of Use."** — *St. Louis & Bell Telephone Co.*, 96 Mo. 623, 9 Am. St. Rep. 370, 25 Am. & Eng. Corp. Cas. 476.

10. **Regulation Must Be Reasonable.** — *Summit Tp. v. New York, etc., Telephone Co.*, 57 N. J. Eq. 123; *Northwestern Telephone Exch. Co. v. Minneapolis*, 81 Minn. 140; *Seaboard Tel., etc., Co. v. Kearny*, 68 N. Y. App. Div. 283. See also *American Union Tel. Co. v. Harrison*, 31 N. J. Eq. 627.

11. **Regulation of Charges Not Within General**  
Volume XXVII.

The Municipality May Provide for an Inspection of the company's lines within its limits and require it to pay, annually, a sum reasonably sufficient to cover the cost of such inspection by a municipal officer.<sup>1</sup>

**VII. DUTY TO FURNISH EQUAL FACILITIES TO ALL — 1. Telegraph Companies.** — Such companies are so far common carriers that they are under a legal obligation to serve with impartiality all who apply to them offering compliance with their reasonable regulations.<sup>2</sup> They must, except when the circumstances justify a different practice, transmit messages in the order in which they are received.<sup>3</sup> In a number of states, this latter duty is declared by statute.<sup>4</sup>

**Discrimination as to Charges.** — It is a violation of its duty as a public service corporation for a telegraph company to discriminate unjustly in the matter of charges, and in the absence of national legislation on the subject the principles of the common law or the general jurisprudence of the state are applicable and may be asserted and enforced even as to charges for interstate business.<sup>5</sup> In this class of cases, as in those involving charges by railroads and similar corporations,<sup>6</sup> it is not all discrimination that is unjust or unlawful, and the question as to whether a telegraph company has violated its duty by granting a lower rate to one patron than that exacted of another is to be determined from the facts and the general nature of the service involved.<sup>7</sup>

**2. Telephone Companies — a. IN GENERAL.** — Telephone companies, whether corporations or not, are affected with a public interest,<sup>8</sup> and are bound to serve impartially and without unjust discrimination all who apply for their service and offer compliance with their reasonable regulations.<sup>9</sup> In many of

**Police Power.** — *St. Louis v. Bell Telephone Co.*, 96 Mo. 623, 9 Am. St. Rep. 370; *State v. Sheboygan*, 111 Wis. 23.

**1. May Provide for Inspection.** — *Atlantic, etc., Tel. Co. v. Philadelphia*, 23 U. S. Sup. Ct. Rep. 817; *Allentown v. Western Union Tel. Co.*, 148 Pa. St. 117, 33 Am. St. Rep. 820; *Chester v. Western Union Tel. Co.*, 154 Pa. St. 464; *Western Union Tel. Co. v. Philadelphia*, (Pa. 1888) 12 Atl. Rep. 144, 21 Am. & Eng. Corp. Cas. 40; *Taylor v. Postal Tel., etc., Co.*, 4 Lack. Leg. (Pa.) 111; *Taylor v. Central Pennsylvania Telephone, etc., Co.*, 8 Pa. Dist. 92, 4 Lack. Leg. (Pa.) 191.

**Such Regulation May Not Discriminate Between Companies.** — See *Athens v. New York, etc., Tel. Co.*, 9 Pa. Dist. 283.

**2. Equal Facilities.** — *State v. American, etc., Commercial News Co.*, 43 N. J. L. 381; *Western Union Tel. Co. v. Call Pub. Co.*, 44 Neb. 326, 48 Am. St. Rep. 729, 58 Neb. 192. See also the title COMMON CARRIERS, vol. 6, p. 261.

**There Is No Obligation to Receive Oral Messages,** and a company may receive them from one telephone company without being bound to receive them from another. *People v. Western Union Tel. Co.*, 166 Ill. 15.

**3. Order in Which Messages Received Must Be Observed.** — *Mackay v. Western Union Tel. Co.*, 16 Neb. 223; *Reuter v. Electric Tel. Co.*, 6 El. & Bl. 341, 88 E. C. L. 341.

**4. See *infra*, this title, Statutory Penalties.** See also *Western Union Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715.

**5. Discrimination in Rates.** — *Western Union Tel. Co. v. Call Pub. Co.*, 44 Neb. 326, 48 Am. St. Rep. 729, 58 Neb. 192.

**6. See the titles CARRIERS OF GOODS, vol. 5, p. 178; INTERSTATE COMMERCE, vol. 17, p. 34.**

**7. See the subject considered at length in**

*Western Union Tel. Co. v. Call Pub. Co.*, 44 Neb. 326, 48 Am. St. Rep. 729, 58 Neb. 192. See also *U. S. v. Northern Pac. R. Co.*, 120 Fed. Rep. 546; and see *supra*, this title, II. 1. c. *To Subsidized Railroads Operating Telegraph Lines.*

**8. Telephone Companies Must Furnish Equal Facilities.** — *Nebraska Telephone Co. v. State*, 55 Neb. 627; *Central Union Telephone Co. v. Swoveland*, 14 Ind. App. 341; *Trenton, etc., Turnpike Co. v. American, etc., Commercial News Co.*, 43 N. J. L. 381.

**9. United States.** — *Missouri v. Bell Telephone Co.*, 23 Fed. Rep. 539, 8 Am. & Eng. Corp. Cas. 7; *Delaware v. Delaware, etc., Tel., etc., Co.*, 47 Fed. Rep. 640, 35 Am. & Eng. Corp. Cas. 15, affirmed 50 Fed. Rep. 677.

**Indiana.** — *Central Union Telephone Co. v. State*, 118 Ind. 194, 10 Am. St. Rep. 114, 25 Am. & Eng. Corp. Cas. 481; *Central Union Telephone Co. v. State*, 123 Ind. 113; *Central Union Telephone Co. v. Swoveland*, 14 Ind. App. 341.

**Kentucky.** — *Louisville Transfer Co. v. American Dist. Telephone Co.*, (Ky. 1881) 24 Alb. L. J. 283. See also *Owensboro Harrison Telephone Co. v. Wisdom*, (Ky. 1901) 62 S. W. Rep. 529.

**Maryland.** — *Chesapeake, etc., Telephone Co. v. Baltimore, etc., Tel. Co.*, 66 Md. 399, 59 Am. Rep. 167, 16 Am. & Eng. Corp. Cas. 221.

**Missouri.** — *State v. Bell Telephone Co.*, (Mo. 1880) 22 Alb. L. J. 363; *State v. Kinloch Telephone Co.*, 93 Mo. App. 349.

**Nebraska.** — *Nebraska Telephone Co. v. State*, 55 Neb. 627.

**New York.** — *Atlantic, etc., Tel. Co. v. Western Union Tel. Co.*, 4 Daly (N. Y.) 527.

**Pennsylvania.** — *Bell Telephone Co. v. Com.*, (Pa. 1886) 3 Atl. Rep. 825; *Central Dist., etc., Tel. Co. v. Com.*, 114 Pa. St. 592.

the states statutes exist which provide for the recognition and enforcement of these obligations, but it seems that these are merely declaratory of the common law on the subject.<sup>1</sup>

**The Company May Refuse to Furnish Facilities**, however, to one who does not offer to pay its proper charges;<sup>2</sup> but the fact that an applicant had violated a former contract with the company is no ground for its refusing his application, the company's remedy for that being an action for the breach of contract.<sup>3</sup> The company may also refuse its facilities to one who violates its reasonable regulations with regard to the use of its instruments.<sup>4</sup>

**Effect of Ownership of Patent.** — Where the owners of telephone patents grant a license for the use of the patented articles to telephone companies and insert in the license a clause restricting the use to a portion of the public only, such restriction is void as against public policy.<sup>5</sup>

**b. REMEDIES FOR BREACH OF DUTY — Mandamus the Proper Remedy.** — The duty of the company in any case being established, mandamus is the proper remedy to enforce its performance;<sup>6</sup> and in such a proceeding the owner of the patent under whom the defendant company holds is not a necessary party although the company's defense may be that its contract with the

*Rhode Island.* — *Gardner v. Providence Telephone Co.*, 23 R. I. 262, 312.

*South Carolina.* — *State v. Citizens' Telephone Co.*, 61 S. Car. 83, 85 Am. St. Rep. 870.

*Texas.* — *Lewis v. Southwestern Tel., etc., Co.*, (Tex. Civ. App. 1900) 59 S. W. Rep. 303 (sufficiency of complaint).

*Vermont.* — *Commercial Union Tel. Co. v. New England Telephone, etc., Co.*, 61 Vt. 241, 15 Am. St. Rep. 893.

**Reasonable Regulations in Contracts with Subscribers.** — A stipulation that a subscriber's telephone shall not be used for transmitting or delivering messages taken by a rival company has been held valid. *People v. Hudson River Tel. Co.*, (Supm. Ct. Spec. T.) 19 Abb. N. Cas. (N. Y.) 466. In the same case it was held (following *Louisville Transfer Co. v. American Dist. Telephone Co.*, (Ky.) 24 Alb. L. J. 283) that where the telephone company engages in a distinct business, it cannot refuse its services to a rival in such business, and a stipulation with its subscribers intended to give effect to such a policy is unreasonable and void.

A stipulation not to subscribe to a rival system is void. *State v. Citizens' Telephone Co.*, 61 S. Car. 83, 85 Am. St. Rep. 870.

**That the Company Is Engaged in Interstate Commerce** is immaterial. *Central Union Telephone Co. v. State*, 118 Ind. 194, 10 Am. St. Rep. 114.

**1. Statutes Declaring Obligation.** — *Central Union Telephone Co. v. Fehring*, 146 Ind. 189; *State v. Nebraska Telephone Co.*, 17 Neb. 126, 52 Am. Rep. 409; *State v. Citizens' Telephone Co.*, 61 S. Car. 83, 85 Am. St. Rep. 870. See also *State v. Bell Telephone Co.*, 36 Ohio St. 296, 38 Am. Rep. 584.

**2. Refusing to Pay Proper Charges.** — *Nebraska Telephone Co. v. State*, 55 Neb. 627.

But if the failure to pay is due to the company's refusal to render to plaintiff the service he is entitled to demand, it affords no ground to the company for discontinuing the service. *Owensboro Harrison Telephone Co. v. Wisdom*, 62 S. W. Rep. 529, 23 Ky. L. Rep. 97.

**Refusal to Pay for Services in Time Limited by**

**Company's Rules.** — *Rushville Coöperative Telephone Co. v. Irvin*, 27 Ind. App. 62.

**3. Breach of Former Contract.** — *State v. Nebraska Telephone Co.*, 17 Neb. 126, 52 Am. Rep. 409, 8 Am. & Eng. Corp. Cas. 1; *State v. Kinloch Telephone Co.*, 93 Mo. App. 349; *State v. Citizens Telephone Co.*, 61 S. Car. 83, 85 Am. St. Rep. 870.

**4. Applicant Violating Regulations — Transmitting Messages to Rival Companies.** — *People v. Hudson River Tel. Co.*, (Supm. Ct. Spec. T.) 19 Abb. N. Cas. (N. Y.) 466.

**Attaching Private Extension Instruments to Lines.** — *Gardner v. Providence Telephone Co.*, 23 R. I. 262, 312.

**Use of Profane Language.** — *Pugh v. Telephone Co.*, (Ohio 1883) 27 Alb. L. J. 163.

**Rule Requiring Written Notice of Interrupted Service** in order to entitle the subscriber to a fixed rebate is valid and enforceable. *Atlanta Standard Telephone Co. v. Porter*, 117 Ga. 124. See also *Malochée v. Great Southern Telephone, etc., Co.*, 49 La. Ann. 1690.

**5. See the cases collected in the title PATENTS**, vol. 22, p. 438, note 1.

When the owner of a patent applies his property to a public employment, the employment itself is subject to the rules prescribed by law for its government, without reference to the means or instruments by which it is conducted. *Delaware, etc., Tel., etc., Co. v. Delaware*, 50 Fed. Rep. 677.

**6. Mandamus.** — See generally the title **MANDAMUS**, vol. 19, p. 877. Also the following cases:

*Kentucky.* — See *Owensboro Harrison Telephone Co. v. Wisdom*, 62 S. W. Rep. 529, 23 Ky. L. Rep. 97 (mandatory injunction).

*Michigan.* — *Mahan v. Michigan Telephone Co.*, (Mich. 1903) 93 N. W. Rep. 629.

*Missouri.* — *State v. Kinloch Telephone Co.*, 93 Mo. App. 349.

*New York.* — See *People v. Central New York Telephone, etc., Co.*, 41 N. Y. App. Div. 17, holding that the remedy by mandamus is superseded by statute.

*South Carolina.* — *State v. Citizens Telephone Co.*, 61 S. Car. 83, 85 Am. St. Rep. 870.

parent company, the owner of the patent, forbids it to furnish the particular service in dispute.<sup>1</sup>

An Injunction is the remedy where the complainant is already supplied with facilities and the company is threatening to deprive him of them.<sup>2</sup>

Action for Damages for Wrongful Discontinuance of Service. — If the service is wrongfully discontinued, the subscriber is entitled to recover such damages as were the direct result of the wrong.<sup>3</sup> The measure of damages in such a case, where there is no wilful wrong and the discontinuance is due to an honest mistake on the company's part, and no special damages are shown, is the price of the service during the time it was discontinued, calculated on the basis of the regular monthly charge.<sup>4</sup> Special damages are also recoverable when proven.<sup>5</sup>

**VIII. TRANSMISSION AND DELIVERY OF MESSAGES — 1. General Nature of Liability — a. TELEGRAPH COMPANIES.** — Telegraph companies have been held to be common carriers in all respects, and therefore to be insurers of the correctness of messages offered for transmission.<sup>6</sup> This view, however, is now universally abandoned, and it is established that telegraph companies are not insurers of the correctness of messages transmitted nor of their safe and correct delivery; their liability is limited to losses caused by their negligence or wilful default.<sup>7</sup>

**1. Owner of Patent Not a Necessary Party.** — *Bell Telephone Co. v. Com.*, (Pa. 1886) 3 Atl. Rep. 825. Compare *Commercial Union Tel. Co. v. New England Telephone, etc., Co.*, 61 Vt. 241, 15 Am. St. Rep. 893. See also *Missouri v. Bell Telephone Co.*, 23 Fed. Rep. 539, 8 Am. & Eng. Corp. Cas. 7 (court equally divided).

**2. Injunction.** — *Louisville Transfer Co. v. American Dist. Telephone Co.*, (Ky.) 24 Alb. L. J. 283. See also *Central Dist., etc., Tel. Co. v. Com.*, 114 Pa. St. 592.

**Sale of Company Pending Suit.** — Where, pending the injunction suit, the telephone company sold and transferred its property and rights to another, the suit cannot be continued against the purchaser merely as its successor. *Sterne v. Metropolitan Telephone, etc., Co.*, 33 N. Y. App. Div. 169.

**3. Right to Written Notice Before Discontinuance of Service May Be Waived Orally.** — *Malochee v. Great Southern Telephone, etc., Co.*, 49 La. Ann. 1690.

**4. Measure of Damages.** — *Cumberland Telephone, etc., Co. v. Hendon*, 71 S. W. Rep. 435, 24 Ky. L. Rep. 1271.

**5. Owensboro Harrison Telephone Co. v. Wisdom**, 62 S. W. Rep. 529, 23 Ky. L. Rep. 97 (loss of profits to messenger service company).

**6. Telegraph Companies Considered Insurers.** — *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589. The rule established in this case has been changed by statute. *Western Union Tel. Co. v. Cook*, (C. C. A.) 61 Fed. Rep. 624; *Civ. Code Cal.*, §§ 2162, 2168. See for dicta in accord with the *California* case above, *MacAndrew v. Electric Tel. Co.*, 17 C. B. 3, 84 E. C. L. 3; *Bell v. Dominion Tel. Co.*, 25 L. C. Jur. 248; *Western Union Tel. Co. v. Meek*, 49 Ind. 53; *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Bryant v. American Tel. Co.*, 1 Daly (N. Y.) 575.

**Must Transmit "Correctly at All Events."** — In *Western Union Tel. Co. v. Cohen*, 73 Ga. 522, it was held that where a telegraph company receives a message for transmission "it

must be transmitted correctly at all events." Atmospheric disturbances may excuse delay in transmission, but not errors. See, however, *Coit v. Western Union Tel. Co.*, 130 Cal. 657, 80 Am. St. Rep. 153.

**7. View that Such Companies Are Not Insurers — United States.** — *Abraham v. Western Union Tel. Co.*, 23 Fed. Rep. 315, 11 Sawy. (U. S.) 28, 8 Am. & Eng. Corp. Cas. 130; *Southern Express Co. v. Caldwell*, 21 Wall. (U. S.) 269; *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181.

*Arkansas.* — *Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79, 8 Am. & Eng. Corp. Cas. 102.

*California.* — *Hart v. Western Union Tel. Co.*, 66 Cal. 579, 56 Am. Rep. 119, 8 Am. & Eng. Corp. Cas. 24. See also *Coit v. Western Union Tel. Co.*, 130 Cal. 657, 80 Am. St. Rep. 153.

*Colorado.* — *Postal Tel. Cable Co. v. Barwise*, 11 Colo. App. 328.

*Florida.* — *Western Union Tel. Co. v. Hyer*, 22 Fla. 637, 1 Am. St. Rep. 222, 16 Am. & Eng. Corp. Cas. 232.

*Georgia.* — See *Western Union Tel. Co. v. Davis*, 95 Ga. 522.

*Illinois.* — *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38.

*Indiana.* — *Central Union Telephone Co. v. Bradbury*, 106 Ind. 1.

*Iowa.* — *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa 458, 1 Am. Rep. 285; *Aiken v. Western Union Tel. Co.*, 69 Iowa 31, 58 Am. Rep. 210, 13 Am. & Eng. Corp. Cas. 585.

*Kentucky.* — *Camp v. Western Union Tel. Co.*, 1 Met. (Ky.) 164, 71 Am. Dec. 461.

*Maine.* — *Bartlett v. Western Union Tel. Co.*, 62 Me. 209; 16 Am. Rep. 437; *Fowler v. Western Union Tel. Co.*, 80 Me. 381, 6 Am. St. Rep. 211.

*Maryland.* — *Birney v. New York, etc., Printing Tel. Co.*, 18 Md. 341, 81 Am. Dec. 507.

*Massachusetts.* — *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485.

*Michigan.* — *Western Union Tel. Co. v. Carew*, 15 Mich. 525.

**Are Not Ordinary Bailees for Hire.** — The proposition has been advanced that telegraph companies are ordinary bailees for hire, and therefore governed by the rules which control the duties and liabilities of such bailees. But the public nature of such companies, whose duties and liabilities do not arise wholly out of the contract of employment, renders the proposition untenable.<sup>1</sup>

**b. TELEPHONE COMPANIES.** — A telephone company does not ordinarily undertake to deliver messages; but where the agents of the company have apparent authority to receive messages for delivery, and they undertake delivery, the company is liable in damages for their negligence in performing the undertaking, and in determining whether they have apparent authority, their general practice, as well as the nature of the service, is to be considered.<sup>3</sup>

**Messenger for Person Wanted at Telephone.** — By the construction of an *Indiana* statute, it has been held to be the duty of telephone companies in that state to notify a person living within a reasonable distance of the receiving station that he is wanted at the telephone.<sup>3</sup>

**Furnishing Connections.** — A long-distance telephone company holding itself out as furnishing connections with a distant point is liable for damages resulting from a failure to secure connection by reason of the negligence of its agent at an intermediate point at which its own line ends.<sup>4</sup>

**2. Telegraph Company's Duty — a. FROM WHAT SOURCE IT ARISES.** — The duty and obligations of a telegraph company do not arise entirely out of the contract of sending. The company is a *quasi*-public institution enjoying unusual grants and privileges from the state and federal governments, and cannot claim that the standard of its duty and liability is the same as that of a private individual. The contract of sending gives force and effect to the duties which the law imposes upon such companies, but it does not, alone, fix the measure of the company's duty.<sup>5</sup>

*Missouri.* — *Wann v. Western Union Tel. Co.*, 37 Mo. 472, 90 Am. Dec. 395.

*New York.* — *Leonard v. New York, etc., Electro Magnetic Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *De Rutte v. New York, etc., Electric Magnetic Tel. Co.*, 1 Daly (N. Y.) 547, 30 How. Pr. (N. Y.) 403; *Schwartz v. Atlantic, etc., Tel. Co.*, 18 Hun (N. Y.) 157. And see *Baldwin v. U. S. Telegraph Co.*, 45 N. Y. 744, 6 Am. Rep. 165.

*Ohio.* — *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 310, 41 Am. Rep. 500.

*Pennsylvania.* — *New York, etc., Printing Tel. Co. v. Dryburg*, 35 Pa. St. 298, 78 Am. Dec. 338; *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 238.

*South Carolina.* — *Aiken v. Western Union Tel. Co.*, 5 S. Car. 358; *Pinckney v. Western Union Tel. Co.*, 19 S. Car. 71, 45 Am. Rep. 765.

*Texas.* — *Western Union Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *Western Union Tel. Co. v. Edsall*, 63 Tex. 668, 8 Am. & Eng. Corp. Cas. 70; *Western Union Tel. Co. v. Hays*, (Tex. Civ. App. 1901) 63 S. W. Rep. 171; *Western Union Tel. Co. v. Wofford*, 94 Tex. 345, reversing (Tex. Civ. App. 1900) 58 S. W. Rep. 627; *Western Union Tel. Co. v. Stiles*, (Tex. Civ. App. 1896) 35 S. W. Rep. 76; *Hargrave v. Western Union Tel. Co.*, (Tex. Civ. App. 1901) 60 S. W. Rep. 687. Compare *Western Union Tel. Co. v. Odom*, 21 Tex. Civ. App. 537.

*Virginia.* — *Washington, etc., Tel. Co. v. Hobson*, 15 Gratt. (Va.) 122.

*Wisconsin.* — *Hibbard v. Western Union Tel. Co.*, 33 Wis. 565, 14 Am. Rep. 775; *Candee v. Western Union Tel. Co.*, 34 Wis. 471, 17 Am.

Rep. 452. See also *Fisher v. Western Union Tel. Co.*, (Wis. 1903) 96 N. W. Rep. 545; *Summerfield v. Western Union Tel. Co.*, 87 Wis. 1, 41 Am. St. Rep. 17.

*Canada.* — *Baxter v. Dominion Tel. Co.*, 37 U. C. Q. B. 470.

In *Tennessee*, while telegraph companies are not liable as insurers, "their obligations are more exacting than those of a private individual." Considerations of public policy demand that they shall be held responsible for a very high degree of diligence. *Marr v. Western Union Tel. Co.*, 85 Tenn. 538; *Jones v. Western Union Tel. Co.*, 101 Tenn. 443.

**Character of Message Does Not Affect Degree of Care Required.** — *Hargrave v. Western Union Tel. Co.*, (Tex. Civ. App. 1901) 60 S. W. Rep. 687.

**1. Not Bailees Merely.** — *Gillis v. Western Union Tel. Co.*, 61 Vt. 461, 15 Am. St. Rep. 917, 25 Am. & Eng. Corp. Cas. 570. See also *Western Union Tel. Co. v. Fontaine*, 58 Ga. 433; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; *Birmey v. New York, etc., Printing Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607; *Smithson v. U. S. Telegraph Co.*, 29 Md. 162; *Pinckney v. Western Union Tel. Co.*, 19 S. Car. 71, 45 Am. Rep. 765.

**2. Telephone Companies.** — *Cumberland Telephone Co. v. Brown*, 104 Tenn. 56, 78 Am. St. Rep. 906; *Southwestern Tel., etc., Co. v. Dale*, (Tex. Civ. App. 1894) 27 S. W. Rep. 1059.

**3. Central Union Telephone Co. v. Swoveland**, 14 Ind. App. 341.

**4. Southwestern Tel., etc., Co. v. Taylor**, 26 Tex. Civ. App. 79.

**5. Foundation of Duty.** — *Smith v. Western*



**b. TO ACCEPT FOR TRANSMISSION.** — The duty of the company is to accept for transmission all proper messages tendered by persons who comply or offer to comply with its reasonable rules and regulations.<sup>1</sup>

If the Company's Lines Are Down, or for any other reason it cannot transmit the message, it may decline to accept it, but if it accepts the message, knowing the condition of its lines and without informing the sender, it is responsible for a failure to transmit, even though the transmission was impossible.<sup>2</sup>

**Delivery to the Company for Transmission.** — No duty or liability on the part of the company with respect to a message arises until it has been properly tendered at the company's office for transmission. It must be in writing and in conformity with the reasonable rules and regulations of the company.<sup>3</sup> Merely to tell the operator to send a certain message, without more, is no such tender.<sup>4</sup> But the fact that the message was not on one of the company's regular blanks, nor in writing at all, but was merely telephoned to the operator, will not affect the company's liability where the negligence complained of is a failure to deliver after transmission.<sup>5</sup>

**Delivery of a Message to the Company's Messenger Boy** under an express stipulation that in so receiving messages he shall be deemed the sender's agent is no delivery to the company unless the message is subsequently delivered by the messenger at the company's office.<sup>6</sup>

**c. TO TRANSMIT WITHOUT DELAY.** — Upon the receipt of a message tendered for transmission, it is the duty of the company to transmit it without delay, and a negligent failure to do so renders it liable in damages to the party thereby injured.<sup>7</sup> This does not mean, however, that there must be an immediate transmission. If causes beyond the company's control, or the arrangement of its system of offices, prevent a direct transmission, the company is not guilty of a neglect of duty in adopting a circuitous route for the message;<sup>8</sup> and if it is necessary that the message pass through a repeating office, a reasonable allowance must be made in the company's favor for the

Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126, 8 Am. & Eng. Corp. Cas. 20; Ellis v. American Tel. Co., 13 Allen (Mass.) 231; Wadsworth v. Western Union Tel. Co., 86 Tenn. 695, 6 Am. St. Rep. 864; Western Union Tel. Co. v. Reynolds, 77 Va. 173, 46 Am. Rep. 715, 5 Am. & Eng. Corp. Cas. 182.

**The Measure of Damages Recoverable**, however, is to be determined upon the theory of a breach of contract. See Western Union Tel. Co. v. Wood, (C. C. A.) 57 Fed. Rep. 471; *infra*, this title, *Measure of Damages*.

1. See *supra*, this title, VII. *Duty to Furnish Equal Facilities to All*; *infra*, this title, XIII. *Statutory Penalties*.

**A Mistake in Entering the Name of a Station in the Official Guide Book** furnished by a telegraph company to its agents is no defense in a suit for damages for refusal to receive a message for transmission to such station. Western Union Tel. Co. v. Downs, 25 Tex. Civ. App. 597.

**Mandamus to Compel Performance.** — See *supra*, this title, VII. 2. *b. Remedies for Breach of Duty*. See also *Friedinan v. Gold*, etc., Tel. Co., 32 Hun (N. Y.) 4.

**Exemplary Damages** cannot be recovered where the failure to transmit was due to an honest misapprehension of the facts. Western Union Tel. Co. v. Ferguson, 57 Ind. 495.

2. **Acceptance Creates Liability for Failure to Transmit.** — Western Union Tel. Co. v. Beige-Forbes Co., 29 Tex. Civ. App. 526,

3. See *infra*, this title, IX. 1. *Right to Make and Enforce Regulations*.

4. **Tender.** — Western Union Tel. Co. v. Dozier, 67 Miss. 288. See also *Greenberg v. Western Union Tel. Co.*, 89 Ga. 754.

**Insufficient Tender.** — Western Union Tel. Co. v. Liddell, 68 Miss. 1 (message written on a sheet of a memorandum book and given to the operator by a servant without any instruction or payment or tender of charges).

**Presumption of Delivery for Transmission** arises from the receipt of a message written on one of the company's blanks. Western Union Tel. Co. v. Russell, (Tex. Civ. App. 1895) 31 S. W. Rep. 698. But see the title **PRESUMPTIONS**, vol. 22, p. 1256.

5. Western Union Tel. Co. v. Jones, 69 Miss. 658, 30 Am. St. Rep. 579. See also *infra*, this title, IX. 1. *Right to Make and Enforce Regulations*.

6. See *Ayers v. Western Union Tel. Co.*, 65 N. Y. App. Div. 149.

7. Western Union Tel. Co. v. Cunningham, 99 Ala. 314; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209, 16 Am. Rep. 437; Western Union Tel. Co. v. Jobe, 6 Tex. Civ. App. 403.

**The Sender's Consent to a Delay** under a misapprehension induced by the company's agent creates no estoppel. Western Union Tel. Co. v. Seffel, (Tex. Civ. App. 1903) 71 S. W. Rep. 616; (Tex. Civ. App. 1901) 65 S. W. Rep. 897.

8. *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181.

delay caused by other business at that office.<sup>1</sup>

**At Small Stations** the company is not bound to keep more than one operator, and if a slight delay occurs owing to the absence of the operator at his meals, the company cannot be held guilty of a negligent delay if the message is forwarded immediately on his return to the office.<sup>2</sup> But this is true only as to offices where the business is not large enough to justify the employment of more than one operator; if the business of the station is so large as to make it clear that one operator cannot properly attend to it, the company will not be allowed to set up the inadequacy of its means of transmission as an excuse for delay.<sup>3</sup>

**Duty to Inform Sender When Delay Is Unavoidable.** — Where, from any cause, it is impossible to transmit the message, or where considerable delay will be necessary, and the operator is aware of the fact when the message is offered him, it is his duty to inform the sender, particularly when the message shows on its face the necessity or importance of its being speedily transmitted.<sup>4</sup>

**Delay as Creating Presumption of Negligence.** — A delay of ten or twelve hours in transmission, if unexplained, will create a presumption of negligence on the part of the company.<sup>5</sup>

**d. TO TRANSMIT CORRECTLY.** — A telegraph company, not being an insurer, is responsible for errors in transmission only when they are a result of its want of care.<sup>6</sup> But the mere fact of an error creates a presumption of negligence.<sup>7</sup>

**e. TO DELIVER TO ADDRESSEE** — (1) *In General.* — Subject to reasonable regulations as to delivery limits, the company is bound to make delivery of all messages sufficiently addressed, when this can be done by the exercise of reasonable diligence. It cannot escape this duty by showing that the business of its office at the receiving station is not sufficient to justify the employment of an additional agent to make delivery.<sup>8</sup>

**Duty to Notify Sender of Nondelivery.** — When the company ascertains that a delivery cannot be made, it is not, as a matter of law, bound to notify the sender of that fact; whether it was under a duty to do so depends upon whether ordinary care under all circumstances would have required such a notification.<sup>9</sup>

1. *Behm v. Western Union Tel. Co.*, 8 Biss. (U. S.) 131.

2. *Behm v. Western Union Tel. Co.*, 8 Biss. (U. S.) 131. *Compare* *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 30 Am. & Eng. Corp. Cas. 615. And see *Western Union Tel. Co. v. Georgia Cotton Co.*, 94 Ga. 444.

3. *Western Union Tel. Co. v. Scircle*, 103 Ind. 227, 10 Am. & Eng. Corp. Cas. 616. See also *Western Union Tel. Co. v. Parsons*, 72 S. W. Rep. 800, 24 Ky. L. Rep. 2008.

**When the Telegraph and Railroad Company Employ the Same Agent** at a small station, the reasonable office hours of the railroad are those of the telegraph company, and telegraph business need not be transacted at other hours. *Western Union Tel. Co. v. Georgia Cotton Co.*, 94 Ga. 444.

4. **Necessity for Delay Must Be Communicated.** — *Fleischner v. Pacific Postal Tel. Cable Co.*, 55 Fed. Rep. 738; *Western Union Tel. Co. v. Cohen*, 73 Ga. 522; *Bierhans v. Western Union Tel. Co.*, 8 Ind. App. 246; *Western Union Tel. Co. v. Harding*, 103 Ind. 505. See also *Western Union Tel. Co. v. Birge-Forbes Co.*, 29 Tex. Civ. App. 526. *Compare* *Ohio, etc., R. Co. v. Applewhite*, 52 Ind. 540; *Pittsburgh, etc., R. Co. v. Nuzum*, 50 Ind. 141, 19 Am. Rep. 703.

5. **Delay Creates Presumption of Negligence.** — *Kendall v. Western Union Tel. Co.*, 56 Mo. App. 192; *Western Union Tel. Co. v. Clark*, (Tex. Civ. App. 1894) 25 S. W. Rep. 990.

A delay of very much less time may, under peculiar circumstances, raise the presumption of negligence. See *Postal Tel. Co. v. Rhett*, (Miss. 1903) 33 So. Rep. 412, (Miss. 1904) 35 So. Rep. 829; *Western Union Tel. Co. v. Boots*, 10 Tex. Civ. App. 540.

**Evidence to Overcome Presumption.** — *Smith v. Western Union Tel. Co.*, 57 Mo. App. 259.

6. See *infra*, this title VIII. 1. *General Nature of Liability.* See also *Germain Fruit Co. v. Western Union Tel. Co.*, 137 Cal. 598.

7. See *infra*, this title, VIII. 3. b.

8. **Duty of Delivery.** — *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 30 Am. & Eng. Corp. Cas. 615. *Compare* *Behm v. Western Union Tel. Co.*, 8 Biss. (U. S.) 131.

9. **Notifying Sender of Nondelivery.** — *Western Union Tel. Co. v. Davis*, (Tex. Civ. App. 1899) 51 S. W. Rep. 258. *Compare* *Hendricks v. Western Union Tel. Co.*, 126 N. Car. 304, 78 Am. St. Rep. 658 (duty to notify agent at sending station).

**Liability for Negligent Assurance that Telegram Has Been Delivered.** — *Laudie v. Western Union*

(2) *To Whom Delivery Must Be Made.* — The message must be delivered to the addressee or to his authorized agent.<sup>1</sup> Under ordinary circumstances a delivery to the wife of the addressee is sufficient when he himself cannot be reached.<sup>2</sup> The clerk of a hotel, it has been held, has an implied authority to receive and receipt for messages addressed to the guests of the hotel, and a delivery to him of such a message will discharge the company of further responsibility in the absence of circumstances which clearly call for a different course.<sup>3</sup>

*Delivery to One Having Same Name as Addressee.* — Whether or not a delivery to a person of the same name as the addressee is sufficient to discharge the company must depend upon the accompanying circumstances, and is usually, therefore, a question for the jury. It cannot be said that such a delivery, without proof of facts justifying it, is good as a matter of law.<sup>4</sup>

*Message Directed to Addressee "Care of" Third Party.* — The better rule is that in the case of a message so directed a delivery to the person in whose care it is sent is sufficient,<sup>5</sup> and will discharge the company from further responsibility even though such person declines to receive it.<sup>6</sup> When, however, the person in whose care the message is addressed cannot be found, it is the duty of the company to make an effort to find the addressee, and it will be liable for a

Tel. Co., 126 N. Car. 431, 78 Am. St. Rep. 668.

1. *Delivery of Message.* — A delivery of a telegraph message which would be good in law as between the addressee and the company is good as between the sender and the company. *Norman v. Western Union Tel. Co.*, 31 Wash. 577.

The company is liable for loss and damage resulting from delivery in an envelope directed to "T. W. P." when the true address was "T. W. P. & Co." *Pearsall v. Western Union Tel. Co.*, 44 Hun (N. Y.) 532, affirmed 124 N. Y. 256, 21 Am. St. Rep. 662.

*The Addressee May Make the Company's Messenger His Agent* so that he cannot hold the company for the messenger's mistakes. *Norman v. Western Union Tel. Co.*, 31 Wash. 577.

*Addressee Absent—Special Contract to Deliver to Third Person Made by Company's Agent Binds Company.* — *Western Union Tel. Co. v. Evans*, 5 Tex. Civ. App. 55.

*Duty to Deliver at Absent Addressee's Residence or Place of Business.* — *Western Union Tel. Co. v. Woods*, 56 Kan. 737; *Sherrill v. Western Union Tel. Co.*, 117 N. Car. 352.

*Diligence to Make Personal Delivery Necessary.* — Even if the addressee is absent from his home and place of business the delivery must be made to him personally, if he can be found by the exercise of reasonable diligence. *Western Union Tel. Co. v. Mitchell*, 91 Tex. 454, 66 Am. St. Rep. 906; *Western Union Tel. Co. v. Moseley*, 28 Tex. Civ. App. 562; *Western Union Tel. Co. v. De Jarjes*, 8 Tex. Civ. App. 109.

As to what is reasonable diligence, see *Herron v. Western Union Tel. Co.*, 90 Iowa 129; *Western Union Tel. Co. v. Redinger*, (Tex. Civ. App. 1902) 66 S. W. Rep. 485 (where the facts were held not to show negligence).

2. *Delivery to Addressee's Wife.* — *Given v. Western Union Tel. Co.*, 24 Fed. Rep. 119, 8 Am. & Eng. Corp. Cas. 107; *Western Union Tel. Co. v. Woods*, 56 Kan. 737.

*Delivery to Wife Not For So Sufficient as Matter*

*of Law.* — *Western Union Tel. Co. v. Mitchell*, 91 Tex. 454, 66 Am. St. Rep. 906; *Western Union Tel. Co. v. Moseley*, 28 Tex. Civ. App. 562. See also the titles *AGENCY*, vol. 1, pp. 957, 958; *HUSBAND AND WIFE*, vol. 15, p. 856.

3. *Delivery to Clerk of Hotel.* — *Western Union Tel. Co. v. Trissal*, 98 Ind. 566. *Contra*, *Western Union Tel. Co. v. Cobb*, 95 Tex. 333, 93 Am. St. Rep. 862.

*Sufficient of Such Delivery Question of Fact.* — *Barefoot v. Western Union Tel. Co.*, 28 Tex. Civ. App. 457.

4. *Sherrill v. Western Union Tel. Co.*, 116 N. Car. 655. Compare the title *CARRIERS OF GOODS*, vol. 5, p. 212, note 3.

5. *Message in "Care of" Third Person.* — *Lefler v. Western Union Tel. Co.*, 131 N. Car. 355; *Western Union Tel. Co. v. Young*, 77 Tex. 245, 19 Am. St. Rep. 751, 30 Am. & Eng. Corp. Cas. 612; *Western Union Tel. Co. v. Thompson*, (Tex. Civ. App. 1895) 31 S. W. Rep. 318; *Western Union Tel. Co. v. Houghton*, 82 Tex. 562, 27 Am. St. Rep. 918; *Western Union Tel. Co. v. Elliott*, 7 Tex. Civ. App. 482.

*Such Delivery Sufficient Though No Effort Made to Find Addressee.* — *Western Union Tel. Co. v. Terrell*, 10 Tex. Civ. App. 60. Compare *Martin v. Sunset Telephone, etc., Co.*, 18 Wash. 260.

*When the Address is "Care of" a Railway Company* at a certain place, delivery to its agent there is sufficient. *Lefler v. Western Union Tel. Co.*, 131 N. Car. 355. Compare *Western Union Tel. Co. v. Newhouse*, 6 Ind. App. 422.

6. *When Person in Whose Care Addressed Refuses to Receive Message.* — *Western Union Tel. Co. v. Thompson*, (Tex. Civ. App. 1895) 31 S. W. Rep. 318. But in *Hinson v. Postal Tel. Cable Co.*, 132 N. Car. 460, it is held that where the message is sent "care of" the addressee's employer, and the latter declines to receive it, it is the duty of the company to use reasonable diligence to find the addressee himself, and, failing in that, to wire back for a better address.

failure to deliver when it appears that he was within the delivery limits and his residence is a matter of common knowledge in the locality.<sup>1</sup>

**Special Arrangements Between the Operator and the Third Party** under which delivery to certain persons, or in a peculiar way, is sufficient as to messages addressed to such third party are not operative as to messages sent to one in "care of" the latter, and the company's duty must be determined without regard to such arrangements.<sup>2</sup> But such special arrangements are binding upon both the addressee and the sender if made with either, with respect to messages between them.<sup>3</sup>

(3) *Manner of Delivery.* — The addressee is entitled to a written copy of the message and the company does not fully discharge its duty by communicating the contents of the message over the telephone.<sup>4</sup> The addressee may, however, waive this duty and accept such method of delivery,<sup>5</sup> but his waiver will apply only to messages addressed to him and not to those sent to another in his care.<sup>6</sup>

(4) *Duty to Forward Messages.* — The company is under no obligations to forward messages when the addressee has removed his residence to another locality, but it may assume this duty by contracting to forward all messages received by it for him. Such an agreement is binding on the company for a reasonable time only.<sup>7</sup> What is a reasonable time in such cases is ordinarily a question for the jury.<sup>8</sup>

**A Mere Verbal instruction to the Company's Messenger Boy**, by the addressee, to deliver messages received during certain hours, at a particular place, will not bind the company and renders the messenger the addressee's agent; to bind the company an instruction to this effect must be in writing and addressed to it.<sup>9</sup>

(5) *Time of Delivery — Delay — In General.* — The delivery must be made as

1. **Duty to Seek Addressee When Person to Whose Care Addressed Not Found.** — *Western Union Tel. Co. v. Houghton*, 82 Tex. 562, 27 Am. St. Rep. 918, 39 Am. & Eng. Corp. Cas. 577; *Western Union Tel. Co. v. Jackson*, 19 Tex. Civ. App. 273.

A delivery to the partner of the person in whose care the plaintiff is addressed, such person, as well as the addressee, being out of town, but their temporary address known to the operator, is insufficient. *Western Union Tel. Co. v. Hendricks*, 26 Tex. Civ. App. 366, 68 S. W. Rep. 720.

2. **Special Agreements.** — *Thompson v. Western Union Tel. Co.*, 10 Tex. Civ. App. 120.

Thus an arrangement by the third party with the operator that all messages to him might be telephoned to him will not relieve the company of the duty to deliver to him the written message addressed to plaintiff in his care. *Western Union Tel. Co. v. Pearce*, 95 Tex. 578, reversing (Tex. Civ. App. 1902) 67 S. W. Rep. 920, and distinguishing *Western Union Tel. Co. v. Young*, 77 Tex. 245, 19 Am. St. Rep. 751.

3. *Norman v. Western Union Tel. Co.*, 31 Wash. 577.

4. **Transmission Over Telephone.** — *Brashears v. Western Union Tel. Co.*, 45 Mo. App. 433 (error in telephoning message); *Western Union Tel. Co. v. Pearce*, 95 Tex. 578, reversing (Tex. Civ. App. 1902) 67 S. W. Rep. 920.

5. *Norman v. Western Union Tel. Co.*, 31 Wash. 577 (telegraph messenger telephoning message by request is addressee's agent).

6. *Western Union Tel. Co. v. Pearce*, 95 Tex.

578, reversing (Tex. Civ. App. 1902) 67 S. W. Rep. 920.

7. **Special Duty to Forward.** — *Thorp v. Western Union Tel. Co.*, 84 Iowa 190; *Western Union Tel. Co. v. Bierhaus*, 8 Ind. App. 563.

In *Western Union Tel. Co. v. Hendricks*, 26 Tex. Civ. App. 366, it is held that when the company has been paid the extra charge for delivery beyond the free limits and payment of any additional charges has been guaranteed, the operator at the receiving station, knowing that the message is important and that the addressee is temporarily in another city (where the company had an office), is under a duty to send it to him there, and for his failure to attempt to send it there the company is liable.

8. But the company is not liable for failing to forward a message to an absent addressee where it exercises due diligence to make personal delivery and the operator is not aware of his temporary address, although the messenger boy in charge of the message might easily have learned where the addressee was if he had inquired at any of the places where he attempted to make delivery. *Western Union Tel. Co. v. Redinger*, (Tex. Civ. App. 1901) 63 S. W. Rep. 156.

**Reply Message.** — The company may assume the duty of delivering such a message at a place other than that directed therein; whether it has done so is a question of fact. *Harper v. Western Union Tel. Co.*, 92 Mo. App. 304.

**Additional Charges Must Be Paid** or provided for. *Abbott v. Western Union Tel. Co.*, 86 Minn. 44.

9. *Givin v. Western Union Tel. Co.*, 24 Fed. Rep. 119, 8 Am. & Eng. Corp. Cas. 107.

soon after transmission as is reasonably practicable;<sup>1</sup> the duty of early delivery is as imperative as that of prompt transmission.<sup>2</sup> A peculiar duty with respect to the time of delivery arises when there are two messages, both relating to the same subject, sent at different times not far apart, and a delivery of the later one first will mislead the addressee.<sup>3</sup>

(6) *Free Delivery Limits.* — The company may, by regulation, fix for each station limits beyond which it shall not be bound to make free delivery of messages.<sup>4</sup> The reasonableness of any particular limit must depend upon circumstances, the size of the town or city being the chief element to be considered.<sup>5</sup> In some jurisdictions the limits are fixed by statute.<sup>6</sup> The company may also require that for a delivery beyond the free delivery limits a special charge must be paid, and that, in the absence of such payment, it will be under no obligation to make the delivery.<sup>7</sup> Of the existence of such a rule it should promptly inform the sender, when the addressee lives beyond such limits, and its failure to do so is evidence of negligence.<sup>8</sup>

When the Addressee Resides Several Miles from the Receiving Office the company is under no duty to deliver to him there in the absence of a special contract to do so and the payment of the necessary charges.<sup>9</sup> But the mere fact that the addressee's home is far from the office does not excuse the company from its duty to exercise reasonable diligence to deliver to him within the free delivery limits.<sup>10</sup>

1. *Duty to Deliver Without Delay.* — *Harkness v. Western Union Tel. Co.*, 73 Iowa 190, 5 Am. St. Rep. 672; *Bliss v. Baltimore, etc., Tel. Co.*, 30 Mo. App. 103; *Cannon v. Western Union Tel. Co.*, 100 N. Car. 300, 6 Am. St. Rep. 590, 21 Am. & Eng. Corp. Cas. 124.

A dispatch delivered in its regular order within half an hour of the time it was received at its destination is seasonably delivered. *Julian v. Western Union Tel. Co.*, 98 Ind. 327.

Although the operator promised the addressee to deliver his message "at once," the company is still bound only to ordinary diligence. *Western Union Tel. Co. v. De Jarles*, 8 Tex. Civ. App. 109.

2. *Western Union Tel. Co. v. Gougar*, 84 Ind. 176; *Western Union Tel. Co. v. Pallotta*, 81 Miss. 216.

3. *Western Union Tel. Co. v. Virginia Paper Co.*, 87 Va. 418.

*Time Required for Copying and Addressing the Message* and for numbering it, etc., is to be considered in determining the diligence exercised. *Western Union Tel. Co. v. McConico*, 27 Tex. Civ. App. 610. See also *Davis v. Western Union Tel. Co.*, 66 S. W. Rep. 17, 23 Ky. L. Rep. 1758.

4. *Limits of Free Delivery.* — *Western Union Tel. Co. v. Ward*, 23 Ind. 377, 85 Am. Dec. 462; *Western Union Tel. Co. v. Redinger*, 22 Tex. Civ. App. 362.

5. *Reynolds v. Western Union Tel. Co.*, 81 Mo. App. 223.

A regulation fixing the free delivery limits at one-half mile from the office, in a town of five thousand inhabitants, is not unreasonable. *Western Union Tel. Co. v. Trotter*, 55 Ill. App. 659.

6. *Statutes.* — See *Reese v. Western Union Tel. Co.*, 123 Ind. 294; *Western Union Tel. Co. v. Moore*, 12 Ind. App. 136, 54 Am. St. Rep. 515.

7. *Whittemore v. Western Union Tel. Co.*, 71 Fed. Rep. 651; *Western Union Tel. Co. v.*

*Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 30 Am. & Eng. Corp. Cas. 615; *Western Union Tel. Co. v. Mathews*, 107 Ky. 663; *Roche v. Western Union Tel. Co.*, 70 S. W. Rep. 39, 24 Ky. L. Rep. 845; *Western Union Tel. Co. v. Cross*, (Ky. 1903) 74 S. W. Rep. 1098; *Anderson v. Western Union Tel. Co.*, 84 Tex. 17.

*Agent May Waive Prepayment by Sender.* — *Roche v. Western Union Tel. Co.*, 70 S. W. Rep. 39, 24 Ky. L. Rep. 845; *Western Union Tel. Co. v. O'Keefe*, (Tex. Civ. App. 1895) 29 S. W. Rep. 1137.

*A More Guaranty by the Sender*, accepted by the agent at the sending station, binds the company to make delivery without prepayment. *Western Union Tel. Co. v. Warren*, (Tex. Civ. App. 1896) 36 S. W. Rep. 314; *Western Union Tel. Co. v. Drake*, 13 Tex. Civ. App. 572. Compare *Hargrave v. Western Union Tel. Co.*, (Tex. Civ. App. 1901) 60 S. W. Rep. 687.

*Whether Guaranty Must Be Written on Message.* — *Reynolds v. Western Union Tel. Co.*, 81 Mo. App. 223 (meaning of "gtd." on telegram and evidence explanatory thereof is for jury).

8. *Hendricks v. Western Union Tel. Co.*, 126 N. Car. 304, 78 Am. St. Rep. 658; *Bright v. Western Union Tel. Co.*, 132 N. Car. 317; *Bryan v. Western Union Tel. Co.*, 133 N. Car. 603.

9. *Western Tel. Co. v. Mathews*, 107 Ky. 663; *Western Union Tel. Co. v. Swearingen*, 95 Tex. 420, reversing (Tex. Civ. App. 1901) 65 S. W. Rep. 1080; *Western Union Tel. Co. v. Taylor*, 3 Tex. Civ. App. 310.

*Company Liable on Special Agreement to Deliver.* — *Western Union Tel. Co. v. Matthews*, 67 S. W. Rep. 849, 24 Ky. L. Rep. 3 (addressee residing four miles from office).

10. *Rosser v. Western Union Tel. Co.*, 130 N. Car. 251; *Western Union Tel. Co. v. Davis*, 30 Tex. Civ. App. 590.

When the agent at the receiving station notifies the addressee by mail and also asks the extra charges to be guaranteed by the sender,

The Company May Waive Its Requirement of an Extra Charge for delivery beyond the free limits, and when it appears that, without demanding the charge, it specially undertook to deliver, it will be liable for a nondelivery even though the addressee lived beyond the free delivery limits.<sup>1</sup> A waiver of the rule as to nondelivery beyond such limits will, it seems, be presumed from a long continued failure to enforce it.<sup>2</sup>

A Custom or Regulation of the Company under which the operator at the destination must notify the sending office of any necessary special charges in order that the sender may pay or guarantee them, may be shown in evidence as a part of the contract of sending.<sup>3</sup> So also, when prepayment of the extra charge for delivery beyond the free limits is not required, but the custom is to collect such charge from the addressee, the failure to prepay such charges will constitute no defense to the company.<sup>4</sup>

The Regulation Requiring Prepayment of Special Charges will be strictly construed against the company.<sup>5</sup>

No Delivery Limits Fixed. — In the absence of proof as to free delivery limits it will be assumed that the company undertook to make free delivery to all persons living within a reasonable distance of such office; what is a reasonable distance, in such a case, is ordinarily a question for the jury under all the circumstances proven.<sup>6</sup>

(7) *What Constitutes Due Diligence.* — What constitutes due diligence in the effort to make prompt delivery of messages is a question to be determined from all the facts and circumstances in each case, and is usually for the jury.<sup>7</sup>

f. MESSAGE TO PASSENGER "CARE OF" CARRIER. — A common carrier, as such, owes no duty to a passenger to receive and deliver telegrams directed to him, and in the absence of evidence showing an undertaking or custom on its part to that effect, or that it knew or permitted its agents or servants to do so, it is not liable for a failure on the part of one of its agents to deliver to a passenger a telegram directed to the passenger in the care of the carrier and accepted by the agent for delivery.<sup>8</sup>

3. Negligence of Company — a. IN GENERAL. — Any failure on the part of the company to exercise ordinary care to effect a prompt and correct transmission and a prompt delivery to the proper party constitutes negligence. What is ordinary care is to be determined from the character of the company's duty in the premises,<sup>9</sup> and from all the facts and circumstances in evidence.

the agent is not liable for refusing to give the message to a neighbor who offers to deliver it without charge. *Western Union Tel. Co. v. Swearing*, 95 Tex. 420, *reversing* (Tex. Civ. App. 1901) 65 S. W. Rep. 1080.

1. *Waiver of Extra Charges.* — *Whittemore v. Western Union Tel. Co.*, 71 Fed. Rep. 651; *Western Union Tel. Co. v. Matthews*, 67 S. W. Rep. 849, 24 Ky. L. Rep. 3; *Western Union Tel. Co. v. Robinson*, 97 Tenn. 638; *Western Union Tel. Co. v. Teague*, 8 Tex. Civ. App. 444; *Western Union Tel. Co. v. Hargrove*, 14 Tex. Civ. App. 79; *Western Union Tel. Co. v. Sweetman*, 19 Tex. Civ. App. 435; *Western Union Tel. Co. v. Davis*, 30 Tex. Civ. App. 590.

In *Western Union Tel. Co. v. Womack*, 9 Tex. Civ. App. 607, it appeared that the agent had for years been in the habit of sending messages to persons beyond the free limits by volunteers, without charge, and undertook to do so in plaintiff's case. It was held that the company was liable for a failure to deliver, notwithstanding the stipulation exempting it from liability in such a case.

2. *Western Union Tel. Co. v. Robinson*, 97 Tenn. 638; *Western Union Tel. Co. v. Cain*,

(Tex. Civ. App. 1897) 40 S. W. Rep. 624. See also *Western Union Tel. Co. v. Davis*, 24 Tex. Civ. App. 427.

3. *Evans v. Western Union Tel. Co.*, (Tex. Civ. App. 1900) 56 S. W. Rep. 609.

4. *Western Union Tel. Co. v. Pierce*, (Tex. Civ. App. 1902) 70 S. W. Rep. 360, *reversing* 67 S. W. Rep. 920.

5. *Western Union Tel. Co. v. Moore*, 12 Ind. App. 136, 54 Am. St. Rep. 515.

6. *Delivery to All within Reasonable Distance.* — *Western Union Tel. Co. v. Russell*, (Tex. Civ. App. 1895) 31 S. W. Rep. 698.

7. *Due Diligence.* — See *Ross v. Western Union Tel. Co.*, (C. C. A.) 81 Fed. Rep. 676; *Henderson v. Western Union Tel. Co.*, 106 Iowa 529, 68 Am. St. Rep. 313; *Western Union Tel. Co. v. Burgess*, (Tex. Civ. App. 1897) 43 S. W. Rep. 1033. And also the cases in the notes to the paragraphs preceding.

8. *No Duty of Carrier to Deliver Telegrams.* — *Davies v. Eastern Steamboat Co.*, 94 Me. 379, where the telegram was delivered to the captain of a steamboat.

9. See *infra*, this title, *Transmission and Delivery of Messages.*

A distinction is made between "gross" negligence and "ordinary" negligence in the law governing the liability of telegraph companies in determining the extent to which stipulations in the contract of sending will relieve the company from liability.<sup>1</sup>

6. **PRESUMPTION OF NEGLIGENCE — BURDEN OF PROOF.** — Here, as elsewhere, the plaintiff must make out a *prima facie* case of negligence,<sup>2</sup> and this duty is discharged when facts are shown which raise a presumption of negligence.<sup>3</sup> That certain facts raise a presumption of negligence as against telegraph companies, in apparent exception to the general rule that the fact of injury merely is no evidence of negligence,<sup>4</sup> has been placed on the ground that such companies are engaged in a public employment which requires a high degree of technical skill and the causes of mistakes and errors are peculiarly within their knowledge.<sup>5</sup>

**Proof of an Unreasonable Delay in Delivery** or of a failure to deliver creates a presumption of negligence on the part of the company and casts upon it the burden of showing exculpatory facts or circumstances.<sup>6</sup>

**Proof of an Error in Transmission** that is material likewise creates a presumption that it was due to the company's negligence and will justify a recovery in the absence of proof by the company excusing the error.<sup>7</sup>

**When Gross Negligence, Misconduct, or Fraud** is necessary in order to render the

1. See *infra*, this title, *Stipulations in Contract of Sending*. See also *Coit v. Western Union Tel. Co.*, 130 Cal. 657, 80 Am. St. Rep. 153. As to this distinction generally, see the titles *BAILEMENTS*, vol. 3, p. 742; *NEGLIGENCE*, vol. 21, p. 459 *et seq.*

2. See the titles *BURDEN OF PROOF*, vol. 5, p. 38; *NEGLIGENCE*, vol. 21, p. 515.

3. See the titles *BURDEN OF PROOF*, vol. 5, p. 40; *NEGLIGENCE*, vol. 21, p. 515.

4. See the titles *CONTRIBUTORY NEGLIGENCE*, vol. 7, p. 453 *et seq.*; *NEGLIGENCE*, vol. 21, p. 510 *et seq.*

5. See for instance *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 313, 41 Am. Rep. 500. And see generally the title *BURDEN OF PROOF*, vol. 5, p. 41.

6. **Failure to Deliver or Unreasonable Delay — Arkansas.** — *Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79, 8 Am. & Eng. Corp. Cas. 102.

**Indiana.** — *Western Union Tel. Co. v. Scircle*, 103 Ind. 227, 10 Am. & Eng. Corp. Cas. 610; *Western Union Tel. Co. v. Ward*, 23 Ind. 377, 85 Am. Dec. 462.

**Iowa.** — *Harkness v. Western Union Tel. Co.*, 73 Iowa 190, 5 Am. St. Rep. 672, 21 Am. & Eng. Corp. Cas. 182.

**Kansas.** — *Western Union Tel. Co. v. Crall*, 38 Kan. 679, 5 Am. St. Rep. 795.

**Kentucky.** — *Western Union Tel. Co. v. McIlvoy*, 107 Ky. 633; *Western Union Tel. Co. v. Fisher*, 107 Ky. 513.

**Maine.** — *Bartlett v. Western Union Tel. Co.*, 62 Me. 209, 16 Am. Rep. 447; *Fowler v. Western Union Tel. Co.*, 80 Me. 381, 6 Am. St. Rep. 216.

**Maryland.** — See *U. S. Telegraph Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519.

**North Carolina.** — *Sherrill v. Western Union Tel. Co.*, 116 N. Car. 655, 117 N. Car. 352; *Rosser v. Western Union Tel. Co.*, 130 N. Car. 251. Compare *Thompson v. Western Union Tel. Co.*, 106 N. Car. 549, 30 Am. & Eng. Corp. Cas. 634.

**Pennsylvania.** — *U. S. Telegraph Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 751.

**Texas.** — *Western Union Tel. Co. v. Smith*, (Tex. Civ. App. 1898) 46 S. W. Rep. 659, 88 Tex. 9; *Western Union Tel. Co. v. Carter*, 2 Tex. Civ. App. 624; *Western Union Tel. Co. v. Bouchell*, 28 Tex. Civ. App. 23; *Western Union Tel. Co. v. Boots*, 10 Tex. Civ. App. 540; *Western Union Tel. Co. v. Clark*, (Tex. Civ. App. 1894) 25 S. W. Rep. 990. Compare *Western Union Tel. Co. v. Bennett*, 1 Tex. Civ. App. 558, holding that where the action is for special damages, as opposed to general damages, the burden is on the plaintiff to show negligence causing such damages. And see the next note but one, *infra*.

7. **Error in Transmission — Arkansas.** — *Western Union Tel. Co. v. Short*, 53 Ark. 434.

**Illinois.** — *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38.

**Indiana.** — See *Western Union Tel. Co. v. Meek*, 49 Ind. 53.

**Iowa.** — *Turner v. Hawkeye Tel. Co.*, 41 Iowa 458, 20 Am. Rep. 605.

**Louisiana.** — *La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383.

**Maine.** — *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 1 Am. St. Rep. 353.

**Mississippi.** — *Western Union Tel. Co. v. Goodbar*, (Miss. 1890) 7 So. Rep. 214.

**Missouri.** — *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 58 Am. St. Rep. 609; *Lee v. Western Union Tel. Co.*, 51 Mo. App. 375.

**New York.** — *Rittenhouse v. Independent Line of Tel.*, 44 N. Y. 263, 4 Am. Rep. 673; *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256, 21 Am. St. Rep. 662, *affirming* 44 Hun (N. Y.) 532, *criticising* *Breece v. U. S. Telegraph Co.*, 48 N. Y. 132, 8 Am. Rep. 526.

**Ohio.** — *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 303, 41 Am. Rep. 500.

**Pennsylvania.** — *New York, etc., Printing Tel. Co. v. Dryburg*, 35 Pa. St. 298, 78 Am. Dec. 338.

**Texas.** — *Western Union Tel. Co. v. Harper*,

company liable, owing to the stipulations in the contract of sending, it has been held that mere proof of an error in transmission or of a delay in delivery is not enough to shift the burden upon the company.<sup>1</sup>

**The Presumption Thus Arising Is Not Conclusive**, and where the evidence, when considered in a light most favorable to the company, would warrant a finding in its favor, it is error to take the question from the jury and to declare the company guilty of negligence as a matter of law.<sup>2</sup>

**Payment of Charges.** — The plaintiff is not bound to prove a payment or tender of the charges; if there is a showing that he engaged the company's services and that it undertook to transmit the message, the duty of the company is sufficiently shown, and if the nonpayment of charges affords it a defense it must prove the nonpayment.<sup>3</sup>

**The Failure to Comply with a Regulation or Stipulation** is a matter of defense and the burden of proving it is on the company.<sup>4</sup>

**4. Contributory Negligence** — *a. IN GENERAL.* — The general principles of the law of contributory negligence apply in the class of cases under consideration here.<sup>5</sup> It is not necessary for the defendant to show that the plaintiff's contributory negligence was the direct or sole cause of the loss; if it "proximately contributed" to cause the loss, it will bar recovery.<sup>6</sup>

*b. FORM OR ADDRESS OF MESSAGE NEGLIGENTLY WRITTEN.* — The message as offered to the company for transmission must be written legibly; the company cannot be held liable when the mistake in transmission was due to the indistinct or uncertain writing of the sender.<sup>7</sup> The address of the per-

15 Tex. Civ. App. 37; *Western Union Tel. Co. v. Odom*, 21 Tex. Civ. App. 537; *Western Union Tel. Co. v. Hines*, 22 Tex. Civ. App. 315 (provided there was no stipulation for repeating); *Western Union Tel. Co. v. Boots*, 10 Tex. Civ. App. 540.

**An Error in Name of Addressee or Sender**, made in the course of transmission, creates a presumption of negligence. See *Western Union Tel. Co. v. Ragland*, (Tex. Civ. App. 1901) 61 S. W. Rep. 421; *Western Union Tel. Co. v. Boots*, 10 Tex. Civ. App. 540; *Western Union Tel. Co. v. Norris*, 25 Tex. Civ. App. 43; *Western Union Tel. Co. v. Reeves*, 8 Tex. Civ. App. 37. Compare *Western Union Tel. Co. v. Elliott*, 7 Tex. Civ. App. 482.

**Connecting Lines.** — In *La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383, the defendant company contended that it was not the first carrier and that plaintiff had failed to prove that the error had occurred on its line, and showed an express provision in its printed blanks that it would not be liable for errors occurring on connecting lines. It was held that the burden of proof was nevertheless on it to show that the error did not occur on its line, since such proof was easily within its power to make.

1. See *infra*, this title, *Stipulations in Contract of Sending* — *General Rule as to Validity*; *Aiken v. Western Union Tel. Co.*, 69 Iowa 31, 58 Am. Rep. 210; *Sweatland v. Illinois, etc.*, Tel. Co., 27 Iowa 433, 1 Am. Rep. 285.

So also in *Texas*. *Womack v. Western Union Tel. Co.*, 58 Tex. 180, 44 Am. Rep. 614. See also *Western Union Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *Western Union Tel. Co. v. Hines*, 22 Tex. Civ. App. 315.

2. **Presumption Not Conclusive.** — *Hunter v. Western Union Tel. Co.*, 130 N. Car. 602.

**Evidence in Rebuttal.** — *Fowler v. Western Union Tel. Co.*, 80 Me. 381, 6 Am. St. Rep. 211.

In *Western Union Tel. Co. v. Meek*, 49 Ind. 53, it is held that the company is not relieved from liability for an erroneous transmission merely by showing that its line was in good order, that approved instruments were used, and that faithful and competent servants were employed, if the particular act complained of shows a negligent performance of its duty to transmit. See also *Western Union Tel. Co. v. Scirelle*, 103 Ind. 227, 10 Am. & Eng. Corp. Cas. 611. Compare *Smith v. Western Union Tel. Co.*, 57 Mo. App. 259.

3. **Payment or Tender of Charges.** — *Western Union Tel. Co. v. Meek*, 49 Ind. 53; *Milliken v. Western Union Tel. Co.*, 40 N. Y. 403, reversing 53 N. Y. Super. Ct. 111.

4. **Effect of Regulations.** — *Western Union Tel. Co. v. Wilson*, 93 Ala. 32, 30 Am. St. Rep. 23; *Kendall v. Western Union Tel. Co.*, 56 Mo. App. 192. See *infra*, this title, *Stipulations in Contract of Sending*.

But where the defense is that the addressee lived beyond the free delivery limits, and that the extra charges for such a delivery were not paid or tendered, the burden is on the plaintiff to show that the addressee lived within the delivery limits. *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148; *Reese v. Western Union Tel. Co.*, 123 Ind. 294.

5. **Contributory Negligence.** — See the title **CONTRIBUTORY NEGLIGENCE**, vol. 7, p. 368.

An instruction which ignores the defense of contributory negligence is erroneous. *Western Union Tel. Co. v. McNair*, 120 Ala. 99.

6. *Western Union Tel. Co. v. Rawls*, (Tex. Civ. App. 1901) 62 S. W. Rep. 136.

7. **Negligent Writing of Address or Message.** — *Koons v. Western Union Tel. Co.*, 102 Pa. St. 164 (order for "two thousand" so written as to resemble more nearly "ten thousand"). See also *Western Union Tel. Co. v. Liddell*, 78 Miss. 1.



son to whom the message is sent must be definitely given; the company cannot be required to make extended searches in large cities in order to find the addressee.<sup>1</sup> But such negligence on the part of the addressee will not relieve the company of its duty to exercise what is ordinary care under the circumstances, and it will be liable if it appears that the addressee might have been easily found despite the insufficient address.<sup>2</sup>

**Where There Are Two Towns of the Same Name** in the state, and the operator is informed, at the time the message is offered for transmission, which one of the two is meant, the company cannot excuse its failure to deliver by averring an insufficient address.<sup>3</sup>

**Where the Operator Writes Out the Message** for the sender, at the latter's request, he acts, in so doing, as the sender's agent and not as agent of the company, and if a mistake is occasioned through his writing it incorrectly it is chargeable to the sender as contributory negligence and not to the company.<sup>4</sup>

**c. SENDER'S FAILURE TO STAMP MESSAGE.** — When the Revenue Act of Congress required all messages to be stamped, it was the duty of the sender and not of the company to stamp the message, and the company could not be made liable either for damages or for the statutory penalty for refusing to accept for transmission an unstamped message.<sup>5</sup>

**d. SENDER'S DELAY IN STARTING MESSAGE.** — The company cannot excuse a negligent delay on its part by contending that the sender should have started the message earlier instead of waiting until the last minute.<sup>6</sup> But this fact may be considered in determining whether the company's negligence was the proximate cause of the loss, and the plaintiff may fail to recover even though a case of neglect is made out against the company.<sup>7</sup>

**e. PLAINTIFF'S DUTY TO AVOID OR TO MINIMIZE DAMAGES.** — The party who is affected by the negligence of the company must exercise reasonable diligence to avert or to minimize the harmful consequences of the company's neglect, and damages which might have been prevented by the exercise of ordinary care form no ground of recovery.<sup>8</sup>

**Where Two Messages Are Sent in Succession, One Revoking the Other,** the fact that the messages do not on their face show which was latest does not excuse the company in an action for damages resulting from the delivery of the second message first. *Hocker v. Western Union Tel. Co.*, (Fla. 1903) 34 So. Rep. 901.

**Sender's Error in Message Harmless.** — Where the message notified plaintiff that his brother was sick at S. when he was at C., the error, though made by the sender, is no defense if the addressee knew his brother was at C. and would have gone there. *Western Union Tel. Co. v. Zane*, 6 Tex. Civ. App. 585. See also *Western Union Tel. Co. v. Thompson*, 18 Tex. Civ. App. 609.

**1. Address Must Be Definite.** — *Western Union Tel. Co. v. Patrick*, 92 Ga. 607, 44 Am. St. Rep. 90; *Western Union Tel. Co. v. McDaniel*, 103 Ind. 294; *Hargrave v. Western Union Tel. Co.*, (Tex. Civ. App. 1901) 60 S. W. Rep. 687. Compare *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181. See also *Lambert v. Western Union Tel. Co.*, (Tex. Civ. App. 1898) 45 S. W. Rep. 1034.

**Address "B Street" Instead of "South B Street" Bars Recovery for Misdelivery.** — *Deslottes v. Baltimore, etc., Tel. Co.*, 40 La. Ann. 183. Compare *Western Union Tel. Co. v. Cain*, (Tex. Civ. App. 1897) 40 S. W. Rep. 624; *Western Union Tel. Co. v. Birchfield*, 14 Tex. Civ. App. 664.

**2.** See *Western Union Tel. Co. v. Smith*, 93 Ga. 635.

An inaccuracy or error in address due to the operator's writing it on the envelope from a blurred copy is no excuse to the company for a delay or failure to deliver. *Western Tel. Co. v. Johnson*, 9 Tex. Civ. App. 48.

**3.** *Western Union Tel. Co. v. Parsons*, 72 S. W. Rep. 800, 24 Ky. L. Rep. 2008.

**4. Operator Writing Message for Sender.** — *Western Union Tel. Co. v. Edsall*, 63 Tex. 668, 8 Am. & Eng. Corp. Cas. 70; *Western Union Tel. Co. v. Foster*, 64 Tex. 220, 53 Am. Rep. 754; *Gulf, etc., R. Co. v. Geer*, 5 Tex. Civ. App. 349. Compare *Carland v. Western Union Tel. Co.*, 118 Mich. 369, 74 Am. St. Rep. 394.

**Contra**, where the operator sends a message communicated by telephone without first writing it. *Texas Tel., etc., Co. v. Seiders*, 9 Tex. Civ. App. 431.

**5. Stamp.** — *Western Union Tel. Co. v. Henley*, 157 Ind. 90; *Gray v. Western Union Tel. Co.*, 85 Mo. App. 123.

**6. Delay in Starting Message.** — *Pope v. Western Union Tel. Co.*, 14 Ill. App. 531; *Western Union Tel. Co. v. Bruner*, (Tex. 1892) 19 S. W. Rep. 149.

**7.** See *Western Union Tel. Co. v. Housewright*, 5 Tex. Civ. App. 1.

**8. Consequences Which Might Have Been Avoided.** — See generally the titles CONTRIBUTORY NEGLIGENCE, vol. 7, p. 387; DAMAGES, vol. 8, pp. 605, 690; and the following cases:

The sender is entitled to assume that the company will do or has done its duty, and is not bound to anticipate negligence on its part<sup>1</sup> nor to inquire of it whether his message was correctly transmitted and delivered.<sup>2</sup> Nor is he under any duty, upon discovering that an error in transmission has occurred, to notify the company thereof immediately.<sup>3</sup>

If there are other means of communication available to the plaintiff after he becomes aware that his efforts through the defendant company are fruitless, and he knowingly neglects to avail himself of them, he cannot recover for damages which might have been prevented by the use of such other means of communication.<sup>4</sup>

Reasonable care is the measure of plaintiff's duty, and even though it appears that it was possible for him so to have acted as to prevent or to lessen the damages resulting from the company's negligence, he may account for his failure to do so by showing peculiar circumstances which induced his failure.<sup>5</sup>

Where plaintiff could only have lessened the damage and could not have prevented it entirely, his negligence will not bar his recovery, but will merely prevent his recovery for so much of the damage as he might reasonably have prevented.<sup>6</sup>

*Alabama.*—*Daughtery v. American Union Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435, 5 Am. & Eng. Corp. Cas. 205, 89 Ala. 191; *Western Union Tel. Co. v. Way*, 83 Ala. 542; *Western Union Tel. Co. v. Crawford*, 110 Ala. 460. See also *Western Union Tel. Co. v. Chamblee*, 122 Ala. 428.

*Georgia.*—*Western Union Tel. Co. v. Reid*, 83 Ga. 401.

*Illinois.*—*Western Union Tel. Co. v. Hart*, 62 Ill. App. 120; *Western Union Tel. Co. v. North Packing, etc., Co.*, 188 Ill. 366, affirming 89 Ill. App. 301.

*Indiana.*—*Western Union Tel. Co. v. Briscoe*, 18 Ind. App. 22.

*Iowa.*—*Hasbrouck v. Western Union Tel. Co.*, 107 Iowa 160, 70 Am. St. Rep. 181.

*Kentucky.*—*Western Union Tel. Co. v. Matthews*, 67 S. W. Rep. 849, 24 Ky. L. Rep. 3; *Postal Tel. Cable Co. v. Schaefer*, 62 S. W. Rep. 1119, 23 Ky. L. Rep. 344.

*Mississippi.*—*Shingleur v. Western Union Tel. Co.*, 72 Miss. 1030, 48 Am. St. Rep. 604.

*Missouri.*—*Reynolds v. Western Union Tel. Co.*, 81 Mo. App. 223.

*New York.*—*Leonard v. New York, etc., Electro Magnetic Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446.

*Tennessee.*—*Marr v. Western Union Tel. Co.*, 85 Tenn. 550; *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 10 Am. St. Rep. 699; *Western Union Tel. Co. v. Mellon*, 96 Tenn. 67.

*Texas.*—*Western Union Tel. Co. v. Hoffman*, 80 Tex. 420, 26 Am. St. Rep. 759; *Gulf, etc., R. Co. v. Loonie*, 82 Tex. 323, 27 Am. St. Rep. 891; *Western Union Tel. Co. v. Berdine*, 2 Tex. Civ. App. 517; *Western Union Tel. Co. v. Terrell*, 10 Tex. Civ. App. 60; *Western Union Tel. Co. v. Jeanes*, (Tex. Civ. App. 1895) 29 S. W. Rep. 1130, 88 Tex. 230; *Western Union Tel. Co. v. Hill*, (Tex. Civ. App. 1894) 26 S. W. Rep. 252; *Western Union Tel. Co. v. Davis*, (Tex. Civ. App. 1896) 35 S. W. Rep. 189; *Western Union Tel. Co. v. Sorsby*, 29 Tex. Civ. App. 345. See also *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570, 10 Am. St. Rep. 790; *Western Union Tel. Co. v. Brown*, 84 Tex. 54; *Western Union Tel. Co. v. Stephens*, 2 Tex. Civ. App. 129; *Western Union Tel. Co. v. Stevens*, (Tex. 1891) 16 S. W. Rep. 1095.

*Virginia.*—*Washington, etc., Tel. Co. v. Hobson*, 15 Gratt. (Va.) 122.

*Rule Applied to Case of Delay in Delivery Preventing Addressee from Attending Funeral—Facts Held Not to Show Want of Diligence on Addressee's Part After Receipt of Message.*—*Western Union Tel. Co. v. Cain*, (Tex. Civ. App. 1897) 40 S. W. Rep. 624. See also *Western Union Tel. Co. v. Kinaley*, 8 Tex. Civ. App. 527.

*Facts Showing that Consequences of Delay Might Have Been Avoided.*—*Western Union Tel. Co. v. Jeanes*, 88 Tex. 230. Compare *Western Union Tel. Co. v. Anderson*, (Tex. Civ. App. 1896) 37 S. W. Rep. 619; *Western Union Tel. Co. v. Crawford*, (Tex. Civ. App. 1903) 75 S. W. Rep. 843.

1. *Sender May Presume Discharge of Duty by Company.*—*Mitchell v. Western Union Tel. Co.*, 12 Tex. Civ. App. 262.

2. *Western Union Tel. Co. v. Chamblee*, 122 Ala. 428. See also *Western Union Tel. Co. v. Downs*, 25 Tex. Civ. App. 597.

3. *Rittenhouse v. Independent Line of Tel.*, 1 Daly (N. Y.) 474, 44 N. Y. 263, 4 Am. Rep. 673.

4. *Southwestern Tel., etc., Co. v. Gotcher*, 93 Tex. 114. But see *Western Union Tel. Co. v. Wisdom*, 85 Tex. 261, 34 Am. St. Rep. 805.

5. *Reasonable Care Only Required of Plaintiff.*—*Western Union Tel. Co. v. Lydon*, 82 Tex. 364; *Western Union Tel. Co. v. Bryson*, 25 Tex. Civ. App. 74; *Western Union Tel. Co. v. Cain*, (Tex. Civ. App. 1897) 40 S. W. Rep. 624. See also *Southwestern Tel., etc., Co. v. Taylor*, 26 Tex. Civ. App. 79; *Western Union Tel. Co. v. Matthews*, (Ky. 1902) 67 S. W. Rep. 849; *Western Union Tel. Co. v. Lavender*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1035; *Western Union Tel. Co. v. Johnson*, 16 Tex. Civ. App. 546.

But having received a telegram after delay, the plaintiff, having started by wagon, cannot excuse his failure to take the first train at a connecting point by showing that he did not know of it; it was his duty to find out. *Western Union Tel. Co. v. Matthews*, (Ky. 1902) 67 S. W. Rep. 849.

6. *Mitchell v. Western Union Tel. Co.*, 12 Tex. Civ. App. 262.

**J. ADDRESSEE MISINTERPRETING MESSAGE.** — If the message as delivered to the addressee is intelligible and not doubtful in its terms, he cannot be considered negligent in acting according to its requirements.<sup>1</sup> But if there, is anything in the message itself or in the circumstances connected with it which would lead a man of ordinary care to suspect that an error had occurred, he is guilty of negligence if he acts upon it without first seeking further information if the opportunity is afforded.<sup>2</sup> And if the message is ambiguous, he assumes all responsibility in guessing at its intended meaning, and acting accordingly; he cannot charge the loss to the company if it turns out that his guess was wrong.<sup>3</sup>

If the Addressee Fails to Read the Message Carefully, and in consequence fails to take steps to prevent loss as he might have done, the company is not responsible for such loss as a careful reading of the message would have enabled him to prevent.<sup>4</sup>

If the Message, Though Correctly Transmitted, Is Vague and its meaning uncertain, the addressee must bear the loss resulting from that fact; he cannot recover damages if he fails to exert himself properly to ascertain its meaning, or if, upon ascertaining it, he does not take steps to prevent the loss complained of.<sup>5</sup>

**5. Proximate and Remote Cause.** — As in other cases where the defendant's negligence is the basis of the claim for damages,<sup>6</sup> the plaintiff must show that the negligence of the defendant or some one for whose conduct it was responsible was the proximate cause of the loss complained of.<sup>7</sup> Similarly, where the defense of contributory negligence of the plaintiff is relied on, it must appear that such negligence contributed proximately to cause the injury.<sup>8</sup> If it appears that the injury would have been sustained even if the company had exercised due care, there can be no recovery, no matter how negligent the defendant may have been.<sup>9</sup>

**Question for Jury.** — Whether the negligence of the company was the proximate cause of the loss complained of is a question for the jury except when the facts are undisputed or but one inference is deducible from them.<sup>10</sup>

**1. Acting on Unambiguous Word.** — *Western Union Tel. Co. v. Beals*, 56 Neb. 415, 71 Am. St. Rep. 682; *Tobin v. Western Union Tel. Co.*, 146 Pa. St. 375, 28 Am. St. Rep. 802, 39 Am. & Eng. Corp. Cas. 565. See also *Hasbrouck v. Western Union Tel. Co.*, 107 Iowa 160, 70 Am. St. Rep. 181.

**2. Where Face of Message Should Create Doubt.** — *Western Union Tel. Co. v. Adair*, 115 Ala. 441; *Manly Mfg. Co. v. Western Union Tel. Co.*, 105 Ga. 235; *Western Union Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589.

Where the addressee suspects that there is an error and requests the operator to wire back to the relay office to have the message verified, and this is done, he has discharged his duty and cannot be said to be guilty of contributory negligence in not having gone beyond the relay office for information. *Efird v. Western Union Tel. Co.*, 132 N. Car. 267.

**3. Hart v. Direct U. S. Cable Co.**, 86 N. Y. 633; *De Rutte v. New York, etc., Electric Magnetic Tel. Co.*, 1 Daly (N. Y.) 547; *Western Union Tel. Co. v. Neill*, 57 Tex. 292, 44 Am. Rep. 589.

**The Question in Such Cases Is Often for the Jury.** — *Manly Mfg. Co. v. Western Union Tel. Co.*, 105 Ga. 235; *Hasbrouck v. Western Union Tel. Co.*, 107 Iowa 160, 70 Am. St. Rep. 181.

**4. Western Union Tel. Co. v. Harper**, 15 Tex. Civ. App. 37.

**5. Davis v. Western Union Tel. Co.**, 46 W. Va. 48.

**6. See the title NEGLIGENCE**, vol. 21, p. 483 *et seq.*

**7. Proximate Cause.** — *Hendershot v. Western Union Tel. Co.*, 106 Iowa 529, 68 Am. St. Rep. 313; *McPeck v. Western Union Tel. Co.*, 107 Iowa 356, 70 Am. St. Rep. 205; *Western Union Tel. Co. v. Simpson*, 64 Kan. 309; *Strahorn-Hutton-Evans Commission Co. v. Western Union Tel. Co.*, 101 Mo. App. 500; *Higdon v. Western Union Tel. Co.*, 132 N. Car. 726. See also *infra*, this title, *Measure of Damages for Negligence*.

**8. See supra**, this section, *Contributory Negligence*. See also the title *CONTRIBUTORY NEGLIGENCE*, vol. 7, p. 381 *et seq.*

**9. See infra**, this title, *Measure of Damages for Negligence — Mental Anguish — Limitations of Rule*.

**Warning Message.** — Where a warning message, directed to a man who was being pursued, was not delivered, and the addressee was killed by his pursuers, it was held that there could be no recovery, since it did not appear that the prompt delivery of the message would have saved the life. *Ross v. Western Union Tel. Co.*, (C. C. A.) 81 Fed. Rep. 676.

**10. Western Union Tel. Co. v. Morris**, (C. C. A.) 83 Fed. Rep. 992; *Wallingford v. Western Union Tel. Co.*, 60 S. Car. 201. See also the title *NEGLIGENCE*, vol. 21, p. 508.

**6. Evidence — Wealth or Poverty of Either Party.** — Evidence of the wealth of the defendant company is admissible only when there has been a wilful injury and exemplary damages are to be allowed.<sup>1</sup> Nor is evidence of the embarrassed financial condition of the sender of the message admissible as bearing on the question of damages for the loss of a valuable bargain in consequence of the company's negligence.<sup>2</sup>

**Statements or Declarations of the Company's Agent** who handled the message are inadmissible either to prove negligence or the absence of negligence, except when they are shown to be part of the *res gestæ*.<sup>3</sup>

**Evidence that a Deduction Had Been Made from the Pay of the Operator**, by one of his superior officers, is not competent for the purpose of showing negligence on the part of such operator, even though it is claimed that the deduction was made because of his negligence.<sup>4</sup>

**Evidence as to Other Messages** — As accentuating the negligence of the agent at the destination in failing to deliver a message, the plaintiff may show that he sent a message to that agent asking him to deliver the first one.<sup>5</sup> The plaintiff has also been allowed to show, in an action for failure to transmit and deliver a message, that he sent another message to the same place, but to a different person, and that it was duly delivered and a reply promptly received.<sup>6</sup>

**When the Plaintiff's Good Faith** in making certain purchases in reliance upon the erroneous message is in question, he may show his understanding of the message and that he acted on the basis of that understanding.<sup>7</sup>

**Other Cases.** — Evidence of the proximity of the place of business and the residence of the plaintiff to the office to which the message was transmitted and that it could have been forwarded to him from either place in time to prevent the loss is competent.<sup>8</sup> And when the company seeks to excuse a failure to deliver on the ground that the addressee was an obscure person whom the messenger could not find, he may introduce specimens of printed cards and letter heads which he had used in his business as grocer, particularly after he has testified, without objection, that he so used them.<sup>9</sup> When the message was addressed to a physician and requested his professional attendance, evidence on behalf of the company that his charges had not been paid and that he did not usually make such visits without payment in advance is not admissible.<sup>10</sup> The reported cases afford other particular instances.<sup>11</sup>

1. **Evidence — Pecuniary Condition of Parties.** — *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 30 Am. & Eng. Corp. Cas. 615. See the title **EXEMPLARY DAMAGES**, vol. 12, p. 47 *et seq.*

2. *Western Union Tel. Co. v. Way*, 83 Ala. 542.

3. **Statements by Agent.** — *Aiken v. Western Union Tel. Co.*, 5 S. Car. 358. See generally the titles **DECLARATIONS (IN EVIDENCE)**, vol. 9, p. 5; **RES GESTÆ**, vol. 24, p. 660.

**Statements Not Made in the Performance of Any Duty** relating to the transmission of the message are inadmissible. *Western Union Tel. Co. v. Way*, 83 Ala. 542.

**But a Statement that the Message Had Not Been Delivered**, made in answer to an inquiry, has been held to be admissible as "a part of the same transaction and not relating to past occurrences." *Evans v. Western Union Tel. Co.*, 102 Iowa 219. See also *Carland v. Western Union Tel. Co.*, 118 Mich. 369, 74 Am. St. Rep. 394; *Western Union Tel. Co. v. Lydon*, 82 Tex. 364.

**Declarations by Messenger as to Inability to Find Plaintiff Admissible.** — *Western Union Tel. Co. v. Bennett*, 1 Tex. Civ. App. 558.

4. **Deduction from Pay.** — *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485.

5. **Other Messages.** — *Western Union Tel. Co. v. Frith*, 105 Tenn. 167.

6. *Western Union Tel. Co. v. Lydon*, 82 Tex. 364.

7. **Good Faith of Plaintiff.** — *Aiken v. Western Union Tel. Co.*, 69 Iowa 31, 58 Am. Rep. 210, 13 Am. & Eng. Corp. Cas. 585.

**The Meaning of a Dispatch** couched in such terms as to be ambiguous to persons not engaged in the business of the plaintiff, may be explained by the testimony of the sender. *Western Union Tel. Co. v. Collins*, 45 Kan. 88. See also *Carland v. Western Union Tel. Co.*, 118 Mich. 369, 74 Am. St. Rep. 394.

8. **Proximity of Addressee.** — *Western Union Tel. Co. v. Woods*, 56 Kan. 737.

9. **Prominence of Addressee.** — *Gulf, etc., R. Co. v. Wilson*, 69 Tex. 739, 21 Am. & Eng. Corp. Cas. 80.

10. **Physician's Charges.** — *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 30 Am. & Eng. Corp. Cas. 615.

11. **Letters and Statements of the Addressee** as to the reasons for his failure to purchase stock

# IX. COMPANY'S DUTY AND LIABILITY AS AFFECTED BY REGULATIONS—

**1. Right to Make and Enforce Regulations.**—Like other corporations or individuals engaged in a public business, a telegraph company has the right to provide rules and regulations with which all persons desiring to engage its services must comply.<sup>1</sup> This right, however, is subject to the limitation that the regulations must be reasonable and may not operate to relieve the company of any obligation imposed by law or by public policy;<sup>2</sup> and they must be reasonably applied under the special circumstances of any particular case.<sup>3</sup>

**2. Particular Regulations—*a.* AS TO OFFICE HOURS.**—The company has the right to provide reasonable regulations as to the hours during which its offices shall be open for the transmission and delivery of messages.<sup>4</sup> The reasonableness of the regulation with respect to any particular office must depend largely upon the character of the locality of that office, and is therefore a mixed question of law and fact.<sup>5</sup> It is not necessary that all offices shall have the same hours; the practical effect of a contrary rule would be to destroy the right of regulation.<sup>6</sup>

for the plaintiff ordered by letter and telegram have been held to be inadmissible in an action for failure to deliver the telegram. *U. S. Telegraph Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 751. See also *Western Union Tel. Co. v. Stevenson*, 128 Pa. St. 442, 15 Am. St. Rep. 687.

**Evidence that a Child Was Stillborn** has been held to be admissible in an action for failure to deliver a message summoning a physician to the mother, as tending to show delay and consequent increase of suffering. *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 10 Am. St. Rep. 772.

**1. Right to Make and Enforce Regulations.**—*Hewlett v. Western Union Tel. Co.*, 28 Fed. Rep. 181, 14 Am. & Eng. Corp. Cas. 134; *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Birney v. New York, etc., Printing Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607; *Western Union Tel. Co. v. Neal*, 86 Tex. 368, 40 Am. St. Rep. 847; *Western Union Tel. Co. v. McMillan*, (Tex. Civ. App. 1895) 30 S. W. Rep. 298. See also the title *CARRIERS OF PASSENGERS*, vol. 5, p. 482.

**Right to Enact By-laws.**—See the titles *BY-LAWS*, vol. 5, p. 86; *CORPORATIONS (PRIVATE)*, vol. 7, p. 694.

**2. Must Be Reasonable.**—*Western Union Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226; *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 313, 41 Am. Rep. 500; *Western Union Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715, 5 Am. & Eng. Corp. Cas. 182.

**Questions of Law and Fact.**—The reasonableness of a particular regulation is a question of law when the facts are clear and undisputed. *Shepard v. Gold, etc., Tel. Co.*, 38 Hun (N. Y.) 338; *Smith v. Gold, etc., Tel. Co.*, 42 Hun (N. Y.) 454. But where the facts are disputed it is a question for the jury. *Heimann v. Western Union Tel. Co.*, 57 Wis. 562. See also the title *QUESTIONS OF LAW AND FACT*, vol. 23, p. 584.

**3. Must Be Reasonably Applied.**—*Hewlett v. Western Union Tel. Co.*, 28 Fed. Rep. 181, 14 Am. & Eng. Corp. Cas. 134.

**4. Regulation of Office Hours—United States.**—*Given v. Western Union Tel. Co.*, 24 Fed. Rep. 119, 8 Am. & Eng. Corp. Cas. 107.

*Georgia.*—*Western Union Tel. Co. v. Georgia Cotton Co.*, 94 Ga. 444; *Bateman v. Western Union Tel. Co.*, 97 Ga. 338.

*Indiana.*—*Western Union Tel. Co. v. Harding*, 103 Ind. 505, 10 Am. & Eng. Corp. Cas. 617.

*Kentucky.*—*Western Union Tel. Co. v. Van Cleave*, 107 Ky. 464, 92 Am. St. Rep. 366.

*Rhode Island.*—*Sweet v. Postal Tel., etc., Co.*, 22 R. I. 344.

*Texas.*—*Western Union Tel. Co. v. Neel*, 86 Tex. 368, 40 Am. St. Rep. 847; *Western Union Tel. Co. v. Wingate*, 6 Tex. Civ. App. 394; *Western Union Tel. Co. v. Gibson*, (Tex. Civ. App. 1899) 53 S. W. Rep. 712; *Western Union Tel. Co. v. McCoy*, (Tex. Civ. App. 1895) 31 S. W. Rep. 210; *Western Union Tel. Co. v. Rawls*, (Tex. Civ. App. 1901) 62 S. W. Rep. 136; *Robinson v. Western Union Tel. Co.*, (Tex. Civ. App. 1898) 43 S. W. Rep. 1053.

*West Virginia.*—*Davis v. Western Union Tel. Co.*, 46 W. Va. 48.

**5.** *Western Union Tel. Co. v. Crider*, 107 Ky. 600; *Western Union Tel. Co. v. Bryson*, 25 Tex. Civ. App. 74; *Western Union Tel. Co. v. Rawls*, (Tex. Civ. App. 1901) 62 S. W. Rep. 136; *Brown v. Western Union Tel. Co.*, 6 Utah 219; *Davis v. Western Union Tel. Co.*, 46 W. Va. 48; *Heimann v. Western Union Tel. Co.*, 57 Wis. 562. See also the title *QUESTIONS OF LAW AND FACT*, vol. 23, pp. 584, 585.

**Ten Hours a Day** has been held to be a reasonable time during which to keep the office open in a town of only a few thousand people. See *Western Union Tel. Co. v. Gibson*, (Tex. Civ. App. 1899) 53 S. W. Rep. 712.

**Postponing Delivery.**—A regulation that telegrams received after seven o'clock in the evening will not be delivered until the next morning is reasonable in a town where the business is not sufficiently large to justify the employment of a special messenger. *Davis v. Western Union Tel. Co.*, 66 S. W. Rep. 17, 23 Ky. L. Rep. 1758; *Western Union Tel. Co. v. Steenbergen*, 107 Ky. 469; *Western Union Tel. Co. v. Crider*, 107 Ky. 600.

**The Burden of Proof** to establish reasonableness is on the company. *Western Union Tel. Co. v. Luck*, (Tex. Civ. App. 1897) 40 S. W. Rep. 753.

**6.** *Western Union Tel. Co. v. Harding*, 103 Ind. 505, 10 Am. & Eng. Corp. Cas. 617.

The Employees at One Office Are Not Bound to Know the Office Hours of All Other Offices in the country,<sup>1</sup> though there is authority for the view that when the company's operator accepts a message for transmission, the fact that the office at the destination had closed for the day will be no defense to an action for damages arising out of delay in transmission thereby occasioned.<sup>2</sup>

When No Definite Hours Have Been Fixed, it is a question for the jury as to what the office hours were, and evidence is admissible as to what hours had usually been observed at the office in question.<sup>3</sup>

**Waiver of Regulation.** — The company may not keep its office open, after its established hours, for the transaction of business for the public and then use its regulation as to office hours as a defense to an action for negligence. It is within the apparent scope of the agent's authority to extend the hours fixed for his office, particularly where notice of the established hours is not brought home to the patron.<sup>4</sup>

**Office Hours as Affecting Company's Duty — Duty of Prompt Transmission.** — If the hours established for an office are reasonable, the company is under no duty to transmit messages except during such hours, and a message offered for transmission after the close of such hours at the office of destination may be transmitted within a reasonable time after the office is open next morning.<sup>5</sup>

**Duty of Prompt Delivery.** — Similarly, where a message is transmitted to the receiving office after its regular hours, the company is not guilty of negligence, in the absence of a special undertaking, in deferring delivery until the next morning.<sup>6</sup>

1. *Given v. Western Union Tel. Co.*, 24 Fed. Rep. 119, 8 Am. & Eng. Corp. Cas. 113; *Western Union Tel. Co. v. Harding*, 103 Ind. 505, 10 Am. & Eng. Corp. Cas. 617; *Sweet v. Postal Tel., etc., Co.*, 22 R. I. 344; *Western Union Tel. Co. v. Neel*, 86 Tex. 368, 40 Am. St. Rep. 847; *Western Union Tel. Co. v. McConnico*, 27 Tex. Civ. App. 610. See also *Stevenson v. Montreal Tel. Co.*, 16 U. C. Q. B. 539; *Thompson v. Western Union Tel. Co.*, 32 Mo. App. 197.

**That the Operator Has Habitually Kept the Office Open** after the established hours will not deprive the company of the benefit of its regulations duly established in that office. *Western Union Tel. Co. v. Georgia Cotton Co.*, 94 Ga. 444.

2. *Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. Rep. 843; *Western Union Tel. Co. v. Bruner*, (Tex. 1892) 19 S. W. Rep. 149. Compare *Western Union Tel. Co. v. May*, 8 Tex. Civ. App. 176.

**Where Message Appears on Its Face to Be Urgent**, the fact that it is offered for transmission after office hours will be no defense to the company if the agent accepts it without reserve. *Brown v. Western Union Tel. Co.*, 6 Utah 219. See also *McPeck v. Western Union Tel. Co.*, 107 Iowa 356, 70 Am. St. Rep. 205; *Bryant v. American Tel. Co.*, 1 Daly (N. Y.) 575; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. Rep. 843 [*distinguished in Western Union Tel. Co. v. Neel*, 86 Tex. 368, 40 Am. St. Rep. 847]; *Western Union Tel. Co. v. Bruner*, (Tex. 1892) 19 S. W. Rep. 149. Compare *Robinson v. Western Union Tel. Co.*, (Tex. Civ. App. 1898) 43 S. W. Rep. 1053.

3. *Western Union Tel. Co. v. Bryson*, 25 Tex. Civ. App. 74.

4. **Regulations May Be Waived.** — *Dowdy v. Western Union Tel. Co.*, 124 N. Car. 522; *Western Union Tel. Co. v. Bryson*, 25 Tex. Civ. App. 74; *Western Union Tel. Co. v. Pierce*, (Tex. Civ. App. 1902) 70 S. W. Rep. 361.

It is within the apparent scope of the agent's authority to undertake the delivery of a message after office hours, and if he does so he is bound to exercise due diligence to effect a delivery then. *McPeck v. Western Union Tel. Co.*, 107 Iowa 356, 70 Am. St. Rep. 205.

**The Failure of the Agent to Observe the Office Hours**, when habitual, may be shown in evidence as indicating that no rule on the subject prevailed or was enforced; but proof merely of an occasional transmission or delivery after office hours will not be sufficient to establish a waiver of the regulations. *Western Union Tel. Co. v. Crider*, 107 Ky. 600; *Western Union Tel. Co. v. McConnico*, 27 Tex. Civ. App. 610.

**There Is No Waiver of the Regulation** where the operator, in accepting a message, expressly informs the sender that he does not know the office hours of the destination office, but will make an effort to effect the transmission; such an acceptance does not amount to a special undertaking to transmit without reference to office hours prevailing at the destination. *Western Union Tel. Co. v. Gibson*, (Tex. Civ. App. 1899) 53 S. W. Rep. 712; *Western Union Tel. Co. v. McConnico*, 27 Tex. Civ. App. 610. Compare *Western Union Tel. Co. v. Hill*, (Tex. Civ. App. 1894) 26 S. W. Rep. 252.

So a mere agreement of the agent to use his best efforts to effect immediate transmission will not render the company liable where the receiving office is closed pursuant to established office hours. *Western Union Tel. Co. v. Rawls*, (Tex. Civ. App. 1901) 62 S. W. Rep. 136; *Western Union Tel. Co. v. Wingate*, 6 Tex. Civ. App. 101.

5. *Western Union Tel. Co. v. Neel*, 86 Tex. 368, 40 Am. St. Rep. 847; *Western Union Tel. Co. v. Gibson*, (Tex. Civ. App. 1899) 53 S. W. Rep. 712.

6. *Sweet v. Postal Tel., etc., Co.*, 22 R. I. 344. applying the rule where the receiving office was open at night for the special purpose of re-

**Knowledge of Sender as to Office Hours.** — The rule upheld by the weight of authority is that the sender of a message is bound by a reasonable rule fixing office hours, without regard to his knowledge of it;<sup>1</sup> but the contrary has been held.<sup>2</sup>

**b. AS TO FORM AND SUBSTANCE OF MESSAGE.** — The company may require that all messages offered for transmission shall be fully and clearly written out, without the use of numerals and in the language prevailing at the place of contract, and may refuse to accept for transmission an oral message.<sup>3</sup> It may require that the message shall not be immoral in character or indecent in language<sup>4</sup> and that it shall not be libelous.<sup>5</sup>

**Messages Relating to Gambling Transactions.** — The company may make and enforce a regulation under which it will not accept for transmission any message relating to a gambling transaction. But in refusing to transmit a message on such ground, the company acts at its peril; if it is mistaken, it is responsible for all damages resulting from its refusal.<sup>6</sup>

**c. AS TO PREPAYMENT OF CHARGES.** — The company may require that the price of every message shall be prepaid,<sup>7</sup> and that a deposit to pay extra charges of delivery shall be made when the addressee lives beyond the regular free delivery limits of the office to which the message is directed.<sup>8</sup>

**When the Message Requests an Answer,** the company may require the sender to deposit an amount sufficient to pay for the answer.<sup>9</sup>

ceiving press dispatches only; *Western Union Tel. Co. v. Stoenbergen*, 107 Ky. 469; *Western Union Tel. Co. v. Rawls*, (Tex. Civ. App. 1901) 62 S. W. Rep. 136. Compare *Dowdy v. Western Union Tel. Co.*, 124 N. Car. 522.

**A Verbal Agreement** between the operator and the sender that the message need not be delivered at night is binding. *Western Union Tel. Co. v. Wingate*, 6 Tex. Civ. App. 394.

**A Mere Attempt** to make immediate delivery, where there is no duty to deliver before the next morning, will not render the company liable for failure to effect delivery. *Western Union Tel. Co. v. Rawls*, (Tex. Civ. App. 1901) 62 S. W. Rep. 136.

**But a Special Undertaking** to deliver without regard to office hours, in consideration of extra payment, renders the company liable for failure to perform. *Western Union Tel. Co. v. Perry*, 30 Tex. Civ. App. 243; *Western Union Tel. Co. v. Cavin*, 30 Tex. Civ. App. 152. See also *Western Union Tel. Co. v. Hill*, (Tex. Civ. App. 1894) 26 S. W. Rep. 252.

**Physical Suffering Endured by the Plaintiff** during the time when the company, by virtue of its reasonable office hours, was not bound to transmit or deliver cannot be considered in determining the damages recoverable for delay in delivering a message summoning a physician, even though it be shown that there was a negligent delay in delivery after the opening of the office. *Western Union Tel. Co. v. Merrill*, (Tex. Civ. App. 1893) 22 S. W. Rep. 826. See also *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406.

**1. Knowledge of Sender.** — *Western Union Tel. Co. v. Georgia Cotton Co.*, 94 Ga. 444; *Bateman v. Western Union Tel. Co.*, 97 Ga. 338; *Western Union Tel. Co. v. Harding*, 103 Ind. 505, 10 Am. & Eng. Corp. Cas. 617; *Western Union Tel. Co. v. May*, 8 Tex. Civ. App. 176; *Western Union Tel. Co. v. Neel*, 86 Tex. 368, 40 Am. St. Rep. 847.

**2. Bierhaus v. Western Union Tel. Co.**, 8 Ind. App. 246.

**3. Form and Substance of Message.** — *Western Union Tel. Co. v. Wilson*, 93 Ala. 32, 30 Am. St. Rep. 23; *People v. Western Union Tel. Co.*, 166 Ill. 15; *Western Union Tel. Co. v. Todd*, 22 Ind. App. 701; *Western Union Tel. Co. v. Dozier*, 67 Miss. 288; *Cumberland Telephone, etc., Co. v. Sanders*, (Miss. 1904) 35 So. Rep. 653. Compare *Texas Tel., etc., Co. v. Seiders*, 9 Tex. Civ. App. 431. And see *infra*, this section, *Waiver of Regulation*.

In *Atlantic, etc., Tel. Co. v. Western Union Tel. Co.*, 4 Daly (N. Y.) 527, a regulation was considered reasonable which required the name of the company from which a message was received, together with the date of its receipt, to be added to every message offered by other companies for transmission to Europe and which required an extra charge to be paid for the transmission of such additions.

**4. Western Union Tel. Co. v. Ferguson**, 57 Ind. 495; *Archambault v. Great North Western Tel. Co.*, 14 Quebec 8. See also *infra*, this title, *Liability of Company in Particular Classes of Cases — Immoral Messages*.

**5. See *infra*, this title, Liability of Company in Particular Classes of Cases — Libelous Messages.**

**6. Gambling Transactions.** — *Smith v. Western Union Tel. Co.*, 84 Ky. 664, 16 Am. & Eng. Corp. Cas. 231. See also *infra*, this title, *Liability of Company in Particular Classes of Cases — Messages Relating to Gambling Transactions*. And see *Gray v. Western Union Tel. Co.*, 87 Ga. 350, 27 Am. St. Rep. 259, 35 Am. & Eng. Corp. Cas. 47.

**7. Prepayment of Charges.** — *Langley v. Western Union Tel. Co.*, 88 Ga. 777; *Harkness v. Western Union Tel. Co.*, 73 Iowa 190, 5 Am. St. Rep. 672, 21 Am. & Eng. Corp. Cas. 182; *Smith v. Western Union Tel. Co.*, 83 Ky. 104, 4 Am. St. Rep. 126, 8 Am. & Eng. Corp. Cas. 15.

**8. See *supra*, this title, Transmission and Delivery of Messages — Telegraph Company's Duty — Free Delivery Limits.**

**9. Hewlett v. Western Union Tel. Co.**, 28

A Failure to Prepay the Charges is no defense, however, to the company in an action for negligence in delivery of a message where it is not shown that the sender was informed of the rule requiring it or where the operator accepted the message without requiring the charges to be prepaid.<sup>1</sup> Nor will the rule requiring prepayment of charges affect the company's liability for negligence with respect to a message sent without charge on behalf of a person in the company's employ.<sup>2</sup>

d. AS TO SIGNATURE OF SENDER. — It has been held that the company cannot enforce a regulation that every message shall bear the autograph signature of the sender unless a power of attorney from him is produced.<sup>3</sup>

e. INFORMATION AS TO MEANING OF MESSAGE. — The company cannot require its patrons to inform its agents of the true import and meaning of every message offered for transmission nor forbid the use of ciphers in messages.<sup>4</sup> But the failure of the sender to disclose the meaning or nature of his message will affect the damage recoverable by him in case of an error in transmission or a failure to transmit or deliver.<sup>5</sup>

f. REGULATIONS TO ENFORCE PAYMENT OF TOLLS. — A telephone company may make such regulations as will compel the payment of tolls due from subscribers within a reasonable time, and may enforce them by depriving the subscriber of his connections until he complies with them.<sup>6</sup> That the subscriber claims that the company is indebted to him will not affect the company's right to enforce the regulation.<sup>7</sup>

3. Waiver of Regulations. — Any rule of the company designed for its own protection may be waived, expressly or by implication.<sup>8</sup> Thus, when the operator accepts and transmits an oral message, the company cannot excuse its failure to deliver or a delay in delivery on the ground that the message was not tendered in writing.<sup>9</sup> Likewise, the fact that the sender did not prepay the charges for transmission is no defense to the company when the agent accepted the message and undertook to transmit it without insisting upon prepayment.<sup>10</sup> The agent of the company acts within the scope of his employment in accepting for transmission any message even though the rules of the company forbid his doing so, and his violation of the company's instructions cannot be available to the company as against its patrons.<sup>11</sup>

## X. STIPULATIONS IN CONTRACT OF SENDING — 1. General Rule as to Validity

— a. VALID WHEN REASONABLE. — The rules as to contracts limiting the liability of common carriers of passengers or merchandise are applicable to

Fed. Rep. 181; *Western Union Tel. Co. v. McGuire*, 104 Ind. 130, 54 Am. Rep. 296.

1. *Western Union Tel. Co. v. Cunningham*, 99 Ala. 314.

2. *Western Union Tel. Co. v. Snodgrass*, 94 Tex. 284, 86 Am. St. Rep. 851.

3. *Atlantic, etc., Tel. Co. v. Western Union Tel. Co.*, 4 Daly (N. Y.) 527. This was a case, however, in which the message was tendered by a connecting line.

4. *Western Union Tel. Co. v. Ferguson*, 57 Ind. 495, approved in *Gray v. Western Union Tel. Co.*, 87 Ga. 350, 27 Am. St. Rep. 259, 35 Am. & Eng. Corp. Cas. 50. See also *supra*, this title, *Transmission and Delivery of Messages — Telegraph Company's Duty — To Accept for Transmission*; *infra*, this title, *Liability of Company in Particular Classes of Cases — Immoral or Indecent Messages*.

5. See *infra*, this title, *Measure of Damages for Negligence — Message in Cipher or Otherwise Unintelligible*.

6. *Enforcing Payment of Tolls*. — *Rushville Co-operative Telephone Co. v. Irvin*, 27 Ind. App. 62,

7. *Rushville Co-operative Telephone Co. v. Irvin*, 27 Ind. App. 62.

8. *Waiver of Regulations*. — *Western Union Tel. Co. v. Stevenson*, 128 Pa. St. 442, 15 Am. St. Rep. 687; *People v. Western Union Tel. Co.*, 166 Ill. 15.

*Waiver as to Office Hours*. — See *supra*, this section, *As to Office Hours*.

9. *Western Union Tel. Co. v. Wilson*, 93 Ala. 32, 30 Am. St. Rep. 23; *Carland v. Western Union Tel. Co.*, 118 Mich. 369, 74 Am. St. Rep. 394; *Texas Tel., etc., Co. v. Seiders*, 9 Tex. Civ. App. 431.

*Messages Received by Telephone*. — Where the local officers make a practice of receiving for transmission messages telephoned to the office, and it does not appear that the company had forbidden the practice, it seems that the operator, in writing out the message, must be deemed the company's agent so as to render it liable for an error by him in transcribing. *Western Union Tel. Co. v. Todd*, 22 Ind. App. 701.

10. *Western Union Tel. Co. v. Yopst*, 118 Ind. 248, 25 Am. & Eng. Corp. Cas. 520.

11. *Beasley v. Western Union Tel. Co.*, 39



telegraphic messages written on blanks furnished by the company and containing stipulations qualifying the company's liability for errors, failures, and delays.<sup>1</sup> Thus, the company may, by special contract, or by regulations brought to the sender's notice, fix reasonable limitations upon its liability, but in nearly all jurisdictions it cannot stipulate for immunity from liability for the consequences of its own negligence or that of its servants or agents.<sup>2</sup> This rule applies as well to its liability for statutory penalties as to that at common law.<sup>3</sup> In some jurisdictions, however, the rule has been adopted that the company may, by a stipulation reasonable in other respects, exempt itself from liability to one failing to comply therewith, except for damages resulting from gross negligence or wilful default,<sup>4</sup> or, as stated in other cases,

Fed. Rep. 181; Western Union Tel. Co. v. Todd, 22 Ind. App. 701; Carland v. Western Union Tel. Co., 118 Mich. 369, 74 Am. St. Rep. 394; Texas Tel., etc., Co. v. Seiders, 9 Tex. Civ. App. 431.

1. **Stipulations Limiting Liability.**—See the titles CARRIERS OF GOODS, vol. 5, p. 288; CARRIERS OF PASSENGERS, vol. 5, p. 608; EXPRESS COMPANIES, vol. 12, p. 561.

2. **Company Cannot Stipulate Against Liability for Negligence**—*Alabama*.—American Union Tel. Co. v. Daugherty, 89 Ala. 181.

*Arizona*.—Stiles v. Western Union Tel. Co., (Ariz. 1887) 15 Pac. Rep. 712.

*Arkansas*.—Western Union Tel. Co. v. Short, 53 Ark. 434.

*Colorado*.—Western Union Tel. Co. v. Graham, 1 Colo. 230, 9 Am. Rep. 136.

*Georgia*.—Western Union Tel. Co. v. Blanchard, 68 Ga. 299, 45 Am. Rep. 480. *Compare* Western Union Tel. Co. v. Fontaine, 58 Ga. 433.

*Illinois*.—Tyler v. Western Union Tel. Co., 60 Ill. 421, 14 Am. Rep. 38; Western Union Tel. Co. v. Tyler, 74 Ill. 168, 24 Am. Rep. 279.

*Indiana*.—Western Union Tel. Co. v. Meek, 49 Ind. 53; Western Union Tel. Co. v. Fenton, 52 Ind. 1; Western Union Tel. Co. v. Adams, 87 Ind. 598, 44 Am. Rep. 776; Western Union Tel. Co. v. Meredith, 95 Ind. 93, 8 Am. & Eng. Corp. Cas. 54; Central Union Telephone Co. v. Swoveland, 14 Ind. App. 341.

*Iowa*.—Sweetland v. Illinois, etc., Tel. Co., 27 Iowa 433, 1 Am. Rep. 285; Manville v. Western Union Tel. Co., 37 Iowa 214, 18 Am. Rep. 8; Harkness v. Western Union Tel. Co., 73 Iowa 190, 5 Am. St. Rep. 672, 21 Am. & Eng. Corp. Cas. 182.

*Kentucky*.—Camp v. Western Union Tel. Co., 1 Met. (Ky.) 164, 71 Am. Dec. 461; Smith v. Western Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126, 8 Am. & Eng. Corp. Cas. 15.

*Louisiana*.—La Grange v. Southwestern Tel. Co., 25 La. Ann. 383.

*Maine*.—Bartlett v. Western Union Tel. Co., 62 Me. 209, 16 Am. Rep. 437; Ayer v. Western Union Tel. Co., 79 Me. 493, 1 Am. St. Rep. 353, 21 Am. & Eng. Corp. Cas. 145.

*Mississippi*.—Western Union Tel. Co. v. Goodbar, (Miss. 1890) 7 So. Rep. 214.

*Missouri*.—Reed v. Western Union Tel. Co., 135 Mo. 661, 58 Am. St. Rep. 609, *overruling* Wann v. Western Union Tel. Co., 37 Mo. 472, 90 Am. Dec. 395.

*Nebraska*.—Kemp v. Western Union Tel. Co., 28 Neb. 661, 26 Am. St. Rep. 363, 30 Am. & Eng. Corp. Cas. 607. *Compare* Becker v.

Western Union Tel. Co., 11 Neb. 87, 38 Am. Rep. 356.

*North Carolina*.—Sherrill v. Western Union Tel. Co., 116 N. Car. 655; Brown v. Postal Tel. Co., 111 N. Car. 187, 32 Am. St. Rep. 793.

*Ohio*.—Western Union Tel. Co. v. Griswold, 37 Ohio St. 303, 41 Am. Rep. 500.

*Tennessee*.—Marr v. Western Union Tel. Co., 85 Tenn. 529, 16 Am. & Eng. Corp. Cas. 243; Pepper v. Western Union Tel. Co., 87 Tenn. 554, 10 Am. St. Rep. 699, 25 Am. & Eng. Corp. Cas. 542.

*Texas*.—Western Union Tel. Co. v. Broesche, 72 Tex. 654, 13 Am. St. Rep. 843; Western Union Tel. Co. v. Neill, 57 Tex. 283, 44 Am. Rep. 589; Womack v. Western Union Tel. Co., 58 Tex. 176, 44 Am. Rep. 614.

*Utah*.—Wertz v. Western Union Tel. Co., 7 Utah 446.

*Vermont*.—Gillis v. Western Union Tel. Co., 61 Vt. 461, 15 Am. St. Rep. 917, 25 Am. & Eng. Corp. Cas. 568.

*Wisconsin*.—Candee v. Western Union Tel. Co., 34 Wis. 471, 17 Am. Rep. 452; Thompson v. Western Union Tel. Co., 64 Wis. 531, 54 Am. Rep. 644.

3. *Western Union Tel. Co. v. Adams*, 87 Ind. 598, 44 Am. Rep. 776. See also *infra*, this title, *Statutory Penalties*.

4. **May Not Stipulate Against Liability for Gross Negligence**—*United States*.—White v. Western Union Tel. Co., 14 Fed. Rep. 710, 5 McCrary, (U. S.) 103; Jones v. Western Union Tel. Co., 18 Fed. Rep. 717.

*California*.—Hart v. Western Union Tel. Co., 66 Cal. 579, 56 Am. Rep. 119, 8 Am. & Eng. Corp. Cas. 24.

*Massachusetts*.—Redpath v. Western Union Tel. Co., 112 Mass. 71, 17 Am. Rep. 69; Grinnell v. Western Union Tel. Co., 113 Mass. 299, 18 Am. Rep. 485.

*New York*.—Schwartz v. Atlantic, etc., Tel. Co., 18 Hun (N. Y.) 157; Dixon v. Western Union Tel. Co., 3 N. Y. App. Div. 60, 3 N. Y. Annot. Cas. 126.

*North Carolina*.—Lassiter v. Western Union Tel. Co., 80 N. Car. 336, 5 Am. & Eng. Corp. Cas. 230; Pegram v. Western Union Tel. Co., 97 N. Car. 57, 21 Am. & Eng. Corp. Cas. 122.

In *Nebraska* a new rule has been established by statute, eliminating considerations of degrees of negligence. Kemp v. Western Union Tel. Co., 28 Neb. 661, 26 Am. St. Rep. 363, 30 Am. & Eng. Corp. Cas. 607. *Compare* Becker v. Western Union Tel. Co., 11 Neb. 87, 38 Am. Rep. 356.

from fraud or any conduct inconsistent with good faith.<sup>1</sup>

**b. WHAT CONSTITUTES GROSS NEGLIGENCE INVALIDATING STIPULATION.**—What Constitutes Gross Negligence within the meaning of the rule just stated must depend upon the facts of each particular case. An error of a single word in transmission may<sup>2</sup> or may not<sup>3</sup> amount to gross negligence according to the nature of the error and the circumstances under which it was made. But several errors in a brief message, whether of omission or commission, amount to such negligence, particularly where there is no exculpatory evidence offered by the company.<sup>4</sup>

The Operator's Ignorance of the Locality of a well-known town or city to which a message is directed is evidence of gross negligence.<sup>5</sup> The company's operators are bound to know the locality of any station to which a message is directed.<sup>6</sup>

A Total Failure to Send the Message, if not explained, is of itself proof of gross negligence.<sup>7</sup>

An Error in the Name of the Destination for which the message was directed constitutes such negligence unless satisfactorily explained.<sup>8</sup>

**c. CONFLICT OF LAWS.**—The law of the place where the contract of sending was made, and not that of the state to which the message is sent or where the error occurred, governs the validity of the stipulation.<sup>9</sup>

**d. STATUTORY REGULATION OF STIPULATIONS.**—In a few states stipulations by telegraph companies have been made the subject of regulation by the legislature. Such regulation, in so far as it seeks to make the company responsible for errors or delays due to its negligence, seems to be within the power of the state.<sup>10</sup>

1. U. S. Telegraph Co. v. Gildersleeve, 29 Md. 232, 96 Am. Dec. 519.

2. Error of One Word Gross Negligence.—Western Union Tel. Co. v. Howell, 38 Kan. 685, 21 Am. & Eng. Corp. Cas. 100. See also *infra*, this section, *Stipulation as to Repeating Message*.

3. Error of One Word Not Gross Negligence.—United States.—White v. Western Union Tel. Co., 14 Fed. Rep. 710; Jones v. Western Union Tel. Co., 18 Fed. Rep. 717.

California.—Hart v. Western Union Tel. Co., 66 Cal. 579, 56 Am. Rep. 119, 8 Am. & Eng. Corp. Cas. 24.

Missouri.—See E. P. Cowen Lumber Co. v. Western Union Tel. Co., 58 Mo. App. 257.

Nebraska.—Becker v. Western Union Tel. Co., 11 Neb. 87, 38 Am. Rep. 356.

New York.—Mowry v. Western Union Tel. Co., 51 Hun (N. Y.) 126.

North Carolina.—Lassiter v. Western Union Tel. Co., 89 N. Car. 334, 5 Am. & Eng. Corp. Cas. 230; Pegram v. Western Union Tel. Co., 97 N. Car. 57, 21 Am. & Eng. Corp. Cas. 123.

Texas.—Western Union Tel. Co. v. Neill, 57 Tex. 283, 44 Am. Rep. 589; Womack v. Western Union Tel. Co., 58 Tex. 176, 44 Am. Rep. 619.

4. Several Errors.—Western Union Tel. Co. v. Crall, 38 Kan. 679, 5 Am. St. Rep. 795; Western Union Tel. Co. v. Goodbar, (Miss. 1890) 7 So. Rep. 214.

"The cases which hold that a common carrier may stipulate for immunity from liability for mere negligence all agree that they are liable for 'gross negligence.' But just what this term means is not easily ascertainable. There is authority for holding it to be equivalent to fraud or intentional wrong. \* \* \*

But a majority of the cases would seem to hold it to be a failure to exercise ordinary care. \* \* \* 'Any negligence is gross in one who undertakes a duty and fails to perform it.'" Western Union Tel. Co. v. Griswold, 37 Ohio St. 311, 41 Am. Rep. 500.

5. Operator's Ignorance.—Western Union Tel. Co. v. Buchanan, 35 Ind. 429, 9 Am. Rep. 744.

6. Western Union Tel. Co. v. Simpson, 73 Tex. 422.

7. Failure to Send.—Garrett v. Western Union Tel. Co., 83 Iowa 257.

8. Error in Name of Destination.—Western Union Tel. Co. v. Howell, 38 Kan. 685, 21 Am. & Eng. Corp. Cas. 100; Postal Tel. Cable Co. v. Robertson, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 785 (message directed to Toledo sent to Chicago).

9. Law of Place of Contract Governs.—Hazel v. Chicago, etc., R. Co., 82 Iowa 477; Shaw v. Postal Tel. Cable Co., 79 Miss. 670, 89 Am. St. Rep. 666. See also the title PRIVATE INTERNATIONAL LAW, vol. 22, p. 1352. Compare North Packing, etc., Co. v. Western Union Tel. Co., 70 Ill. App. 275; Western Union Tel. Co. v. Lovely, (Tex. Civ. App. 1899) 52 S. W. Rep. 563.

10. Statutory Regulation.—Kemp v. Western Union Tel. Co., 28 Neb. 661, 26 Am. St. Rep. 363, 44 Neb. 194, 48 Am. St. Rep. 723; Pacific Tel. Co. v. Underwood, 37 Neb. 315, 40 Am. St. Rep. 490; Western Union Tel. Co. v. Beals, 56 Neb. 415, 71 Am. St. Rep. 682, wherein it was said that the Nebraska statute was enacted for the express purpose of obviating the effect of the decision in Becker v. Western Union Tel. Co., 11 Neb. 87, 38 Am. Rep. 356. See also *infra*, this section, *Requiring Claim for Damages to Be Filed Within Certain Time*.

**2. Stipulation as to Repeating Messages — a. LANGUAGE OF STIPULATION.** — The blanks in common use by telegraph companies contain a printed stipulation to the effect that the company will not be liable for mistakes or delays in transmission of a message beyond the amount received for sending same unless it is ordered repeated.<sup>1</sup> As to the validity of this stipulation, the authorities are widely at variance.

**b. STIPULATION REGARDED AS INVALID.** — In the majority of the states the stipulation, in so far as it is a regulation, is regarded as a mere device by the company to evade liability for the consequences of its own negligence, and therefore void.<sup>2</sup> If it be treated as a contract entered into by the sender, it

**1. Language of Stipulation.** — The stipulation has never materially varied in form or language from that now used on the blanks of the Western Union. It provides that: "To guard against mistakes, the sender of the message should order it repeated, that is, telegraphed back to the original office. For repeating, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that the said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeatable message, beyond the amount received for sending the same, nor for mistakes or delays in the transmission or delivery, or for nondelivery, of any repeated message beyond fifty times the amount received for sending the same, unless specially insured."

**2. Stipulation Held Invalid — Alabama.** — *American Union Tel. Co. v. Daughtery*, 89 Ala. 191; *Western Union Tel. Co. v. Crawford*, 110 Ala. 460; *Western Union Tel. Co. v. Chamblee*, 122 Ala. 428.

*Arkansas.* — *Western Union Tel. Co. v. Short*, 53 Ark. 434.

*Colorado.* — *Western Union Tel. Co. v. Graham*, 1 Colo. 239, 9 Am. Rep. 136.

*Georgia.* — *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480.

*Illinois.* — *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38; *Western Union Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 279; *Western Union Tel. Co. v. Harris*, 19 Ill. App. 347; *North Packing, etc., Co. v. Western Union Tel. Co.*, 70 Ill. App. 275.

*Indiana.* — *Western Union Tel. Co. v. Fenton*, 52 Ind. 1; *Western Union Tel. Co. v. Todd*, 22 Ind. App. 701; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429, 9 Am. Rep. 744; *Western Union Tel. Co. v. Adams*, 87 Ind. 598, 44 Am. Rep. 777; *Western Union Tel. Co. v. Meek*, 49 Ind. 53.

*Iowa.* — *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa 433, 1 Am. Rep. 285; *Manville v. Western Union Tel. Co.*, 37 Iowa 214, 18 Am. Rep. 8.

*Kentucky.* — *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 66 Am. St. Rep. 361; *Postal Tel. Cable Co. v. Schaefer*, 62 S. W. Rep. 1119, 23 Ky. L. Rep. 344. *Compare Camp v. Western Union Tel. Co.*, 1 Met. (Ky.) 164, 71 Am. Dec. 461.

*Maine.* — *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 1 Am. St. Rep. 353, 21 Am. & Eng. Corp. Cas. 145.

*Minnesota.* — *Francis v. Western Union Tel. Co.*, 58 Minn. 252, 49 Am. St. Rep. 507.

*Missouri.* — *Reed v. Western Union Tel. Co.*,

135 Mo. 661, 58 Am. St. Rep. 609, *overruling Wann v. Western Union Tel. Co.*, 37 Mo. 472, 90 Am. Dec. 395. See also *E. P. Cowen Lumber Co. v. Western Union Tel. Co.*, 58 Mo. App. 257; *Jarboe v. Western Union Tel. Co.*, 63 Mo. App. 226.

*Nebraska.* — *Western Union Tel. Co. v. Lowrey*, 32 Neb. 732; *Kemp v. Western Union Tel. Co.*, 28 Neb. 661, 26 Am. St. Rep. 363 (stipulation avoided by statute); *Western Union Tel. Co. v. Beals*, 56 Neb. 415, 71 Am. St. Rep. 682. *Compare Becker v. Western Union Tel. Co.*, 11 Neb. 87, 38 Am. Rep. 358.

*North Carolina.* — *Brown v. Postal Tel. Cable Co.*, 111 N. Car. 187, 32 Am. St. Rep. 793, 39 Am. & Eng. Corp. Cas. 581, *overruling Lassiter v. Western Union Tel. Co.*, 89 N. Car. 334, 5 Am. & Eng. Corp. Cas. 230. See also *Thompson v. Western Union Tel. Co.*, 107 N. Car. 449, 35 Am. & Eng. Corp. Cas. 59.

*Tennessee.* — *Marr v. Western Union Tel. Co.*, 85 Tenn. 529, 16 Am. & Eng. Corp. Cas. 243; *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 10 Am. St. Rep. 699, 25 Am. & Eng. Corp. Cas. 542.

*Texas.* — *Western Union Tel. Co. v. Burrow*, 10 Tex. Civ. App. 122; *Gulf, etc., R. Co. v. Wilson*, 69 Tex. 739, 21 Am. & Eng. Corp. Cas. 83; *Western Union Tel. Co. v. Tobin*, (Tex. Civ. App. 1900) 56 S. W. Rep. 540; *Western Union Tel. Co. v. Norris*, 25 Tex. Civ. App. 43; *Western Union Tel. Co. v. Ragland*, (Tex. Civ. App. 1901) 61 S. W. Rep. 421; *Mitchell v. Western Union Tel. Co.*, 12 Tex. Civ. App. 262; *Western Union Tel. Co. v. Nagle*, 11 Tex. Civ. App. 539. *Compare Western Union Tel. Co. v. Hearne*, 77 Tex. 83, 30 Am. & Eng. Corp. Cas. 588.

*Utah.* — *Wertz v. Western Union Tel. Co.*, 7 Utah 446.

*Vermont.* — *Gillis v. Western Union Tel. Co.*, 61 Vt. 461, 15 Am. St. Rep. 917, 25 Am. & Eng. Corp. Cas. 568.

*Wisconsin.* — *Thompson v. Western Union Tel. Co.*, 64 Wis. 531, 54 Am. Rep. 644.

In *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa 433, 1 Am. Rep. 285, the court, by Dillon, J., said: — "We have examined all the leading cases known to have been decided with respect to this subject and have found not one holding, when this was the exact point in judgment, that the ordinary printed conditions as to repeating messages have the effect to release the company from mistakes caused by its own want of ordinary care."

**Rule in Kansas and Nevada.** — In *Western Union Tel. Co. v. Crall*, 38 Kan. 679, 5 Am. St. Rep. 795, and *Western Union Tel. Co. v.*

is void as having been induced by a species of moral fraud.<sup>1</sup> Other authorities hold that the company cannot, by such a stipulation, secure immunity from liability for losses caused by its negligence, and that the stipulation operates merely to exempt the company from liability for errors arising out of causes beyond its control.<sup>2</sup> But as the company is not an insurer<sup>3</sup> and consequently is not liable for such errors even in the absence of any contractual exemption, such a ruling amounts to a holding that the stipulation is of no effect whatever unless it operates to place on the plaintiff the burden of affirmatively proving negligence on the part of the company.<sup>4</sup>

**Where the Action Is to Recover a Statutory Penalty,** the stipulation limiting the company's liability for an unpeated message to a fixed amount is invalid as attempting to fix a rule of liability different from that prescribed by the statute.<sup>5</sup>

**c. STIPULATION REGARDED AS VALID.** — In the federal Supreme Court and the courts of several of the states, the stipulation as to repeating messages is declared to be a valid and binding one; that it comes within the rule that every company engaged in a public undertaking may provide, for the conduct of its business, reasonable rules and regulations, to which all contracts with

Howell, 38 Kan. 685, 21 Am. & Eng. Corp. Cas. 100, the stipulation was held not to protect the company, on the ground that the evidence showed that the loss complained of was due to the "gross negligence" of the company. What the effect of the stipulation is in cases of "ordinary negligence" was not determined. In *Barnes v. Western Union Tel. Co.*, 24 Nev. 125, 77 Am. St. Rep. 791, the stipulation was held to be no defense to the company because the loss in that case, due to delay or nondelivery, would not have been prevented by repeating the message. The court expressed no opinion as to the effect of the stipulation in cases of error in transmission.

**Rule in Nebraska.** — The stipulation was originally regarded as reasonable and valid. *Becker v. Western Union Tel. Co.*, 11 Neb. 87, 38 Am. Rep. 358. But a statute now exists which renders the company liable for errors or delays without regard to any stipulation in the contract, and under this statute the repeating stipulation is nugatory although the court has indicated that it was a reasonable one. *Western Union Tel. Co. v. Beals*, 56 Neb. 415, 71 Am. St. Rep. 682; *Kemp v. Western Union Tel. Co.*, 28 Neb. 661, 26 Am. St. Rep. 363; *Western Union Tel. Co. v. Lowrey*, 32 Neb. 732.

**1. Stipulation Held Void as Induced by Duress.** — *Gillis v. Western Union Tel. Co.*, 61 Vt. 461, 15 Am. St. Rep. 917, 25 Am. & Eng. Corp. Cas. 572; *Marr v. Western Union Tel. Co.*, 85 Tenn. 544, 16 Am. & Eng. Corp. Cas. 243. See also *Dorgan v. Telegraph Co.*, 1 Am. L. T. Rep. N. S. 406; *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 311, 41 Am. Rep. 500.

"If it be a contract, the sender entering into it was under a species of moral duress. His necessities compelled him to resort to the telegraph as the only means through which he could speedily transact the business in hand. \* \* \* 'Prudential rules and regulations,' such as the company is authorized by statute to establish, cannot be understood to embrace such regulations as shall deprive a party of the use of their instrumentality, save by coming under most onerous and unjust conditions." *Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 51.

**2.** See *Western Union Tel. Co. v. Tyler*, 74 Ill. 168, 24 Am. Rep. 280; *Western Union Tel. Co. v. Hearne*, 77 Tex. 83, 30 Am. & Eng. Corp. Cas. 588.

"If it becomes necessary for the company, in transmitting messages with integrity, skill and diligence, to secure accuracy, to have such messages repeated, then the law devolves upon them that duty to meet its requirements." *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 484.

"Having taken the message and the pay, why should they not do all things (including the repeating) necessary for correct transmission? Why should they insist on a special compensation for using any particular mode or instrumentality as a guard against their own negligence?" *Ayer v. Western Union Tel. Co.*, 9 Me. 493, 1 Am. St. Rep. 353.

**3.** See *supra*, this title, VIII. 1. *General Nature of Liability.*

**4.** In *Gulf, etc., R. Co. v. Wilson*, 69 Tex. 739, 21 Am. & Eng. Corp. Cas. 83, the court declared "that such condition or stipulation, in so far as it undertakes to exempt the company from liability for negligence of its servants and employees is void, is too well settled to require discussion here." But in a later case it was said: — "We think it should now be considered settled in this state that this limitation of liability by special contract is valid and binding and that no recovery can be had for an error committed in transmitting an unpeated message, unless it be clearly shown that the error was caused by the misconduct, fraud or the want of due care on the part of the company, its servants or agents." *Western Union Tel. Co. v. Hearne*, 77 Tex. 83, 30 Am. & Eng. Corp. Cas. 588, and the latter case states the rule as now in force in *Texas*. See *Western Union Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *Womack v. Western Union Tel. Co.*, 58 Tex. 176, 44 Am. Rep. 614; *Western Union Tel. Co. v. Brown*, (Tex. Civ. App. 1903) 75 S. W. Rep. 359.

**5. Statutory Penalties Not Affected by Stipulation.** — *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429, 9 Am. Rep. 744. See *infra*, this title, *Statutory Penalties*.

it are subject.<sup>1</sup> These cases proceed on the ground that the extra charge for repeating is reasonably small and if the sender fails to order his message repeated, he is presumed to have preferred to assume the slight risk.<sup>2</sup>

*d. EFFECT OF STIPULATION WHERE VALID.* — Even where the validity of the stipulation as to repeating messages is recognized, the sender's failure to have the message repeated is no bar to his action where it appears that compliance with the stipulation would not have prevented the wrong; the stipulation can apply only to such errors as are preventible by having the message repeated, although it may attempt to comprehend others.<sup>3</sup> It does not apply, therefore, where there has been a total failure to transmit<sup>4</sup> nor where there was a failure to deliver or an unreasonable delay in transmission or delivery.<sup>5</sup> Nor does it apply in the case of an error in the name of the

**1. Stipulation Held Valid — England.** — *MacAndrew v. Electric Tel. Co.*, 17 C. B. 3, 84 E. C. L. 3.

**United States.** — *Primrose v. Western Union Tel. Co.*, 154 U. S. 1; *Western Union Tel. Co. v. James*, 162 U. S. 650; *Western Union Tel. Co. v. Coggin*, (C. C. A.) 68 Fed. Rep. 137. *Compare Western Union Tel. Co. v. Cook*, (C. C. A.) 61 Fed. Rep. 624.

**California.** — *Coit v. Western Union Tel. Co.*, 130 Cal. 657, 80 Am. St. Rep. 153 (addressee bound); *Hart v. Western Union Tel. Co.*, 66 Cal. 579, 56 Am. Rep. 119. *Compare Western Union Tel. Co. v. Cook*, (C. C. A.) 61 Fed. Rep. 624, where the later case is disapproved.

**Massachusetts.** — *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226; *Redpath v. Western Union Tel. Co.*, 112 Mass. 71, 17 Am. Rep. 69; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485.

**Michigan.** — *Birkett v. Western Union Tel. Co.*, 103 Mich. 361, 50 Am. St. Rep. 374; *Western Union Tel. Co. v. Carew*, 15 Mich. 525.

**New York.** — *Bennett v. Western Union Tel. Co.*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 365; *Schwartz v. Atlantic, etc., Tel. Co.*, 18 Hun (N. Y.) 157; *Breese v. U. S. Telegraph Co.*, 48 N. Y. 138, 8 Am. Rep. 526; *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231, 21 Am. & Eng. Corp. Cas. 107; *Riley v. Western Union Tel. Co.*, (N. Y. City Ct. Gen. T.) 6 Misc. (N. Y.) 221.

**Pennsylvania.** — *Passmore v. Western Union Tel. Co.*, 9 Phila. (Pa.) 90, 30 Leg. Int. (Pa.) 36, affirmed 78 Pa. St. 238. See also *Western Union Tel. Co. v. Stevenson*, 128 Pa. St. 442, 15 Am. St. Rep. 687. But the stipulation is held to apply only to the sender. *Tobin v. Western Union Tel. Co.*, 146 Pa. St. 375, 28 Am. St. Rep. 802; *Western Union Tel. Co. v. Richman*, 19 W. N. C. (Pa.) 569. And see *New York, etc., Printing Tel. Co. v. Dryburg*, 35 Pa. St. 298, 78 Am. Dec. 338.

**2. Theory of Cases Upholding Stipulation Requiring Message to Be Repeated.** — See *Primrose v. Western Union Tel. Co.*, 154 U. S. 1; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 489.

**What Amounts to a Request to Repeat.** — In *Western Union Tel. Co. v. Landis*, (Pa. 1888) 12 Atl. Rep. 467, 21 Am. & Eng. Corp. Cas. 206, it appeared that, upon receipt of the dispatch, plaintiff, the addressee, went at once to the operator and requested him to ask the sender whether certain words were "five six"

or "five sixty." It was held that this amounted to a request by plaintiff to have the message repeated and that it was immaterial that the forms established by the company for the repetition of messages were not complied with.

**3. Error Not Preventable by Repeating Message.** — *Pacific Postal Tel. Cable Co. v. Fleischner*, (C. C. A.) 66 Fed. Rep. 899, affirming 55 Fed. Rep. 738; *Birney v. New York, etc., Printing Tel. Co.*, 18 Md. 341, 81 Am. Dec. 612; *Sprague v. Western Union Tel. Co.*, 6 Daly (N. Y.) 200; *New York, etc., Printing Tel. Co. v. Dryburg*, 35 Pa. St. 300, 78 Am. Dec. 338. *Compare Clement v. Western Union Tel. Co.*, 137 Mass. 463, 8 Am. & Eng. Corp. Cas. 66.

In *Mowry v. Western Union Tel. Co.*, 51 Hun (N. Y.) 126, the message, when offered, was placed in a pile of messages awaiting transmission and when it was reached the operator called up the agent at the destination but found the wire in use. While waiting, his attention was diverted to something else and he inadvertently placed the message among those already sent. The mistake was not discovered for a week. Applying the rule of the text, the court held that the stipulation as to repeating messages was no defense.

**4. Failure to Transmit.** — *Western Union Tel. Co. v. Way*, 83 Ala. 542 (failure to deliver to connecting line); *Garrett v. Western Union Tel. Co.*, 83 Iowa 257; *Birney v. New York, etc., Printing Tel. Co.*, 18 Md. 341, 81 Am. Dec. 612; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 492; *Sprague v. Western Union Tel. Co.*, 6 Daly (N. Y.) 200; *Brooks v. Western Union Tel. Co.*, (Utah 1903) 72 Pac. Rep. 499; *Beatty Lumber Co. v. Western Union Tel. Co.*, 52 W. Va. 410.

**5. Nondelivery or Unreasonable Delay — Alabama.** — *Western Union Tel. Co. v. Henderson*, 8 Ala. 510, 18 Am. St. Rep. 148, 30 Am. & Eng. Corp. Cas. 615.

**Colorado.** — *Western Union Tel. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136.

**Illinois.** — *North Packing, etc., Co. v. Western Union Tel. Co.*, 70 Ill. App. 275.

**Indiana.** — *Western Union Tel. Co. v. Fenton*, 52 Ind. 6; *Western Union Tel. Co. v. Henley*, 157 Ind. 90.

**Nebraska.** — *Western Union Tel. Co. v. Lowrey*, 32 Neb. 732.

**New York.** — *Bryant v. American Tel. Co.*, 1 Daly (N. Y.) 575; *Baldwin v. U. S. Telegraph Co.*, 54 Barb. (N. Y.) 505, 1 Lans. (N. Y.) 125.

**North Carolina.** — *Thompson v. Western Union Tel. Co.*, 107 N. Car. 449.

place from which the message is sent, that not being properly a part of the message but rather the statement of a fact peculiarly within the knowledge of the company's operator.<sup>1</sup> It does not apply where the failure to have the message repeated is due to the assurance of the operator that it has been correctly transmitted and that repeating it is unnecessary.<sup>2</sup>

When the Error Is Due to "Gross Negligence" or Wilful Misconduct on the part of the company or its agents, the stipulation will not protect the company even in those jurisdictions where the validity of the stipulation is recognized.<sup>3</sup> But proof merely of an error of one word in transmission does not establish "gross negligence" within the meaning of the rule.<sup>4</sup>

**3. Requiring Claims to Be Presented Within Certain Time**—*a. VALIDITY OF LIMITATION.*—The stipulation contained in the usual contract of sending to the effect that the company will not be liable for damages in any case where the claim is not presented in writing within a prescribed time, after the message is filed with the company for transmission, does not tend to limit the liability of the company for its own negligence or that of its agents, and is not unreasonable where the time fixed is not too short to prevent the party claiming damages to become aware of the fact of his injury and to present his claim properly.<sup>5</sup> The reasons for the stipulation are obvious,<sup>6</sup> and it has

*Texas.*—*Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. Rep. 843; *Gulf, etc., R. Co. v. Wilson*, 69 Tex. 739, 21 Am. & Eng. Corp. Cas. 80; *Western Union Tel. Co. v. Linn*, (Tex. Civ. App. 1893) 23 S. W. Rep. 895, 87 Tex. 7, 47 Am. St. Rep. 58; *Western Union Tel. Co. v. Lyman*, 3 Tex. Civ. App. 460.

*Wisconsin.*—*Hibbard v. Western Union Tel. Co.*, 33 Wis. 564, 14 Am. Rep. 775.

**1. Error as to Name of Place Whence Message Was Sent.**—*Western Union Tel. Co. v. Simpson*, 73 Tex. 422; *Western Union Tel. Co. v. Tobin*, (Tex. Civ. App. 1900) 56 S. W. Rep. 540.

**2. Western Union Tel. Co. v. Reeves**, 8 Tex. Civ. App. 37.

**3. Gross Negligence or Wilful Misconduct**—*England.*—*MacAndrew v. Electric Tel. Co.*, 17 C. B. 3, 84 E. C. L. 3.

*United States.*—*Jones v. Western Union Tel. Co.*, 18 Fed. Rep. 717; *Pacific Postal Tel. Cable Co. v. Fleischner*, (C. C. A.) 66 Fed. Rep. 899.

*Kansas.*—*Western Union Tel. Co. v. Crall*, 38 Kan. 679, 5 Am. St. Rep. 795; *Western Union Tel. Co. v. Howell*, 38 Kan. 685, 21 Am. & Eng. Corp. Cas. 100.

*Massachusetts.*—*Redpath v. Western Union Tel. Co.*, 112 Mass. 71, 17 Am. Rep. 69; *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 488.

*North Carolina.*—*Pegram v. Western Union Tel. Co.*, 97 N. Car. 57, 21 Am. & Eng. Corp. Cas. 119.

*Texas.*—*Womack v. Western Union Tel. Co.*, 58 Tex. 176, 44 Am. Rep. 614; *Western Union Tel. Co. v. Hearne*, 77 Tex. 83, 30 Am. & Eng. Corp. Cas. 588.

**4. What Amounts to Gross Negligence**—*United States.*—*Jones v. Western Union Tel. Co.*, 18 Fed. Rep. 717.

*California.*—*Hart v. Western Union Tel. Co.*, 66 Cal. 579, 56 Am. Rep. 119, 8 Am. & Eng. Corp. Cas. 24. See also *Coit v. Western Union Tel. Co.*, 130 Cal. 657, 80 Am. St. Rep. 153.

*Missouri.*—*E. P. Cowen Lumber Co. v. Western Union Tel. Co.*, 58 Mo. App. 257.

*North Carolina.*—*Lassiter v. Western Union Tel. Co.*, 89 N. Car. 334, 5 Am. & Eng. Corp. Cas. 230.

*Pennsylvania.*—*Passmore v. Western Union Tel. Co.*, 9 Phila. (Pa.) 907, 30 Leg. Int. (Pa.) 36, affirmed 78 Pa. St. 238.

*Texas.*—*Womack v. Western Union Tel. Co.*, 58 Tex. 176, 44 Am. Rep. 619; *Western Union Tel. Co. v. Elliott*, 7 Tex. Civ. App. 482.

The fact that an operator, who was thoroughly competent but was temporarily filling the place of the regular agent, neglected to connect his instrument with the line running to the station from which the message was sent, is not gross negligence such as will render the company responsible for delay in transmitting an unrepeated message. *Birkett v. Western Union Tel. Co.*, 103 Mich. 361, 50 Am. St. Rep. 374.

**"Gross Negligence" Defined.**—See *Redington v. Pacific Postal Tel. Cable Co.*, 107 Cal. 317, 48 Am. St. Rep. 132; *Coit v. Western Union Tel. Co.*, 130 Cal. 657, 80 Am. St. Rep. 153.

**Attempt to Send Message While Electric Storm Is Raging Not Gross Negligence.**—*Coit v. Western Union Tel. Co.*, 130 Cal. 657, 80 Am. St. Rep. 153.

**What Amounts to Fraud.**—The acceptance, for transmission, of an important message, at a time when the company's lines are not working, without notifying the sender of that fact, amounts to a fraud on him and will preclude the company from relying upon its stipulation as to repeating messages. *Pacific Postal Tel. Cable Co. v. Fleischner*, (C. C. A.) 66 Fed. Rep. 899, affirming 55 Fed. Rep. 738.

**5. See ACCIDENT INSURANCE**, vol. 1, p. 325; **CARRIERS OF GOODS**, vol. 5, p. 320; **EXPRESS COMPANIES**, vol. 12, p. 566; **FIRE INSURANCE**, vol. 13, p. 385. See also **LIMITATION OF ACTIONS**, vol. 19, p. 149.

In *Lewis v. Great Western R. Co.*, 5 H. & N. 867, a similar stipulation was upheld although the time allowed was only seven days.

**6. It does not operate as a limitation of the time within which suit may be brought, but is designed merely to give the company notice of the claim in order that it may be investigated**

been upheld where the limitation was fixed at ninety days,<sup>1</sup> at sixty days,<sup>2</sup> at thirty days<sup>3</sup> and at twenty days<sup>4</sup> after the filing of the message for transmission.

But such a stipulation has been held invalid in some jurisdictions, as contrary to public policy and as attempting to establish limitations other than those fixed by the general statute of limitations,<sup>5</sup> while in other jurisdictions they have been declared void because prohibited by positive statutory provisions.<sup>6</sup>

The Reasonableness of Any Particular Limitation May Change With Peculiar Circumstances so that what is ordinarily a reasonable length of time for filing the claim may be unreasonable.<sup>7</sup>

promptly. Messages are usually destroyed after being kept six months and the company's ability to defend would be materially affected by a delay in its being informed of a claim.

1. See *infra*, this subdiv., par. In *Texas*.

2. *Sixty Days*.—*United States*.—*Findlay v. Western Union Tel. Co.*, 64 Fed. Rep. 459.

*Alabama*.—*Western Union Tel. Co. v. Way*, 83 Ala. 542; *Harris v. Western Union Tel. Co.*, 121 Ala. 519, 77 Am. St. Rep. 70.

*Arkansas*.—*Western Union Tel. Co. v. Dougherty*, 54 Ark. 221, 26 Am. St. Rep. 33.

*Georgia*.—*Hill v. Western Union Tel. Co.*, 85 Ga. 425, 21 Am. St. Rep. 166, 30 Am. & Eng. Corp. Cas. 590; *Western Union Tel. Co. v. James*, 90 Ga. 254; *Western Union Tel. Co. v. Waxelbaum*, 113 Ga. 1017.

*Indiana*.—*Western Union Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 713, 8 Am. & Eng. Corp. Cas. 47; *Western Union Tel. Co. v. Yopst*, 118 Ind. 248, (Ind. 1887) 11 N. E. Rep. 16, 21 Am. & Eng. Corp. Cas. 88; *Western Union Tel. Co. v. Meredith*, 95 Ind. 93. Compare *Western Union Tel. Co. v. McKibben*, 114 Ind. 511, 21 Am. & Eng. Corp. Cas. 133.

*Iowa*.—*Albers v. Western Union Tel. Co.*, 98 Iowa 51. Compare *Herron v. Western Union Tel. Co.*, 90 Iowa 129; *Garrett v. Western Union Tel. Co.*, 83 Iowa 257.

*Kansas*.—*Russell v. Western Union Tel. Co.*, 57 Kan. 230.

*Mississippi*.—*Clement v. Western Union Tel. Co.*, 77 Miss. 747.

*Missouri*.—*Smith-Frazier Boot, etc., Co. v. Western Union Tel. Co.*, 49 Mo. App. 99; *Kendall v. Western Union Tel. Co.*, 56 Mo. App. 192.

*New York*.—*Young v. Western Union Tel. Co.*, 65 N. Y. 163.

*North Carolina*.—*Sherrill v. Western Union Tel. Co.*, 109 N. Car. 527; *Lewis v. Western Union Tel. Co.*, 117 N. Car. 436.

*Pennsylvania*.—*Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83, 1 Am. Rep. 387. Compare *Conrad v. Western Union Tel. Co.*, 162 Pa. St. 204.

*South Dakota*.—*Kirby v. Western Union Tel. Co.*, 7 S. Dak. 623.

*Tennessee*.—*Manier v. Western Union Tel. Co.*, 94 Tenn. 446.

*Texas*.—*Western Union Tel. Co. v. Rains*, 63 Tex. 27; *Western Union Tel. Co. v. Brown*, 84 Tex. 54; *Lester v. Western Union Tel. Co.*, 84 Tex. 313; *Western Union Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608; *Western Union Tel. Co. v. Ferguson*, (Tex. Civ. App. 1804) 27 S. W. Rep. 1048. Compare *Western Union Tel. Co. v. Hinkle*, 3 Tex. Civ. App. 518.

The Fact that the Exact Amount of Damage Is Not Ascertainable within the sixty days affords the plaintiff no excuse for failing to comply with the stipulation. *Manier v. Western Union Tel. Co.*, 94 Tenn. 442.

3. *Thirty Days*.—*United States*.—*Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181.

*Colorado*.—*Western Union Tel. Co. v. Dunfield*, 11 Colo. 335, 21 Am. & Eng. Corp. Cas. 111.

*Minnesota*.—*Cole v. Western Union Tel. Co.*, 33 Minn. 228, 8 Am. & Eng. Corp. Cas. 45.

*Missouri*.—*Massengale v. Western Union Tel. Co.*, 17 Mo. App. 257.

*Texas*.—*Western Union Tel. Co. v. Pells*, (1883) 2 Tex. L. Rev. 276; *Western Union Tel. Co. v. Culbertson*, 79 Tex. 65, cited in 35 Am. & Eng. Corp. Cas. 45.

*Washington*.—See *Martin v. Sunset Telephone, etc., Co.*, 18 Wash. 260.

4. *Twenty Days*.—*Aiken v. Western Union Tel. Co.*, 5 S. Car. 358; *Heimann v. Western Union Tel. Co.*, 57 Wis. 562.

5. *Stipulation Held Void*.—*Johnston v. Western Union Tel. Co.*, 33 Fed. Rep. 362, 21 Am. & Eng. Corp. Cas. 116 (thirty days). See also *Southern Express Co. v. Caperton*, 44 Ala. 101, 4 Am. Rep. 118; *Garrett v. Western Union Tel. Co.*, 83 Iowa 257.

"It would introduce into the local jurisprudence of every state, territory, and country, a species of private statutes of limitation of non-claim. It would avoid the policy of the state in the matter of the time in which actions, both in tort and in contract, should be brought." *Western Union Tel. Co. v. Longwill*, 5 N. Mex. 308, 25 Am. & Eng. Corp. Cas. 559 (60 days).

6. *Stipulation Invalid under Statute*.—*Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 66 Am. St. Rep. 361 (*construing* Ky. Const. 1890, §§ 192, 196); *Davis v. Western Union Tel. Co.*, 107 Ky. 527, 92 Am. St. Rep. 371; *Pacific Tel. Co. v. Underwood*, 37 Neb. 315, 40 Am. St. Rep. 400; *Western Union Tel. Co. v. Kemp*, 44 Neb. 104, 48 Am. St. Rep. 723.

An Addressee suing under the Indiana Statute to recover damages is held not to be bound by the stipulation, although its validity in other cases is recognized. *Western Union Tel. Co. v. McKibben*, 114 Ind. 511, 21 Am. & Eng. Corp. Cas. 133.

7. See *Massengale v. Western Union Tel. Co.*, 17 Mo. App. 257; *Herron v. Western Union Tel. Co.*, 90 Iowa 129. See also *Heimann v. Western Union Tel. Co.*, 57 Wis. 562.

Thus a limitation of sixty days has been held unreasonable when the message was sent from Philadelphia to Shanghai calling for a reply by

In Texas, the statute provides that no such stipulation shall be valid when it allows a shorter time than ninety days for presenting the claim.<sup>1</sup> Under this, a stipulation requiring the claim to be presented within ninety days from the time the message is filed for transmission is valid,<sup>2</sup> but a stipulation fixing a shorter period is void<sup>3</sup> even though the contract containing it was made in a foreign state where such a limitation was valid.<sup>4</sup>

*b. WHEN LIMITATION BEGINS TO RUN.* — The limitation begins to run from the time specified in the stipulation and is now usually from the filing of the message for transmission.<sup>5</sup> A mere delay in receiving the message, although due to the company's negligence, will not modify the stipulation or extend the time if a reasonable time remains, after knowledge of the error, to present the claim,<sup>6</sup> and it is error to instruct the jury that the limitation begins to run only from the time when plaintiff became aware of defendant's breach of duty.<sup>7</sup>

*c. MESSAGE NOT SENT.* — When the message is never sent by the company and the stipulation requires the claim to be filed within a fixed time "after the sending of the message," the failure of the party complaining to present his claim is, of course, no defense to the company.<sup>8</sup> And this rule has been applied to a case where the claim was required to be filed within a fixed time after the message was "filed for transmission" on the ground that the company could not avail itself of any provision in a contract which it had failed to accept.<sup>9</sup>

*d. WHAT CONSTITUTES A COMPLIANCE WITH STIPULATION.* — The Claim Presented Should Set Forth Fairly the nature and extent of the claimant's demands.<sup>10</sup> While he will not be limited to the amount of damages set up in his claim<sup>11</sup> he cannot recover for subjects of damage not mentioned therein.<sup>12</sup>

The Claim Must Be Presented to a Proper Agent of the company. The agent or manager at the office or station from which the message was sent is a proper agent.<sup>13</sup> Likewise, the agent or operator at the point to which the message

mail. *Conrad v. Western Union Tel. Co.*, 162 Pa. St. 204.

1. Rule in Texas. — Supp. to Sayles' Rev. Stat. Texas, art. 3203*b*; Tex. Rev. Stat. 1895, art. 3379.

2. *Baldwin v. Western Union Tel. Co.*, (Tex. Civ. App. 1896) 33 S. W. Rep. 890; *Western Union Tel. Co. v. Vanway*, (Tex. Civ. App. 1899) 54 S. W. Rep. 414.

3. *Western Union Tel. Co. v. Jobe*, 6 Tex. Civ. App. 409.

4. *Western Union Tel. Co. v. Lovely*, (Tex. Civ. App. 1899) 52 S. W. Rep. 563; *Burgess v. Western Union Tel. Co.*, 92 Tex. 125, 71 Am. St. Rep. 833. Compare *Western Union Tel. Co. v. Burgess*, (Tex. Civ. App. 1897) 43 S. W. Rep. 1033.

5. The original form, upon which a number of decisions were made, provided a limitation of sixty days "after sending the message." See *Western Union Tel. Co. v. Way*, 83 Ala. 542.

6. *Heimann v. Western Union Tel. Co.*, 57 Wis. 562; *Massengale v. Western Union Tel. Co.*, 17 Mo. App. 258; *Western Union Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608.

The mere fact that the exact amount of the damage suffered by plaintiff (the addressee) was not ascertainable within sixty days is no excuse for his failure to present his claim within that time. *Manier v. Western Union Tel. Co.*, 94 Tenn. 442.

7. *Western Union Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608.

8. *Message Not Sent.* — *Western Union Tel. Co. v. Way*, 83 Ala. 542; *Western Union Tel. Co. v. Yopst*, 118 Ind. 248; *Western Union Tel. Co. v. Trumbull*, 1 Ind. App. 121; *Sherrill v. Western Union Tel. Co.*, 109 N. Car. 527.

9. *Western Union Tel. Co. v. Michelson*, 94 Ga. 436.

10. *What Claim Must Show.* — *Western Union Tel. Co. v. Brown*, 84 Tex. 54.

11. *Manier v. Western Union Tel. Co.*, 94 Tenn. 442; *Western Union Tel. Co. v. Murray*, 29 Tex. Civ. App. 207. See also *Western Union Tel. Co. v. Partlow*, 30 Tex. Civ. App. 599.

The claim presented by a sender classified the damages as "fifty dollars actual damages and five thousand dollars exemplary damages." At the trial the jury returned a verdict for five hundred dollars actual damages alone. It was held that plaintiff was not prejudiced by his classification and the verdict was allowed to stand. "The claim was for five thousand and fifty dollars in the aggregate, and served in all respects to give the defendant the information stipulated for." *Western Union Tel. Co. v. Morris*, 77 Tex. 173, 30 Am. & Eng. Corp. Cas. 633.

12. *Western Union Tel. Co. v. Murray*, 29 Tex. Civ. App. 207; *Swain v. Western Union Tel. Co.*, 12 Tex. Civ. App. 385.

13. *Presentation to Proper Agent.* — *Hill v. Western Union Tel. Co.*, 85 Ga. 425, 21 Am. St. Rep. 166, 30 Am. & Eng. Corp. Cas. 590; *Western Union Tel. Co. v. Blanchard*, 68 Ga.



is sent is a proper person with whom to file the notice.<sup>1</sup>

**But Delivery of the Claim to a Mere Messenger Boy** to be by him delivered to the local agent is not a sufficient compliance with the stipulation.<sup>2</sup>

**The Notice Must Be in Writing** as required by the express terms of the stipulation, but this requirement is waived where a claim is made orally within the time and acted on by the company without objection to its form.<sup>3</sup> But a mere promise by an operator, to whom an oral claim is made, to look into the matter is no waiver of the company's right to insist on a written presentation of the claim.<sup>4</sup>

**The Commencement of a Suit** against the company to recover damages is equivalent to the presentment of the claim and is a sufficient compliance with the stipulation when done within the prescribed time.<sup>5</sup>

**4. Limiting Liability to Specified Amount.**—In sending night messages for which reduced rates are charged, the telegraph companies have sometimes inserted into the contract of sending a stipulation to the effect that in consideration of the reduced rate for which this message is sent, the company shall not be liable beyond the amount paid for transmission, or a small multiple thereof. Such a stipulation is unreasonable and, so far as it seeks to limit the liability of the company for the consequences of its own negligence, is contrary to public policy and void.<sup>6</sup> The terms of such a contract are

299, 45 Am. Rep. 480; *Western Union Tel. Co. v. Yopst*, (Ind. 1887) 11 N. E. Rep. 16, 21 Am. & Eng. Corp. Cas. 88; *Bennett v. Western Union Tel. Co.*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 365 (clerk in main office). See also *Western Union Tel. Co. v. Collins*, 45 Kan. 88.

Plaintiff, a sender, presented an imperfect statement of his claim to an operator or receiving clerk at the New York office of the company, who, after examination, returned it, saying that he had no authority to attend to it, referring him at the same time to the proper officers. Plaintiff, upon going to their offices and finding them absent, left and presented no other claim until after the expiration of the sixty days. It was held that this was no compliance with the stipulation. *Young v. Western Union Tel. Co.*, 65 N. Y. 163.

1. *Western Union Tel. Co. v. May*, 8 Tex. Civ. App. 176.

2. **Presentation to Messenger Boy Not Sufficient.**—*Western Union Tel. Co. v. Terrell*, 10 Tex. Civ. App. 60.

3. **Necessity of Writing.**—*Western Union Tel. Co. v. Stratemeyer*, 6 Ind. App. 125; *Hill v. Western Union Tel. Co.*, 85 Ga. 425, 21 Am. St. Rep. 166, 30 Am. & Eng. Corp. Cas. 590. See also *Western Union Tel. Co. v. Yopst*, (Ind. 1887) 11 N. E. Rep. 16, 21 Am. & Eng. Corp. Cas. 88; *Bennett v. Western Union Tel. Co.*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 365.

4. **Waiver of Requirement.**—*Massengale v. Western Union Tel. Co.*, 17 Mo. App. 257.

5. **Bringing Suit Equivalent to Presentation.**—*Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 30 Am. & Eng. Corp. Cas. 615; *East Tennessee, etc., R. Co. v. Bayliss*, 74 Ala. 150, 19 Am. & Eng. R. Cas. 480; *Bryan v. Western Union Tel. Co.*, 133 N. Car. 603; *Western Union Tel. Co. v. Mellon*, 96 Tenn. 78; *Western Union Tel. Co. v. Cooper*, 29 Tex. Civ. App. 591; *Western Union Tel. Co. v. Piner*, 9 Tex. Civ. App. 152; *Phillips v. Western Union Tel. Co.*, 95 Tex. 638; (Tex.

Civ. App. 1902) 69 S. W. Rep. 997; *Western Union Tel. Co. v. Karr*, 5 Tex. Civ. App. 60; *Western Union Tel. Co. v. Crawford*, (Tex. Civ. App. 1903) 75 S. W. Rep. 843.

**A Contrary Rule** was once recognized in *Texas* and is still in force in some jurisdictions. *Western Union Tel. Co. v. McKinney*, 5 Tex. L. Rev. 173, 8 Am. & Eng. Corp. Cas. 125; *Western Union Tel. Co. v. Ferguson*, (Tex. Civ. App. 1894) 27 S. W. Rep. 1048; *Western Union Tel. Co. v. Yopst*, (Ind. 1887) 11 N. E. Rep. 16, 21 Am. & Eng. Corp. Cas. 88, *affirmed* 118 Ind. 248, 25 Am. & Eng. Corp. Cas. 526. See also *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83, 1 Am. Rep. 387.

**Filing of Claim Held a Condition Precedent to Right to Sue.**—In *Western Union Tel. Co. v. McKinney*, 5 Tex. L. Rev. 173, 8 Am. & Eng. Corp. Cas. 123, the claim was filed with the company within the prescribed time, but after suit was commenced. It was held that this was not a compliance with the stipulation, but that such a filing might be made the basis of another suit or of an amendment to the pending suit. See also *Western Union Tel. Co. v. Hays*, (Tex. Civ. App. 1901) 63 S. W. Rep. 171, (Tex. Civ. App. 1902) 67 S. W. Rep. 1072.

6. **Limitation of Amount of Liability Held Void**—*Alabama*.—*American Union Tel. Co. v. Daughtery*, 89 Ala. 191.

*Georgia*.—*Western Union Tel. Co. v. Fontaine*, 58 Ga. 433.

*Illinois*.—*Western Union Tel. Co. v. Harris*, 19 Ill. App. 347.

*Indiana*.—*Western Union Tel. Co. v. Young*, 93 Ind. 118.

*Iowa*.—*Harkness v. Western Union Tel. Co.*, 73 Iowa 190, 5 Am. St. Rep. 672, 21 Am. & Eng. Corp. Cas. 182.

*Maine*.—*True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156; *Bartlett v. Western Union Tel. Co.*, 62 Me. 209, 16 Am. Rep. 437; *Fowler v. Western Union Tel. Co.*, 80 Me. 381, 6 Am. St. Rep. 211.

*North Carolina*.—*Brown v. Postal Tel.*

repugnant in assuming to impose an obligation upon the company and, by the same act, to release it from all obligation.<sup>1</sup> In some jurisdictions, however, such a stipulation has been upheld as an agreement, by the parties, upon a certain sum as liquidated damages.<sup>2</sup>

**A Stipulation Requiring the Sender to Insure the Message** and providing that, in default of doing so, the company's liability shall not exceed fifty times the price paid for transmission, is regarded, like the stipulation just mentioned, as void.<sup>3</sup>

**5. Night Messages — Time of Delivery.** — A stipulation on a night message blank that, in consideration of the reduced rate charged, the company's duty to deliver shall be deemed fulfilled by a delivery by noon of the succeeding day is valid and binding.<sup>4</sup>

**6. As to Unavoidable Interruptions of Service.** — The company may, by special contract, limit its liability or stipulate against any liability whatever for failure or delays due to unavoidable interruptions in the working of its lines, as, for example, where peculiar climatic conditions prevent the proper operation of its instruments, or where a storm has blown down its wires,<sup>5</sup> or, it would seem, where its business is interfered with by a strike of its operators.<sup>6</sup>

**But Where Such Conditions Necessitating Delay Are Known to the Operator,** it is his duty to inform the sender thereof, and if he fails to do so the stipulation will not be available as a defense to the company.<sup>7</sup>

**7. Other Stipulations.** — The company may stipulate against any liability for errors or delays occurring on a connecting line.<sup>8</sup>

**Where the Message Is in Cipher,** or otherwise obscure, it seems that the company may limit its liability by a stipulation assented to by the sender.<sup>9</sup>

Cable Co., 111 N. Car. 187, 32 Am. St. Rep. 793, 39 Am. & Eng. Corp. Cas. 583.

*Tennessee.* — See *Marr v. Western Union Tel. Co.*, 85 Tenn. 529, 16 Am. & Eng. Corp. Cas. 243.

*Vermont.* — *Gillis v. Western Union Tel. Co.*, 61 Vt. 461, 15 Am. St. Rep. 917, 25 Am. & Eng. Corp. Cas. 572.

*Wisconsin.* — *Candee v. Western Union Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452; *Hibbard v. Western Union Tel. Co.*, 33 Wis. 559, 14 Am. Rep. 775; *Thompson v. Western Union Tel. Co.*, 64 Wis. 531, 54 Am. Rep. 644.

1. *Bartlett v. Western Union Tel. Co.*, 62 Me. 209, 16 Am. Rep. 437.

2. **Limitation Held Valid.** — *Alsen v. Western Union Tel. Co.*, 5 S. Car. 358; *Schwartz v. Atlantic, etc., Tel. Co.*, 18 Hun (N. Y.) 157; *Bennett v. Western Union Tel. Co.*, (Supra. Ct. Gen. T.) 2 N. Y. Supp. 365; *Jones v. Western Union Tel. Co.*, 18 Fed. Rep. 717; *Clement v. Western Union Tel. Co.*, 137 Mass. 463, 8 Am. & Eng. Corp. Cas. 66.

In *Western Union Tel. Co. v. Neill*, 57 Tex. 289, 44 Am. Rep. 589, the rule is declared to be that the parties may, in this way, "agree upon a sum certain in the nature of liquidated damages for an error or delay arising from a cause other than misconduct, fraud, or the want of proper care."

3. **Requiring Sender to Insure Message.** — *Brown v. Postal Tel. Cable Co.*, 111 N. Car. 187, 32 Am. St. Rep. 793.

4. **Time of Delivery of Night Message.** — *Western Union Tel. Co. v. McCoy*, (Tex. Civ. App. 1896) 31 S. W. Rep. 210; *Western Union Tel. Co. v. Van Cleave*, 107 Ky. 464, 92 Am. St. Rep. 366; *Western Union Tel. Co. v. Johnson*, 107 Ky. 631. Compare *Hibbard v. Western*

*Union Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775.

In *Sefel v. Western Union Tel. Co.*, (Tex. Civ. App. 1900) 57 S. W. Rep. 857, it is held that such a stipulation may be and is waived by a parol promise of the operator to have the message transmitted and delivered sooner. See also *Western Union Tel. Co. v. Bruner*, (Tex. 1892) 19 S. W. Rep. 149.

5. **Delays Due to Climatic Conditions.** — *Sweetland v. Illinois, etc., Tel. Co.*, 27 Iowa 433, 1 Am. Rep. 285; *Western Union Tel. Co. v. Graham*, 1 Cole. 237, 9 Am. Rep. 136; *White v. Western Union Tel. Co.*, 14 Fed. Rep. 710; *Riley v. Western Union Tel. Co.*, (N. Y. City Ct. Gen. T.) 6 Misc. (N. Y.) 221. See also *Western Union Tel. Co. v. Cohen*, 73 Ga. 522; *Western Union Tel. Co. v. Stiles*, (Tex. Civ. App. 1896) 35 S. W. Rep. 76.

Such a stipulation would not embrace a case where the delay is to the exclusive use of wire, for the time, in sending out train orders. *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406, 35 Am. & Eng. Corp. Cas. 77.

6. **Interference by Striking Operators.** — See the title *CARRIERS OF GOODS*, vol. 5, pp. 257, 319.

7. **Duty to Disclose Known Conditions.** — *Western Union Tel. Co. v. Birge-Forbes Co.*, 29 Tex. Civ. App. 526; *Pacific Postal Tel. Cable Co. v. Fleischner*, 66 Fed. Rep. 899, 29 U. S. App. 227, affirming 55 Fed. Rep. 738; *Western Union Tel. Co. v. Bierhaus*, 12 Ind. App. 17.

8. See *infra*, this title, XI. 7. *Message Passing over Connecting Lines.*

9. *Primrose v. Western Union Tel. Co.*, 154 U. S. 1; *Cannon v. Western Union Tel. Co.*, 100 N. Car. 311, 6 Am. Rep. 590, 21 Am. & Eng. Corp. Cas. 124. A contrary rule is announced in *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 66 Am. St. Rep. 361.

A Stipulation that the Company Is the Agent of the Sender Without Liability is void in so far as it undertakes to relieve the company from liability for the consequences of its negligence.<sup>1</sup>

A Stipulation that No Responsibility Shall Attach to Company until the Message Is Presented and Accepted at one of its transmitting offices is reasonable and valid,<sup>2</sup> but will afford no protection to the company where the message, though delivered to the agent while he was away from the office, was duly filed by him and its delay occurred after such filing.<sup>3</sup>

A Stipulation that a Messenger Boy Shall Be Deemed the Sender's Agent and that the company shall not become responsible until the message is presented at the office has been held to be a reasonable one even though the messenger is one of the company's delivery messengers and was acting in that capacity when the message was handed him, where it does not appear that he was employed or authorized to receive messages.<sup>4</sup> But such a stipulation is of no effect when it appears that the messenger, sent to deliver a telegram requesting a reply, was directed by the company to obtain a reply.<sup>5</sup>

8. Burden of Proof as to Noncompliance. — The burden is on the company to show a failure to comply with the stipulation.<sup>6</sup>

9. Proof of Assent to Stipulations — *a*. SENDER'S ASSENT. — The message blanks in common use being so arranged that a sender, in affixing his signature to the message, signs the printed contract, it is conclusively presumed, in the absence of fraud or imposition, that he thereby assented to and became bound by the terms of the contract, in so far as they are valid, though he may not have read or noticed them<sup>7</sup> or even been able to read them.<sup>8</sup>

1. *Western Union Tel. Co. v. Seals*, (Tex. Civ. App. 1898) 45 S. W. Rep. 964.

2. *Acceptance of Message at Transmitting Office*. — *Stamey v. Western Union Tel. Co.*, 92 Ga. 613, 44 Am. St. Rep. 95.

3. *Delivery to Agent Away from Office*. — *Western Union Tel. Co. v. Pruett*, (Tex. Civ. App. 1896) 35 S. W. Rep. 78.

4. *Delivery through Messenger Boys*. — *Ayers v. Western Union Tel. Co.*, 65 N. Y. App. Div. 149; *Stamey v. Western Union Tel. Co.*, 92 Ga. 613, 44 Am. St. Rep. 95.

5. *Will v. Postal Tel. Cable Co.*, 3 N. Y. App. Div. 22.

6. *Burden of Proving Noncompliance*. — *Kendall v. Western Union Tel. Co.*, 56 Mo. App. 192; *Beatty Lumber Co. v. Western Union Tel. Co.*, 52 W. Va. 410. Compare *Albers v. Western Union Tel. Co.*, 98 Iowa 51.

In *Texas* the rule is fixed by statute that compliance with such a stipulation shall be presumed unless the company denies it upon oath. *Texas Tel., etc., Co. v. Seiders*, 9 Tex. Civ. App. 431.

7. *Sender Bound by His Signature to Printed Contract* — *United States*. — *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181; *Primrose v. Western Union Tel. Co.*, 154 U. S. 1.

*Georgia*. — *Hill v. Western Union Tel. Co.*, 85 Ga. 425, 21 Am. St. Rep. 166, 30 Am. & Eng. Corp. Cas. 590; *Stamey v. Western Union Tel. Co.*, 92 Ga. 613, 44 Am. St. Rep. 95.

*Iowa*. — *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa 433, 1 Am. Rep. 285.

*Kentucky*. — *Camp v. Western Union Tel. Co.*, 1 Met. (Ky.) 164, 71 Am. Dec. 461.

*Maryland*. — *Birney v. New York, etc., Printing Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607.

*Massachusetts*. — *Redpath v. Western Union Tel. Co.*, 112 Mass. 71, 17 Am. Rep. 69; *Grin-*

*nell v. Western Union Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485.

*Michigan*. — *Western Union Tel. Co. v. Carew*, 15 Mich. 525.

*Minnesota*. — *Cole v. Western Union Tel. Co.*, 33 Minn. 227, 8 Am. & Eng. Corp. Cas. 45.

*Nebraska*. — *Becker v. Western Union Tel. Co.*, 11 Neb. 87, 38 Am. Rep. 356.

*New York*. — *Breece v. U. S. Telegraph Co.*, 48 N. Y. 132, 8 Am. Rep. 526, *affirming* 45 Barb. (N. Y.) 274; *Young v. Western Union Tel. Co.*, 65 N. Y. 163, 34 N. Y. Super. Ct. 390; *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231, 21 Am. & Eng. Corp. Cas. 107, *affirming* 39 Hun (N. Y.) 158; *Pearsall v. Western Union Tel. Co.*, 44 Hun (N. Y.) 532, *affirmed* 124 N. Y. 256, 21 Am. St. Rep. 662, 35 Am. & Eng. Corp. Cas. 31; *Schwartz v. Atlantic, etc., Tel. Co.*, 18 Hun (N. Y.) 159. Compare *Curtin v. Western Union Tel. Co.*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 347.

*Pennsylvania*. — *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83, 1 Am. Rep. 387; *Passmore v. Western Union Tel. Co.*, 78 Pa. St. 238. But see *Western Union Tel. Co. v. Stevenson*, 128 Pa. St. 442, 15 Am. St. Rep. 687.

*South Carolina*. — *Young v. Western Union Tel. Co.*, 65 S. Car. 93; *Pinckney v. Western Union Tel. Co.*, 19 S. Car. 73, 45 Am. Rep. 765.

*Tennessee*. — *Marr v. Western Union Tel. Co.*, 85 Tenn. 530, 16 Am. & Eng. Corp. Cas. 243.

*Texas*. — *Womack v. Western Union Tel. Co.*, 58 Tex. 179, 44 Am. Rep. 614; *Western Union Tel. Co. v. Edsall*, 63 Tex. 668, 8 Am. & Eng. Corp. Cas. 70; *Anderson v. Western Union Tel. Co.*, 84 Tex. 17. See also *Western Union Tel. Co. v. Hays*, (Tex. Civ. App. 1901) 63 S. W. Rep. 171.

8. *Sender Not Able to Read Contract*. — West-

The Use of Very Small Type for Printing the Stipulations in the message blank, where there are letters in large type directing attention to the stipulations, does not constitute fraud or imposition such as will affect the validity of the implied assent.<sup>1</sup>

*b. ASSENT OF ADDRESSEE.* — The right of the addressee to recover rests on the contract of sending and on the principle that where two parties contract for the benefit of a third, the last may maintain an action, in his own right, for a breach of the agreement.<sup>2</sup> It necessarily follows that the addressee can, as a rule, assert no rights except under the contract made by the sender; he is therefore bound by the stipulations to the same extent as the sender.<sup>3</sup>

*c. WHAT AMOUNTS TO PROOF OF ASSENT.* — The Opportunities of the Sender or Addressee to Know and to be familiar with the regulations of the company are mere probative facts and do not create any conclusive presumption of knowledge, no matter what the opportunities were.<sup>4</sup>

Where the Stipulations Are Conspicuously Posted in the Company's Office in which the sender prepared his message it has been held that they are binding on him although not incorporated with the printed contract on the blank.<sup>5</sup> But this view is opposed to the almost universally accepted doctrine as to a carrier's limiting its liability by mere notice<sup>6</sup> and is not believed to be sound.<sup>7</sup>

*ern Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 30 Am. & Eng. Corp. Cas. 615; *Western Union Tel. Co. v. Edsall*, 63 Tex. 668, 8 Am. & Eng. Corp. Cas. 70.

1. *Contract Printed in Small Type.* — *Wolf v. Western Union Tel. Co.*, 62 Pa. St. 83, 1 Am. Rep. 387.

2. *Manier v. Western Union Tel. Co.*, 94 Tenn. 448.

The Illinois Court denies the application of the rule of the text in a case where the addressee sues in tort for a breach of a public duty. However, it enforces the same rule where the addressee sues as where the suit is by the sender, and makes the binding effect of the stipulation to depend upon the fact whether a knowledge of the stipulation was brought home to him. See *Webbe v. Western Union Tel. Co.*, 169 Ill. 610, 61 Am. St. Rep. 207, reversing 64 Ill. App. 331; *Western Union Tel. Co. v. Dubois*, 128 Ill. 248, 15 Am. St. Rep. 109.

3. *Georgia.* — *Western Union Tel. Co. v. Waxelbaum*, 113 Ga. 1017; *Stamey v. Western Union Tel. Co.*, 92 Ga. 613, 44 Am. St. Rep. 95; *Western Union Tel. Co. v. James*, 90 Ga. 254.

*Iowa.* — *Sweatland v. Illinois, etc., Tel. Co.*, 27 Iowa 433, 1 Am. Rep. 285.

*Kansas.* — *Russell v. Western Union Tel. Co.*, 57 Kan. 230.

*Massachusetts.* — *Ellis v. American Tel. Co.*, 13 Allen (Mass.) 226.

*Missouri.* — *Massengale v. Western Union Tel. Co.*, 17 Mo. App. 257.

*New York.* — *Curtin v. Western Union Tel. Co.*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 347.

*South Carolina.* — *Aiken v. Western Union Tel. Co.*, 5 S. Car. 358.

*Tennessee.* — *Manier v. Western Union Tel. Co.*, 94 Tenn. 442.

*Texas.* — *Western Union Tel. Co. v. Neill*, 57 Tex. 283, 44 Am. Rep. 589; *Western Union Tel. Co. v. Culbertson*, 79 Tex. 65.

Where the Original Sender Requests a Reply, his addressee, in sending the reply, acts as his agent and binds him by assenting to the stipulation concerning unrepeat messages. *Coit*

*v. Western Union Tel. Co.*, 130 Cal. 657, 80 Am. St. Rep. 153.

4. *Webbe v. Western Union Tel. Co.*, 169 Ill. 610, 61 Am. St. Rep. 207, reversing 64 Ill. App. 331 (question of addressee's assent); *Merchants' Dispatch, etc., Co. v. Moore*, 88 Ill. 136, 30 Am. Rep. 541; *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256, 21 Am. St. Rep. 662, 35 Am. & Eng. Corp. Cas. 31, affirming 44 Hun (N. Y.) 532. In this last case the company showed that for a long time it had required messages to be written on a blank containing the stipulations. Plaintiff admitted that he was familiar with the appearance of the blanks, had frequently used them for writing messages, and that a parcel of them was always on his office desk; but averred that he had never read the stipulation and had no knowledge of its terms. It was held that, in the absence of evidence that the terms of the stipulation were brought home to plaintiff, it was proper to exclude the blank from the consideration of the jury. Compare, however, *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231, 21 Am. & Eng. Corp. Cas. 107, where it appeared that plaintiff was familiar with the blanks, having used them for several years, and had seen the words, "Read the notice and agreement at the top." It was held that although he may not have known what the precise terms of the stipulation were, "yet he knew that some stipulations were therein contained, and he must be held, by the use of the blank and its delivery to the defendant, to have assented to them."

That Plaintiff Was a Shareholder in the Company does not charge him with notice of the printed stipulations or of a resolution of the directors limiting the company's liability for unrepeat messages, and a copy of such resolutions is not competent evidence. *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256, 21 Am. St. Rep. 662.

5. *Birney v. New York, etc., Printing Tel. Co.*, 18 Md. 341, 81 Am. Dec. 607.

6. See *CARRIERS OF GOODS*, vol. 5, p. 289.

7. See *Carland v. Western Union Tel. Co.*, 118 Mich. 369, 74 Am. St. Rep. 394.

That the Message Was Written on the Blank of Another Company does not affect the validity of the stipulations nor lessen their binding effect upon the parties.<sup>1</sup>

If the Message Is Written on a Mutilated Blank which contains language sufficient to put the sender upon inquiry as to what the full agreement is, his agreement will be presumed, particularly where he is shown to have been a frequent user of the blanks.<sup>2</sup>

When the Message Is Not Written on the Usual Blank, but is received for transmission by the company's agent, the sender is not bound by the stipulations printed on the company's blanks,<sup>3</sup> unless it can be shown that he had knowledge of the rules of the company in regard to them.<sup>4</sup> And this is true although a rule of the company, of which the sender was ignorant, forbade its agents to accept for transmission any message unless it was written on one of its regular blanks.<sup>5</sup>

Where the Operator Receives the Message by Telephone or other means of verbal communication from the sender, the question whether the latter knew of the company's regulations and was therefore bound by them is one of fact to be determined by the jury from the evidence submitted.<sup>6</sup>

Where the Company Habitually Receives and Delivers Messages Verbally, for reasons growing out of the peculiar character of the message, it is a question for the jury whether, by thus dispensing with the use of its blanks, the company has intended to relieve its customer of the stipulations printed thereon.<sup>7</sup>

The Knowledge of an Agent who sends a message to his principal is chargeable to his principal, and if the former knew of the stipulations, the latter is bound by them.<sup>8</sup>

Where the Operator Writes Out the Message on one of the company's usual blanks, at the request of the sender, the latter, upon signing his name thereto, is bound by the stipulations notwithstanding his failure to notice them.<sup>9</sup> It is otherwise, however, in such a case, if the sender does not see and does not sign or otherwise agree to the stipulations.<sup>10</sup>

1. **Message Written on Blank of Another Company.**—*Western Union Tel. Co. v. Waxelbaum*, 113 Ga. 1017; *U. S. Telegraph Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519; *Clement v. Western Union Tel. Co.*, 137 Mass. 463; *Young v. Western Union Tel. Co.*, 65 S. Car. 93. *Compare* *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256, 21 Am. St. Rep. 662, 35 Am. & Eng. Corp. Cas. 31.

2. **Use of Mutilated Blank.**—*Kiley v. Western Union Tel. Co.*, 109 N. Y. 231, 21 Am. & Eng. Corp. Cas. 107.

3. **Message Not Written on Blank.**—*Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256, 21 Am. St. Rep. 662, 35 Am. & Eng. Corp. Cas. 31, *affirming* 44 Hun (N. Y.) 532. See also *Western Union Tel. Co. v. Stevenson*, 128 Pa. St. 442, 15 Am. St. Rep. 687, 30 Am. & Eng. Corp. Cas. 590; *Western Union Tel. Co. v. Hinkle*, 3 Tex. Civ. App. 518.

4. *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429, 9 Am. Rep. 744; *Kiley v. Western Union Tel. Co.*, 109 N. Y. 231, 21 Am. & Eng. Corp. Cas. 107.

5. *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181; *Western Union Tel. Co. v. Arwine*, 3 Tex. Civ. App. 156.

6. **Message by Telephone.**—*Carland v. Western Union Tel. Co.*, 118 Mich. 369, 74 Am. St. Rep. 394.

7. **Messages Delivered Verbally.**—*Western Union Tel. Co. v. Stevenson*, 128 Pa. St. 442, 15 Am. St. Rep. 687.

In *Western Union Tel. Co. v. Todd*, 22 Ind.

App. 701, the message was telephoned to the company and accepted by the operator pursuant to a local practice. An error occurred in the name of the addressee, and it was held that the company was responsible on the ground that the operator was its agent in writing the message, and that plaintiff was not bound by the stipulation.

8. **Knowledge of Agent Imputed to Principal.**—*Clement v. Western Union Tel. Co.*, 137 Mass. 463, 8 Am. & Eng. Corp. Cas. 66. See also *Coit v. Western Union Tel. Co.*, 130 Cal. 657, 80 Am. St. Rep. 153.

9. **Message Written by Operator at Request of Sender.**—*Western Union Tel. Co. v. Edsall*, 63 Tex. 668, 8 Am. & Eng. Corp. Cas. 70; *Gulf, etc., R. Co. v. Geer*, 5 Tex. Civ. App. 349; *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148. *Compare* *Carland v. Western Union Tel. Co.*, 118 Mich. 369, 74 Am. St. Rep. 394.

If the operator, upon being offered a message written on plain paper, transcribes it on a blank and then reads it over to the sender or his agent, the stipulations are binding. *Western Union Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608.

10. *Western Union Tel. Co. v. Uvalde Nat. Bank*, (Tex. Civ. App. 1903) 72 S. W. Rep. 232; *Peasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181; *Western Union Tel. Co. v. Powell*, 94 Va. 268.

In *Western Union Tel. Co. v. Neel*, (Tex. Civ. App. 1894) 25 S. W. Rep. 661, it was held

When the Message Written on Plain Paper Is Pasted to a Regular Blank by the operator, without authority from the sender, it seems that the latter is not bound by the stipulations printed on the blank if he had no knowledge of them.<sup>1</sup>

**XI. LIABILITY OF COMPANY IN PARTICULAR CLASSES OF CASES—1. Company Acting under Contract to Furnish Market Reports and Other News.**—It is no part of the general duty of a telegraph company to collect and transmit news of any kind unless it contracts to do so.<sup>2</sup> But it may enter into agreements to furnish news reports and may make the collection and transmission of market reports, stock quotations and other news a special department of its business.<sup>3</sup> In such cases it becomes liable for all damages occasioned to its patrons through its furnishing incorrect information, and this whether the error occurred in the process of transmission or existed in the information as originally received by it. The company, in such cases, assumes duties beyond those incumbent on it as a mere carrier of messages for the public and cannot escape liability by showing a mere correct transmission.<sup>4</sup>

**2. Messages Relating to Gambling Transactions.**—While a telegraph company may not refuse to send a message,<sup>5</sup> or escape liability for a statutory penalty for failing to send it correctly or promptly,<sup>6</sup> on the ground that it relates to "futures" or similar gambling transactions, the damages recoverable for error or delay in connection with the transmission or delivery of such message are nominal merely and cannot exceed the price paid for transmission.<sup>7</sup> The "future" contract being illegal and void, neither the sender nor addressee is bound by it, and neither can invoke it as a basis for the recovery of substantial damages.<sup>8</sup>

**3. Interstate Messages.**—Except in so far as it may give rise to a question of conflict of laws, the fact that the initial and terminal points of a message sent by telegraph are not in the same state is not material in an action against the company to recover damages for a breach of its common-law duty to use

error to charge that if the sender procured the operator to write out the message, the addressee thereby became charged with such knowledge of the company's rules as to office hours and as to free delivery limits as the operator had.

1. *Harris v. Western Union Tel. Co.*, 121 Ala. 519, 77 Am. St. Rep. 70; *Western Union Tel. Co. v. Shumate*, 2 Tex. Civ. App. 429; *Western Union Tel. Co. v. Pruett*, (Tex. Civ. App. 1896) 35 S. W. Rep. 78; *Anderson v. Western Union Tel. Co.*, 84 Tex. 17; *Western Union Tel. Co. v. Arwine*, 3 Tex. Civ. App. 156. See also *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256, 21 Am. St. Rep. 662, 35 Am. & Eng. Corp. Cas. 31, *affirming* 44 Hun (N. Y.) 532.

When it merely appears that the message was written on plain paper and then pasted on to a message blank, the plaintiff must plead and prove *non est factum* or he will be bound by the stipulations. *Western Union Tel. Co. v. Hays*, (Tex. Civ. App. 1901) 63 S. W. Rep. 171.

2. *Bradley v. Western Union Tel. Co.*, 8 Ohio Dec. (Reprint) 707, 9 Cinc. L. Bul. 223, 27 Alb. L. J. 363.

3. See *Western Union Tel. Co. v. Stevenson*, 128 Pa. St. 442, 15 Am. St. Rep. 687. See also *infra*, this title, *Companies Furnishing "Tickers."*

**Construction of Contract to Furnish Reports.**—See *Goodsell v. Western Union Tel. Co.*, 130 N. Y. 430, *affirming* 58 N. Y. Super. Ct. 26.

**4. Company Liable for Incorrect Information However Occurring.**—*Turner v. Hawkeye Tel. Co.*, 41 Iowa 458, 20 Am. Rep. 605; *New Orleans Bank v. Western Union Tel. Co.*, 27

La. Ann. 49. In this last case, the company claimed that the error was caused by the working of the gold stock indicator in its New York office. It was held that this was no defense as the company had no right to rely solely on the indicator.

5. See *supra*, this title, VIII. 2. b. *To Accept for Transmission.*

6. See *infra*, this title, *Statutory Penalties.*

**7. Messages Relating to Gambling Transactions.**

—*Bryant v. Western Union Tel. Co.*, 17 Fed. Rep. 825; *Cahn v. Western Union Tel. Co.*, 46 Fed. Rep. 40, *affirmed* (C. C. A.) 48 Fed. Rep. 810, 39 Am. & Eng. Corp. Cas. 552; *Smith v. Western Union Tel. Co.*, 84 Ky. 664, 16 Am. & Eng. Corp. Cas. 231; *Morris v. Western Union Tel. Co.*, 94 Me. 423; *Western Union Tel. Co. v. Harper*, 15 Tex. Civ. App. 37. See also *Western Union Tel. Co. v. Hall*, 124 U. S. 444; *Western Union Tel. Co. v. Littlejohn*, 72 Miss. 1025. And see the title *GAMBLING CONTRACTS*, vol. 14, p. 644.

**The Burden of Proof** is on the company to show that the message related to a "future" contract and not to a *bona fide* agreement under which an actual delivery of the goods was contemplated. *Western Union Tel. Co. v. Hill*, (Tex. Civ. App. 1902) 65 S. W. Rep. 1123; *Hocker v. Western Union Tel. Co.*, (Fla. 1903) 34 So. Rep. 901.

8. *Melchert v. American Union Tel. Co.*, 11 Fed. Rep. 194; *Cothran v. Western Union Tel. Co.*, 83 Ga. 25, 25 Am. & Eng. Corp. Cas. 533. Compare *Western Union Tel. Co. v. Littlejohn*, 72 Miss. 1025.

proper care to effect a prompt and correct transmission and delivery, since such a fact can have no effect upon the right of the sender or addressee to recover. This has been specifically declared,<sup>1</sup> and the cases are numerous in which the messages involved were sent from one state to another and the fact ignored as utterly immaterial. Nor is the rule different when the plaintiff relies on a state statute, where such statute is merely declaratory of the common law, as when it undertakes to deny the company the right, by stipulation or otherwise, to limit its liability for negligence.<sup>2</sup>

**4. Forged or Fraudulent Messages.** — Where a telegraph company, by its agent, receives and transmits a forged or fraudulent message, it is responsible to the addressee for damages sustained by him in consequence of the fraud or forgery if it is made to appear that the company's agent, by the exercise of ordinary care, might have detected and prevented the fraud.<sup>3</sup> And if the circumstances attending the request to transmit the message are such as would give the agent reasonable cause to suspect the fraud, his negligence in failing to prevent it will render the company liable.<sup>4</sup> On the other hand, if an impostor, using the name of another, sends over the company's line a request for money, the company is not liable to the party who responds to the request and sends the money by telegraph, for a *bona fide* payment to the impostor, when it appears that there was nothing in the circumstances of the case to excite suspicion in the mind of an ordinarily careful man.<sup>5</sup>

**When Operator Perpetrates the Fraud.** — The liability of the telegraph company for damages resulting from the sending of forged or fraudulent messages extends to cases where the operator himself is the author of the forged dispatch.<sup>6</sup> It extends also to cases where the recognized agent of the company employs, without special authority, a sub-agent to receive and transmit messages, and such sub-agent forges and transmits a message whereby he obtains money.<sup>7</sup>

**1. Interstate Messages.** — *Kemp v. Western Union Tel. Co.*, 28 Neb. 661, 26 Am. St. Rep. 363, 30 Am. & Eng. Corp. Cas. 607; *Western Union Tel. Co. v. Mellon*, 96 Tenn. 66; *Western Union Tel. Co. v. Boots*, 10 Tex. Civ. App. 540. See also *Carnahan v. Western Union Tel. Co.*, 89 Ind. 526, 46 Am. Rep. 175.

**2. Rule Not Affected by State Statutes.** — *Kemp v. Western Union Tel. Co.*, 28 Neb. 661, 26 Am. St. Rep. 363, 30 Am. & Eng. Corp. Cas. 607.

**3. Liability for False or Fraudulent Messages.** — *Strause v. Western Union Tel. Co.*, 8 Biss. (U. S.) 104; *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549, 6 Am. Rep. 140. Compare *Dickson v. Reuter's Tel. Co.*, 2 C. P. D. 62, affirmed 3 C. P. D. 1.

**Fraud Occurring After Negligent Transmission.** — In *Lowery v. Western Union Tel. Co.*, 60 N. Y. 198, 19 Am. Rep. 154, it appeared that B sent a telegram to plaintiff asking for five hundred dollars. By mistake in transmission the message, as delivered to plaintiff, asked for five thousand dollars. The money was sent, and B, overcome by cupidity, absconded with it. It was held that the company was not liable since its negligence was not the proximate cause of the loss.

**Liability for Fraud Effected by "Wire Tapping."** — *Western Union Tel. Co. v. Uvalde Nat. Bank*, (Tex. Civ. App. 1903) 72 S. W. Rep. 232.

**4. Operator Having Reasonable Cause to Suspect Fraud.** — *Elwood v. Western Union Tel. Co.*, 45 N. Y. 549, 6 Am. Rep. 140.

**5. Western Union Tel. Co. v. Meyer**, 61 Ala. 158, 32 Am. Rep. 1.

**6. Fraud Perpetrated by Operator.** — *Pacific Postal Tel. Cable Co. v. Palo Alto Bank*, (C. C. A.) 109 Fed. Rep. 369; *McCord v. Western Union Tel. Co.*, 39 Minn. 181, 12 Am. St. Rep. 636, 25 Am. & Eng. Corp. Cas. 582.

In *Magouirk v. Western Union Tel. Co.*, 79 Miss. 632, 89 Am. St. Rep. 663, an agent of the defendant company sent this message: "Mr. G., Ellisville. Be sure to go to Heidelberg. Am on excursion," and forged plaintiff's name to it. Plaintiff was an unmarried woman and the addressee an unmarried man with whom she had but a slight acquaintance. After sending the message, the agent boasted of having sent it and paraded its contents before the public. It was held that his acts were within the scope of his employment and that the company was liable to plaintiff for the mortification and injury occasioned to her. It was also held that plaintiff might show the agent's habits as to the use of intoxicants as indicating his unfitness for the position he held.

**The Measure of Damages** in such a case is the amount of money of which the plaintiff was defrauded less what he recovers of the defrauder. He cannot recover of the telegraph company the amount expended by him for attorney's fees and expenses in recovering part of the money from the defrauder or his confederate. *Pacific Postal Tel. Cable Co. v. Palo Alto Bank*, (C. C. A.) 109 Fed. Rep. 369.

**7. Forgery by Sub-agent.** — *State Bank v. Western Union Tel. Co.*, 52 Cal. 280. The

It is no bar to an action *ex delicto* against the telegraph company for damages resulting from the transmission of a fraudulent message whereby payment of a draft was fraudulently obtained, that the addressee has a remedy *ex contractu* against a solvent indorsee on the draft; nor is it necessary in such a case to sue the indorsee first.<sup>1</sup>

**5. Immoral or Indecent Messages.** — When a message is couched in decent language it is the company's duty to accept and transmit it, and it has no right to inquire its real meaning or purport.<sup>2</sup> If the meaning is ambiguous, the company, in determining whether to transmit it or not, must give the sender the benefit of the doubt.<sup>3</sup> But when the message is expressed in indecent, obscene, or filthy language, or is clearly for an immoral purpose, the company may decline to accept it for transmission.<sup>4</sup>

**Supplying Gambling Room with Racing News, Etc.** — A telegraph company is not indictable as being guilty of maintaining a common nuisance for transmitting to a poolroom telegraphic information concerning horse races even though it appears that the place is resorted to for selling pools and betting on races, by idle and evil disposed persons, to the common annoyance of all good citizens of the neighborhood.<sup>5</sup>

**6. Libelous Messages.** — The transmission of a message which, on its face, is libelous, is a publication of the libel for which the company must answer in damages to the person libeled.<sup>6</sup> But where the message is couched in such language that an ordinary person, ignorant of the circumstances and knowing nothing of the parties, would not suppose it to be defamatory, the company, unless specially informed of the facts and of the true nature of the message, is bound to accept and transmit it and incurs no liability by doing so, though the message may be, in fact, libelous.<sup>7</sup>

**7. Messages Passing Over Connecting Lines** — *a.* IN GENERAL. — By analogy to the principle governing the liability of common carriers of goods,<sup>8</sup> the rule is that a telegraph company which has received for transmission a message directed to a point beyond its own lines, is not, in the absence of special agreement, liable for errors or delays occurring on other lines; its undertaking is only to transmit the message promptly and correctly over its own lines and to deliver it to the succeeding line.<sup>9</sup>

court reasoned that although a principal is not bound by a contract made in his name by a subagent appointed by his agent without authority, yet he is responsible for the negligence and torts of such subagent, if the agent who appointed him was, at the time, acting in the business of his principal and the subagent was transacting such business.

1. *Strause v. Western Union Tel. Co.*, 8 Biss. (U. S.) 104. See also *Hasbrouck v. Western Union Tel. Co.*, 107 Iowa 160, 70 Am. St. Rep. 181.

2. *Western Union Tel. Co. v. Ferguson*, 57 Ind. 495. See *supra*, this title, *Company's Duty and Liability as Affected by Regulations*.

3. **Ambiguous Message — Sender Entitled to Benefit of Doubt.** — *Gray v. Western Union Tel. Co.*, 87 Ga. 350, 27 Am. St. Rep. 259, 35 Am. & Eng. Corp. Cas. 50. The rule rests on the reason that "the law would give the benefit of the ambiguity to the company in dealing with it, either civilly or criminally, for transmitting the dispatch."

4. **No Duty to Transmit Immoral or Indecent Messages.** — *Western Union Tel. Co. v. Ferguson*, 57 Ind. 495.

5. *Com. v. Western Union Tel. Co.*, 67 S. W. Rep. 59, 57 L. R. A. 614.

6. **Transmitting Libelous Messages.** — *Archaus-*

*bault v. Great North Western Tel. Co.*, 14 Quebec 8 (dispatch to Associated Press).

In *Peterson v. Western Union Tel. Co.*, 65 Minn. 18, 72 Minn. 41, 71 Am. St. Rep. 461, 75 Minn. 368, 74 Am. St. Rep. 502, the company accepted and transmitted a message directed to plaintiff reading: "Slippery Sam, your name is pants," and signed "Many Republicans." It was held that the message sufficiently indicated to the company its libelous character and that plaintiff was entitled to recover damages for the libel.

7. *Nye v. Western Union Tel. Co.*, 104 Fed. Rep. 628; *Stockhan v. Western Union Tel. Co.*, 10 Kan. App. 580, 63 Pac. Rep. 658.

8. See the title **CONNECTING CARRIERS**, vol. 6, p. 603.

9. **Messages Over Connecting Lines.** — *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *Baldwin v. U. S. Telegraph Co.*, 45 N. Y. 744, 6 Am. Rep. 165, *reversing* 1 Lans. (N. Y.) 125, 54 Barb. (N. Y.) 505, 6 Abb. Pr. N. S. (N. Y.) 405; *Gulf, etc., R. Co. v. Baird*, 75 Tex. 256; *Smith v. Western Union Tel. Co.*, 84 Tex. 359, 31 Am. St. Rep. 59, 39 Am. & Eng. Corp. Cas. 589. See also *Western Union Tel. Co. v. Lovely*, (Tex. Civ. App. 1899) 52 S. W. Rep. 563.

In those states which uphold the English doc-



The fact that the initial company receives the entire charge for transmission does not alter the general rule, that being the usual practice.<sup>1</sup>

The initial line must exercise diligence to secure the prompt and correct transmission of the message and is liable for a delay on its part in delivering it to the connecting line;<sup>2</sup> and when, on tendering the message to the connecting line, it finds that the latter's line is out of order so that the message cannot be forwarded, it is its duty to notify the sender of that fact.<sup>3</sup>

The connecting line is bound to accept for transmission all messages tendered it by another line. This is declared by statute in a number of the states, but such provisions are merely affirmatory of the common law.<sup>4</sup> But in the absence of an express statutory provision otherwise, such a duty does not extend to cases where the message is directed to a point beyond the company's line unless the company undertakes, as a part of its regular business, the transmission of such messages; in accepting such a message, therefore, the company is entitled to affix reasonable conditions and limitations to its liability.<sup>5</sup>

For a delay in delivery, after the message has been transmitted, the last line is, of course, alone liable.<sup>6</sup>

Where a partnership exists between the two connecting lines, the initial line is liable for errors or delays occurring on either line,<sup>7</sup> but the mere fact that one company regularly receives messages to be sent over its own line and that of another company is, alone and of itself, no sufficient evidence of a partnership arrangement whereby each company becomes responsible for the negligence or defaults of the other.<sup>8</sup>

trine that the initial carrier is liable over the entire route, it may be that a different rule from that announced in the text would prevail. See *Stevenson v. Montreal Tel. Co.*, 16 U. C. Q. B. 530; *CONNECTING CARRIERS*, vol. 6, p. 611.

1. **Initial Company Receiving Entire Charge.** — *Baldwin v. U. S. Telegraph Co.*, 45 N. Y. 744, 6 Am. Rep. 165, reversing 54 Barb. (N. Y.) 505. Compare *Western Union Tel. Co. v. Shumate*, 2 Tex. Civ. App. 429.

2. **Delay in Delivering Message to Connecting Line.** — *Western Union Tel. Co. v. Seals*, (Tex. Civ. App. 1898) 45 S. W. Rep. 964.

Where the company undertakes to transmit the message to the terminus of its line and there forward it by mail, a delay of three days in mailing it is negligence. *Western Union Tel. Co. v. McIlvoy*, 107 Ky. 633.

The initial line is responsible if, through its own delay, there is a greater delay on the connecting line. *Weatherford, etc., R. Co. v. Seals*, (Tex. Civ. App. 1897) 41 S. W. Rep. 841.

A telephone company which holds itself out as undertaking to furnish long distance service from H. to A., having its own line to an intermediate point and an arrangement with another line from thence to A., the two companies employing a common agent at the intermediate point, is liable for the negligence of such agent in failing to make such connection as to enable plaintiff at H. to communicate with a party at A., in consequence of which plaintiff was kept from his dying father. *Southwestern Tel., etc., Co. v. Taylor*, 26 Tex. Civ. App. 79.

3. **Connecting Line Not in Working Order.** — *Western Union Tel. Co. v. Sorsby*, 29 Tex. Civ. App. 345, holding, however, that in such a case there is no duty on the part of the company to attempt to deliver the message by telephone or by mail.

4. **Duty of Connecting Line.** — *U. S. Telegraph Co. v. Western Union Tel. Co.*, 56 Barb.

(N. Y.) 46; *Baldwin v. U. S. Telegraph Co.*, (Supm. Ct. Gen. T.) 6 Abb. Pr. N. S. (N. Y.) 405.

5. *Western Union Tel. Co. v. Taylor*, 3 Tex. Civ. App. 310.

6. **Delay in Delivery — Only Last Line Liable** — *Western Union Tel. Co. v. Phillips*, 2 Tex. Civ. App. 608; *Western Union Tel. Co. v. Smith*, (Tex. Civ. App. 1894) 30 S. W. Rep. 937; *Western Union Tel. Co. v. Lyman*, 3 Tex. Civ. App. 460; *Western Union Tel. Co. v. Taylor*, 3 Tex. Civ. App. 310; *Martin v. Western Union Tel. Co.*, 1 Tex. Civ. App. 143.

7. See the title *CONNECTING CARRIERS*, vol. 6, p. 654.

Where the evidence is conflicting as to whether the line to which the defendant delivered the message was an independent connecting line, or was one operated to the point of destination by defendant, a finding for the plaintiff will not be disturbed. *Western Union Tel. Co. v. Jones*, 81 Tex. 271.

8. **Evidence of Partnership Between Connecting Lines.** — *Baldwin v. U. S. Telegraph Co.*, 45 N. Y. 744, 6 Am. Rep. 165, reversing 54 Barb. (N. Y.) 505, 6 Abb. Pr. N. S. (N. Y.) 405; *Western Union Tel. Co. v. Lovely*, (Tex. Civ. App. 1899) 52 S. W. Rep. 563.

An action to recover a statutory penalty, based on the failure of the last line to deliver a message, cannot be maintained against such line and the initial line jointly, there being no joint default and no claim of a joint conduct of business. *Chandler v. Western Union Tel. Co.*, 94 Ga. 442.

In *Western Union Tel. Co. v. Stratemeier*, 6 Ind. App. 125, it appeared that plaintiff asked the operator whether his company had a line to and a receiving station at O. and on being informed that it had, he handed the operator a message directed to that point, relying entirely on the operator's representations. In an action

Any Company May, by Special Contract, Extend Its Common-law Liability and undertake to become responsible for the correct transmission of the message over the entire route; when such an agreement is shown, the fact that the error occurred on another line will be no defense.<sup>1</sup>

The Burden of Proof rests upon any one of the connecting lines which is sued, when it is shown to have received the message, to show that the error or delay did not occur on its line, since it lies peculiarly within its power to show its own conduct with respect to the handling of the message.<sup>2</sup>

Each Connecting Company Receiving the Message for further transmission becomes bound, while the message is in its charge, to exercise the same degree of care and diligence as is exacted of telegraph companies in ordinary cases.<sup>3</sup>

Where Two of Several Connecting Lines Are Both Negligent, that one will be held responsible whose negligence was the proximate cause of the loss complained of.<sup>4</sup>

**b. STIPULATIONS AS TO RESPECTIVE LIABILITY.** — Exemption from liability for errors or delays occurring beyond its line is usually provided for in the printed contract of the telegraph company by a stipulation that the company shall be merely the agent of the sender, to forward the message over other lines when necessary. Such a stipulation merely gives to the company that immunity which the law itself extends and is valid and binding.<sup>5</sup>

Stipulations Made by the Initial Company Inure to the Benefit of Connecting Lines,<sup>6</sup> unless the language of the stipulation confines its operation to the first company, as in the case of the usual stipulation with respect to unrepeatd messages.<sup>7</sup>

A Stipulation That the Initial Line Is the Agent of the Sender for delivery to the connecting line, without liability, does not relieve it from liability for want of care in selecting the connecting line, and if it forwards the message by telephone instead of by telegraph, it will be responsible for errors in transmission occurring over the telephone line.<sup>8</sup>

**c. SENDER'S RIGHT TO NAME ROUTE.** — Under the usual stipulation, in telegraph contracts, that the company is the agent of the sender to forward the message where it is directed to a point beyond the initial company's line, the sender has the right to name the route by which the message shall go after it reaches the terminus of the first line.<sup>9</sup> If the initial company selects

for failure to deliver the message, it was held that the company was estopped to deny that it had a receiving station at O.

**1. Common-law Liability Extended by Special Contract.** — *Western Union Tel. Co. v. Carter*, 24 Tex. Civ. App. 80.

The Receiver of a Telegraph Company, in the absence of proof to the contrary, will be presumed to have authority to contract for transmission of a message to a point beyond his line. *Jones v. Roach*, 21 Tex. Civ. App. 301.

**2.** *La Grange v. Southwestern Tel. Co.*, 25 La. Ann. 383.

**3. Duty of Connecting Lines.** — *Western Union Tel. Co. v. Lyman*, 3 Tex. Civ. App. 460; *Martin v. Western Union Tel. Co.*, 1 Tex. Civ. App. 143.

**4.** *Western Union Tel. Co. v. Munford*, 87 Tenn. 190, 10 Am. St. Rep. 630. In this case, the defendant accepted a message directed to a point on a connecting line. In the course of transmission over defendant's line, the address became changed from "Sam T." to "Wm. T." The agent of the connecting line at the destination was satisfied the message was intended for Sam T. and, on being informed (erroneously) that he was in another town, mailed it to him there. The transmission by defendant having been prompt, and its error having been

cured, it was held that its negligence was not the proximate cause of plaintiff's injury.

**5. Stipulations Against Liability for Acts of Connecting Lines.** — *Western Union Tel. Co. v. Carew*, 15 Mich. 525; *McCarn v. International, etc.*, R. Co., 84 Tex. 352, 31 Am. St. Rep. 51; *Western Union Tel. Co. v. Simms*, 30 Tex. Civ. App. 32; *Gulf, etc., R. Co. v. Geer*, 5 Tex. Civ. App. 349.

Although the stipulation may not show that the message would pass over a connecting line, the sender of the message is nevertheless put upon inquiry and cannot hold the initial company liable for errors occurring on another line on the ground that he was ignorant of the fact that defendant's lines did not extend to the destination. *Western Union Tel. Co. v. Carew*, 15 Mich. 525.

**6.** See the title *CONNECTING CARRIERS*, vol. 6, p. 643. See also *Western Union Tel. Co. v. Smith*, (Tex. Civ. App. 1894) 26 S. W. Rep. 216.

**7.** *Squire v. Western Union Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157.

**8. Company Cannot Stipulate Against Its Own Negligence.** — *Western Union Tel. Co. v. McLeod*, (Tex. Civ. App. 1894) 24 S. W. Rep. 815.

**9. Selection of Route.** — *Western Union Tel. Co. v. Turner*, 94 Tex. 304. In this case the

the route, it will be held to the exercise of ordinary care in making a selection.<sup>1</sup>

If the Sender Designates the Route, there is no liability on the part of the initial company for any delay resulting from a bad selection; it is under no duty to adopt a different route except when it knows, at the time of sending, that the route selected by the sender is not open.<sup>2</sup>

The Initial Company May Require the Sender to Designate the Route and exact a small additional charge to cover the cost of transmitting the names of the designated connecting lines.<sup>3</sup>

**XII. MEASURE OF DAMAGES FOR NEGLIGENCE — 1. General Rule — a. RULE OF HADLEY v. BAXENDALE.** — The rule as to the measure of damages in actions against telegraph companies for negligence in the transmission or delivery of messages is that laid down in an early English case,<sup>4</sup> that when two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect to such breach of contract should be such as may fairly and reasonably be considered, either as arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of a breach of it.<sup>5</sup> While actions against telegraph companies are not necessarily or usually *ex contractu*, but *ex delicto* for a breach of a public duty,<sup>6</sup> the cause of action is so far dependent upon the original contract of sending as to make the rule just stated controlling, and it has been universally applied in this class of actions without regard to whether the particular action is *ex contractu* or *ex delicto*.<sup>7</sup>

destination could be reached from the company's terminus by two telephone lines; its rule was that messages should be sent over the nearest line that was open. It was held that, notwithstanding this rule, the sender had the right to indicate which telephone line should be used, and that it was negligence in the company to use the other, in consequence of which a delay occurred, although in so doing it acted under misinformation as to the line it attempted to use being open. *Compare* Post v. Southern R. Co., 103 Tenn. 184.

1. Mitchell v. Western Union Tel. Co., 12 Tex. Civ. App. 262.

2. Effect of Selection of Route by Sender. — Western Union Tel. Co. v. Simms, 30 Tex. Civ. App. 32.

3. Initial Line May Require Sender to Select Route. — U. S. v. Northern Pac. R. Co., 120 Fed. Rep. 546.

4. Hadley v. Baxendale, 9 Exch. 341. And see generally the title DAMAGES, vol. 8, p. 632 *et seq.*

5. Measure of Damages. — Primrose v. Western Union Tel. Co., 154 U. S. 1; Pacific Postal Tel. Cable Co. v. Fleischner, (C. C. A.) 66 Fed. Rep. 899, both quoting the rule as stated in Hadley v. Baxendale, 9 Exch. 341; McBride v. Sunset Telephone Co., 96 Fed. Rep. 81; Western Union Tel. Co. v. Henley, 23 Ind. App. 14. *Compare* Squire v. Western Union Tel. Co., 98 Mass. 232, 93 Am. Dec. 157, in which the court said that "the practical rule, founded on a wise policy, and at the same time consistent with good sense and sound equity, is that a party can be held liable for a breach of a contract only for such damages as are the natural or necessary and the immediate and direct results of the breach — such as might properly be deemed to have been in contemplation of the

parties when the contract was entered into — and that all remote, speculative, and uncertain results, as well as possible profits and advantages and other like consequences which might have arisen from the fulfilment of the contract, must be excluded as forming no just or legitimate basis on which to determine the extent of the injury actually caused by a breach."

6. See 21 ENCYC. OF PL. AND PR. 507.

The provision of Missouri Rev. Stat. 1889, § 2729, making telegraph companies liable for special damages, does not alter the common-law rule as to the measure of damages. Hughes v. Western Union Tel. Co., 79 Mo. App. 133.

7. Colorado. — Postal Tel. Cable Co. v. Barwise, 11 Colo. App. 328.

Kentucky. — Chapman v. Western Union Tel. Co., 90 Ky. 265, 30 Am. & Eng. Corp. Cas. 627; Smith v. Western Union Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126, 8 Am. & Eng. Corp. Cas. 15.

Maine. — Bartlett v. Western Union Tel. Co., 62 Me. 209, 16 Am. Rep. 437.

Nebraska. — Western Union Tel. Co. v. Church, 90 N. W. Rep. 878, 57 L. R. A. 909.

Nevada. — Mackay v. Western Union Tel. Co., 16 Nev. 226.

New York. — Leonard v. New York, etc., Electro Magnetic Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446; Baldwin v. U. S. Telegraph Co., 45 N. Y. 744, 6 Am. Rep. 165; Curtin v. Western Union Tel. Co., (N. Y. City Ct. Gen. T.) 14 Misc. (N. Y.) 459.

Ohio. — Barnesville First Nat. Bank v. Western Union Tel. Co., 30 Ohio St. 565, 27 Am. Rep. 485.

Texas. — Western Union Tel. Co. v. Edmondson, 91 Tex. 206, reversing (Tex. Civ. App. 1897) 40 S. W. Rep. 622; Rowell v. Western Union Tel. Co., 75 Tex. 26; Western Union

It is Not Essential that the Parties Must Have Contemplated the Actual Damages which are to be allowed. The liability of the company is for all direct damages which both parties would have contemplated as flowing from its breach if, at the time they entered into it, they had bestowed proper attention upon the subject and had been fully informed of the facts.<sup>1</sup>

*b. REMOTE DAMAGES.* — The general rule operates to exclude from consideration all damages which do not result as the proximate consequence of the default complained of.<sup>2</sup> Such damages are those which do not result directly or necessarily from the wrong complained of<sup>3</sup> and which are the result of the operation of a prior independent cause or of an efficient intervening cause.<sup>4</sup>

*c. SPECULATIVE DAMAGES.* — In this class are to be embraced such damages as are uncertain and contingent, which depend upon the happening of merely possible events.<sup>5</sup> Thus, the loss of a valuable note which the plaintiff avers her father would have given her had she been able to see him at his death is too speculative to be considered in a claim for damages for a failure by the company to deliver a message announcing the father's illness.<sup>6</sup> The reported cases furnish other illustrations of the rule.<sup>7</sup>

Tel. Co. v. Murray, 29 Tex. Civ. App. 207; Western Union Tel. Co. v. Stiles, 89 Tex. 312; Western Union Tel. Co. v. Ragland, (Tex. Civ. App. 1901) 61 S. W. Rep. 421.

*Wisconsin.* — Fisher v. Western Union Tel. Co., (Wis. 1903) 96 N. W. Rep. 545.

1. *Damages Contemplated by Parties.* — Leonard v. New York, etc., Electro Magnetic Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446; Western Union Tel. Co. v. Church, 90 N. W. Rep. 878, 57 L. R. A. 909.

"Whatever may arise in the usual course of things from the failure to accomplish the purpose indicated by the terms of the message may be considered within the contemplation of the parties at the time the contract was made as being the probable result of the breach of it, and for this the party who fails to comply is held responsible." Western Union Tel. Co. v. Edmondson, 91 Tex. 206, 66 Am. St. Rep. 873, note.

2. *Proximate and Remote Cause.* — Western Union Tel. Co. v. Simpson, 64 Kan. 309; Stansell v. Western Union Tel. Co., 107 Fed. Rep. 668. See also Pacific Pine Lumber Co. v. Western Union Tel. Co., 123 Cal. 428.

Damages for bruises received in consequence of being obliged to take a rough vehicle instead of the family carriage, which plaintiff had telegraphed for, are too remote to sustain an action against the telegraph company for failure to transmit a message ordering the carriage. McAllen v. Western Union Tel. Co., 70 Tex. 243, 21 Am. & Eng. Corp. Cas. 195. See also Western Union Tel. Co. v. Smith, 76 Tex. 253.

That plaintiff might have secured the modification of a contract to his advantage had his message been promptly delivered will not entitle him to recover for the loss resulting therefrom; such damages are too remote. Western Union Tel. Co. v. Watson, 94 Ga. 202, 47 Am. St. Rep. 151.

3. Western Union Tel. Co. v. Carter, 85 Tex. 580, 34 Am. St. Rep. 826. See *infra*, this subdivision, *d. Effect of Special Circumstances.*

4. *Intervening Efficient Cause.* — Bodkin v. Western Union Tel. Co., 31 Fed. Rep. 134, 21

Am. & Eng. Corp. Cas. 202; Lowery v. Western Union Tel. Co., 60 N. Y. 198, 19 Am. Rep. 154; Western Union Tel. Co. v. Briscoe, 18 Ind. App. 22.

Where the loss is "occasioned by two causes — the shortcoming of the telegraph company in not delivering the message and the still shorter coming of L. (a third party) in appropriating to himself what belonged to some one else," the company's liability is for nominal damages only. Barnesville First Nat. Bank v. Western Union Tel. Co., 30 Ohio St. 555, 27 Am. Rep. 485.

5. *Speculative Damages.* — See the title DAMAGES, vol. 8, p. 608; Cahn v. Western Union Tel. Co., (C. C. A.) 48 Fed. Rep. 810; Western Union Tel. Co. v. Hall, 124 U. S. 444, 21 Am. & Eng. Corp. Cas. 211; Western Union Tel. Co. v. Fellner, 58 Ark. 29, 41 Am. St. Rep. 81; Pacific Pine Lumber Co. v. Western Union Tel. Co., 123 Cal. 428; Harmon v. Western Union Tel. Co., 65 S. Car. 490; Western Union Tel. Co. v. Haman, 2 Tex. Civ. App. 100; Beatty Lumber Co. v. Western Union Tel. Co., 52 W. Va. 410.

6. Chapman v. Western Union Tel. Co., 90 Ky. 265, 30 Am. & Eng. Corp. Cas. 627. Compare Western Union Tel. Co. v. Crall, 39 Kan. 580.

In Iowa it has been held that a plaintiff may recover the amount of a reward offered for the arrest of a criminal which he alleged he would have gotten had a message to him saying "come at once" been promptly delivered. McPeck v. Western Union Tel. Co., 107 Iowa 356, 70 Am. St. Rep. 205.

7. *Illustrations.* — Baldwin v. U. S. Telegraph Co., 45 N. Y. 744, 6 Am. Rep. 165; Postal Tel. Cable Co. v. Barwise, 11 Colo. App. 328; Martin v. Sunset Telephone, etc., Co., 18 Wash. 260; McBride v. Sunset Telephone Co., 96 Fed. Rep. 81.

The loss to plaintiff of customers resulting from his failing to perform a particular contract, his failure being due to the negligent alteration of a message by the defendant company, is wholly speculative and conjectural, and cannot be considered in estimating the

the

**Loss of the Benefit of a Contract** which was subject to be defeated by the will of the other party to it affords a basis for nothing more than nominal damages, the benefits being entirely contingent and speculative.<sup>1</sup>

**Telegrams of Inquiry.** — The failure to deliver a message inquiring as to the condition of the sender's relative will not support an action to recover for mental anguish suffered by him in consequence of being absent from the funeral; the possibility that no answer might have been sent had the sender's message been seasonably delivered or that, if sent, it might, without fault of the company, never have reached the plaintiff, renders the damage complained of too speculative.<sup>2</sup>

**d. EFFECT OF SPECIAL CIRCUMSTANCES.** — Special circumstances involved in or connected with the sending of the message cannot be considered in estimating the damages to be recovered unless it affirmatively appears that the telegraph company was informed or knew of them at the time the contract of sending was made.<sup>3</sup>

**How Communicated to the Company.** — It is immaterial how the information of special circumstances is communicated to the company; it may appear from the face of the message or be communicated by the sender or his agent at the time of offering the message for transmission; it is only necessary that the company shall have had knowledge of such circumstances at the time it entered into the contract for sending.<sup>4</sup> The operator in charge of the company's office is its agent for the purpose of receiving such information, and knowledge on his part, no matter how acquired, is chargeable to the company.<sup>5</sup>

**Message Requesting Addressee to Meet Sender.** — Where the basis of the action is the negligence of the company in failing to transmit or deliver promptly a message requesting the addressee to meet the sender or the plaintiff at a station, damages are not recoverable for fatigue and exposure incident to the

damages. *Fererro v. Western Union Tel. Co.*, 9 App. Cas. (D. C.) 455.

**Damages for the Loss of a Horse Which Might Possibly Have Been Saved** if the company had transmitted and delivered plaintiff's message to a veterinary surgeon promptly are too speculative to form the basis of a recovery against the company. *Central Union Telephone Co. v. Swoveland*, 14 Ind. App. 341; *Duncan v. Western Union Tel. Co.*, 87 Wis. 173. Compare *Hendershot v. Western Union Tel. Co.*, 106 Iowa 529, 68 Am. St. Rep. 313.

**1. Loss of Benefit of Contract.** — *Merrill v. Western Union Tel. Co.*, 78 Me. 97; *Johnson v. Western Union Tel. Co.*, 79 Miss. 58, 89 Am. St. Rep. 584.

**2. Telegrams of Inquiry.** — *Taliferro v. Western Union Tel. Co.*, (Ky. 1900) 54 S. W. Rep. 825. See *Western Union Tel. Co. v. Motley*, 87 Tex. 38.

As to mental anguish in general, see the title **DAMAGES**, vol. 8, p. 537.

**3. Special Circumstances as Affecting Measure of Damages — Alabama.** — *Western Union Tel. Co. v. Way*, 83 Ala. 542.

**Colorado.** — *Western Union Tel. Co. v. Cornwell*, 2 Colo. App. 491.

**Iowa.** — *Evans v. Western Union Tel. Co.*, 102 Iowa 219.

**Mississippi.** — *Western Union Tel. Co. v. Pearce*, (Miss. 1903) 34 So. Rep. 152.

**Missouri.** — *Melson v. Western Union Tel. Co.*, 72 Mo. App. 111.

**Texas.** — *Western Union Tel. Co. v. Lively*, (Tex. App. 1891) 15 S. W. Rep. 197; *Western Union Tel. Co. v. J. A. Kemp Grocer Co.*,

(Tex. Civ. App. 1894) 28 S. W. Rep. 905; *Western Union Tel. Co. v. Parlin, etc., Co.*, (Tex. Civ. App. 1894) 25 S. W. Rep. 40; *Reliance Lumber Co. v. Western Union Tel. Co.*, 58 Tex. 394, 44 Am. Rep. 620.

**Message Announcing Date of Trial of Lawsuit.** — In *Western Union Tel. Co. v. Short*, 53 Ark. 434, a message was sent to plaintiff informing him that his case was set for trial Aug. 17th. The company negligently changed it to read Aug. 7th thereby causing plaintiff to make an unnecessary journey to the place of trial. It was held that he might recover his reasonable expenses in going to and returning from such place and also the value of his time, but not for the loss resulting from the necessity of shutting down his mill, idleness of hand and teams, etc., during his absence, it not being shown that the company was informed of the special circumstances which occasioned such loss. See also *Western Union Tel. Co. v. Bates*, 93 Ga. 352.

In *Sprague v. Western Union Tel. Co.*, 6 Daly (N. Y.) 200, affirmed 67 N. Y. 590, a similar message was lost in transmission and plaintiff and his counsel made an unnecessary trip to the place of trial. He was allowed to recover the expense of himself and his counsel on the trip and also the amount of the fee paid by him to his counsel for going a second time to attend to the case.

**4. Mode of Communicating Special Circumstances.** — *McColl v. Western Union Tel. Co.*, 44 N. Y. Super. Ct. 487.

**5. Western Union Tel. Co. v. Valentine**, 18 Ill. App. 57.

plaintiff's being compelled to walk from the station nor for impairment of health resulting therefrom, such damages being remote and conjectural and not such as the company ought to have anticipated as likely to follow a delay in delivering the message.<sup>1</sup>

**2. Message in Cipher or Otherwise Unintelligible** — *a. IN GENERAL.* — The rule is well established that where the message, as delivered for transmission, is in cipher and unintelligible except to the sender and addressee, and the company has no information otherwise as to its character or purpose, nor of its importance and urgency, the party injured can recover nothing more than nominal damages.<sup>2</sup> The rule is analogous to and derives support from the principle in the law relating to common carriers which exempts the carrier from liability in cases where the shipper conceals the nature and value of his goods.<sup>3</sup> In some states, however, a different view prevails, and the rule is upheld that the measure of damages recoverable by the plaintiff is not to be affected by a concealment of the character of the message or by the company's ignorance of its urgency or importance, though the company might reasonably decline to transmit a cipher message without having its meaning explained.<sup>4</sup>

1. *Stafford v. Western Union Tel. Co.*, 73 Fed. Rep. 273; *Yazoo, etc., R. Co. v. Foster*, (Miss. 1898) 23 So. Rep. 581; *Western Union Tel. Co. v. Smith*, 76 Tex. 253. See also *Western Union Tel. Co. v. Henley*, 23 Ind. App. 14.

But it has been held that where the operator knows that the sender of such a message is a woman and that her destination is a flag station, the company is put on notice that a failure to deliver her message will necessitate her walking and is liable accordingly, but not for such sickness as was the result of the fatigue and exposure to which she was subjected. *Western Union Tel. Co. v. Norton*, (Tex. Civ. App. 1901) 62 S. W. Rep. 1081. See also *Western Union Tel. Co. v. Bryant*, 17 Ind. App. 70; *Western Union Tel. Co. v. Ragland*, (Tex. Civ. App. 1901) 61 S. W. Rep. 421; *Western Union Tel. Co. v. Karr*, 5 Tex. Civ. App. 60.

**2. Only Nominal Damages Recoverable in Case of Cipher Messages.** — *England.* — *Sanders v. Stuart*, 1 C. P. D. 326, 17 Moak 286, 24 W. R. 949; *Kinghorne v. Montreal Tel. Co.*, 18 U. C. Q. B. 60.

*United States.* — *Primrose v. Western Union Tel. Co.*, 154 U. S. 1. See also *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 21 Am. & Eng. Corp. Cas. 211; *Western Union Tel. Co. v. Coggin*, (C. C. A.) 68 Fed. Rep. 137; *Behm v. Western Union Tel. Co.*, 8 Biss. (U. S.) 131.

*California.* — *Hart v. Western Union Tel. Co.*, 66 Cal. 579, 56 Am. Rep. 119, 8 Am. & Eng. Corp. Cas. 27.

*District of Columbia.* — *Fererro v. Western Union Tel. Co.*, 9 App. Cas. (D. C.) 455.

*Florida.* — *Western Union Tel. Co. v. Wilson*, 32 Fla. 527, 37 Am. St. Rep. 125, overruling *Western Union Tel. Co. v. Hyer*, 22 Fla. 637, 1 Am. St. Rep. 222, 16 Am. & Eng. Corp. Cas. 233.

*Illinois.* — *Postal Tel. Co. v. Lathrop*, 131 Ill. 575, 19 Am. St. Rep. 55, 30 Am. & Eng. Corp. Cas. 605; *Western Union Tel. Co. v. Martin*, 9 Ill. App. 587.

*Maryland.* — *U. S. Telegraph Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519.

*Minnesota.* — *Beaupre v. Pacific, etc., Tel. Co.*, 21 Minn. 155.

*Missouri.* — *Abeles v. Western Union Tel. Co.*, 37 Mo. App. 554; *Hughes v. Western Union Tel. Co.*, 79 Mo. App. 133; *Melson v. Western Union Tel. Co.*, 72 Mo. App. 111.

*Nevada.* — *Mackay v. Western Union Tel. Co.*, 16 Nev. 222.

*New York.* — *McColl v. Western Union Tel. Co.*, 44 N. Y. Super. Ct. 487, 7 Abb. N. Cas. (N. Y.) 151; *Landsberger v. Magnetic Tel. Co.*, 32 Barb. (N. Y.) 530; *Leonard v. New York, etc., Electro Magnetic Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446.

*North Carolina.* — *Cannon v. Western Union Tel. Co.*, 100 N. Car. 300, 6 Am. St. Rep. 590, 21 Am. & Eng. Corp. Cas. 124.

*Ohio.* — *Western Union Tel. Co. v. Griswold*, 37 Ohio St. 301, 41 Am. Rep. 500. Compare *Bowen v. Lake Erie Tel. Co.*, (Ohio 1853) 1 Am. L. Reg. 685.

*Pennsylvania.* — *Ferguson v. Anglo-American Tel. Co.*, 178 Pa. St. 377, 56 Am. St. Rep. 770, distinguishing *Western Union Tel. Co. v. Landis*, 21 W. N. C. (Pa.) 38, and *U. S. Telegraph Co. v. Wenger*, 55 Pa. St. 263, 93 Am. Dec. 751.

*Texas.* — *Daniel v. Western Union Tel. Co.*, 61 Tex. 452, 48 Am. Rep. 305, 8 Am. & Eng. Corp. Cas. 117; *McAllen v. Western Union Tel. Co.*, 70 Tex. 243, 21 Am. & Eng. Corp. Cas. 195; *Western Union Tel. Co. v. Kirkpatrick*, 76 Tex. 217, 18 Am. St. Rep. 37; *Western Union Tel. Co. v. McKinney*, 5 Tex. L. Rev. 173, 8 Am. & Eng. Corp. Cas. 123; *Houston, etc., R. Tel. Co. v. Davidson*, 15 Tex. Civ. App. 334.

*Wisconsin.* — *Candee v. Western Union Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452.

**3. Analogy to Rule Governing Liability of Common Carriers.** — *Candee v. Western Union Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452. See also the title CARRIERS OF GOODS, vol. 5, p. 345.

**4. Alabama.** — *Daughtery v. American Union Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435, 5 Am. & Eng. Corp. Cas. 203; *American Union Tel.*

**b. WHEN MESSAGE AFFORDS THE ONLY EVIDENCE OF ITS IMPORTANCE.**

— In such cases, if the message is unintelligible or fails to disclose to the company its nature or importance, there is no question as to the application of the rule just stated with respect to cipher messages.<sup>1</sup> But when the message, though couched in unusual or technical trade language, is sufficiently plain to indicate that it is of importance, or to apprise the company that a pecuniary loss may, and probably will, result from an incorrect or delayed transmission, there is no such obscurity as will confine its liability to nominal damages.<sup>2</sup>

**It Is Not Essential that the Message Disclose All the Details** of the transaction to which it relates, nor the particular business intended, in order to take it out of the rule governing cipher messages. It is sufficient if the results likely to follow negligence in transmitting it may be gathered in a general way from the wording of the telegram.<sup>3</sup>

**The Frequency with Which Peculiar Words Are Used** and their familiarity in trade circles, where the telegraph is often used as a means of communication, are facts to be considered in determining whether such words were or ought to have been sufficiently intelligible to the operator for him to know from them of the nature or importance of the message.<sup>4</sup>

*Co. v. Daughtery*, 89 Ala. 196; *Western Union Tel. Co. v. Way*, 83 Ala. 542.

*Georgia*.—*Western Union Tel. Co. v. Fatman*, 73 Ga. 285, 54 Am. Rep. 877; *Western Union Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480; *Dodd Grocery Co. v. Postal Tel. Cable Co.*, 112 Ga. 685.

*Kentucky*.—See *Western Union Tel. Co. v. Eubanks*, 100 Ky. 604, 66 Am. St. Rep. 368.

*Virginia*.—*Western Union Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715, 5 Am. & Eng. Corp. Cas. 183.

1. *Cahn v. Western Union Tel. Co.*, (C. C. A.) 48 Fed. Rep. 810; *Western Union Tel. Co. v. Cornwell*, 2 Colo. App. 491; *Western Union Tel. Co. v. Kemp*, 55 Ill. App. 583; *Melson v. Western Union Tel. Co.*, 72 Mo. App. 111; *McColl v. Western Union Tel. Co.*, (N. Y. Super. Ct. Gen. T.) 7 Abb. N. Cas. (N. Y.) 151; *Baldwin v. U. S. Telegraph Co.*, 45 N. Y. 744, 6 Am. Rep. 165; *Daniel v. Western Union Tel. Co.*, 61 Tex. 452, 48 Am. Rep. 305; *Candee v. Western Union Tel. Co.*, 34 Wis. 471, 17 Am. Rep. 452.

A message reading, "Have work; come at once," sufficiently charges the company with notice that damages will probably result from a delay in delivery. *Western Union Tel. Co. v. Hines*, 96 Ga. 688, 51 Am. St. Rep. 159. See also *Baldwin v. Western Union Tel. Co.*, 93 Ga. 692, 44 Am. St. Rep. 194 (message accepting employment).

2. **Importance Apparent on Face of Message.**—*Georgia*.—*Western Union Tel. Co. v. Blanchard*, 68 Ga. 299, 45 Am. Rep. 480.

*Illinois*.—*Tyler v. Western Union Tel. Co.*, 60 Ill. 421, 14 Am. Rep. 38, 74 Ill. 168, 24 Am. Rep. 279.

*Indiana*.—*Western Union Tel. Co. v. Henley*, 157 Ind. 90; *Bierhaus v. Western Union Tel. Co.*, 8 Ind. App. 246.

*Ohio*.—*Western Union Tel. Co. v. Griswold*, 37 Ohio St. 303, 41 Am. Rep. 500.

*Pennsylvania*.—*U. S. Telegraph Co. v. Wenger*, 55 Pa. St. 263, 93 Am. Dec. 751.

*Tennessee*.—*Marr v. Western Union Tel. Co.*, 85 Tenn. 530.

*Texas*.—*Erie, Tel., etc., Co. v. Grimes*, 82 Tex. 89; *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570, 10 Am. St. Rep. 790; *Western Union Tel. Co. v. Turner*, 94 Tex. 304; *Western Union Tel. Co. v. Williford*, 2 Tex. Civ. App. 574; *Western Union Tel. Co. v. Haman*, 2 Tex. Civ. App. 100; *Western Union Tel. Co. v. Carver*, 15 Tex. Civ. App. 547; *Western Union Tel. Co. v. Birge-Forbes Co.*, 29 Tex. Civ. App. 526.

*Utah*.—*Brooks v. Western Union Tel. Co.*, (Utah 1903) 72 Pac. Rep. 499.

*West Virginia*.—*Beatty Lumber Co. v. Western Union Tel. Co.*, 52 W. Va. 410.

**Importance Not Apparent on Face of Message.**—Where the gist of the telegram is the bare word "Narrator," the liability of the company for a delay is for nominal damages only, even though the message indicated that it concerned the market. *Cannon v. Western Union Tel. Co.*, 100 N. Car. 300, 6 Am. St. Rep. 590, 21 Am. & Eng. Corp. Cas. 124.

A message, "sell fifty gold," is so unintelligible as to confine a recovery to nominal damages. *U. S. Telegraph Co. v. Gildersleeve*, 29 Md. 232, 96 Am. Dec. 519.

3. **Details of Transaction Need Not Be Disclosed.**—*Evans v. Western Union Tel. Co.*, 102 Iowa 219; *Harkness v. Western Union Tel. Co.*, 73 Iowa 190, 5 Am. St. Rep. 672; *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 10 Am. St. Rep. 699, 25 Am. & Eng. Corp. Cas. 542; *Gulf, etc., R. Co. v. Loonie*, 82 Tex. 323, 27 Am. St. Rep. 891. See also *Manville v. Western Union Tel. Co.*, 37 Iowa 214, 18 Am. Rep. 8; *Garrett v. Western Union Tel. Co.*, 83 Iowa 257; *McPeck v. Western Union Tel. Co.*, 107 Iowa 356, 70 Am. St. Rep. 205.

A message, "Fifty-five cents, usual terms quick acceptance," indicates that it relates to a business transaction and to a contemplated trade and puts the company on notice that it is important. *Fererro v. Western Union Tel. Co.*, 9 App. Cas. (D. C.) 455.

4. **Frequent Use of Peculiar Words.**—In *Pep- per v. Western Union Tel. Co.*, 87 Tenn. 554, 10 Am. St. Rep. 699, the message, sent to

**A Message Summoning a Physician** indicates on its face, when the company has knowledge that the addressee is a physician, that it is of importance, and that the damages ordinarily resulting from the lack of medical attention are apt to be caused by its nondelivery.<sup>1</sup>

**A Message Announcing an Illness** is sufficient to advise the company of the importance of its prompt transmission and delivery and that mental suffering is likely to result from a failure to deliver promptly.<sup>2</sup>

**Messages Relating to Failing Debtors.** — A message directing the sender's attorneys to attach property, or advising plaintiff of the fact that a debtor is about to fail, or the like, is sufficient on its face to indicate to the telegraph company that a loss of the debt may result from a failure to transmit and deliver promptly.<sup>3</sup>

**c. COMPANY HAVING EXTRANEOUS EVIDENCE OF NATURE OF MESSAGE.** — It is not essential to the recovery of substantial damages that the message itself shall disclose its importance or the necessity for prompt and correct transmission. If the company is informed of this fact through other sources, it becomes charged with notice of the loss that is likely to follow from a negligent transmission or delivery.<sup>4</sup> In determining whether it had such information, the court and jury are not confined to what the sender or his agent may have communicated to the company upon tendering the message, but may consider the surrounding circumstances, particularly the fact that the operator knew or ought to have known of the general nature of the message from other messages, handled by him, relating to the same transaction.<sup>5</sup>

**d. OPERATION OF RULE IN "MENTAL ANGUISH CASES"** — (1) *Such Cases No Exception to General Rule.* — Messages involved in this class of cases are no exception to the general rule. They must indicate on their face, or the company must be otherwise notified of, their importance and the probability that mental suffering would result from a failure to transmit and deliver promptly; otherwise the company is liable for nominal damages only.<sup>6</sup>

produce dealers, read: "Car cribs six sixty, c. a. f., prompt." The word "cribs" meant "clear ribs" and "c. a. f." meant "cost and freight." These terms, it appeared, were well understood in the trade and were constantly being used in telegrams. It was held that the company was liable for all damages resulting from its having changed the message from "six sixty" to "six thirty" in transmitting it. See also *Mowry v. Western Union Tel. Co.*, 51 Hun (N. Y.) 126; *Martin v. Western Union Tel. Co.*, 1 Tex. Civ. App. 143. Compare *Cahn v. Western Union Tel. Co.*, 48 Fed. Rep. 810, 2 U. S. App. 24.

1. *Western Union Tel. Co. v. Church*, 90 N. W. Rep. 878, 57 L. R. A. 905.

2. *Western Union Tel. Co. v. Eskridge*, 7 Ind. App. 208; *Western Union Tel. Co. v. Pearce*, (Miss. 1903) 34 So. Rep. 152; *Meadows v. Western Union Tel. Co.*, 132 N. Car. 40; *Western Union Tel. Co. v. Wilson*, (Tex. Civ. App. 1899) 51 S. W. Rep. 521; *Western Union Tel. Co. v. Linn*, 87 Tex. 7, 47 Am. St. Rep. 58; *Western Union Tel. Co. v. Zane*, 6 Tex. Civ. App. 585.

As to the doctrine in regard to mental anguish, see generally the title *DAMAGES*, vol. 8, p. 537; and *infra*, this section, *Operation of Rule in Mental Anguish Cases*.

3. **Messages Relating to Failing Debtors.** — *Pacific Postal Tel. Cable Co. v. Fleischner*, (C. C. A.) 66 Fed. Rep. 899, 55 Fed. Rep. 738; *Bierhaus v. Western Union Tel. Co.*, 8 Ind. App. 246; *Martin v. Western Union Tel. Co.*, 1 Tex.

Civ. App. 143. See *infra*, this section, 5. *b. Messages to Creditors Regarding Failing Debtors*.

4. **Extraneous Evidence of Nature of Message.** — *McPeck v. Western Union Tel. Co.*, 107 Iowa 356, 70 Am. St. Rep. 205; *Herron v. Western Union Tel. Co.*, 90 Iowa 129; *Sprague v. Western Union Tel. Co.*, 6 Daly (N. Y.) 200; *Rittenhouse v. Independent Line of Tel.*, 44 N. Y. 263, 4 Am. Rep. 673; *Western Union Tel. Co. v. Edsall*, 74 Tex. 329, 15 Am. St. Rep. 835; *Western Union Tel. Co. v. Williford*, (Tex. Civ. App. 1894) 27 S. W. Rep. 700; *Western Union Tel. Co. v. Jobe*, 6 Tex. Civ. App. 403.

The mere fact that the sender requested the operator to "rush" the message as it was important is not sufficient to charge the company with knowledge of the nature of a cipher message. *Houston, etc., R. Tel. Co. v. Davidson*, 15 Tex. Civ. App. 334.

5. **Knowledge Derived from Other Messages.** — *Postal Tel. Cable Co. v. Lathrop*, 131 Ill. 575, 19 Am. St. Rep. 55, 30 Am. & Eng. Corp. Cas. 600; *Mackay v. Western Union Tel. Co.*, 16 Nev. 227; *Western Union Tel. Co. v. Williford*, (Tex. Civ. App. 1894) 27 S. W. Rep. 700; *Erie Tel., etc., Co. v. Grimes*, 82 Tex. 89; *Roach v. Jones*, 18 Tex. Civ. App. 231; *Western Union Tel. Co. v. Nagle*, 11 Tex. Civ. App. 539. Compare *Pope v. Western Union Tel. Co.*, 14 Ill. App. 531.

6. **Rule in Mental Anguish Cases.** — *Western Union Tel. Co. v. Todd*, 22 Ind. App. 701; *Western Union Tel. Co. v. Pearce*, (Miss. 1903) 34 So. Rep. 152; *Sherrill v. Western Union*



The Nature of the Message May Be Sufficient, of itself, to inform the company of the necessity of a prompt and correct transmission. This is true of messages announcing the dangerous illness, the death, or the time of the funeral of a relative, or requesting the addressee to "come at once," and messages of like import. In such cases the rule seems to be that nothing more than the importance of the case as appears from the message itself is necessary to charge the company with notice of the mental suffering likely to result from a negligent transmission or delivery.<sup>1</sup>

(2) *Relationship of Persons Affected.* — The relationship of the parties to be affected ought to appear from the face of the message or, be otherwise communicated to the company,<sup>2</sup> but this requirement is satisfied if the language of the message is such as to suggest a relationship and put the company upon inquiry;<sup>3</sup> the rule does not mean that the family pedigree should be set out in the message or given to the agent.<sup>4</sup> In *Texas*, the rule of the later cases seems to be that the company is charged with knowledge of the relationship of the parties by the mere fact of the nature of the message where it is one relating to an illness, death, time of a funeral, or the like.<sup>5</sup>

If the Relationship Is by Affinity Only, there can be no recovery for mental suffering resulting from a failure to transmit or a delay, unless it is affirmatively shown that the company was informed, from other sources than the message,

Tel. Co., 116 N. Car. 655; *Cashion v. Western Union Tel. Co.*, 123 N. Car. 267; *Darlington v. Western Union Tel. Co.*, 127 N. Car. 448; *Sparkman v. Western Union Tel. Co.*, 133 N. Car. 447; *Kennon v. Western Union Tel. Co.*, 126 N. Car. 232; *Ikard v. Western Union Tel. Co.*, (Tex. Civ. App. 1893) 22 S. W. Rep. 534; *Western Union Tel. Co. v. Womack*, 9 Tex. Civ. App. 607; *Western Union Tel. Co. v. Murray*, 29 Tex. Civ. App. 207; *Western Union Tel. Co. v. May*, 8 Tex. Civ. App. 176; *Western Union Tel. Co. v. Kerr*, 4 Tex. Civ. App. 280; *Western Union Tel. Co. v. Smith*, (Tex. Civ. App. 1894) 26 S. W. Rep. 216. See also *Davis v. Western Union Tel. Co.*, 46 W. Va. 48.

A message read: "Meet me to-morrow at 12 o'clock." Through a delay in its delivery, plaintiff, the sender, was prevented from seeing her aunt until a moment before the latter's death. It was held that the company had no notice of the consequences likely to follow a delay in delivery, and was therefore not liable for the mental suffering endured by plaintiff. *Kennon v. Western Union Tel. Co.*, 126 N. Car. 232.

As to the right to recover damages for mental anguish, see the title DAMAGES, vol. 8, p. 658 *et seq.*

1. *Importance of Message Apparent on Its Face.* — *Reese v. Western Union Tel. Co.*, 123 Ind. 294; *Lyne v. Western Union Tel. Co.*, 123 N. Car. 129; *Cashion v. Western Union Tel. Co.*, 123 N. Car. 267, 124 N. Car. 459; *Bennett v. Western Union Tel. Co.*, 128 N. Car. 103; *Meadows v. Western Union Tel. Co.*, 132 N. Car. 40; *Bright v. Western Union Tel. Co.*, 132 N. Car. 317; *Western Union Tel. Co. v. May*, 8 Tex. Civ. App. 176; *Western Union Tel. Co. v. Randles*, (Tex. Civ. App. 1896) 34 S. W. Rep. 447; *Western Union Tel. Co. v. Kinsley*, 8 Tex. Civ. App. 527, following *Loper v. Western Union Tel. Co.*, 70 Tex. 689; *Western Union Tel. Co. v. De Jarles*, 8 Tex. Civ. App. 109; *Southwestern Tel., etc., Co. v. Taylor*, 26 Tex. Civ. App. 79; *Western Union Tel. Co. v. Sweetman*, 19 Tex. Civ. App. 435.

A message saying merely that the sender would arrive at the town where the addressee resided at a certain hour on a particular train does not show on its face its importance. *Western Union Tel. Co. v. Henley*, 23 Ind. App. 14.

2. See *infra*, this section, 7. a. (6) *Relationship of Parties Material.*

3. *Suggestion of Relationship Enough.* — *Davis v. Western Union Tel. Co.*, 107 Ky. 527, 92 Am. St. Rep. 371; *Bennett v. Western Union Tel. Co.*, 128 N. Car. 103; *Meadows v. Western Union Tel. Co.*, 132 N. Car. 40; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. Rep. 843; *Western Union Tel. Co. v. Adams*, 75 Tex. 531, 16 Am. St. Rep. 920, 30 Am. & Eng. Corp. Cas. 594; *Western Union Tel. Co. v. Feegles*, 75 Tex. 537; *Western Union Tel. Co. v. Moore*, 76 Tex. 66, 18 Am. St. Rep. 25; *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406, 35 Am. & Eng. Corp. Cas. 77; *Potts v. Western Union Tel. Co.*, 82 Tex. 545; *Western Union Tel. Co. v. Nations*, 82 Tex. 539, 27 Am. St. Rep. 914; *Roach v. Jones*, 18 Tex. Civ. App. 231; *Western Union Tel. Co. v. Carter*, (Tex. Civ. App. 1892) 20 S. W. Rep. 834; *Western Union Tel. Co. v. Lavender*, (Tex. Civ. App. 1897) 40 S. W. Rep. 1035; *Western Union Tel. Co. v. Porter*, (Tex. Civ. App. 1894) 26 S. W. Rep. 866.

A message reading, "My wife very ill, not expected to live," is sufficient to suggest to the company a relationship between her and the addressee, and the fact that such relationship was not disclosed is no bar to a recovery. *Reese v. Western Union Tel. Co.*, 123 Ind. 294.

4. *Western Union Tel. Co. v. Rosentreter*, 80 Tex. 406, 35 Am. & Eng. Corp. Cas. 77.

5. *Rule in Texas — Subject of Message.* — *Western Union Tel. Co. v. Coffin*, 88 Tex. 94; *Western Union Tel. Co. v. Luck*, 91 Tex. 178, 66 Am. St. Rep. 870; *Western Union Tel. Co. v. Smith*, (Tex. Civ. App. 1895) 33 S. W. Rep. 742. Compare *Western Union Tel. Co. v. Brown*, 71 Tex. 723.

of the peculiar tenderness of the relations sustained by the parties to each other.<sup>1</sup>

(3) *Interest of Plaintiff in Transaction.* — When the person was not a party to the message, his interest must be shown to have been brought to the knowledge of the company;<sup>2</sup> but it is not necessary that the fact appear from the message itself if the company is notified of it through other means.<sup>3</sup>

When the Action Is Brought by a Person Who Is Not Deprived of the privilege of attending at the deathbed or funeral of a relative, but by one who claims to have been deprived of the comfort and society of the person who was prevented from attending, it must be affirmatively shown that the company was informed of the circumstances, either from the face of the message or from extraneous sources.<sup>4</sup>

**3. Loss of Expected Profits in Transactions of Sale — a. SALE PREVENTED — PLAINTIFF THE VENDOR.** — When the negligence of the telegraph company in the transmission or delivery of a message operates to prevent a sale by the plaintiff which he would otherwise have consummated, the measure of damages for which the company is responsible is the difference between the price that would have been realized had the sale not been so prevented, and the price which the plaintiff in the exercise of reasonable diligence is thereafter able to obtain,<sup>5</sup> together with expenses necessarily incurred in consequence of the delay or failure.<sup>6</sup> In short, plaintiff is entitled to recover the profits he

**1. Relationship by Affinity.** — *Western Union Tel. Co. v. Coffin*, 88 Tex. 94; *Western Union Tel. Co. v. McMillan*, (Tex. Civ. App. 1895) 30 S. W. Rep. 298; *Western Union Tel. Co. v. Garrett*, (Tex. Civ. App. 1896) 34 S. W. Rep. 649.

Proof that the sender told the operator that the deceased was plaintiff's son-in-law, and that plaintiff would attend the funeral if she received the message in time, is not sufficient to charge the company with knowledge of the specially affectionate relations which had existed between the plaintiff and deceased, and will not warrant a recovery by plaintiff for being kept away from the funeral. *Western Union Tel. Co. v. Gibson*, (Tex. Civ. App. 1896) 39 S. W. Rep. 198.

**2. Interest of Plaintiff Not Party to Message.** — *Morrow v. Western Union Tel. Co.*, 107 Ky. 517; *Davidson v. Western Union Tel. Co.*, (Ky. 1900) 54 S. W. Rep. 830; *Southwestern Tel., etc., Co. v. Gotcher*, 93 Tex. 114; *Western Union Tel. Co. v. Motley*, (Tex. Civ. App. 1894) 27 S. W. Rep. 51; *Western Union Tel. Co. v. Grigsby*, (Tex. Civ. App. 1894) 29 S. W. Rep. 406. See also *Western Union Tel. Co. v. Morrison*, (Tex. Civ. App. 1896) 33 S. W. Rep. 1025. Compare *Landis v. Western Union Tel. Co.*, 124 N. Car. 528, holding that a wife may recover for mental suffering caused by the failure of her relatives to meet her at a station and assist in caring for the body of her dead child, although the message was sent by her husband and the company was not notified of her interest in the message. Compare also *Western Union Tel. Co. v. Carter*, (Tex. Civ. App. 1892) 20 S. W. Rep. 834; *Western Union Tel. Co. v. Russell*, (Tex. Civ. App. 1895) 31 S. W. Rep. 698.

In *Western Union Tel. Co. v. Womack*, 9 Tex. Civ. App. 607, the plaintiff sent to his son's uncle a message reading: "Is Fred over there; he left yesterday morning." The boy was supposed to be lost. It was held that

plaintiff's wife could not recover for her mental suffering unless the company had information, other than that the message afforded, of her beneficial interest in the message. See also *Western Union Tel. Co. v. Procter*, 6 Tex. Civ. App. 300.

**Damages Due a Wife for Mental Suffering Are Community Property**, and are an element of recovery in a suit by the husband. *Loper v. Western Union Tel. Co.*, 70 Tex. 689. See also *Southwestern Union Tel. Co. v. Dale*, (Tex. Civ. App. 1894) 27 S. W. Rep. 1059.

**3. Western Union Tel. Co. v. Evans**, 5 Tex. Civ. App. 55.

**4. Western Union Tel. Co. v. Luck**, 91 Tex. 178, 66 Am. St. Rep. 870, *disapproving* *Western Union Tel. Co. v. Nations*, 82 Tex. 539, 27 Am. St. Rep. 914. See also *Western Union Tel. Co. v. Burrow*, 10 Tex. Civ. App. 122.

**5. Sale Prevented — Plaintiff the Vendor.** — *Western Union Tel. Co. v. Lindley*, 89 Ga. 484; *Western Union Tel. Co. v. James*, 90 Ga. 254; *E. ans v. Western Union Tel. Co.*, 102 Iowa 219; *Herron v. Western Union Tel. Co.*, 90 Iowa 129; *Western Union Tel. Co. v. Nye, etc., Grain Co.*, (Neb. 1903) 97 N. W. Rep. 305; *Western Union Tel. Co. v. Brown*, 84 Tex. 54; *Western Union Tel. Co. v. Williford*, 2 Tex. Civ. App. 574, (Tex. Civ. App. 1894) 27 S. W. Rep. 700; *Brooks v. Western Union Tel. Co.*, (Utah 1903) 72 Pac. Rep. 499. Compare *Western Union Tel. Co. v. Haman*, 2 Tex. Civ. App. 100. See generally the titles DAMAGES, vol. 8, p. 632 *et seq.*; SALES, vol. 24, p. 1114 *et seq.*

**6. Expenses Recoverable.** — *Western Union Tel. Co. v. Collins*, 45 Kan. 88; *Western Union Tel. Co. v. Shumate*, 2 Tex. Civ. App. 429; *Lane v. Montreal Tel. Co.*, 7 U. C. C. P. 23.

A message to plaintiff reading, "Ship your hogs at once, was delayed four days, in consequence of which plaintiff had to keep his hogs four days longer than he would have done, thus incurring expense for feeding, etc.,

would have realized had the bargain been consummated.<sup>1</sup>

**The Loss Must Be Actual and Substantial,** and plaintiff must, in all such cases, prove it; there is no presumption of loss or damage from the mere fact of negligence on the part of the company.<sup>2</sup> And there can be no recovery for a loss of profits which were purely speculative or conjectural, particularly where the transaction is of a gambling nature. The bargain prevented must have been free from such a taint, and the profits anticipated from it must have been reasonably certain and not dependent upon the hazards or chances of business.<sup>3</sup>

**b. ORDER FOR GOODS NOT DELIVERED.** — When the telegraph company wholly fails to transmit or deliver a message ordering goods, the measure of damages is the difference between the price which was due under that order and that which the plaintiff was or would be obliged to pay at the same place in order, by due diligence, after knowing of the company's failure, to purchase a like quality and quantity of goods;<sup>4</sup> but he is not entitled to recover profits

and had to sell at a decreased price. He was allowed to recover the difference between the market value of the hogs, at the place of delivery, on the day when they would have been delivered had the message been promptly delivered, and the market value on the day when he was able to deliver them, together with the extra expense to which he was subjected. *Manville v. Western Union Tel. Co.*, 37 Iowa 214, 18 Am. Rep. 8.

**Avoided Expense Must Be Deducted.** — *Western Union Tel. Co. v. Brown*, 84 Tex. 54. See also *Evans v. Western Union Tel. Co.*, 102 Iowa 219; *Western Union Tel. Co. v. Williford*, 2 Tex. Civ. App. 574.

1. *Western Union Tel. Co. v. Lindley*, 89 Ga. 484; *Western Union Tel. Co. v. Eubanks*, 100 Ky. 591, 66 Am. St. Rep. 361; *Postal Tel. Co. v. Rhett*, (Miss. 1903) 33 So. Rep. 412, (Miss. 1904) 35 So. Rep. 829; *Western Union Tel. Co. v. Wilhelm*, 48 Neb. 910 (exchange of lands); *Wallingford v. Western Union Tel. Co.*, 53 S. Car. 410; *Western Union Tel. Co. v. Morrison*, (Tex. Civ. App. 1896) 33 S. W. Rep. 1025 (exchange of lands).

2. **Plaintiff Must Prove Loss.** — *Pennington v. Western Union Tel. Co.*, 67 Iowa 631, 56 Am. Rep. 367, 8 Am. & Eng. Corp. Cas. 115; *Mickelwait v. Western Union Tel. Co.*, 113 Iowa 177. Compare *Alexander v. Western Union Tel. Co.*, 67 Miss. 386.

The sender cannot recover of the company for the alleged loss of a bargain caused by its failure to transmit a message ordering goods when there is no evidence that the goods could or would have been shipped to him if the message had been promptly sent and delivered. *Meggett v. Western Union Tel. Co.*, 69 Miss. 198; *Cahn v. Western Union Tel. Co.*, 46 Fed. Rep. 40, *affirmed* (C. C. A.) 48 Fed. Rep. 810. See also *Levy v. Western Union Tel. Co.*, 35 Mo. App. 170.

If the quantity of goods to be sold is uncertain or depends upon other contingencies, there can be no recovery of profits. *Kinghorne v. Montreal Tel. Co.*, 18 U. C. Q. B. 60.

In *Western Union Tel. Co. v. Aubrey*, 61 Ark. 613, a telegram to plaintiff offering to buy cotton of him named a price of 7½ cents per pound, but through an error in transmission it read 8½ cents. Plaintiff bought cotton with

which to fill the order at 7½. It was held that he was not entitled to recover damages, having sustained no actual loss. But compare *Western Union Tel. Co. v. Nagle*, 11 Tex. Civ. App. 539.

3. **Profits Must Not Be Conjectural or Speculative.** — *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 21 Am. & Eng. Corp. Cas. 211; *Cahn v. Western Union Tel. Co.*, 46 Fed. Rep. 40, *affirmed* (C. C. A.) 48 Fed. Rep. 810, 39 Am. & Eng. Corp. Cas. 522; *Beaupre v. Pacific, etc., Tel. Co.*, 21 Minn. 155; *Reynolds v. Western Union Tel. Co.*, 81 Mo. App. 223; *Kiley v. Western Union Tel. Co.*, 39 Hun (N. Y.) 158; *Cannon v. Western Union Tel. Co.*, 100 N. Car. 300, 6 Am. St. Rep. 590, 21 Am. & Eng. Corp. Cas. 124; *Reliance Lumber Co. v. Western Union Tel. Co.*, 58 Tex. 395, 44 Am. Rep. 620.

4. **Failure to Deliver Telegram Ordering Goods** — *Alabama.* — *Western Union Tel. Co. v. Way*, 83 Ala. 542.

*Colorado.* — *Western Union Tel. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136.

*Georgia.* — See *Dodd Grocery Co. v. Postal Tel. Cable Co.*, 112 Ga. 685.

*Illinois.* — *Western Union Tel. Co. v. Harris*, 19 Ill. App. 347.

*Iowa.* — *Turner v. Hawkeye, etc., Tel. Co.*, 41 Iowa 458, 20 Am. Rep. 605.

*Maine.* — *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156.

*Massachusetts.* — *Squires v. Western Union Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157.

*New York.* — *Mowry v. Western Union Tel. Co.*, 51 Hun (N. Y.) 126.

*Pennsylvania.* — *U. S. Telegraph Co. v. Wenger*, 55 Pa. St. 262, 93 Am. Dec. 751.

*Texas.* — *Gulf, etc., R. Co. v. Loonie*, 82 Tex. 323, 27 Am. St. Rep. 891; *Carver v. Western Union Tel. Co.*, (Tex. Civ. App. 1895) 31 S. W. Rep. 432.

**Lost Opportunity to Buy Real Estate.** — Through the negligence of the company in failing to deliver a message, the plaintiff, A., lost the opportunity to buy for three thousand dollars land worth five thousand and which the message instructed his agent to buy for him. It was held that he might recover the difference, such damages not being remote or conjectural. It appeared also that another person had sent a message instructing the same agent to buy

which he expected and might have realized from a re-sale not then effected or agreed on.<sup>1</sup> The same rule obtains when there was a mere delay in delivery.<sup>2</sup> But there can be no recovery for more than nominal damages for the failure to deliver a message ordering goods unless the plaintiff proves that, had the message been delivered, his addressee would have filled the order.<sup>3</sup>

c. ORDER FOR GOODS ERRONEOUSLY TRANSMITTED. — Where an error in transmission causes an excess of goods to be sent to a purchaser, the measure of damages is the difference between the market value of the excess at the place of shipment and that at the place to which they were shipped, together with the expense of transportation.<sup>4</sup> If the vendee declines to receive the excess of goods and they are shipped back to the shipper, he may recover the transportation charges both ways and the depreciation in value of the goods, if any.<sup>5</sup> If the subject of the sale is not a commodity, but stocks or bonds or similar securities, the measure of damages is the increase in the loss, if any, sustained by the purchaser in consequence of the error in transmission making the amount purchased larger,<sup>6</sup> or, when there is a profit which

the same property for him, and that if both messages had been promptly delivered, the latter would have reached the agent first and A would not have secured the property. It was held, however, that this fact afforded no defense to the company. *Alexander v. Western Union Tel. Co.*, 67 Miss. 386. See also *Western Union Tel. Co. v. Snow*, (Tex. Civ. App. 1903) 72 S. W. Rep. 250, where delay in delivery of a message saying, "Offer on cattle accepted. Come on quick," caused plaintiff to lose the opportunity to close a trade for the cattle.

When the Same Message Contains Orders Both to Buy and to Sell and is not delivered, the losses plaintiff would have sustained on the purchase order must be deducted from the profits he would have made on the sale order in determining the measure of damages. *Western Union Tel. Co. v. Way*, 83 Ala. 542.

1. Speculative Profits. — *Western Union Tel. Co. v. Fellner*, 58 Ark. 29, 41 Am. St. Rep. 81; *Western Union Tel. Co. v. Graham*, 1 Colo. 230, 9 Am. Rep. 136; *Squire v. Western Union Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *Hibbard v. Western Union Tel. Co.*, 33 Wis. 558, 14 Am. Rep. 775; *Western Union Tel. Co. v. Hall*, 124 U. S. 444, 21 Am. & Eng. Corp. Cas. 211. See also *Sanders v. Stuart*, 1 C. P. D. 326, 24 W. R. 949, 17 Moak 288.

A different rule would obtain, if the plaintiff had an agreement with his seller for a definite quantity at a fixed price, and acting on the assumption that his message would be delivered, had re-sold for delivery upon arrival of the goods. See *Western Union Tel. Co. v. Brown*, 84 Tex. 54; *Walden v. Western Union Tel. Co.*, 105 Ga. 275; *Western Union Tel. Co. v. Landis*, (Pa. 1888) 12 Atl. Rep. 467, 21 Am. & Eng. Corp. Cas. 206; *Postal Tel. Co. v. Rhett*, (Miss. 1903) 33 So. Rep. 412, (Miss. 1904) 35 So. Rep. 829. Compare *Western Union Tel. Co. v. J. A. Kemp Grocer Co.*, (Tex. Civ. App. 1894) 28 S. W. Rep. 905; *Western Union Tel. Co. v. Thomas*, 7 Tex. Civ. App. 105, holding that evidence of such a re-sale is incompetent unless it appears that company was chargeable with notice of the fact.

As to Speculative Damages in general see the title DAMAGES, vol. 8, p. 608 *et seq.*

2. Delay in Delivery. — *Western Union Tel. Co. v. Carver*, 15 Tex. Civ. App. 547; *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256, 21 Am. St. Rep. 662, 35 Am. & Eng. Corp. Cas. 31, *affirming* 44 Hun (N. Y.) 532.

3. Meggett v. Western Union Tel. Co., 69 Miss. 198. See also *Western Union Tel. Co. v. Burns*, (Tex. Civ. App. 1902) 70 S. W. Rep. 784.

4. Error in Transmission Causing Excess of Goods to Be Shipped. — *Leonard v. New York, etc., Electro Magnetic Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446; *New York, etc., Printing Tel. Co. v. Dryburg*, 35 Pa. St. 298, 78 Am. Dec. 338. See also *Washington, etc., Tel. Co. v. Hobson*, 15 Gratt. (Va.) 122.

If the Goods Are Perishable and become of no value before they can be disposed of, the measure of damages is the market value at the place of shipment plus the cost of transportation. *Elsay v. Postal Tel. Cable Co.*, 15 Daly (N. Y.) 58.

While It Is the Duty of the Party to Use Due Diligence to render the loss as slight as possible, it seems that he is not bound to transport the goods to a more favorable place of sale than that at which they happen to be. *Leonard v. New York, etc., Tel. Co.*, 41 N. Y. 544. But this duty would depend upon the circumstances. See *infra*, this subd. e. *Message Announcing Prices, Etc.*

5. Return of Goods. — *Bowen v. Lake Erie Tel. Co.*, (Ohio 1853) 1 Am. L. Reg. 685.

6. *Washington, etc., Tel. Co. v. Hobson*, 15 Gratt. (Va.) 122, explained in *Western Union Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715.

Thus, where an order to a broker directs him to buy "five Hudson" and is erroneously transmitted "buy five hundred," in consequence of which the broker buys five hundred shares of another stock instead of five hundred Hudson ("five Hudson" meaning five hundred shares of the latter stock), and by the time the error was discovered the price of Hudson had advanced, plaintiff may recover the amount of the advance up to the time he discovered the error, as well as the amount of the loss on the other stock. *Rittenhouse v. Independent Line of Tel.*, 44 N. Y. 263, 4 Am. Rep. 673.

would have been larger but for the error in transmission, the decrease in the profit realized.<sup>1</sup>

If the Error in Transmission Causes the Goods to Be Shipped to the Wrong Place, the measure of damages for which the company is liable is the difference between the price which could have been obtained had the goods gone to the proper place and the market value or best obtainable price at the point to which they were actually sent.<sup>2</sup>

d. MESSAGE DIRECTING PLAINTIFF'S AGENT TO SELL OR PURCHASE.— Where a message directing plaintiff's agent to sell certain property is delayed and the price of the property declines meanwhile, the company is responsible for the difference between the price actually obtained, due diligence being used, and that which would have been obtained had there been no delay in delivery.<sup>3</sup>

If a Message Directing Plaintiff's Agent to Close an Option to Purchase is delayed so that it does not reach the agent until the option has expired, the measure of damages is the difference between the price fixed by the option and the market price at the same point on that day, and if the latter is less than the former there can be no recovery. Subsequent speculative advances in the market cannot be considered.<sup>4</sup>

e. MESSAGE ANNOUNCING PRICES OR STATE OF MARKET.— When a message announcing prices, sent in contemplation of a trade, is erroneously transmitted, the party injured through acting upon the erroneous message may recover the amount of his actual loss caused by the decrease in the price he obtained<sup>5</sup> or, in case he is a purchaser, the increase in price he is obliged to pay in consequence of the error.<sup>6</sup> If the message is directed to one con-

1. In *Marr v. Western Union Tel. Co.*, 85 Tenn. 529, 16 Am. & Eng. Corp. Cas. 243, plaintiff sent a message ordering his broker to buy one thousand shares of a certain stock but the message was changed in transmission to "one hundred." He learned of the error the day after the one hundred shares were purchased for him, but did not repeat his order until several days later, and meanwhile the stock advanced in price. It was held that he could recover the amount of the advance in the price of nine hundred shares up to the time he became aware of the error but not for advances occurring thereafter.

2. Error Causing Goods to Be Shipped to Wrong Place.— *Western Union Tel. Co. v. Reid*, 83 Ga. 401; *Western Union Tel. Co. v. Stevens*, (Tex. 1891) 16 S. W. Rep. 1095.

3. *Daugherty v. American Union Tel. Co.*, 75 Ala. 168, 51 Am. Rep. 435, 5 Am. & Eng. Corp. Cas. 203; *Hocker v. Western Union Tel. Co.*, (Fla. 1903) 34 So. Rep. 901; *Hadley v. Western Union Tel. Co.*, 115 Ind. 191, 21 Am. & Eng. Corp. Cas. 72; *Western Union Tel. Co. v. Littlejohn*, 72 Miss. 1025; *Western Union Tel. Co. v. Stevens*, (Tex. 1891) 16 S. W. Rep. 1095. Compare *Cahn v. Western Union Tel. Co.*, (C. C. A.) 48 Fed. Rep. 810, 39 Am. & Eng. Corp. Cas. 552, affirming 46 Fed. Rep. 40.

Plaintiff wired his agent to postpone the purchase of hogs until a certain day. There was a negligent delay in delivery, rendering the message ineffective, and it was held that the measure of damages was the difference in the cost of the hogs on the day the agent bought and that on the day on which the message instructed him to buy. *Western Union Tel. Co. v. North Packing, etc., Co.*, 188 Ill. 366, affirming 89 Ill. App. 301.

4. Direction to Close Option.— *Brewster v. Western Union Tel. Co.*, 65 Ark. 537.

Where a telegram to plaintiff's broker, as delivered, authorized him to pay a higher price for certain cotton than the market price at the time, there can be no recovery for the error in transmission, in the absence of evidence that the cotton could have been bought at a lower price or that it was not worth what plaintiff paid for it. *Western Union Tel. Co. v. Bell*, 24 Tex. Civ. App. 572.

5. Seller Obtaining Decrease in Price.— *Western Union Tel. Co. v. Crawford*, 110 Ala. 460; *Western Union Tel. Co. v. Flint River Lumber Co.*, 114 Ga. 576, 88 Am. St. Rep. 36; *Postal Tel. Cable Co. v. Schaefer*, 62 S. W. Rep. 1119, 23 Ky. L. Rep. 344; *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 58 Am. St. Rep. 609; *Western Union Tel. Co. v. Richman*, (Pa. 1887) 8 Atl. Rep. 171, 16 Am. & Eng. Corp. Cas. 263; *Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 10 Am. St. Rep. 699, 25 Am. & Eng. Corp. Cas. 542. See also *Hollis v. Western Union Tel. Co.*, 91 Ga. 801.

If plaintiff, acting on a telegram altered in transmission, sells shares at their full market value, he can recover no more than nominal damages, even though he may have to pay an advanced price a few days later. *Hughes v. Western Union Tel. Co.*, 114 N. Car. 70, 14 Am. St. Rep. 782.

Where the party sending the message announcing prices was under no obligation to keep plaintiff informed as to prices and it appears that plaintiff did not rely on him for such information, plaintiff cannot recover on the ground that he sold his cotton for a less price than he might have obtained had the message been correctly transmitted. *Frazer v. Western Union Tel. Co.*, 84 Ala. 497. Compare *Garrett v. Western Union Tel. Co.*, 83 Iowa 257.

6. *Western Union Tel. Co. v. Dubois*, 128 Ill. 248, 15 Am. St. Rep. 109.

templating a shipment of live stock and advises him to ship, the measure of damages, in case of delay or nondelivery in consequence of which the addressee ships to a less advantageous point, is the difference between the market prices prevailing at the two places at the time, together with the increased cost of transportation, if any.<sup>1</sup> If the message is one advising the addressee not to ship, and through a delay in delivery he ships and thereby encounters an unfavorable market, the measure of damages is the difference between the value of the stock at the place from which they were shipped and the price actually obtained at such market, together with the cost of transportation and the increased expense incident to keeping the stock at the new point.<sup>2</sup> If he is unable to sell at all at such point, he not only may but it is his duty, if practicable, to ship to the nearest good market in order to reduce, as far as possible, the loss to him.<sup>3</sup>

If the Message Is Never Delivered and the addressee has a right, under the circumstances, to believe that a failure to receive a message means that no change in the market has occurred, and buys accordingly at the last rates communicated to him, the measure of damages is the excess of amount which he actually paid over the price he would have paid had the message been delivered.<sup>4</sup>

If the Plaintiff Received from Other Sources the Same Information which the undelivered telegram, for the nondelivery of which he claims damages, would have given him, and gets such information before he takes any action, he has no cause of action.<sup>5</sup>

**4. Loss of Employment or of Professional Fees.**—Where the negligence of the telegraph company in the transmission or delivery of a message causes the plaintiff to lose a situation or employment, he is entitled to recover the actual damage sustained by him in consequence of the loss. The amount of the recovery must, of course, depend upon the circumstances involved, the character of the employment, its probable duration, etc.<sup>6</sup> The same right of recovery exists where a contractor loses, through the negligence of the company, the opportunity to secure a valuable contract, and the measure of damages is the difference between the compensation the contract would have called for and the sum it would cost to fulfil it.<sup>7</sup>

**1. Message Advising Shipment of Live Stock.**—*Western Union Tel. Co. v. Collins*, 45 Kan. 88; *Western Union Tel. Co. v. Stevens*, (Tex. 1891) 16 S. W. Rep. 1095. See also *Turner v. Hawkeye Tel. Co.*, 41 Iowa 458, 20 Am. Rep. 605.

**2. Message Advising Against Shipment.**—*Western Union Tel. Co. v. Linney*, (Tex. Civ. App. 1894) 28 S. W. Rep. 234; *Western Union Tel. Co. v. Woods*, 56 Kan. 737. See also *Western Union Tel. Co. v. Reid*, 83 Ga. 401.

**3. Western Union Tel. Co. v. Woods**, 56 Kan. 737. Compare *Leonard v. New York, etc., Electro Magnetic Tel. Co.*, 41 N. Y. 544, 1 Am. Rep. 446.

**4. Garrett v. Western Union Tel. Co.**, 92 Iowa 449.

**5. Reynolds v. Western Union Tel. Co.**, 81 Mo. App. 223.

**6. Loss of Employment, Etc.**—*Western Union Tel. Co. v. Hines*, 96 Ga. 688, 51 Am. St. Rep. 159; *Western Union Tel. Co. v. Fenton*, 52 Ind. 11; *Kemp v. Western Union Tel. Co.*, 28 Neb. 661, 26 Am. St. Rep. 363, 30 Am. & Eng. Corp. Cas. 607; *Wolfskehl v. Western Union Tel. Co.*, 46 Hun (N. Y.) 542. See also *Baldwin v. Western Union Tel. Co.*, 93 Ga. 692, 44 Am. St. Rep. 194. Compare *Jacobs v. Postal Tel. Cable Co.*, 76 Miss. 278.

**Period of Employment.**—Only nominal damages are recoverable where plaintiff lost merely the opportunity to work by the day for an uncertain period. *Merrill v. Western Union Tel. Co.*, 78 Me. 97. See also *Western Union Tel. Co. v. Pallotta*, 81 Miss. 216.

In *Mondon v. Western Union Tel. Co.*, 96 Ga. 499, the plaintiff had a letter offering him employment at a stipulated sum per month but specifying nothing as to its duration. In consequence of the company's delay in delivering his reply in which he accepted the offer, he failed to get the position. It was held that he could recover the stipulated salary for one month only.

**The General Rule in Such Cases** is that the plaintiff may recover the difference between the amount of the salary he would have received and the amount actually earned by him. *Western Union Tel. Co. v. Valentine*, 18 Ill. App. 57; *Western Union Tel. Co. v. McKibben*, 114 Ind. 511, 21 Am. & Eng. Corp. Cas. 133; *McGregor v. Western Union Tel. Co.*, 85 Mo. App. 308.

**7. Loss of Threshing Contracts.**—*Western Union Tel. Co. v. Robinson*, (Tex. Civ. App. 1895) 29 S. W. Rep. 71; *Western Union Tel. Co. v. Bowen*, 84 Tex. 476.

Where a Professional Man Loses a Fee through the negligence of the company which he would otherwise have secured, by being deprived of the opportunity of attending a patient or client in a professional capacity, he may recover the amount of the fee he would have earned,<sup>1</sup> provided it is made to appear that the company, either from the message itself or from other sources, knew or ought to have known of the nature or importance of the message.<sup>2</sup> Within this rule would come the claim of a real-estate agent who loses the commissions for making a sale of real estate in consequence of the negligent transmission of a telegram whereby a sale already arranged by him was not consummated.<sup>3</sup>

If the Plaintiff Is Already under a Contract of Employment of such a character as would preclude him from entering into a contract with another, he cannot recover damages for failure to secure the latter contract even though the failure was due to the company's negligence.<sup>4</sup>

If the Employment Is Conjectural or contingent upon other circumstances, so that the delivery of the message in due time might or might not have secured the employment for plaintiff, the loss of the employment must be classed as speculative damages and is not recoverable.<sup>5</sup>

**5. Losses Which Might Have Been Prevented**—*a. IN GENERAL.*—When a party sustains a loss which could and would have been prevented if the company had discharged its duty with reference to a message, he is entitled to hold the company responsible for it.<sup>6</sup> But in all such cases he must be able

**1. Loss of Professional Fees.**—*Western Union Tel. Co. v. McLaurin*, 70 Miss. 26 (attorney's fee); *Fairley v. Western Union Tel. Co.*, 73 Miss. 6 (loss of fee to physician). See also *Mood v. Western Union Tel. Co.*, 40 S. Car. 524.

In *Western Union Tel. Co. v. Longwill*, 5 N. Mex. 308, 25 Am. & Eng. Corp. Cas. 565, plaintiff, a physician, was telegraphed for but the message was delivered too late to enable him to respond to the call. There was proof that a reasonable fee for the operation to be performed was five hundred dollars and that the parties sending the message were solvent. It was held that the case was within the rule of *Griffin v. Colver*, 16 N. Y. 489, 69 Am. Dec. 718, allowing damages for "gains prevented," and that plaintiff could recover five hundred dollars less the amount he earned at home during the time he would have been away.

**An Undertaker** to whom a message is sent directing him to meet the sender at the train cannot recover, for a delay in delivery of the message causing him to fail to meet the train, the amount of profit he might have made out of conducting the funeral of the sender's relative, had he received the message in time. Such damages are too speculative. *Clay v. Western Union Tel. Co.*, 81 Ga. 285, 12 Am. St. Rep. 316.

**Loss of Reward for Capturing Criminal.**—In *McPeck v. Western Union Tel. Co.*, 107 Iowa 356, 70 Am. St. Rep. 205, a message sent to plaintiff saying "come on first train" was delayed in delivery. Plaintiff claimed that if it had been promptly delivered he would have responded by taking the first train and would have captured a criminal for whose capture a reward was to be given. It was held that he was entitled to recover, although he did not know at the time that a reward had been offered but merely understood that one would be.

**3.** In *Western Union Tel. Co. v. Clifton*, 68 Miss. 307, a party at W. telegraphed to his at-

torney to meet him there to arrange an assignment. The attorney replied that he would come at once, but this latter message was not delivered, and the party secured a local attorney and plaintiff lost the expected fee. The only information the company had of the circumstances was from the message which read, "Send Eckford on first train. Am here. Answer," and a reply to the effect that E. would come at once. It was held that no more than nominal damages were recoverable. See *Melson v. Western Union Tel. Co.*, 72 Mo. App. 111.

**3. Loss of Commissions on Sale of Realty.**—*Western Union Tel. Co. v. Fatman*, 73 Ga. 285, 54 Am. Rep. 877; *Western Union Tel. Co. v. Cook*, 54 Neb. 109.

**4.** *Freeman v. Western Union Tel. Co.*, 93 Ga. 230.

**5.** *Walser v. Western Union Tel. Co.*, 114 N. Car. 440.

Failure to secure a position as deputy assessor is not a ground for the recovery of more than nominal damages where it appears that the deputy holds only at the pleasure of the officer appointing him. *Kenyon v. Western Union Tel. Co.*, 100 Cal. 454.

**6. Liability for Losses.**—*Bodkin v. Western Union Tel. Co.*, 31 Fed. Rep. 134, 21 Am. & Eng. Corp. Cas. 202; *Western Union Tel. Co. v. McCormick*, (Miss. 1900) 27 So. Rep. 606; *Wolfskehl v. Western Union Tel. Co.*, 46 Hun (N. Y.) 542; *Wallingford v. Western Union Tel. Co.*, 60 S. Car. 201; *Western Union Tel. Co. v. Shumate*, 2 Tex. Civ. App. 429.

Where a message directing the shipment of cattle was delayed so that the agent in charge of them released the herd, the measure of damages is the cost of regathering them and the depreciation in value due to the regathering. *Pruett v. Western Union Tel. Co.*, 6 Tex. Civ. App. 533; *Western Union Tel. Co. v. Pruett*, (Tex. Civ. App. 1896) 35 S. W. Rep. 78. Compare, as to first element of damage,

to show that the loss was sustained and that it could and would have been prevented;<sup>1</sup> and therefore when the action is for a failure to deliver a message summoning a physician to see plaintiff's wife, the plaintiff cannot recover for the value of his wife's services in the absence of proof that the prompt delivery of the message and the arrival of the physician would have saved her life.<sup>2</sup>

*b. MESSAGES TO CREDITORS REGARDING FAILING DEBTORS.* — Where a creditor or his representative telegraphs to his attorney to attach the property of a certain debtor and through the company's negligence in delaying or failing to transmit the message the property is attached by other creditors and plaintiff's debt is thereby lost, the company is responsible in damages for the amount of the debt, together with interest thereon to the date of the trial of the action.<sup>3</sup> So, also, where the company's agent, in order to secure himself and others, wilfully withholds a message to a branch bank announcing the failure of its principal until some time after the bank has opened, the company is liable for all money paid out by the bank between the time when the message should have been delivered and the time when it was actually delivered.<sup>4</sup>

*Western Union Tel. Co. v. Williford*, (Tex. Civ. App. 1894) 27 S. W. Rep. 700.

The deterioration in market value, and not the cost of restoring cattle to their former condition, is the measure of damages where there is a shrinkage in weight for want of water, which would have been prevented if the message in question had been delivered. *Mitchell v. Western Union Tel. Co.*, 12 Tex. Civ. App. 262.

**Plaintiff Prevented from Stopping Foreclosure Sale.** — Where the company's negligence prevents plaintiff from stopping a sale of his property under foreclosure he is not bound, in order to recover damages, to show that he has been evicted from the property; the loss of his title is enough. But he must be able to show that had the message been duly delivered he would have been able to command the money necessary to stop the sale. *Western Union Tel. Co. v. Hearne*, 7 Tex. Civ. App. 67.

**1. Proof of Unavoidable Loss.** — *Western Union Tel. Co. v. Cornwell*, 2 Colo. App. 491; *Giddens v. Western Union Tel. Co.*, 111 Ga. 824; *Western Union Tel. Co. v. Norton*, (Tex. Civ. App. 1901) 62 S. W. Rep. 1081; *Western Union Tel. Co. v. Patton*, (Tex. Civ. App. 1900) 55 S. W. Rep. 973; *Cutts v. Western Union Tel. Co.*, 71 Wis. 46.

**2. Western Union Tel. Co. v. Kendzora**, 77 Tex. 257.

In such cases it is usually a question for the jury as to whether the patient for whom the physician was called was injured by the delay and whether the result would have been different had he arrived promptly. See *Brown v. Western Union Tel. Co.*, 6 Utah 219.

**Loss of Child's Services by Marriage.** — The father may recover the value of the child's services up to its majority where, through the negligence of the company, a telegram was delayed, and, in consequence, he was unable to prevent her marriage. *Western Union Tel. Co. v. Procter*, 6 Tex. Civ. App. 300.

**Funeral Expenses Unnecessarily Incurred.** — In *Western Union Tel. Co. v. Hines*, 22 Tex. Civ. App. 315, a message from a sister to a brother reading "Mother started to-night" was changed in transmission to "Mother died to-night." It was held that expenses incurred by

the brother in preparing for the funeral, including flowers bought, were elements of damage.

**3. Directions for Collection of Debts.** — *Pacific Postal Tel. Cable Co. v. Fleischer*, (C. C. A.) 66 Fed. Rep. 899; *Parks v. Alta California Tel. Co.*, 13 Cal. 422, 73 Am. Dec. 589; *Bierhaus v. Western Union Tel. Co.*, 8 Ind. App. 246; *Bryant v. American Tel. Co.*, 1 Daly (N. Y.) 575; *Western Union Tel. Co. v. Sheffield*, 71 Tex. 570, 10 Am. St. Rep. 790. See also, as to the latter point, *Western Union Tel. Co. v. Wofford*, (Tex. Civ. App. 1897) 42 S. W. Rep. 119.

In *Hartstein v. Western Union Tel. Co.*, 89 Wis. 531, a debtor about to fail wired plaintiff, one of his creditors, suggesting that he "come at once." Delivery of the message was negligently delayed for four days, so that when plaintiff arrived all of his debtor's property had been attached by other creditors. If the message had been promptly delivered plaintiff would have been able to arrive on the scene two days before those attachments. There was no proof, however, that he would have left immediately if he had gotten the telegram promptly, or that his debtor would have voluntarily given him any security for his claim. It was held that damages for the loss of the claim were too remote to be recovered. See also *Manier v. Western Union Tel. Co.*, 94 Tenn. 442.

**Law Suit Lost Through Failure of Transmission**

— An attorney representing the plaintiff in a certiorari proceeding sent a message over the defendant's line containing notice of the hearing. Owing to defendant's failure to deliver it promptly the proceeding was dismissed for want of notice, and the attorney thereupon paid his client the amount involved in the suit and instituted suit to recover damages of the company. It was held that he could not recover in the absence of proof that he would have succeeded in the proceeding had the notice been promptly delivered. *Western Union Tel. Co. v. Bailey*, 115 Ga. 725. See also *Martin v. Sunset Telephone, etc., Co.*, 18 Wash. 260; *Western Union Tel. Co. v. Gidcomb*, (Tex. Civ. App. 1894) 28 S. W. Rep. 699.

**4. Stiles v. Western Union Tel. Co.**, (Ariz. 1887) 15 Pac. Rep. 712.



**6. Failure to Transmit Money.**—When the company undertakes to transmit money by telegraph and fails to do so or is guilty of unreasonable delay in transmitting and delivering it, the measure of damages is merely interest on the money from the time it should have been delivered until it is actually delivered, together with the cost of the message.<sup>1</sup> In order to stop interest in such a case there must be a tender of the money and not of a check merely.<sup>2</sup>

**7. Mental Anguish**—*a. RECOGNIZED IN SOME JURISDICTIONS*—(1) *In General.*—Until a comparatively recent date, it was a recognized rule of law that mental anguish and suffering alone, unaccompanied by actual pecuniary damage or physical injury, was not a ground for the maintenance of an action and could not be considered as an element of damage, even though the negligence or wrongful act of the defendant as a proximate cause of the wrong was established.<sup>3</sup> Isolated exceptions to the rule were recognized in cases of breach of promise suits<sup>4</sup> and where the injury was wilful and malicious. But the courts of *Texas*, following the suggestion of a text writer,<sup>5</sup> have adopted and steadily adhered to the rule that the party who has been compelled to undergo mental suffering in consequence of the negligence of a telegraph company in the transmission or delivery of a message may recover compensatory damages<sup>6</sup> although he sustained no other injury.<sup>7</sup> And this view has

**1. Failure to Transmit Money.**—*Robinson v. Western Union Tel. Co.*, 68 S. W. Rep. 656, 24 Ky. L. Rep. 452; *Smith v. Western Union Tel. Co.*, 150 Pa. St. 561 (no damages for injury to credit). Compare *Western Union Tel. Co. v. Burgess*, (Tex. Civ. App. 1900) 56 S. W. Rep. 237, (Tex. Civ. App. 1901) 60 S. W. Rep. 1023 (message requesting money).

Damages claimed by plaintiff for having been put out of his house and thereby injured in his reputation, owing to the delay of the company in transmitting money sent to him, are too remote to be recoverable. *Stansell v. Western Union Tel. Co.*, 107 Fed. Rep. 668.

**2. Tender to Stop Interest.**—*Robinson v. Western Union Tel. Co.*, 68 S. W. Rep. 656, 24 Ky. L. Rep. 452. See generally the title INTEREST, vol. 16, p. 1066 *et seq.*

Plaintiff, having purchased some cattle at M., in Colorado, and having a letter of credit from a Kansas bank, gave a draft on that bank for the purchase money. The Colorado bank telegraphed to the Kansas bank to know if the draft was good. This message was not delivered until two days later, and during that time the cattle had to be detained at M. in a stock yard, where they lost greatly in weight owing to bad conditions. It was held by the Court of Appeals that the defendant's delay in delivering the message was the proximate cause of the loss in weight, and that a recovery for the amount represented by such loss might be had. But this holding was reversed in the Supreme Court on the ground that the damages mentioned were too remote. *Western Union Tel. Co. v. Simpson*, 64 Kan. 309, reversing 10 Kan. App. 473.

**3. Former Rule as to Mental Anguish.**—*Lynch v. Knight*, 9 H. L. Cas. 577. See also the titles DAMAGES, vol. 8, p. 658; DEATH BY WRONGFUL ACT, vol. 8, p. 926.

In *Alabama*, where the "mental anguish doctrine" obtains, the original rule is recognized. Thus where the plaintiff brought an action *ex*

*delicto* against the telegraph company, seeking to recover solely for mental anguish, the court said: "There can be no recovery here of nominal damages as for a breach of contract—to which we have held that damages for mental suffering may be superadded—because the complaint is not upon contract, but purely in tort. No recovery apart from damages for mental suffering, in other words, can be had upon this complaint, and therefore no recovery for mental suffering can be had." *Blount v. Western Union Tel. Co.*, 126 Ala. 105. See also *Western Union Tel. Co. v. Krichbaum*, 132 Ala. 535; *Western Union Tel. Co. v. Brocker*, (Ala. 1903) 35 So. Rep. 469.

**4. Exceptions—Breach of Promise of Marriage.**—See the title BREACH OF PROMISE OF MARRIAGE, vol. 4, p. 882. And see *Western Union Tel. Co. v. Rogers*, 68 Miss. 748, 24 Am. St. Rep. 300.

**5.** *Shear. & Redf. on Neg.* (4th ed.), § 605. The cases of *Phillips v. Hoyle*, 4 Gray (Mass.) 568, and *Roberts v. Graham*, 6 Wall. (U. S.) 578, were also relied on. But neither the federal courts nor those of *Massachusetts* recognize the *Texas* doctrine as sound. See *infra*, this subdivision, *b. Doctrine Denied*.

**6. Damages Are Compensatory and Not Punitive.**—In several cases allowing damages for mental anguish it was expressly held that punitive damages were not recoverable, there being no proof of malice or wilful wrong on the part of defendant. *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 59 Am. Rep. 623, 13 Am. & Eng. Corp. Cas. 590; *Western Union Tel. Co. v. Berdine*, 2 Tex. Civ. App. 517. See *Connell v. Western Union Tel. Co.*, 116 Mo. 34, 38 Am. St. Rep. 575.

**7. Rule in Texas.**—So *Relle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805; *Gulf, etc., R. Co. v. Levy*, 59 Tex. 542, 12 Am. & Eng. R. Cas. 96; *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 59 Am. Rep. 623, 13 Am. & Eng. Corp. Cas. 590; *Loper v. Western Union Tel. Co.*, 70 Tex. 689, 21 Am. & Eng. Corp.

been adopted to a greater or less extent in a number of other states.<sup>1</sup>

(2) *Theory of Rule Allowing Such Damages.* — The courts proceed on the theory that by virtue of the company's negligent breach of the contract to which the plaintiff was a party, or which was made for his benefit, or by virtue of the statutes declaring the duties and liabilities of telegraph companies,<sup>2</sup> the plaintiff has a cause of action, and, having thus secured a standing in court, he is entitled to recover damages for all the injury suffered by him as a proximate consequence of the defendant's wrongful act.<sup>3</sup> The company

Cas. 191; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 10 Am. St. Rep. 772, *affirmed* (Tex. 1892) 20 S. W. Rep. 47; *Western Union Tel. Co. v. Broesche*, 72 Tex. 654, 13 Am. St. Rep. 843; *Western Union Tel. Co. v. Brown*, 71 Tex. 723; *Western Union Tel. Co. v. Simpson*, 73 Tex. 423; *Gulf, etc., Tel. Co. v. Richardson*, 79 Tex. 649; *Western Union Tel. Co. v. Nations*, 82 Tex. 539, 27 Am. St. Rep. 914; *Western Union Tel. Co. v. Rosentreler*, 80 Tex. 406, 35 Am. & Eng. Corp. Cas. 77; *Western Union Tel. Co. v. Beringer*, 84 Tex. 38; *Western Union Tel. Co. v. Erwin*, (Tex. 1892) 19 S. W. Rep. 1002; *Western Union Tel. Co. v. Linn*, 87 Tex. 7, 47 Am. St. Rep. 58; *Western Union Tel. Co. v. Neel*, (Tex. Civ. App. 1894) 25 S. W. Rep. 661; *Western Union Tel. Co. v. Carter*, 2 Tex. Civ. App. 624; *Western Union Tel. Co. v. Jobe*, 6 Tex. Civ. App. 403; *Western Union Tel. Co. v. Sweetman*, 19 Tex. Civ. App. 435; *Western Union Tel. Co. v. May*, 8 Tex. Civ. App. 176; *Western Union Tel. Co. v. O'Keefe*, (Tex. Civ. App. 1895) 29 S. W. Rep. 1137; *Western Union Tel. Co. v. Warren*, (Tex. Civ. App. 1896) 36 S. W. Rep. 314; *Western Union Tel. Co. v. Kinsley*, 8 Tex. Civ. App. 527; *Western Union Tel. Co. v. Smith*, (Tex. Civ. App. 1895) 33 S. W. Rep. 742; *Roach v. Jones*, 18 Tex. Civ. App. 231; *Jones v. Roach*, 21 Tex. Civ. App. 301; *Western Union Tel. Co. v. Seffel*, (Tex. Civ. App. 1903) 71 S. W. Rep. 616.

1. *Damages for Mental Anguish Allowed in Other States* — *Alabama*. — *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 30 Am. & Eng. Corp. Cas. 615; *Western Union Tel. Co. v. Wilson*, 93 Ala. 32, 30 Am. St. Rep. 23; *Western Union Tel. Co. v. Cunningham*, 99 Ala. 314; *Western Union Tel. Co. v. Adair*, 115 Ala. 441; *Western Union Tel. Co. v. McNair*, 120 Ala. 99; *Western Union Tel. Co. v. Crocker*, 135 Ala. 492.

*Iowa*. — *Mentzer v. Western Union Tel. Co.*, 93 Iowa 752, 57 Am. St. Rep. 294.

*Kentucky*. — *Chapman v. Western Union Tel. Co.*, 90 Ky. 265, 30 Am. & Eng. Corp. Cas. 626; *Western Union Tel. Co. v. Van Cleave*, 107 Ky. 464, 92 Am. St. Rep. 366; *Western Union Tel. Co. v. Fisher*, 107 Ky. 513; *Western Union Tel. Co. v. Mathews*, 107 Ky. 663; *Western Union Tel. Co. v. Johnson*, 107 Ky. 631; *Western Union Tel. Co. v. McIlvoy*, 107 Ky. 633; *Western Union Tel. Co. v. Sternberg*, 107 Ky. 469; *Western Union Tel. Co. v. Crider*, 107 Ky. 600; *Taliferro v. Western Union Tel. Co.*, 54 S. W. Rep. 825, 21 Ky. L. Rep. 1290; *Louisville, etc., R. Co. v. Hull*, 68 S. W. Rep. 433, 57 L. R. A. 771.

*Louisiana*. — *Graham v. Western Union Tel. Co.*, 109 La. 1069.

*North Carolina*. — *Young v. Western Union*

*Tel. Co.*, 107 N. Car. 370, 22 Am. St. Rep. 883, 35 Am. & Eng. Corp. Cas. 60; *Sherrill v. Western Union Tel. Co.*, 116 N. Car. 655, 117 N. Car. 352; *Lyne v. Western Union Tel. Co.*, 123 N. Car. 129; *Cashion v. Western Union Tel. Co.*, 123 N. Car. 267, 124 N. Car. 459; *Dowdy v. Western Union Tel. Co.*, 124 N. Car. 522; *Darlington v. Western Union Tel. Co.*, 127 N. Car. 448; *Kennon v. Western Union Tel. Co.*, 126 N. Car. 232; *Landie v. Western Union Tel. Co.*, 124 N. Car. 528; *Meadows v. Western Union Tel. Co.*, 132 N. Car. 40; *Bryan v. Western Union Tel. Co.*, 133 N. Car. 603. See also *Havener v. Western Union Tel. Co.*, 117 N. Car. 540.

*South Carolina*. — *Butler v. Western Union Tel. Co.*, 62 S. Car. 222, 89 Am. St. Rep. 893; *Marsh v. Western Union Tel. Co.*, 65 S. Car. 430. See *infra*, this section, *c. Rule Declared by Statute*.

*Tennessee*. — *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 6 Am. St. Rep. 864, 21 Am. & Eng. Corp. Cas. 161; *Railroad Co. v. Griffin*, 92 Tenn. 694; *Western Union Tel. Co. v. Robinson*, 97 Tenn. 638; *Western Union Tel. Co. v. Frith*, 105 Tenn. 167; *Gray v. Western Union Tel. Co.*, 108 Tenn. 39, 91 Am. St. Rep. 706.

2. *Theory of Mental Anguish Doctrine*. — The strict requirement of the statute was the principal ground upon which the right to recover such damages was rested in *Tennessee*. *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 6 Am. St. Rep. 864, 21 Am. & Eng. Corp. Cas. 161.

3. *Alabama*. — *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 30 Am. & Eng. Corp. Cas. 623; *Western Union Tel. Co. v. Wilson*, 93 Ala. 32, 30 Am. St. Rep. 23. There can be no recovery for mental anguish alone when the action is in tort. The action must be upon the contract and thus give the plaintiff a right to nominal damages before proof of mental anguish is competent. *Blount v. Western Union Tel. Co.*, 126 Ala. 105.

*Kentucky*. — *Chapman v. Western Union Tel. Co.*, 90 Ky. 265, 30 Am. & Eng. Corp. Cas. 628.

*Tennessee*. — *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 6 Am. St. Rep. 864, 21 Am. & Eng. Corp. Cas. 161.

In *Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 30 Am. St. Rep. 183, 39 Am. & Eng. Corp. Cas. 567, the court, referring to the theory stated in the text as that upon which recovery for mental anguish alone is allowed, said: "To speak of the right to nominal damages as a condition for giving substantial damages, is a palpable contradiction. To give nominal damages necessarily denies any further recovery. \* \* \* It is manifest that to allow such a recovery is, in real substance, an effort to protect feeling by legal remedy."

having been informed, from the message itself or from extraneous sources, that a negligent transmission or delivery will probably cause mental distress, damages arising from such a cause must have been within the contemplation of the parties when the contract was made.<sup>1</sup>

In Louisiana, such damages are allowed in view of the peculiar provisions of the civil law not in force where the common law prevails.<sup>2</sup>

(3) *Limitations of Rule.*—The recognition of the right to recover damages for mental suffering alone has led to such an abnormal increase in the number of such suits and to the assertion of so many unreasonable claims that the courts are not inclined to extend its operation.<sup>3</sup>

The Injury Suffered Must Be Real, not imaginary, and not the result of a too sensitive or excitable mental constitution or of a morbid spirit or distorted imagination.<sup>4</sup>

The Suffering Must Result from the Wrong Complained of, and it is the duty of the court always, when properly requested, to remind the jury of this principle and to caution them that the plaintiff's mental anguish occasioned by other and independent causes, *e. g.*, the death or illness of a relative, cannot be considered.<sup>5</sup>

The Anguish and Suffering Must Be That of the Plaintiff Himself; the recovery cannot include the distress or mental suffering endured by the plaintiff's relative on account of the former's absence.<sup>6</sup>

A Distinction Is Made between anguish caused by the delay or non-delivery of a message and that resulting from independent causes which would have been relieved had the company been prompt in the discharge of its duty. There can be no recovery for the latter.<sup>7</sup>

If the Prompt Delivery of the Message Would Not Have Prevented the Suffering, the failure to deliver cannot be regarded as a proximate cause of the damages com-

1. *Reese v. Western Union Tel. Co.*, 123 Ind. 294; *So Relle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805.

2. *Rule in Louisiana.*—*Graham v. Western Union Tel. Co.*, 109 La. 1069.

3. *Limitations on Doctrine.*—*Robinson v. Western Union Tel. Co.*, 68 S. W. Rep. 656, 24 Ky. L. Rep. 452.

"While reaffirming the doctrine, we must again earnestly caution juries against its abuse." *Cashion v. Western Union Tel. Co.*, 123 N. Car. 267, 124 N. Car. 459.

4. *Suffering Must Be Real.*—*McAllin v. Western Union Tel. Co.*, 70 Tex. 243, 21 Am. & Eng. Corp. Cas. 195; *Morrison v. Western Union Tel. Co.*, 24 Tex. Civ. App. 347.

5. *More Anxiety* resulting from plaintiff's inability to learn what he seeks to know of his relatives is no ground for recovery of damages. *Akard v. Western Union Tel. Co.*, Tex. Civ. App. 1897) 44 S. W. Rep. 538.

6. *More Anger and Resentment* felt by the plaintiff toward the telegraph company on account of its failing to deliver a death message is not such mental suffering as will justify a recovery of damages. *Western Union Tel. Co. v. Bell*, (Tex. Civ. App. 1901) 61 S. W. Rep. 942.

7. *Worry Over the Loss of a Position* caused by the failure of the company to deliver a message, even though plaintiff, a student, testifies that it seriously interferes with his studies, cannot be considered as an element of damage. *Western Union Tel. Co. v. Partlow*, 30 Tex. Civ. App. 599.

8. *United States.*—*Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181.

*North Carolina.*—*Rosser v. Western Union Tel. Co.*, 130 N. Car. 251; *Cashion v. Western Union Tel. Co.*, 123 N. Car. 267, 124 N. Car. 459.

*Tennessee.*—*Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 6 Am. St. Rep. 864, 21 Am. & Eng. Corp. Cas. 161.

*Texas.*—*So Relle v. Western Union Tel. Co.*, 55 Tex. 308, 40 Am. Rep. 805; *Gulf, etc., R. Co. v. Levy*, 59 Tex. 543, 46 Am. Rep. 269, 12 Am. & Eng. R. Cas. 96; *Western Union Tel. Co. v. Wingate*, 6 Tex. Civ. App. 394; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 10 Am. St. Rep. 772; *Johnson v. Western Union Tel. Co.*, 14 Tex. Civ. App. 536; *Western Union Tel. Co. v. Shumate*, 2 Tex. Civ. App. 429; *Western Union Tel. Co. v. Warren*, (Tex. Civ. App. 1896) 36 S. W. Rep. 314; *Western Union Tel. Co. v. Stephens*, 2 Tex. Civ. App. 129; *Western Union Tel. Co. v. Edmondson*, 91 Tex. 206, 66 Am. St. Rep. 873, note. Compare *Western Union Tel. Co. v. Smith*, 88 Tex. 9.

6. *Anguish Suffered by Plaintiff.*—*Gulf, etc., Tel. Co. v. Richardson*, 79 Tex. 649; *Western Union Tel. Co. v. Lovett*, 24 Tex. Civ. App. 84.

7. *Anguish from Independent Causes.*—*Sparkman v. Western Union Tel. Co.*, 130 N. Car. 447; *McCarthy v. Western Union Tel. Co.*, (Tex. Civ. App. 1900) 56 S. W. Rep. 568; *Western Union Tel. Co. v. Edmondson*, 91 Tex. 206, 66 Am. St. Rep. 873, note; *Western Union Tel. Co. v. Bass*, 28 Tex. Civ. App. 418; *Western Union Tel. Co. v. Parks*, (Tex. Civ. App. 1894) 25 S. W. Rep. 813.

In *Rowell v. Western Union Tel. Co.*, 75 Tex. 26, plaintiff and his wife had received

plained of and there can be no recovery.<sup>1</sup> It is therefore incumbent upon a plaintiff who claims damages because of being kept from his father's death-bed to show that he could and would have reached his father before death had the message been delivered promptly.<sup>2</sup>

If the Anguish Arises from Being Kept from the Funeral of a Relative, the plaintiff cannot evade the operation of the rule just stated by showing that if he had received the message promptly he would have replied and secured a postponement of the funeral so as to give him time to be present. From causes for which the company would not be responsible, his reply might not reach its destination, and if it reached there it might fail to accomplish the purpose intended.<sup>3</sup>

**Failure or Delay in Transmitting Money Order.**—The mental anguish of a party expecting a remittance of money by mail, caused by the company's negligent failure or delay, cannot be made a basis for the recovery of damages.<sup>4</sup>

(4) *Objections to Doctrine.*—The rule allowing mental anguish alone to constitute a basis for the recovery of damages has its practical as well as its legal objections. It is an innovation upon long-established principles,<sup>5</sup> and its recognition has, in one jurisdiction at least, produced such a flood of litigation that refinements and distinctions of the most unsubstantial character have been necessary to prevent its application to unjust cases.<sup>6</sup> The damages sought and allowed are essentially speculative and of a character not measurable by accepted legal standards.<sup>7</sup>

information of dangerous illness of the wife's mother. Subsequently, a dispatch was sent informing them of her improved condition, but the company failed to deliver it. The court held that there could be no recovery for the mental anguish suffered by the plaintiff and his wife which a delivery of the message would have relieved. *Compare Western Union Tel. Co. v. Womack*, 9 Tex. Civ. App. 607.

1. *Western Union Tel. Co. v. Andrews*, 78 Tex. 305; *Western Union Tel. Co. v. Hendricks*, 26 Tex. Civ. App. 366. *Compare Phillips v. Western Union Tel. Co.*, (Tex. Civ. App. 1902) 69 S. W. Rep. 997; *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 10 Am. St. Rep. 772.

2. *Cumberland Telephone Co. v. Brown*, 104 Tenn. 56, 78 Am. St. Rep. 906; *Western Union Tel. Co. v. Smith*, 88 Tex. 9; *Western Union Tel. Co. v. Housewright*, 5 Tex. Civ. App. 1. See also *Western Union Tel. Co. v. Eskridge*, 7 Ind. App. 208; *Western Union Tel. Co. v. Smith*, (Tex. Civ. App. 1894) 30 S. W. Rep. 937; *Western Union Tel. Co. v. Drake*, 14 Tex. Civ. App. 601; *Western Union Tel. Co. v. Johnson*, 16 Tex. Civ. App. 546; *Western Union Tel. Co. v. Waller*, (Tex. Civ. App. 1898) 47 S. W. Rep. 396; *Western Union Tel. Co. v. Norris*, 25 Tex. Civ. App. 43.

Whether or not the plaintiff could and would have gone to her relative had she received the message promptly is a question for the jury, even though she testifies that she could and would have done so. *Western Union Tel. Co. v. May*, 8 Tex. Civ. App. 176. See also *Evans v. Western Union Tel. Co.*, (Tex. Civ. App. 1900) 56 S. W. Rep. 609.

3. **Preventing Attendance at Funeral.**—*Western Union Tel. Co. v. Stone*, (Tex. Civ. App. 1894) 27 S. W. Rep. 144; *Western Union Tel. Co. v. Linn*, 87 Tex. 7, 47 Am. St. Rep. 58; *Western Union Tel. Co. v. Motley*, 87 Tex. 38, reversing (Tex. Civ. App. 1894) 27 S. W. Rep.

51. *Compare Western Union Tel. Co. v. Van Way*, (Tex. Civ. App. 1899) 54 S. W. Rep. 414; *Western Union Tel. Co. v. Carter*, (Tex. Civ. App. 1892) 20 S. W. Rep. 834; *Western Union Tel. Co. v. Parsons*, 72 S. W. Rep. 800, 24 Ky. L. Rep. 2008.

4. **Delay in Transmitting Money.**—*Robinson v. Western Union Tel. Co.*, 68 S. W. Rep. 656, 24 Ky. L. Rep. 452; *De Voegler v. Western Union Tel. Co.*, 10 Tex. Civ. App. 229; *Ricketts v. Western Union Tel. Co.*, 10 Tex. Civ. App. 226. See *supra*, this section, 6. *Failure to Transmit Money.*

5. **Objections to Doctrine.**—See *Robinson v. Western Union Tel. Co.*, 68 S. W. Rep. 656, 24 Ky. L. Rep. 452.

"It is somewhat remarkable that, although telegraphy has now been in use for over fifty years, it has never seemed to occur to any court or, so far as we can discover, to any lawyer, that damages were recoverable for mental suffering resulting from neglect to transmit or deliver a telegram until it was so held in 1881 by the Supreme Court of Texas." *Francis v. Western Union Tel. Co.*, 58 Minn. 252.

6. *McAllen v. Western Union Tel. Co.*, 70 Tex. 243, 21 Am. & Eng. Corp. Cas. 195.

In *Western Union Tel. Co. v. Rogers*, 68 Miss. 748, 24 Am. St. Rep. 300, the court, by Cooper, J., reviewing the case of *Rowell v. Western Union Tel. Co.*, 75 Tex. 26, where it was held that damages were not recoverable for mental anguish which a delivery of the telegram would have relieved, said: "The distinction drawn by the court is so unsubstantial that it was evidently resorted to for the purpose of obstructing the tide of intolerable litigation flowing from previous decisions." See also the dissenting opinion of Lawton, J., in *Wadsworth v. Western Union Tel. Co.*, 86 Tenn. 695, 6 Am. St. Rep. 864.

7. *Western Union Tel. Co. v. Wood*, (C. C. A. 57 Fed. Rep. 471.

(5) *Evidence of Mental Suffering.* — The behavior of the party affected and his natural expressions at the time tending to indicate his mental state are competent to show his mental suffering.<sup>1</sup> When the action is to recover for the anguish suffered by the plaintiff in being kept from the bedside of his dying mother, it is competent to prove that he was her favorite son.<sup>2</sup> But it is not competent, for the purpose of showing how plaintiff's suffering was aggravated, to prove that his relative, when dying, made repeated requests for him, and that these requests were afterwards communicated to the plaintiff.<sup>3</sup>

*Where Sickness Results.* — If the plaintiff is entitled, in the jurisdiction in which he sues, to recover for mental anguish, he may show that, as a result of such anguish, he became ill and was forced to take to his bed, call in a physician, and buy medicines.<sup>4</sup> But there can be no recovery for "physical suffering" resulting from plaintiff's being kept from his relative's funeral, in the absence of specific proof of such suffering as a result of the deprivation.<sup>5</sup>

*As Tending to Disprove the Fact of Mental Suffering,* the defendant may show that the plaintiff, who sues on account of the delay in delivering a telegram calling him to see his sick daughter, had abandoned his family and was living apart from them.<sup>6</sup>

(6) *Relationship of Parties Material.* — In cases where the message is one announcing the illness or death or the time of the burial of a near blood relation of the plaintiff, the latter's mental anguish will be presumed when, through the fault of the defendant company, he is prevented from being at the bedside or funeral of his relative, and it is not necessary to make proof of it,<sup>7</sup> though the plaintiff may prove facts tending to aggravate the damages.<sup>8</sup>

*But Where the Parties Are Related by Affinity Merely,* the law does not presume any mental suffering, and in such cases plaintiff must prove it affirmatively.<sup>9</sup> Indeed, the better rule seems to be that the right to recover damages for mental anguish should be confined to cases in which the affected parties are

Such damages "open into a field without boundaries, and there is no principle by which the court can limit the amount of damages. Mere logic will not dispose of a question of this character." *Connelly v. Western Union Tel. Co.*, 100 Va. 51, 93 Am. St. Rep. 919, quoting concurring opinion of Cauty, J., in *Francis v. Western Union Tel. Co.*, 58 Minn. 252.

1. *Behavior of Plaintiff as Indicating His Suffering.* — *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148, 30 Am. & Eng. Corp. Cas. 615; *Western Union Tel. Co. v. Carter*, (Tex. Civ. App. 1892) 20 S. W. Rep. 834; *Mentyer v. Western Union Tel. Co.*, 93 Iowa 752, 57 Am. St. Rep. 294. *Compare Western Union Tel. Co. v. McLeod*, (Tex. Civ. App. 1893) 22 S. W. Rep. 988; *Western Union Tel. Co. v. Adams*, 75 Tex. 535, 16 Am. St. Rep. 920.

2. *Western Union Tel. Co. v. Lydon*, 82 Tex. 364.

3. *Western Union Tel. Co. v. Stiles*, 89 Tex. 312. *Compare Western Union Tel. Co. v. Evans*, 1 Tex. Civ. App. 297.

4. *Sickness Resulting from Mental Anguish.* — *Simmons v. Western Union Tel. Co.*, 63 S. Car. 425; *Western Union Tel. Co. v. Sweetman*, 19 Tex. Civ. App. 435.

5. *Western Union Tel. Co. v. Thompson*, 18 Tex. Civ. App. 609.

6. *Western Union Tel. Co. v. Terrell*, 10 Tex. Civ. App. 60.

The Number of Plaintiff's Grandchildren or the fact that they were widely scattered cannot be shown by the defendant in an action by her to recover for being kept from the death-bed

of one of them. *Western Union Tel. Co. v. Crocker*, 135 Ala. 492.

7. *Mental Suffering Presumed Where Blood Relationship Exists.* — *Western Union Tel. Co. v. Coffin*, 88 Tex. 94; *Western Union Tel. Co. v. Randles*, (Tex. Civ. App. 1896) 34 S. W. Rep. 447; *Western Union Tel. Co. v. Porter*, (Tex. Civ. App. 1894) 26 S. W. Rep. 866; *Western Union Tel. Co. v. McLeod*, (Tex. Civ. App. 1893) 22 S. W. Rep. 988; *Western Union Tel. Co. v. Thompson*, 18 Tex. Civ. App. 609; *Western Union Tel. Co. v. Crocker*, 135 Ala. 492.

8. See *supra*, this section, 5. *Evidence of Mental Anguish.*

9. *No Presumption of Mental Suffering in Cases of Affinity.* — *Cashion v. Western Union Tel. Co.*, 123 N. Car. 267; *Bennett v. Western Union Tel. Co.*, 128 N. Car. 103; *Western Union Tel. Co. v. Coffin*, 88 Tex. 94 (brother-in-law); *Western Union Tel. Co. v. Carter*, (Tex. Civ. App. 1892) 20 S. W. Rep. 834; *Western Union Tel. Co. v. McMillan*, (Tex. Civ. App. 1895) 30 S. W. Rep. 298 (sister-in-law); *Western Union Tel. Co. v. Garrett*, (Tex. Civ. App. 1896) 34 S. W. Rep. 649 (stepson); *Western Union Tel. Co. v. Gibson*, (Tex. Civ. App. 1896) 39 S. W. Rep. 198 (son-in-law). See also *Johnson v. Western Union Tel. Co.*, 14 Tex. Civ. App. 536.

The relation between plaintiff and her husband's uncle may be sufficient to warrant a recovery by her for damages suffered by her because of his absence at the death of her husband, his relations with her being shown to have been peculiarly affectionate. *Bright v. Western Union Tel. Co.*, 132 N. Car. 317.

of close degrees of blood relationship, and that no recovery at all may be had where there is merely a relationship by affinity.<sup>1</sup>

(7) *Character of Messages Giving Rise to Mental Anguish.*—These messages in the great majority of cases are those which announce the illness or death of a relative and are intended to enable the addressee to attend the bedside, death, or funeral or are inquiries which would develop such information.<sup>2</sup> The rule allowing a recovery of damages for mental suffering has been extended, however, to cases where the message was one of information merely and not calculated or intended to affect the movements of the addressee.<sup>3</sup>

(8) *Action to Recover for Mental Anguish Does Not Survive.*—Such an action is one for "an injury to the person" within the rule that actions for such injuries do not survive, and the right of action dies with the person injured.<sup>4</sup>

(9) *Limitation of Actions.*—Actions against telegraph companies to recover damages for mental suffering caused by error or delay in the transmission or delivery of messages are "actions for injuries to the person" within the meaning of the statutes of limitation.<sup>5</sup>

*b. DOCTRINE DENIED.*—The rule more consistent with recognized principles and supported by the weight of authority is that mental suffering alone, unaccompanied with other loss or injury, will not sustain an action and cannot be considered as an element of damage. Anxiety of mind and mental torture are too refined and too vague in their nature to be a proper subject for pecuniary compensation in damages except where, as in cases of physical injury, they are so inseparably connected with the physical pain that they can not be distinguished from it.<sup>6</sup>

1. *Recovery Confined to Cases Where Close Relationship by Blood Exists.*—*Western Union Tel. Co. v. Ayers*, 131 Ala. 391; *Robinson v. Western Union Tel. Co.*, 68 S. W. Rep. 656, 24 Ky. L. Rep. 452. See also *Western Union Tel. Co. v. Steenbergen*, 107 Ky. 469; *Morrow v. Western Union Tel. Co.*, 107 Ky. 517; *Davidson v. Western Union Tel. Co.*, (Ky. 1900) 54 S. W. Rep. 830.

2. *Character of Message.*—*Western Union Tel. Co. v. McIlvoy*, 107 Ky. 633; *Western Union Tel. Co. v. Hale*, 11 Tex. Civ. App. 79.

3. *Message Merely Giving Information.*—*Western Union Tel. Co. v. Odom*, 21 Tex. Civ. App. 537; *Western Union Tel. Co. v. Hines*, 22 Tex. Civ. App. 315.

*Plaintiff Prevented from Stopping Marriage.*—Where a father would have been able to prevent the marriage of his daughter had the message been promptly delivered, he may prove, as an element of damages, his mental suffering resulting from the marriage being undesirable. But he cannot recover for the mental suffering of his wife unless it appears that the company knew of his having a wife. *Western Union Tel. Co. v. Procter*, 6 Tex. Civ. App. 300.

4. *Action Does Not Survive.*—*Morton v. Western Union Tel. Co.*, 130 N. Car. 299; *Fitzgerald v. Western Union Tel. Co.*, 15 Tex. Civ. App. 143.

5. *Kelly v. Western Union Tel. Co.*, 17 Tex. Civ. App. 344; *Martin v. Western Union Tel. Co.*, 6 Tex. Civ. App. 619. See the title LIMITATION OF ACTIONS, vol. 19, p. 136.

6. *Damages for Mental Anguish Denied—United States.*—*Chase v. Western Union Tel. Co.*, 44 Fed. Rep. 554; *Crawson v. Western Union Tel. Co.*, 47 Fed. Rep. 544; *Kester v. Western Union Tel. Co.*, 55 Fed. Rep. 603; *Tyler v. Western Union Tel. Co.*, 54 Fed. Rep. 634; *Gahan v. Western Union Tel. Co.*, 59 Fed.

Rep. 433; *Stansell v. Western Union Tel. Co.*, 107 Fed. Rep. 668; *McBride v. Sunset Telephone Co.*, 96 Fed. Rep. 81; *Western Union Tel. Co. v. Wood*, (C. C. A.) 57 Fed. Rep. 471; *Wilcox v. Richmond, etc., R. Co.*, (C. C. A.) 52 Fed. Rep. 264; *Western Union Tel. Co. v. Sklar*, (C. C. A.) 126 Fed. Rep. 295. Compare *Beasley v. Western Union Tel. Co.*, 39 Fed. Rep. 181.

*Arkansas.*—*Peay v. Western Union Tel. Co.*, 64 Ark. 538.

*Dakota.*—*Russell v. Western Union Tel. Co.*, 3 Dak. 315, 5 Am. & Eng. Corp. Cas. 218.

*Florida.*—*International Ocean Tel. Co. v. Saunders*, 32 Fla. 434.

*Georgia.*—*Chapman v. Western Union Tel. Co.*, 88 Ga. 763, 30 Am. St. Rep. 183, 39 Am. & Eng. Corp. Cas. 567; *Giddens v. Western Union Tel. Co.*, 111 Ga. 824.

*Illinois.*—*Western Union Tel. Co. v. Halton*, 71 Ill. App. 63; *North Chicago St. R. Co. v. Duebner*, 85 Ill. App. 602. Compare *Logan v. Western Union Tel. Co.*, 84 Ill. 468, holding that "nominal damages at least" are recoverable.

*Indiana.*—*Western Union Tel. Co. v. Ferguson*, 157 Ind. 64, overruling *Reese v. Western Union Tel. Co.*, 123 Ind. 294; *Western Union Tel. Co. v. Adams*, 28 Ind. App. 420. The rule of the Reese case had been followed in *Western Union Tel. Co. v. Strate-meier*, 6 Ind. App. 125; *Western Union Tel. Co. v. Newhouse*, 6 Ind. App. 434; *Western Union Tel. Co. v. Cline*, 8 Ind. App. 364; *Western Union Tel. Co. v. Briscoe*, 18 Ind. App. 22; *Western Union Tel. Co. v. Bryant*, 17 Ind. App. 70; *Western Union Tel. Co. v. Todd*, 22 Ind. App. 701; *Western Union Tel. Co. v. Cain*, 14 Ind. App. 115. See also *Hadley v. Western Union Tel. Co.*, 115 Ind. 191.

*Kansas.*—*West v. Western Union Tel. Co.*,

*c. RULE DECLARED BY STATUTE.*—In *South Carolina*, the rule formerly prevailing that damages for mental anguish were not recoverable<sup>1</sup> has been changed by a statute which expressly provides that all telegraph companies doing business within the state shall be liable in damages for mental anguish, even in the absence of bodily injury, for negligence in receiving, transmitting, or delivering messages.<sup>2</sup> The statute has been held to be constitutional.<sup>3</sup>

*d. CONFLICT OF LAWS.*—The fact that damages for mental anguish alone are not recoverable under the laws of the state from which the message was sent will not preclude a recovery of such damages in the state to which the message was directed where the laws of the latter state permit such recovery.<sup>4</sup> Likewise, a recovery for such damages may be had in the state whence the message was sent, although they may not be recoverable under the laws of the state where the message was to be delivered.<sup>5</sup> But when the law of the place whence the message was sent and that of the place of delivery both refuse to recognize such damages, they cannot be recovered, although the action may have been brought in a jurisdiction which recognizes the right to recover them.<sup>6</sup>

The Rule in the Federal Courts is that damages cannot be recovered for mental suffering alone. The question is one with respect to which such courts exercise an independent judgment, and are not bound by the holding of the courts of the state in which the case arises.<sup>7</sup> This is true, although the rule

39 Kan. 93, 7 Am. St. Rep. 530, 21 Am. & Eng. Corp. Cas. 190.

*Maine.*—Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303.

*Minnesota.*—Francis v. Western Union Tel. Co., 58 Minn. 252.

*Mississippi.*—Western Union Tel. Co. v. Rogers, 68 Miss. 748, 24 Am. St. Rep. 300. Compare Hartzog v. Western Union Tel. Co., (Miss. 1903) 34 So. Rep. 361.

*Missouri.*—Connell v. Western Union Tel. Co., 116 Mo. 34, 38 Am. St. Rep. 575; Burnett v. Western Union Tel. Co., 39 Mo. App. 599; Denning v. Chicago, etc., R. Co., 80 Mo. App. 152; Newman v. Western Union Tel. Co., 54 Mo. App. 434.

*New York.*—Curtin v. Western Union Tel. Co., 13 N. Y. App. Div. 253, 3 N. Y. Annot. Cas. 286.

*Ohio.*—Morton v. Western Union Tel. Co., 53 Ohio St. 431, 53 Am. St. Rep. 648; Kline v. Western Union Tel. Co., 4 Ohio Dec. 224, 3 Ohio N. P. 143; Kester v. Western Union Tel. Co., 4 Ohio Cir. Dec. 410, 8 Ohio Cir. Ct. 236.

*Oklahoma.*—Butner v. Western Union Tel. Co., 2 Okla. 235.

*Pennsylvania.*—See Kightlinger v. Western Union Tel. Co., 20 Pa. Co. Ct. 630.

*South Carolina.*—Lewis v. Western Union Tel. Co., 57 S. Car. 325. But see *infra*, this section, *c. Damages for Mental Anguish Allowed by Statute.*

*Virginia.*—Connelly v. Western Union Tel. Co., 100 Va. 51, 93 Am. St. Rep. 919; Tyler v. Western Union Tel. Co., 54 Fed. Rep. 634.

*West Virginia.*—Davis v. Western Union Tel. Co., 46 W. Va. 48.

*Wisconsin.*—Summerfield v. Western Union Tel. Co., 87 Wis. 1.

In *Mississippi*, a Modification of the Original Doctrine has been adopted to the effect that where the evidence shows a wilful wrong on the part of the telegraph company or its agent, or

such gross negligence as amounts to wilful wrong, the plaintiff may prove his mental anguish occasioned by his being kept from the death bed or funeral of his relative and have it considered by the jury in determining exemplary damages, although there may have been no pecuniary loss or physical suffering. *Western Union Tel. Co. v. Watson*, (Miss. 1902) 33 So. Rep. 76; *Hartzog v. Western Union Tel. Co.*, (Miss. 1903) 34 So. Rep. 361.

1. *Lewis v. Western Union Tel. Co.*, 57 S. Car. 325.

2. Act of Feb. 20, 1901.

3. *Simmons v. Western Union Tel. Co.*, 63 S. Car. 425. See also *Butler v. Western Union Tel. Co.*, 62 S. Car. 222, 89 Am. St. Rep. 893.

4. *Conflict of Laws.*—*Gray v. Western Union Tel. Co.*, 108 Tenn. 46, 91 Am. St. Rep. 706; *Western Union Tel. Co. v. Blake*, (Tex. Civ. App. 1902) 68 S. W. Rep. 526.

The fact that the delay occurred at a relay station in the state from which the message was sent will not affect the rule of the text. *Western Union Tel. Co. v. Cooper*, 29 Tex. Civ. App. 591.

5. *Bryan v. Western Union Tel. Co.*, 133 N. Car. 603; *Western Union Tel. Co. v. Waller*, (Tex. 1903) 74 S. W. Rep. 752, *reversing* (Tex. Civ. App. 1903) 72 S. W. Rep. 264; *Western Union Tel. Co. v. Cooper*, 29 Tex. Civ. App. 591.

But where parties agree that the contract of sending was made with reference to and was to be controlled by the laws of *Arkansas*, where recovery for mental anguish alone is not allowed, the law of *Arkansas* will control. *Western Union Tel. Co. v. Preston*, (Tex. Civ. App. 1899) 54 S. W. Rep. 650.

6. *Thomas v. Western Union Tel. Co.*, 25 Tex. Civ. App. 398.

7. *Rule in Federal Courts.*—*Western Union Tel. Co. v. Wood*, (C. C. A.) 57 Fed. Rep. 471; *Western Union Tel. Co. v. Sklar*, (C. C. A.)

of the state court allowing such damages may have been largely, induced by the provisions of the statutes of the state.<sup>1</sup>

*e. MENTAL ANGUISH INDUCING SICKNESS AND PHYSICAL PAIN.* — Except in those jurisdictions which recognize the "mental anguish doctrine," the negligence of a telegraph company with respect to a message will not authorize a recovery of damages, even though the mental suffering thereby caused may have induced sickness and physical pain.<sup>2</sup>

*f. MESSAGES SUMMONING A PHYSICIAN.* — These differ from the messages ordinarily involved in mental anguish cases, in that the failure of the telegraph company to transmit or deliver such messages may entail physical as well as mental suffering; they are governed by the long-recognized rule that when the physical and mental suffering are so inseparably connected as that the one is not distinguishable from the other, both are to be considered in estimating the damages.<sup>3</sup> But there can be no recovery for such results as would not naturally be expected to follow the absence of a physician or which are mere remote consequences of his absence.<sup>4</sup>

**8. Exemplary or Punitive Damages.** — A telegraph company is responsible for the wilful and malicious acts of its agents done within the scope of their employment,<sup>5</sup> and is liable for exemplary damages where the injury to the complaining party is due to the wilful or malicious conduct of its agent,<sup>6</sup> or where his negligence has been of so culpable a character as that the law conclusively presumes a wilful wrong.<sup>7</sup> But there can be no recovery of such damages where the proof shows nothing more than a mere want of ordinary care on the part of the company's agent.<sup>8</sup> Nor are such damages recoverable

126 Fed. Rep. 295. See also cases cited *supra*, this subsection, *Doctrine Denied*.

1. *Western Union Tel. Co. v. Sklar*, (C. C. A.) 126 Fed. Rep. 295.

2. *Mental Anguish Inducing Physical Pain.* — *Curtin v. Western Union Tel. Co.*, 13 N. Y. App. Div. 253, 3 N. Y. Annot. Cas. 286; *Kline v. Western Union Tel. Co.*, 4 Ohio Dec. 224, 3 Ohio N. P. 143.

3. *Messages Summoning Physicians.* — *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 10 Am. St. Rep. 772; *Western Union Tel. Co. v. Kendzora*, (Tex. Civ. App. 1894) 26 S. W. Rep. 245; *Western Union Tel. Co. v. Shumate*, 2 Tex. Civ. App. 429; *Western Union Tel. Co. v. Merrill*, (Tex. Civ. App. 1893) 22 S. W. Rep. 826; *Western Union Tel. Co. v. Church*, 90 N. W. Rep. 878, 57 L. R. A. 905; *Western Union Tel. Co. v. McCall*, 9 Kan. App. 886, 58 Pac. Rep. 797. See also *Western Union Tel. Co. v. Henderson*, 89 Ala. 510, 18 Am. St. Rep. 148; *Western Union Tel. Co. v. Pelzer*, (Tex. Civ. App. 1896) 35 S. W. Rep. 836.

4. *Western Union Tel. Co. v. Morris*, (C. C. A.) 83 Fed. Rep. 992. In this case it was held error to permit the jury to consider, in estimating the damages, the probability of permanent impairment of plaintiff's health and the lessening of his ability to work, as the result of an operation which was rendered necessary by the delay in a physician's arrival.

5. See *supra*, XI. 4. *Forged or Fraudulent Messages.* See also *Magouirk v. Western Union Tel. Co.*, 79 Miss. 632, 89 Am. St. Rep. 663.

6. *Exemplary Damages.* — *Magouirk v. Western Union Tel. Co.*, 79 Miss. 632, 89 Am. St. Rep. 663; *Lewis v. Western Union Tel. Co.*, 57 S. Car. 325.

Punitive damages are recoverable where a messenger boy intentionally fails to deliver a

message. *Butler v. Western Union Tel. Co.*, 65 S. Car. 510.

7. *Gross Negligence Amounting to Wilful Wrong* — *Alabama.* — *Western Union Tel. Co. v. Seed*, 115 Ala. 670; *Western Union Tel. Co. v. Cunningham*, 99 Ala. 314.

*Kansas.* — *West v. Western Union Tel. Co.*, 39 Kan. 93, 7 Am. St. Rep. 530, 21 Am. & Eng. Corp. Cas. 190; *Southern Kansas R. Co. v. Rice*, 38 Kan. 398, 5 Am. St. Rep. 766; *Western Union Tel. Co. v. Lawson*, 66 Kan. 660.

*Mississippi.* — *Western Union Tel. Co. v. Watson*, (Miss. 1902) 33 So. Rep. 76.

*South Carolina.* — See *Young v. Western Union Tel. Co.*, 65 S. Car. 93.

*Tennessee.* — *Western Union Tel. Co. v. Frith*, 105 Tenn. 167.

*Texas.* — *Western Union Tel. Co. v. Morris*, 77 Tex. 173, 30 Am. & Eng. Corp. Cas. 633; *Gulf, etc., R. Co. v. Levy*, 59 Tex. 542, 46 Am. Rep. 269.

Where the gross negligence charged is the employment of an incompetent agent and it appears that the agent referred to had never been negligent before, exemplary damages are not recoverable. *Western Union Tel. Co. v. Karr*, 5 Tex. Civ. App. 60.

8. *Western Union Tel. Co. v. Way*, 83 Ala. 542; *Haber, etc., Hat Co. v. Southern Bell Telephone, etc., Co.*, 118 Ga. 874; *Stuart v. Western Union Tel. Co.*, 66 Tex. 580, 59 Am. Rep. 623, 13 Am. & Eng. Corp. Cas. 590; *Western Union Tel. Co. v. Brown*, 58 Tex. 170, 44 Am. Rep. 610; *McAllen v. Western Union Tel. Co.*, 70 Tex. 243, 21 Am. & Eng. Corp. Cas. 195; *Davis v. Western Union Tel. Co.*, 46 W. Va. 48.

*Georgia Code*, § 2943, provides that "exemplary damages can never be allowed in cases arising on contract." Under this, no damages of any kind can be recovered where no wilful wrong on the part of the company or its agent



except when there is proof of actual damage to the plaintiff.<sup>1</sup>

What Constitutes Gross Negligence, such as will justify an award of exemplary damages, must depend upon the circumstances of each particular case and is usually a question for the jury where there is evidence tending to show such negligence.<sup>2</sup>

**9. Excessive Damages.**—The general rule that when the plaintiff is entitled to recover, the verdict of the jury assessing the damages will not be disturbed as being excessive unless the amount is so large as to indicate that it was the result of passion or prejudice,<sup>3</sup> applies to actions against telegraph companies.<sup>4</sup> Occasion has rarely arisen for the invocation of the rule in such actions<sup>5</sup> except in the class of cases where damages are sought for mental suffering. What constitutes an excessive allowance must, of course, depend upon the peculiar circumstances of each particular case, and the determination of the question must rest within the sound discretion of the court.<sup>6</sup>

is shown and the only damage suffered was the mental anguish of the plaintiff. *Chase v. Western Union Tel. Co.*, 44 Fed. Rep. 554. See also *Western Union Tel. Co. v. Goodsey*, 4 Tex. App. Civ. Cas., § 123, where it was said that an allegation of "gross negligence" would not support a claim of exemplary damages.

A mere refusal by a telephone company to furnish a long distance connection will not justify the allowance of exemplary damages. *Haber, etc., Hat Co. v. Southern Bell Telephone, etc., Co.*, 118 Ga. 874.

**1. Necessity of Showing Actual Damage.**—*Schippel v. Norton*, 38 Kan. 567; *Western Union Tel. Co. v. Cross* (Ky. 1903) 74 S. W. Rep. 1098. See EXEMPLARY DAMAGES, vol. 12, p. 29.

When plaintiff makes out a case entitling him to recover the price paid for transmission, that is a showing of actual damages which will warrant the allowance of exemplary damages if a wilful injury or gross negligence is shown. *Western Union Tel. Co. v. Lawson*, 66 Kan. 660.

**2. As to What Constitutes Gross Negligence,** see *Western Union Tel. Co. v. Sneed*, 115 Ala. 670. See also *Western Union Tel. Co. v. Watson*, (Miss. 1902) 33 So. Rep. 76.

Evidence of all the accompanying circumstances is admissible in determining the company's liability for punitive damages. *Marsh v. Western Union Tel. Co.*, 65 S. Car. 430.

**3.** See the title DAMAGES, vol. 8, p. 629.

**4.** *Western Union Tel. Co. v. McCall*, 9 Kan. App. 886, 58 Pac. Rep. 797; *Peterson v. Western Union Tel. Co.*, 75 Minn. 368, 74 Am. St. Rep. 502.

**5.** See *Western Union Tel. Co. v. Church*, 90 N. W. Rep. 878, 57 L. R. A. 905, where a verdict for \$950 was held not to be excessive, it appearing that, through delay in delivery of a message summoning a physician to attend plaintiff, a woman, during her confinement, the confinement was prolonged and she suffered great physical pain in consequence.

In a similar case, the confinement and consequent suffering was prolonged two hours by the delay in delivering the message, and a verdict for \$600 was held not excessive. *Western Union Tel. Co. v. Cooper*, (Tex. 1892) 20 S. W. Rep. 47.

In *Barnes v. Western Union Tel. Co.*, 24 Nev. 125, 77 Am. St. Rep. 791, through the non-

delivery of a message requesting a ticket, plaintiff claimed that he was compelled to walk and to steal rides from Grand Junction, Colo., to Lovelock, Nev. An allowance of \$1,250 was held excessive.

**6. In Mental Anguish Cases.**—*Verdicts Held Excessive—Tennessee.*—*Western Union Tel. Co. v. Mellon*, 100 Tenn. 429 (\$500); *Railroad Co. v. Griffin*, 92 Tenn. 694 (\$900).

*Texas.*—*Western Union Tel. Co. v. Houghton*, 82 Tex. 562, 27 Am. St. Rep. 918 (\$4,500); *Western Union Tel. Co. Piner*, 1 Tex. Civ. App. 301 (\$4,750); *Western Union Tel. Co. v. Evans*, 1 Tex. Civ. App. 297 (\$5,000); *Western Union Tel. Co. v. Berdine*, 2 Tex. Civ. App. 517 (\$1,999.99); *Western Union Tel. Co. v. Bouchell*, 28 Tex. Civ. App. 23 (\$1,250; remittitur of \$750 ordered).

*Verdicts Held Not Excessive—Mental Anguish Cases—Alabama.*—*Western Union Tel. Co. v. Sneed*, 115 Ala. 670 (\$1,500); *Western Union Tel. Co. v. Crocker*, 135 Ala. 492 (\$225); *Western Union Tel. Co. v. Cunningham*, 99 Ala. 314 (\$500).

*Indiana.*—*Western Union Tel. Co. v. Strate-meier*, 6 Ind. App. 125 (\$500); *Western Union Tel. Co. v. Newhouse*, 6 Ind. App. 422 (\$400); *Western Union Tel. Co. v. Cain*, 14 Ind. App. 115 (\$225).

*Kentucky.*—*Western Union Tel. Co. v. Fisher*, 107 Ky. 513 (\$300); *Western Union Tel. Co. v. McIlvoy*, 107 Ky. 633 (\$1,000).

*Tennessee.*—*Western Union Tel. Co. v. Frith*, 105 Tenn. 167 (\$1,500 including punitive damages); *Western Union Tel. Co. v. Robinson*, 97 Tenn. 638 (\$500).

*Texas.*—*Western Union Tel. Co. v. Evans*, 5 Tex. Civ. App. 55 (\$2,500); *Western Union Tel. Co. v. Karr*, 5 Tex. Civ. App. 60 (\$100); *Western Union Tel. Co. v. Zane*, 6 Tex. Civ. App. 585 (\$1,950); *Western Union Tel. Co. v. Hill*, (Tex. Civ. App. 1894) 26 S. W. Rep. 252 (\$500); *Western Union Tel. Co. v. Houghton*, (Tex. Civ. App. 1894) 26 S. W. Rep. 448 (\$2,000); *Western Union Tel. Co. v. Porter*, (Tex. Civ. App. 1894) 26 S. W. Rep. 866 (\$1,000); *Western Union Tel. Co. v. Kinsley*, 8 Tex. Civ. App. 527 (\$750); *Western Union Tel. Co. v. Piner*, 9 Tex. Civ. App. 152 (\$2,150); *Western Union Tel. Co. v. O'Keefe*, (Tex. Civ. App. 1895) 29 S. W. Rep. 1137 (\$1,000); *Western Union Tel. Co. v. Guest*, (Tex. Civ. App. 1895) 33 S. W. Rep. 281 (\$450); *West-*

**10. Nominal Damages.**—The cost of sending the message, if it has been paid, is always recoverable, though no substantial damages are proven, provided a breach of the company's duty is shown, but not otherwise.<sup>1</sup>

**XIII. STATUTORY PENALTIES — 1. Object and Purposes of Statutes.**—To secure the easier and more complete enforcement of the recognized obligations of telegraph companies as to the transmission and delivery of messages, particularly in cases in which, from their nature, substantial damages are not recoverable, statutes have been enacted in a number of the states providing for the recovery of a fixed money penalty from the company for every negligent failure to discharge its duties.<sup>2</sup> The duty designed to be enforced by these statutes is threefold: first, to transmit messages tendered for that purpose with the charges established by the rules of the company; second, to receive and transmit such messages with impartiality as to the order of transmission; and third, to transmit and deliver such messages in good faith and with due diligence.<sup>3</sup>

**2. Construction of Statutes — a. IN GENERAL.**—Such statutes are penal and therefore are to be construed strictly, but not with such strictness as to defeat the manifest purpose of the legislature in enacting them.<sup>4</sup> Thus if the statute evidently contemplates, though it does not expressly indicate, only written messages, the penalty cannot be recovered where the proof shows that the message was an oral one.<sup>5</sup>

*ern Union Tel. Co. v. Russell*, 12 Tex. Civ. App. 82 (\$1,500); *Western Union Tel. Co. v. Johnson*, 16 Tex. Civ. App. 546 (\$400); *Western Union Tel. Co. v. Thompson*, 18 Tex. Civ. App. 279 (\$200); *Western Union Tel. Co. v. Trice*, (Tex. Civ. App. 1898) 48 S. W. Rep. 770 (\$1,000); *Western Union Tel. Co. v. Patton*, (Tex. Civ. App. 1900) 55 S. W. Rep. 973 (\$1,000); *Western Union Tel. Co. v. Norris*, 25 Tex. Civ. App. 43 (\$1,000); *Western Union Tel. Co. v. Rice*, (Tex. Civ. App. 1901) 61 S. W. Rep. 327 (\$750); *Western Union Tel. Co. v. Giffiin*, 27 Tex. Civ. App. 306 (\$750); *Western Union Tel. Co. v. James*, (Tex. Civ. App. 1903) 73 S. W. Rep. 79 (\$1,995); *Western Union Tel. Co. v. Hines*, 22 Tex. Civ. App. 315 (\$780).

**1. Nominal Damages.**—*Western Union Tel. Co. v. Lawson*, 66 Kan. 660; *Kennon v. Western Union Tel. Co.*, 126 N. Car. 232; *Thompson v. Western Union Tel. Co.*, 106 N. Car. 549, 30 Am. & Eng. Corp. Cas. 634.

**Necessity of Proving Negligence.**—*Hargrave v. Western Union Tel. Co.*, (Tex. Civ. App. 1901) 60 S. W. Rep. 687.

**2. Penalty Is a "Fine."**—Under § 2939 of the *Virginia* code, a justice of the peace has jurisdiction of a suit to recover a fine not exceeding twenty dollars and of a suit to recover other claims not exceeding one hundred dollars. He has no jurisdiction to recover the penalty of one hundred dollars imposed upon telegraph companies by § 1292, that penalty being a "fine" within the meaning of § 2939. *Western Union Tel. Co. v. Pettyjohn*, 88 Va. 296. See also *Baltimore, etc., Tel. Co. v. Lovejoy*, 48 Ark. 301.

**3. Burnett v. Western Union Tel. Co.**, 39 Mo. App. 607.

**4. Strict Construction of Statutes — Arkansas.**—*Frauenthal v. Western Union Tel. Co.*, 50 Ark. 78, 21 Am. & Eng. Corp. Cas. 70.

**California.**—*Thurn v. Alta Tel. Co.*, 15 Cal. 473.

**Georgia.**—*Langley v. Western Union Tel.*

*Co.*, 88 Ga. 777; *Greenberg v. Western Union Tel. Co.*, 89 Ga. 754.

**Indiana.**—*Western Union Tel. Co. v. Axtell*, 69 Ind. 199; *Hadley v. Western Union Tel. Co.*, 115 Ind. 191, 21 Am. & Eng. Corp. Cas. 72; *Western Union Tel. Co. v. Roberts*, 87 Ind. 377; *Western Union Tel. Co. v. Kilpatrick*, 97 Ind. 42.

**Iowa.**—*Taylor v. Western Union Tel. Co.*, 95 Iowa 740.

**Mississippi.**—*Wilkins v. Western Union Tel. Co.*, 68 Miss. 6; *Cumberland Telephone, etc., Co. v. Sanders*, (Miss. 1904) 35 So. Rep. 653.

**South Dakota.**—*Kirby v. Western Union Tel. Co.*, 4 S. Dak. 463.

**Georgia.**—The statute requiring delivery to "residents," there can be no recovery of the penalty for a failure to deliver a message to one who is merely a transient visitor at the locality to which it is directed. *Moore v. Western Union Tel. Co.*, 87 Ga. 613. Compare *Horn v. Western Union Tel. Co.*, 88 Ga. 538.

**Missouri.**—Rev. Stat. Mo., § 885, imposes a penalty for the giving of false information as to the time within which a dispatch may be sent. On an application to send a message, made on Sunday, on which day telegraph companies are prohibited from transmitting messages, the company does not incur the penalty by giving false information that the message can be sent on that day. *Thompson v. Western Union Tel. Co.*, 32 Mo. App. 191.

**Virginia.**—By the *Virginia* code, § 1292, a telegraph company, on the arrival of a message at its destination, must deliver it promptly, where its regulations require such delivery, under a penalty for failure to do so. Under this, there can be no recovery of the penalty unless it appears that the message reached its destination. *Western Union Tel. Co. v. Powell*, 94 Va. 268.

And see generally the titles FINES AND PENALTIES, vol. 13, p. 55; STATUTES, vol. 26, p. 658.

**5. Cumberland Telephone, etc., Co. v. Sanders, (Miss. 1904) 35 So. Rep. 653. But**

**b. NO EXTRATERRITORIAL EFFECT.**—Independently of the constitutional question arising in this connection,<sup>1</sup> such statutes, being penal, are within the general rule that penal statutes have no extraterritorial effect and will not be enforced beyond the territorial jurisdiction of the state enacting them.<sup>2</sup> But where the specific breach of the statutory duty occurs in such state, the penalty is recoverable even though the message was an interstate message.<sup>3</sup>

**3. Constitutionality of Statutes.**—The principal ground of attack upon the constitutionality of such statutes has been their interference with the exclusive power of Congress over interstate commerce.<sup>4</sup> They are not open to the objection that because they apply only to telegraph companies they deny to such companies the equal protection of the law, since they apply equally to all companies of that class;<sup>5</sup> nor, in so far as they apply to actions by persons other than the sender, open to the objection that they impair the obligation of the contract of sending by fixing a different liability from that assumed in the contract.<sup>6</sup>

**4. Character and Form of Message.**—The character of the message is not material, provided it is not immoral, libelous, or fraudulent, and the penalty is recoverable though the message relates to a transaction in "futures," which is illegal and such as would not support an action for damages against the company.<sup>7</sup> Nor is the form of the message material, as where it is in cipher, if the ground of complaint is that the company, after accepting it for transmission, failed to send it at all.<sup>8</sup> But the fact that the message was not on

compare *Western Union Tel. Co. v. Jones*, 69 Miss. 658, 30 Am. St. Rep. 579, where the penalty was allowed to be recovered although the message was telephoned to the operator.

1. See *INTERSTATE COMMERCE*, vol. 17, pp. 64, 89.

**2. Statutes Have No Extraterritorial Effect—United States.**—See *Western Union Tel. Co. v. Texas*, 105 U. S. 464, reversing *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 692.

*Arkansas.*—*Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79, 8 Am. & Eng. Corp. Cas. 102.

*Georgia.*—*Western Union Tel. Co. v. Michelson*, 94 Ga. 436.

*Iowa.*—*Taylor v. Western Union Tel. Co.*, 95 Iowa 740.

*Mississippi.*—*Alexander v. Western Union Tel. Co.*, 66 Miss. 161, 14 Am. St. Rep. 556.

*Missouri.*—*Rixke v. Western Union Tel. Co.*, 96 Mo. App. 406; *Connell v. Western Union Tel. Co.*, 108 Mo. 459, 39 Am. & Eng. Corp. Cas. 594.

*New York.*—See *Hearn v. Western Union Tel. Co.*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 557.

*Tennessee.*—*Western Union Tel. Co. v. Mellon*, 100 Tenn. 429.

The *Indiana* statute is held to be inapplicable except where the contract of sending was made in that state. *Carnahan v. Western Union Tel. Co.*, 89 Ind. 526, 46 Am. Rep. 175; *Rogers v. Western Union Tel. Co.*, 122 Ind. 395, 17 Am. St. Rep. 373; *Western Union Tel. Co. v. Reed*, 96 Ind. 195.

And it does not embrace a breach of duty occurring in another state even though the contract of sending was made in *Indiana*. *Western Union Tel. Co. v. Carter*, 156 Ind. 531,

overruling *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 693.

3. *Western Union Tel. Co. v. James*, 90 Ga. 254, affirmed 162 U. S. 650; *Western Union Tel. Co. v. Howell*, 95 Ga. 194, 51 Am. St. Rep. 68; *Butner v. Western Union Tel. Co.*, 2 Okla. 235.

4. See the title *INTERSTATE COMMERCE*, vol. 17, p. 90.

5. *Western Union Tel. Co. v. Ferguson*, 157 Ind. 37. See also the title *CONSTITUTIONAL LAW*, vol. 6, p. 967.

The *Tennessee* statute (Shannon's Tenn. Code, 1896, § 1830-39; M. & V. Code, 1884, § 1542) which declares the duty and liability of telegraph companies has no extraterritorial operation and is not open to objection as impeding such companies in the exercise of a federal duty or privilege. *Western Union Tel. Co. v. Mellon*, 100 Tenn. 429.

The *Indiana* statute inflicting a penalty of \$100 to be recovered by the party aggrieved is not unconstitutional as conflicting with art. 5, § 17, of the state constitution which confers the pardoning power on the governor, since a violation of the statute is not a misdemeanor and the liability is a civil one. Nor is the statute unconstitutional as inflicting a cruel or unusual punishment or as imposing a penalty disproportionate to the offense. *Western Union Tel. Co. v. Ferguson*, 157 Ind. 37.

6. *Western Union Tel. Co. v. James*, 162 U. S. 650.

**7. Message Relating to "Futures."**—*Gray v. Western Union Tel. Co.*, 87 Ga. 350, 27 Am. St. Rep. 259, 35 Am. & Eng. Corp. Cas. 47. See *infra*, this title, XI. 2. *Messages Relating to Gambling Transactions.*

8. *Western Union Tel. Co. v. Reynolds*, 77 Va. 173, 46 Am. Rep. 715, 5 Am. & Eng. Corp. Cas. 182.

one of the company's regular blanks will justify the operator in declining to accept it for transmission and such declination will not justify a recovery of the penalty.<sup>1</sup> And the fact that the message was written on a piece of memorandum paper and handed to the operator by the sender's servant in such a casual way as not to indicate that it was a message for transmission, will be a good defense to an action under the statute.<sup>2</sup>

**5. Proof of Breach of Duty.**—A breach of the company's duty must be established in order to recover the penalty,<sup>3</sup> but this may be done by the same proof which is sufficient in actions for damages.<sup>4</sup> It has been held in some cases that the plaintiff must prove something more than mere negligence on the part of the company, and show that it acted wilfully or in bad faith;<sup>5</sup> but this requirement is confined to particular instances, as when the wrong consisted in unduly postponing the plaintiff's message in favor of some other, or in declining to receive it, and does not apply where there is a breach of the ordinary duty to transmit and deliver; in this latter class of cases proof of the mere negligence of the company is sufficient.<sup>6</sup>

**Failure or Refusal to Transmit.**—A "refusal to transmit," for which the statute provides a penalty, is not shown by proof merely of a refusal to deliver after the message has been transmitted.<sup>7</sup> Nor is such a refusal shown so as to justify a recovery of the penalty where it appears that the company made a *bona fide* effort to transmit the message and acted with impartiality, although the message was lost, and this, no matter how culpable may have been the conduct of the company by reason of which the loss occurred.<sup>8</sup> Where the statute provides a penalty for failure or refusal to "transmit," proof merely of an erroneous transmission will not sustain a recovery of the penalty,<sup>9</sup> nor

**1. Message Not Written on Usual Blank Form.**—*Kirby v. Western Union Tel. Co.*, 7 S. Dak. 623, overruling prior decision in same case in 4 S. Dak. 105, 46 Am. Rep. 765.

If, however, the agent accepts a message so tendered, the fact that it was not on one of the company's blanks will be no defense to an action for the penalty. *Western Union Tel. Co. v. Jones*, 69 Miss. 658, 30 Am. St. Rep. 579.

**2. Western Union Tel. Co. v. Liddell**, 68 Miss. 1. See also *Western Union Tel. Co. v. Dozier*, 67 Miss. 288.

**3. Proof of Breach of Duty.**—*Western Union Tel. Co. v. Wilson*, 108 Ind. 308, 16 Am. & Eng. Corp. Cas. 257; *Western Union Tel. Co. v. Ward*, 23 Ind. 377, 85 Am. Dec. 462; *Western Union Tel. Co. v. Liddell*, 68 Miss. 1; *Kirby v. Western Union Tel. Co.*, 7 S. Dak. 623.

**4. See infra**, this title, VIII. 3. *b. Presumption of Negligence—Burden of Proof.*

**5. Proof of Bad Faith Necessary When.**—*Western-Union Tel. Co. v. Swain*, 109 Ind. 405; *Western Union Tel. Co. v. Brown*, 108 Ind. 538, 14 Am. & Eng. Corp. Cas. 139; *Western Union Tel. Co. v. Steele*, 108 Ind. 163; *Hadley v. Western Union Tel. Co.*, 115 Ind. 191, 21 Am. & Eng. Corp. Cas. 76; *Western Union Tel. Co. v. Jones*, 116 Ind. 361. These cases arose under the Act of 1885 (Ind. Acts, 1885, p. 151) which repealed by implication Ind. Rev. Stat., § 4276, and was directed against partiality and unjust discrimination or bad faith.

The same rule obtains in actions under How. Ann. Stat. (Mich.), § 3706. *Weaver v. Grand Rapids, etc., R. Co.*, 107 Mich. 300. See also *Wichelman v. Western Union Tel. Co.*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 450.

**The Contributory Negligence of the sender in**

failing to give a sufficiently definite address, although it may be such as would afford a good defense to an action for failure to deliver, is no defense where the action is based on the wilful partiality of the company. *Western Union Tel. Co. v. Ferguson*, 157 Ind. 37.

**6. Burnett v. Western Union Tel. Co.**, 39 Mo. App. 599; *Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79, 8 Am. & Eng. Corp. Cas. 102; *Western Union Tel. Co. v. Lindley*, 89 Ga. 484; *Western Union Tel. Co. v. Scircle*, 103 Ind. 227, 10 Am. & Eng. Corp. Cas. 610.

**7. Failure or Refusal to Transmit.**—*Brooks v. Western Union Tel. Co.*, 56 Ark. 224; *Dudley v. Western Union Tel. Co.*, 54 Mo. App. 391; *Rixke v. Western Union Tel. Co.*, 96 Mo. App. 406. Compare *Western Union Tel. Co. v. Gougar*, 84 Ind. 176.

Under the former *Arkansas* statute (Gantt's Ark. Dig., § 5271) imposing a penalty for failure to transmit messages "with impartiality and in good faith" the penalty could be recovered for a failure of the agent at the receiving office to deliver a message duly received. *Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79.

**8. Bona Fide Effort to Transmit.**—*Frauenthal v. Western Union Tel. Co.*, 50 Ark. 78, 21 Am. & Eng. Corp. Cas. 70; *Baltimore, etc., Tel. Co. v. State*, (Ark. 1888) 6 S. W. Rep. 513; *Weaver v. Grand Rapids, etc., R. Co.*, 107 Mich. 300.

**9. Erroneous Transmission.**—*Wilkins v. Western Union Tel. Co.*, 68 Miss. 6. This case was decided under the Miss. Act of 1886. The Code of 1892 expressly embraces errors in transmission.

A verdict for the plaintiff will not be disturbed where there is evidence to support it, although the testimony is conflicting as to

will proof of a mere delay in transmission justify a recovery under a provision imposing a penalty for incorrect transmission.<sup>1</sup>

**6. Proof of Actual Damage Unnecessary.**—The statutes are not to be construed as awarding liquidated damages<sup>2</sup> for a failure to discharge the duty enjoined, but as imposing a penalty by way of punishment. The plaintiff is not bound, therefore, to prove any general or special damage in order to recover the penalty,<sup>3</sup> nor does his suit for or recovery of the penalty affect his right to recover substantial damages sustained by him in consequence of the company's breach of duty.<sup>4</sup> In some jurisdictions the claim for damages and that for the penalty may be asserted in one suit.<sup>5</sup>

**Where the Error in Transmission Is Harmless** and is due to a mere inadvertence, the penalty is not recoverable.<sup>6</sup>

**7. Where There Are Connecting Lines.**—These statutes extend to cases where the refusal to transmit is on the part of a connecting line to which the initial line has tendered a message for further transmission,<sup>7</sup> but in such a case the initial line which tenders the message,<sup>8</sup> and not the original sender, must be the plaintiff; the latter can not maintain the suit for the penalty.<sup>9</sup>

**8. Defenses to Actions for Penalty**—*a. IN GENERAL.*—Upon the issue of the negligence or default of the company, the same defenses are available to the company in such actions as in ordinary actions for damages. The company may show, where the charge is a failure to deliver, that the addressee did not live within the free delivery limits of the locality to which the message is sent.<sup>10</sup> Where the charge is a failure to transmit promptly, the company may show that the delay was due to the arrangement of its office hours reasonably established by it,<sup>11</sup> or that the delay was caused by a derangement

whether the delay was in the transmission or in the delivery after transmission. *Western Union Tel. Co. v. Pallotta*, 81 Miss. 216.

**1. Mere Delay in Transmission.**—*Western Union Tel. Co. v. Hall*, 79 Miss. 623; *Marshall v. Western Union Tel. Co.*, 79 Miss. 154, 89 Am. St. Rep. 585. *Compare Parker v. Western Union Tel. Co.*, 87 Mo. App. 553, where a recovery was allowed for a delay in delivery after receipt of the message at the destination office, under Mo. Rev. Stat. 1899, § 1255, imposing a penalty for failing to transmit promptly and in good faith.

**2.** See the title **LIQUIDATED DAMAGES**, vol. 19, p. 394.

**3. Proof of Actual Damage Not Required.**—*Little Rock, etc., Tel. Co. v. Davis*, 41 Ark. 79, 8 Am. & Eng. Corp. Cas. 102; *Western Union Tel. Co. v. Cobbs*, 47 Ark. 344, 58 Am. Rep. 756; *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 692; *Western Union Tel. Co. v. Adams*, 87 Ind. 598, 44 Am. Rep. 776; *Western Union Tel. Co. v. Ferguson*, 157 Ind. 37; *Western Union Tel. Co. v. Allen*, 66 Miss. 549, 25 Am. & Eng. Corp. Cas. 535; *Jacobs v. Postal Tel. Cable Co.*, 76 Miss. 278.

**4. Plaintiff's Right to Damages Unaffected by Recovery of the Penalty.**—*Western Union Tel. Co. v. Lindley*, 89 Ga. 484; *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12, 48 Am. Rep. 692, 8 Am. & Eng. Corp. Cas. 56; *Hadley v. Western Union Tel. Co.*, 115 Ind. 191, 21 Am. & Eng. Corp. Cas. 76; *Carnahan v. Western Union Tel. Co.*, 89 Ind. 526, 46 Am. Rep. 175; *Wilkins v. Western Union Tel. Co.*, 68 Miss. 6.

The California Statute authorizes a recovery of "actual damages and \$50 in addition thereto." Cal. Civ. Code, § 2209. Under this, where there is a showing of negligence but no

proof of substantial damages, the penalty and nominal damages are recoverable. *Stafford v. Western Union Tel. Co.*, 73 Fed. Rep. 273.

**5.** *Western Union Tel. Co. v. McLaurin*, 70 Miss. 26; *Western Union Tel. Co. v. McCormick*, (Miss. 1900) 27 So. Rep. 606.

**6. Harmless Error in Transmission.**—*Western Union Tel. Co. v. Clarke*, 71 Miss. 157. See also *Western Union Tel. Co. v. Rountree*, 92 Ga. 611, 44 Am. St. Rep. 93; *Wolf v. Western Union Tel. Co.*, 94 Ga. 434.

**7. Connecting Line Refusing to Transmit.**—*U. S. Telegraph Co. v. Western Union Tel. Co.*, 56 Barb. (N. Y.) 46.

The *Illinois* Act of July 1, 1874, requiring every telegraph company to accept and transmit messages offered by other telegraph companies, does not embrace a message telephoned to the company for transmission. *People v. Western Union Tel. Co.*, 166 Ill. 15.

**8. Initial Line Must Sue.**—*U. S. Telegraph Co. v. Western Union Tel. Co.*, 56 Barb. (N. Y.) 46.

**9.** *Thurn v. Alta Tel. Co.*, 15 Cal. 473.

**10. Addressee Not Within Delivery Limits.**—*Western Union Tel. Co. v. Lindley*, 62 Ind. 371.

But such a fact is no defense where the fault of the company was in not transmitting the message promptly. *Horn v. Western Union Tel. Co.*, 88 Ga. 538.

**11. Delay Due to Arrangement of Office Hours.**—*Western Union Tel. Co. v. Harding*, 103 Ind. 505, 10 Am. & Eng. Corp. Cas. 617; *Given v. Western Union Tel. Co.*, 24 Fed. Rep. 119, 8 Am. & Eng. Corp. Cas. 107, *supra*, IX. 2. *a. As to Office Hours. Compare Western Union Tel. Co. v. Ward*, 23 Ind. 377, 85 Am. Dec. 462.

of its lines due to an unavoidable casualty and that the message was sent within a reasonable time after the difficulty was removed.<sup>1</sup> It may also be shown, by way of defense generally, that the plaintiff has not brought his case within the operation of the statute under which he claims,<sup>2</sup> or that the failure to deliver was due to the contributory negligence of the sender.<sup>3</sup>

*b. EFFECT OF STIPULATIONS.*—Where the language of the stipulation makes it applicable to actions for penalties, it is as effective in such actions as in actions to recover damages.<sup>4</sup> A stipulation requiring "all claims for damages" to be presented within sixty days embraces a claim for the penalty, though there is some controversy on the point.<sup>5</sup>

*c. ACCORD AND SATISFACTION.*—Since the penalty is not an award of liquidated damages, the fact that the telegraph company voluntarily tendered or paid to the plaintiff the price paid for transmission and such damages as he sustained by reason of its error or delay does not affect his right to recover the penalty unless it appears also that he accepted such payment in full settlement of all his claims and by way of accord and satisfaction.<sup>6</sup>

*d. PREPAYMENT OF CHARGES.*—Where the statute, in terms, is applicable only when the charges for transmission were paid, no recovery of the penalty can be had in the absence of proof of the payment of such charges.<sup>7</sup>

*9. Effect of Repeal of Statute.*—There is no vested right in a penalty although liability therefor has accrued; an action to recover it cannot be maintained after the act providing for it has been repealed, although the penalty

1. *Unavoidable Derangement of Lines.*—*Western Union Tel. Co. v. Davis*, 95 Ga. 522.

2. See the various requirements of the statute as set out in other paragraphs of this section.

If the Company Has No Office at the point to which the message is directed, so that the message cannot be sent, and the acceptance of the message for transmission was inadvertent, there is no liability for the penalty. *Peterson v. Western Union Tel. Co.*, 10 Ind. App. 227. Compare *Western Union Tel. Co. v. Jones*, 69 Miss. 658, 30 Am. St. Rep. 579.

3. *Contributory Negligence.*—*Western Union Tel. Co. v. Patrick*, 92 Ga. 607, 44 Am. St. Rep. 90 (failure to give proper address).

4. *Stipulation—Indiana.*—*Western Union Tel. Co. v. Yopst*, 118 Ind. 248, 25 Am. & Eng. Corp. Cas. 527; *Western Union Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 713, 8 Am. & Eng. Corp. Cas. 47.

*Iowa.*—*Albers v. Western Union Tel. Co.*, 98 Iowa 51.

*Missouri.*—*Montgomery v. Western Union Tel. Co.*, 50 Mo. App. 591; *Kendall v. Western Union Tel. Co.*, 56 Mo. App. 192; *Barrett v. Western Union Tel. Co.*, 42 Mo. App. 546.

*South Dakota.*—*Kirby v. Western Union Tel. Co.*, 7 S. Dak. 623.

*Virginia.*—*Western Union Tel. Co. v. Powell*, 94 Va. 268.

In *Georgia*, the stipulation requiring the claim, whether for damages or for the penalty, to be presented, in writing, within sixty days is held void as to the claim for the penalty as being contrary to the policy of the statute, though it is valid as to the claim for damages. *Mattis v. Western Union Tel. Co.*, 94 Ga. 338, 47 Am. St. Rep. 167; *Meadors v. Western Union Tel. Co.*, 96 Ga. 788.

5. *Western Union Tel. Co. v. Jones*, 95 Ind. 228, 48 Am. Rep. 713. In this case it was observed that the word "claims" is one of very

extensive significance, embracing every species of legal demand; that the word "damages" means that which is to be assessed in plaintiff's favor as the amount of his recovery; and that the penalty is, in this sense, "damages," it being a recovery in which the individual alone, and not the public, is interested. The correctness of this holding was denied in *Western Union Tel. Co. v. Cobbs*, 47 Ark. 344, 58 Am. Rep. 756. See also *Western Union Tel. Co. v. James*, 90 Ga. 254.

6. *Accord and Satisfaction.*—*Western Union Tel. Co. v. Taylor*, 84 Ga. 419; *Western Union Tel. Co. v. Moss*, 93 Ga. 494; *Western Union Tel. Co. v. Brightwell*, 94 Ga. 434; *Western Union Tel. Co. v. Buchanan*, 35 Ind. 429, 9 Am. Rep. 744.

7. *Prepayment of Charges.*—*Western Union Tel. Co. v. Mossler*, 95 Ind. 32; *Western Union Tel. Co. v. Ferguson*, 57 Ind. 495; *Langley v. Western Union Tel. Co.*, 88 Ga. 777; *Wood v. Western Union Tel. Co.*, 59 Mo. App. 236.

Under the *Georgia* statute there can be no recovery unless the charges were actually prepaid. If the message was sent without charge because of the sender's connection with the company or for other reason, the penalty is not recoverable although the message was marked "prepaid." *Western Union Tel. Co. v. Ryels*, 94 Ga. 336.

Where the sender tenders the amount of the charges and then withdraws it, observing that the addressee ought to pay it, the tender amounts to nothing and the penalty is not recoverable. *Western Union Tel. Co. v. Power*, 93 Ga. 543.

If the message is paid for, the fact that the operator returns the money to the person paying and substitutes a free or a "collect" message for the prepaid one, without the sender's knowledge, will not relieve the company of liability. *Western Union Tel. Co. v. Moss*, 93 Ga. 494.

was incurred before the repeal, unless the repealing act contains a clause saving the right to recover penalties already incurred.<sup>1</sup>

**XIV. TELEGRAMS IN EVIDENCE — 1. Admissibility in General.** — Ordinarily the general rules of law relative to the admission of letters in evidence apply to telegrams,<sup>2</sup> with the exception that while the rule which permits a letter to be admitted in evidence against a party without proof of the handwriting further than that it had been received in due course in reply to a letter which had been addressed to the same party will apply to a dispatch sent in answer to a communication by letter, it is not applicable to a dispatch sent in reply to a communication by telegraph.<sup>3</sup>

**Authenticity Must Be Shown.** — A telegram is not admissible as evidence in the absence of proof of its authenticity, either by proof of the handwriting of the sender when the original message is offered, or by other evidence of its genuineness.<sup>4</sup>

**Effect to Be Given Them.** — Telegrams which are shown to have been delivered for transmission are admissible as declarations of the sender when proven to have been signed by him, or by some one for him,<sup>5</sup> and dispatches in the form in which they are received by the party to whom they are sent are evidence of the communication between the parties,<sup>6</sup> and also of the information upon which the addressee may have acted, where his good faith or his intentions are in question,<sup>7</sup> provided it is shown that he read and acted upon them.<sup>8</sup>

1. *Western Union Tel. Co. v. Brown*, 108 Ind. 538, 14 Am. & Eng. Corp. Cas. 139. See also the title *STATUTES*, vol. 26, p. 753.

2. *Telegrams in Evidence — General Rule.* — *U. S. v. Babcock*, 3 Dill. (U. S.) 571; *Southern R. Co. v. Howell*, 135 Ala. 639; *Com. v. Burton*, 183 Mass. 461; *People v. Hammond*, (Mich. 1903) 93 N. W. Rep. 1084; *Coupland v. Arrowsmith*, 18 L. T. N. S. 755.

3. *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355; *Howley v. Whipple*, 48 N. H. 487. See also *Ovenston v. Wilson*, 2 C. & K. 1, 61 E. C. L. 1. Compare *Thorp v. Philbin*, 15 Daly (N. Y.) 155; *People v. Hammond*, (Mich. 1903) 93 N. W. Rep. 1084. In this last case it was shown by parol that the witness had sent a dispatch to the defendant and had received what purported to be a reply, and it appearing that the telegraph company had before the trial destroyed the original, it was held that the reply message was admissible without other proof that it had been sent by the defendant.

4. *Proof of Genuineness.* — *Richie v. Bass*, 15 La. Ann. 668; *Burt v. Winona*, etc., R. Co., 31 Minn. 472; *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355; *Reynolds v. Hinrichs*, (S. Dak. 1903) 94 N. W. Rep. 694; *Chester v. State*, 23 Tex. App. 577. See also *Eppinger v. Scott*, 112 Cal. 369, 53 Am. St. Rep. 220.

**The Authenticity of Certain Telegrams Is Sufficiently Proven, prima facie** at least, where one in an agreed cipher was proved to a certainty, others were referred to in exhibits of the opposite party, and still others contained directions to draw drafts which were shown to have been drawn and paid. *Oregon Steamship Co. v. Otis*, 100 N. Y. 446, 53 Am. Rep. 221; (Supm. Ct. Gen. T.) 14 Abb. N. Cas. (N. Y.) 388.

Testimony of the recipient that he received the message and the admission of the sender that it is the message he sent is abundant proof of the authenticity of the message. *Dunbar v. U. S.*, 156 U. S. 185.

But where the sender testifies that the message was in her own handwriting, and was sent by her, a dispatch taken from the company's files of about the same date, purporting to be signed by her and referring to the subject-matter in question, is not admissible if not in her handwriting. *Lewis v. Havens*, 40 Conn. 363.

5. *Telegrams Admissible on Declarations.* — *Com. v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 712. See also *People v. Hammond*, (Mich. 1903) 93 N. W. Rep. 1084.

Evidence that a telegram was sent by the defendant to the drawee of an order which he had given to plaintiff, directing the drawee to withhold a part of the amount specified and to pay the remainder, is competent as tending to show an admission by the defendant of indebtedness, at least to the extent of the amount of such remainder. *Griggs v. Deal*, 30 Mo. App. 152. See also *Benford v. Sanner*, 40 Pa. St. 9, 80 Am. Dec. 545.

6. *Com. v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 712; *Taylor v. Steamboat Robert Campbell*, 20 Mo. 254. See also *infra*, this title, XVI. 2. *Telegraph Company Ordinarily Agent of Sender.*

7. **As showing Information** on which a plaintiff acted in suing out an attachment, telegrams sent to him and delivered by telephone, and reduced to writing by the person receiving them and acted upon in that form by such plaintiff, are admissible. It is not necessary in such a case that they should be verified by comparing them with the originals on file in the company's office, the question in such a case being not what the original messages contained, but what was contained in them as they reached the plaintiff. *Deere v. Bagley*, 80 Iowa 197.

8. **Proof that Telegram Was Acted On.** — *J. K. Armsby Co. v. Eckerly*, 42 Mo. App. 299.

The General Rules Governing the Admission of Documentary Evidence apply in the case of telegrams as in other cases.<sup>1</sup> As a rule, it must appear that the party who is to be adversely affected by the evidence must have been a party to the message, either as sender or addressee,<sup>2</sup> but exceptional cases may arise. Thus, in an action for the price of goods sold, a telegram countermanding the order for such goods, though sent to one not a party to the suit, is admissible when it appears that it was intended to be delivered to the sellers and that it actually came into their possession and was replied to by them.<sup>3</sup> The reported cases afford other instances of the application of the general rules to this class of cases.<sup>4</sup>

**2. Primary and Secondary Evidence.**—The principal question arising in this connection is as to what is the primary or best evidence of the communication sent by telegraph. In such communications there are two distinct documents, the one delivered to the telegraph company for transmission and the one delivered by the company, from its receiving office, to the addressee. While the contents of these are so usually identical as to create a presumption that they are the same,<sup>5</sup> they are not always so, and the presumption is not a conclusive one.

**Nature of Inquiry.**—When the message is offered as a declaration by the sender, to be used in a criminal proceeding, or as an admission in a civil suit, the message as tendered for transmission is the original and best evidence and its absence must be accounted for before proof is admissible to show its contents.<sup>6</sup> But the inquiry, where the message relates to a contract between the parties, is as to what message was transmitted and not what was intended or directed to be sent; the general rule therefore is that the message delivered at the destination to the person addressed is the original and is the best evidence of the communication between the parties,<sup>7</sup> and may be introduced as evi-

1. See generally the title DOCUMENTARY EVIDENCE, vol. 9, p. 877.

2. **Only Parties to Message Affected.**—See *Powell v. Brunner*, 86 Ga. 531; *People v. Hammond*, (Mich. 1903) 93 N. W. Rep. 1084.

Correspondence by wire between operators sending and receiving a message which was not communicated to the sender is not admissible to show that the person to whom the message was directed was absent from the place of delivery. *Western Union Tel. Co. v. Cooper*, 71 Tex. 507, 10 Am. St. Rep. 772.

Letters and telegrams as to the cancellation of an insurance policy, sent by the insurance company to its agent after a loss, are not admissible against the insured in an action on the policy. *Brownfield v. Phoenix Ins. Co.*, 35 Mo. App. 54, 26 Mo. App. 390. See also *Larminie v. Carley*, 114 Ill. 196.

3. *Eldridge v. Hargreaves*, 30 Neb. 638.

4. **Particular Instances.**—In an action for a conspiracy, telegrams from the wife of one of the defendants, being neither written nor sent by either of them, are not admissible as evidence against them, nor can they, as declarations of the wife, affect her husband. *Benford v. Sanner*, 40 Pa. St. 9, 80 Am. Dec. 545.

In the trial of a person charged with stealing horses, a telegram sent by him in which he offered to sell horses, taken in connection with other circumstances, is competent as evidence tending to show his preparations for flight. *State v. Espinozie*, 20 Nev. 209. See also *Meinert v. Snow*, 3 Idaho 112; *People v. Hammond*, (Mich. 1903) 93 N. W. Rep. 1084.

A police officer at the station house, in conversation with a prisoner under arrest for larceny, stood by and saw the prisoner receive and read a telegram which he afterwards passed to the officer to be read aloud. This the officer did, when the prisoner denied all knowledge of the message or its sender. It was held that the telegram was admissible for the purpose of enabling the jury to understand the conversation of which it was a part. *Com. v. Vosburg*, 112 Mass. 419.

5. See the title PRESUMPTIONS, vol. 22, p. 1256.

6. **Original as Best Evidence.**—*Com. v. Jeffries*, 7 Allen (Mass.) 548, 83 Am. Dec. 712. See also *Morgan v. People*, 59 Ill. 58.

7. **Rule that Message Delivered at Destination Is Original.**—*Illinois.*—*Anheuser-Busch Brewing Assoc. v. Hutmacher*, 127 Ill. 652, affirming 29 Ill. App. 316; *Chicago, etc., R. Co. v. Russell*, 91 Ill. 298, 33 Am. Rep. 54; *Matteson v. Noyes*, 25 Ill. 591.

*Kansas.*—*Barons v. Brown*, 25 Kan. 414. *Massachusetts.*—*Nickerson v. Spindell*, 164 Mass. 25.

*Minnesota.*—*Wilson v. Minneapolis, etc., R. Co.*, 31 Minn. 481; *Magie v. Herman*, 50 Minn. 424, 36 Am. St. Rep. 660.

*New Hampshire.*—*Howley v. Whipple*, 48 N. H. 487.

*New York.*—See *Thorp v. Philbin*, 15 Daly (N. Y.) 155.

*Vermont.*—*Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127.

*West Virginia.*—*Merchants' Nat. Bank v. Wheeling First Nat. Bank*, 7 W. Va. 544.



dence without any accounting for the message tendered to the company.<sup>1</sup> An exception to this rule will prevail where the company acts as the agent of the addressee by reason of his having been the party suggesting the telegraph as the means of communication.<sup>2</sup>

Where the Action Is Against the Telegraph Company for Error in Transmission the inquiry is, necessarily, as to the contents of both messages, and in such case each message is the original evidence of its own contents.<sup>3</sup> If the action is based merely on a delay in delivery, the message delivered to the addressee is admissible without proof of the original tendered to the company,<sup>4</sup> particularly where there is no claim that the former was different from the latter.<sup>5</sup>

Secondary Evidence of the Contents of a Telegram, by the testimony of witnesses or a letterpress or other copy, is admissible only after proof that the original telegram has been lost or destroyed,<sup>6</sup> or that it is beyond the jurisdiction of the court.<sup>7</sup> But where it is not shown that the message was ever reduced to writing, either at the sending or receiving office, there is no ground for excluding parol evidence as to its contents.<sup>8</sup>

Sufficiency of Proof of Loss or of Contents of Message. — What constitutes sufficient proof of the loss or destruction of the original telegram and of proper effort, on the part of the party offering the secondary evidence, to secure the original must depend upon circumstances and, like other matters of proof, varies with particular cases.<sup>9</sup> The testimony of the company's employees at the office where the original was received that it could not be found and that under the rules of the company all messages, after being kept for six months, are sent to the home office to be destroyed is competent to show the impossibility of producing the original,<sup>10</sup> though it is not competent for the manager of the sending office to testify, from information, that the messages filed with him for transmission had been destroyed by the officials at the head office.<sup>11</sup> The testimony of an addressee as to the contents of a message is not admissible in the absence of proof of the loss of the message itself but the

1. *Saveland v. Green*, 40 Wis. 431. Compare *Oregon Steamship Co. v. Otis*, 100 N. Y. 446, 53 Am. Rep. 221.

2. *Company as Agent of Sender*. — *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355. See also *Pegram v. Western Union Tel. Co.*, 100 N. Car. 28, 6 Am. St. Rep. 557, 21 Am. & Eng. Corp. Cas. 150.

3. *Action for Error in Transmission*. — *Morgan v. People*, 59 Ill. 58; *Cairo, etc., R. Co. v. Mahoney*, 82 Ill. 73, 25 Am. Rep. 299; *Western Union Tel. Co. v. Hopkins*, 49 Ind. 223; *Reliance Lumber Co. v. Western Union Tel. Co.*, 58 Tex. 394, 44 Am. Rep. 620.

4. *Action for Delay*. — *Conyers v. Postal Tel. Cable Co.*, 92 Ga. 619, 44 Am. St. Rep. 100; *Western Union Tel. Co. v. Bates*, 93 Ga. 352; *Western Union Tel. Co. v. Blance*, 94 Ga. 431.

5. *Western Union Tel. Co. v. Fatman*, 73 Ga. 285, 54 Am. Rep. 877.

6. *Secondary Evidence* — *Alabama*. — *McCormick v. Joseph*, 83 Ala. 401; *Whilden v. Merchants', etc., Nat. Bank*, 64 Ala. 1, 38 Am. Rep. 1.

*Arizona*. — *Yavapai County v. O'Neil*, (Ariz. 1892) 29 Pac. Rep. 430.

*Georgia*. — *Western Union Tel. Co. v. Hines*, 94 Ga. 430.

*Indiana*. — *Western Union Tel. Co. v. Hopkins*, 49 Ind. 223.

*Mississippi*. — *Williams v. Brickell*, 37 Miss. 682, 75 Am. Dec. 88.

*Nebraska*. — *Yeiser v. Cathers*, (Neb. 1903) 97 N. W. Rep. 840.

*Texas*. — *Prather v. Wilkens*, 68 Tex. 187; *Western Union Tel. Co. v. Williford*, (Tex. Civ. App. 1894) 27 S. W. Rep. 700.

And see generally the title SECONDARY EVIDENCE, vol. 25, p. 161.

A letterpress copy of the message is competent secondary evidence. *Anglo-American Packing, etc., Co. v. Cannon*, 31 Fed. Rep. 313.

On proof of the destruction of the original, an uncertified copy of a telegram was held to be admissible on a trial for forgery to show that the respondent at a certain time knew of a material fact therein stated. *State v. Hopkins*, 50 Vt. 316.

7. *Pensacola R. Co. v. Schaffer*, 76 Ala. 233; *Whilden v. Merchants', etc., Nat. Bank*, 64 Ala. 1, 38 Am. Rep. 1.

8. *When Message Was Not Reduced to Writing*. — *Terre Haute, etc., R. Co. v. Stockwell*, 118 Ind. 98. See also *Riordan v. Guggerty*, 74 Iowa 688.

9. See generally SECONDARY EVIDENCE, vol. 25, p. 161. See also *Flint v. Kennedy*, 33 Fed. Rep. 820.

10. *Destruction of Originals Pursuant to Rule*. — *Riordan v. Guggerty*, 74 Iowa 688; *Western Union Tel. Co. v. Collins*, 45 Kan. 88; *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355; *Oregon Steamship Co. v. Otis*, 100 N. Y. 446, 53 Am. Rep. 221, (Supm. Ct. Gen. T.) 14 Abb. N. Cas. (N. Y.) 388. See also *People v. Hammond*, (Mich. 1903) 93 N. W. Rep. 1084.

11. *American Union Tel. Co. v. Daughtery*, 89 Ala. 191.

admission of such testimony is harmless where the sender, who is a party to the action, admits the sending of the message and the contents as alleged in the pleadings.<sup>1</sup>

**Necessity of Notice to Produce.** — It has been held that, in an action against a telegraph company for negligence with respect to a message, the plaintiff may not introduce secondary evidence of the contents of the message unless notice to produce the original has been first given to the company.<sup>2</sup> The better rule, however, is that in such case the company, from the nature of the suit, is charged with notice that, having possession of the original, it will be expected to produce it, and plaintiff may therefore introduce secondary evidence without having given a formal notice to produce.<sup>3</sup>

**3. Presumption Arising from Sending of Message.** — The presumption that letters duly posted reach their addressees in due course applies equally to telegrams which are shown to have been accepted by the telegraph company for transmission;<sup>4</sup> and the receipt of a message over the wires at the point of destination creates a presumption that the message is from the office from which it purports to come.<sup>5</sup> But the fact that a dispatch was forwarded to a person at a particular place and that an answer purporting to be from him was received in due course is not evidence that the person in question was at that place at that particular time.<sup>6</sup>

**4. Telegrams as Privileged Communications.** — They are not privileged and their production in evidence, by the telegraph company, may be compelled.<sup>7</sup>

**The Disclosure of the Contents of Telegrams by the Company** is prohibited by statute in a number of the states, and the company is made liable in damages for any failure to observe the prohibition.<sup>8</sup>

**5. Notice by Telegram.** — A notice by telegram is a sufficient compliance with a rule or statute requiring written notice.<sup>9</sup>

1. *Addressee Testifying as to Contents.* — *Williams v. Brickell*, 37 Miss. 682, 75 Am. Dec. 88. See also *Oregon Steamship Co. v. Otis*, 100 N. Y. 446, 53 Am. Rep. 221.

2. *Notice to Produce Original.* — *Western Union Tel. Co. v. Hopkins*, 49 Ind. 223.

3. *Reliance Lumber Co. v. Western Union Tel. Co.*, 58 Tex. 395, 44 Am. Rep. 620.

4. See the title *PRESUMPTIONS*, vol. 22, p. 1256.

5. *Elwood v. Western Union Tel. Co.*, 48 N. Y. 549, 6 Am. Rep. 140.

6. *Howley v. Whipple*, 48 N. H. 487. In this the court points out the grounds for distinction in this particular between letters and telegrams.

7. See the title *PRIVILEGED COMMUNICATIONS*, vol. 23, p. 100.

As to the sufficiency and the requisites of process to compel the production of messages, see 22 *ENCYC. OF PL. AND PR.* 1334. See also *U. S. v. Babcock*, 3 Dill. (U. S.) 570; *In re Smith*, 7 L. R. Ir. 286.

8. See Code of Miss. 1892, § 1301; Code of Tenn. 1896, § 1837-8.

Where the contents of a telegram are disclosed by an agent who receives it, the sender is entitled to recover damages sustained in consequence of the disclosure, notwithstanding his failure to comply with the stipulation requiring the presentation of the claim in sixty days, the disclosure having been fraudulently concealed from him until after the expiration of that time and then discovered by him through accident. *Gulf, etc., R. Co. v. Todd*, 4 Tex. App. Civ. Cas., § 318. What is a reasonable

time within which the claim must be presented in such a case is a question for the jury. See *Thorpe v. Western Union Tel. Co.*, 84 Iowa 190.

The disclosure of an offensive telegram, to which plaintiff's name had been forged by the operator, may be considered in determining the damages she is entitled to recover. *Magouirk v. Western Union Tel. Co.*, 79 Miss. 632, 89 Am. St. Rep. 663, *supra*, XI. 4. *Forged or Fraudulent Messages.*

The *Indiana* statute imposing a penalty on telegraph companies in certain cases does not embrace the wilful disclosure of the contents of a message by the company and no penalty is recoverable therefor. *Western Union Tel. Co. v. Bierhaus*, 8 Ind. App. 563.

9. *Notice by Telegram — England.* — *Heywood v. Wait*, 18 W. R. 205; *Tonkinson v. Cartledge*, 22 Alb. L. J. 123; *In re Bryant*, 4 Ch. D. 98, 35 L. T. N. S. 489, 25 W. R. 230; *Ex p. Langley*, 13 Ch. D. 110, 28 W. R. 174.

*United States.* — *Schofield v. Horne Springs Cattle Co.*, 65 Fed. Rep. 433 (order for adjourning court). See also *infra*, this title, *Telephonic Communications as Evidence.*

*Georgia.* — *Western Union Tel. Co. v. Bailey*, 115 Ga. 723 (notice of writ of certiorari).

*Illinois.* — *Morgan v. People*, 59 Ill. 58.

*Indiana.* — See *Kaufman v. Wilson*, 29 Ind. 504.

*Iowa.* — *State v. Holmes*, 56 Iowa 588, 41 Am. Rep. 121.

*New Jersey.* — *Cape May, etc., R. Co. v. Johnson*, 35 N. J. Eq. 422.

**XV. TELEPHONIC COMMUNICATIONS AS EVIDENCE.** — Conversations conducted through the medium of a telephone do not differ in their essential characteristics from other verbal communications; their admissibility and effect as evidence are therefore governed by the same general legal principles which apply in case of ordinary oral declarations. The instrument merely enables the parties to carry on their conversation at greater distances than under ordinary circumstances.<sup>1</sup> There may be cases, however, in which the fact that the voice was not recognized and that neither party is absolutely sure of the identity of the person conversing with him, may necessitate a modification of the general rules.<sup>2</sup>

**A Notice by Telephone Is a Verbal One** and therefore insufficient under a statute requiring a notice to be in writing.<sup>3</sup>

**Where the Parties Converse Through the Medium of an Operator** in the employ of the telephone company, he is to be deemed the agent of the party who invokes his aid and is competent to prove the message or conversation by his principal.<sup>4</sup>

**XVI. CONTRACTS BY TELEGRAPH — 1. In General.** — Communication by telegraph does not differ essentially from correspondence through the mails, and contracts may be made by it as well as by letter.<sup>5</sup> Such contracts are governed

**1. Telephonic Communications as Evidence.** — *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331, 37 Am. & Eng. R. Cas. 720; *Globe Printing Co. v. Stahl*, 23 Mo. App. 451; *People v. Ward*, (Oyer & T. Ct.) 3 N. Y. Crim. 483. See also *Galt v. Wolliver*, 103 Ill. App. 71; *Dannemiller v. Leonard*, 8 Ohio Cir. Dec. 735, 15 Ohio Cir. Ct. 686; *Southwark Nat. Bank v. Smith*, 21 Pa. Co. Ct. 1, 7 Pa. Dist. 182. And see the title **ADMISSIONS**, vol. 1, pp. 578, 717.

**An Acknowledgment of a Debt** made to a notary over a telephone has been held valid, the identity of the party making the acknowledgment being clear. *Bänning v. Bänning*, 80 Cal. 271, 13 Am. St. Rep. 156.

**In a Criminal Case**, where a witness testifies that he called up a certain person over the telephone and recognized his voice in talking to him, he may give in evidence the communication which the other made to him. *People v. Ward*, (Oyer & T. Ct.) 3 N. Y. Crim. 483.

**2. Failure to Recognize Voice of Speaker.** — The fact that the witness, who testifies to a conversation between himself and another, did not recognize the other's voice does not affect the admissibility of his evidence but only its weight. *Wolfe v. Missouri Pac. R. Co.*, 97 Mo. 473, 10 Am. St. Rep. 331; *Globe Printing Co. v. Stahl*, 23 Mo. App. 451.

The same rule applies to a case where the witness, in an action against a carrier, testifies that he demanded the goods in question from the defendant's agent, through the telephone, but that he did not remember the name of the agent of whom he made the demand. *Missouri Pac. R. Co. v. Heidenheimer*, 82 Tex. 195, 27 Am. St. Rep. 861. See also *Rock Island, etc., R. Co. v. Potter*, 36 Ill. App. 590. Compare *Kimbark v. Illinois Car, etc., Co.*, 103 Ill. App. 632.

**3. Notice by Telephone.** — *Ex p. Apeler*, 35 S. Car. 417; *South Carolina Code of Civil Procedure*, § 408. See also *Schofield v. Morse Springs Cattle Co.*, 65 Fed. Rep. 433, holding that a telephone message by the judge

to the officers of his court directing them to adjourn the court to a day named was not sufficient under U. S. Rev. Stat., § 672, requiring a written order in such cases.

**4. Sullivan v. Kuykendall**, 82 Ky. 483, 36 Am. Rep. 901.

The same rule would apply to a case in which, owing to peculiar atmospheric conditions, the parties are unable to converse with each other direct and the operator volunteers to act as a go-between. In such case, the operator is the agent of the party who first sought the telephone as the means of communication. *Oskamp v. Gadsden*, 35 Neb. 7, 37 Am. St. Rep. 428.

**5. Contracts by Telegraph—England.** — *Stevenson v. McLean*, 5 Q. B. D. 346; *Godwin v. Francis*, L. R., 5 C. P. 295.

**Canada.** — *Prosser v. Henderson*, 20 U. C. Q. B. 438; *Harty v. Gooderham*, 31 U. C. Q. B. 18; *Webb v. Sharman*, 34 U. C. Q. B. 410; *Willing v. Currie*, 36 U. C. Q. B. 46; *Marshall v. Jamieson*, 42 U. C. Q. B. 115; *Thorne v. Barwick*, 16 U. C. C. P. 369; *Dalrymple v. Scott*, 19 Ont. App. 477; *Montreal Bank v. Thomas*, 16 Ont. 503.

**United States.** — *Utley v. Donaldson*, 94 U. S. 29; *Alford v. Wilson*, 20 Fed. Rep. 96; *Central Trust Co. v. Wabash, etc., R. Co.*, 38 Fed. Rep. 561; *Garrettson v. North Atchison Bank*, 39 Fed. Rep. 163; 47 Fed. Rep. 867, *affirmed* (C. C. A.) 51 Fed. Rep. 168; *Schultz v. Phenix Ins. Co.*, 77 Fed. Rep. 375; *Andrews v. Schreiber*, 93 Fed. Rep. 367.

**Alabama.** — *Whilden v. Merchants', etc., Nat. Bank*, 64 Ala. 1, 38 Am. Rep. 1.

**Idaho.** — *Meinert v. Snow*, 3 Idaho 112.

**Illinois.** — See *Haas v. Myers*, 111 Ill. 421, 83 Am. Rep. 634.

**Indiana.** — *Robinson Mach. Works, v. Chandler*, 56 Ind. 575.

**Iowa.** — See *Richmond v. Sundberg*, 77 Iowa 255.

**Kansas.** — *Post v. Davis*, 7 Kan. App. 217.

**Kentucky.** — *Calhoun v. Atchinson*, 4 Bush (Ky.) 265, 96 Am. Dec. 299.

by the same general rules applicable to contracts made by letter.<sup>1</sup> The fact that the message, unlike a letter, is liable to become materially changed in the process of transmission through negligence on the part of the telegraph company or through other causes, introduces no element of difference; the message as delivered to the addressee is the real message and the sender must look to the company for any damages he may sustain in consequence of an alteration in transmission.<sup>2</sup> Nor does the fact that the telegraph, unlike the postal service, is a private institution, owned and operated by private individuals or corporations, create any distinction in the effect of correspondence conducted through them.<sup>3</sup>

Within the Meaning of the Statute of Frauds, the written message offered for transmission is a sufficient writing to constitute a memorandum so as to bind the parties,<sup>4</sup> and it seems that the same would be true of a message dictated by the sender and written out by the operator at the receiving station.<sup>5</sup>

Such Contracts Take Effect as in the case of contracts by correspondence; the agreement becomes complete when the party to whom the offer was made delivers his acceptance to the telegraph company for transmission,<sup>6</sup> and a revocation of an offer can have no effect unless communicated to the addressee before his acceptance.<sup>7</sup>

**2. Telegraph Company Ordinarily Agent of Sender.**— Ordinarily, in communication by telegraph, the telegraph company is to be regarded as the

*Maryland.*— *Franklin Bank v. Lynch*, 52 Md. 279, 36 Am. Rep. 375.

*Massachusetts.*— *Brauer v. Shaw*, 168 Mass. 198, 60 Am. St. Rep. 387.

*Missouri.*— *Taylor v. Steamboat Robert Campbell*, 20 Mo. 254. See also *Hammond v. Beeson*, (Mo. 1891) 15 S. W. Rep. 1000.

*New York.*— *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511, 41 Barb. (N. Y.) 255; *Beach v. Raritan, etc.*, R. Co., 37 N. Y. 457; *Crossett v. Carleton*, 23 N. Y. App. Div. 366; *Sanders v. Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209, 43 Am. St. Rep. 757, reversing 70 Hun (N. Y.) 597.

*Pennsylvania.*— *Isaac Joseph Iron Co. v. Richardson*, 38 W. N. C. (Pa.) 487; *Eckert v. Schoch*, 155 Pa. St. 530.

*Texas.*— *Short v. Threadgill*, 3 Tex. App. Civ. Cas., § 266; *Duble v. Batts*, 38 Tex. 312.

*Vermont.*— *Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127.

*Wisconsin.*— *Wells v. Milwaukee, etc.*, R. Co., 30 Wis. 605; *Saveland v. Green*, 40 Wis. 431.

When a telegram making an offer and demanding an immediate acceptance is received at ten o'clock Saturday night, the sender is not bound by an acceptance sent on the following Monday. *James v. Marion Fruit Jar, etc., Co.*, 69 Mo. App. 207.

The decided cases are numerous in which telegrams alone and telegrams supplemented by letters were insufficient to constitute a contract binding between the parties. But the holdings in these cases were not on the ground that a contract could not be made by telegraph but were based upon the insufficiency of the matter in the particular telegrams under consideration. See *Brewer v. Horst, etc., Co.*, 127 Cal. 643.

1. *Minnesota Linseed Oil Co. v. Collier White Lead Co.*, 4 Dill. (U. S.) 431; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Saveland v.*

*Green*, 40 Wis. 431; *Stevenson v. McLean*, 5 Q. B. D. 346.

2. *Western Union Tel. Co. v. Shotter*, 71 Ga. 760; *Ayer v. Western Union Tel. Co.*, 79 Me. 493, 1 Am. St. Rep. 353; *Magie v. Herman*, 50 Minn. 424, 36 Am. St. Rep. 660; *Saveland v. Green*, 40 Wis. 431.

3. See *Dickson v. Reuter's Tel. Co.*, 2 C. P. D. 62, 19 Moak 313, affirmed 3 C. P. D. 1, 30 Moak 1.

4. See title VERBAL AGREEMENTS (STATUTE OF FRAUDS). See also *Brewer v. Horst, etc., Co.*, 127 Cal. 643.

5. In such case, the operator acts as the agent of the sender. See *supra*, X. 9. *Proof of Assent to Stipulation*.

6. When Contract Takes Effect—*England.*— *Stevenson v. McLean*, 5 Q. B. D. 346; *Dunlop v. Higgins*, 1 H. L. Cas. 381; *Household F., etc., Co. v. Grant*, 4 Ex. D. 216; *Duncan v. Topham*, 8 C. B. 225, 65 E. C. L. 225.

*United States.*— *Minnesota Linseed Oil Co. v. Collier White Lead Co.*, 4 Dill. (U. S.) 431; *Taylor v. Merchants' F. Ins. Co.*, 9 How. (U. S.) 390.

*Illinois.*— *Cobb v. Force*, 38 Ill. App. 255. Compare *Macley v. Harvey*, 90 Ill. 525, 32 Am. Rep. 35.

*Maine.*— *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156.

*Maryland.*— *Wheat v. Cross*, 31 Md. 99, 1 Am. Rep. 28.

*Massachusetts.*— *Squire v. Western Union Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157; *M'Culloch v. Eagle Ins. Co.*, 1 Pick. (Mass.) 278.

*New York.*— *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511.

*Pennsylvania.*— *Hamilton v. Lycoming Mut. Ins. Co.*, 5 Pa. St. 339.

*Wisconsin.*— *Baker v. Holt*, 56 Wis. 100.

7. *Cobb v. Force*, 38 Ill. App. 255. See also *Taylor v. Merchants' F. Ins. Co.*, 9 How. (U. S.) 390.

agent of the party sending the message.<sup>1</sup> The effect of this rule is to make the telegram as delivered to the addressee original evidence of the communication, as between the sender and the addressee,<sup>2</sup> and to make the sender bound by the terms of the message as delivered to the addressee, however much it may have become changed in the process of transmission.<sup>3</sup>

An Exception to the Rule Exists, however, in the case of a continued telegraphic correspondence; in such case, the company is regarded as the agent of the party who first makes it the medium of communication.<sup>4</sup> An exception is also made in cases where the sender, in using the telegraph, does so at the request or suggestion of the addressee.<sup>5</sup>

In England and a Few of the States, a different rule prevails and the sender is not bound by the terms of a message incorrectly transmitted, even though the addressee may have incurred trouble and expense in acting on the faith of the message as delivered to him.<sup>6</sup> The telegraph company is regarded as an independent contractor, liable to either party who is injured through its negligent transmission of a message.<sup>7</sup>

**XVII. DISTRICT TELEGRAPH COMPANIES.**—Companies of this kind exist in all cities; their business is principally, if not exclusively, the furnishing of messenger boys to perform such services as delivering or calling for messages or parcels or attending to other similar matters. Such companies are subject

1. **Company as Agent of Sender.**—*Haubelt v. Rea, etc., Mill Co.*, 77 Mo. App. 672.

2. *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355; *Morgan v. People*, 59 Ill. 58. See also *supra*, this title, *Telegrams in Evidence*.

3. **Sender Bound by Terms of Message as Delivered to Addressee**—*Georgia*.—*Western Union Tel. Co. v. Shotter*, 71 Ga. 760.

*Illinois*.—*Anheuser-Busch Brewing Assoc. v. Hutmacher*, 127 Ill. 652, *affirming* 29 Ill. App. 316. See *Haas v. Myers*, 111 Ill. 421, 53 Am. Rep. 634.

*Maine*.—*Ayer v. Western Union Tel. Co.*, 79 Me. 493, 1 Am. St. Rep. 353, 21 Am. & Eng. Corp. Cas. 145. See also *True v. International Tel. Co.*, 60 Me. 9, 11 Am. Rep. 156.

*Massachusetts*.—*Squire v. Western Union Tel. Co.*, 98 Mass. 232, 93 Am. Dec. 157.

*Minnesota*.—*Magie v. Herman*, 50 Minn. 424, 36 Am. St. Rep. 660; *Wilson v. Minneapolis, etc., R. Co.*, 31 Minn. 481.

*Missouri*.—*Asheford v. Schoop*, 81 Mo. App. 539; *Haubelt v. Rea, etc., Mill Co.*, 77 Mo. App. 672; *Taylor v. The Steamboat Robert Campbell*, 20 Mo. 254.

*New Hampshire*.—*Howley v. Whipple*, 48 N. H. 487.

*New York*.—*Dunning v. Roberts*, 35 Barb. (N. Y.) 463; *Rose v. U. S. Telegraph Co.*, (N. Y. Super. Ct. Gen. T.) 3 Abb. Pr. N. S. (N. Y.) 408.

*Pennsylvania*.—*New York, etc., Printing Tel. Co. v. Dryburg*, 35 Pa. St. 298, 78 Am. Dec. 338.

*Texas*.—*Western Union Tel. Co. v. Edsall*, 74 Tex. 329, 15 Am. St. Rep. 835.

*Vermont*.—*Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127.

*Wisconsin*.—*Saveland v. Green*, 40 Wis. 431.

4. **Continued Telegraphic Correspondence.**—*Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127. See also *Sullivan v. Kuykendall*, 82 Ky. 483, 56 Am. Rep. 901.

A grain deal having been effected through telegraphic correspondence, the payment of part

of the purchase money by the buyer amounts to a ratification of the agency of the telegraph company in the transmission of the messages. *Culver v. Warren*, 36 Kan. 391.

5. **Telegram at Request of Addressee.**—See *Smith v. Easton*, 54 Md. 138, 39 Am. Rep. 355; *Durkee v. Vermont Cent. R. Co.*, 29 Vt. 127.

6. *Henkel v. Pape*, L. R. 6 Exch. 7.

In view of the *English* rule that an addressee is not entitled to maintain an action against a telegraph company for error in transmission, it would seem that the rule making him assume the risk of the message having been correctly transmitted might work a serious hardship in many cases. See 21 ENCYC. OF PL. AND PR. 509. In *Western Union Tel. Co. v. Shotter*, 71 Ga. 760, the rule prevailing in England is accounted for by the fact that the telegraph is a part of the government service. Compare *Bundy v. Johnson*, 6 U. C. C. P. 221.

7. **Company as Independent Contractor**—*Mississippi*.—*Shingleur v. Western Union Tel. Co.*, 72 Miss. 1030, 48 Am. St. Rep. 604.

*North Carolina*.—*Pegram v. Western Union Tel. Co.*, 100 N. Car. 28, 6 Am. St. Rep. 557, 21 Am. & Eng. Corp. Cas. 150.

*Tennessee*.—*Pepper v. Western Union Tel. Co.*, 87 Tenn. 554, 10 Am. St. Rep. 699, 25 Am. & Eng. Corp. Cas. 542.

*Texas*.—*Harrison v. Western Union Tel. Co.*, (Tex. 1885) 10 Am. & Eng. Corp. Cas. 600.

In *Germain Fruit Co. v. Western Union Tel. Co.*, 137 Cal. 598, the plaintiff wired C. offering *Riverside* oranges at \$2.60 per box, but the message as delivered read "\$1.60." The former was the market price then prevailing and C. knew, from this and from the character of the fruit, that the message was intended to read \$2.60. He ordered the goods; plaintiff furnished them at \$1.60 and sued the telegraph company for the difference. It was held that the contract of sale was invalid because of C.'s fraud and that the company could set that up as a complete defense. See also *Postal Tel. Cable Co. v. Akron Cereal Co.*, 22 Ohio Cir. Ct. 516.

to the same general duties as telegraph companies and to the same rules of liability, except in so far as both may be affected by the difference in the nature of their business in particular cases.<sup>1</sup>

**XVIII. COMPANIES FURNISHING "TICKERS."** — In some instances telegraph companies are organized for the express purpose of collecting and distributing market reports and other news. Such companies have the same general powers and are subject to the same measure of liability as ordinary telegraph companies, the difference between the two being merely in the method of doing business.<sup>2</sup> Such companies may make and enforce regulations as to the use of their instruments, commonly called "tickers" or "stock indicators," by subscribers, and require that they shall not allow nonsubscribers to use them or to have copies of the reports furnished subscribers.<sup>3</sup>

**They Cannot Make Unjust Discriminations;** they are of a public character and must serve all alike, and may be enjoined from refusing to continue the service to a subscriber who has observed their reasonable rules and regulations.<sup>4</sup> But they may lawfully refuse to furnish their instruments or reports to a gambling place, even though they may have contracted to do so, since they cannot be under an obligation to forward an illegal undertaking.<sup>5</sup>

**They Cannot Enforce an Unreasonable Stipulation** in their contracts with subscribers. A stipulation in such a contract that the company shall have the right to discontinue the service to any subscriber, without notice, whenever, in its judgment, he has violated the contract is unreasonable as making the company the sole judge in its own cause, and will not be enforced.<sup>6</sup>

**1. District Telegraph Companies.** — Such a company is liable for the loss of a package caused by one of its messengers delivering it contrary to the instructions of the sender. *Felber v. Manhattan Dist. Tel. Co.*, (C. Pl. Gen. T.) 22 Abb. N. Cas. (N. Y.) 121.

Authority to a telegraph company to occupy city streets with its poles and wires does not authorize it to construct and operate a district telegraph system. *Western Union Tel. Co. v. Toledo*, 103 Fed. Rep. 746. See also *Western Union Tel. Co. v. Toledo*, (C. C. A.) 121 Fed. Rep. 734.

In *American Dist. Tel. Co. v. Walker*, 72 Md. 454, 20 Am. St. Rep. 479, 35 Am. & Eng. Corp. Cas. 91, the plaintiffs had hired a buggy and horses and, on returning, stopped at the office of the defendant company and asked for a boy who could drive the horses back to the livery stable. A boy was sent out who took charge of the horses, but owing to his negligence and incompetency, the horses ran away and injured themselves and the vehicle. It was held that the company was liable for the damages thus caused and that plaintiffs might maintain the action therefor, although they were merely bailees for hire.

**2.** See *supra*, this title, *Company Acting under Contract to Furnish Market Reports and Other News*.

**3.** In *Shepard v. Gold Stock, etc.*, Tel. Co., 38 Hun (N. Y.) 338, the subscriber's contract with the company provided that "these reports are furnished to subscribers for their own private use in their own business exclusively. It is stipulated that subscribers will not sell or give up copies of the reports in whole or in part, nor permit any outside party to copy them for use or publication. Under this rule subscriptions by one party for the benefit of himself and others at their joint expense will not be received." It was held that this stipu-

lation was reasonable, and that the subscriber violated it by furnishing copies to another firm, although he was a member of such firm, and that the company was justified in removing the instrument for such violation.

**4. Public Character of Ticker Companies.** — *Friedman v. Gold, etc.*, Tel. Co., 34 Hun (N. Y.) 4; *Smith v. Gold, etc.*, Tel. Co., 42 Hun (N. Y.) 454; *Metropolitan Grain, etc., Exch. v. Mutual Union Tel. Co.*, 11 Biss. (U. S.) 531; *Bradley v. Western Union Tel. Co.*, 27 Alb. L. J. 363.

**5.** *Smith v. Western Union Tel. Co.*, 84 Ky. 664, 16 Am. & Eng. Corp. Cas. 231 ("bucket shop" case). Compare *Gray v. Western Union Tel. Co.*, 87 Ga. 350, 27 Am. St. Rep. 259.

Complainants being in the business of gambling, equity will not compel the company to furnish them with a "ticker" giving quotations of prices ruling in the Chicago board of trade, even though they are members of that board. *Bryant v. Western Union Tel. Co.*, 17 Fed. Rep. 825.

**Where the Telegraph Company Is Merely an Agent for Transmission** under a contract with an exchange under which it is to transmit market quotations to such persons as the exchange may direct, and to no other, the rule of the text has no application, the exchange being regarded as a sender, with the right to name its addressees, and under no duty to furnish its quotations to the public. Statutes declaratory of the rule will not affect the case, being no more applicable than the rule itself. *Matter of Reuville*, 46 N. Y. App. Div. 37. See also *Christie Grain, etc., Co. v. Board of Trade*, 125 Fed. Rep. 161, reversing 121 Fed. Rep. 608.

**6. Stipulation Must Be Reasonable.** — *Smith v. Gold Stock, etc.*, Tel. Co., 42 Hun (N. Y.) 454.

## TELEGRAPHS AND TELEPHONES—TEMPORAL ESTATE.

**Protection Against Unfair Competition.**—While the market quotations and similar news gathered by such companies and disseminated among their patrons are not within the protection of the copyright laws, they constitute property, and the company will be protected in equity against rival companies which seek to appropriate such property and sell it to their customers to the injury or detriment of the service.<sup>1</sup>

**TELEGRAPHY.** See note 2.

**TELEPHONE EXCHANGE.** (See also the title **TELEGRAPHS AND TELEPHONES**, *ante*, p. 998.)—"A telephone exchange is an arrangement for putting up and maintaining wires, poles, and switchboards within a given area, with a central office, and the necessary operators to enable the individual hirers of telephones within that area to converse with each other."<sup>2</sup>

**TELLER.** (See also the titles **BANKS AND BANKING**, vol. 3, p. 787; **NATIONAL BANKS**, vol. 21, p. 319; **OFFICERS AND AGENTS OF PRIVATE CORPORATIONS**, vol. 21, p. 833; **SAVINGS BANKS**, vol. 24, p. 1240.)—The office of a teller is implied in the word used to designate it—to tell or count the moneys of the bank which are received or paid out. The office is often divided into two branches, receiving teller and paying teller, where the business of the bank is large and the duties cannot conveniently be united in one person.<sup>4</sup>

**TELLTALE.**—See the titles **BRIDGES**, vol. 4, p. 936; **MASTER AND SERVANT**, vol. 20, p. 69.

**TEMPER.**—See note 5.

**TEMPERATE—TEMPERANCE.** (See also **MODERATE**, vol. 20, p. 836.)—The word "temperance" has no fixed legal meaning as contradistinguished from its usual import. Webster defines it as "habitual moderation in regard to the indulgence of the natural appetites and passions; restrained or moderate indulgence; moderation; as, temperance in eating and drinking, temperance in the indulgence of joy and mirth."<sup>6</sup>

**TEMPEST.**—An extensive current of wind rushing with great velocity and violence; a storm of extreme violence.<sup>7</sup>

**TEMPORAL ESTATE.**—See note 8.

1. *National Tel. News Co. v. Western Union Tel. Co.*, (C. C. A.) 119 Fed. Rep. 294; *Illinois Commission Co. v. Cleveland Tel. Co.*, (C. C. A.) 119 Fed. Rep. 301.

2. **Telegraphy.**—That *telegraphy* is a branch of commerce, see *Western Union Tel. Co. v. Atlantic, etc., Tel. Co.*, 5 Nev. 102, and see the title **INTERSTATE COMMERCE**, vol. 17, pp. 48, 89.

3. **Telephone Exchange.**—*Western Union Tel. Co. v. American Bell Telephone Co.*, 105 Fed. Rep. 696.

4. **Teller.**—*Mussey v. Eagle Bank*, 9 Met. (Mass.) 311, in which case also a summary of the duties, liabilities, etc., of a teller is given.

5. **Temper and Courage Distinguished.**—See *Gardner v. State*, 40 Tex. Crim. 19, decided under the Texas statute defining "adequate cause" in manslaughter. See also **ADEQUATE**, vol. 1, p. 632, and the title **MURDER AND MANSLAUGHTER**, vol. 21, p. 177 *et seq.*

6. **Temperance—Charity.** (See generally the title **CHARITIES AND TRUSTS FOR CHARITABLE USES**, vol. 5, p. 893.)—*People v. Dashaway Assoc.*, 84 Cal. 123, in which case it was held that the term was too vague and uncertain to establish a public charity.

But in *Harrington v. Pier*, 105 Wis. 485, it was held that the promotion of *temperance*

work in a certain city was a proper subject for a charitable trust, and that a bequest for such a purpose was not fatally indefinite where the term "*temperance work*" was obviously intended to mean work to prevent, as far as practicable, the use of intoxicating liquors.

**Life Insurance.**—See the titles **ALCOHOLISM, INTemperance, AND NARCOTICS (IN INSURANCE)**, vol. 2, p. 40 *et seq.*; **LIFE INSURANCE**, vol. 19, p. 67; and see **MODERATE**, vol. 20, p. 836.

"*Temperance Saloon*" is "a common designation for places where nonintoxicating drinks and other refreshments are kept for sale," *Clinton v. Grusendorf*, 80 Iowa 120.

7. **Tempest.**—*Thistle v. Union Forwarding, etc., Co.*, 29 U. C. C. P. 76, holding that damage done by the action of ice at the time of unusually high water, but in ordinary wind and weather, was not the result of a *tempest* within the meaning of a covenant to repair.

8. **Temporal Estate.** (See also the title **WILLS**.)—In *Tanner v. Wise*, 3 P. Wms. 294, it was held that the words *temporal estate* in a will signified the same as "worldly estate," or all that a man has in the world; and consequently passed both real and personal property. See also *Grayson v. Atkinson*, 1 Wils. C. Pl. 333; *Beall v. Holmes*, 6 Har. & J. (Md.) 211; *Goodrich v. Harding*, 3 Rand. (Va.) 280.

**TEMPORALITIES.** — See note 1.

**TEMPORARY—TEMPORARILY.** (See also **PERMANENT—PERMANENTLY**, ETC., vol. 22, p. 698.) — Temporary means lasting for a time only; existing or continuing for a limited time; not of long duration; not permanent; transitory; continuing but a short time.<sup>2</sup>

**TEMPTATION.** — See note 3.

**TENANCY.** (See also the titles **ESTATES**, vol. 11, p. 364; **LANDLORD AND TENANT**, vol. 18, p. 149; **LEASES**, vol. 18, p. 593.) — A tenancy exists where one has let property to another.<sup>4</sup>

**TENANCY AT SUFFERANCE.** — See the titles **ESTATES**, vol. 11, p. 381; **LANDLORD AND TENANT**, vol. 18, p. 177.

**TENANCY AT WILL.** — See the titles **ESTATES**, vol. 11, p. 381; **LANDLORD AND TENANT**, vol. 18, p. 182.

**TENANCY BY CURTESY.** — See the title **CURTESY**, vol. 8, p. 506.

**TENANCY FOR LIFE.** — See the titles **ESTATES**, vol. 11, p. 377; **LANDLORD AND TENANT**, vol. 18, p. 213; **REMAINDERS, REVERSIONS, AND EXECUTORY INTERESTS**, vol. 24, p. 374.

**TENANCY FOR YEARS.** — See the titles **ESTATES**, vol. 11, p. 380; **LANDLORD AND TENANT**, vol. 18, p. 207.

**TENANCY FROM YEAR TO YEAR.** — See the titles **ESTATES**, vol. 11, p. 381; **LANDLORD AND TENANT**, vol. 18, pp. 203, 210.

**TENANCY IN COMMON.** — See the title **JOINT TENANTS AND TENANTS IN COMMON**, vol. 17, p. 646.

1. **Temporalities—Church.** — In *St. Patrick's Roman Catholic Church v. Abst*, 76 Ill. 253, it was said: "Hiring a sexton to perform the duties incident to such an office has nothing to do with the management of 'the temporalities' of the church. They are understood to be the revenues, lands, and tenements, to be managed according to the charter and the by-laws; in other words, secular possessions with which a church may be endowed."

2. **Temporary.** — *Moore v. Smead*, 89 Wis. 567.

**Indefinite Time.** — In *Slack v. Jacob*, 8 W. Va. 650, it was said: "It will be observed that nearly all [of the definitions] \* \* \* clearly indicate an undefined period of time. If a physician says 'the patient has obtained temporary relief,' he means that the patient has obtained such relief for an undefined time, which may be determined by a future uncertain contingency. So when a general speaks of a 'temporary cessation of hostilities,' though in some cases the time may be prescribed, in others it is often indefinite. These definitions and examples of the word *temporary*, and its use, correspond with our common understanding of the subject."

**Permanent and Temporary Distinguished.** — In *Pickens v. Coal River Boom, etc., Co.*, 51 W. Va. 450, it was said: "A permanent structure is one that is to continue for all time, except for some unforeseen event, while a *temporary* structure is one erected for a known *temporary* and limited business."

**Temporary Building.** — In *Bates v. Holbrook*, 171 N. Y. 468, it was held that a building erected in the street by contractors for a subway, for the purpose of storing tools and materials while work on the subway was carried forward, which work was not expected to be completed for three or more years, was not a *temporary* building.

**Temporary Insanity.** — See *Evers v. State*, 31 Tex. Crim. 318. And see the title **INSANITY**, vol. 16, p. 558; **MEDICAL JURISPRUDENCE**, vol. 20, p. 548.

**Temporary Removal.** — "The words '*temporary* removal' manifestly mean a removal for a fixed and *temporary* purpose, or for a *temporary* reason." *Moore v. Smead*, 89 Wis. 567. See also *Phillips v. Root*, 68 Wis. 128; *Jarvais v. Moe*, 38 Wis. 440; *Herrick v. Graves*, 16 Wis. 157.

**Temporary Statute.** — See the title **STATUTES**, vol. 26, p. 534.

**Temporarily.** — Power in the authorities of a city to close liquor shops *temporarily* will not authorize the closing of such shops "until further notice." *State v. Strauss*, 49 Md. 288.

3. **Temptation.** — "*Temptation* is that which tempts to evil—an evil inducement or allurements." *Hall v. State*, 134 Ala. 119, quoting *Suther v. State*, 118 Ala. 93. See generally the title **SEDUCTION**, vol. 25, pp. 191, 227.

4. **Tenancy.** — *Morrill v. Mackman*, 24 Mich. 284.

**General Tenancy.** — See **GENERAL**, vol. 14, p. 950, note.

**Tenancy of Present Occupants—Title-Insurance Policy.** (See also the title **TITLE INSURANCE**.) — It has been held that the phrase "*tenancy of the present occupants*," stated in a title-insurance policy as a defect in or objection to the title against which the insurer does not insure, must be construed as meaning the *tenancy* which arises through the occupation or temporary possession of the premises by those who are tenants in the popular sense in which the word "tenant" is used. The phrase does not include the claim of a person who, asserting ownership in fee as against the title insured, is in actual adverse possession at the time when the policy is issued. *Place v. St. Paul Title Ins., etc., Co.*, 67 Minn. 126.



**TENANCY IN COPARCENARY.**—See the title PARCENARY (ESTATES IN), vol. 21, p. 1032.

**TENANCY IN FEE—TENANCY IN FEE SIMPLE.**—See the titles ESTATES, vol. 11, p. 366; LANDLORD AND TENANT, vol. 18, p. 214.

**TENANCY, JOINT.**—See the titles JOINT TENANTS AND TENANTS IN COMMON, vol. 17, p. 646.

**TENANT.** (See also the title LANDLORD AND TENANT, vol. 18, p. 149).—A tenant is one who holds or possesses lands or tenements by any kind of title, either in fee, for life, for years, or at will.<sup>1</sup> In the popular sense, he is one who has the temporary use and occupation of lands or tenements which belong to another, the duration and other terms of whose occupation are usually defined by an agreement called a lease, while the parties thereto are placed in the relation of landlord and tenant.<sup>2</sup>

1. **Tenant.**—Harris v. Reynolds, 13 Cal. 514, 73 Am. Dec. 600; Walker v. McCusker, 71 Cal. 597; Powers v. Ingraham, 3 Barb. (N. Y.) 576; Clift v. White, 12 N. Y. 527; Hosford v. Ballard, 39 N. Y. 151; Fuchs v. Cohen, (C. Pl. Gen. T.) 29 Abb. N. Cas. (N. Y.) 56, 22 Civ. Pro. (N. Y.) 269; Woolsey v. State, 30 Tex. App. 347.

The word *tenants* means holders, from the word *teneo*, to hold. Stevens v. Enders, 13 N. J. L. 280, per Ford, J.

**Occupancy Not Necessary to Relation.**—Rex v. Ditchat, 9 B. & C. 183, 17 E. C. L. 355, per Littledale, J.

So it has been held that the word *tenant* as used in the California "Van Ness ordinance" applies to any party who holds the actual possession in subordination to another party under or by virtue of an agreement, either express or implied. Irvine v. Adler, 44 Cal. 559, disproving contrary dictum in Brooks v. Hyde, 37 Cal. 366.

**Debtor for Rent.**—Where, by statute, distress for rent might be levied "on any property belonging to the said *tenant*," it was held that the term *tenant* must be understood in its technical sense, not as including all debtors for rent; and that on the termination of the relation of landlord and *tenant* the right to distress was lost. Hale v. Burton, Dudley (Ga.) 106. And see the title DISTRESS, vol. 9, p. 625.

2. **Popular Sense.**—Woolsey v. State, 30 Tex. App. 347. And see the title LANDLORD AND TENANT, vol. 18, pp. 163, 164.

**Lodger Not Tenant.**—White v. Maynard, 111 Mass. 253, 15 Am. Rep. 28. See also LODGE—LODGER—LODGING, vol. 19, p. 520, note.

**Tenant in Possession.**—As used in a statute providing that notice in ejectment must be served upon the "*tenant* in possession," it was held that the term "*tenant* in possession" did not include a soldier of the United States claiming to be in charge, under superior officers, of real property of the United States. People v. Ambrecht, (Supm. Ct.) 11 Abb. Pr. (N. Y.) 101.

**Same—Judgment Debtor.**—Under the California statute providing that the purchaser of real property at a sheriff's sale is entitled until redemption to receive "from the *tenant* in possession" the rents of the property, it was held that a judgment debtor occupying the land was a *tenant* in possession. Harris v. Reynolds, 13 Cal. 517, 73 Am. Dec. 600. To the

same effect see Walker v. McCusker, 71 Cal. 594 (foreclosure sale).

**Executors and Administrators of Tenant.**—See Gough v. Gough, (1891) 2 Q. B. 674.

**Forcible Entry and Detainer.**—Where a statute required that in forcible entry and detainer the petition should describe the premises and the interest therein of the petitioner, it was held that a recital merely that the petitioner was "the *tenant* of the premises pursuant to an agreement with the landlord" was not a description of the interest of the petitioner, and was insufficient. Fuchs v. Cohen, (C. Pl. Gen. T.) 29 Abb. N. Cas. (N. Y.) 56, 22 Civ. Pro. (N. Y.) 269.

**New Tenant—Beerhouse Keeper.**—See Reg. v. Powell, (1891) 1 Q. B. 718.

**Proprietor.**—Under a Virginia statute providing that on an inquest of damages summonses are to be issued to the several proprietors or *tenants* of the lands found liable to damage, it was held that "the terms 'proprietors' and *tenants* were intended to designate the same interest, a possession as visible owner or *tenant*." Pitzer v. Williams, 2 Rob. (Va.) 253.

**Subtenants.**—The assignee of a lessee, or a sublessee, is a *tenant*. Whitfield v. Roe, 3 Taunt. 402; Williams v. Bosanquet, 1 Brod. & B. 238, 5 E. C. L. 72; Doe v. Byron, 1 C. B. 623, 50 E. C. L. 623. See also Stokes v. Burney, 3 Tex. Civ. App. 219, and see the title LANDLORD AND TENANT, vol. 18, p. 163, note.

**Same—Arson.**—Woolsey v. State, 30 Tex. App. 347, holding that there was no variance where an indictment alleged that a building was occupied by the defendant and another as *tenants*, but the proof showed that the defendant rented of the owner and sublet to the other.

**Same—Distress.**—In Coles v. Marquand, 2 Hill (N. Y.) 449, it was held that the word *tenant* in a statute providing that "any goods or chattels of the *tenant* which shall be carried off from any demised premises" might within a certain time be distrained, did not include an under *tenant* of the original lessee, or one who was still further removed from the chief landlord.

**Same—English Parliamentary Franchise Act.**—To occupy "as *tenant*," within the English statute conferring the parliamentary franchise, involves the idea of some permanent occupation and independent interest, and "excludes some occupations of less independence, such as occupations of servants for their service;

**TENANTABLE REPAIR.**—See the title LANDLORD AND TENANT, vol. 18, p. 251, and see REPAIR, vol. 23, p. 470.

**TENANT IN DOWER.**—See the title DOWER, vol. 10, p. 122.

**TENANT IN TAIL.**—See the title ESTATES, vol. 11, p. 371.

**TENANT'S FIXTURES.** (See also the title FIXTURES, vol. 13, p. 639 *et seq.*)—The term "tenant's fixtures," in its strict legal definition, is to be understood to signify things which are fixed to the freehold of the demised premises, but which nevertheless the tenant is allowed to disannex and take away, provided he seasonably exerts his right to do so.<sup>1</sup>

**TEND.**—To tend means to be directed, as to any end or purpose; to aim; to have or give a leaning; to exert activity or influence; to act as a means; to contribute to.<sup>2</sup>

for example, porters of the lodge, gardeners of the dwelling in the garden, and also such as that of the surgeon for the hospital of the rooms therein. *Dobson v. Jones*, 5 M. & G. 112, 44 E. C. L. 68. Also the occupation of premises by objects of charity occupying under the permission of the trustees of the charity. *Heartley v. Banks*, 5 C. B. N. S. 40, 94 E. C. L. 40, 28 L. J. C. P. 144; *Davis v. Waddington*, 7 M. & G. 37, 49 E. C. L. 37. *Cook v. Humber*, 11 C. B. N. S. 33, 103 E. C. L. 33. See also *Smith v. Seghill*, L. R. 10 Q. B. 422; *Hughes v. Chatham*, 5 M. & G. 54, 44 E. C. L. 39; *Bridgewater v. Durant*, 11 C. B. N. S. 7, 103 E. C. L. 7; *Fryer v. Bodenham*, L. R. 4 C. P. 529, 19 L. T. 645; *Durant v. Carter*, L. R. 9 C. P. 261; *Ford v. Pye*, L. R. 9 C. P. 269.

1. *Tenant's Fixtures.*—*Wall v. Hinda*, 4 Gray (Mass.) 270, 64 Am. Dec. 64.

2. *Tend.*—*Santee v. State*, (Tex. Crim. 1896) 37 S. W. Rep. 437, quoting *Webster's Dict.* and holding that a charge in a prosecution for receiving stolen goods that the evidence admitted *tended* to show that the defendant about the time charged in the indictment received the goods in question and that they were stolen was error as suggesting to the jury that the evidence aimed and contributed to establish the fact that the goods in question were stolen.

*Tending.*—The word *tending* "in its pri-

mary sense means direction or course towards any object, effect, or result—drift." *White v. State*, 153 Ind. 692.

*Evidence Tending to Prove Issue.*—In *Davis v. Barney*, 2 Gill & J. (Md.) 403, the Court of Appeals of Maryland laid down as a general rule that "where there is any legal admissible evidence *tending* to prove the issue, the effect of that evidence is solely for the consideration of the jury." In *Cole v. Hebb*, 7 Gill & J. (Md.) 27, it was held that "the word *tending* as there used was not designed by the court to be understood in its literal or vulgar sense, as contributing, or having a leaning to, the proof of the issue; but to be understood according to its legal intendment, viz., as so *tending* to prove the issue that a rational common-sense intellect might draw from it the conclusion to which by its production it was desired to lead the jury."

*Tending to Show.*—In *White v. State*, 153 Ind. 691, it was said: "The statement that there has been evidence '*tending* to show' a particular fact is equivalent to a statement that evidence has been offered relating to such fact. The force and effect of the evidence is in no sense suggested by the term. How slightly or how strongly the evidence *tended*, etc., or whether it *tended* at all to effect a conclusion, is expressly left to the jury."

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